



[Articles]

An Overview on the Current Status of Japanese Private Dispute Resolution - Small impact of the ADR Act and it's still at the early stage

Hideaki Irie*

1. The Act for Promotion of Use of Alternative Dispute Resolution and the Effect

This article is intended to show an overview on the current status of the private mediation movement in Japanese society.

The Act for Promotion of Use of Alternative Dispute Resolution (Act No. 151 of December 1, 2004, hereafter the "ADR Act") was enacted as part of justice system reform and has been in force since April 2007.

The purpose of the ADR Act is to promote the use of ADR. We can recognize its positive effects, for example, new dispute resolution processes emerge one right after the other. The ADR Act gives good opportunities for experienced organizations to reconsider their processes and the rules. Ministry of Justice (MOJ) has certified 80 dispute resolution centers in Japan since April 1, 2007. In the academic fields, Japan Association of the Law of Arbitration and Alternative Dispute Resolution has been established since 2004, and the association has started to publish a new academic journal.

It is true that the ADR Act leads to "promote building new ADR organizations and processes", but fails to "promote usage of ADR by consumers". It might sound strange but it is true that many ADR processes in Japan count zero or one mediation case a year. People in ADR organizations have incentives to build and keep ADR organizations but have no incentives or disincentives to deal with disputes. This challenge has been recognized by scholars and practitioners of ADR before the justice system reform debate around the beginning of the 2000s. However, the ADR Act failed to conquer the challenge. I identify the two biggest issues under the challenge: one is the funding mechanism; the other is unauthorized practice of law (UPL) restrictions. These issues are not solved by the ADR Act enacted.

2. Actors as Private ADR Sectors in Japan

Type of private ADR organizations in Japan are divided into three categories. One is industry groups, second is Bar Associations, and third is quasi-lawyers associations (judicial scriveners, administrative scriveners, land and house investigators, certified social insurance and labor consultants, etc.). There are miscellaneous organizations besides the three categories, which are independent organizations including grassroots ones.

1) Industry Groups

Advantages of ADR Processes by Industry Groups

Many industry groups have their own organizations which have the function of complaint processing. Some of these organizations also have dispute resolution processes. The reason why such organizations have these dispute resolution processes is to secure their own market quietly and secretly. They provide free or low cost complaint handling and dispute resolution processes. Consumers do not have to hire a lawyer to start these processes. Management level is comparatively good because industry groups support the cost.

Challenges of ADR Processes by Industry Groups

Major challenges of ADR processes by industry groups are that counseling services are still doubtful and mediation processes are often too formal. Because of the nature of ADR organizations of an industry group, it is common to be questioned in terms of neutrality. Then, mediation processes tend to become more formal and more rigid. For example, a mediation committee consists of more than five specialists of academics, attorneys, and consumer advocates (As all of them are not employed by these organizations, such committee members have to be called in order to make up the committee for each case). One mediation session would be held more

* University of Tokyo, Graduate School of Interdisciplinary Information Studies, Project Researcher

than one month after, etc. It is not informal, flexible and user-friendly enough for customers. These organizations need much more cost than parties actually pay. Then, they have the incentive not to conduct mediation sessions, and have the incentive to solve problems before the formal mediation proceedings. This understanding explains why most of ADR organizations of industry group report many or at least some number of counseling services and a very small number of mediation processes.

Counseling services are commonly conducted by the organization staffs, who are typically an employee temporarily-transferred from the industry or a retired employee of the industry. Mind-set of organization staffs are or *seem* to be commonly on the industry side. Even if the dispute resolution organizations establish their policy to be neutral between consumer and industry, it is still doubtful in their informal problem solving processes which are officially reported as counseling services. More efforts are needed to make informal problem solving processes more transparent and to improve diversity among the organization staffs.

