An American Perspective On The United Nations Convention On The International Sale Of Goods

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The internationalisation of American commercial law

American commercial law

Commercial law in America is primarily state, not federal law, and it is independently promulgated in 51 separate jurisdictions. Until the late 19th century, American commercial law was based on English common law and the law of merchants, and each state's law evolved independent of the other states' law.

Today, although commercial law is still the law of the individual states, commercial law is primarily uniform throughout the US because of the existence of the Uniform Commercial Code (UCC). The UCC has been adopted in some form by all jurisdictions[1]

The UCC is the product of two organisations which developed and continue to revise it – the National Conference of Commissioners for Uniform State Laws American Law Institute.[2] Unlike the American Law Institute, the National Conference of Commissioners on Uniform State Laws is a government organisation, but neither organisation, nor the combination of the two, has the power to create positive law. The UCC, and the subsequent revisions to it, are presented to the various state legislatures for adoption and the Code only becomes the law of a respective state when it is adopted by that state's legislature.

The internationalisation of American commercial law

In the last 20 years, there has been great interest in the United States to conform American commercial law in accordance with developed and developing standards of international commercial law. Lawmakers in the US are quite aware of the necessity of tailoring commercial law to be compatible with international commerce and business practices. For this reason, the various revised sections of the UCC have adopted the existing and emerging international commercial standards as possible

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1 Louisiana, which is primarily a civil law and not a common law jurisdiction, has not adopted the sales and leases provisions, but has adopted the rest of the UCC.

2 The purpose of the NCCUSL is to determine what areas of private state law might benefit from uniformity among the states, to prepare statutes or 'uniform Acts' to carry that object forward, and then to have those statutes enacted in each jurisdiction represented in NCCUSL. The ALI was established 'to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work'.

models and influences. The increased use of technology and new means of transport have effectively changed our market structures from domestic to global economies and American commercial lawyers no longer see themselves limited to the domestic arena.

Concomitant with the recent revisions of the American domestic commercial law, there has been a great deal of activity in the drafting of new international commercial law conventions. These conventions and uniform rules have set out international standards in such areas as in the financing of goods, payments systems, and transport.[3]

One of the most important developments in international commercial law is the widespread adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[4] The United States is a party to the CISG, and in this article I examine two aspects of the CISG from the American perspective. First, I look at how American courts and lawyers have reacted to the CISG and the problems that have emerged. Secondly, I examine the attempt made to redraft the American domestic sales law to conform to the CISG. I propose that due to the inward-looking redrafting process and the incompatibility of the UCC and the CISG, these attempts have not been very successful.

In an ideal world, the draftsmen of both international and domestic laws would take the best features which both bodies of law have to offer and meld them together into a comprehensive legislative scheme. The CISG made many improvements over the older provisions of Article 2 of the UCC and these improvements should have influenced the revision of the UCC provisions on sales.[5] However, the world is not ideal and attempts to harmonise – although successful in many cases – have run into obstacles such as differences in commercial practices in the US and elsewhere throughout the world, as well as differences in legal theory and perception of the appropriate policies.

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3 See, eg, United Nations Convention on International Bills of Exchange and International Promissory Notes (1988); UNCITRAL Legal Guide on Electronic Funds Transfers (1987); UNCITRAL Model Law on International Credit Transfers (1992); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995); Convention on the Limitation Period in the International Sale of Goods (1974); United Nations Convention on Contracts for the International Sale of Goods (1980); International Countertrade Transactions (1992); United Nations Convention on the Carriage of Goods by Sea (1978, the Hamburg Rules); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1992). Also influential in the realm of contracts for the sale of goods is the International Institute for the Unification of Private Law (UNIDROIT) Principles on International Commercial Contracts (1994).

4 This Convention was drafted by UNCITRAL and issued for signature in 1980. Currently, the CISG has been ratified and entered into force in 47 nations.

5 Similarly, Article Four A of the UCC on Electronic Funds Transfers was a definite influence on the development of UNCITRAL Model Law on International Credit Transfers.

Selected problems in the CISG from an American perspective

There are several problems the CISG has raised from an American legal perspective. As there have only been 29 reported CISG cases by the United States courts,[6] the numbers of problems that have arisen are rather few and confined. However, this low number of reported cases should not be seen as a lack of acceptance of the CISG in the United States. It is more a realisation of the fact that international commercial disputes are usually resolved in private arbitration, and therefore do not result in published opinions.

Scope

The CISG defines neither a 'sale' nor a 'good'.[7]These omissions are intentional, as there are no universally agreed upon definitions that would accommodate the variety of domestic laws. To some extent the question of what constitutes a sale would implicate the differences between civil law and common law traditions. However, there are other differences as well, and these differences have raised several questions in the co-ordination of the CISG with American law.

Software Transfers

The issue of software transfers in one area of importance when looking at the operation of the CISG in the US. The issue relates to not only what constitutes goods, but also what constitutes a sale. The law is not consistent in the US as to whether software constitutes a 'good' for the purposes of a transfer. Although there is some case law that suggests that it is, the current revisions of the Uniform Commercial Code presupposes that software is information and not goods per se.[8] However, this is inconsistent with many of the non-American CISG cases[9] that have determined that software is a 'good' under the CISG.[10]

Software also raises another issue under the CISG because of the common American practice not to 'sell' software but to 'license' a limited right of use. Whether all transfers of software constitute a 'licence' and not a 'sale', it is likely the American law will differ from the law in this area which is emerging from other jurisdictionsVirtually all American sellers would characterise the transaction as a licence, but certainly the law outside the US has been much less willing to accept the characterisation of the transfer as anything other than a sale. This is being done to

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6 As at 23 August 2003.

