Accession by Japan to the Vienna Sales Convention (CISG)

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I. INTRODUCTION

The Vienna Sales Convention is also called the "United Nations Convention on Contracts for the International Sale of Goods" or simply "CISG." In this Article, the Convention will be referred to as "CISG." CISG was adopted by the diplomatic conference of the United Nations in 1980. Japan sent a delegation to the discussion and was actively involved in the process of finalizing the convention at UNCITRAL[1]. CISG became effective as of January 1, 1988 after obtaining the ratification of 10 countries. Now, as of February 18, 2007, 70 countries and areas are member states. Only Japan and the UK have not yet ratified CISG among major industrialized nations. In East Asia and South East Asia, China, Singapore and the Republic of Korea have already ratified CISG.

In 1989, the director of the Civil Affairs Bureau of the Ministry of Justice answered to the Secretary General of the United Nations that he was placing top priority upon the ratification of CISG[2]. Actually, an informal study group was organized at *Shôji Hômu Kenkyû-Kai,* a non-profit organization for the promotion of the study of commercial law. The group was joined by professors, practicing lawyers, staff of the Ministry of Justice and legal staff members of large corporations[3]. The group was also joined by Professor Kazuaki Sono, former Secretary General of UNCITRAL. At the time of intensive study meetings of the group, he was in Washington DC, USA. He frequently flew back to Tokyo only to attend the meetings. The author of this Article was a staff member of a trading company at that time and joined the group.

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1 SHINICHIRO MICHIDA, Draft International Sales Convention and UN Resolution (1)-(5), 661 Jurisuto 97 (1978) – 665 Jurisuto 109 (1978)

2 SUGURU HARA, Study of Vienna Convention (*Uiin baibai jôyaku no kentô*), 440 NBL 14, at 15 (1990)

3 KEN FUJISHITA, Study of Vienna Convention (*Uiin baibai jôyaku no kentô*), 464 NBL 16 (1991)

However, when the meetings of the group were concluded in 1991, the Civil Affairs Bureau of the Ministry of Justice became over-burdened with enactments and amendments of various important statutes, such as the Code of Civil Procedure, an overhaul of the insolvency law system and a series of amendments to corporations law. The bureau had to spare scarce human resources to these urgent and pressing works. Also, the industry was not so enthusiastic about the ratification of CISG because of the lack of foreseeability. CISG had just become effective. There were not so many cases all over the world. There were also not so many articles written by professors to guide the interpretation of CISG. For reasons explained later, large corporations did not have many troubles in connection with international sales transactions. For these reasons, the efforts for accession to CISG were suspended.

II. RE-STARTING OF ACCESSION PROCESS

Now, enactments and amendments of major laws have been completed. The Ministry of Justice once again decided to try to accede to CISG. Professor Hiroo Sono of Hokkaido University, who is famous for the detailed study of CISG, was invited to the Ministry of Justice as a staff member of The Civil Affairs Bureau, to help prepare for the accession to CISG. The *Nihon Keizai Shimbun*, one of the most influential industrial newspapers in Japan, reported on January 7, 2007[4]:

> The Government decided to accede to CISG, which sets forth the basic rules of international commercial transactions. The Government will ask the advice of the *Hôsei Shingi-kai* (Legislative Council) on the accession to CISG. The Ministry is planning to get the approval of the Diet at its Ordinary General Meeting of 2008. Lawyers and industrial companies had requested early accession for some time.

It seems to me an intention of the Government that it will not enact a new law in order to implement the accession of CISG. After the accession, CISG will become a part of Japanese law as a self-executory treaty.

A new study group was formed again at Shôji Hômu, headed by Professor Yoshihisa Nomi of the University of Tokyo, and joined by professors of Kyoto University, the University of Tokyo, Sophia University, Keio University, Hitotsubashi University, Rikkyo University and Chuo University, a practicing attorney, and staff members of the Ministry of Justice, Ministry of Foreign Affaires and the General Secretariat of the Supreme Court. Two of the professors had formerly been staff members of large trading companies.

The *Kokusai torihiki-hô Forum* (a private study group of international business law) held a symposium on CISG for corporate employees, on July 15, 2006, inviting Professor Kwang Hyun Suk, of Hanyang University, Seoul, Korea, in order to learn about

4 *Nihon Keizai Shinbun* Morning ed. of 7 January, 2007, 1.

the experiences of Korea, which acceded to CISG in 2004. Also, the Forum held another symposium in November 17, 2006 for researchers and business people. About 200 people attended the seminar.