2) Bar Associations

Advantages of ADR Processes by Bar Associations

Niben Arbitration and Mediation Center has been established since 1990 by Daini Tokyo Bar Association; it has lead the private initiative mediation movement in Japan. Now, 30 centers are operated by bar associations as of September 30, 2010. Roughly 1,000 cases are filed and seventy or eighty percent of these cases are mediated a year in the centers. Attorney Sanji Harago, who was the founder and leader of Niben Arbitration and Mediation Center, emphasized that “kind” dispute resolution processes would enhance social justice. The enthusiasm of Harago has succeeded to get a sympathetic response; Niben Arbitration and Mediation Center has succeeded to list so-called “star-neutrals”, who are famous ex-judges or senior attorneys.

Parties who use Niben Arbitration and Mediation Center’s process might be satisfied by the passion and the kindness by the neutrals. For example, it is common to make the co-mediators panel of a senior construction specialist and a well-experienced attorney in order to resolve a construction dispute, and these mediators are eager to go and see the field of dispute with parties. The quick on-site investigation could enhance common ground among parties to solve the problem. These attitudes are often surprise the parties, because mediators are not arrogant at all. (Average senior attorneys might be arrogant.)

Okayama Arbitration and Mediation Center is another good example of an enthusiastic response, which

is run by Okayama Bar Association. The center is the only one which adopts the “facilitative mediation model”. The center serves training opportunities for neutrals and reviews exit surveys by parties

Challenges of ADR Processes by Bar Associations

As the motive to build ADR centers is to enhance social justice, centers handle small claims with a relatively low fee. Many centers are run by and supported financially by the bar associations. Lack of funding is the biggest challenge for all centers. There are no schemes to give some grant to centers by courts or governments. Even some neutrals are very enthusiastic to serve very high quality processes, others might not. Lack of funding leads lack of management.

Another challenge is to maintain the spirit of founders. It is 20 years from the establishment of Niben Arbitration and Mediation Center, and enthusiastic first-generation members leave the center one after another.

3) Quasi-lawyers Associations

Advantages of ADR Processes Quasi-lawyers Associations

Quasi-lawyers associations (judicial scriveners, administrative scriveners, land and house investigators, certified social insurance and labor consultants, etc.) started up building dispute resolution centers around the beginning of the 2000s. It is completely new to them, at least as the associations’ activities. As their traditional work as scrivener is to assist customers to draft applications for government agencies, they are not accustomed to assist parties with conflicts. However, lack of vanity is the strong point for them. Remarkable numbers of them are eager to study from the elementary level to conduct dispute resolution services. For example, their enthusiasm toward mediation skills is much more than lawyers’ one.

Some judicial scriveners’ groups report success stories. One story is that parties finally reached agreement after a four-hour joint session of mediation (Court annexed mediation service provides commonly a one or two hour session by shuttle-diplomacy style.). Another story is a mediation session between a man and woman. A woman-center official joins and helps the dispute. Even the official keeps silent during the session; the woman as the party feels confident because of her attendance. (Court annexed mediation service routinely refuses a third party.)

Another advantage is the financial one. As the incentive is not to establish the business among ADR fields but to enhance their area of certified work by the government, they need not take off their business quickly. (Actually, they are suffering from budgetary issues for operating ADR services.)

Challenges of ADR Processes Quasi-lawyers Associations

Lack of experience as conflict specialists is the biggest challenge to earn a reputation in this field. Even the members of the same associations are not willing to use their centers because of less reliability. As the numbers of usage are low, it is hard to become experienced. As they are not experienced, people hesitate to use these centers. Thus, it is hard to exit from the circle.

Diversity level is quite low, for example, it is seldom outsiders that join centers. Even centers run by bar associations list outsider specialists like construction specialists and mental health specialists as roster members, however, centers run by quasi-lawyers association do not.

Upper level association which is called a “federal association” tends to be eager to develop a new field, and lower level local associations tend to avoid these jobs because it is very time consuming and not good “business” in terms of revenue/cost balance.

Another challenge is the unauthorized practice of law restrictions. According to the American Bar Association, mediation is not the practice of law (ABA 2002).¹ On the other hand, Japan Federation of Lawyers Association regards mediation as the practice of law. Under the ADR Act, anyone (in other words a non-lawyer) including a quasi-lawyer can be a mediator “with assistance of a lawyer”. It was good news to quasi-lawyers to start the way to become a mediator, but also bad news to them that it costs much to get lawyers’ assistance. In reality, getting lawyers’ assistance is sometimes very hard because lawyers are reluctant to help rivals and a very small portion of lawyers are interested in business serving as a neutral.