7 In the average case, the courts have not been troubled by the omission. Thus, for example, in a dispute over the transport documents covering the goods, the court properly noted that the dispute was not within the scope of the CISG. *Thypin Steel Co v Certain Bills of Lading Issued for Cargo of 3017 Metric Tons, More or Less of Hot Rolled Steel Plate Laden on Board the M/V Geroi Panfillovsky*, 48 UCC Rep Serv 2d 1443 (SDNY, 2002).

8 The question of whether mixed goods and software transaction comes within the law of the law of goods, such as when a good contains software, is wholly unresolved and developing in the American commercial law. The newly approved revisions of the UCC specifically leaves open the question for judicial development.

9 There are no American CISG cases that deal with the classification of software.

10 The CISG applies to 'standard software'. See Honnold, J, *Uniform Law for International Sales*, 3rd edn, , 1999, New York: Kluwer Law International, citing case lae on UNCITRAL Texts (CLOUT), Case No 131 (Landgericht München I, Germany: 1995).

the extent that the American case law is developing an acceptance of the 'licensing' model, and therefore excluding the transfers of software from the CISG.

Retention of security rights in the goods

Another issue as to the question of what constitutes a 'sale' is the retention of a security interest in the financing of the sale of the goods. An example of where this has been a problem and is likely to continue to cause confusion can be seen in the cases involving the financing of the sale of goods by the seller. For example, in *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*,[11] the contract for sale had a retention of title clause.[12] In this case, the Federal Court of Australia stated that whether the clause had been validly agreed upon in the sales contract and whether the retention of title constitutes a breach of contract had to be determined according to the rules of the Convention, although the question of whether there had been a valid retention of title at all was a question of local law.[13] This seemingly straightforward division between the contract for sale and the question of the transfer of property rights brought the breach of the retention of title clause within the remedial structure of the CISG.

This result would make no sense in the US or the common law provinces of Canada where there is a wholly separate statutory framework for security rights in personal property which has its own internal remedial structure separate from the law governing the sale of goods. Moreover, it is not clear that this result would not create problems in other jurisdictions which, although they treat the retention of property rights as a financing method for the credit sale of goods as part of the contract of sale and not as a wholly separate legal regime, would still consider the rights retained in the goods a question to be resolved by the law of property and not the law of contract. Thus, for example, in *Usinor Industeel v Leeco Steel Products Inc*,[14] a French seller brought an action against an Illinois buyer to recover possession of unpaid shipments of goods located in Illinois.[15] On the seller's claim to take possession of the goods and to avoid the contract under the CISG, the court held that the CISG did not apply to the security right of the seller, and the court applied the law of Illinois on this issue.[16] If the transaction was wholly governed by domestic law, the court would have come to the same conclusion under American domestic law: the law governing the property right retained would not have been governed by the law of the sale of goods.

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11 [1995] 57 FCR 216 (*Rosedown Park*). For a full discussion and analysis of this case, see Zeigel, JS, 'Comment on *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*', in *Cornell International Law Journal*, *Review of the Convention for the International Sale of Goods*, 1998, New York: Kluwer Law International.

12 What North American law would refer to as a 'conditional sales contract'.

13 *Rosedown Park* [1995] 57 FCR 216.

14 209 F Supp 2d 880 (ND Ill, 2002) (*Usinor Industeel*).

15 *Ibid*, 881.

16 *Ibid*, 882.

Choice of law

In *BP Oil International Ltd v Empresa Estatal Petoleos de Equador*,[17] the United States Court of Appeals determined that the CISG applied to a contract between an American and an Ecuadorian party when the agreement called for the application of the law of Ecuador.[18] Although this is consistent with the majority of cases that have had to decide whether the CISG applies to a contract that refers to the domestic law[19] of a country which has adopted the CISG[20] It is important to note that the lower court had determined that Ecuadorian law applied because of the direct reference to it in the agreement.[21] That result certainly has some merit because had the parties not mentioned any choice of law, the CISG would have applied, as both the Untied States and Ecuador are parties to the CISG. Therefore one could logically assume that the parties may have intended something other than the default application of the CISG by specifically mentioning the domestic law of Ecuador. At a minimum, we can see from this case that in the absence of a specific reference to the domestic law of a given jurisdiction, the courts will continue to muddle through the question of whether the parties intended something other than the application of the CISG.

The application of the CISG by default is clearly an easy decision when the parties are both from states which are parties to the CISG, but the blind application can sometimes bring anomalous results and the American courts have also been willing to make the application without much thought. Thus, for example when the buyer's form said the 'Law of California' (American) should apply, and the seller's form said 'the Law of British Columbia' (Canadian) should apply, the court in *Asante Technologies Inc v PMC-Sierra Inc*,[22] applied the CISG because both countries were parties to the Convention.[23] Although this is probably the correct result, it is probably based on flawed assumption, for certainly if the parties specified different

17 332 F 3d 333 (5th Cir, 2003) (*BP Oil International*).

18 *Ibid*, 335.

19 Frequently, in the case where the parties are from different countries, the CISG is applied as the domestic law of the forum states if that state is a party to the CISG. See, eg, CLOUT, Case No 103 (International Chamber of Commerce: 1993)('applied the CISG on the grounds that the parties had chosen French law as applicable law and the Convention was in force in France at the time the contract was concluded'); CLOUT, Case No 104 (International Chamber of Commerce: 1993) ('CISG had been incorporated into the Austrian legal system'); CLOUT, Case No 125 (Oberlandesgericht Hamm, Germany: 1995) (finding 'CISG is an essential part of German law'); abstracts are available online, CLOUT, United Nations Commission on International Trade Law www.uncitral.org/english/clout/abstract/index.htm at 1 April 2004.

