Deepening confidence in the application of CISG to the sales agreements between U.S. and Japanese companies

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By

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Abstract

Parties between U.S. and Japanese companies usually agree to exclude the application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") to the sales agreement due to concerns about how CISG will be interpreted and/or incompatibility with US or Japanese law or both. In this paper the author will suggest that the more countries amend their laws in accordance with CISG standards and the more national courts develop unified interpretation of CISG, CISG will represent harmonized law and contracting parties should not exclude it.

This paper begins with the trend concerning the application of CISG to sales agreements between U.S. and Japanese companies, and the backgrounds/reasons for such a trend. In the second part, the author introduces some laws which are/will be amended in accordance with CISG standards and some uniform laws which are already in effect, which can resolve some problems arising from the application of CISG. In the third part, the author introduces and analyzes some cases in which the courts made decisions referring to those made in other countries concerning CISG, which leads to the development of a unified interpretation of CISG among many countries. Then, in the last part, the author concludes that CISG will represent harmonized law and contracting parties should not exclude it, which will ultimately
give both contracting parties more substantive benefits.
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INTRODUCTION

The Contracts for the International Sale of Goods (CISG) is an international treaty which defines the formation of contracts, the obligations of sellers, obligations of buyers and so on, and which would be applied to sales contracts between parties from countries which ratified it unless they agree to exclude it from such sales contracts. Both the United States and Japan ratified this treaty, and so, for example, if both U.S. and Japanese companies do not agree with the exclusion of CISG, it would be automatically applied to the sales contracts made among them.

This topic was chosen because the author had many opportunities to review sales contracts between U.S. and Japanese companies while working in Japan. The author noticed that in most of contracts, CISG was excluded due to concerns about how CISG would be interpreted and/or incompatibility with U.S. or Japanese law or both. So, in examining this topic, the author would like to make certain whether it is
beneficial for both U.S. and Japanese parties to exclude the CISG.

In this paper the author will suggest that the more countries amend their laws in accordance with CISG standards and the more national courts develop unified interpretation of CISG, CISG will represent harmonized law and contracting parties should not exclude it.

This paper begins with the trend concerning the application of CISG to sales agreements between U.S. and Japanese companies, and the backgrounds of and the reasons for such a trend. In the second part, the author introduces some uniform laws which are already in effect and some U.S. and Japanese laws which either are or will be amended in accordance with CISG standards, and which can resolve some problems arising from the application of CISG. In the third part, the author introduces and analyzes some cases in which the courts made decisions referring to those made in other countries concerning CISG, which leads to the development of a consistent interpretation of CISG among many countries. Then, in the last part, the author concludes that CISG will represent harmonized law and contracting parties should not exclude it, which will ultimately give both contracting parties more substantive benefits.

A. What is the CISG?
1. Introduction to CISG

The CISG is an international treaty.¹ A draft of CISG was prepared by the United Nations Commission on International Trade Law, and the CISG was adopted at the conference on April 10, 1980 and opened for signature on April 11, 1980.² Under the preamble of CISG, the purpose is to encourage the development of international trade on the basis of equality and mutual benefit which is an important element in promoting friendly relations among states.³ CISG addresses the adoption of uniform rules which govern contracts for the international sale of goods and takes into account that the removal of legal barriers related to different social, economic and legal systems would contribute to international trade and promote the development of international trade.⁴

According to Article 1 of the CISG, CISG is applied to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State.⁵

³ CISG, supra note 1, at pmbl.
⁴ Id.
⁵ Id at art. 1.
However, according to Article 6 of the CISG\(^6\) which is based on the premise, accepted by most legal systems, that the parties to a sales transaction are at liberty to choose the law applicable to their contract,\(^7\) the parties may exclude the application of the CISG.\(^8\) To exclude the application of the CISG, it is said that the clear language indicating that both contracting parties intend to opt out of the CISG is necessary. This is because an affirmative opt-out requirement, which means the expressing language that both parties does not apply CISG to contracts of sale of goods, promotes uniformity and observance of good faith in international trade, two principles that guide interpretation of the CISG.\(^9\)

\(^6\) CISG, supra note 1, at art. 6.
\(^8\) CISG, supra note 1, at art. 6.
\(^9\) Id. at art. 6, 7(1). See, e.g., \textit{BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador}, 332 F.3d 333 (5th Cir. 2003) (saying that if the parties decide to exclude the CISG, it should have been expressly excluded by language which stated that it did not apply and also stated what law shall have governed the contract because an affirmative opt-out requirement promoted uniformity and observance of good faith in international trade two principles that guided interpretation of the CISG (article Seven (1))). See also \textit{Asante Technologies, Inc. v. PMC-Sierra, Inc.}, 164 F. Supp. 2d 1142 (N.D. Cal. 2001) (saying that if both parties are “Contracting Countries” under the article One of the CISG and there is no agreement concerning governing law under contracts of sale of goods, the CISG can be applied to such contracts because there is no clear language indicating that both contracting parties intend to opt out of the CISG.).
2. Ratification of CISG by the United States and Japan

In the United States, the U.S. Senate ratified the CISG in 1986. The CISG entered into force on January 1, 1988, in accordance with Article Ninety-nine, Section 1 of the CISG, after ten countries, including the United States, had deposited with the United Nations their respective instruments of ratification of the CISG. On the other hand in Japan, on July 1, 2008, the Government of Japan deposited the instrument of accession to CISG at the United Nations Headquarters in New York and CISG entered into force in respect of Japan on August 1, 2009. Considering these things, both the United States and Japan are already “Contracting States” defined in Article one of CISG, and so CISG would be automatically applied to contracts of sale of goods made between U.S. and Japanese companies.

