The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law

Table of Contents

I. INTRODUCTION 388
A. *UNIDROIT and the Creation of the Hague Conventions* 391
B. *UNCITRAL and the Adoption of the Hague Conventions* 393

III. LEGISLATIVE HISTORY 395
A. *Interpreting the CISG Under the Vienna Convention on the Interpretation of Treaties* 395
B. *Legislative History of Article 6* 396
C. *How May a State Opt Out of the CISG?* 401
1. *The Role of the CISG's Documentary History* . . 401
2. *Implicit and Explicit Exemption of the CISG's Application* 402
D. *Exclusion and the Development of Uniform Sales Law* 403

IV. THE ARTICLE 95 RESERVATION 405

V. THE U.S. ROLE OF LEADERSHIP IN IMPLEMENTING CISG 409
A. *Canada's Recent Ratification of the Convention* . . . 410
B. *Possible Directions for U.S. Influence on World Trade* 411

VI. CONCLUSION 412

APPENDIX A
IMPORT-EXPORT STATISTICS FOR CISG-MEMBER STATES 414

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention) has been hailed as a significant achievement in uniform international law.[1] The CISG is a culmination of a legal phenomenon stretching back five centuries to the ancient *Lex Mercatoria*.[2] However, while the CISG went into effect in the U.S. on January 1, 1988,[3] no one is certain how the courts will interpret the Convention. Many articles, law review comments, and private practice memoranda document this uncertainty.[4] It is reasonable to expect that as time passes and businesses become more familiar with using the CISG to resolve disputes within its scope, parties will be better able to determine how the Convention will affect their international sales transactions.

---

1. *Proposed United Nations Convention on Contracts for the International Sale of Goods: Hearing on Treaty Document 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 15, 25, 28 (1984) [hereinafter *Senate Hearings*] (statements of Peter Pfund, Assistant Legal Advisor for Private International Law at the U.S. State Department, noting the role of the world's distinguished sales and contract law experts in writing the CISG; Mark Joelson of the ABA testifying in support of the CISG; Peter H. Kaskell, Chairman of the Private Lawyer's Committee for the Convention on Contracts for the International Sale of Goods, stating that the Convention will improve choice of law issues and encourage international trade).

2. *See generally* Richard Bergman et al., *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978) (discussing the *Lex Mercatoria*, or Law Merchant, the precursor of private international uniform trade law); LEON TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983) (providing an historical overview of international commercial law).

3. *The United Nations Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18, Annex 1 [hereinafter CISG], *in United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee*, Official Records, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981). Signatories include: Argentina, Australia, Austria, Bulgaria, Byelorussia Soviet Socialist Republic, Chile, China, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Ghana, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, Norway, Poland, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Ukrainian Soviet Socialist Republics, the former U.S.S.R., Venezuela, Yugoslavia and Zambia. *Multilateral Treaties Deposited with the Secretary General as of 31 December 1990*, U.N. Doc. ST/LEG/SER.E/9 (1990). Guinea, Canada, and Romania acceded to the CISG in 1991. *Id.* (update as of Oct. 7, 1991). Ecuador and Uganda acceded to the CISG in early 1992. *Id.* (update as of Feb. 12, 1992).

4. *See* Peter Winship, *A Bibliography of Commentaries on the United Nations International Sale Convention*, 21 INT'L LAW. 588 (1984) (setting forth a detailed bibliography of books, symposia, articles, and commentaries on the CISG).

Only the application of the CISG will reveal its strengths and flaws, its consistencies and inconsistencies.[5]

Commentators further note that parties to international sales of goods avoid the CISG, and some states[6] have not adopted it because of uncertainty over how it will be interpreted.[7] In the U.S., where courts and attorneys rely on precedent for understanding the meaning of a statute or code provision, the lack of cases interpreting the CISG necessarily makes parties wary of using it.

The drafters anticipated states might interpret the CISG differently.[8] To help alleviate the possibility of different interpretations, they relied on the standard of good faith,[9] and required that courts and contracting parties pay special attention to the CISG's international character.[10] In addition, the drafters made an effort to use the clearest and most easily interpreted words to

---

5. *Id.* As of publication date, no case law involving the United States (or between any signatory states) in which the CISG is the controlling law has been discovered. In international sales transactions, most parties arbitrate disputes, the proceedings and results of which remain private.

6. The term "state," as used in this comment, refers to sovereign units at the international level and not to the separate geopolitical entities within the United States.

7. V. Suzanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 217 (1988). As another commentator writes, "In the international setting, this problem [of varying interpretations] is likely to be exacerbated by the cultural differences between nations and the lack of a final authority whose interpretations of the convention would be authoritative." J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms*, 21 COLUM. J. TRANSN'L L. 529, 556 (1983).

8. *Analysis of Comments and Proposals relating to Articles 1-17 of the ULIS*, [1970] 2 Y.B. UNCITRAL 49, U.N. Doc. A/CN.9/WG.2/WP.6, *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 41, 54 (1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY]. *See* C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION 66 (1987) (noting the problem of states turning to their own laws for interpreting the CISG).

9. *See* CISG, *supra* note 3, art. 7 ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."). This provision not only explains the directive given to the tribunal, but also illustrates the characteristic clarity of the language.

10. *Id.*

express their intent.[11] The drafters intended these safeguards to allay some of their fears of inconsistent interpretation.[12]

In addition to interpretation questions, another significant problem exists: getting the private parties of contracting states to include their international sales of goods transactions within the ambit of the CISG.[13] Article 6 of the CISG allows parties of contracting states to elect not to have the Convention apply to their transactions. This ability to exclude the CISG at will undermines the effort to firmly establish a uniform international sales law by making it too easy for parties to exempt its application to their transactions.[14]

This comment presupposes that actual use of the CISG benefits the world, the point of view reflected in the reasons for creating the CISG. These reasons focus on facilitation of world trade[15] and eliminating the uncertainty created by conflicting states' national laws.[16] These reasons are discussed further in Part III.D of this comment. Naturally, a decision by a state not to adopt the CISG, or by parties of contracting states to opt out of the CISG, creates

11. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 69 (1989) [hereinafter HONNOLD, INTERNATIONAL SALES]. The drafters intentionally avoided words which retained a legal meaning. For example, the French concept of deliverance, a property right concept of contract law, was overtly omitted from the Convention since its analogue was not found in several of the other states' legal systems, and partly because the word implies "delivery" concepts found in the Anglo-American legal tradition. *"Delivery" in the Uniform Law on the International Sale of Goods (ULIS): Report of the Secretary-General*, [1971] 3 Y.B. UNCITRAL 31-41, U.N. Doc. A/CN.9/WG.2/WP.8, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 73; *see*, John O. Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959) [hereinafter Honnold, *Uniform Law*] (discussing the concept of deliverance).

12. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 69.

13. CISG, *supra* note 3, art. 1. The term "contracting state" refers to a state that has ratified, adopted, approved, or acceded to the CISG. In this section of the comment, all references to parties of contracts involving the CISG presume that the parties are from different contracting states.

14. Whether uniformity should give way to the autonomy of the parties is a debate not undertaken in this article. Proponents of allowing parties to develop the law of their contracts would find that uniformity should give way to autonomy. The reader is asked to view this article as starting with the assumption that uniformity is the more desirable objective.

15. Errol P. Mendes, *The U.N. Sales Convention and U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law*, 8 J.L. & COM. 109, 114 (1988).

16. *See infra* text accompanying notes 115-16 (discussing the reasons for establishing the CISG).

a problem in realizing the goals of the CISG. Effective uniform law mandates actual use of its provisions in practice.

Part II of this comment looks briefly at the development of the CISG and the participation of the U.S. in that development. Part III discusses CISG article 6, which allows for parties to exclude the CISG from their transaction or to vary its provisions, and examines how its legislative history helps clarify the meaning of this provision. Part III also argues that article 6 counteracts the world's efforts through UNCITRAL to establish a vital uniform international law. Part IV reviews article 95 and the American reservation thereunder. Article 95 allows the CISG to apply in transactions between contracting and noncontracting states when the private choice of law rules indicate that the law of the contracting state will apply. Part IV also argues that the U.S. should revoke its reservation. Finally, Part V argues that this revocation will allow the U.S. to use its dominance in the international market to encourage acceptance and use of CISG by more states.

II. HISTORICAL DEVELOPMENT OF THE CISG[17]

A. UNIDROIT and the Creation of the Hague Conventions

The first modern attempt to develop a uniform international sales law came in the early 1930s as a result of efforts by the International Institute for the Unification of Private Law (UNIDROIT).[18] This institute consisted of European scholars whose objective was to draft a uniform sales law. By 1935, UNIDROIT completed a draft of uniform sales law for international transactions, but upon the advent of the Second World War, the group abandoned its efforts.[19] UNIDROIT resumed its efforts in 1951, and by 1964 the group completed the Hague

17. *See* HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 47; Mendes, *supra* note 15, at 109 (for a concise history of CISG); *see also* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 13-292 (for a detailed account of the documents relevant to establishing the CISG).

18. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 49; Mendes, *supra* note 15, at 113.

19. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 49.

Conventions.[20] The Hague Conventions consist of two documents: the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[21] These two conventions are the predecessor of the CISG.

During the years of work that went into the Hague Conventions, the U.S. was absent.[22] Not until December 1963, four months before the convention at the Hague, did the U.S. take an active interest in the proceedings. At this time, the State Department authorized a delegation to participate in the Hague Convention drafts conference.[23] However, by this point in the conference, the U.S. delegates did little more than make suggestions designed to include in the conventions elements of the common law and of the Uniform Commercial Code (UCC).[24] Few of their suggestions were incorporated into the ULIS or the ULF since UNIDROIT had practically completed its work. Only five states ratified the Hague Conventions.[25]

The U.S. rejected the Hague Conventions, finding the ULF and the ULIS inadequate to meet its needs[26] because these conventions, based on the European civil law tradition, were

---

20. *Id.*

21. Uniform Law on the International Sale of Goods (ULIS), July 1, 1964, 834 U.N.T.S. 107; Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

22. *See* Honnold, *Uniform Law, supra* note 11, at 303, 305 ("Overtures to the United States inviting its participation have been rebuffed on the ground that constitutional power over the problem has been reserved to the several states, and therefore lies beyond the competence of the national government . . . ."). Honnold explains away this reason, noting that the federal government may rely on the treaty power within the Constitution, and suggests that the U.S. was behaving according to "older patterns of isolationism." *Id.* at 303.

23. Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29, 29 (1984). Two of the representatives, Prof. John Honnold and Dean Soia Mentschikoff, preeminent scholars in American Contract law, went on to become extremely influential in the development of CISG along with Prof. E. Allan Farnsworth.

24. *Id.*

25. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 49.

26. Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 267 n.16 (1986). ULF and ULIS were extensively criticized by non-European states who felt that the Hague Conventions were self-serving treaties produced by a closed, closely knit European Community. *Id.*

incompatible with the American common law tradition.[27] The U.S. was not alone in feeling isolated from the Hague Conventions, as Third World, socialist, and Asian states were also excluded from the drafting process.[28] Also at this time, the UCC had begun to receive wide acceptance throughout the U.S., indicating a firm commitment by the individual American state governments[29] to the concept of uniformity in commercial and sales law.[30] Despite the rejection of U.S. participation by the drafters of the Hague Conventions, the U.S. did not abandon its interest in uniform international sales law. Prompted by the 1964 conference at the Hague, the Secretary of State developed the Advisory Committee on Private International Law to review developments in this subject.[31] The Advisory Committee would keep the State Department informed of efforts to establish a uniform sales law on an international level.[32]

B. UNCITRAL and the Adoption of the Hague Conventions

The creation of the United Nations Commission on International Trade Law (UNCITRAL)[33] marked the beginning of

---

27. *Id.* at 268. As noted, the Hague Conventions were the product of Western European scholarship based on the civil law tradition. The belief was that the drafters cared little about including common law traditions and reflected that sentiment in the Hague Convention. For obvious reasons, this would not attract the United States to sign on. *Id.*

28. *Id.*

29. *Cf. supra* note 6 (using the word "state" to refer to sovereign nations).

30. ROBERT BRAUCHER ET AL., INTRODUCTION TO COMMERCIAL TRANSACTIONS 29 (1977). Between 1960 and 1968, the number of state jurisdictions within the U.S. that adopted the UCC rose from two to forty-nine (excluding Louisiana but including the District of Columbia and the Virgin Islands). The 1960s marked the success of the UCC and a commitment by the states to adopt one uniform commercial law. That decade also marked the trend in commercial legal scholarship that underpinned the final draft of the UCC. *Id.* It is only logical that a body of law as important as the UCC, embodying decades of work among the several states of the U.S. would be a factor in developing provisions for a uniform world sales law. Clearly, U.S. legal scholars would not have worked so hard to enact a cornerstone of U.S. commercial law, only to have to adopt an international set of laws that bore no resemblance to the UCC.

31. *See* Landau, *supra* note 23, at 29.

