

**DEEPENING CONFIDENCE IN THE APPLICATION  
OF CISG TO THE SALES AGREEMENTS  
BETWEEN THE UNITED STATES AND  
JAPANESE COMPANIES**

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ABSTRACT

Parties to contracts 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") from the sales agreement due to concerns about how the CISG will be interpreted and/or incompatibility with U.S. 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 a unified interpretation of the CISG, the more the CISG will represent harmonized law, and as such, contracting parties should not exclude it.

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

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## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) is an international treaty that defines the formation of contracts and the obligations of sellers and buyers. It will be applied to sales contracts between parties from countries that ratified it unless they agree to exclude it from such sales contracts. Both the United States and Japan ratified this treaty, which means that if both U.S. and Japanese companies do not agree with the exclusion of the CISG, it will be automatically applied to the sales contracts made between 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 contracts, the CISG was excluded due to concerns about how the 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 ascertain 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 a unified interpretation of the CISG, the more the CISG will represent harmonized law. For this reason, contracting parties should not exclude it.

This paper begins with the trend concerning the application of the 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 that are already in effect as well as some U.S. and Japanese laws that either are or will be amended to be in accordance with CISG standards. These laws can resolve some problems arising from the application of the CISG. In the third part, the author introduces and analyzes some cases in which the courts made decisions referring to decisions made in other countries concerning the CISG, which in turn has led to the development of a consistent interpretation of the CISG among many countries. Finally, the author concludes that the CISG will represent harmonized law in the future, which will ultimately give both contracting parties more substantive benefits, and contracting parties should not exclude it.

### A. *What is the CISG?*

#### 1. *Introduction to the CISG*

The CISG is an international treaty.<sup>1</sup> The United Nations Commission on International Trade Law prepared a draft of the CISG,

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, 1489 U.N.T.S. 3 [hereinafter CISG].

which was adopted at the conference on April 10, 1980 and opened for signature on April 11, 1980.<sup>2</sup> Under the preamble of the CISG, its 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.<sup>3</sup> The CISG addresses the adoption of uniform rules that 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 and promote the development of international trade.<sup>4</sup>

According to Article 1 of the CISG, the treaty applies to contracts for the 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.<sup>5</sup>

According to Article 6 of the CISG,<sup>6</sup> 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,<sup>7</sup> the parties may exclude the application of the CISG.<sup>8</sup> To exclude the application of the CISG, 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 express language that both parties do not wish to apply the CISG to the contract, promotes uniformity and observance of good faith in international trade, two principles that guide interpretation of the CISG.<sup>9</sup>

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<sup>2</sup> William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 217-218 (2011).

<sup>3</sup> CISG, *supra* note 1, at pmbl.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* art. 1.

<sup>6</sup> *Id.* art. 6.

<sup>7</sup> United Nations Commission on International Trade Law, Vienna, May 23-June 17, 1977, *Report of Committee of the Whole Relating to the Draft Convention on the International Sale of Goods*, U.N. Doc A/32/17, Annex 1 (1977), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/vol8-p11-70-e.pdf> (last visited Feb. 22, 2013).

<sup>8</sup> CISG, *supra* note 1, art. 6.

<sup>9</sup> *Id.* art. 6, 7(1); *see, e.g.*, *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 stating that it did not apply and also stating what law shall govern the contract, because an affirmative opt-out requirement promoted uniformity and observance of good faith in international trade (art. 7(1))); *see also 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 article 1 of the CISG and there is no agreement concerning governing law under contracts of sale of goods, the CISG can be applied to such con-

## 2. *Ratification of the CISG by the United States and Japan*

In the United States, the Senate ratified the CISG in 1986.<sup>10</sup> The CISG entered into force on January 1, 1988, in accordance with Article 99, 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.<sup>11</sup> In contrast, the Government of Japan didn't accede to the CISG until July 1, 2008. The Government of Japan deposited the instrument of accession to the CISG at the United Nations Headquarters in New York and the CISG entered into force in Japan on August 1, 2009.<sup>12</sup> Considering these accessions, both the United States and Japan are already Contracting States as defined in Article 1 of the CISG, and as such the treaty automatically applies to contracts for the sale of goods made between U.S. and Japanese companies.

### B. *Present Trends of Either Application or Exclusion of the CISG Between U.S. and Japanese Parties*

#### 1. *Exclusion of the CISG*

##### a. *The Present Trend in the United States*

Concerning the United States, the present trend seems to be the exclusion of the CISG from sales agreements.<sup>13</sup> The Martin F. Koehler and Guo Yujun survey on practical operations of practicing attorneys in the United States, Germany, and China concerning the CISG was sent to attorneys in private practice and in-house counsel in the United States and Germany, both directly and via various discus-

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tracts because there is no clear language indicating that both contracting parties intend to opt out of the CISG.).

