JAPAN'S ACCESSION TO THE CISG: THE ASIA FACTOR

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I. INTRODUCTION

I would like to start my presentation with what is probably good news. Japan is preparing to accede to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG"). The work started in October, 2006 and the plan is to get approval from the legislature in 2008. Unless anything unexpected happens, the CISG will come into force with respect to Japan in the year 2009. That will be almost 30 years since the adoption of the CISG at the diplomatic conference in Vienna, and almost 20 years since its coming into force.

The questions I would like to address in this short presentation is: why did Japan not join the CISG earlier? And, why now?

II. REASONS FOR NON-ACCESSION: THE CASE OF THE UNITED KINGDOM

Whenever I am asked why Japan has not become a member State of the CISG, I always feel a bit uneasy, but the consolation has been that Japan is not alone. The United Kingdom has always been standing by our side. I am in no position to explain

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why the UK has not joined the CISG, but several explanations are given by our fellow Englishmen.[1]

First, in many international commercial disputes concerning the sale of goods, England is often chosen as the seat of litigation or arbitration for international commercial disputes, and English law is chosen as the applicable law. This is especially so in the field of commodity trade. This means business for the legal service industry in England, who enjoys this advantage because of the nature of its contract law, which I will touch upon shortly, and the existence of its strong "commercial bar." There is a fear that joining the CISG may diminish this advantage.

Second, English contract law, which is characterized by its strictness and emphasis on certainty, is considered more suitable for international sales than the CISG, which values equitable solutions over certainty. The fact seems to be that English law is better suited for commodity trade, but perhaps not obviously so for other types of transactions. Thus, we have a "bifocal" world of international sales which focuses on different types of sale transactions. However, the opponents of the CISG view this as another battle between "form and substance"[2] in contract law in general.

These reasons, although not totally convincing,[3] are based on real concerns about the impact of the CISG, and are real oppositions. The reasons for Japan's inaction are less glamorous.

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[1] *See, e.g.,* Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, address before *Centro Di studi ericerche di diritto comparato estraniero, UniRoma* (1993), http://w3.uniroma1.it/idc/centro/publications/09nicholas.pdf (last visited July 22, 2008); Michael G. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna, in* MAKING COMMERCIAL LAW: ESSAY IN HONOUR OF ROY GOODE 277, 277-96 (Ross Cranston ed.,1997); Alastair Mullis, *Twenty-Five Years On - The United Kingdom, Damages and the Vienna Sales Convention, in* 71 RABELS ZEITZCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RAB. ZEIT. AUS. INT'L PRIV.] 35, 36-38.

[2] P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987) (comparing the formality of English law and the substantive nature of U.S. law).

[3] If the parties consider that English law is better suited for their transaction than the CISG, they can simply make it the applicable law of their choice, even if the United Kingdom accedes to the CISG. All they have to do is put into their contract a choice-of-law clause choosing English law. The only change they will have to make to their current contract practice is to make sure that the choice-of-law clause explicitly excludes the application of the CISG, in accordance with Article 6, because otherwise simply choosing English law will most likely be inter-

III. REASONS FOR NON-ACCESSION: THE CASE OF JAPAN

In contrast to the UK, there has never been a real opposition to the CISG in Japan. No decision to reject the CISG has been made. There was a time in the early 1990s when it seemed like Japan was almost going to join the CISG. In 1989, soon after the CISG came into force, the Ministry of Justice (hereinafter referred to as the "MOJ") organized an informal study group to examine the CISG. It was expected that upon the recommendation of this study group, the MOJ would commence the official process of acceding to the CISG. This did not happen. The study group continued with its mandate until 1993 when its work was suspended before reaching any conclusion.

The most direct reason for the suspension was the lack of manpower.[4] In the early 1990s, the Japanese economy was struggling with the aftermath of the burst of the bubble economy. The legislative agenda became full of urgent legislation directed toward economic recovery. These included laws on secured transactions, insolvency laws, corporation laws, and so on, which required the full attention of the MOJ. The MOJ could no longer afford to continue with its work on the CISG.