20 Despite Article 7 of the CISG requiring an international character, the US judiciary has failed to embrace completely this concept, as demonstrated by the courts' unwillingness to utilise international law to assist in the analysis of the Convention to cases. For an interesting discussion, see Victoria M Genys, 'Blazing a trail in the new frontier of the CISG: *Helen Kaminski v Marketing Australian Products Pty Ltd Inc*' (1998) 17 Journal of Law and Commerce 415–26.

21 *BP Oil International*, 332 F 3d 333 (5th Cir, 2003).,

22 164 F Supp 2d 1142 (ND Cal, 27 July 2001) (*Asante Technologies*).

23 *Ibid*, 1153.

laws, they probably did not intend the same thing. It is probably correct to say, as a matter of contract formation, the conflicting terms cancel each other out and therefore by default the CISG applies as neither party's terms prevail on this issue. However, to conclude as the court did that the parties intended the same thing is probably making too great an assumption of party intent.

Unavoidability of the application of domestic law to CISG cases

Article 7(1) sets forth the basic principle that the CISG should be interpreted in light of its international character.[24] Thus, to the extent possible, one is eschewed from interpreting the Convention based on domestic, as opposed to international standards. However, this aspiration rule is unattainable when there is neither an international nor a universal rule to apply in a given case. Thus, for example, in the recent American case Zapata Hermanos v Hearthside Baking,[25] a federal appellate court had to decide whether the award of attorney's fees constitutes part of the damages recoverable under Article 74 or whether the question of attorney's fees is a procedural question outside the CISG and one subject to the local law of the court.[26] In this case, the court determined the issue as a procedural question and not a substantive question of damages.[27] However, the result in the case (which would not be the result under the domestic laws of many jurisdictions, and which has been the subject of much debate[28]), is not as great a concern as the fact that this case emphasises that courts, both in America as well as other jurisdictions, will inevitably have to apply domestic legal rules to some of the questions raised by the CISG.

The problem of vertical uniformity

As discussed below, there are many substantive differences between the CISG and the domestic American law. These differences create what I term the problem of vertical uniformity. This arises when the goods at issue move through the chain of distribution and are thereby subject to both the CISG and the local domestic law.

One area of substantial concern with vertical uniformity is the ability of third parties to pursue remedies against manufacturers or other upstream sellers under the domestic American law. For example, in certain circumstances under the current version of the American Uniform Commercial Code, a buyer has a direct action against a manufacturer or distributor to whom the buyer is not in privity.[29] Thus, if there were a New York manufacturer who sold goods to a New Jersey dealer, who subsequently sold the goods to an Ohio consumer, the consumer may have a direct

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24 See Article 7(1) of the CISG.

25 313 F 3d 385 (7th Cir, 2002) (*Zapata Hermanos*).

26 *Ibid*, 387.

27 *Ibid*, 389.

28 See, eg, Flechtner, HM, 'Recovering attorneys' fees as damages under the UN Sales Convention (CISG): the role of case law in the new international commercial practice, with comments on *Zapata Hermanos v Hearthside Baking*' (2002) 22 Northwestern Journal of International Law and Business 121.

29 §2–318 of the UCC.

breach of contract claim against the New York manufacturer. This would not be an unknown risk to the manufacturer who would be bound by the New York law imposing this obligation. On the other hand, if the manufacturer were a Canadian company selling the goods to the New Jersey distributor, it is not clear that the consumer buyer would have any right against the manufacturer. The obvious defence by the manufacturer would be that the contract between it and the distributor was governed by the CISG, and this contract therefore did not impose any third party rights.

Inconsistent case law

In the United States, there are 51 independent state court systems. Because of the small number of cases that are successfully appealed to the United States Supreme Court, there are also 13 independent federal appellate courts. All of these courts have independent jurisdiction to decide cases governed by the CISG. As with American domestic law, in this system there will inevitably develop inconsistent interpretations of the CISG.

Thus, for example, the long standing debate on the proper reading of Article 14 of the CISG as requiring or not requiring a definite price term has already resulted in inconsistent cases concerning the question of whether an agreement for the distribution of goods comes within the scope of the CISG.[30] In *Helen Kaminski Pty Ltd v Marketing Australian Products Inc*,[31] the court noted that although the distributor agreement required the purchase of a minimum quantity of goods, the agreement did not identify the goods to be sold by type, date or price, whereas the CISG requires an enforceable contract to have definite terms regarding quantity and price.[32] For this reason, the court concluded that the CISG does not apply to distributor contracts because whether or not the CISG applies turns on whether the distributor agreement can be characterised as a contract for the sale of goods – that is, that it contained definite terms for specified goods.[33]

Conversely, in *Geneva Pharmaceuticals Technology Corporation v Barr Laboratories Inc*,[34] the court came to the opposite conclusion by reading Article 14 as allowing a distribution agreement as governed by the CISG because Article 14 only requires some reasonable basis for determining what the future quantity of goods will be.[35]

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30 For a discussion of the contract formation and the interaction between Articles 14 and 55 of the CISG, see generally Murray, JE, 'An essay on the formation of contracts and related matters under the United Nations Convention on Contracts for the International Sale of Goods' (1998) 8 Journal of Law and Commerce 11–51; Leete, BA, 'Contract formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: pitfalls for the unwary' (1992) 6 Temple International and Comparative Law Journal 193–215; Flechtner, HM (ed), 'Transcript of a workshop on the Sales Convention: leading CISG scholars discuss contract formation, validity, excuse for hardship, avoidance, Nachfrist, contract interpretation, parol evidence, analogical application, and much more' (1999) 18 Journal of Law and Commerce 191; Ronald A Brand and Flechtner, HM, 'Arbitration and contract formation in international trade: first interpretations of the UN Sales Convention' (1993) 12 Journal of Law and Commerce 239.

