

The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care

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I. Introduction: An American CISG Case

Even in the age of statutes, common lawyers see law primarily in cases. Thus, as this article concerns the legal situation in a common law jurisdiction, it may be appropriate to begin with a case – i.e., an American court decision involving the United Nations Convention on Contracts for the International Sale of Goods (hereinafter “CISG” or “the Convention”).

Between 1998 and 2000, Asante Technologies, a Delaware corporation with its principal place of business in California, posted several orders for electronic component parts with PMC Sierra Inc., a Delaware corporation headquartered in British Columbia, Canada. The situation was somewhat

* My sincere thanks go to Franco Ferrari, Bruce Frier, and Peter Winship for many helpful comments and references. The views expressed in this article are mine and are not necessarily shared by these scholars.

complicated because PMC, the seller, also had an office in Portland, Oregon, as well as an American distributor located, like the buyer, in California. After some of the merchandise had been delivered, Asante sued PMC for breach of warranty in California state court in 2001. In response, PMC removed the case to the Federal District Court. According to PMC, the Federal Court had jurisdiction because the dispute was governed by federal law, namely by CISG¹. The federal judge agreed that CISG was applicable and therefore that the Federal Court could properly hear the case². It is unclear what happened after that ruling; the parties presumably settled the dispute.

Asante Technologies v. PMC-Sierra is an interesting, and to some extent typical, American CISG decision in four regards. First, it is a somewhat lonely case – one of merely a handful decided in 2001. Second, it did not apply any of the substantive provisions of CISG pertaining to the parties' rights or obligations. Third, the federal judge fully understood the nature and impact of CISG and construed it in a straightforward (though perhaps debatable) fashion. Fourth, and perhaps most importantly, the parties had obviously not thought of CISG at the stage of contracting, and instead attempted to choose their respective domestic laws for the transaction³. We will return to all these points in due course.

Examining the *Asante* case and, more generally, the role of CISG in the United States, on the occasion of the twenty-first anniversary of the Convention, is worthwhile not only because the United States was one of the driving forces behind the project, not only because it wields more economic power than any other member state, and not only because it has the most active legal system. It is interesting also because the U.S.-American attitude towards CISG is, at least in some respects, fairly typical of the common law world generally. As we shall see, at least in legal practice, CISG has been received in the United States and other common law countries with far less enthusiasm than in most civil law jurisdictions.

My brief essay has three parts. I begin by showing that in United States legal practice, the CISG is of amazingly marginal relevance (II.). I then venture to consider various explanations for that situation (III.). Finally, I want to point out briefly why, despite the breadth of the Atlantic, Europeans should

¹ There was no diversity jurisdiction under 28 U.S.C. § 1332 as both parties were incorporated in Delaware and thus lacked the requisite diversity of citizenship. Thus, federal jurisdiction could only be based on 28 U.S.C. § 1331 which covers "civil actions arising under the Constitution, laws, or treaties of the United States".

² *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp.2d 1142 (N.D. Cal. 2001).

³ It had probably not occurred to the parties that they might be dealing with an international sales transaction, since both parties were Delaware corporations, most of the buyer's orders were handled by the seller's U.S.-American distributor in California, and the seller also had an office in Portland, Oregon. The federal judge, however, found that the seller's British Columbia headquarters was most closely related to the transaction so that CISG applied according to Art. 10(a).

care about the lack of enthusiasm for CISG in the United States and other common law countries (IV).

II. The Marginal Relevance of the CISG in the United States: Extrapolations from the Case Law

The United States was an early and eager participant in the CISG. It was among the earliest jurisdictions to ratify the Convention (in 1986) and among the very first group of nations for which it entered into force (on 1 January 1988) – sooner than for most European countries. There is also no doubt about the legal force of the CISG in the United States. Under the Supremacy Clause of the U.S. Constitution, the CISG, as a duly ratified treaty, is part of the “supreme law of the land”⁴. It has the rank and effect of a federal statute and directly applies to all cases covered by it, in both state and federal courts⁵.

Undoubtedly, businesses in the United States conclude sales contracts with businesses located in other CISG member states by the thousands every day and by the millions every year. One would therefore expect the CISG to play a huge role in U.S. legal practice. Yet, all indications suggest exactly the opposite. It is true that many of these indications consist merely of scholarly commentary⁶, which is sometimes based on hearsay or individual impressions, and that much of the evidence we have is fragmentary and scarcely reliable⁷. Still, there is one kind of evidence that is both quite precise and highly indicative: the small number of cases involving the CISG in United States courts⁸. It is here that we may return to the *Asante* case for the first time: it is typical in its loneliness – for the whole year in which it was decided (2001), we find only five reported CISG cases in all of the United States.