But that was not the only reason. There was also some hesitation, though not a concern, about the CISG. First of all, it was still in the early 1990s when the number of Contracting States was around thirty. It was not clear whether the use of the CISG would become prevalent. There was also some uncertainty as to how the CISG would be applied in other Contracting States.

Second, at that time, the major Japanese trading companies (the "*sogoshosha*") did not really feel a need for the CISG, and were not particularly enthusiastic about it. Rather, they were reluctant to take on the costs of learning the CISG,[5] and

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preted as including the CISG. *See, e.g.*, PETER SCHLECHTRIEM, *Article 6, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 90-92 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

[4] For another account of the story, *see* Yoshihisa Nomi, *The CISG from the Asian Perspective*, *in* CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 169, 169-77 (2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/nomi.html.

[5] Luke Nottage, *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan*, 36 VICTORIA WELLINGTON L. REV. 815, 829-40 (2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/nottage.html (last visited July 22, 2008).

have repeated that they will opt out of the CISG anyway. Standard terms opting out of the CISG became so common that one will find them even in contracts which do not involve any element of sale of goods.

This lack of support, no doubt, discouraged the MOJ to continue its work on the accession to the CISG under the economic condition of the time.

IV. Reasons for Change

As I reported at the outset, Japan has reversed its course and is now preparing to accede to the CISG. What brought about this change? The most direct reason is that the congested legislative agenda has somewhat cleared and the MOJ is now able to devote its manpower to this task again.

A more indirect reason, but an equally important one, is the phenomenal success of the CISG. All of the negative predictions which were sources of reluctance in acceding to the CISG in the early 1990s turned out to be wrong. The number of Contracting States has more than doubled. With the emergence of the vast array of court and arbitral decisions, and the enormous amount of scholarly writings, doubts about the predictability of the CISG have diminished as well. This has impact both on the legal community and the business community.

The legal community is becoming more and more comfortable with the CISG. The CISG is gradually becoming assimilated into Japanese law, and is starting to influence the interpretation of the Japanese Civil Code. For example, CISG's limitation of avoidance of contracts to cases of "fundamental breach" (CISG Arts. 49(1)(a), 64(1)(a)) was first considered to be an alien concept in Japan. It was traditionally understood under Japanese law that, as a general rule, the injured party may avoid the contract after giving the breaching party a *Nachfrist* period, no matter how trivial and what type the breach may be (although it was also understood that fault on the part of the breaching party was necessary). There were, however, exceptions scattered around the Code which allowed avoidance of contracts only when the purpose of the contract could no longer be achieved. A reconfiguration of the interpretation of the Japanese Civil Code now attempts to turn these exceptions into the norm, which will put the Civil Code in line with the CISG. Ac-

cording to this view, the limitation of avoidance to cases of fundamental breach is nothing new, and it has always been a part of the Japanese Civil Code.[6]

Further, the MOJ has now started working on the revision of the Obligations Law of the Civil Code.[7] That decision was made in order to adapt the Code to the social and economic changes that took place since its enactment more than a century ago. However, this decision was also partially stimulated, either directly or indirectly, by the success of the CISG. It is only natural that the CISG will have impact on this upcoming revision.

For the business community, the benefit of using the CISG is gradually settling in. At the background of this is the development of globalization, and international trade has become a part of everyday life. Small and medium-size enterprises which are not well prepared to face the legal technicalities are engaging in international trade more than ever. Arguably, the small and medium-size enterprises will become the largest beneficiaries of the CISG when Japan becomes a Contracting State. This factor adds to the reason to accede to the CISG.