31 1997 WL 414137 (SDNY, 1997) (*Helen Kaminski*).

32 *Ibid*.

33 *Ibid*.

34 201 F Supp 2d 236 (SDNY, 10 May 2002) (*Geneva Pharmaceuticals*).

35 *Ibid*, 282.

Incorrect case law

In addition to inconsistent interpretations of the CISG, because of both the novelty of the CISG as well as international law as a whole, some courts will inevitably simply misapply the law. Due to of the number of courts in the United States, the possibility of the development of a body of case law that misapplies the law is always of concern, and there are certainly incidents of this in the American case law. Thus, for example, in *BP Oil International*,[36] the parties used standard International Commercial Terms (INCOTERMS) to define the shipping obligations of the parties. In that case, although the court properly applied the relevant INCOTERM, the court reasoned that the term was applicable by implication of trade usage under Article 9(2).37 However, the validity of the INCOTERMS can hardly by implication when the parties have expressly used it in their agreement. It was applicable to the agreement because the parties expressly agreed to it. The court simply missed the distinction between parties expressly including a term, which then becomes valid by the general principle of freedom of contract, and terms which the CISG allows to be incorporated by implication.

Mistakes in interpretation, once made, are often difficult to correct in the American law. Thus, for example, in the notorious American case *Beijing Metals & Mineral Import/Export Corporation v American Business Center Inc*,[38] a federal appellate court, in what is generally regarded as a clear misinterpretation of Article 8(3)[39] of the CISG, imported the common law parol evidence rule into the CISG. By doing so, the court allowed the party to avoid evidence of contemporary discussions during the contract negotiations in order to explain the parties' understanding of the written agreement.

In a subsequent case, *MCC Marble Ceramic Center Inc v Ceramica Nuova d'Agostini SpA*,[40] another federal appellate court addressing the same issue properly concluded that the CISG does not contain the common law parol evidence rule. However, since the courts have jurisdiction over separate states, the initial decision is still precedent in the states subject to the court's jurisdiction.

Reluctance to apply the CISG

Consistent with many cases throughout the world, there has been some reluctance on the part of American courts to apply to CISG. Thus, for example, one court was confronted with the novel and interesting question of whether the American declaration of CISG Article 95 that the US would not be bound by the CISG under Article 1(b): in other words, the CISG does not apply unless both parties are from contracting states but does apply where one of the contracting parties is from a state which is not bound by the formation provisions of the CISG when the issue is one of

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36 332 F 3d 333 (5th Cir, 2003).

37 *Ibid*, 338–39.

38 993 F 2d 1178 (5th Cir, 1993).

39 Article 8(3) provides: 'determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.'

40 144 F 3d 1384 (11th Cir, 1998).

contract formation.[41] Instead of addressing the issue, the court simply concluded that: '[b]ecause the parties have not raised the CISG's applicability to the dispute, we decline to address it here.'[42]

In addition, as is all too common in CISG cases worldwide, in at least one American case, the court, having determined that the CISG applied, simply stated without any analysis that the law of the CISG was the same as the domestic law and then applied the local law to the case.[43]

The revision of the Uniform Commercial Code Article 2: Sales – the question of harmonisation with the CISG

Article 2, the sale of goods provisions of the Uniform Commercial Code, which has been in existence since 1958, has recently been revised and was approved in August 2003. The prior Article 2 replaced the Uniform Sales Act of 1906, which itself was based on the British Sale of Goods Act of 1893.[44] Both of these earlier statutes attempted to codify the common law of sales and, as such, retained much of the formalism of the late 19th century law of contract. However, Article 2 represents a distinctly different approach to the law of sales. Eschewing traditional contract formalism, Article 2 sets out rules that are designed to weave the particular sale into its specific business context.[45] The CISG was likewise drafted with practical business implications in mind.[46] The Drafting Committee to Revise Article 2 continued to work in this tradition.[47]

As previously mentioned, in an ideal world the draftsmen of both international and domestic laws would take the best features of several bodies of law and meld them together into a comprehensive legislative scheme. However, the revision of the sales articles proved that this is a difficult task, and below I will give my analysis of why this was so. It is fair to conclude that the attempt to harmonise American domestic sales law with the CISG was not very successful.

Given the mandate to the drafting committee, the drafting process is inward-looking, making a focus on international law difficult

To understand the process and direction of the Article 2 revision project, one must first understand the mandate given to the drafting committee. The mandate was to revise the sales provisions, not to draft a new commercial code.[48] The revision

41 *Standard Bent Glass Corp v Glassrobots Oy*, 333 F 3d 440 (3rd Cir, 2003).

42 *Ibid*, 444, fn 7.

43 *Schmitz-Werke GMBH N Co v Rockland Industries Inc*, 37 Fed Appx 687 (4th Cir, 2002).

44 See Braucher, R, 'The legislative history of the Uniform Commercial Code' (1958) 58 Columbia Law Review 798, 798–99; Teevan, KM, 'A history of legislative reform of the common law of contract' (1994) 26 University of Toledo Law Review 35, 71.

45 See Hillinger, IM, 'The Article 2 Merchant Rules: Karl Llewellen's attempt to achieve the good, the true, the beautiful in commercial law' (1985) 73 Georgia Law Review 1141, 1151–60.