B. Present trends of either application or exclusion of CISG between U.S. and Japanese parties

11 William P. Johnson, supra note 2, at 218.
1. Exclusion of CISG

a. The present trend in the United States

Concerning the U.S., the exclusion of CISG from sales agreements seems to be the present trend. There are some data to support this statement. One of them is the Martin F. Koehler and Guo Yujun survey on practical operations of practicing attorneys in the United States, Germany and China concerning CISG. The survey was sent to attorneys in private practice and in-house counsel in the United States and Germany, both directly and via various discussion forums or e-mail distribution. In China, in addition to mailings to attorneys in private practice and in-house counsel, the survey was also sent to people's courts and arbitration commissions by post or e-mail. The fact that, in the United States alone, it is likely that more than 3,000 practitioners were addressed and only about 50 questionnaires were returned, could be seen as an early indication of poor acceptance of the CISG. 29.2% of the practicing attorneys in the United States had contact with CISG in their day-to-day work, and the majority of the U.S. practitioners (58.2%) knew of the CISG.

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15 Id at 46.
16 Id at 46-47.
only from hearsay (29.2%), from their studies (16.7%), from literature (10.4%) or from their colleagues (2.1%). Additionally, 70.8% of U.S. practicing attorneys excluded the CISG principally and preponderantly.

The second data set is the survey conducted by Peter L. Fitzgerald. This survey was conducted entirely online, using the Zoomerang online survey hosting service, although the initial “welcome” page that provided entry to the actual survey was hosted on the Stetson University College of Law website. Each participant was asked to respond to between 20 and 38 questions, depending upon their responses. There were ten basic questions asked of all participants. These were followed by questions specifically directed at practitioners, jurists, and legal academics. A total of 236 individuals responded to the survey, with 66% of the responses coming from practitioners, 7% from jurists, and 27% from legal academics. The majority of the responses, 68%, came from the five target jurisdictions of California, Florida, Hawaii, Montana, and New York. However, 22% of the practitioners or academics who responded were located in other U.S. jurisdictions, and 10% came from foreign jurisdictions. Altogether, responses were received from 22 states, the District of

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17 Koehler and Yujun, supra note 14, at 47.
18 Id at 48.
20 Id at 4-5.
21 Id at 5.
Columbia, and 15 foreign countries or regions.\textsuperscript{22} According to the results of this survey, only 30\% of U.S. practitioners had familiarity with the CISG.\textsuperscript{23} Additionally, when drafting international commercial contracts, 55\% of U.S. practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage, while 24\% specifically opt in to the CISG in whole or in part.\textsuperscript{24} However, 21\% do not address the Convention at all in their agreements. These data are consistent with other studies that found a comparable, or even higher, tendency for U.S. practitioners to opt out of the CISG in whole or in part.\textsuperscript{25}

b. The present trend in Japan

Even before August 1, 2009, when the CISG went into effect in Japan, some Japanese lawyers and large Japanese companies tended to exclude CISG from sales agreements between such Japanese companies and foreign parties whose countries were Contracting States defined in Article one (1)(a) of the CISG even if such Japanese companies had their subsidiaries or branches in such counter parties’ countries.\textsuperscript{26} No specific data is available regarding whether such trends continued

\textsuperscript{22} Fitzgerald, \textit{supra} note 19, at 6.
\textsuperscript{23} \textit{Id} at 7.
\textsuperscript{24} \textit{Id} at 14.
\textsuperscript{25} \textit{Id}.
\textsuperscript{26} Tusneyoshi Tanaka, Adam NEWHOUSE, Nihonhou to beikokuhou no kanten karano Uinbaibaijyouyaku (CISG) ; globalization heno tool [the CISG from the standpoint of Japanese law and U.S. law] 338 RITSUMEIKAN HOUGAKU 2084, 2089
after 2009. However, anecdotal evidence from the author’s experience suggests the same trend as in the United States. The author checked all of the sales contracts which were made between U.S. companies and one large Japanese chemical company after August 1, 2009, when the CISG went into effect in Japan. In a majority of the contracts reviewed, the parties excluded CISG.

2. Obvious reasons for excluding CISG in agreements

There are some obvious reasons for the trend of “exclusion of CISG.”