4) Miscellaneous

Though independent dispute resolution organizations vary very much about what kind of dispute they handle and how these organizations have been established, most of them have the same character that they mediate a very small number of cases every year, mostly under ten, commonly zero or one.

Grassroots organizations emerged in the dispute resolution field in recent years. Ehime Wakai Shien Center (Ehime Mediation Center), which is located in

Matsuyama City, is regarded as a successful grass-roots model. The center, which has been established by a senior judicial scrivener, provides free mediation service for citizens. The center reported 55 mediated cases (both parties participate) and 37 settled cases for seven years (from 2004 to 2010 July). One of the successes of the mediation case at the center is that they schedule mediation sessions every week (In the court annexed mediation processes, parties commonly have to be wait one month or even more after one session.). They provide sincere and user-friendly service for free with altruism. As no governmental and private funds support the center, they maintain the center by the members’ own funding.

3. Conclusion - Still at the Early Stage

When we look at the private dispute resolution movement very carefully, we can find some parties are very satisfied with the processes. In other words, private dispute resolution organizations create values on society. This means the private dispute resolution movement in Japan will grow in the long run.

However, at present, even dispute resolution specialists often hesitate to recommend using private dispute resolution processes because the quality of the services is unstable. Some mediators or some mediation organizations are excellent, but others are not. Though the purpose of the ADR Act is to provide consumers enough information about private dispute resolution processes, it is not enough for consumers to distinguish good and bad processes for private dispute resolution.

As dispute resolution providers, the funding mechanism and UPL restrictions are problems too huge to solve. In future, additional policies for the dispute resolution field would be needed. As a business field, policy for creating a competitive environment is necessary. It means we have to reconsider the UPL restrictions. As a social justice enhancement tool, funding and other supporting mechanisms are necessary.

In short, the private dispute resolution movement in Japan is still at the early stage.

¹ ABA, *Section of Dispute Resolution (2002) “Resolution on Mediation and the Unauthorized Practice of Law”, Dispute Resolution Ethics A Comprehensive Guide*. Phyllis Bernard & Bryant Garth eds. 409-413.

Choice of Law under the United Nations Convention on Contracts for the International Sale of Goods (Part 2)

Gerald Paul McAlinn*

Introduction

Part 1 of this article¹ provided background information and a general introduction to the United Nations

Convention on Contracts for the International Sale of Goods (the CISG or the Vienna Sales Convention), as well as to Japan’s decision to join the regime some

* Professor of Law, Keio Law School, Tokyo, Japan. The author welcomes questions or comments by email at mcalinn@gmail.com.

¹ Gerald Paul McAlinn, “Japan and the United Nations Convention on Contracts for the International Sale of Goods (Part 1)” 24 JCAA Newsletter 1 (May 2010).

29 years after the CISG came into force. The CISG became a part of Japanese law on August 1, 2009, and is now applicable to contracts for the sale of goods between commercial parties whose places of business are in different “Contracting States” (i.e., any of the 76 countries that have joined the CISG),² or “when the rules of private international law lead to the application of the law of a contracting state.”³

The *raison d’être* of the CISG is to provide parties engaging in the international sale of goods with a uniform body of contract law so that neither party to the contract will be required to submit to substantive rules with which it is not familiar.⁴ Harmonization is intended to create a level playing field thereby increasing international trade and ultimately benefiting all nations.⁵ At the same time, the drafters realized that making the provisions of the CISG mandatory would not garner the necessary support to make the objectives of the Vienna Sales Convention a reality. The compromise was to allow parties to opt out of the CISG under Article 6.⁶

Choice of Law Rules under the CISG

Choice of law principles are not an issue under Article 1(1)(a) of the CISG if the parties to a commercial contract for the sale of goods are in different contracting states. The CISG applies automatically under this subparagraph, subject only to the right to opt out under Article 6.