Now that they have discovered that the CISG is being used in a large part of the world, the major trading companies are also beginning to change their attitudes toward the CISG. They are finding out that the CISG can curtail costs of dealing with

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[6] *See, e.g.*, Hiroo Sono, *Keiyakukaijono Yoken, Koka [Avoidance of Contracts], in* MINJIHO 3 [Private Law] 76-89 (Kaoru Kamata et al. eds., Tokyo: Nipponhyoronsha, 2005). The author stumbled across a similar and interesting case law development in Spain which restricts avoidance of contracts to cases of fundamental breach in non-CISG cases. *See, e.g.*,Banco Urquijo, S.A. v. Hispania Agropecuaria, S.L., STS, Apr. 5, 2006 (R.J. no. 364 abstract no. 735) *available at* http://cisgw3.law.pace.edu/cases/060405s4.html (last visited July 22, 2008); D. Thomás y DaAlmudena v. Don Casimiro y Doña Maria Milagros, STS, Oct. 31, 2006 (R.J. no.1062 abstract no. 736), *available at* http://cisgw3.law.pace.edu/cases/061031s4.html (last visited Apr. 13, 2008); Doña Rosa v. Caprintería Merak, S. Audiencia Provincial Islas Baleares, (J.U.R. no. 479 abstract no. 737), *available at* http://cisgw3.law.pace.edu/cases/061109s4.html (last visited July 22, 2008).

[7] *See* Mission Statement of the Japanese Civil Code (Law of Obligations) Reform Commission, http://www.shojihomu.or.jp/saikenhou/lawofobligations/missionstatement.pdf. Nomi suspects that one reason that held Japan back from acceding to the CISG in the early 1990's was the misconception that a revision of the Civil Code would be required to accommodate the CISG. As Nomi points out correctly, this is a fallacy. Nomi, *supra* note 4, at 171-72. However, the government's willingness today to consider revising the Civil Code certainly helps to remove this (false) barrier.

diverse domestic laws, as well as transaction costs associated with negotiating choice-of-law clauses.

These changes in the business environment are, in large part, due to the growth of the Asian market.

V. THE ASIA FACTOR

This can be observed from two perspectives. One is the increase in trade between Japan and the rest of Asia. The other is the characteristics of CISG cases involving Japanese parties.

1. *Increase in Japan's Trade with Asia*[8]

Most symbolic is the rapid increase of Japan's trade with China. In 1990, China's share in Japan's export and import trade was less than 4%. Today it is close to 20%. This is equal to Japan's trade with the United States, which used to be Japan's largest trading partner for years. The U.S. and China combined make up nearly 40% of Japan's international trade.

The same applies to other East Asian countries. Japan's trade with this region, even excluding China, amounts to more than 20% of Japan's exports and imports. This surpasses Japan's trade with the U.S. or China. Given the diversity of legal systems among these countries, and given that many of these countries are either transition economies or economies in the process of developing their legal infrastructures, the advantage of having one common contract law is becoming more attractive than ever. Of course, at present, China, Singapore, and Korea are the only East Asian States who are parties to the CISG. However, joining the CISG would be a big step for Japan toward dealing with the Asian diversity.

2. *CISG Cases Involving Japanese Parties*

A quick research of the Pace CISG database[9] revealed ten cases where the CISG was applied to international sales involv-

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[8] Japan External Trade Organization [JETRO], *Japanese Trade and Investment Statistics*, http://www.jetro.go.jp/en/stats/statistics/ (last visited on July 22, 2008).

[9] A "Google" search by the combination of the terms "cisg case presentation" and "country: japan" will result in a list of cases in the Pace database involving a Japanese seller or buyer. I conducted the search on June 17, 2007 and again on September 6, 2007. Two cases which appeared on the first search did not show up

ing a Japanese seller or buyer.[10] One of them is an Australian court decision, another a Russian arbitration, and the other eight are cases from China (three court decisions and five arbitration cases). The arbitration cases are all from the China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC"). The cases identified are probably only the tip of the iceberg, and this is indicative of where the gravity of the CISG practice in Japan will lie. All the cases are from the Asia-Pacific region, mostly China, and Japan's northern neighbor, Russia.