Let us consider the statistics more generally. I am relying on one of the most complete databases on CISG case law, published and continuously updated on the Pace Law School website⁹. It currently lists over 1800 decisions world-

⁴ Article VI §2 of the Constitution of the United States of America.

⁵ While this is true only for so-called self-executing treaties (see *Foster and Elam v. Nelson*, 27 U.S. 253 [1829]), it is generally accepted that CISG falls into this category. Thus, it requires no Congressional implementation, and instead applies directly just like a Congressional statute.

⁶ See, e.g., J. Murray, *The Neglect of CISG: A Workable Solution*: J.L. Com. 17 (1997/98) 365.

⁷ See J. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*: New Zealand Bus. L.Q. 6 (2000) 336, 339.

⁸ The low number of reported CISG cases in the United States has, of course, not escaped the attention of other commentators either; see, e.g., H. Flechtner, *The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation*, in: *Quo Vadis CISG?*, ed. by F. Ferrari (2005) 92.

⁹ Available online at: <<http://www.cisg.law.pace.edu>> (accessed 8. November 2006).

wide involving the CISG. Of these, a total of 87, or less than 5% were rendered in the United States as by far the largest member state¹⁰; most of those come from courts of first instance, barely a dozen from appellate tribunals, and not a single one from the U.S. Supreme Court¹¹.

This record is shockingly low. Compare it, for example, to the number of cases reported in various other CISG member states. The 87 reported U.S.-American decisions amount to about one fifth of the German crop of 401. Given that Germany is at most a third of the size of the United States in terms of population and judicial system, it has produced roughly 15 times as many CISG decisions per capita and court as the United States – and in a shorter time-period to boot (since 1991, rather than 1988). Admittedly, Germany is the frontrunner in this regard, but the United States has also produced many fewer CISG cases than tiny Switzerland (137). Or consider that in roughly the same time-period, the United States has generated three times as many cases touching on the Alien Tort Claims Act (a quasi-archaic statute allowing foreigners to sue for torts in violation of international law in a U.S. federal court¹²) including a major U.S. Supreme Court decision¹³, than on the Vienna Sales Convention.

A closer look at the U.S. data reveals that the number of *truly relevant* cases is even lower than 87. Whoever reads the reported decisions will quickly notice that in approximately half of them, CISG is neither applied nor interpreted. In some opinions, it is considered inapplicable, in others it is just referred to in passing. The number of cases in which CISG plays an actual role in terms of the outcome is roughly 40¹⁴. And even in those cases in which CISG does (or at least helps to) determine the outcome, the courts do not always apply any of its substantive provisions. It is here that we may take note of the *Asante* case for the second time: the CISG did matter in that case – but merely for jurisdictional purposes; the decision had nothing to do with the substantive rights or obligations of the buyer or seller. It would go too far to allege that *Asante* is

¹⁰ The number found through a search on the major U.S.-American databases, LEXIS and WESTLAW, is considerably smaller because, while they report widely, they still do so selectively.

¹¹ In two instances, parties sought review by the U.S. Supreme Court, but in both the Court denied the application; see *Ceramica Nuova v. MCC-Marble*, cert. denied, 526 U.S. 1087, 119 S.Ct. 1496 (1999), and *Zapata Hermanos v. Hearthside Baking*, cert. denied, 540 U.S. 1068; 124 S.Ct. 803 (2003).

¹² 28 U.S.C. 1350.

¹³ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2749 (2004).

¹⁴ The exact number depends on one's method of counting, i.e., on how one defines such a role or whether one counts several decisions in the same case (e.g., in the first and appellate instance) as one or several cases. The most comprehensive commentary on CISG lists only 36 U.S. cases, Commentary on the UN Convention for the International Sale of Goods (CISG), ed. by P. Schlechtriem/I. Schwenzer, 2. (Engl.) ed. (2005) pp. lvii-lix (cited: Schlechtriem/Schwenzer).

typical in this regard, but it nevertheless illustrates that many American CISG decisions concern merely the applicability of the Convention, not its actual substance.