32. *Id.*

33. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 50. UNCITRAL is composed of 36 member states, chosen according to a formula that assigns representation by geographical location. A smaller working group was carved out of UNCITRAL, consisting of the following states: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the former U.S.S.R.,

the United Nations' involvement in the international uniform trade law arena.[34] The Hungarian delegation viewed uniform international trade law as a means to improve world trade and requested creation of an adjunct committee to study the potential of an international uniform sales law.[35] The U.N. General Assembly responded to the suggestion by authorizing the Secretary-General to investigate the problems inherent in developing uniform international trade laws. The Secretary's report, disseminated at a General Assembly meeting held in December 1966, contained findings sufficient to lead to the creation of UNCITRAL.[36]

UNCITRAL began its work in January 1968, when it resolved to make developing and adopting uniform international sales law its first objective.[37] The U.S. took an active part in UNCITRAL from the beginning and participated in its Working Group, in contrast to its role in the Hague Conventions. The Working Group consisted of a subset of the entire Commission assigned to review the Hague Conventions and report back to the entire Commission.[38] Perhaps the U.S. learned from its experience at the conference on the Hague Conventions that early involvement would be essential if U.S. interests were to be considered in any meaningful way. Also, early involvement would serve to base uniform law more broadly and permit inclusion of a wider cross-section of states.

UNCITRAL's initial concern was to determine the Hague Conventions' role in UNCITRAL's efforts to develop uniform trade laws.[39] The primary discussions focused on whether to recommend adoption of the Hague Conventions.[40] UNCITRAL determined that the Hague Conventions would not be universally

---

the U.K., and the U.S. *Id.*

34. John O. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: an Overview*, 27 AM. J. COMP. L. 223, 226 (1979); *see generally* Symposium, *UNCITRAL's First Decade*, 27 AM. J. COMP. L. 201 (1979).

35. Mendes, *supra* note 15, at 114 (citing 19 U.N. GAOR, Annex 2, at 3, U.N. Doc. A/5728).

36. *Id.* at 115 n.40.

37. HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 8.

38. *Id.* at 50.

39. *Id.* at 9.

40. *Id.*

adopted, primarily because of their basis in concepts of Western European law. The Hague Conventions did not encompass aspects of all the legal traditions of the various states from which it sought acceptance.[41] Instead, the Hague Conventions became the starting point for a draft of the CISG. UNCITRAL's Working Group analyzed, criticized, and altered ULIS and ULF separately.[42]

Ultimately, the Working Group combined into one document elements of contract formation and sales law set forth by both Hague Conventions.[43] This draft eventually became the foundation of the CISG, and was adopted at the United Nations Conference on Contracts for the International Sale of Goods which opened for signature on April 11, 1980.[44] The U.S. became a signatory to the Convention on August 31, 1981.[45]

III. LEGISLATIVE HISTORY

A. Interpreting the CISG Under the Vienna Convention on the Interpretation of Treaties

The problem of a consistent interpretation of the CISG presents a major obstacle to widespread use of the Convention. The Vienna Convention on the Law of Treaties [hereinafter Interpretation Convention] offers an interpretation scheme with respect to international laws.[46] Article 31 of the Interpretation Convention states that treaties are to be interpreted in good faith, with regard

41. *Id.*

42. HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 6.

43. *Id.*

44. *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1990*, U.N. Doc. ST/LEG/SER.E/9 (1990).

45. *Id.*

46. May 23, 1969, 8 I.L.M. 679, *reprinted in* MARK W. JANUS, AN INTRODUCTION TO INTERNATIONAL LAW 13 (1988) (citing U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969), signed in Vienna, Austria, May 23, 1969, entered into force January 27, 1980, but not in force for the United States) [hereinafter Interpretation Convention]. Although this Convention is not in force for the U.S., the State Department recognizes it as "the authoritative guide to current treaty law and practice." S. EXEC. DOC. L., 92d Cong., 1st Sess. 1 (1971).

to the ordinary meaning of the terms within their context.[47] Article 32 allows recourse to the preparatory documents generated in the process of creating a treaty in order to confirm the meaning of a particular provision.[48] For a state such as the U.S. which often relies on legislative intent in determining the meaning of a statute or code provision, Interpretation Convention article 32 is pivotal. Professor Honnold of the University of Pennsylvania, U.S. delegate to the 1980 conference in Vienna and commentator on the CISG, agrees in his Documentary History of the Convention that resorting to legislative history may be the way to work toward a uniform interpretation of the CISG.[49] Following Professor Honnold's belief that legislative history may assist in interpretation, an analysis of CISG article 6 follows.

B. Legislative History of Article 6

Article 6 provides: "The parties may exclude the application of this convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[50] Arguably, article 6 is the most important provision in the CISG, because it gives power to the contracting parties to decide whether the CISG will apply to their transactions. Article 6 began as article 3 of the ULIS and allowed the parties, either expressly or by implication, to exclude that convention from their transactions.[51] The second sentence of ULIS article 3 is of interest because the CISG is silent on the manner in which parties may exclude the CISG from their transactions. This

---

47. Interpretation Convention, *supra* note 46, art. 31. This mandate is reflected in the text of CISG, *supra* note 3, art. 8.

48. Interpretation Convention, *supra* note 46, art. 32.

49. HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at vii.

50. CISG, *supra* note 3, art. 6. The discussion here of article 6 focuses on the ability of parties to exclude CISG entirely and does not discuss the license to vary its provisions. All references to article 6 refer to the final version.

51. Article 3 of ULIS states: "The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied." *Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964*, [1970] 2 Y.B. UNCITRAL 43, U.N. Doc. A/CN.9/WG.2/WP.6, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 41, 49.

omission raises the question whether a party may imply the exclusion under article 6.

The Working Group suggested at its second session that ULIS article 3 be revised to retain the ability of parties to vary the CISG's provisions or to exclude them entirely.[52] The Working Group consciously omitted the second sentence that appeared in ULIS article 3. The reasons why are not entirely clear and are somewhat contradictory. Some members of the Working Group believed that allowing parties to opt out of the Convention by implication would create a situation where courts could too easily find an implied exclusion.[53] The effect would be the nonapplication of the Convention's uniform rules in an instance where they otherwise would apply. Other members believed that such a fear was unfounded, but agreed to the change because, to use their words, "the law does not ordinarily attempt to establish special rules for construing agreements."[54] By the third session of the Working Group, this revised language[55] became article 5, with no changes in the interim.[56]

At its fifth session, the Working Group concluded its review of ULIS and solicited the U.N. Secretary-General to prepare a study of pending questions on the revisions it had made to the ULIS.[57] The Secretary-General received no questions concerning the

52. *Working Group on the International Sale of Goods, Report on the Work of the Second Session*, [1971] 2 Y.B. UNCITRAL 55, U.N. Doc. A/CN.9/SER.A/5/1971, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 55, 61. ULIS article 3 provides that "[t]he parties may exclude the application of the present law or derogate from or vary the effect of any of its provisions." *Id.*

53. *Id.*

54. *Id.* No explanation was made for this reasoning. Perhaps these members believed no special rules which depart from generally accepted principles should be established.