<sup>10</sup> William P. Johnson, *supra* note 2, at 218. (citing Dep't of State Pub. Notice 1004, 52 Fed. Reg. 6262 (Mar. 2, 1987); UNITED NATIONS TREATY COLLECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, CHAPTER X: INTERNATIONAL TRADE AND DEVELOPMENT, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Apr. 11, 1980) (last updated Jan. 11, 2010).

<sup>11</sup> William P. Johnson, *supra* note 2, at 218.

<sup>12</sup> *Deposit of Instrument of Accession to the United Nations Convention on Contracts for the International Sale of Goods*, Ministry of Foreign Affairs in Japan. (July 2, 2008), [http://www.mofa.go.jp/announce/announce/2008/7/1181058\\_1030.html](http://www.mofa.go.jp/announce/announce/2008/7/1181058_1030.html).

<sup>13</sup> Tetsuo Morishita, CISG no Kakkoku ni okeru riyouno jyokyo [The Usage Situation of CISG in Each Country] 1375 JURISTO 12, 15-16 (2009) (citing Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems an International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China*, 20 PACE INT'L L. REV. 45, 46 (2008)).

sion forums or by e-mail.<sup>14</sup> 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.<sup>15</sup> In the United States alone it is likely that more than 3,000 practitioners were addressed and only about 50 questionnaires were returned, which could be seen as an early indication of the poor acceptance of the CISG.<sup>16</sup> Of the responses received, 29.2 percent of the practicing attorneys in the United States had contact with the CISG in their day-to-day work, and the majority of the U.S. practitioners (58.2 percent) knew of the CISG only from hearsay (29.2 percent), from their studies (16.7 percent), from literature (10.4 percent), or from their colleagues (2.1 percent).<sup>17</sup> Additionally, 70.8 percent of U.S. practicing attorneys excluded the CISG principally and preponderantly.<sup>18</sup>

A second survey was conducted by Peter L. Fitzgerald.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> A total of 236 individuals responded to the survey, with 66 percent of the responses coming from practitioners, 7 percent from jurists, and 27 percent from legal academics. The majority of the responses (68 percent) came from the five target jurisdictions of California, Florida, Hawaii, Montana, and New York. However, 22 percent of the practitioners or academics who responded were located in other U.S. jurisdictions, and 10 percent came from foreign jurisdictions. Altogether, responses were received from 22 states, the District of Columbia, and 15 foreign countries or regions.<sup>22</sup> According to the results

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<sup>14</sup> Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems an International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China*, 20 PACE INT'L L. REV. 45, 46 (2008).

<sup>15</sup> *Id.* at 46.

<sup>16</sup> *Id.* at 46-47.

<sup>17</sup> *Id.* at 47.

<sup>18</sup> *Id.* at 48.

<sup>19</sup> Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International*, 27 J.L. & COMM. 1 (2008).

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Fitzgerald, *supra* note 19, at 6.

of this survey, only 30 percent of U.S. practitioners had familiarity with the CISG.<sup>23</sup> Additionally, when drafting international commercial contracts, 55 percent of U.S. practitioners who said they were familiar with the CISG specifically choose to opt out of its coverage, while 24 percent specifically opt in to the CISG in whole or in part.<sup>24</sup> However, 21 percent 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.<sup>25</sup>

*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 the CISG from sales agreements between such Japanese companies and foreign parties who were Contracting States, as defined in Article 1(1)(a) of the CISG, even if such Japanese companies had their subsidiaries or branches in such counter parties' countries.<sup>26</sup> No specific data is available regarding whether such trends continued after 2009. Anecdotal evidence from the author's experience, however, suggests the same trend as in the United States. The author checked all of the sales contracts that 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 the CISG.

*2. Obvious Reasons for Excluding the CISG in Agreements*

There are some obvious reasons for the trend of exclusion of the CISG. One of them is that generally, the 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 percent of the practicing attorneys in the United States answered that they excluded the CISG because the CISG was generally not very widely known.<sup>27</sup> Additionally, according to the survey conducted by Peter L. Fitzgerald, 44 percent of U.S. practitioners are not familiar with the CISG.<sup>28</sup>

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<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.*

<sup>26</sup> Tusneyoshi Tanaka & Adam Newhouse, *Nihonhou to beikokuhou no kanten karano Uiinbaibaijyouyaku (CISG); globalization heno tool [The CISG from the Standpoint of Japanese Law and U.S. Law]* 338 RITSUMEIKAN HOUGAKU 2084, 2089 (2011), [http://r-cube.ritsumei.ac.jp/bitstream/10367/3256/1/J2011\\_4tanakaadam.pdf](http://r-cube.ritsumei.ac.jp/bitstream/10367/3256/1/J2011_4tanakaadam.pdf).

<sup>27</sup> Koehler & Yujun, *supra* note 14, at 49.