III. ACCESSION OF CISG FROM THE POINT OF VIEW OF JAPANESE INDUSTRY

1. The Increase in Predictability

At the time of the first initiative toward the accession to CISG, the number of cases available in English – not to mention those in Japanese language – was quite scarce. Now we have databases of CLOUT, UNILEX and Pace University. CLOUT lists about 400 abstracts in English of cases of member countries of CISG all over the world[5]. CLOUT digests prepared through UNCITRAL give us an overview of the cases world-wide relating to CISG[6]. UNILEX[7] provides us information on 713 cases relating to CISG in English. Furthermore, it provides us with the full text of judgments in the original languages or in English. Pace University publishes information about the world cases on CISG. Now they list about 1600 cases in English. Also, it makes available 700 academic articles on CISG on Pace University website. We can also view documents relating to the legislative history of CISG.

I have not yet counted the number of Japanese cases relating to the sale of goods. But because of the paucity of the total number of cases in the Japanese legal system, due to the non-litigious character of the Japanese people, or scarcity of lawyers in Japan[8], or the comparatively high filing fees for commencement of litigation[9], the number of cases in Japan on the sale of goods is not large[10]. When it comes to the number of cases relating to the international sale of goods, it is far less. Probably the number is well below 50.

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5 *http://www.uncitral.org/uncitral/en/case_law/abstracts.html.* Total number of case abstracts is 677. But this number includes case abstracts relating to other UNCITRAL Model Laws such as Model Arbitration Law. But it seems to me roughly about 60% of them relate to CISG.

6 *http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.*

7 *http://www.unilex.info/* .

8 The total number of practicing attorneys is still only about 22,000.

9 JOHN O. HALEY, Myth of the Reluctant Litigants, in: Journal of Japanese Studies 4 (1978) 359.

10 *Hanrei Timusu* has been collecting major cases since 1948. Computer research resulted 5930 cases with the key word *"baibai."* It includes both sale of real estate and goods. Key words "sale" and "real estate *(fudôsan)*" produced 2666 cases. Therefore, at least there are 3264 cases concerning sale, except the sale of real estates. The search tool picks up cases with marginal relation with sale, this number should be discounted if we try to compare the number of CISG cases collected by Pace University. More over, the number of cases in Japan is from 1943 for the period of more than 60 years, while it is only less than 20 years since CISG became effective. If we measure the foreseeability only based upon the number of cases, CISG may be as foreseeable as the Japanese sales law, even at this moment. CISG will become more foreseeable than Japanese sales law very quickly.

Therefore, at least from the number of cases available in English, we cannot say any more that the application of CISG is unpredictable. Moreover, the number of cases on CISG is increasing and zhe number of scholarly works on CISG is also increasing with such speed that Japan alone cannot compete anymore, because of the so many member countries are producing cases and so many professors and lawyers have now a keen interest in the publication of articles on CISG. So far as the international sale of goods is concerned, CISG is more predictable than the Japanese Civil Code.

Most of the Japanese cases on international sale of goods are concerned with industrial goods, while many of CISG cases deal with a variety of goods: shoes, socks, jewelry, clothes and fashion goods, textile products, vegetables, foods such as caviar, truffles, shellfish, lemons, pineapples, cheese, stones for buildings and tombs, new and old machinery, chemical products, furs and so on. When Japanese companies try to find out about cases of like products and in like situations, they may find some among the cases under CISG.

2. *Convenience in Agreeing upon the Governing Law*

In the past, when it came to the time for determination of the governing law in contract negotiations, many foreign businesspersons and lawyers vigorously opposed accepting Japanese law as the governing law. The reason was that foreign parties could not understand the Japanese law because of the language barrier. That is one of the reasons why the Government decided to promote the consistent and reliable English translations of Japanese statutes and regulations[11]. When parties to an international sales contract have places of business in member countries, it is not necessary to negotiate the governing law. CISG will automatically apply[12]. After accession to CISG by Japan, Japanese companies need not provide for the specific governing law in their sales contract with Chinese companies, because then both Japan and China will both be contracting states to CISG. If the Chinese party insists on the application of Chinese domestic law as governing law, it will be easier for the Japanese party to insist on the application of CISG as governing law because CISG will be a part of both Chinese law and Japanese law, and because it is believed to be fair and specifically designed for international sales transactions.