55. *Id.* The revision reads as follows: "[T]he parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions." *Id.*

56. *Progress Report of the Working Group on the International Sale of Goods*, Third Session, [1972] 3 Y.B. UNCITRAL 79, U.N. Doc. A/CN.9/SER.A/77, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 93, 96.

57. *Progress Report of the Working Group on the International Sale of Goods*, Fifth Session [1974] 5 Y.B. UNCITRAL 50-51, U.N. Doc. A/CN.9/SER.A/25, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 174, 196-97.

language of article 5.[58] By 1977, the Working Group submitted a draft of its ULIS revisions, known as the "sales draft," to UNCITRAL.[59] In this draft, article 5 was renumbered to article 4 and took on the language of present article 6, although not without debate.[60] Some factions supported the proposal that parties who choose to opt out of the Convention be required expressly to state this fact in their agreements, and that this requirement be reflected in the article.[61] This proposal was rejected for two reasons. First, some Committee members believed that parties to a contract are completely capable of excluding the Convention from their transactions without stating so expressly.[62] Second, other areas of the Convention allowed modification or exclusion by other than express means.[63]

The Working Group's completion of the sales draft resulted in the creation of a 1978 draft, the base working document at the 1980 Vienna conference.[64] Also in 1978, UNCITRAL requested the Secretary-General to develop a commentary to accompany the 1978 draft.[65]

In Vienna in March 1980, prior to the commencement of the conference on the Convention, the Secretary-General requested the delegations to submit proposals for changes in any of the CISG's draft proposals.[66] The United Kingdom submitted a proposal that article 5 be amended to state that parties are allowed to opt out of the Convention by implication.[67] At the conference, during the

58. *Report of the Secretary-General*, [1975] 6 Y.B. UNCITRAL 92, U.N. Doc. A/CN.9/1975, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 213, 217.

59. *Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods*, [1977] 8 Y.B. UNCITRAL 29, U.N. Doc. A/CN.9/SER.A/25, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 322.

60. *Id.*

61. *Id.*

62. *Id.* para. 57.

63. *Id.*; *see* CISG, *supra* note 3, art. 9 (setting forth the provisions on usage of trade).

64. The 1978 draft was the combination of the Working Group's revisions to ULIS and ULF.

65. HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 404.

66. *Id.* at 364.

67. *United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee*, Official Records, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter Official Records]. "The Official Records of the United Nations Conference on Contracts for the

third and fourth meetings of the First Committee,[68] the delegations divided over the issue of whether the parties must explicitly state that the Convention does not apply when parties opt out of it.

The United Kingdom, Belgium, and Pakistan all offered separate amendments which either required article 5 to include language allowing for express or implied exclusion, or to specify the manner in which a party could exclude the Convention.[69] The Pakistani and United Kingdom proposals would allow the parties to demonstrate their intention to opt out merely by naming the controlling law in the contract. Others called for the article to state that parties who opt out must name the controlling law selected in its place.[70] Canada and the former German Democratic Republic[71] also proposed amendments.[72] Canada's proposal

---

International Sale of Goods contains the preliminary documents, the summary records of the plenary meetings and the meetings of the Main Committees, the Final Act, the Convention and the Protocol amending the Convention on the Limitation Period in the International Sale of Goods; it also contains a complete index of the documents relevant to the proceedings of the Conference." *Id.* at ii.

68. *Id.* The conference divided into plenary meetings and meetings of the First and Second Committees. The First Committee included representatives from all the delegations and was responsible for preparing parts I-III of CISG. HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 3.

69. Official Records, *supra* note 67, at 73. The United Kingdom offered the following language: "Such exclusion, derogation or variation may be express or impled." Belgium suggested adding these two additional paragraphs: "[S]uch exclusion, derogation or variation must be express or derive with certainty from the circumstances of the case. The application of this Convention shall be excluded if the parties have stated that their contract is subject to a specific national law." *Id.* Pakistan requested that the word "expressly" appear after the words, "the parties may." *Id.*

70. *Id.* Italy proposed that an additional paragraph state that "[t]he Convention may only be excluded in its entirety where the parties have expressly so agreed or where they have chosen the law of a non-contracting state to govern their contract." *Id.*

71. The German Democratic Republic no longer exists since the reunification of East and West Germany in 1990.

72. Official Records, *supra* note 67, at 86. Canada would like to have revised article 5 extensively to read as follows:

(1) The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions. However, except where the parties have wholly excluded this convention, the obligations of good faith, diligence and reasonable care prescribed by this convention may not be excluded by agreement, but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.

(2) A provision in the contract that the contract shall be governed by the law of the particular State shall be deemed sufficient to exclude the application of the Convention even where the law of that State incorporated the provisions of the Convention.

would find that parties had excluded the Convention if they indicated which law would govern the contract. The Committee rejected all of the proposals. This meeting ended with the Belgium representative explaining his view that the foregoing discussion of article 5 was not so much about the various amendments as it was about arriving at the meaning of article 5, inferring an inherent ambiguity in the article.[73] The unceremonious, undebated adoption of article 5 at the thirty-fifth meeting of the First Committee, one week before the adoption of the entire Convention, suggests that the delegates retreated from attempting to refine the opt out provision.[74]

While the First Committee adopted article 5 without debate, the Plenary Conference, just four days later, disagreed on how the article would be interpreted.[75] The Italian delegate stated that even if parties chose the national law of a contracting state, one could not infer exclusion of the CISG.[76] Pakistan, which abstained from the final vote, wanted to incorporate express language requiring parties to state that the CISG was excluded.[77] The representative from Ireland disagreed with both notions,[78] while the Spanish representative expressed regret at leaving article 5 couched in such broad terms.[79]

The number of and divergent content within the proposals illustrate that the delegates reached an impasse in the express or implied exclusion debate, and that further discussions might have been counterproductive to the Convention as a whole. Perhaps the Committee decided to leave the interpretation of article 5, now renumbered to article 6, to the courts implementing the CISG.