46 See Sono, K, 'UNCITRAL and the Vienna Sales Convention' (1984) 18 Int'l Law 7, 13.

47 See PEB Study Group, 'Uniform Commercial Code, Article 2 Executive Summary' (1991) 46 Bus Law 1869.

48 *Ibid*.

process was based on the idea that the Code was not reflective of current business practices, particularly in areas such as consumer protection, warranty and products liability, third party rights in sales contracts and emerging electronic modes of contracting.[49] Therefore, the focus was on the existing Code and how it could be changed to reflect modern business practices and the better reasoned cases. This focus tended to be inward-looking – always focused on the existing Code itself – and therefore the comparisons with other codes such as the CISG or similar international standards such as the International Institute for the Unification of Private Law (UNIDROIT) Principles on International Contracts tended to be incidental as opposed to deliberate.[50]

In addition, the process of open NCCUSL drafting,[51] with its heavy influence of interest groups familiar with the Code and its problems (or simply the desires of specific interest groups), kept the focus on the existing Code.[52] By allowing the full participation of all of the attendees, the NCCUSL process ensured that the conversation rarely moved beyond the text of the existing statute or the language of a proposed revision. This is what the participants engaged in the process were concerned with and, therefore, this is where the discussion and drafting were centred.

Moreover, beyond the actual mandate of the drafting committee to revise the existing code, there is also the question of familiarity. The members of the drafting committee and the advisers and observers involved in the process were all very familiar with the UCC,[53] and therefore this common language and familiarity kept the focus on the UCC rather than the CISG.[54]

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49 *Ibid*.

50 Despite this statement, 'The Study Group further recommends that the Drafting Committee, in its deliberations, constantly monitor, assess, and integrate, where appropriate, developments in the following areas external to Article 2: … [t]he ratification and implementation of the Convention on the International Sales of Goods…' See *ibid*.

51 For an excellent discussion of the process of NCCUSL drafting committee meetings by its executive director, see Miller, FH, 'The Uniform Commercial Code: will the experiment continue?' (1992) 43 Mercer Law Review 799, 810–12.

52 See Patchel, K, 'Interest group politics, federalism, and the uniform laws process: some lessons from the Uniform Commercial Code' (1993) 78 Minnesota Law Review 83, 120–23. Part of the impetus for revision came from the fact that a lot of litigation could be prevented if holes in the current Code that have spawned litigation were addressed. See Leary Jr, F and Frisch, D, 'Is revision due for Article 2?' (1986) 31 Villanova Law Review 405.

53 The reporter and chair of the drafting committee were both commercial law professors with strong backgrounds in the UCC, as were five of the six other members of the drafting committee.

54 That revised laws tend to replicate what the revisors already know will be of no surprise to students of comparative law. See Watson, A, *Legal Transplants* 95–96 (1974); Watson, A, *Sources of Law, Legal Change, and Ambiguity*, 1984, Philadelphia: University of Pennsylvania Press, 51–75.

The CISG, or other international sales regimes, are not appropriate models for the revision of Article 2

Even to the extent that the drafting committee looked outward to other legal systems for guidance, the CISG did not prove to be an appropriate model for the revision. From the beginning of the revision process, the drafting committee studied the extent to which the revised Article 2 should be consistent with the CISG.[55] However, a perusal through the comments to the final draft shows virtually no examples of the CISG being the source of the changes.

Although the drafting committee did not consistently follow the CISG, there are strong arguments for uniformity between the two sales regimes. In international commercial transactions, 'uniform international sales law avoids disputes over which domestic law applies' and thereby enhances the efficiency of international trade.[56] This facilitates transaction planning and dispute settlement, as well as promotes consistent interpretations by courts and arbitrators. In the domestic context the same argument has justified the UCC since its inception. However, despite the similar rationales, the drafting committee did not choose to adopt the CISG as the model for the revision of Article 2 for several reasons.

Different legal traditions

The former Article 2 was drafted and operated within a context of established principles of the common law of contracts.[57] To the extent that Article 2 does not displace the common law of contract, the common law is a part of the operative principles that govern domestic sales law.[58]

Unlike the UCC, the CISG is not based on any particular set of underlying established domestic legal principles. Instead, it was drafted to be independent of, rather than to work in conjunction with, any particular domestic law.[59] Without a common legal framework for both the UCC and the CISG as background, and because the drafting committee never considered jettisoning the common law background of the UCC, the CISG did not fit neatly as a model for a revised Article 2.[60]

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55 PEB Study Group, 'Uniform Commercial Code, Article 2 Executive Summary' (1991) 46 Bus Law 1869, 1876.

56 Speidel, RE, 'The revision of UCC Article 2, Sales in light of the United Nations Convention on Contracts for the International Sale of Goods' (1995) 16 Northwestern Journal of International Law and Business 165, 170.

57 An understanding of the common law is certainly necessary to understand the UCC, as one commentator has recently noted: 'While it is obviously a statute, and may even claim to be a code, it relies heavily upon the common-law models. Sometimes it follows these models slavishly, and sometimes it modifies them creatively, but common law has remained at the foundation of the vast majority of the Code's provisions.' See Rubin, EL, 'The Code, the consumer, and the institutional structure of the common law' (1997) 75 Washington University Law Quarterly 11, 14.

58 See § 1–103 of the UCC.

59 See Garro, AM, 'Reconciliation of legal traditions in the UN Convention on Contracts for the International Sale of Goods' (1989) 23 Int'l Law 443, 480–83.

60 Unlike the UCC, where the common law is the basis for resolving questions not directly answered by the Code itself, under the CISG, questions for which there are no clear answers 'are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law'. See Article 7(2) of the CISG.

To the degree that one can attach a specific legal tradition to the CISG, an analysis shows that it is a blend of both common law and civil law traditions.[61] One sees this clash of civil law and common law legal cultures in areas such as specific performance, where the CISG liberally allows for it,[62] and the doctrine of impossibility, where the CISG also takes a more liberal civil law approach.