Since Japan is not a contracting state, the application of the CISG in those cases cannot be based on Article 1(1)(a), although there are several CIETAC cases which have mistakenly applied the CISG to disputes involving parties with place of business in Japan on that basis.[11] Rather, they must be applied on the basis of Article 1(1)(b). In 2003, the Supreme Court of Victoria, Australia applied the CISG to a dispute involving a Japanese seller and an Australian buyer.[12] Similarly, in 2005, a Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, applied the CISG to a dispute between a Japanese buyer and a Russian seller.[13] In those cases, the private international law of the fo-

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on the second search. Admittedly, this search is not totally watertight, but it should suffice for the purpose of this paper.

[10] In addition to these, there are cases involving overseas subsidiaries of Japanese companies. *See, e.g.*,Cour d'appel [CA] [regional court of appeal] Paris, Apr. 22, 1992, http://cisgw3.law.pace.edu/cases/920422f1.html (last visited July 22, 2008). The German seller was a subsidiary of Fujitsu Ltd., a Japanese company.

[11] Stone Products case (Japan v. P.RC.) (CIETAC 1996), *available at* http://cisgw3.law.pace.edu/cases/961107c1.html; Wakame case (P.R.C. v. Japan) (CIETAC 1997), *available at* http://cisgw3.law.pace.edu/cases/970402c1.html; Sheet Metal Producing System case (P.R.C. v. Japan) (CIETAC 2005), *available at* http://cisgw3.law.pace.edu/cases/051021c1.html. *See also* Dong Wu, *CIETAC's Practice on the CISG*, 2005/2 NORDIC J. OF COMM. LAW 9-10 (2005) (Fin.), *available at* http://www.njcl.fi/2_2005/article2.pdf (last visited July 26, 2008) and Fan Yang, *The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice*, 2006/2 NORDIC J. OF COMM. LAW 25 (2006) (Fin.), *available at* http://www.njcl.utu.fi/2_2006/article4.pdf (last visited July 26, 2008).

[12] Australia 24 April 2003 Supreme Court of Victoria (Playcorp Pty Ltd. v. Taiyo Kogyo Ltd.) (Toys case), *available at* http://www.austlii.edu.au/au/cases/vic/VSC/2003/108.html and http://cisgw3.law.pace.edu/cisg/text/030424a2english.html.

[13] (Japan v. Russ.) (Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 2005). *available at* http://cisgw3.law.pace.edu/cases/050124r2.html.

rum led to the application of Victorian law and Russian law, respectively, and the CISG was applied on the basis of Article 1(1)(b).[14]

However, China has declared a reservation under Article 95, and therefore, Article 1(1)(b) is not part of China's application of the CISG. Then how does the CISG get applied in China to cases involving Japanese parties?[15] There is a case in which the parties chose the law of People's Republic of China ("P.R.C.") as the governing law.[16] The court interpreted that the law of P.R.C. includes the CISG. This presumably is a case where the court allowed "opting-in" by the parties.

There are also some cases that applied the CISG because the parties based their arguments before the tribunal on the CISG. For example, one CIETAC tribunal ruled that "[b]oth the [Buyer] and the [Seller] analyzed the rights and responsibilities based on the law of People's Republic of China and the CISG.

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[14] Società X v. Società Y (Italy v. Japan) (Ad Hoc Arbitral Tribunal 1994), *available at* http://cisgw3.law.pace.edu/cases/940419i3.html (involving a dispute between an Italian seller and a Japanese buyer, in which the parties chose "Italian law" as governing law. The majority of the tribunal decided to apply not the CISG but domestic Italian law, although one of the three arbitrators dissented.).