Id. The German Democratic Republic would have revised article 5 to read as follows: "Even if this Convention is not applicable in accordance with articles 2 or 3, it shall apply if it has been validly chosen by the parties." *Id.*

73. Official Records, *supra* note 67, at 254.

74. *Id.* at 423. The article was approved without discussion by the First Committee on April 4, 1980. *Id.*

75. *Id.* at 201-02.

76. *Id.* at 201.

77. *Id.*

78. Official Records, *supra* note 67, at 201.

79. *Id.* at 201-02.

C. How May a State Opt Out of the CISG?

1. The Role of the CISG's Documentary History

After reviewing the legislative history of article 6, certain interpretation issues remain. The central issue involves communicating the intention to exclude the Convention from a contract. The role of choice of law provisions takes on added importance. Parties need to know whether choosing a law other than the CISG to govern their agreement is enough to express their intention to exclude the CISG. This last situation is especially important to parties with a history of dealings before the ratification of the CISG who now come under its authority.

In arguing a particular meaning, the Interpretation Convention allows for resort to a treaty's preparatory documents for assistance in interpreting its provisions.[80] For article 6, those preparatory documents include the reports generated by UNCITRAL, its Working Group, the Secretary-General's studies, and the Official Records of the 1980 Vienna Convention. One key document is the commentary which the Secretary-General prepared to accompany the 1978 draft.[81] The commentary is important to U.S. attorneys in particular, since it is common practice for them to use a commentary in arguing the meaning of a statute. Unfortunately, the delegates decided to omit the commentary from the final version of the CISG. Such a decision was not in keeping with UNCITRAL's request for a commentary to accompany the 1978 draft. The Committee gave no reason for excluding the commentary.[82]

80. Interpretation Convention, *supra* note 46, art. 32.

81. Official Records, *supra* note 67, at 14.

82. Peter Winship, *A Note on the Commentary of the 1980 Vienna Convention*, 18 INT'L LAW. 37, 38 (1984). The U.S. requested that the commentary accompany the final version of the CISG but, as the history shows, to no avail. *Id.*

2. *Implicit and Explicit Exemption of the CISG's Application*

An example of when the issue of an implied exclusion becomes important is where the parties have specified that the law governing the contract is to be the law of the contracting state of one of the parties.[83] The comment to article 6 does not specifically address whether parties may imply exclusion of the CISG from their transactions. Instead, the rationale expressed centers on preventing courts from too easily finding an implied exclusion in a contract, in other words, an admonition to courts to be cautious.[84]

Even without resort to the commentary, the rationale behind allowing implied exclusion does not change. The same reasoning was set forth during the second session of the Working Group, when it decided to omit the second sentence of ULIS article 3.[85] There, the lack of express language on implied exclusion also relates to deterring courts from finding an implied exclusion too easily.[86] One may logically infer that when drafting the comment to article 6, the Secretary-General relied upon the discussions at the Working Group's meeting where they discussed ULIS article 3.

While parties of contracting states are left to decide whether they may impliedly opt out of the Convention, they should be able to prove their choice using available means of contract interpretation.[87] These means coupled with the legislative history of article 6 should provide a strong basis for implied exclusion.

---

83. A problem occurs where a contract involving a party from the United States names the law of a particular state of the U.S. (for example, California) as the law which governs in the event of a dispute. Since the CISG is a treaty of the U.S., and treaties are the law of the land under article VI, section 2 of the U.S. Constitution, the CISG would apply. Hence the need for practitioners to be especially careful when drafting the choice of law provisions.

84. *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 15 (1979), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 8, at 404, 407.

85. *See supra* text accompanying note 50 (recounting the beginning of article 6's legislative history).

86. *Id.*

87. Courts would attempt to arrive at the intention of the parties within the strictures of interpretative tools such as parol evidence, course of dealings, and similar trade practices. CISG, *supra* note 3, art. 7-13.

The legislative history manifests the drafters' rejection of language permitting an implied decision to exclude the Convention. This is evident in the deletion of the second sentence of ULIS article 3. While the legislative history leaves implied exclusion ambiguous, the stronger argument is to find that parties may exclude the CISG by implication.[88] This conclusion is based on the rationale allowing courts to find implied exclusion. The only qualification in the legislative history is that courts be sparing in their finding an implied exclusion.

In sum, while careful parties and attorneys will include express language in their contracts to document their intention to exclude the CISG, some parties may legitimately exclude the CISG by implication. What those exact situations are remains undetermined and will certainly depend on the facts of each case. Most cases are likely to arise when parties that are used to dealing under a particular state's national law, have their state adopt the CISG; such parties might not want the CISG to apply to their course of dealing, yet neglect to take measures to block the CISG's application.

D. Exclusion and the Development of Uniform Sales Law

Ultimately, one must recognize that the CISG allows private parties of contracting states to elect not to have the Convention apply. This decision rests on the primacy of contract principles.[89] The parties are the masters of their deal and are, therefore, free to choose the law they wish to rule their bargain.[90]

---

88. The argument that the CISG permits no implied exclusion might find support in the drafters' decision to exclude express language to that effect. One would argue that had the committee intended to allow implied exclusion, it would have stated so expressly. Additionally, since all proposals to include language allowing implied exclusion offered at the third and fourth meetings of the First Committee were rejected, it reasonably follows that the committee rejected the idea of implied exclusion. *See supra* text accompanying notes 66-79 (reviewing the various proposals for article 6 which UNCITRAL members offered).

89. JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS 5 (3d ed. 1987).

90. *See* HONNOLD, INTERNATIONAL SALES, *supra* note 11, at 105. The basic reason for allowing the parties to contract out of the Convention is explained by Professor Honnold when he says that the "dominant theme of the Convention is the primacy of the contact." This statement suggests that central importance is ascribed to the right of the parties to create the bargain they desire.

The ability of parties of contracting states to opt out of the Convention has a critical impact on the goals of establishing firmly a uniform international sales law. Indeed, the opt out provision is counterproductive to the goal of uniformity because there is no assurance that it will ever be used. The Committee could have given away too much by allowing parties to opt out of the CISG and to imply that exclusion.

At best, article 6 allows the parties to structure their interactions and promotes freedom of contract.[91] This flexibility may be desirable where a bargaining party will enter a contract only when it is allowed to choose the law governing the contract. This rationale seems to suggest that it is better to have parties engage in international sales and exclude the Convention, than it is to promote usage of the Convention among states that have adopted or ratified it at the expense of international trade. This idea certainly comports with leaving the parties in control of their bargain.