One of them is that generally, CISG is not very widely known among U.S. practicing attorneys. According to the survey conducted by Martin F. Koehler and Guo Yujun, 54.2% of the practicing attorneys in the United States answered that they excluded CISG because the CISG was generally not very widely known.27 Additionally, according to the survey conducted by Peter L. Fitzgerald, 44% of U.S. practitioners are not familiar with CISG.28

The second reason is that there is legal uncertainty of CISG. CISG does not have a long history of interpretation in cases, and additionally, the interpretation itself differs from country to country. One result of the surveys showed that the second

27 Koehler and Yujun, supra note 14, at 49.
28 Fitzgerald, supra note 19, at 41.
most chosen answer by U.S. practicing attorneys to the question as to why they excluded CISG was that there is still “insufficient case-law to date related to the CISG.” This reason also seems to be applicable to Japan. In Japan, there has been no court case which shows that any Japanese court has interpreted a provision of CISG. Additionally, the language itself, Japanese and English, is different between Japanese law and CISG. So, for example, even if a Japanese court interprets a provision of CISG citing cases which were decided in other countries, a different interpretation may arise based on the difference in language itself.

Furthermore, the third reason is that there are some differences between U.S. law and CISG which are applicable to sales contracts of goods, and also between Japanese law and CISG. Specifically four differences will be introduced in the following section:

a. Differences between U.S. law and CISG

Each state has state laws concerning sales of goods, which are enacted based on the Uniform Commercial Code (UCC). The UCC is a uniform law that governs commercial transactions, including sales of goods, secured transactions, and

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29 Koehler and Yujun, supra note 14, at 49.
30 Morishita, supra note 13, at 19.
negotiable instruments.\textsuperscript{31} The UCC has been adopted in some form by every state and the District of Columbia.\textsuperscript{32} There are four significant differences between the CISG and the UCC. The first is the “statute of frauds” or oral contracts.\textsuperscript{33} Article 11 of CISG says that to make a sales contract, it does not require any writing or any other evidence form.\textsuperscript{34} On the other hand, UCC Article 2, Section 2-201 says that a contract for the sales of goods for the price of $500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by such parties.\textsuperscript{35} So, under the CISG, we can make an oral sales contract of goods even if the price of such goods is over $500. However, under the UCC, such oral sales contracts cannot be enforceable.

The second difference between the CISG and the UCC is the “parol evidence rule”, which means that in the United States, oral testimony of witnesses concerning the terms of a contract and intent of the parties that contradicts or varies from such terms of a written contract is generally inadmissible as evidence, which reflects UCC Article 2, Section 2-201.\textsuperscript{36} On the other hand, there is no provision which seems to have the concept of the “parol evidence rule” in the CISG.

\textsuperscript{31} \textsc{Black’s Law Dictionary} 789 (Bryan A. Garner, Jeff Newman, Tiger Jackson, and Recky R. McDaniel eds, 4th pocket ed. 2011).
\textsuperscript{32} \textsc{Black’s Law Dictionary}, \textit{supra} note 31, at 789.
\textsuperscript{34} CISG, \textit{supra} note 1, at art. 11.
\textsuperscript{35} U.C.C.\textsection 2-201 (1999).
\textsuperscript{36} McNamara, \textit{supra} note 33, at 16-17., U.C.C.\textsection 2-201 (1999).
The third difference between the CISG and the UCC is “Disclaimers of Warranties.”\textsuperscript{37} UCC Article 2, Section 2-316 says that an effective disclaimer of the implied warranty of merchantability must mention “merchantability” and must be in conspicuous writing, and that an effective disclaimer of an implied warranty of fitness must be in writing and conspicuous.\textsuperscript{38} On the other hand, there is no provision in the CISG which states clearly the “Disclaimers of Warranties” as it appears in UCC Article 2, Section 2-316.\textsuperscript{39}

Furthermore, CISG is a statute. So, when lawyers have to handle a legal issue which is related to CISG at the very beginning, it seems that they tend to make an interpretation based on the CISG itself. If they do such a thing, the method to handle the legal issue under CISG seems to be totally different from that under common law which is familiar to the United States because common law’s body is derived from judicial decisions, rather than from statutes or constitutions,\textsuperscript{40} and so to handle such a legal issue, at the very beginning, it seems that lawyers tend to analyze and search for judicial decisions whose facts are similar to those which are extracted from such a legal issue. It is not surprising, therefore, that U.S. attorneys would be particularly concerned about the lack of cases interpreting and developing the jurisprudence of

\textsuperscript{37} McNamara, \textit{supra} note 33, at 18.
\textsuperscript{38} Id at 18., U.C.C.§2-316 (1999).
\textsuperscript{39} U.C.C.§2-316 (1999).
\textsuperscript{40} BLACK’S LAW DICTIONARY, \textit{supra} note 31, at 133.
CISG.

b. Differences between Japanese law and CISG

Japanese commercial transactions are generally governed by Japanese Civil Code\(^{41}\) and Japanese Commercial Code\(^{42}\). As there are some differences between CISG and UCC, there are some differences between CISG and the Japanese Civil Code, and between CISG and Japanese Commercial Code.\(^{43}\) The first difference is “Time of Formation of Contract between Persons at a Distance” which is defined in Article 526 (1) of Japanese Civil Code.\(^{44}\) Article 18 (2) of CISG says “the acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”\(^{45}\) On the other hand, according to Article 526 (1) of the Japanese Civil Code, it is said that “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”\(^{46}\) So principally under CISG, the time when a contract is formed is when the indication of an assent reaches the offeror. However, under Japanese Civil Code, the time when a contract is formed is when the indication of an assent is dispatched.