The CISG can also apply if the parties to a contract chose the law of a jurisdiction that is a contracting state under Article 1(1)(b). An example of such a case is ICC arbitration case 11333 (the “*Machine Case*”) decided in 2002.⁷ The arbitration involved a U.S. insurer as the assignee of a Canadian buyer (claimant) and an Italian seller (respondent). The contract was entered into before Canada joined the Vienna Sales Convention so the tribunal rightly determined that the CISG was not applicable pursuant to Article 1(1)(a). The tribunal found that the CISG was nevertheless applicable under Article 1(1)(b) because

the parties had selected French law and the CISG “... is the French law of international sales of goods.”⁸

If one party is from a contracting state and the other is not, and the contract does not have a choice of law provision (unlike in the *Machine Case* where the parties chose French law) the CISG may still apply. This can happen when relevant choice of law rules lead to the application of the law of a contracting state. Assume that party A with a place of business in country X makes a contract with party B with its place of business in country Y, and assume further that country X is not a contracting state but country Y is. If a court or arbitral tribunal determines that the law of country Y applies to the contract under relevant choice of law principles, then the CISG will be the governing law because the CISG is the law of country Y under the same reasoning as the *Machine Case*.⁹

What about a case with the same facts as above, but now we assume that both countries X and Y are members of the CISG and the issue is to be decided by a court in country Z, which is not a party to the CISG? The court in country Z should still apply the CISG because arguably the parties intended that result since they are both from different contracting states and did not expressly exclude the CISG.¹⁰

The choice of law principle embodied in Article 1(1)(b) was perceived by some delegates as being problematic. These countries sought to have it removed from the final version of the CISG, preferring that the application of the CISG be limited strictly to contracts between parties in contracting states. Another compromise was reached with the addition of Article 95 to the CISG. This article provides that “Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of the convention.”

A small number of countries have taken advantage of Article 95 to exclude the choice of law rule of Article

² CISG, Article 1(1)(a).

³ CISG, Article 1(1)(b). The term commonly used to refer to private international law in common law jurisdictions and in contractual language is choice of law.

⁴ Readers should see Part 1 for a brief overview of what kinds of contracts are excluded and should read Articles 1 through 6 of the CISG to understand its sphere of application.

⁵ The Preamble of the CISG expresses the opinion “that the adoption of uniform rules which govern contracts for the international sales of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”

⁶ Article 6 provides as follows: “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.”

⁷ ICC Arbitration Case 11333 (2002), CISG Database at <http://cisgw3.law.pace.edu/cases/021333i1.html>. See, also, John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), Section 48(b) at <http://www.cisg.law.pace.edu/cisg/biblio/ho1.html>. Canada joined the CISG in 1992.

⁸ *Id.* at CISG Database at <http://cisgw3.law.pace.edu/cases/021333i1.html>. Accord, ICC Arbitration Case 12173 (partial award 2004), CISG Database at <http://cisgw3.law.pace.edu/cases/0412173i1.html>. The ICC arbitral tribunal applied the CISG when a contract provided for Swiss law without expressly excluding Swiss conflict of law rules. In the view of the tribunal, Swiss law applied to the contract but, since Swiss law includes the CISG, the CISG was the applicable law.

⁹ See, *Margon S.R.L. v. NV Sadelco*, Commercial Court of Hasselt, AR 2012/96 (1996) where an Italian seller concluded a contract with a Belgian buyer. At the time of the contract, Belgium was not a party to the CISG. The Belgian court applied its private international rules and determined that the law of Italy should apply to the contract and, since Italy was a contracting state, the CISG was the applicable law. Abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=264&step=Abstract>. Belgium joined the CISG in 1997.

¹⁰ See, Chow and Schoenbaum, *International Business Transactions* 2d ed. (Aspen Publishing 2010) (arguing that the CISG should apply unless to do so would violate the public policy of the third country) at p. 182.

