

2017

## Should the United States Withdraw Its CISG Article 95 Declarations

Peter Winship  
*Southern Methodist University, Dedman School of Law*

---

### Recommended Citation

Peter Winship, *Should the United States Withdraw Its CISG Article 95 Declarations*, 50 INT'L L. 217 (2017)  
<https://scholar.smu.edu/til/vol50/iss1/15>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## Should the United States Withdraw Its CISG Article 95 Declaration?

PETER WINSHIP\*

*As a benefit of membership in the ABA's Section of International Law, The International Lawyer ends up in the hands of thousands of practicing lawyers worldwide. As a consequence, The International Lawyer is an ideal place to solicit answers to questions like "Should the United States withdraw its Article 95 'declaration' to the United Nations Convention on Contracts for the International Sale of Goods?" The following paper asks this very question. It does so in the hope that readers with practical experience with the CISG will respond. When considering an appropriate way to celebrate, the author wished to highlight the practical value of the most widely-circulated international law journal in the world today.\*\**

Twenty-five years ago the United States ratified the U.N. Sales Convention ("CISG").<sup>1</sup> At that time it declared that it would not be bound by subparagraph (1)(b) of article 1—a provision that makes the Convention applicable when choice-of-law rules lead to the law of a State party to the Convention. Article 95 authorized the United States to do so.<sup>2</sup> Should the United States now withdraw this declaration?<sup>3</sup>

---

\* James Cleo Thompson Sr. Trustee Professor of Law, SMU Dedman School of Law, Dallas, Texas. Comments, queries and complaints should be sent to [pwinship@mail.smu.edu](mailto:pwinship@mail.smu.edu).

\*\* The paper was presented several years ago to a meeting of the U.S. Secretary of State's Advisory Committee on Private International Law. The text is reproduced as written but the footnotes have been modified to conform to standard citation form. The author has prepared a more elaborate analysis that, with the permission of the editors of *The International Lawyer*, will be published with appropriate acknowledgments.

1. United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10-Apr. 11, 1980, *Documents of the Conference and Summary Records of the Plenary Meetings and the Meetings of the Main Committees*, U.N. Doc. A/CONF.97/18 (Apr. 11, 1980) [hereinafter CISG]. The United States signed the Convention on August 31, 1981, and it deposited its instrument of ratification on December 11, 1986. Both the ratification and declaration entered into force on January 1, 1988, when the Convention itself entered into force. *Id.* arts. 97(3) & 99(1), at 189.

2. *Id.* art. 95, at 189 ("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 this Convention").

3. Although the question is asked only about the CISG, the same question arises with respect to the Limitation Convention to which the United States is also a party. United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, May 20-June 14, 1974, *Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, U.N. Doc. A/CONF.63/15, as amended by the Protocol of Apr. 10, 1980. CISG, *supra* note 1, Annex II, at 191-92 [hereinafter Protocol]. As amended, the

Professor Harry Flechtner has made the case for withdrawal.<sup>4</sup> This paper comments on his arguments. Before setting out these comments, however, the paper first examines the present effect of the article 95 declaration, the reasons for the declaration, and the consequences of withdrawing it in order to put the comments in context.<sup>5</sup>

### **I. When ARE U.S. Courts Now Bound to Apply the CISG to a Dispute Arising from a Cross-Border Sale of Goods Transaction?**

As a consequence of the article 95 declaration, U.S. courts are only bound to apply the CISG when subparagraph (1)(a) of article 1 is satisfied: “This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States (*i.e.*, States party to the Convention)”, and even then only if the seller and buyer have not agreed to exclude its application as they are authorized to do under article 6.<sup>6</sup> Thus, if an enterprise with its place of business in Texas agrees to the sale and purchase of goods with a business in Mexico, a U.S. court should apply the CISG to a dispute arising from the sales contract. Both the United States and Mexico are parties to the Convention and there is nothing to suggest that the seller and buyer have excluded application of the Convention. If, on the other hand, the Texas enterprise agrees on similar terms with an English company, a U.S. court will not be bound to apply the CISG because the United Kingdom is not yet a party to the Convention. (Note that while the court is not bound to apply the CISG, the court is not prohibited from doing so.)

In most cases, U.S. courts—and presumably practitioners aware of the CISG—have had little difficulty applying the scope provision in subparagraph (1)(a) of article 1.<sup>7</sup> The only choice-of-law rule that the court must apply when faced with a non-U.S. plaintiff or defendant in a dispute arising from a contract of sale is this subparagraph. Although state (*e.g.*,

---

Limitation Convention has the same scope as the CISG and the Convention authorizes a declaration similar in effect to the CISG article 95 declaration. *See* Protocol, art. I & art. XII, at 191-92. The United States made such a declaration at the time it acceded to the Convention as amended by the Protocol. The U.S. declaration became effective on December 1, 1994, when the Convention entered into force for the United States. *Id.*

4. Letter from Harry Flechtner, Professor of Law, University of Pittsburgh, to Keith Loken, Attorney in the Office of the Legal Advisor, U.S. Department of State (Jan. 30, 2012) (*See* App. 1).