\(^{41}\) MINPÔ [MINPÔ] [CIV. C.] (Japan).

\(^{42}\) SHÔHÔ [SHÔHÔ] [COMM. C.] (Japan).

\(^{43}\) YASUTOMO SUGIURA, TAKASHI KUBOTA, UIINBAIBAIJYOYAKUNO JITSUMUKAISETSU [THE EXPLANATION TO THE PRACTICAL USAGE OF CISG] 9-10 (2nd ed. 2011).

\(^{44}\) MINPÔ, supra note 41, at art. 526, para.1.

\(^{45}\) CISG, supra note 1, at art. 18 (2).

\(^{46}\) MINPÔ, supra note 41, at art. 526, para.1.
The second difference between CISG and the Japanese Civil Code is a seller's warranty against (hidden) defects of goods which is defined in Article 526 of the Japanese Commercial Code. Article 35(1) of the CISG says “the seller must deliver goods which are of the quality, quantity and description required by the contract and which are contained or packaged in the manner required by the contract,”47 which means the seller’s obligation based on such a contract. On the other hand, Article 415 of the Japanese Civil Code says “if an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure,” which is construed to require the delivery of goods which are of the quality, quantity and description required by the contract by the seller,48 and which also means the seller’s obligation based on such a contract. Additionally Article 526 of the Japanese Commercial Code, which is a special provision of Article 566 and 570 of the Japanese Civil Code49 and applied to a transaction which takes place among merchants, says that if the buyer detects hidden defects of goods and dispatches the notice of such detection to the seller in six months, such buyer can claim the termination of such a contract, deducting the price of such goods or damages.50 This seller’s obligation occurs even if there is no contract concerning the quality and

47 CISG, supra note 1, at art. 35 (1).
48 MINPŌ, supra note 41, at art. 415.
49 MINPŌ, supra note 41, at art. 566, 570.
50 SHŌHŌ, supra note 42, at art. 526.
description of such goods. Furthermore, whether there are “hidden defects of goods” or not is decided based on the requirement of the quality which such goods usually have. For example, take the purchase of a ball point pen and the pen fails to write. Such a pen, which may meet the requirement of quality and description under contract, has “hidden defects of good” because such pen lacks the quality, which such a pen usually has, specifically, that it will function. So, under the CISG, there is one concept concerning warranties of quality, quantity and description of the goods which are based on contract. However, Japanese law has not only the warranty of the goods based on a contract, but also one which is based on the concept of “hidden defects of the goods” and arises without relation to a contract.

The third difference between CISG and the Japanese Civil Code is the time of forecast to determine the scope of damages. Article 74 of the CISG says that the damages for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of contract.\(^{51}\) On the other hand, Article 416(2) of the Japanese Civil Code says “the obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.” However, this can be construed as stating that the time when such forecast should be done is one

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\(^{51}\) CISG, \textit{supra} note 1, at art. 74.
when the obligor causes a default. So, the time of the forecast to determine the
scope of damages under CISG is the conclusion of the contract. However, under the
Japanese Civil Code, it is the time that the obligor causes a default, which postdates
that of the conclusion of the contract.

The fourth difference between CISG and the Japanese Civil Code is the
revocation of offers. Article 16(1) of the CISG says “until a contract is concluded an
offer may be revoked if the revocation reaches the offeree before he has dispatched an
acceptance.”\(^{52}\) On the other hand, Article 521(1) of the Japanese Civil Code says
“an offer which specifies a period for acceptance may not be revoked,” and Article
524 of the Japanese Civil Code says “an offer made to a person at a distance without
specifying a period for acceptance may not be revoked until the lapse of a reasonable
period for the offeror to receive a notice of acceptance.”\(^{53}\) So, principally, under
CISG the offer can be revocable, however under Japanese Civil Code, it is
irrevocable.

II. Possible Unification Through National Laws and “Soft Law” Collaboration

As mentioned in Part-I, there are some factors which induce the exclusion of

\(^{52}\) CISG, *supra* note 1, at art. 16 (1).
\(^{53}\) MINPO, *supra* note 41, at art. 521, 524.
CISG from sales agreements between U.S. and Japanese companies. However, there are some circumstances from a legal point of view which seem to remove or mitigate such factors which induce such exclusion. These circumstances include:


There are some international rules which are usually used in sales agreements between U.S. and Japanese companies, which can lead to the argument that although these parties seem reluctant to follow hard international law like the CISG, in practice there is in fact unification by resorting to another ‘global’ standard, and maybe the problem of exclusion of CISG is not such a big problem in reality. An analysis of these international rules will follow:

1. The Uniform Customs and Practice for Documentary Credits

The first international rule is the Uniform Customs and Practice for Documentary Credits ("UCP"), which is a set of rules on the issuance and use of letters of credit, first published in 1933 and revised in 1951, 1962, 1974, 1983, 1993, and 2007, and whose latest version is publication no. 600 known as “UCP 600.”