1(1)(b). Reservations under Article 95 take three distinct forms:¹¹

- A reservation against the extension of the CISG when Article 1(1)(b) would cause it to apply, i.e., by virtue of choice of law rules¹²
- A reservation where national courts will not apply Article 1(1)(b) to sales where the other country has made an Article 95 reservation¹³
- A reservation where the country requests that its domestic law not be applied, in favor of the CISG, if local law would be applicable by virtue of a local conflict rule¹⁴

Opting Out of the CISG

Article 6 permits parties to opt out of the CISG. The CISG has been called a “trap for the unwary” because it is not as easy to opt out as one might expect. For example, merely choosing a jurisdiction’s national law in an international sales contract, without more, may not be sufficient as demonstrated by the *Machine Case*. There the parties chose French law in their contract but got the CISG because it had supplanted French law as to contracts within the sphere of the CISG. By the same reasoning, if a Japanese party and a U.S. party to an international sales contract were to select Japanese law as the governing law, a court or an arbitral tribunal should apply the CISG, since both Japan and the U.S. are parties to the CISG. The CISG now represents the contract law of both the U.S. and Japan as to international agreements for the sale of goods.¹⁵

Courts have not always been consistent in finding the CISG applicable under circumstances such as in the *Machine Case*. In *Beijing Chen Guang Hui Long Electronic Technology Development Co. Ltd. v. Thales (France) Co.*,¹⁶ the Beijing High People’s Court was called upon to decide the applicability of the CISG to an alleged contract (whether a contract existed was one of the issues to be decided) between a French seller (defendant) and a Chinese buyer (plaintiff). The alleged contract apparently chose Chinese law and did not expressly exclude the CISG. The Beijing High People’s Court ruled as follows:

The [Buyer] asserts that Chinese law and the CISG apply to the present dispute. The [Seller] asserts that only Chinese law applies to this dispute, and denied the application of the

CISG in the first instance. This Court finds that the parties do not object to the application of Chinese law. The key is whether the CISG is applicable. Article 142 of the General Principles provides,

“If any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations.”

If businesspersons from two Contracting States of the CISG do not exclude the application of the CISG, the CISG shall automatically and preemptively be the law applicable to their transactions. However, the [Seller] in the present case expressly stated that the Chinese domestic law applied to the dispute, which does not include the CISG. Moreover, the [Buyer] did not submit that the Chinese law and the CISG have different provisions. On the other hand, the [Buyer] claimed that under the relevant provisions on “offer” and “acceptance” of either Chinese law or the CISG, the contract between the [Buyer] and the [Seller] was sufficiently concluded. Consequently, this Court does not support the [Buyer]’s claim on appeal that the Court of First Instance erred in not applying the CISG. This Court upholds the Court of First Instance’s application of Chinese law to the present case.

The Court failed to explain why Chinese domestic law does not include the CISG, apparently being satisfied that the result would be the same whether the issue of formation was governed by domestic Chinese law or the CISG. A similar result was reached by the Sichuan High People’s Court in a case involving a Chinese seller (plaintiff) and a U.S. buyer (defendant) holding that a choice of law provision calling for Chinese law should be interpreted to mean Chinese domestic law, ex-CISG. The Sichuan High People’s Court did not expressly discuss whether the choice of Chinese law meant the parties had opted out of the CISG but that is the logical result in light of the deci-

¹¹ Philip De Ly, “Sources of International Sales Law: An Eclectic Model,” at UNCITRAL -- SIAC Conference on 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005) quoted on the CISG Database at <http://www.cisg.law.pace.edu/cisg/text/e-text-95.html>.

¹² This kind of reservation has been lodged by the U.S., China, Singapore, the Czech Republic and Slovakia.

¹³ Germany has made this kind of reservation.

¹⁴ The Netherlands has made this kind of reservation.

¹⁵ As of this writing, the author has not been able to find any reported Japanese cases decided since the CISG became effective in Japan. It is reasonable to expect that Japanese courts will embrace uniformity and will be diligent in seeking interpretations that are consistent with the growing body of CISG precedent.