When it comes to negotiation with parties in the countries where CISG has not been acceded to yet, the Japanese party may insist on the application of CISG as a kind of global standard for the international sale of goods. When Japanese companies do busi-

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11 NOBORU KASHIWAGI, *Hôrei no gaikokugo-yaku o meguru giron to kongo no mondai yôkyo*, in: Jurisuto 1284 (2005) 6; YOSHIO NAKAMURA, *Keizai-kai kara mita nihon hôrei no gaikokugo-yaku seibi no igi* (Significance of the Translation of Japanese Statutes), in Jurisuto 1284 (2005) 13; see also NOBORU KASHIWAGI, Translations of Japanese Statutes into English, in: ZJapanR / J.Japan.L. 23 (2007) 221 *(the ed.).*

12 CISG Art. 1(1)(a)

ness, one of the problems was the unpredictability of the legal system of developing countries. Sometimes, the government or a company there may be a customer with a strong bargaining position or for some reason may not accept the law of the Western world or the law influenced by it as governing law. Sometimes, the last resort is internationally accepted legal principles (the broader *lex mercatoria*). That is not predictable at all, but may be better than selecting the laws of developing countries as governing law. Again, in such cases, CISG may be a better solution as governing law because it was created by United Nations. A further advantage is that Japanese companies can get advice on CISG from law firms in 70 countries. They are supposed to understand CISG.

3. Convenience in Drafting Contracts

Also, by using CISG as governing law, it will be easier for Japanese companies to draft the general terms and conditions of their printed sales contract forms. The following is a sample of an exclusion clause regarding warranty liability found in the general terms and conditions of a Japanese large company:

> IV. WARRANTY
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> An example of warranty clause used in practice is the following:
>
> > UNLESS EXPRESSLY STIPULATED ON THE FACE OF THIS CONTRACT, SELLER MAKES NO WARRANTY OR CONDITION, EXPRESSLY OR IMPLIEDLY, AS TO THE FITNESS OF SUITABILITY OF THE GOODS FOR ANY PARTICULAR PURPOSE OR MERCHANTABILITY THEREOF.
>
> The governing law is not the Uniform Commercial Code of some state in the United States, but is Japanese law. Article 570 of the Civil Code of Japan provides:
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> > Article 566 applies mutatis mutandis to latent defects in the object of a sale.
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> Article 566 provides:
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> > If the object of a sale is subject to superficies, emphyteuta or easement, and if the buyer has not known it and the buyer cannot attain the purpose of the contract, then, the buyer may cancel the contract. In this case, if the buyer cannot cancel the contract, he may claim damages only.
>
> The above-mentioned warranty clause is drafted perfectly in accordance with the Uniform Commercial Code. It is completely unnecessary under the Japanese law to write the disclaimer in capital letters nor is it necessary to mention the word "merchantability." There is no corresponding notion of "merchantability" under the law of Japan.
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> Why did the Japanese company draft the warranty disclaimer clause not in accordance with the Japanese law, but instead borrowed the ideas of the Uniform Commercial Code? It is only a guess, but probably because of the difficulty in communicating the intention of the seller to foreign buyers in words consistent with the Japanese law. If the warranty clause is to be drafted in line with Japanese law, it is sufficient to say simply:

"There is no warranty against defects in goods." Probably the drafter was not confident that potential foreign buyers all over the world could correctly understand the meaning of this provision. Probably the drafter believed that language in line with the Uniform Commercial Code, which was far better known in the international business world than the Japanese law, could convey the intentions of the seller. I have seen several examples of the combination of similar warranty disclaimer clauses and governing law.

After the accession of CISG, Japanese companies need no longer use UCC terminology that is inconsistent with the Japanese law. They can rely upon the terminology used in CISG that can be understood by the people of 70 countries.

1. CISG is Probably More Suitable to Modern Sales Transactions than Japanese Law

The Japanese Civil Code became effective in 1898. Though there had been several amendments since that time, basic provisions concerning the sale of goods have not been changed. It was drafted taking into consideration the draft German Civil Code, with a lot of influence of the French Civil Code. It is very theoretical and dogmatic. However, lawyers specialized in foreign transactions and legal staff members of large corporations are quite familiar with the Uniform Commercial Code. To the author of this Article, the CISG provisions seem more practical and a better fit with actual commercial practices. There is no empirical study on this point. But, if you look at the above example of a warranty disclaimer clause, you may understand the strong preference for the Uniform Commercial Code among the legal staff members of large corporations and Japanese international business lawyers.