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54 DANIEL C.K. CHOW, THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES AND MATERIALS 235 (Aspen Publishers 2nd ed.)
is standardized by the International Chamber of Commerce ("ICC") which was founded in 1919 by the private sectors in Belgium, Britain, France, Italy and the United States, and has become a world business organization with thousands of member companies and associations in around 120 countries. Its aim is to promote international trade, service, investment and a market economy system, and to foster the economic growth of developed and developing countries.

“Letter of credit” means an instrument under which the issuer, at a customer’s request, agrees to honor a draft or other demand for payment made by a party, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.

One of the examples of issuance and use of a letter of credit is the following: an issuer located in the United States, which is usually the buyer’s bank, at the U.S. buyer’s request, issues a letter of credit. After the seller in Japan is notified of the issuance of the letter of credit by the issuer, it delivers the goods to the carrier. The carrier loads the goods and issues a bill of lading to the seller. The seller presents the bill of lading, a commercial invoice, and a certificate of issuance to the Japanese seller’s

2010).

55 Id at 235.
58 BLACK’S LAW DICTIONARY, supra note 31, at 450-451.
bank, which acts as a confirming bank. The seller’s bank examines the bill of lading and other documents to determine whether they conform to the letter of credit. Then the seller’s bank decides whether the documents are conforming and if so, makes payment to the seller.\textsuperscript{59} These procedures related to the issuance and use of a letter of credit are regulated by UCP.

A letter of credit is frequently used in international transactions because it reduces the risk of the seller if the buyer does not pay. While reviewing international sales contracts, the author sometimes saw provisions concerning a letter of credit as follows:

“\textit{At least thirty (30) days prior to the date of shipment of the Products under this Agreement, the Purchaser shall open an irrevocable and confirmed letter of credit, through a prime bank satisfactory to the Seller, which letter of credit shall be in a form and upon terms satisfactory to the Seller and shall be in favor of the Seller and shall be payable in United States Dollars.}”\textsuperscript{60}

Furthermore, in some circumstances, the UCP may govern the sales transaction without express agreement between them by well-known custom and usage.\textsuperscript{61} So for

\textsuperscript{59} CHOW AND SCHOENBAUM TAKAO, supra note 54, at 64–65.
\textsuperscript{60} TAKAO YAMAMOTO, EIBUN BIJINESU KEIYAKUSHO DALJITEN [A DICTIONARY FOR STANDARD INTERNATIONAL BUSINESS CONTRACTS] 251 (Nihonkeizaishinbunsha 1st ed. 2006).
now the UCP fulfills the unifying function similar to the purpose of the CISG.

2. Incoterms rules or International Commercial terms.

The second rule is Incoterms rules or International Commercial terms ("Incoterms"). The Incoterms have become familiar with contracts for the international sale of goods worldwide and provide rules and guidance to people who engage in international trade. They were first published by ICC as well as UCP 600 in 1921, and the latest versions of them became effective on 1 January 2011.62

Incoterms apply to a sales contract relating to the delivery of tangible goods sold.63 They clarify which party, seller or buyer, has to perform some necessary tasks for the delivery of goods under a sales contract, for example, which party bears the risk of loss to the goods and which party bears the costs relating to such goods.64 Under the term “CIF” in Incoterms 2000, the seller must bear all risks of loss to the goods until such time as they passed the ship’s rail at the port of shipment,65 and must obtain at his expense cargo insurance as agreed in the contract.66

The Incoterms is also frequently used in international sales contracts. While

63 Chow and Schoenbaum, supra note 54, at 68.
64 Id at 69.
66 Id at CIF COST INSURANCE AND FREIGHT (… named port of destination) A3.
reviewing the international sales contracts, the author sometimes saw provisions concerning Incoterms in such contracts like:

“Delivery of the Products shall be made at San Francisco Port, California, on or before 31\textsuperscript{st} of December, 20XX, on F.O.B. San Francisco Port basis. The trade term “F.O.B.” shall be interpreted in accordance with INCOTERMS 2000.”\textsuperscript{67}

Furthermore, in some circumstances, the Incoterms also may govern sales transactions without express agreement between them by well-known custom and usage.\textsuperscript{68} So for now Incoterms fulfill the unifying function similar to the purpose of CISG.

Considering the above, in terms of the rules which are applied to sales transactions between U.S. and Japanese companies, CISG might be similarly applied to them as UCP and Incoterms are applied. So, as CISG becomes more familiar to U.S. and Japanese lawyers, it may be possible that it will become a common rule which is written in many sales contracts between U.S. and Japanese companies like letter of credits and Incoterms.