Of course, the number of cases reported in the United States is merely an indication of the Convention's small practical relevance. Of all transactions falling under the CISG, only a tiny fraction ever leads to a legal dispute; of all legal disputes, only some end up in court – especially given that the majority of international contractual disputes among large enterprises are being arbitrated, rather than litigated¹⁵; of all the litigated cases, only some result in a judgment¹⁶; and, of course, even a database with wide coverage will not contain every decision ever rendered. But all that is largely true of other countries with much higher numbers, such as Germany and Switzerland as well. In all these countries, the reported cases are thus only the tip of the iceberg. Thus, it remains indisputable that in comparison to the size of the country, the American tip is so tiny that the iceberg underneath cannot be very large either.

Nor has the number of reported cases recently grown all that much in the United States. Of course, one could not have expected many court decisions in the first few years after the CISG entered into force. It takes time for disputes to occur, for lawsuits to be filed, and for litigation to result in judgments. It is little wonder, therefore, that there were hardly any cases in the first decade under the CISG¹⁷. Yet, even after that initial period, the expectation that “courts will apply the Convention with more regularity”¹⁸ has by and large failed to materialize. Even since the late 1990s, the number of reported cases turning on the CISG in one way or another has hovered around half a dozen or so per year¹⁹ although over the last year, it has gone up to above a dozen.

¹⁵ There is reason to believe that the CISG plays a significantly larger role in international commercial arbitration than in U.S. domestic litigation, see *M. Kilian*, CISG and the Problem with Common Law Jurisdictions: J. Transnat. L. Pol. 10 (2001) 219, 243.

¹⁶ Yet, this factor must not be overrated. It is true that only about five percent of all civil cases filed in American courts ever result in a final judgment (on the merits). Many more, however, generate procedural or other partial decisions of all sorts, and those decisions are included in CISG cases reported – see, again, the *Asante* case (supra n.2).

¹⁷ For an overview of the earlier CISG decisions in the United States, see *L. Castellet*, The Application of the Vienna Convention in the United States (CISG): Rev.dr.aff. int./Int.Bus.L.J. 1999, 582–594.

¹⁸ *P. Hackney*, Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?: La. L. Rev. 61 (2000/2001) 473, 486.

¹⁹ *O. Meyer*, Die Anwendung des UN-Kaufrechts in der US-amerikanischen Gerichtspraxis: IPrax 2005, 462, states that there has been a ‘jump-like increase’ (“sprunghafter Anstieg”) in the number of reported CISG cases in the United States since the late 1990s. In a sense, this is true because, relatively-speaking, an increase from between one to three cases per year (before the mid-1990s) to between three to six decisions (after 1997) and, in the last year, to over 10 is significant. Still, in absolute terms, the numbers remain so tiny that the difference between three or six or even ten cases per year hardly matters. See also *Flecht-*

In sum, the fact that a country with a population, economy, and court system approaching that of Western Europe produces at most a dozen of rereported CISG cases per year strongly suggests that the Convention does not play a significant role there.

III. Some Explanations: Ignorance, Avoidance, and Exclusion

Why does the CISG matter so little in United States legal practice? Commentators have spilled considerable amounts of ink on that question, coming up with a host of possible explanations, but at the end of the day nobody knows for sure. Still, some explanations are more persuasive than others. Let us consider the three major candidates.

1. Fundamental Ignorance

One possible explanation for the low number of CISG cases is that the contractual parties simply overlook the fact that the CISG applies. In other words, perhaps American lawyers – both attorneys and judges – are just ignorant of the Convention²⁰. Such ignorance surely exists in some cases²¹, but several considerations suggest that it plays a minor role in this context.

To begin with, although professional ignorance of the CISG was probably fairly common twenty years ago, it is hardly widespread today. Among the American bench and bar, awareness of the CISG has increased enormously in the last decade or so. Most lawyers who graduated from law school in the last ten or fifteen years will almost invariably have heard of the CISG, given that at least some contracts casebooks used in U.S.-American law schools now touch on it²², and most courses offered on International Business Transactions deal

ner (supra n.8) 91–92 (“slow but marked increase”, “original trickle of cases has now become a substantial and steady (although not imposing) stream”).

²⁰ See C. Thiele, *Das UN-Kaufrecht vor US-amerikanischen Gerichten: Internationales Handelsrecht (IHR)* 2 (2002) 8 (referring to this position in the American literature with further references).

²¹ M. Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles: Am.J.Comp. L. (Supplement)* 46 (1998) 361. See also A. Kritzer, *The Convention for the International Sale of Goods – Scope, Interpretation and Resources: Cornell Review of the CISG (Cornell Rev. CISG)* (1995) 147, also available online at: <<http://cisgw3.law.pace.edu/cisg/biblio/kritzer.html>> (accessed 7 July 2006). In evaluating these statements, one must not overlook that they refer to experiences of almost a decade ago.