<sup>28</sup> Fitzgerald, *supra* note 19, at 41.

The second reason is that there is legal uncertainty of the CISG. The 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 most chosen answer by U.S. practicing attorneys to the question as to why they excluded the CISG was that there is still “insufficient case-law to date related to the CISG.”<sup>29</sup>

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 the CISG. Additionally, the language itself, Japanese or English, is different between Japanese law and the CISG. So, for example, even if a Japanese court interprets a provision of the CISG, citing cases which were decided in other countries, a different interpretation may arise based on the differences in the language itself.<sup>30</sup>

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

*a. Differences between U.S. Law and the CISG*

Each state has 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 negotiable instruments.<sup>31</sup> The UCC has been adopted in some form by every state except Louisiana and the District of Columbia.<sup>32</sup> There are four significant differences between the CISG and the UCC. The first is the “statute of frauds” or oral contracts.<sup>33</sup> Article 11 of the CISG says that making a sales contract does not require any writing or any other evidence form.<sup>34</sup> 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.<sup>35</sup> So, under the CISG, we can make an oral sales contract of goods even if

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<sup>29</sup> Koehler & Yujun, *supra* note 14, at 49.

<sup>30</sup> Morishita, *supra* note 13, at 19.

<sup>31</sup> BLACK’S LAW DICTIONARY 1168 (9th ed. 2009).

<sup>32</sup> *Id.* at 1668.

<sup>33</sup> Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, COLO. LAW. Feb. 2003, at 11, 11.

<sup>34</sup> CISG, *supra* note 1, art. 11.

<sup>35</sup> U.C.C. § 2-201 (1999).



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.” Under UCC Article 2, Section 2-201, oral testimony of witnesses concerning the terms of a contract and the intent of the parties that contradicts or varies from the terms of a written contract is generally inadmissible as evidence.<sup>36</sup> On the other hand, there is no similar “parole evidence rule” provision in the CISG.

The third difference between the CISG and the UCC is “Disclaimers of Warranties.”<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

Furthermore, the CISG is a statute. When lawyers have to handle a legal issue related to the CISG, they tend to make an interpretation based on the CISG itself. If they do so, the method to handle the legal issue under the CISG seems to be totally different from that under common law because the common law is derived from judicial decisions, rather than from statutes or constitutions.<sup>40</sup> So, to handle such a legal issue, it seems that lawyers tend to analyze and search for judicial decisions whose facts are similar to their own at the very beginning of the legal process. It is not surprising, therefore, that U.S. attorneys would be particularly concerned about the lack of cases interpreting and developing the jurisprudence of the CISG.

#### *b. Differences Between Japanese Law and the CISG*

Japanese commercial transactions are generally governed by the Japanese Civil Code<sup>41</sup> and the Japanese Commercial Code.<sup>42</sup> Just as there are some differences between the CISG and the UCC, there are some differences between the CISG and the Japanese Civil Code, and between the CISG and the Japanese Commercial Code.<sup>43</sup> The first difference is “Time of Formation of Contract between Persons at a

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<sup>36</sup> McNamara, *supra* note 33, at 16; U.C.C. § 2-201.

<sup>37</sup> McNamara, *supra* note 33, at 18.

<sup>38</sup> *Id.*; U.C.C. § 2-316 (1999).

<sup>39</sup> U.C.C. § 2-316 (1999).

<sup>40</sup> BLACK'S LAW DICTIONARY, *supra* note 31, at 133.

<sup>41</sup> MINPŌ [MINPŌ] [CIV. C.] (Japan).

<sup>42</sup> SHŌHŌ [SHŌHŌ] [COMM. C.] (Japan).

<sup>43</sup> YASUTOMO SUGIURA, TAKASHI KUBOTA, UINBAIBALJYOYAKUNO JITSUMUKAISSETSU [THE EXPLANATION TO THE PRACTICAL USAGE OF CISG] 9-10 (2d ed. 2011) (Japan).

Distance,” which is defined in Article 526(1) of the Japanese Civil Code.<sup>44</sup> Article 18(2) of the CISG says “the acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”<sup>45</sup> On the other hand, according to Article 526(1) of the Japanese Civil Code, “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”<sup>46</sup> So principally under the CISG, the time when a contract is formed is when the indication of an assent reaches the offeror. Under the Japanese Civil Code, however, the time when a contract is formed is when the indication of an assent is dispatched.