[15] Not all cases clearly state the ground for applying the CISG. *See, e.g.*, Tai Hei v. Shun Tian (Jiangsu Higher People's Ct. 2001), *available at* http://cisgw3.law.pace.edu/cases/010219c1.html (last visited Apr. 13, 2008); Xinsheng Trade Co. v. Shougang Nihong Metallurgic Products (Ningxia Hui Higher People's Ct. 2002), *available at* http://cisgw3.law.pace.edu/cases/021127c1.html (last visited Apr. 13, 2008); Shaping Machines Case (P.R.C. v. Japan) (CIETAC 1993), translation *available at* http://cisgw3.law.pace.edu/cases/930720c1.html. The application of the CISG as *lex mercatoria* independent of the requirements of Article 1 would be an interesting way. Although I could not find any case involving a Japanese party applying the CISG as *lex mercatoria*, there was one New Zealand case that came close. Yoshimoto v. Canterbury Golf [2000] 1 N.Z.L.R. 503 (C.A.) (involving a contract between a Japanese seller and a New Zealand buyer for the sale of "shares" of a company. This case is clearly outside the scope of the CISG because Article 2(d) explicitly excludes the sale of shares from the application of the CISG. Nonetheless, the court considered the application of Article 8 of the CISG (together with Article 4.3 of the UNIDROIT Principles of International Commercial Contracts 1994). At the end, the court decided not to do so, because such decision will only be overturned by the Privy Council in England. However, the court gives the impression that otherwise it would have applied the CISG).

[16] San Ming Trade Co. v. Shanzhou Metallic Minerals Imp. & Exp. Co. (Fujian Higher People's Ct. 2004), *available at* http://cisgw3.law.pace.edu/cases/941200c1.html (last visited July 22, 2008). For a brief account of the lower court decision *see* San Ming Trade Co. v. Shanzhou Metallic Minerals Imp. & Exp. Co. (Xiamen Intermediate People's Ct. 1994), *available at* http://cisgw3.law.pace.edu/cases/940800c1.html.

Accordingly, the Arbitration Tribunal holds that the law of People's Republic of China, as well as the CISG, shall be the applicable law to this case."[17] This would be another case of "opting-in."[18]

As can be seen from these examples, it seems that Japanese business is starting to appreciate the merits of the CISG, either by opting-in to the CISG or arguing on the basis of CISG, especially in the context of trading with China, and likely in the context of trading with the diverse legal systems of Asia.

As for the nature of the dispute, they are all usual disputes such as a seller claiming payment of the price, or a buyer claiming damages for delivery of non-conforming goods. They are decided upon the facts rather than on interpretive issues of the CISG. One interesting trend in the Chinese cases mentioned above is that in all of the CIETAC decisions the claimants were Chinese parties, whereas in all of the court cases, the plaintiffs were Japanese parties. I do not know if any implication can be derived from this.

VI. CONCLUSION

In this essay, I have stressed that the most direct allure of the CISG for Japan lies in its success and the benefit that it brings.[19] The success of the CISG has turned the legal community into admirers of the CISG. The benefit derived from the "Asia factor" is easing the business community's hesitation about the CISG.

In this process, China is playing a major role. Even after Japan accedes to the CISG, there is no doubt that Chinese cases will have to be reckoned with in the uniform interpretation of the CISG. I look forward to further dialogue in the ensuing years.

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[17] Polypropylene Case (P.R.C v. Japan) (CIETAC 1997), *available at* http://cisgw3.law.pace.edu/cases/970723c1.html.

[18] *See* Wu, *supra* note 11, at 5-6.

[19] For a similar "realist" argument regarding a slightly different context, *see,* Souichirou Kozuka, *Contract Law in East Asia at the turn of the century: Lawyers and Globalization, in* GLOBALIZATION AND ECONOMIC LAW REFORMS: PERSPECTIVES FROM INDIA, MEXICO, THAILAND AND EAST ASIA (Shinya Imaizumi et al. eds., 2005); Souichirou Kozuka, *Economic Implications of Uniformity of Law, in* AN ECOMOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 3 (Jürgen Basedow & Toshiyoki Kono eds, 2006).

POSTSCRIPT

On July 1, 2008, the Government of Japan deposited its instrument of accession to the CISG at the United Nations Headquarters in New York. The CISG will enter into force in respect of Japan on August 1, 2009.