²² See, e.g., B. Frier/J. White, *The Modern Law of Contracts* (2005) 14–24, 282–289; L. Fuller/M. Eisenberg, *Basic Contract Law*⁷ (2003) 379–383 and numerous references to the CISG throughout the book; R. Hamilton/A. Rau/R. Weintraub, *Contracts, Cases and Materials*² (1992) (comparing CISG to the Uniform Commercial Code throughout the book);

with international sales law in considerable depth²³. The CISG is also increasingly hard to overlook because there is now an extensive literature about it in the United States, especially on the practitioner level. Handbooks, commentaries, and case digests are readily available²⁴, not to mention more than a hundred law review articles. Thus, even if professional ignorance was once a major cause for the paucity of case law, that can no longer be true²⁵.

Furthermore, while it is possible that many American businesspeople, and sometimes perhaps even their lawyers, still overlook the CISG when drafting contracts, it is highly unlikely that litigators do so in court. Attorneys handling international commercial cases, especially in the federal courts where almost all CISG cases are brought, are by and large specialized and experienced litigators who very thoroughly check all the sources that may work to their client's advantage. They will rarely miss a piece of federal law as important and widely discussed as the CISG, especially given that it has been in force for more than a decade. To be sure, such oversight may occasionally happen, but in order to explain the dearth of reported cases, it would have to occur in the vast majority of disputes. That is highly implausible.

As we shall see below (*infra*. III.), in the majority of international transactions potentially falling under the CISG, American lawyers are not ignorant of the Convention, but rather conscious of, and hostile to, it.

2. Illicit Avoidance

Another possible explanation is that American lawyers, especially attorneys representing clients in court, simply avoid invoking the provisions of the

C. Knapp/N. Crystal/H. Prince, Problems in Contract Law: Cases and Materials⁵ (2003) 9–10, 326, 345–346, 405–406, 871.

²³ See, e.g., M. Gordon/R. Folsom/J. Spanogle, International Business Transactions² (2001) 1–168; *id.*, International Business Transactions, Trade & Economic Relations (2005) 1–68; *id.*, International Business Transactions⁷ (2004) 20–69; *id.*, International Business Transactions⁸ (2005) 91–98; A. Mendoza, International Business Planning (2001) 305–320; D. Vågst/W. Dodge/H. Koh, Transnational Business Problems (2003) 284–294. In my own courses on *Jurisdiction and Choice of Law* and on *Transnational Law*, I also teach the basics of CISG.

²⁴ My initial search found more than 50 book titles on the CISG available in English with many publications in the United States. Most were practitioner handbooks rather than academic treatises. Note especially that the leading printed collection of materials on the CISG (including case law) is published in the state of New York: UNILEX, ed. by M. Bonnell (looseleaf 1995ff., constantly updated), and that two leading commentaries on CISG are available in English: J. Honnold, Uniform Law for International Sales under the 1980 United Nations Sales Convention³ (1999); Schlechtriem/Schwenzer (*supra* n. 14).

²⁵ Whether ignorance of CISG is still more widespread among U.S.-American lawyers than among their European colleagues is an empirical question to which we have no reliable answers.

CISG in cases in which they apply, perhaps out of mindless parochialism or for lack of familiarity. Again, while one can observe this occasionally, it is surely not the norm.

Litigants conscious of the Convention will normally not ignore it for a simple reason: where the CISG applies, it is likely to be to the advantage of at least one side and therefore that side has every reason to raise it in court. Attorneys failing to do so would not only betray their clients' interests and violate their professional obligations; they would also be risking their reputation and exposing themselves to liability for malpractice.

A further possibility is that litigants duly invoke the CISG, whereupon courts tend not to address it, be it out of neglect, incomprehension or even hostility. This, too, will happen only in the exceptional case. Judges are duty-bound to deal with the arguments and legal sources put before them, and they normally do so. There are few signs that American judges shun the CISG when it is invoked; by contrast, there are indications that they take it quite seriously and often strive to apply it as intended, i.e., with a view to its international nature²⁶. Moreover, if judges fail to apply a binding rule of law, they make an egregious mistake and their judgment is subject to reversal on appeal. Of course, judges may duly consider and then, perhaps wrongly, refuse to apply the CISG; that, however, cannot explain the low number of reported decisions either, as such cases of open rejection are included in the count.