At worst, article 6 is a shield behind which private parties of contracting states may hide while they watch and determine the effect CISG will have on international sales transactions. This phenomenon is what appears to be happening in private practice.[92] Parties may continue to ignore CISG indefinitely and conduct business as usual. The effect is to reduce CISG to mere theory never used in practice.

The logical conclusion is that implementing uniform international sales law is less important than the freedom of the parties of contracting states. If a contracting party or its drafting attorney is savvy enough, the party will be able to escape the

---

Id.

91. CALAMARI & PERILLO, *supra* note 89, at 5.

92. *CISG Expected to Aid Contract Dispute Resolution*, 4 Int'l Trade Rep. (BNA) 677 (1987) (quoting Division Counsel for International Affairs for Abbott Laboratories, Michael J. Feehan, who recommends staying away from the CISG). Attorney William Rossi-Hawkins of the New York law firm of Graham & James writes in that firm's Fall 1991 newsletter that business will choose to avoid the CISG's application to their contracts. Telephone Interview, William Rossi-Hawkins, Attorney, Graham & James (Jan. 10, 1992). It would be unfortunate to think that after the extensive effort that went into the CISG, it should only apply by default because the contracting parties forgot to exempt themselves from its application.

application of the CISG by inserting express language in its choice of law provision stating that the CISG will not apply. They would then state the law of the controlling jurisdiction that will apply in its place. Although contract law has traditionally respected the right of parties to create the bargain they desire, article 6 appears inconsistent with the objective of a uniform international sales law.[93]

Contracting parties at the domestic level generally do not have such wide freedom to exclude whole bodies of law. For example, in the U.S., the CISG is yet another body of law to consider in making an international sales contract. The same party has no choice with respect to whether it wishes the UCC to apply in a domestic sale of goods transaction.[94] Where the UCC is the controlling law in a sale of goods dispute between two parties from the U.S., the legislature has made the choice between uniformity or party autonomy. No competent legislature exists to make a similar choice at an international level when the sovereign states who have adopted the CISG fail to make it themselves.[95]

IV. THE ARTICLE 95 RESERVATION

Not every international sale of goods contract will involve only parties from contracting states. The drafters anticipated this situation and created an ingenious method of applying the CISG to transactions involving a party from a noncontracting state. Article (1)(1)(b) allows the contracting state to apply the CISG to transactions involving a noncontracting state where the choice of

---

93. CALAMARI & PERILLO, *supra* note 89, at 5.

94. The American state of Louisiana has not adopted article 2 of the UCC, and is an anomaly in the foregoing discussion.

95. The Convention is also a treaty of the United States. Therefore, the Convention is the supreme law of the land under article VI, section 2 of the U.S. Constitution. Thus, when the CISG was ratified by the United States, it became the supreme law of the land. This assumes that the Convention applies by operation of constitutional law, and no state action or private party action may deviate from its application. This raises the question where the internal workings of a treaty that becomes the supreme law of land, allows that it may not be followed, is the function of such a provision unconstitutional as violative of article 2, section 6 of the United States Constitution? Time will tell whether this issue will ever be raised. In any event, it may merit a close look by practitioners who choose to opt out of CISG.

law rules indicate operation of the contracting state's national law.[96]

This provision, however, is not absolute. Under CISG article 95, a contracting state may declare that it will not be bound by article 1, subparagraph (1)(b).[97] Article 95 was drafted at the Vienna Conference to accommodate certain states which already developed a set of rules to govern their international sales transactions.[98] Czechoslovakia had already implemented its own international sales law, and the German Democratic Republic was considering a similar international sales law.[99] Article 95 allowed these states to use their international sales law without that law being supplanted by the CISG.

The U.S. made the article 95 reservation when it ratified the CISG.[100] Thus, in a transaction between U.S. and a noncontracting state, when the choice of law rules indicate that the laws of the U.S. apply, the relevant U.S. common law, the UCC, applies.[101]

Arguments do exist for making the article 95 reservation. In support of the decision is the ability of U.S. parties to use the UCC.[102] The courts are familiar with applying these laws.[103] Lawyers are aware of controlling precedent and how to use it in various disputes, whereas the CISG is thought to leave U.S. lawyers at a disadvantage when trying to understand the meaning

---

96. CISG, *supra* note 3, art. 1 ("The Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . (b) when the rules of private international law lead to the application of the law of a Contracting State.").

97. CISG, *supra* note 3, art. 95 ("Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.").

98. Official Records, *supra* note 67, at 229.

99. *Id.*

100. *Senate Hearings, supra* note 1, at 38.

101. Even though Japan was a member of UNCITRAL and a participant in the 1980 conference, it chose not to adopt the CISG. One way to ensure that the CISG applies to U.S.-Japanese sale of goods transactions is to rely on subparagraph 1(b). This application of the CISG to these transactions means that Japan would develop a facility with the CISG. Such a facility may encourage other Japanese trading partners to use the CISG in their respective transactions. Japan has not expressed a reason as to why it did not ratify the CISG.

102. *Senate Hearings, supra* note 1, at 38.

103. *Id.* at 73.

given to terms by parties of other national legal systems.[104] Also, the choice of law option with respect to contracting parties is an important element of freedom of contract.[105] These reasons were mentioned or alluded to in the hearing on the CISG before the Senate Foreign Relations Committee.[106]

The reservation was recommended by the American Bar Association and the private Lawyers Committee on the Convention on Contracts for the International Sale of Goods.[107] President Reagan also included a recommendation for the reservation in his message transmitting the Convention to the Senate.[108] In light of the foregoing recommendations, the U.S. made the reservation in order to ensure adoption of the CISG by the Senate.[109] This represents a compromise[110] resulting from fear by proponents that mandatory application of the CISG would lead the Senate Committee to reject it.[111]

The U.S. decision to make the article 95 reservation does not comport with the reasons for creating the reservation expressed at the 1980 Vienna Conference. The drafters of the CISG recognized that some states had or planned to develop their own international sales laws.[112] The existence of other schemes is the reason why the drafters created article 95.[113] In the U.S., however, the UCC is a uniform domestic sales scheme that grew out of a domestic

104. *Id.*

105. CALAMARI & PERILLO, *supra* note 89, at 5.

106. *Senate Hearings, supra* note 1, at 37.

107. *Id.*

108. *Message of the President of the United States and Legal Analysis on the United Nations Convention on Contracts for the International Sale of Goods*, U.S. Treaty Doc. No. 9, 98th Cong. 1st. Sess. 21 (1983).