B. Amending the U.S. and Japanese laws in accordance with CISG provisions.

It is also possible that unification and alignment with the CISG standards will be achieved through the amendment of national laws, such as in the United States and

\textsuperscript{67} YAMAMOTO, supra note 60, at 246.
\textsuperscript{68} Gabriel, supra note 61.
Japan. Some provisions of U.S. laws, that is to say UCC, are in accordance with the CISG provisions and there is a plan to amend some Japanese Civil Code to be in accordance with the CISG provisions, which can lead to the argument that parties are becoming more comfortable with CISG, and so maybe the problem of excluding CISG is not such a big problem, at least in these provisions. In the next section, the author would like to introduce some provisions of U.S. laws which are in accordance with CISG provisions and the contents of Japanese Civil Code proposed amendments, and then analyze the impact of them for the U.S. and Japanese legal practitioners.

1. Existence of some provisions of U.S. state law which are in accordance with CISG provisions

According to a leading CISG scholar, the functions of the UCC and the CISG are substantially the same:

Both were designed to reduce the misunderstandings and controversies that can arise when one law governs the seller and a different law the buyer. They do the job in different areas: The UCC is designed to avoid the modest differences among the domestic laws of our fifty states, while the CISG is designed to overcome differences among the laws of the countries of the world.69

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Let’s start with three similarities between CISG and UCC.

The first UCC provision which is in accordance with CISG is one concerning “Variation of Agreement” under UCC Article 2, Section 1-302. UCC Article 2, Section 1-302 (a) says that except as otherwise provided in subsection (b) or elsewhere in the UCC, the effect of provisions of the UCC may be varied by agreement. Article 6 of the CISG says that 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.  

The second UCC provision which is in accordance with CISG is one concerning “Implied Warranty: Merchantability; Usage of Trade” under UCC Article 2, Section 2-314. UCC Article 2, Section 2-314 says that goods are “fit for the ordinary purpose for which such goods are used” is implied unless the contract states otherwise. Mirroring the structure and content of this section, Article 35(2) of the CISG provides that unless the contract states otherwise, “goods do not conform with the contract unless they ... [a]re fit for the purposes for which goods of the same description would ordinarily be used.”

The third UCC provision which is in accordance with that of CISG is one

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70 CISG, supra note 1, at art 6.
concerning “Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods” under UCC Article 2, Section 2-711. UCC Article 2, Section 2-711 says “where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, …., the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (a) “cover” and have damages….; or (b) recover damages for non-delivery….” On the other hand, Article 46 of the CISG says “(2) If the goods do not conform with the contract, the Buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and…. (3) If the goods do not conform with the contract, the Buyer may require the Seller to remedy the lack of conformity by repair, unless…..”

The author is unaware of any state in the United States that amended or has a plan to amend some provisions of its state law based on UCC, especially such provisions concerning “statute of frauds”, “parol evidence rule” and “Disclaimers of Warranties” written in I. B. 2, in accordance with those of CISG. So, these same provisions are just coincidental and the impact of them for the U.S. legal practitioners may not be significant.

2. Proposed amendments to Japanese law which would be in accordance with CISG
provisions

In Japan, there is a plan that the Japanese Civil Code will be amended. The proposed amendments have been public on the Ministry of Justice website. The author would like to go over these proposed amendments which are in accordance with CISG.\textsuperscript{72}

The first proposed amendment is concerning “Time of Formation of Contract between Persons at a Distance” defined in Article 526 (1) of the Japanese Civil Code. As mentioned, the existing Article 526 (1) of the Japanese Civil Code says that “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”\textsuperscript{73} However, the proposal concerning amendment of this article includes that a contract between persons at a distance shall be formed at the moment that the indication of an assent reaches the offeror\textsuperscript{74} which seems to be similar to Article 18 (2) of CISG, “the acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”\textsuperscript{75}

The second proposed amendment of the Japanese law is concerning “Seller's Warranty against (Hidden) Defects” defined in Article 526 of the Japanese

\textsuperscript{72} MINPÔ (saiken kankei) no kaisei ni kansuru chukantekina rontenseiri [The tentative issues concerning the amendment of MINPÔ in the area of claims], Ministry of Justice in Japan. (Jun. 3, 2011), http://www.moj.go.jp/content/000074989.pdf (last visited May. 26, 2012).
\textsuperscript{73} MINPÔ, supra note 36, at art. 526, para.1.
\textsuperscript{74} The tentative issues concerning the amendment of MINPÔ in the area of claims, supra note 71, at 81.
\textsuperscript{75} CISG, supra note 1, at art. 18 (2).
Commercial Code which is a special provision of Article 566 and 570 of the Japanese Civil Code\textsuperscript{76} and is applied to transactions which takes place among merchants. As mentioned, the existing Article 526 of the Japanese Commercial Code says “if the buyer detects the hidden defects of the goods and dispatches the notice of such detection to the seller in six months, such buyer can claim the termination of such contract, deducting the price of such goods or damages.”\textsuperscript{77} However, a proposed amendment concerning Article 566 and 570 of the Japanese Civil Code which form the basis for Article 526 of the Japanese Commercial Code states that the legal nature of “the (hidden) defects of the goods” is involved in the seller’s obligation under the contract which means to require the delivery of goods which are of the quality, quantity and description required by the contract by the seller\textsuperscript{78}, which seems to be similar to Article 35 (1) of the CISG, “the seller must deliver goods which are of the quality, quantity and description required by the contract and which are contained or packaged in the manner required by the contract”\textsuperscript{79}, which also means the seller’s obligation under such contract.