Take, now for the third time, the *Asante* case which is, again, fairly typical in this regard. The defendant's counsel saw an advantage in invoking the CISG and thus brought it to the federal court's attention. The judge clearly understood the problems presented and discussed the Convention as required and with considerable sophistication. One may debate the correctness of the outcome, but neither court nor counsel can be blamed for ducking the issue.

3. Conscious Exclusion

The most important reason for the low number of reported CISG decisions in the United States appears to be a third factor: the CISG does not apply to the majority of international sales transactions involving the United States simply because parties exclude its operation under Art. 6. Obviously, if the parties have effectively opted out, the Convention will not be raised in litigation – thus, no case law will be generated.

²⁶ As the leading CISG commentary duly notes, American courts have actually sought guidance from foreign (in this particular case, German) CISG decisions, see the Preface in *Schlechtriem/Schwenzer* (supra n. 14). It is true, however, that in this regard, the record of U.S.-American courts is decidedly mixed and that the “homing trend”, i.e., the tendency to resort to domestic ideas and sources in interpreting CISG, continues to be a problem in many cases; see *Flechtner* (supra n. 8). See also *Thiele* (supra n. 20) 11.

How do we know that this is really the case? Admittedly, there are no hard empirical data²⁷. But there are several factors pointing very strongly in this direction. To begin with, every American commercial lawyer I have ever asked has immediately answered that, as a matter of course, he or she excludes the application of the CISG if at all possible. Moreover, that this practice is common is confirmed by practitioners and academics writing in American and European publications²⁸. Last, but not least, the practice of opting out (or at least attempting to do so), is illustrated by the cases in which the parties dispute whether they had effectively excluded the CISG. Consider, for the fourth and last time, the *Asante* decision. The plaintiff argued that its general business terms providing for California law amounted to an opt-out, particularly since the defendant's terms also contained a clause in favor of local (British Columbia) law. Since *both* parties had attempted to choose a specific domestic regime, it stands to reason that neither really wanted the CISG to regulate the transaction. Unfortunately for the plaintiff, however, the court held, in accordance with the clear rule in American case law and the prevailing international trend,²⁹ that choosing a CISG member state's domestic law included the CISG and that, therefore, an opt-out required an unequivocal statement to that effect³⁰.

In *Asante*, the parties had most likely never considered the CISG before they found themselves in court. Under the circumstances, this was understandable given that their deal involved a Californian buyer and a seller with an Oregon office and a Californian agent, and even the seller's principal place of business was just across the Canadian border in British Columbia. But if one examines other reported cases, it appears that *Asante* represents a more

²⁷ As far as I can see, we have little, if any, reliable empirical data concerning the actual frequency of opt-outs in the United States. In Germany, opt-outs are also very frequent although they are by no means routine and still leave the CISG applicable in ca 1/3 of all cases, J. Meyer, UN-Kaufrecht in der deutschen Anwaltspraxis: RabelsZ 69 (2005) 458. For data concerning various European countries, see F. de Ly, Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary, in: Quo vadis CISG? (supra n. 8) 25, 28–34.

²⁸ See, e.g., V. Cook, CISG: From the Perspective of the Practitioner: J.L.Com. 17 (1998) 343; H. Lavers, CISG: To Use or Not to Use: Int. Bus. Law. 1993, 10; K. Pistor, The Standardization of Law and Its Effect on Developing Economies: Am.J.Comp.L. 50 (2002) 97, 111; Thiele (supra n. 20) 8–9.

²⁹ See J. Lookofsky, In Dubio Pro Conventione?, Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG): Duke J. Comp. Int. L. 13 (2003) 263, 272ff. (with further references); Thiele (supra n. 20) 9 (also with further references to literature and case law).

³⁰ *Asante Technologies v. PMC Sierra* (supra n. 2) 1149–1150. This was hardly the true intent of the parties. A better reason for the conclusion that the CISG governed the transaction was that, as far as one can tell from the facts of the case, the parties never reached an agreement on either domestic law, and thus were left with the CISG as the default source of regulation.

general pattern³¹. In virtually all these cases, the CISG arises because the parties failed to opt out: not because they wished the CISG to apply, nor because they failed to reach an agreement, but because they were simply not aware of the CISG at the contracting stage³². Where they are aware of it, they normally exclude it so that it does not come up in litigation³³.