¹⁶ Beijing High People’s Court (18 March 2005), CISG Database at <http://cisgw3.law.pace.edu/cases/050318c1.html>. See, also, *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, where the Canadian Supreme Court did not refer to the CISG when considering two contracts entered into by a Canadian company and a German company that contained choice of law provisions selecting German law. CISG Database at <http://scc.lexum.umontreal.ca/en/2005/2005scc46/2005scc46.html>.

sion.¹⁷ It is also not clear whether the court analyzed the result under both Chinese domestic law and the CISG as did the Beijing High People's Court.

In contrast to the decisions of the Beijing and Sichuan High People's Court, a CIETAC arbitral tribunal held that when the parties did not include a choice of law provision in their contract and the parties are located in different contracting countries (in this case China and Germany) then "the CISG should be the applicable law of the current case."¹⁸ This case is distinguishable from the two High People's Court results as the parties did not expressly include a governing law clause choosing Chinese law.

Another variation was reached in a Russian arbitration case. In the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry involving a Russian seller (respondent) and a Swiss buyer (claimant), the tribunal "concluded that the agreement of parties to the international sales contract, commercial enterprises of which are situated in States parties to the Vienna Convention of 1980, that calls for the application to the dispute of the substantive law of the Russian Federation [RF], and in cases of its contradiction with the rules of international law, the applicability of CISG, shall be understood to mean that the basic statute that regulates the parties' relations in connection with this contract shall be the Civil Code [CC] of the RF but, in case of discrepancies between the CC of the RF and the CISG, the rules of the CISG shall be applied."¹⁹ The tribunal deferred to Russian law instead of clearly providing that the CISG applies as a part of Russian law. The holding seems to require a comparison of the substantive rules of Russian law with those of the CISG to determine if there is any conflict. The tribunal sought to preserve uniformity with the global standards of the CISG by giving primacy to the CISG but only in cases of substantive conflict. This it is not, however, a very practical or advisable solution. Apart from the extra work required to analyze and compare two potentially different bodies of law (something it is unlikely parties will have done at the time of entering into the agreement – one of the merits of a harmonized body of law), there is always a possibility for error on the part of the tribunal (or a court) in interpreting either Russian law or the CISG.

There is one other interesting point from the *Machine Case* that bears on the operation of Article 1(1)(b).

The parties, it will be remembered, had selected French law in their contract. Since the parties were from a contracting and a non-contracting state (i.e., Article 1(1)(a) did not lead to an automatic application of the CISG), a choice of law analysis was necessary under Article 1(1)(b). The seat of the arbitration was France. The tribunal observed that the relevant forum for such a determination would ordinarily be the forum state. In other words, French private international law rules would be utilized to make a choice of law under Article 1(1)(b). Since arbitral tribunals (unlike judges of national courts) have no forum state, the tribunal reasoned it was not bound by the conflict of laws rules of France where the arbitration was being held. The arbitral tribunal instead reverted to the principle of party autonomy and considered the question of whether the choice of French law necessarily meant by tacit agreement that the parties had intended to exclude the CISG. The tribunal concluded that "it is not possible to infer such an intention to exclude (tacitly) the application of the CISG from the Agreement. In addition, the parties have not shown any element enabling this Tribunal to ascertain a common intention to exclude the application of the CISG."²⁰

Making choice of law a matter of party autonomy means, in essence, that the tribunal must examine evidence to determine the intention of the parties as to the meaning of the governing law provision. The parties in the *Machine Case* contract had provided for a one-year limit on the buyer's right to give notice of nonconforming goods. On the other hand, Article 39 (2) of the CISG establishes a two-year limitation for the buyer to give notice to the seller of nonconformity of goods. The claimant argued that this was evidence of the intention of the parties to exclude the CISG. The tribunal rejected the argument of the claimant/buyer and concluded as follows:

When a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question. It does not affect the applicability of the CISG in general. The parties' specific agreement to reduce, to 12 months, the two-year time limit provided for in Art. 39 CISG does not lead the Arbitral Tribunal to another finding. (footnotes omitted)²¹

This reasoning supports the objectives of the CISG

¹⁷ *Global Nutri Co. v. Sichuan Xinguang Industrial Import & Export Co. Ltd.* (19 December 2005), CISG Database at <http://cisgw3.law.pace.edu/cases/051209c1.html>.