The third proposed amendment of the Japanese Civil Code is concerning “Scope of Damages” defined in Article 416 (2) of Japanese Civil Code. As

\textsuperscript{76} MINPÔ, \textit{supra} note 36, at art. 566, 570.
\textsuperscript{77} SHÔHÔ [SHÔHÔ] [COMM. C.] art. 526 (Japan).
\textsuperscript{78} The tentative issues concerning the amendment of MINPÔ in the area of claims, \textit{supra} note 71, at 118, 119.
\textsuperscript{79} CISG, \textit{supra} note 1, at art. 35 (1).
mentioned, the existing Article 416 (2) of the Japanese Civil Code says “the obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.” However, this can be construed as stating that the time when such forecast should be done is when the obligor causes a default. However, a proposed amendment of Article 416 (2) of the Japanese Civil Code states that the time when such forecast should be done is when the conclusion of contract occurs,\textsuperscript{80} which seems to be similar to Article 74 of the CISG which says that the damages for a breach of contract may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of contract.\textsuperscript{81}

If the proposed amendments including these three lead to the actual amendment of the Japanese Civil Code, it seems that the existing differences between CISG and Japanese Civil Code will dramatically decrease.

III. Building Confidence in CISG Through Judicial Interpretation

Courts in the United States have interpreted some articles of CISG in accordance with interpretations done in other countries, which has led to a unity of

\textsuperscript{80} The tentative issues concerning the amendment of MINPÔ in the area of claims, \textit{supra} note 71, at 9.

\textsuperscript{81} CISG, \textit{supra} note 1, at art. 74.
interpretation of CISG. Three such cases are:


The first example is Chicago Prime Packers, Inc. case. Chicago Prime Packers, Inc. (“Chicago Prime”), which was a seller of pork ribs and Colorado meat wholesaler, started a lawsuit against Northam Food Trading Co. (“Northam Food”), which was a buyer of such pork ribs from Chicago Prime, a meat wholesaler and a partnership formed under the laws of Ontario, Canada. Chicago Prime alleged that Northam Food breached a sales contract by refusing to pay for a shipment of such pork ribs which was condemned as spoiled by the United States Department of Agriculture (USDA) after it was delivered to an American retail customer. One of the issues in this case is the interpretation of Article 38 (1) of CISG because the contract among them did not contain an inspection provision. To construe Article 38 (1) of CISG, the court referred to a Netherlandish case and said “Decisions under the CISG indicate that the buyer bears the burden of proving that the goods were inspected within a reasonable time.”

Through this case, the court achieved a unified interpretation of Article 38 (1)

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of CISG.\textsuperscript{84} The unified interpretation of cases seems to mitigate issues which rise from differences between the CISG and the UCC, and this unification may lead to a higher rate of inclusion of CISG because Article 38 (1) of CISG\textsuperscript{85} is different from similar articles of the UCC. Article 38 (1) of CISG says that the examination to the goods by the buyer is an obligation\textsuperscript{86}, on the other hand, UCC 2-513 (1) says that to inspect them is the buyer’s right.\textsuperscript{87}


The second example is \textit{St. Paul Guardian Ins. Co.} case.\textsuperscript{88} In this case, St. Paul Guardian Insurance Company and Travelers Property Casualty Insurance Company started the lawsuit as subrogues of Shared Imaging, Inc., to recover the money they paid to Shared Imaging for damage to a mobile magnetic resonance imaging system ("MRI") purchased by Shared Imaging from Neuromed Medical Systems & Support GmbH ("Neuromed"). One of the issues in this case was whether CISG is applied to the sales contract of MRI between Shared Imaging, Inc. and Neuromed which

\begin{itemize}
\item \textsuperscript{84} CISG, \textit{supra} note 1, at art. 38.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} U.C.C.§2-512 (1999).
\end{itemize}
contained the provision that German law is applicable law. The court referred to Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*.”

Also, the court interpreted the governing law provisions “country-A law is applicable law” based on a case in country-A, not based on one in the United States. So, for example, if the legal practitioners face the interpretation of the provisions “country-B law is applicable law” and country-B is “Contracting States” in Article 1 (1) (a) of CISG, they should at first search for cases which have been decided in country-B concerning similar provisions. This means that it becomes easier for such legal practitioners to determine interpretations of similar provisions decided by courts. Furthermore, this seems to lead to legal certainty of CISG.