To be sure, American parties are not the only ones who seek to opt out of the CISG. At least in Europe, however, the picture appears to be more mixed. There, opting-out seems to be the norm in some trades, but remains much the exception in other contexts³⁴. This is confirmed by many conversations that I have had with European practitioners: some report that they tend to advise their clients to opt out, while others consider the CISG a viable choice, especially where the domestic law of the other contracting party seems to be scarcely predictable. There is also some evidence that, where European businesspeople fail to opt out, this is often due to the fact that they, like their American counterparts, are also simply not cognizant of the Convention³⁵.

A cynic may thus regard the CISG as a trap for the unwary: those who think about it, escape; those who don't, get caught. Yet, one could also argue that the CISG works exactly as intended, namely, as an international default rule that applies when the parties do not switch it off. This denies either party the advantage of a 'home game', unless both parties clearly agree to it.

4. Why American Parties Prefer to Opt Out

All of this, of course, leads to the question why American businesses and lawyers tend routinely to opt out of the CISG. This question is of considerable interest to foreign lawyers and scholars. After all, to the extent that the American opt-out routine is supported by good reasons, the rest of the world should accept that American parties normally do not want the Convention to apply. On the other hand, if this attitude rests on mere parochialism or an irrational hostility towards international law, it has little legitimacy and should be criticized.

³¹ See S. Walt, *Novelty and the Risks of Uniform Sales Law*: Va. J. Int. L. 39 (1999) 671, 688 (with further references).

³² In most reported decisions, the parties apparently made no attempt to choose any law at all; in a few others, they included a choice-of-law clause picking the law of a CISG member state, and failed specifically to exclude the CISG.

³³ There is only one reported case in which the parties specifically chose the CISG in their contract, *Magellan International Corporation v. Salzgitter Handel GmbH*, 76 F. Supp.2d 919 (N.D. Ill. 1999) (note 4).

³⁴ See *De Ly* (supra n. 27) 28–33.

³⁵ *De Ly* (supra n. 27) 30.

Unfortunately, the picture is far from clear. This is, in part, because we have, again, little reliable data. It is also because several factors are at work at the same time. They matter to varying degrees and in varying combinations, depending on the individual case. Four factors are particularly noteworthy.

One reason for opting out can be that the CISG is considered substantively deficient and thus inferior to domestic law. The Convention's weaknesses have not gone unnoticed in the United States: it does not govern the validity of contracts; its contract formation rules are antiquated in the electronic age; it regulates some important matters inadequately (e.g., interest for non-payment, Art. 78); it lacks a mechanism for updating, etc.³⁶. Still, on the whole, such substantive considerations probably play a minor role in the American reluctance to apply the CISG. The Convention does not have a ubiquitous reputation as 'bad' law; in contrast, it has frequently been praised for its balanced approach³⁷. Most American practitioners who know anything about its substance at all realize that compared to the Uniform Commercial Code (UCC), it has its advantages and disadvantages. They also understand that it is very difficult to predict, at the contracting stage, whether its provisions will ultimately help or harm their client's interests in case of a dispute – simply because it is almost impossible to predict the subject matter of future litigation³⁸.

A much more important reason to opt out are the legal uncertainties, whether perceived or real, inherent in the CISG. To the extent that American lawyers decide to exclude it after carefully weighing the pros and cons, they do so mainly because the Convention seems too risky a bet. The reason is not that there is no common tribunal to decide issues of interpretation in an authoritative fashion; that is also true for the Uniform Commercial Code³⁹, which is happily embraced by the vast majority of business lawyers in the United States. But American lawyers are reluctant to submit their clients' interests to a text that is not uniform in all member states, because it allows all sorts of reservations, declarations, and renunciations⁴⁰. It also comes in six official languages, including Arabic, Chinese, and Russian, which raises the spectre of conflicting interpretations. Of course, German, French, or Swiss lawyers face the same problem. Still, their American colleagues take it far more seriously as the enormous burden and expense of U.S.-style litigation pushes them to strive for maximum certainty in contractual agreements⁴¹. In

³⁶ See *Ziegel* (supra n. 7) 344–345.

³⁷ See, e.g., *Cook* (supra n. 28) 344 ("CISG is good law").

³⁸ See *Lavers* (supra n. 28).

³⁹ The Uniform Commercial Code is enacted in the several states as state law. As a result, the United States Supreme Court has no power to decide UCC issues independently of the states and normally does not hear UCC cases at all.

⁴⁰ See Arts. 96–98, 101; see also *Ziegel* (supra n. 7) 345.