The second difference between the CISG and the Japanese Civil Code is a seller’s warranty against hidden defects in goods, which is defined in Article 526 of the Japanese Commercial Code. Article 35(1) of the CISG states that “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.”<sup>47</sup> On the other hand, Article 415 of the Japanese Civil Code states that “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 seller in the contract.<sup>48</sup>

Additionally, Article 526 of the Japanese Commercial Code, which is a special provision of Articles 566 and 570 of the Japanese Civil Code<sup>49</sup> that applies 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, requiring either the deduction of the price of such goods or damages.<sup>50</sup> This seller’s obligation applies even if there is no contract concerning the quality and 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 where the pen fails to write. Such a pen, which may meet the requirement of quality and description under the contract, has hidden defects because the pen lacks a quality which such a pen usually has, specifi-

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<sup>44</sup> MINPÔ, *supra* note 41, art. 526, para.1.

<sup>45</sup> CISG, *supra* note 1, art. 18 (2).

<sup>46</sup> MINPÔ, *supra* note 41, art. 526, para.1.

<sup>47</sup> CISG, *supra* note 1, art. 35 (1).

<sup>48</sup> MINPÔ, *supra* note 41, art. 415.

<sup>49</sup> MINPÔ, *supra* note 41, art. 566, 570.

<sup>50</sup> SHÔHÔ, *supra* note 42, art. 526.

cally, that it will function. So, under the CISG, there is one concept concerning warranties of quality, quantity, and description of the goods that are based on the contract. Japanese law, however, 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” that arises without relation to a contract.<sup>51</sup>

The third difference between the 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 the contract.<sup>52</sup> On the other hand, Article 416(2) of the Japanese Civil Code states that “the obligee may also demand compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.”<sup>53</sup> This can be construed, however, as stating that the time when such forecast should be made is one when the obligor causes a default. So, the time of the forecast to determine the scope of damages under the CISG is the conclusion of the contract. Under the Japanese Civil Code, however, the time of the forecast is the time at which the obligor causes a default, which postdates the conclusion of the contract.

The fourth difference between the CISG and the Japanese Civil Code is the revocation of offers. Article 16(1) of the CISG states that “until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”<sup>54</sup> On the other hand, Article 521(1) of the Japanese Civil Code states that “an offer which specifies a period for acceptance may not be revoked,” and Article 524 of the Japanese Civil Code states that “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.”<sup>55</sup> So, under the CISG the offer can be revoked, but under the 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 that induce the exclusion of the CISG from sales agreements between U.S. and Japanese companies. There are some additional circumstances from a legal

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<sup>51</sup> SHŌHŌ, *supra* note 42, art. 526.

<sup>52</sup> CISG, *supra* note 1, art. 74.

<sup>53</sup> MINPŌ, *supra* note 41, art. 416, para. 2.

<sup>54</sup> CISG, *supra* note 1, art. 16 (1).

<sup>55</sup> MINPŌ, *supra* note 41, art. 521, 524.

point of view, however, which seem to remove or mitigate the factors which induce such exclusion.

*A. Existence of ‘Soft’ International Law Between US and Japanese Parties.*

There are some frequently used international rules in sales agreements between U.S. and Japanese companies. These rules support 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. Therefore, maybe the problem of exclusion of the CISG is not such a big problem in reality.<sup>56</sup> 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.”<sup>57</sup> It is standardized by the International Chamber of Commerce (“ICC”),<sup>58</sup> 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 approximately 120 countries.<sup>59</sup> Its aim is to promote international trade, service, investment, and a market economy system, as well as to foster the economic growth of developed and developing countries.<sup>60</sup>

A “letter of credit” is 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.<sup>61</sup> 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

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<sup>56</sup> See *infra*. pp. 291-92.

<sup>57</sup> DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES AND MATERIALS 235 (Aspen Publishers 2d. ed. 2010).

<sup>58</sup> *Id.* at 235.

<sup>59</sup> *A Word from our Secretary General*, INT’L CHAMBER OF COMMERCE <http://www.iccwbo.org/id93/index.html> (last visited January 30, 2013).

<sup>60</sup> *Constitution of the International Chamber of Commerce*, INT’L CHAMBER OF COMMERCE (June, 2012), [http://www.iccwbo.org/Data/Documents/About-ICC/ICC-Constitution-\(English\)-June-2012/](http://www.iccwbo.org/Data/Documents/About-ICC/ICC-Constitution-(English)-June-2012/).

<sup>61</sup> BLACK’S LAW DICTIONARY, *supra* note 31, at 987-88.

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 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. The seller's bank then decides whether the documents are conforming and if so, makes payment to the seller.<sup>62</sup> These procedures related to the issuance and use of a letter of credit are regulated by the UCP.

A letter of credit is frequently used in international transactions because it reduces the risk to 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:

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.<sup>63</sup>

Furthermore, in some circumstances, the UCP may govern the sales transaction without express agreement between the buyer and seller by well-known custom and usage.<sup>64</sup> For now, the UCP thus fulfills a unifying function similar to the purpose of the CISG.