American sales law as part of a broader Unified Commercial Code

Another significant difference between Article 2 and the CISG is the fact that Article 2 is an integral part of the Uniform Commercial Code and its logic, terminology, and substantive rules have to conform to the other articles of the Code such as those on leases of goods, commercial paper, electronic funds transfers, letters of credit, documents of title, and secured transactions. Unlike Article 2 of the UCC, the CISG is an independent statute that does not fit within the broader framework of a larger code.

The scope of the American Sales Code and the CISG are different

The difference in the scope of coverage between the two acts t serve as a full model for the UCC. For example, the CISG does not cover consumer contracts,[63] nor does it cover questions of non-economic losses in products liability, whereas the UCC covers both.[64]

In addition, the UCC not only deals with both commercial and consumer contracts but in many contractual contexts, it also sets out different rules based on whether one or both parties are a merchant.[65] The CISG makes no such distinctions. Within Article 2, there is a constant and delicate balance between commercial and consumer contracts[66] – co-ordination unnecessary in the CISG.

Also missing in the provisions of the CISG are the broad protections included in Article 2 against unconscionable contracts,[67] as well as the provisions that provide claims against remote sellers without privity of contract.[68] In addition to adopting

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61 A review of the Working Group's deliberations show numerous examples of compromise and 'blending' of legal approaches. See Honnold, J, *Documentary History of the Uniform Law for International Sales, First Session, Doc A(1) Part II Consideration of Substantive Issues,* 1989, New York: Kluwer Law and Taxation Publishers.

62 For an excellent discussion on the broader right of specific performance under the CISG than under American domestic law, see Walt, S, 'For specific performance under the United Nations Sales Convention' (1991) 26 Texas International Law Journal 211.

63 See Article 2(a) of the CISA.

64 The scope of Article 2 is extremely broad. As §2–102 of the UCC states, 'this Article applies to transactions in goods'. Article 2 has always overlapped with the law of torts to provide for non-economic losses. See § 2–715(2)(b) of the UCC.

65 See, eg, § 2–314 of the UCC (imposing warranty of merchantability on sellers who are 'merchants with respect to goods of that kind').

66 Consumer protection was one of the major flash points in the recent revision. For examples of the debate, see Miller, FH, 'Symposium: the revision of Article 2 of the Uniform Commercial Code: consumer issues and the revision of UCC Article 2' (1994) 35 William and Mary Law Review 1565; Rosmarin, YW, 'Symposium: The revision of Article 2 of the Uniform Commercial Code: consumers-R-us: a reality in the UCC Article 2 revision process' (1994) 35 William and Mary Law Review 1593; 'Symposium: consumer protection and the Uniform Commercial Code' 75 Washington University Law Quarterly 1–672.

67 See § 2–302 of the UCC.

68 See *ibid*, § 2–318.

the common law principles of good faith purchasers within the sales provisions, Article 2 governs the effect of a contract for sale on certain interests in the goods claimed by third persons.[69] To the extent that the revisions of Article 2 promote stronger consumer protection and lessen the privity requirements, the differences in scope between the CISG and the UCC have expanded.

There are other important differences between the CISG and Article 2. For example, the CISG has no statute of frauds.[70] Although there was much debate on whether the revised Article 2 should retain the statute of frauds,[71] its absence in the CISG was one of the arguments for its abolition.[72] However, the statute of frauds was retained.

There are other areas of concern in the Article 2 revision that were also outside the scope of the CISG. For example, the CISG also does not have a parol evidence rule.[73] As for Article 2, although the revision committee has constantly tinkered with the parol evidence rule, there was no suggestion either by the committee or any interested groups to abolish it.

It should also be noted that the revision committee did not discuss the issue of Article 2's scope in a consistent manner, nor did the committee always assume that the scope of the revised Article 2 would remain the same. In fact, the contours of Article 2 expanded and contracted greatly during the revision process and this examination and re-examination of scope has taken up much of the energy of the drafting committee. In doing so, this discussion led the process further afield from considerations of external legal rules, such as the CISG, by focusing the attention of the revision to the narrow question of what Article 2 should cover.

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69 See *ibid*, § 2–403.

70 As with most generalisations about the law, this one is not exactly accurate. The counterpart to § 2–201 of the UCC under the CISG is Article 11. Where the UCC requires that all contracts for sale of goods in excess of $500.00 be in writing (see UCC § 2–201), the CISG eliminates the requirement of writing to evidence the agreement: 'A contract of sale need not be concluded in or evidenced by writing ….' See Article 11 of the CISG. Article 11 also eliminates any mandatory requirement for enforcement based on any domestic requirement of form. However, Article 11 does not prevent the parties from imposing their own contractual requirements. For example, under Article 29, parties by a contract in writing may require 'any modifications or termination by agreement to be in writing'. Article 11 must be read in conjunction with Article 12 which allows contracting states to opt out of Article 11, and thus require writing to evidence the agreement. Therefore, Article 11 does not apply where any party has his place of business in a state that has decided under Article 12 to require writing as a necessary element of a valid contract. The UCC does not have a counterpart to Article 12 because under its terms writing is mandatory.

71 The July 1996 draft abolished the statute of frauds for Article 2. This result was strongly recommended by the PEB Study Group and was approved by the drafting committee on 6 March 1993. A motion to restore the statute of frauds was rejected by an oral vote of the Commissioners at the 1995 and 1996 annual meetings of NCCUSL. However, at the great insistence of many industry groups, at the November 1996 drafting committee meeting, the drafting committee decided to restore 'some version' of the statute of frauds. At the May 1997 meeting of the American Law Institute, a motion to retain the statute of frauds passed by a two-to-one margin. The reconstituted drafting committee of 1999 never considered the question again, and the statute of frauds has been retained.