⁴¹ See *J. Langbein*, *Comparative Civil Procedure and the Style of Complex Contracts*: *Am.J.Comp.L.* 35 (1987) 381.

addition, many American lawyers find it quite unsettling that unlike the UCC and the various *Restatements of Law*, the CISG lacks official comments⁴² and thus provides no authoritative guidance as to what its often broadly drafted provisions really mean. Last, but certainly not least, the paucity of American case law is unnerving to common lawyers who tend not to trust a statutory rule before they have seen what courts actually do with it. Case law from other countries is not an answer because it is difficult to evaluate and has no precedential effect. To be sure, in this regard American lawyers face a catch-22: their routine exclusion of the CISG prevents the emergence of substantial case law, and in the absence of such case law, they prefer to exclude its operation⁴³. Nonetheless, it remains a serious concern that the “CISG is still an unproven commodity, where the outcome is difficult to predict”⁴⁴. In short, the UCC may not be substantively better, but at least to an American lawyer, its meaning is much clearer.

Yet, the assumption that American lawyers opt out of the CISG after careful consideration of its pros and cons gives many, if not most, attorneys far too much credit. In a very large number of cases, the decision to opt out is probably based on a plain preference for the familiar over the unfamiliar: better the devil you know than the one you don't know. One could view this tendency as a form of parochialism, and there is probably some truth in that⁴⁵. But preference for the familiar can be completely rational. Note that most American lawyers lack extensive experience with the CISG, in negotiating and drafting contracts as well as in litigating disputes. Thus, dealing with the CISG means entering new terrain which in turn means additional effort, such as extra re-

⁴² On their importance, see *J. Murray*, *The Neglect of the CISG: A Workable Solution*: J.L.Com. 17 (1997–98) 365, 374–378.

⁴³ American lawyers also realize that even if they did not opt out of the CISG, judges would still tend to look at domestic cases in interpreting it, be it because they have no other choice or because it looks so much more familiar; see *J. Hartwig*, *Schmitz-Werke GmbH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*: J.L.Com. 22 (2002–2003) 77, 97.

⁴⁴ *Cook* (supra n. 28) 343.

⁴⁵ While parochialism is often a problem in American law, foreign observers tend to overrate it, probably because it makes them feel superior. In fact, parochialism in American legal practice was rarely as rampant as has often been alleged abroad and probably no worse than in many other countries in the world. The American legal profession's parochialism has also rapidly diminished over the last few decades as a result of economic globalization. This is true both for the bench and bar. With regard to the bench, certainly the federal courts in the commercial centers, especially on the East and West coasts, handle international issues regularly and usually with aplomb. As far as the bar is concerned, all large American law firms operate on a global level these days (out of sheer economic interest), and lawyers turn to international legal regimes at once whenever it is in their clients' interest. For conflict of laws in particular, see, *M. Reimann*, *Parochialism in American Conflicts Law*: Am.J.Comp.L. 49 (2001) 369.

search time⁴⁶. Particularly in small or moderately sized transactions, such additional effort is rarely cost effective⁴⁷. It is cheaper and faster to stay on familiar ground, at least as long as the new territory is not obviously superior. Judges have similar incentives and thus little reason to engage with the CISG unless the parties force them to do so⁴⁸.

Beyond these three fairly sophisticated reasons lies a more mundane fourth, which may be the most important in the long run: sheer inertia. Lawyers, like other humans, are creatures of habit. Once they have begun to opt out of the CISG (because in the earlier years its complete novelty suggested that course for safety's sake), that quickly turns into unquestioned routine. Routine then spreads due to the human tendency to mimic the behavior of others, perhaps because going against the grain seems risky. Thus, before long, opting-out becomes a broadly shared professional habit⁴⁹. Of course, habits can be changed, but in our case, the standardization of contracts makes that very hard. Lawyers drafting contracts usually work from boilerplate language and if that language excludes the Convention, the exclusion will tend to creep into every agreement. In most mass transactions, that is pretty much the end of the story, because in such cases parties use standard business terms which are not open to negotiation⁵⁰. Even in individually negotiated agreements, changing boilerplate language is not easy. It requires both the will and the bargaining power to do so, and at least one of these preconditions will often be lacking. In addition, parties engaged in complex negotiations usually have so many other, more immediate, concerns that expending negotiation time and energy on a CISG clause will rarely enjoy high priority and may in fact not be cost effective. Simply going with the flow can thus, again, be a rational choice, especially since opting out of the CISG rarely threatens to entail great harm.