109. Telephone Interview with Peter Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State (Jan. 14, 1992).

110. The compromise favors article 2 of the UCC. The argument for the compromise may be summarized as follows. From its inception, the UCC was considered a progressive step toward the unification of domestic sales law. BRAUCHER ET AL., *supra* note 30, at 29. Now that some form of article 2 of the UCC is accepted in all the individual states of the U.S. except Louisiana, and has produced important case law, it is the preeminent law in sales and leasing of goods. *Senate Hearings, supra* note 1, at 38. Therefore, since the UCC is such an integral part of our sales law, its use is preferred and fostered upon every available occasion. *Senate Hearings, supra* note 1, at 38.

111. Telephone Interview with Peter Pfund, *supra* note 109.

112. Official Records, *supra* note 67, at 229.

113. *Id.*

trend toward uniform law in the late nineteenth century.[114] While UCC article 2 may be capable of application to international sales transactions, it is not a body of law created solely to accommodate international sales transactions.

Although the article 95 reservation favors U.S. domestic law in certain settings, it does not facilitate a wider acceptance of the CISG among states that have not ratified it, as in situations where a U.S. party contracts with a party of a noncontracting state. The purpose of the CISG is to unify the varying rules of private international law.[115] The history of private international uniform sales law demonstrates the uncertainty concomitant with such a legal regime. If there was one underlying reason for the intense efforts behind the CISG, it was the desire to bring into being a body of law that eradicated the confusing and contradictory elements of private international law, yet article 95 works at cross-purposes to this desire.[116]

Subparagraph (1)(b) strives for an expansive application of the CISG which encompasses its use in transactions involving noncontracting states. Under its terms, it naturally follows that a party from a noncontracting state may find itself having to understand, argue, and apply the CISG. The effect, then, is to expand the reach of the CISG and encourage states other than contracting states to become familiar with it or to contract out of it. No matter how compelling the reasons for applying the UCC in international sales of goods transactions, exempting application of the CISG in an instance where it normally would apply cannot help but do violence to the objective of achieving universal application of this uniform international sales law.

---

114. BRAUCHER ET AL., *supra* note 30, at 21; *cf.* Official Records, *supra* note 67, at 229 (describing the Czechoslovakian system).

115. C.M. BIANCA ET AL., *supra* note 8, at 19.

116. *See id.* (discussing the purpose of CISG to establish world-wide uniformity in sales contracts).

V. THE U.S. ROLE OF LEADERSHIP IN IMPLEMENTING CISG

The U.S. played a significant role in the development and adoption of the CISG.[117] As the Chairman of the State Department's Advisory Committee wrote, the U.S. was largely responsible for adoption of the texts within the CISG by proposing resolutions to many of the legal issues.[118]

The influence of the U.S. was also manifest in the consideration which other states gave to the U.S. signing of the Convention. The U.S. ratification of the CISG helped induce other states to ratify.[119] The keen interest of other states points to the persuasive role of U.S. law, scholarship, and trade in other states' adoption of the CISG, an influence based on U.S. power as a world purchaser and supplier.

Moreover, trade statistics for 1980 demonstrate the influential role of the U.S. at the time of the Convention in Vienna. These statistics indicate that many states relied upon the U.S. as their most significant export market.[120] Likewise, many states depended upon the U.S. for their imports. Statistics also show that the U.S. dominated the world market, ranking as the leading importer and exporter,[121] purchasing as much as 83% of the exports of a single country.[122] With such a forceful place in the world market, other states naturally would heed any U.S. trade decision.[123] Thus, in 1980, trade with the U.S. was a factor to which potential CISG signatories paid notice.

---

117. Mendes, *supra* note 15, at 118.

118. Landau, *supra* note 23, at 35.

119. Mendes, *supra* note 15, at 118 ("It is not an overstatement to indicate that many countries were in fact waiting for the United States to ratify the convention so that their own bureaucrats would have an impetus to accelerate procedures for approval of the convention . . . .").

120. *Id.*; *see infra* app. A, tbl. 1 (showing trade statistics for Chile, Mexico, and Australia).

121. International Monetary Fund, DIRECTION OF TRADE STATISTICS YEARBOOK 2 (1982) [hereinafter DIRECTION OF TRADE].

122. *Id.* In 1980, the United States purchased 83% of Mexico's exports. *Id.*

123. *See infra* app. A, tbl. 1 (showing the 1980 import-export statistics for 20 states that are signatories to the CISG).

A. Canada's Recent Ratification of the Convention

Despite the loopholes in universal application of the CISG, the U.S. can use its trade influence to encourage the use and adoption of the CISG. Canada's recent ratification of the CISG is an example of this influence.[124] Commentators speculated that Canada would adopt the CISG only because its primary trading partner, the U.S., had adopted the CISG.[125] It may be that Canada believed it really had no choice, since the influence of the U.S. in sale of goods transactions dictated the standards that Canada should follow.[126]

Prior to the existence of the CISG, U.S.-Canada sale of goods transactions, under the relevant choice of law analysis, lead to either an application of the UCC or the Canadian Provincial Sales of Goods Acts (SGA), unless the parties chose another neutral state's law to govern their contract. While the UCC is a true creature of American jurisprudence, the SGA is rooted in the British common law, a key a difference between the two systems.[127]

The U.S. and Canada form the largest trading bloc in the world.[128] For example, in 1990, the U.S. imported over 70% of Canada's exports.[129] Because of this mutual dependence, it was in Canada's interest to adopt the CISG. It was also logical for Canada to keep itself informed of the impact the CISG may have in trade issues with the U.S. With such high stakes in the U.S. market, and the potential for U.S. parties to have the CISG govern their contracts with Canadian parties under article 1, it made sense for Canada to be ready to implement the most current laws which its primary trading partner might select. Canada's ratification results in the unification of the sales law between these two

124. Canada acceded to the CISG on April 23, 1991. *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1990*, U.N. Doc. ST/LEG/SER.E/9.

125. Mendes, *supra* note 15, at 143-44.

126. *Id.* at 109.

127. *Id.* at 143.

128. *Id.* at 143.

129. *See infra* app. A, tbl. 2 (showing the 1990 import-export statistics for 20 states that are signatories to the CISG).

important traders.[130] This ratification exemplifies the purpose of the Convention: facilitation of uniformity of sales laws between foreign states.

Arguably, Canada would not have adopted the CISG but for the adoption by the U.S. The inclination to follow U.S. trade decisions is again evident in the U.S. decision to engage in free trade negotiations with Mexico. The Canadians felt compelled to become involved, not out of a desire to participate, but out of a necessity to protect its interest in the U.S. market.[131] However, even as the Canadian ratification of the CISG unifies the trade law within most of North America, the members of the largest trading bloc in the world, the unification is in part illusory because there remain ways for parties to contract out of the CISG.