## 2. *Incoterms*® Rules or International Commercial Terms

The second rule is the ICC's International Commercial terms, or the Incoterms rules. The ICC first published these rules along with the UCP 600 in 1921, and the latest versions of them became effective on January 1, 2011.<sup>65</sup> Contracts for the international sale of goods have integrated these rules worldwide, providing guidance to those who engage in international trade.

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<sup>62</sup> CHOW & SCHOENBAUM, *supra* note 57, at 64-65.

<sup>63</sup> TAKAO YAMAMOTO, EIBUN BJINESU KEIYAKUSHO DALJITEN [A DICTIONARY FOR STANDARD INTERNATIONAL BUSINESS CONTRACTS] 251 (Nihonkeizaishinbunsha 1st ed. 2006).

<sup>64</sup> Henry D. Gabriel, *Choice of Law, Contract Terms and Uniform Law in Practice*, Congress to Celebrate the Fortieth Annual Session of UNCITRAL, Vienna, July 9-12, 2007, <http://www.uncitral.org/pdf/english/congress/Gabriel-rev.pdf>.

<sup>65</sup> *From 1936 to Today: The Incoterms*® Rules, INT'L CHAMBER OF COMMERCE, available at [http://www.iccwbo.org/incoterms\\_history/](http://www.iccwbo.org/incoterms_history/) (last visited February 19, 2013).

The Incoterms rules apply to sales contracts relating to the delivery of tangible goods.<sup>66</sup> They clarify which party, the buyer or seller, has to perform some necessary tasks for the delivery of goods under a sales contract. For example, they determine which party bears the risk of loss to the goods and which party bears the costs relating to such goods.<sup>67</sup> Under the rules for Cost, Insurance and Freight (“CIF”), the seller must bear all risk of loss to the goods, until such time as they pass the ship’s rail at the port of shipment.<sup>68</sup> The seller must also obtain, at his expense, cargo insurance as provided in the contract.<sup>69</sup>

The Incoterms rules are also frequently used in international sales contracts. One is likely to see provisions concerning Incoterms in such contracts. For example:

“Delivery of the Products shall be made at San Francisco Port, California, on or before 31st 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.”<sup>70</sup>

Furthermore, in certain circumstances, the Incoterms rules may govern sales transactions without express agreement between the parties according to well-known custom and usage.<sup>71</sup> So for now, the Incoterms rules, like the UCP, fulfill the unifying function embodied in the CISG.

Considering the above, in terms of the rules that are applied to sales transactions between U.S. and Japanese companies, the CISG might be as similarly applied to them as the UCP and the Incoterms rules are applied to those transactions. As the CISG becomes more familiar to U.S. and Japanese lawyers, it is possible that its provisions will become common in many sales contracts between U.S. and Japanese companies, much like a letter of credit and the Incoterms rules.

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<sup>66</sup> CHOW & SCHOENBAUM, *supra* note 57, at 68.

<sup>67</sup> *Id.* at 69.

<sup>68</sup> INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (2000), CIF COST, INSURANCE AND FREIGHT (. . . named port of destination) A.5, available at [http://www.cardel.ru/pdf/incoterms\\_eng.pdf](http://www.cardel.ru/pdf/incoterms_eng.pdf) (last visited Feb. 21, 2013).

<sup>69</sup> *Id.* at CIF COST INSURANCE AND FREIGHT (. . . named port of destination) A.3.

<sup>70</sup> YAMAMOTO, *supra* note 63, at 246.

<sup>71</sup> Gabriel, *supra* note 64, at 4.

*B. Amending the U.S. and Japanese Laws in Accordance with the CISG Provisions*

Unification and alignment with the CISG standards can be achieved through amending national laws, such as has occurred in the United States and is being proposed in Japan. Some provisions of the UCC are, in effect, identical with the CISG provisions. There is an effort to amend the Japanese Civil Code to be in accordance with the CISG provisions. This implies that parties are becoming more comfortable with the CISG, ergo the problem of excluding the CISG is not such a big problem, at least in these provisions. In the next section, the author will introduce some sections of the U.S. Code that are in accordance with the CISG, as well as the contents of proposed amendments to the Japanese Civil Code, before analyzing the impact of both for U.S. and Japanese legal practitioners.

*1. Existence of Some Provisions of U.S. State Law that Are in Accordance with the 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 [governs] 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.<sup>72</sup>

What follows are three illustrative similarities between the UCC and the CISG.

The first UCC provision is one entitled “Variation of Agreement” under Article 2, Section 1-302. UCC § 1-302(a) states 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.”<sup>73</sup> Article 6 of the CISG allows parties to “exclude the application of th[e] Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”<sup>74</sup>

Second, the UCC’s “Implied Warranty: Merchantability; Usage of Trade” is substantially the same as the CISG’s Article 35(2). Section 2-314(2)(c) of the UCC requires goods to be “fit for the ordinary pur-

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<sup>72</sup> McNamara, *supra* note 33, at 14 (citing John Honnold, *The Sales Convention: From Idea to Practice*, 17 J. L. & COMM. 181 (1998)).