¹⁸ *China International Economic & Trade Arbitration Commission (CIETAC) Arbitration Award* (30 June 2007), CISG Database at <http://cisgw3.law.pace.edu/cases/070630c1.html>.

¹⁹ CISG Database at <http://cisgw3.law.pace.edu/cases/060630r1.html>.

²⁰ *Machine Case*, *supra*, n 7.

6 ²¹ *Machine Case*, *supra*, n 7.

and is correct because Article 6 permits derogation.²²

Courts in the U.S. have been particularly strong in their support of the CISG, where it is now considered to be, in effect, a federal law for the international sale of goods.²³ In *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), the 5th Circuit Court of Appeals considered a contract dispute involving the sale of gasoline by BP (U.S.) to Empresa (Ecuador). The contract contained a governing law clause selecting the law of Ecuador. The district court sitting in diversity applied the choice of law rules of the state (in this case, Texas) where the federal district court was located. Texas law enforces unambiguous choice of law provisions so the district court held that Ecuador law, and not the CISG, should govern the contract.

The 5th Circuit reversed, using reasoning reminiscent of that in the *Machine Case*, and concluded that the district court judge erred for the following reasons:

Though the court correctly recognized that federal courts apply the choice of law rules of the state in which they sit, it overlooked its concurrent federal question jurisdiction that makes a conflict of laws analysis unnecessary. The general federal question jurisdiction statute grants subject matter jurisdiction over every civil action that arises, *inter alia*, under a treaty of the United States. 28 U.S.C. § 1331(a). The CISG, ratified by the Senate in 1986, creates a private right of action in federal court. *Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir.1995). The treaty applies to “contracts of sale of goods between parties whose places of business are in different States... [w]hen the States are Contracting States.” CISG art. 1(1)(a). BP, an American corporation, and PetroEcuador, an Ecuadorian company, contracted for the sale of gasoline; the United States and Ecuador have ratified the CISG.

As incorporated federal law, the CISG governs the dispute so long as the parties have not elected to exclude its application. CISG art. 6. PetroEcuador argues that the choice of law provision demonstrates the parties’ intent to apply Ecuadorian domestic law instead of the CISG. We disagree.

A signatory’s assent to the CISG necessarily incorporates the treaty as part of that nation’s

domestic law. ... Given that the CISG is Ecuadorian law, a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction. (footnotes omitted)²⁴

If selecting national law is not enough to opt out, the question becomes what should practitioners do to ensure their contracts are not unwittingly caught in the CISG trap. The answer to this question is apparent from the majority of cases decided so far. If the parties do not want the CISG to apply, they should insert express opt out language into their governing law clause and eliminate any room for interpretation by a court or arbitral tribunal.

A sample provision opting out of the CISG might read as follows:

GOVERNING LAW. This Agreement shall be interpreted and construed according to, and governed by, the domestic law of [JURISDICTION], without regard to, and excluding, any such laws that might direct the application of the laws of some other jurisdiction. For the avoidance of doubt, the parties expressly exclude the application of the United Nations Convention on Contracts for the International Sale of Goods to this Agreement.

A clause such as the above should work to remove any interpretation under which the CISG can be applied in contravention of the intention of the parties.

Additional Considerations

There are three additional points to be made regarding choice of law and the CISG.

First, contract drafters have a duty to make an informed decision as to governing law. Parties and their counsel have a natural tendency to negotiate vigorously for the law of their home jurisdiction. This is often a reflex position that can bring parties to impasse. It could well be the case that the CISG provides a more favorable body of rules than the law of a particular jurisdiction. This kind of analysis is case specific and can only be assessed after looking at the contract in its totality, but it is an exercise that cannot, and should not, be avoided now that Japan has joined the CISG.

Second, when doing business in countries with unfavorable or underdeveloped legal infrastructure, affir-

²² The right to derogate is subject to Article 12, which provides, in relevant part, that “Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.” Argentina, Armenia, Belarus, Chile, China, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation and the Ukraine have filed Article 12 declarations.