B. Possible Directions for U.S. Influence on World Trade

Canada's recent ratification of the Convention demonstrates that the influence of the U.S. on world trade still exists. That same influence may be used to entice others to adopt the CISG.[132] Now that Canada followed, Japan may not be far behind. If the U.S. desires a uniform law that encourages use, it needs to lead an effort to have parties opt in to the CISG. Revoking the reservation under article 95 is one method to reach uniform application. One could even consider retracting article 6. In this way, parties litigating or arbitrating international sales issues must use the CISG.

Both article 6 and article 95 defer to the desires of the contracting parties. Both articles place autonomy of the parties above the goal of uniform application. If there is a greater of two evils as between the article 95 reservation and article 6, article 6 surely does more damage to the real muscle of a uniform international sales law because contracting states need not make the

---

130. Mendes, *supra* note 15, at 143.

131. Barbara Wickens, *A Giant Marketplace*, MACLEAN'S, Jan. 25, 1990, at 20.

132. It may have been easy for Canada to follow the U.S. lead because Canada and the U.S. are immediate neighbors, sharing a common legal tradition and, generally, the same language. However, the mere size of Canada's investment in the U.S. market is also a major factor, a factor not unique to Canada.

article 95 reservation. The presumption, based on the legislative history of article 95, is that a state which makes the article 95 reservation is concerned primarily with using its own specially tailored international sales law in transactions with a noncontracting state.[133] Article 6, on the other hand, is so broad as to exclude the Convention in its entirety.[134]

If the U.S. resolved to apply the CISG to all of its international sales transactions, it would also lead the way in interpreting the Convention. Since no precedent now exists, the field is wide open for arguing the most reasonable meaning under any given set of circumstances. And a good deal of that reasonable interpretation will be based on the CISG's legislative history. Unfortunately, so long as parties are entirely free to contract out of the CISG, and are not bound to use the CISG when their contract involves parties in a noncontracting state, the CISG remains more a documentation of successful international diplomacy than a commitment to move the world toward a viable uniform sales law.

VI. CONCLUSION

The U.S. played a significant role in the development of the CISG. It could also substantially influence the implementation of the CISG. Because of the dominance of the U.S. in the world market, its decisions on international sales law carry considerable weight. Since the CISG is being resisted by some states and opted out of by parties of contracting states, the U.S. should reconsider its article 95 reservation. Such a reconsideration will allow the U.S. to take a leadership role in interpreting the CISG. As noted, other states keep watch on the U.S. with respect to trade. They should also watch for the interpretations that U.S. courts give to the CISG.

At present, no means exist to require the use of the CISG, at least so long as article 6 grants unlimited power to the bargaining parties to exclude the CISG from their transactions. The legislative history provides insight into the rationale behind the CISG's

---

133. Official Records, *supra* note 67, at 229.

134. *See supra* text accompanying notes 83-93 (discussing in detail the scope of article 6).

principles, and the clarity of the language should alert parties to the intentional efforts to make CISG easily understood and applied. In short, the CISG merits a greater degree of confidence than it has thus far enjoyed. Meanwhile, states and parties are conducting business as usual, thereby avoiding the burden of having to learn a new body of law, but also foregoing the benefits which a uniform sales law offers international business.

Dennis J. Rhodes

APPENDIX A
IMPORT-EXPORT STATISTICS FOR CISG-MEMBER STATES

Table 1[135]
1980 Import-Export Statistics for CISG-Member States (in millions of U.S. dollars)

State	Annual U.S. Exports (by state)	Annual U.S. Imports (by state)	Value Exported Annually	% of Exports Imported into the U.S.
United States (total)	220,786	256,984	N/A	N/A
1. Australia	4,093	2,782	22,031	12.6%
2. Austria	448	407	17,489	2.3%
3. Chile	4,352	4,000	4,818	83.0%
4. China	3,755	1,164	18,179	6.4%
5. Finland	511	480	14,148	3.4%
6. France	7,485	5,549	116,016	4.8%
7. Germany	10,960	12,257	192,861	6.4%
8. Ghana	127	214	1,154	18.5%
9. Hungary	80	118	8,637.9	1.4%
10. Italy	5,511	4,688	77,679	6.0%
11. Mexico	15,146	12,835	15,570	82.4%
12. Netherlands	8,678	2,044	73,940	2.8%
13. Poland	716	460	7,136.1	6.4%
14. Spain	3,337	1,342	20,720	6.5%
15. Sweden	1,774	1,705	30,911	5.5%
16. USSR	1,515	486	31,738	1.5%
17. Venezuela	4,577	5,571	19,221	29.0%
18. Yugoslavia	756	477	8,988.610	5.3%
19. Canada	35,395	41,999	67,556	62.2%
20. Japan	20,790	32,973	130,436	25.3%

135. International Monetary Fund, *supra* note 121, at 379, 380-82.

Table 2[136]
1990 Import-Export Statistics for CISG-Member States
(in millions of U.S. dollars)

State	Annual U.S. Exports (by state)	Annual U.S. Imports (by state)	Value Exported Annually	% of Exports Imported into the U.S.
United States (Total)	393,592	516,987	N/A	N/A
1. Australia	8,602	4,898	38,911	12.6%
2. Austria	873	1,374	41,392	3.3%
3. Chile	1,672	1,571	8,539	18.4%
4. China	4,807	16,296	69,470	23.5%
5. Finland	1,126	1,358	26,570	5.1%
6. France	13,652	13,594	216,394	6.3%
7. Germany	18,699	29,010	409,274	7.1%
8. Ghana	139	178	1,366	13.0%
9. Hungary	157	361	9,549	3.8%
10. Italy	7,987	13,395	169,939	7.9%
11. Mexico	28,375	30,797	29,982	102.7%[137]
12. Netherlands	13,016	5,358	131,465	4.1%
13. Poland	407	443	14,485	3.1%
14. Spain	5,208	3,546	55,187	6.4%
15. Sweden	3,404	5,112	56,937	8.9%
16. USSR	3,237	1,296	64,728	2.0%
17. Venezuela	3,107	9,938	16,414	60.5%
18. Yugoslavia	566	797	14,356	5.6%
19. Canada	82,959	93,780	131,278	71.4%
20. Japan	48,585	93,070	278,678	32.4%

136. International Monetary Fund, *Direction of Trade Statistics Yearbook* 2, 3-7 (1991).

137. The reporting procedures employed by the International Monetary Fund allow for discrepancies when data compiled is from both the exporting and the importing countries, hence the appearance that the U.S. imported more than Mexico reports having exported.