<sup>73</sup> U.C.C. § 1-302 (2012).

<sup>74</sup> CISG, *supra* note 1, art. 6.

pose for which such goods are used.”<sup>75</sup> Such requirement is implied in the contract, so long as the seller is a merchant that deals in goods of that kind.<sup>76</sup> 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.”<sup>77</sup>

The third UCC provision in accord with the CISG is one 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 states that “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. . .”<sup>78</sup> On the other hand, Article 46 of the CISG states that “(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.”<sup>79</sup>

The author is unaware of any state in the United States that has amended or plans to amend any provisions of its state law based on the UCC in accordance with the CISG, including the provisions concerning the statute of frauds, the parol evidence rule, and disclaimers of warranties. So, the similarity of the provisions is merely coincidental and they likely have little impact on U.S. legal practitioners.

## 2. *Proposed Amendments to Japanese Law that Would be in Accordance with Provisions of the CISG*

In Japan, there is a plan to amend the Japanese Civil Code. The Ministry of Justice has proposed the amendments publicly on its website.<sup>80</sup> The first proposed amendment concerns “Time of Formation of Contract between Persons at a Distance” as defined in Article

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<sup>75</sup> U.C.C. § 2-314(2)(c).

<sup>76</sup> U.C.C. § 2-314 (2012).

<sup>77</sup> CISG, *supra* note 1, art. 35. See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005).

<sup>78</sup> U.C.C. § 2-711 (2012).

<sup>79</sup> CISG, *supra* note 1, art. 46.

<sup>80</sup> 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) (June 3, 2011), <http://www.moj.go.jp/content/000074989.pdf> [hereinafter Tentative Issues].



526(1) of the Japanese Civil Code. The existing Article 526(1) of the Japanese Civil Code states that “a contract between persons at a distance shall be formed upon dispatch of the notice of acceptance.”<sup>81</sup> The amendment proposal for this article, however, modifies that to read that a contract between persons at a distance shall be formed at the moment that the indication of an assent reaches the offeror.<sup>82</sup> The amended language essentially mirrors CISG Article 18(2), which reads, “[T]he acceptance of an offer becomes effective at the moment that the indication of an assent reaches the offeror.”<sup>83</sup>

The second proposed amendment of the Japanese law concerns “Seller’s Warranty against (Hidden) Defects” as defined in Article 526 of the Japanese Commercial Code, which is a special provision of Article 566 and 570 of the Japanese Civil Code,<sup>84</sup> applying to transactions that take place among merchants. The existing Article 526 of the Japanese Commercial Code states that “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.”<sup>85</sup> The proposed amendment to Articles 566 and 570, however, states that the legal nature of “the (hidden) defects of the goods” is part of the seller’s obligation under the contract. This means that the contract requires the seller to deliver goods that are of the quality, quantity and description described in the contract.<sup>86</sup> That language seems similar to Article 35(1) of the CISG, which states that “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.”<sup>87</sup>

The third proposed amendment of the Japanese Civil Code concerns “Scope of Damages” as defined in Article 416(2). The existing Article 416(2) reads, “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.”<sup>88</sup> This can be construed, however, as stating that such foresight should occur when the obligor causes a default. The proposed amendment to Article 416(2) of the Japanese Civil Code instead states that such forecast should be made when the conclusion of the contract occurs.<sup>89</sup> The

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<sup>81</sup> MINPŌ, *supra* note 41, art. 526, para.1.

<sup>82</sup> Tentative Issues, *supra* note 80, at 81.

<sup>83</sup> CISG, *supra* note 1, art. 18 (2).

<sup>84</sup> MINPŌ, *supra* note 41, art. 566, 570.

<sup>85</sup> SHŌHŌ [SHŌHŌ] [COMM. C.] art. 526 (Japan).

<sup>86</sup> Tentative Issues, *supra* note 80, at 118-119.

<sup>87</sup> CISG, *supra* note 1, at art. 35 (1).

<sup>88</sup> MINPŌ, *supra* note 41, art. 416, para. 2.

<sup>89</sup> Tentative Issues, *supra* note 80, at 9.

amended language seems 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 the contract.<sup>90</sup> Thus, if these proposed amendments to the Japanese Civil Code do pass, it appears that the number of differences between the CISG and the Japanese Civil Code will dramatically decrease.