⁴⁶ See *Cook* (supra n.28) 351; *Ziegel* (supra n.7) 344.

⁴⁷ For a broader discussion of the impact of such "learning externalities," see *Walt* (supra n.31) 692–897.

⁴⁸ In contrast to most of their civil law colleagues, common law judges are normally not required to research or apply laws that the parties have not presented to them. At least as a rule, the principle *iura novit curia* does not govern in American courts. In other words, where parties do not raise the CISG in court, a common law judge will not do so either, but his civil law counterpart may very well have to.

⁴⁹ Of the American lawyers to whom I have spoken, many suggest that they are not really sure why they opt out of the CISG, and do it mainly because everybody else does so.

⁵⁰ Of course, if there are contradictory choice-of-law clauses in the parties' business terms, there may not be an effective agreement in that regard so that the CISG may apply as a default rule. While the court did not decide the case on that ground, this was fairly obvious in the *Asante* case (supra n.2) 1149–1150.

IV. Why European Lawmakers Should Care: The Reception of CISG in the Common Law Orbit

When European jurists and lawmakers discuss the CISG as a model for the harmonization of contract law in Europe, as they do at this conference, why should they care about legal practice in the United States? Although the United States is the world's largest national economy and arguably has the most activist legal system, it is not, after all, part of Europe. And while U.S.-American law may be leading in many contexts, that is hardly true regarding the implementation of international conventions.

European jurists should nonetheless care because the United States is not alone in its reluctance to embrace the CISG. Instead, such reluctance is widespread in the common law orbit. Several important common law countries have not adopted the CISG at all, notably the United Kingdom, Ireland, and India. Others which have ratified the Convention also seem to put it to little use. Thus, despite longstanding membership, Australia, Canada, and New Zealand, for example, have each produced less than a dozen reported CISG cases. This suggests a reluctance of similar proportions to that in the United States to put the Convention to use in practice. It is not clear whether this reluctance is based on the same grounds as in the United States, although many of these, such as a particular penchant for legal certainty in commercial dealings and a preference for the detail of case law over the vagueness of broad legislative rules, could easily apply *mutatis mutandis* in the other common law jurisdictions. Be that as it may, it is quite clear, as other commentators have noted, that the CISG has been much less successful in the common law orbit than in the civil law world⁵¹.

If there is indeed something like a civil law versus common law divide characterizing the acceptance of the CISG in legal practice, using the Convention as a model for the harmonization of European contract law can easily have two unintended adverse consequences. Within Europe, it could further sideline the English legal tradition; at a time in which we have come to recognize many commonalities between civil law and common law on both sides of the Channel, and in which we seek private law integration on a European scale, this would be troublesome. From a global perspective, modeling European sales law on the CISG would amount to regional harmonization at the expense of worldwide uniformity⁵²; it would not be free from irony to turn a legal document designed as an instrument of worldwide unification into an instrument of regionalization – and thus, ultimately, a fragmentation of law.

⁵¹ See Kilian (supra n. 15) 217–218; see also Ziegler (supra n. 7).

⁵² Kilian (supra n. 15) 219.

V. Concluding Remarks

The CISG is frequently celebrated as “one of the success stories in the field of the international unification of private law”⁵³. In terms of the number of member states – over 60 to date – this is undoubtedly correct. Yet, the claim that the Convention’s success is also “apparent ... from its increasing acceptance in practice”⁵⁴ must be subjected to an important qualification: the claim is true for most civil law countries, especially in Western Europe, which do apply the CISG in a rapidly growing number of cases, but it remains highly questionable with regard to the common law world which has shown much greater reluctance in that regard. The paucity of American case law is probably the most significant manifestation of this reluctance. In light of the common lawyers’ skepticism, one may be tempted to say that the world can be divided into the civil law camp of adherents to, and the common law world of skeptics vis-à-vis, the Convention. While such a description is certainly something of a caricature, like all caricatures, it brings important features into sharper relief.

None of the above implies that the use of the CISG as a model for legal harmonization within Europe would be per se illegitimate. But it does suggest that in pursuing such a course, one should be fully conscious of the risks entailed in a broader context, and thus proceed with the appropriate caution.

⁵³ *P. Huber*, Comparative Sales Law, in: *The Oxford Handbook of Comparative Law*, ed. by *M. Reimann/R. Zimmermann* (2006) 937 (940).

⁵⁴ *Schlechtriem/Schwenzer* (supra n. 14).