²³ In the U.S., contract law is a matter of state law.

²⁴ 332 F.3d 333 at pp. 336-37.

matively selecting the CISG may be an effective (and face-saving) alternative to arguing against the use of the other party's law.

Third, the CISG has six original languages (Arabic, Chinese, English, French, Russian and Spanish) each considered to be equally authentic, and a multitude of unofficial translations into other languages. As all experienced international practitioners realize, translations of contracts are rarely identical in their rights and obligations. Words can carry a very different nuance from one language to another. To avoid this problem, it might be advisable if the CISG is going to govern a contract for the parties to select the official version that they want the court or arbitral tribunal to use. The CISG Database recommends including the following sentence: "The applicable text of the Convention shall be the official United Nations text in the language in which this contract is written."²⁵

[JCAA Activities]

1. International Commercial Arbitration Seminar "Dos & Don'ts of Drafting an International Arbitration Clause"

On August 30, 2010 in Osaka, JCAA, Osaka Office, co-organized the International Commercial Arbitration Seminar, featuring a lecture and panel discussions, with the Kansai Branch of the Japan Association of Arbitrators and the Osaka Chamber of Commerce and Industry.

The speaker was Mr. Teppei Mogi (Attorney-at-Law, Oh-Ebashi LPC & Partners). He made a presentation on the drafting of the international arbitration clause, explaining the summary of the draft of "Guideline for Drafting an International Arbitration Clause" made by the International Bar Association (IBA). A panel discussion followed. Panelists were Mr. Mogi, Mr. Haruo Okada (Attorney-at-Law, H. Okada International Law Office), and Mr. Masaharu Onuki, Executive Director of JCAA, with Mr. Kazuhiro Kobayashi (Attorney-at-Law, Kikkawa Law Office) serving as the moderator. At the panel discussion, various issues and practical aspects on the arbitration clause were discussed.

Conclusion

Two of the most critical provisions of any international agreement are choice of law and choice of forum. The former because it determines the substantive rights and duties of the parties to the contract, and the latter because it dictates the place and procedures pursuant to which a dispute will be resolved. The dramatic growth of arbitration (i.e., choice of forum) globally stands as a testament to how important party autonomy is to the international business community. Freedom to select substantive rules to govern rights and duties under contract (i.e., choice of law) is an equally critical element of party autonomy. With the CISG now in effect in Japan, practitioners must study its provisions and make informed decisions whether to have it govern their contractual relationship or to opt out.

The Seminar attracted an audience of about 180, consisting of lawyers, business people, and academics.

2. International Dispute Resolution Seminar "The Newest Trend in US Litigation and Arbitration Practice"

On October 5, 2010 in Osaka, JCAA, Osaka Office, co-organized the International Dispute Resolution Seminar entitled "The Newest Trend in US Litigation and Arbitration Practice", with the Osaka Bar Association, the Osaka Chamber of Commerce and Industry, the Inter-Pacific Bar Association (IPBA), and the Kansai Economic Federation.

The speaker was Mr. Yasuhiro Saito, Attorney-at-Law in New York and New Jersey, partner of Carter Ledyard & Milburn LLP. Mr. Saito delivered his speech about the current trends and situations in litigation and arbitration practice in U.S.A., picking up the topics on Discovery including E-Discovery, Deposition, and Trial Practice. Approximately 150 people attended the seminar, most of who were lawyers and business people. A reception was held after the seminar ended.

The Japan Commercial Arbitration Association

URL: <http://www.jcaa.or.jp>

Tokyo Office

3F Hirose Bldg., 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054 Japan

Tel: +81-3-5280-5161 Fax: +81-3-5280-5160 Email: arbitration@jcaa.or.jp

Osaka Office

5F The Osaka Chamber of Commerce & Industry Bldg., 2-8, Hommachibashi, Chuo-ku, Osaka 540-0029 Japan

Tel: +81-6-6944-6163 Fax: +81-6-6946-8865 Email: osaka@jcaa.or.jp

²⁵ CISG Database at <http://www.cisg.law.pace.edu/cisg/text/text.html>.