### III. BUILDING CONFIDENCE IN THE CISG THROUGH JUDICIAL INTERPRETATION

Courts in the United States have interpreted some articles of the CISG in accordance with different interpretations followed in other countries. This practice has led to a unity in the interpretation of the CISG. Three examples of this unity of interpretation can be seen in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*,<sup>91</sup> *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*,<sup>92</sup> and *Macromex Srl. v. Globex International Inc.*<sup>93</sup>

#### A. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*

The first example is *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*<sup>94</sup> Chicago Prime Packers, Inc. (“Chicago Prime”), which was a seller of pork ribs and a Colorado meat wholesaler, filed a lawsuit against Northam Food Trading Co. (“Northam Food”), a partnership formed under the laws of Ontario, Canada, which was a buyer of such pork ribs from Chicago Prime. Chicago Prime alleged that Northam Food breached a sales contract by refusing to pay for a shipment of pork ribs that 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 the CISG because the contract did not contain an inspection provision.<sup>95</sup> To construe Article 38(1) of the CISG, the court relied on a case from the Netherlands and found “decisions under the

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<sup>90</sup> CISG, *supra* note 1, at art. 74.

<sup>91</sup> *See generally* *Chicago Prime Packers v. Northam Food Trading Co.*, 408 F.3d 894, 894 (7th Cir. 2005).

<sup>92</sup> *See generally* *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 53 F. App’x 173, 173 (2d Cir. 2002).

<sup>93</sup> *See generally* *Macromex Srl. v. Globex International Inc.*, AM. ARB. ASSOC., Case No. 50181T 0036406, (23 October 2007).

<sup>94</sup> *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004) *aff’d*, 408 F.3d 894 (7th Cir. 2005).

<sup>95</sup> *Id.*

CISG indicate that the buyer bears the burden of proving that the goods were inspected within a reasonable time.”<sup>96</sup>

As a result of this case, the court achieved a unified interpretation of Article 38(1) of the CISG.<sup>97</sup> The unified interpretation of cases seems to mitigate any issues that arise from differences between the CISG and the UCC, and this unification may lead to a higher rate of inclusion of the CISG because Article 38(1) of the CISG<sup>98</sup> is different from similar articles of the UCC. Article 38(1) of the CISG says that the examination of the goods by the buyer is an obligation.<sup>99</sup> Section 2-513(1) of the UCC, on the other hand, says that to inspect them is the buyer’s right.<sup>100</sup>

#### B. *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*

The second example is *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*.<sup>101</sup> In this case, St. Paul Guardian Insurance Company and Travelers Property Casualty Insurance Company brought the lawsuit as subrogees 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 the CISG is applied to the sales contract for the MRI between Shared Imaging, Inc. and Neuromed, which provided that German law would be the applicable law. The court here referred to Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, in reaching its conclusion.<sup>102</sup>

Additionally, 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

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<sup>96</sup> *Chicago Prime Packers, Inc.*, 320 F. Supp. 2d at 712 (citing *Fallini Stefano & Co. s.n.c. v. Foodic BV*, No. 900336, Arrondissementsrechtbank Roermond, Netherlands (Dec. 19, 1991), UNILEX 1991).

<sup>97</sup> CISG, *supra* note 1, art. 38.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> U.C.C. § 2-512 (1999).

<sup>101</sup> *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support*, 00 CIV. 9344(SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002) *aff’d*, *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GMBH*, 53 F. App’x 173 (2d Cir. 2002).

<sup>102</sup> *St. Paul Guardian Ins. Co.*, 2002 WL 465312 (citing OLG Koblenz 17 September 1993; OLG Köln 22 February 1994), available at <http://www.cisg.law.pace.edu/cisg/biblio/karollus.html> (“[P]arties, as here, designate a choice of law clause in their contract—selecting the law of a Contracting State without expressly excluding application of the CISG—German courts uphold application of the Convention as the law of the designated Contracting state.”).

practitioners face the interpretation of the provisions “country-B law is applicable law” and country-B is a “Contracting State” in Article 1(1)(a) of the CISG,<sup>103</sup> they should first search for cases which have been decided in country-B concerning similar provisions. This makes it easier for such legal practitioners to determine interpretations of similar provisions decided by courts. Furthermore, this leads to legal certainty of the CISG.

### C. *Macromex Srl. v. Globex International Inc.*

The third example is *Macromex Srl. v. Globex International Inc.*<sup>104</sup> In this case, Macromex Srl. (“Buyer”), which was a Romanian company and buyer of chicken leg quarters (“Products”), sought damages for undelivered Products under the contracts (“Contracts”) against Globex International (“Seller”), which was an American company engaged in the export of food products to multiple countries globally, including in Eastern Europe, and the seller of the Products to the Buyer. The Contracts expressly stated the shipments dates of the Products. The evidence at the hearing, however, showed that some flexibility of such shipment dates was allowed in the normal course of dealing within the industry, as well as by communications between Buyer and Seller. In this decision, for the purpose of considering whether the Contracts were modified by the agreement among the parties, the arbitrator construed Articles 11 and 29 of the CISG by referring to a Belgian case.<sup>105</sup>

Through this decision, the arbitral body achieved a unified interpretation of Article 11 of the CISG,<sup>106</sup> referring to a case decided in another country. The accumulation of unified interpreted decisions, even by arbitral bodies, seems to lessen the issues that arise from differences between the CISG and the UCC, and this unification may lead to a higher rate of inclusion of the CISG because Article 11 of the CISG<sup>107</sup> is different from similar articles of the UCC. For example, article 11 of the CISG says that making a sales contract does not require any writing or any other evidence.<sup>108</sup> UCC Article 2, Section 2-

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<sup>103</sup> CISG, *supra* note 1, art. 1.