72 See PEB Study Group, 'Uniform Commercial Code, Article 2 Executive Summary' (1991) 46 Bus Law 1869, 1874.

73 In fact, the CISG basically invites the introduction of parol evidence. According to its terms, '[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'. See Article 8(3) of the CISG.

The primary goal of the revision was not met by the CISG

Another reason why the CISG did not prove to be an appropriate model for the revision of Article 2 is because the primary goal of the revision was not addressed in the CISG. One of the major reasons for the revision of Article 2 was the need to conform the Code to the changes in business practices that had occurred in the last 50 years since the original Article 2 was drafted. While it is true that Article 2 in its original version did not respond to modern electronic and computer-based business transactions,[74] neither does the CISG, and therefore the CISG could not serve as a model to revise Article 2 in light of electronic commerce.[75]

Incompatible structural differences

Another fundamental reason why the CISG was not an appropriate model for the revision on Article 2 was because of several incompatible structural differences in the way in which the two regimes treat basic legal concepts. For example, an important structural difference between the CISG and Article 2 involves the buyer's rights when the seller tenders non-conforming goods. Under the UCC, upon delivery of non-conforming goods, the buyer can choose between acceptance and rejection of the goods.[76] Unlike Article 2, the CISG does not provide for rejection or acceptance. Instead, under the CISG, the buyer can require the seller to repair or replace the goods only in the case of a fundamental breach.[77] It is important to note that this difference in standards in the ability to avoid a seller's performance transcends many areas of sales law, particularly the right to cure[78] as well as the entire damages scheme.[79]

The law of warranty is another good example of where the basic structure of Article 2 is fundamentally different from the CISG and therefore kept the CISG from being an appropriate model for the reform of Article 2.[80] Both the CISG and Article 2 have the basic presumption that the seller must tender goods that conform to the contract.[81] Under Article 2, this proposition is resolved under a theory of

74 Emerging forms of electronic contracting, and the present Article 2's structural inability to handle this, was a major reason justifying the revision of Article 2. See PEB Study Group, 'Uniform Commercial Code, Article 2 Executive Summary' (1991) 46 Bus Law 1869, 1874.

75 For example, neither the definition of a writing under the UCC (§ 1–201(46)) nor the CISG (Article 13) is broad enough to encompass e-commerce non-paper transactions.

76 See § 2–601 of the UCC.

77 See Article 46(2) of the CISG.

78 See § 2–508 of the UCC.

79 For a discussion of the differences between the CISG and the UCC for damages, see Gabriel, HD, 'A primer on the United Nations Convention on the International Sale of Goods: from the perspective of the Uniform Commercial Code' (1997) 7 Indiana International and Comparative Law Review 279, 296–303.

80 Compare §§ 2–313 to 2–316 of the UCC with Articles 35 and 36 of the CISG.

81 See Article 35(1) of the CISG and § 2–313 of the UCC.

warranty.[82] The American law of warranty is an outgrowth of a long history of common law responsibility that has its roots in both contract and tort.[83] The UCC rules are very much grounded in this history and there has been no suggestion to depart from it.

In contrast, the CISG, not being common law based, does not have a general theory of warranty. Instead, the CISG simply provides a series of mandates, such as that the seller 'must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract'.[84] Interpretations of these terms are not set out in the articles on the seller's responsibility concerning the goods, but are instead covered by the general article on interpretation of agreements.[85]

I have suggested elsewhere that the standards of conformity under the CISG are virtually the same as those imposed under Article 2 of the UCC and that the difference is only one of terminology.[86] Therefore, there is no practical difference in the result obtained under each regime. However, for the purposes of drafting, whether the difference is actually substantive or only one of terminology, is significant. Under the UCC, a revision will always be looking to the language of warranties and the well-established rules based on this language. As the CISG does not work in terms of 'warranty', it could not serve as a model for the Article 2 revision in this area.

This point is emphasised in terms of modification and disclaimers of warranties. Because the term 'warranty' is not used, the CISG has no provision dealing with the 'exclusion or modification' of warranties. Rather, disputes over quality turn on what the contract 'required' under Article 35(1) and whether the parties have 'otherwise agreed' under Article 35(2). Unlike Article 2, no special rules for interpretation are provided in these cases; nor are there special procedures for exclusions or modifications.

Incompatible substantive differences

Another reason why the CISG did not prove to be an effective model for the Article 2 revision was because of several major substantive differences between the UCC and the CISG: differences that were not changed by the revisions. Two areas of importance are the standards for rejecting goods under a contract and the question of third-party non-privity rights.

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82 Under Article 35(1) of the CISG, goods must conform to the contract with respect to quantity, quality, description and packaging. Likewise, under the UCC, goods must conform to the contract description: see § 2–313 of the UCC.

83 The seller may make an express warranty, an implied warranty of merchantability, or an implied warranty of fitness for particular purpose or all three in a particular transaction. These warranties are terms of the contract to which the goods must conform. See §§ 2–313, 2–315 of the UCC.

84 Article 35(1) of the CISG.

85 See *ibid*, Article 8.

86 See, eg, Gabriel, HD, 'A primer on the United Nations Convention on the International Sale of Goods: from the perspective of the Uniform Commercial Code' (1997) 7 Indiana International and Comparative Law Review 279.

Under the UCC, a buyer can reject the goods 'if the goods or the tender of delivery fail in any respect to conform to the contract'.[87] This rule, known as the 'perfect tender rule', effectively negates the common law contract rule requiring a 'material breach' as a basis for the rejection of goods.[88] The purpose of this UCC rule is to give buyers certainty as to their right to reject goods and to relieve them of the need to guess whether the non-conformity in the goods or the tender of the goods resulted in the amorphous notion of a 'material breach'. Although sometimes criticised as not reflecting actual business practices and party expectations,[89] the drafting committee considered the rule in light of possible alternatives, including the CISG, and decided to keep the present rule in the revision.