C. Macromex Sr. v. Globex International Inc.

The third example is *Macromex Sr. v. Globex International Inc.* decision. In this case, Macromex Srl. (“Buyer”), which was a buyer of chicken leg quarters

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90 CISG, *supra* note 1, at art. 1.

(“Products”) and a Romanian company, sought a damages remedy with respect to undelivered Products under the contracts (“Contracts”) against Globex International (“Seller”), which was a seller of the Products to the Buyer and an American company engaged in the export of food products to multiple countries globally, including in Eastern Europe. The Contracts expressly stated the shipments dates of the Products.

On the other hand, the evidence at hearing showed that some flexibility of such shipment dates was allowed in the normal course of dealing within the industry and by communication between Buyer and Seller. In this decision, for the purpose of considering whether the Contracts were modified by the agreement among them, the arbitrator construed Article 11 and 29 of CISG referring to a Belgian case.92

Through this decision, the arbitration body achieved a unified interpretation of Article 11 of CISG93 referring to the case decided in another country. The accumulation of unified interpreted decisions, even by arbitration bodies, seems to lessen the issues which rise from differences between CISG and UCC, and this unification may lead to a higher rate of inclusion of CISG because Article 11 of CISG94 is different from similar articles of the UCC. Article 11 of CISG says that to

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93 CISG, supra note 1, at art. 11.
94 Id.
make a sales contract, it does not require any writing or any other evidence form,\textsuperscript{95} on the other hand, UCC Article 2, Section 2-201 says that a contract for the sales of goods for the price of $500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by such parties.\textsuperscript{96}

IV. Conclusion

Considering “Possible Unification Through National Laws and “Soft Law” Collaboration,” it may be possible that the differences between CISG and domestic law, especially those differences between CISG and Japanese law, gradually decrease, which makes Japanese legal practitioners more familiar with CISG. Additionally, there are already common international rules which are applied to international sales contracts between U.S. and Japanese parties, namely the UCP and the Incoterms. So it may be possible that CISG will become harmonized law in the field of international sales like the previously mentioned rules.

Considering “Building Confidence in CISG Through Judicial Interpretation,” it is expected that the cases or decisions which interpret some articles of CISG in

\textsuperscript{95} CISG, \textit{supra} note 1, at art. 11.
\textsuperscript{96} U.C.C.\$2-201 (1999).
accordance with their interpretations done in other countries are gradually increasing in both the United States and Japan. Such cases and decisions may include those which interpret the provisions of CISG which are different from those of UCC or of Japanese Civil Code, which seems to allow legal practitioners in both the United States and Japan to interpret the articles of CISG with more confidence, and which ultimately may lead to legal certainty of the CISG among U.S. and Japanese parties.

Additionally, CISG seems to ultimately give both U.S. and Japanese parties more substantive benefits. As you may know, it seems that there are many differences between U.S. and Japanese parties when making a sales contract. For example, the differences include those between the sizes of the firms, their financial and bargaining powers in the transaction. These differing factors affect the contractual negotiations between the two parties with results varying on a case-by-case basis. For example, if a Japanese distributor sells products which can be produced by only a few companies in the world and the buyer is a U.S. company, the distributor may have bargaining power even if it is smaller than the U.S. buyer, and may decide the governing law provisions as it wishes. However, if the distributor sells products which can be produced by many companies in the world and its size is smaller than that of the buyer, the distributor does not have much bargaining power in this transaction and such a buyer may decide the governing law provisions.
In this situation, the buyer gets the power not only to decide commercial conditions, but also to reduce legal risks more than the distributor. If the CISG is applied to this transaction, this application, at least, seems to give both parties equal legal risks. For example, if some issues arise with an international sales contract between U.S. and Japanese parties and the governing law provisions to this contract include CISG, to resolve such issues both parties have to make equal efforts to examine both the interpretations and cases of CISG. If the associated legal fees are too high, they may choose to resolve such issues directly without the assistance of lawyers, courts or arbitration systems, which seems to be favorable to small and medium-sized enterprises.97 According to the Small and Medium Enterprise Agency in Japan, 99.2% of all companies in Japan are small and medium-sized enterprises.98 On the other hand, according to United States International Trade Commission, small and medium-sized enterprises form a large part of firms and account for roughly half of the gross domestic product generated by nonagricultural sectors in the United States.99

So, under these circumstances, certain changes in conduct which are beneficial to

small and medium-sized enterprises would lead to advantages for both U.S. and Japanese economies. The author believes benefits would be numerous. One of them includes a reduction of legal costs as U.S. and Japanese legal practitioners increase their adoptions of CISG to their sales contracts.

So, in conclusion, it seems that U.S. and Japanese parties should not exclude the CISG from sales agreement. In order to achieve this, the author believes that legal practitioners both in the United States and Japan should familiarize themselves more with CISG and not exclude the application of CISG to their sales contracts as soon as possible. In the meantime, the author recommends that small and medium-sized enterprises, managed without the assistance of lawyers, should use sales contract templates including the governing law provisions which do not exclude the application CISG to its sales contract.
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