2. Somewhat Indifferent Attitude of Japanese Large Corporations and International Business Lawyers

Legal staff members of large corporations in Japan and practicing lawyers in large law firms dealing with international legal problems do not show much interest about the accession to CISG up to date. Probable reasons may be:

(i) They are not familiar with the contents of CISG. There has been no incentive for them to learn CISG up until now. They just do not like what they do not know[13].
(ii) They are influenced by American lawyers who believe that the Uniform Commercial Code is better than CISG[14] and think it is better for them to opt out just like Ame-

13 It may not only be Japanese business persons or lawyers who try to avoid a new law that they do not know. See FILIP DE LY, Opting Out: Some observations on the occasion of the CISG's 25th Anniversary, in: Franco Ferrari (ed.), Quo Vadis CISG? (Bruylant 2005) 25, at 29-30; also see RALPH H. FOLSOM, MICHAEL W. GORDON and JOHN A. SPANOGLE, International Business Transactions (6th ed., West Nutshell Series 2000) 55; LUKE NOTTAGE, Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan, in: Victoria University of Wellington Law Review 36 (2005) 815 (also at *http://ssrn.com/abstract=880372*).

rican lawyers. Many of them have studied in LL.M. courses of American law schools. Therefore, they may believe that CISG is not well drafted or defective because it is a compromise between Civil Law countries and Common Law countries, or a compromise between North and South.

(iii) The third reason is just speculation. It may be because they do not have significant volume of international disputes concerning sales of goods. There is no empirical study on this. Nonetheless, this is my impression obtained from experience as a legal staff member of a large trading company, and the impression of other professors specialized in the area of international business law. Also, many colleagues working as lawyers in large international law firms have the same impression. Most of the work in legal sections of large corporations and large law firms dealing with international transactions consists of M&A, investment, large-scale finance or project finance, joint ventures, construction projects, legal problems under anti-trust, anti-dumping, various legal disputes and compliance-related work. Work concerning international sale of goods is rare or almost non-existent.

(iv) One other possible reason is that most the large corporations have subsidiaries or branch offices or joint venture companies in countries where they purchase raw materials, parts and widgets or finished labor-intensive products to be marketed in Japan, or in countries where the Japanese companies export their products. Therefore, if there is a dispute concerning quality of goods or delay in delivery, these problems will become the problem between original sellers or ultimate buyers in a foreign country and the subsidiaries or branch offices of Japanese large corporations in that country. The legal disputes on international sale of goods will thus tend to become domestic legal disputes in that country.

Small companies may not afford to have subsidiaries or branches in foreign countries. Therefore, they may have legal disputes concerning international sales transactions. One of the unique situations in Japan is that there are several large trading companies dealing with merchandise ranging "from Chinese noodle to missiles." Many small companies use the services of trading companies. Trading companies have subsidiaries and branch offices all over the world. Again, if small companies use trading companies that have expertise in export import business, disputes concerning export and import business will become domestic disputes in the foreign country or in Japan. When a Japanese company engages in the export or import business, they inevitably involve the use of ships or aircraft and involve foreign exchange and correspondence in foreign languages. On the other hand, international sales in European countries are much simpler. For transportation of goods, they may not use ships and aircraft that require some expertise to use. Within Euro currency countries, no foreign exchange will be involved.

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14 United States delegation to the discussion of CISG at UNCITRAL insisted the inclusion of Article 1(1)(b) because they thought that UCC was better than CISG and wanted to limit the chances of application of CISG. FOLSOM ET AL., *supra*, note 13, at 51.

There are many who are proficient in European languages. There is no large general trading company willing to undertake import and export of goods on behalf of small companies.

Therefore, a hypothesis is that in Japan, the direct import business and export business are conducted only by small companies who cannot afford to establish subsidiaries, branch offices or joint venture companies in foreign countries, nor afford to use trading companies. Most of the import and export businesses are conducted between companies in Japan and their subsidiaries, branch offices and joint venture companies in foreign countries. Therefore, most of the lawyers in large law firms and legal sections of large corporations do not have much interest in CISG.

V. CONCLUSION

The Japanese government will continue to make efforts to accede to CISG. Large corporations and lawyers in large law firms may not show much interest in the accession of CISG. But there will be no incentive to oppose the accession. Problems of lack of predictability have been solved. The content of CISG is arguably far better than Japanese sales law. Even for them, sometimes sales law is important in connection with plant export business or as the governing law of sales contracts of products produced under joint ventures or project finance or other large complex project contracts. In particular, Japanese companies will be able to persuade the other party in developing countries to agree to select CISG as governing law instead of the laws of those developing countries. Hopefully, they will realize the merits of accession to CISG in Japan soon.

General References

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ZUSAMMENFASSUNG

Das japanische Justizministerium hat den Beitritt Japans zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (UN-Kaufrecht, CISG) von 1980 beschlossen. Nach den Plänen des Ministeriums soll das japanische Parlament das Abkommen noch im Laufe des Jahres 2008 ratifizieren. Der Beitrag erläutert die Hintergründe, die zu der Befürwortung des Beitritts geführt haben.