Under the CISG however, generally a buyer may only refuse delivery of non-conforming goods or a non-conforming tender of the goods if the non-conformity amounts to a 'fundamental breach', as defined by Article 25 of the CISG.[90] This requirement for avoidance of the contract makes sense in the prototypical international sales agreement in which goods are to be shipped transnationally. In this context, considerably more than a minor defect should be required to void a contract between parties who may be several thousand miles away.

This difference between the UCC and the CISG in the standards for avoiding agreements not only sets up a basic dissimilarity in the performance of contracts, but it also affects the remedial structure of the two regimes. For this reason, it is difficult to make meaningful comparisons between the two systems for the purposes of drafting one code based upon the other. For example, the alternative remedies of 'cover'[91] or market damages[92] for an aggrieved buyer depend upon a proper avoidance of the contract. These damages would not be available were the buyer to retain the non-conforming goods and, under the CISG, in the absence of a fundamental breach. The buyer would be retaining the non-conforming goods. If one adds the additional civil law preference for specific performance found in the CISG to this difference in the standards by which a party is entitled to these remedial rights under the UCC and the CISG, one finds levels of complexity in the comparison of the UCC and the CISG that makes reliance on the CISG less than fruitful.

Another area of significant concern in the Article 2 revision was the question of the extent to which parties not in privity have rights in sales contracts. The original version of Article 2, having come at the time of the emergence of modern product liability law, shows the confusion and indecision that questions of privity brought to

87 § 2–601 of the UCC.

88 *Ibid*.

89 See Honnold, J, 'Buyer's right of rejection' (1949) 97 University of Pennsylvania Law Review 457, 471.

90 Article 49(1) of the CISG. A breach is a 'fundamental breach' 'if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract'. See Article 25 of the CISG. There is one other situation apart from a fundamental breach which allows a buyer to avoid the contract. Under Article 49, the buyer can avoid the contract if, in the case of non-delivery, the seller does not or will not deliver the goods within the additional time fixed by the buyer under Article 47.

91 See § 2–712 of the UCC; Article 75 of the CISG.

92 See *ibid*, § 2–713; *ibid*, Article 76.

the drafting process at the time it was written.[93] The questions of privity, and how far responsibility will be extended to parties who are not in privity, was one of the most contentious areas of debate in the revision process. The debate concerned the scope of seller liability to third parties either through traditional derivative third-party liability[94] or the possibility of new direct warranty rights either through advertising or pass-through warranties**AQ explain what these are???**.[95] It must be remembered that these arguments regarding the scope of sellers' responsibility go beyond the abstract question of the purpose of the doctrine of privity in contract and are intertwined with the question of how much consumer protection will be built into the structure of Article 2.[96] Even prior to the revision of Article 2, the privity requirement has been eroded by the courts,[97] as well as greatly extended in the various alternative versions of Article 2 itself. [98]

However, this question of privity is an area in which the CISG provided no guidance. CISG Article 35(1), by limiting quality disputes to what the contract requires, applies only to the two-person sale between commercial parties. No Article of the CISG extends a seller's responsibility to a remote buyer, either directly or through a third-party beneficiary concept.[99] While the protection of consumer interests is deeply embedded in the UCC, these interests are simply not incorporated in the CISG.

Conscious decision to adopt the CISG

There is one place in the revised Article 2 where the drafting committee consciously followed the lead of the CISG. This is the elimination of the definitions and meanings of specific shipping terms within the Code. The former Article 2 defined and gave consequences to certain shipping terms.[100] The drafting committee, acknowledging – as the draftsmen of the CISG did – that there are no clear universal delivery terms, and because usages and customs change over time, decided that it was best to rely on custom or external legal rules for the meaning of delivery terms.

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93 The disagreement both of what the state of the law was, as well as where it was headed, resulted in the official version of Article 2's provision on third-party beneficiaries having three alternatives. See § 2–318 of the UCC.

94 The revised Article 2 retains the traditional derivative third-party non-privity rights. See *ibid*, § 2–318.

95 See revised UCC. §§ 2–313A, 2–313B.

96 See, eg, Clifford, DF, 'Express warranty liability of remote sellers: one purchase, two relationships' (1997) 75 Washington University Law Quarterly 413; Reitz, CR, 'Manufacturers' warranties of consumer goods' (1997) 75 Washington University Law Quarterly 357.

97 See Stallworth, WL, 'An analysis of warranty claims instituted by non-privity plaintiffs in jurisdictions that have adopted Uniform Commercial Code section 2–318 (Alternative A)' (1993) 20 Pepp L Rev 1215, 1227, fn 90.

98 *Ibid*, 1128–33; Stallworth, WL, 'An analysis of warranty claims instituted by non-privity plaintiffs in jurisdictions that have adopted Uniform Commercial Code section 2–318 (Alternative A)' (1993) 27 Akron L Rev 197, 201–04.

99 At least one American commercial law scholar has found this to be a failure in the CISG. See Rosett, A, 'Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 Ohio State Law Journal 265, 293.

100 See §§ 2–319 to 2–321 of the UCC.

Conclusion

The CISG is becoming increasingly well known in the US and it is now a standard staple in American commercial law courses. Moreover, American lawyers and courts are becoming increasingly more aware of the need to have a global outlook on the law, particularly with the CISG. However, the US has not developed a large body of CISG case law and the timing of and the external forces working with the recent revision of the domestic American sales law were such that the CISG was of little influence in the development of domestic American law.