5. This paper has been prepared for a meeting of the U.S. Secretary of State’s Advisory Committee on Private International Law on October 11-12, 2012 and for a panel at the Fall Meeting of the International Law Section of the American Bar Association on October 18, 2012. A more detailed manuscript, with the usual academic elaborations and qualifications, will be published in a suitable law review in due course.

6. CISG, *supra* note 1, art. 6, at 5. (“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. CISG, *supra* note 1, art. 1(1)(a), at 5.

Texas) conflict of laws rules would normally govern even international choice-of-law issues, the supremacy clause of the federal constitution makes the Convention the supreme law of the United States and thus the CISG scope provision displaces these state rules.<sup>8</sup>

## **II. What Would Be the Consequence of Withdrawing the Article 95 Declaration?**

If the United States withdraws its article 95 declaration, U.S. courts will apply the CISG, rather than domestic sales law, when choice-of-law rules lead to U.S. law. Subparagraph (1)(b) of article 1 provides that the Convention also applies “when the rules of private international law [*i.e.*, choice-of-law rules] lead to the application of the law of a Contracting State.”<sup>9</sup> This subparagraph is irrelevant in a Texas-Mexico dispute because the Convention applies by virtue of subparagraph (1)(a), but is relevant in a Texas-England dispute.<sup>10</sup> In the latter dispute, a U.S. court would have to determine whether applicable choice-of-law rules lead to application of the law of the United States, England, or a third State (in which case it must further determine whether that State is a Contracting State).<sup>11</sup> If the court concludes that applicable choice-of-law rules do not lead to the law of a foreign State, the court would be bound—absent the article 95 declaration—to apply the Convention by virtue of the supremacy clause.<sup>12</sup>

For a variety of reasons, U.S. courts frequently end up applying U.S. law when the seller and buyer have not agreed on the applicable law. In many cases, of course, choice-of-law rules will lead to domestic U.S. law, but other practical considerations may also play a role. Judges and attorneys are notoriously gun shy of conflict of laws issues. The attorneys may conclude that the result would be the same no matter what law applies and fall back on local U.S. law; local attorneys representing foreign clients may be more comfortable arguing on the basis of familiar domestic law; a party may not succeed in proving the content of foreign law. This last reason, for example, is why the one U.S. court analyzing the issue in the context of an international sale—*Prime Start Ltd. v. Maber Forest Products, Ltd.*—decided that because foreign law had not been proved it would apply the locally-enacted Uniform Commercial Code (UCC).<sup>13</sup>

If the United States withdraws its article 95 declaration, the results in the cases outlined in the preceding paragraph would change. U.S. courts would

---

8. U.S. CONST. art. VI, cl. 2.

9. CISG, *supra* note 1, art 1(1)(b), at 5.

10. *Id.*

11. Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in diversity cases a federal court must look to the choice-of-law rules of the state in which it sits. Whether uniform choice-of-law rules could develop as federal common law to implement the Convention and its purpose of promoting uniform rules for cross-border sales is a question that deserves attention.

12. U.S. CONST. art. VI, cl. 2.

13. *Prime Start Ltd. v. Maher Forest Prod., Ltd.*, 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006). An edited text of the decision with annotations is set out in Appendix 2 of this paper.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

220 THE INTERNATIONAL LAWYER

[VOL. 50, NO. 1

apply the CISG rather than domestic state law, usually the Uniform Commercial Code,<sup>14</sup> unless the parties are astute enough to agree to exclude the Convention. Thus, the federal district court in the *Prime Start* case would now apply the Convention, rather than the UCC, as the default rule. Judges, counsel, and parties may be surprised by this change from familiar state law to the less familiar legal rules of the CISG.<sup>15</sup>

Not only would U.S. businesses and legal community be surprised by the application of the CISG rather than state sales law, but application of the CISG may be perceived as unfair. Following withdrawal of the article 95 declaration, a court—whether U.S. or foreign—will apply the CISG if U.S. law is applicable. If, however, the foreign party’s law is applicable the same court will look to that party’s domestic sales law. The U.S. party, in other words, gives up familiar (and modern) state sales law for the less familiar text of the CISG. The foreign party, on the other hand, will have the advantage of its familiar domestic law or the international text of the CISG, depending on whether choice-of-law rules lead to its law or U.S. law.

### **III. Why Did the United States Make the Article 95 Declaration in the First Place?**

The public statement of the reasons for the article 95 declaration is found in Appendix B to the legal analysis accompanying President Ronald Reagan’s 1983 message to the Senate recommending that it give its advice and consent to ratification of the Sales Convention.<sup>16</sup> The Senate consented to this recommendation and the United States ratified the Convention subject to the article 95 declaration.