<sup>104</sup> *Macromex Srl. v. Globex International Inc.*, Case No. 5018IT 0036406, Interim Award (Int’l Centre for Dispute Resolution of the Am. Arbitration Ass’n 2007), <http://cisgw3.law.pace.edu/cases/071023a5.html>.

<sup>105</sup> *Macromex Srl. v. Globex International Inc.*, Case No. 5018IT 0036406, Interim Award (Int’l Centre for Dispute Resolution of the Am. Arbitration Ass’n 2007) (citing *NV A.R. v. NV I. (Design of radio phone case)*, Case No. 2001/AR/0180, (Hof van Beroep [Appellate Court] Gent 2002), <http://cisgw3.law.pace.edu/cases/020515b1.html>).

<sup>106</sup> CISG, *supra* note 1, art. 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

201, however, says that a contract for the sale 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.<sup>109</sup>

#### IV. CONCLUSION

Considering “Possible Unification Through National Laws and ‘Soft Law’ Collaboration,” it is possible that as the differences between the CISG and domestic law, especially those differences between the CISG and Japanese law, gradually decrease, Japanese legal practitioners will become more familiar with the CISG. Additionally, there are already common international rules that are applied to international sales contracts between U.S. and Japanese parties, namely the UCP and the Incoterms rules. It may be possible then that the 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 cases or decisions that interpret some articles of the CISG in accordance with their interpretations in other countries will gradually increase in both the United States and Japan. Such cases and decisions may include those interpreting the provisions of the CISG differently from those of the UCC or the Japanese Civil Code, those allowing legal practitioners in both the United States and Japan to interpret the articles of the CISG with more confidence, and those ultimately leading to legal certainty in the CISG among U.S. and Japanese parties.

Additionally, the CISG seems to ultimately give both U.S. and Japanese parties more substantive benefits. As you may know, there are many differences between U.S. and Japanese parties when making a sales contract. For example, the differences include the sizes of the firms, and in turn, their financial and bargaining powers in the transaction.

These 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 that 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. If the distributor sells products that can be produced by many companies in the world, however, and is smaller than the buyer, the distributor does not have much bargaining power in the transaction and the buyer may decide the governing law provisions. In this situation, the buyer

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<sup>109</sup> U.C.C. § 2-201 (1999).

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 in an international sales contract between U.S. and Japanese parties and the governing law provisions to this contract include the CISG, to resolve such issues both parties must make equal efforts to examine both the interpretations and cases of the CISG.

If the associated legal fees are too high, the parties 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.<sup>110</sup> According to the Small and Medium Enterprise Agency in Japan, 99.2 percent of all companies in Japan are small and medium-sized enterprises.<sup>111</sup> On the other hand, according to the 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.<sup>112</sup> So, under these circumstances, certain changes in conduct that are beneficial to small and medium-sized enterprises would lead to advantages for both U.S. and Japanese economies. The author believes that the benefits would be numerous. One such change includes a reduction of legal costs as U.S. and Japanese legal practitioners increase their adoptions of the CISG into their sales contracts.

In conclusion, U.S. and Japanese parties should not exclude the CISG from sales agreements. To achieve this, the author believes that legal practitioners both in the United States and Japan should familiarize themselves more with the CISG and include the application of the 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, use sales contract templates that include governing law provisions that do not exclude the application of the CISG to their sales contracts.

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<sup>110</sup> Kazuhiko Kokusho, *Wagakunidenō CISG no jūyū: Doitsu Amerika wo sankōni* [Acceptance CISG in Japan Reference to that of Germany and the United States] 38 no.6 *KOKUSAI SHŌJI HŌMU* 758 (2010) (citing Henry D. Gabriel, *Choice of law, Contract Terms and Uniform Law in Practice*, Congress to Celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007).

<sup>111</sup> *FAQ: Chushokigyo hakusho nit suite* [FAQ: Concerning White Paper on Small and Medium Enterprises in Japan], THE SMALL AND MEDIUM ENTERPRISE AGENCY IN JAPAN, <http://www.chusho.meti.go.jp/faq/faq26.html> (last visited May 26, 2012).

<sup>112</sup> *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports*, UNITED STATES INTERNATIONAL TRADE COMMISSION (January 2010), <http://www.usitc.gov/publications/332/pub4125.pdf>.