Appendix B essentially provides two reasons in support of its recommendation: non-uniform choice-of-law rules would create uncertainty as to when the CISG would govern, and extended application of the CISG would be at the expense of the Uniform Commercial Code. The Appendix states in part:

The United States, in signing the Convention, stated that ratification subject to the Article 95 reservation was contemplated. This position,

---

14. The Uniform Commercial Code will “usually” be the relevant state law but it should be remembered that Louisiana has not adopted UCC Article 2, substituting instead a sales law that draws upon civil law, the UCC and the CISG. La. Civ. Code Ann. arts. 2438-2659 (1993). Later references in this paper to the Uniform Commercial Code alone should be read as subject to this qualification.

15. Survey after survey continues to show that the U.S. lawyers and judges are woefully ignorant of the CISG. See, e.g., Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation’s Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States*, 27 J.L. & COM. 1 (2008).

16. Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods, Sept. 21, 1983, S. TREATY DOC. NO. 98-9, app. B (1983). Message from the President of the United States, Appendix B, is set out as Appendix 3 of this paper.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2017] SHOULD U.S. WITHDRAW CISG ARTICLE 95 DECLARATION? 221

recommended by the American Bar Association,<sup>17</sup> will promote maximum clarity in the rules governing the applicability of the Convention. The rules of private international law, on which applicability under subparagraph (1)(b) depends, are subject to uncertainty and international disharmony. \*\*\*

A further reason for excluding applicability based on subparagraph (1)(b) is that this provision would displace our own domestic law more frequently than foreign law. By its terms, subparagraph (1)(b) would be relevant only in sales between parties in the United States (a Contracting State) and a *non*-Contracting State. \*\*\* Under subparagraph (1)(b), when private international law points to the law of a foreign *non*-Contracting State the Convention will not displace that foreign law, since subparagraph (1)(b) makes the Convention applicable only when “the rules of private international law lead to the application of the law of a *Contracting* State.” Consequently, when those rules point to United States law, subparagraph (1)(b) would normally operate to displace United States law (the Uniform Commercial Code) and would not displace the law of foreign *non*-Contracting States.<sup>18</sup>

The Appendix also notes that “parties who wish to apply the Convention to international sales contracts not covered by Article 1(1)(a) may provide by their contract that the Convention will apply.”<sup>19</sup>

The Secretary of State’s Advisory Committee on Private International Law (“ACPIL”) had earlier endorsed the analysis in Appendix B at a meeting in 1981.<sup>20</sup> That meeting had before it the ABA Report and a memorandum from Professor John Honnold, who had been a member of the U.S. delegation to the 1980 Vienna Conference.<sup>21</sup> The meeting itself noted the issue of the scope of federal pre-emption.

#### **IV. How Many Other States Have Made Article 95 Declarations?**

As of October 2012, only seven of the seventy-eight Contracting States have made article 95 declarations. In addition to the United States, these States include Armenia, China, Czech Republic, Slovakia, Singapore, and St.

---

17. The ABA report states that “[t]he principal impact of this provision on traders of a contracting state appears to be that the Convention would be applicable in a greater number of cases but at the expense of the contracting state’s domestic law. The provision also reintroduces the uncertainties of private international law which the CISG was designed to avoid.” A.B.A., *Report to the House of Delegates*, 18 INT’L LAW. 39, 42 (1984).

18. Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods, *supra* note 16, app. B, at 17.

19. *Id.* at 18.

20. As the author was the author of the ABA report and was present at the ACPIL meeting, the author is speaking from firsthand knowledge.

21. *Id.*

Vincent & Grenadines.<sup>22</sup> Armenia is the most recent State to do so (January 1, 2010).<sup>23</sup> None of these States has withdrawn its declaration although several authors have urged them to do so and China is reported to be about to withdraw its declaration.<sup>24</sup>

That so few countries have made the declaration is somewhat surprising. At the 1980 diplomatic conference a motion to delete subparagraph (1)(b) of article 1 was defeated but the conference, notwithstanding general reluctance to permit reservations, adopted article 95. The reasons given for deleting or allowing States to opt out of subparagraph (1)(b) of article 1 are similar to those articulated subsequently by the United States: subparagraph (1)(b) adds complexity and involves serious problems of interpretation and application; it creates special difficulties for States with modern laws drafted with international trade in mind.<sup>25</sup>

#### **V. Are the Reasons for Making the Declaration Still Relevant?**

On their face, the justifications for the initial decision remain valid: neither domestic nor international choice-of-law rules are noticeably more uniform, and application of subparagraph (1)(b) will displace domestic U.S. sales law but not the domestic sales law of a non-Contracting State.

What has changed, however, is the practical importance of these reasons. There were only eleven Contracting States at the time that the U.S. declaration became effective in January 1988. As of October 2012, however, there are seventy-eight Contracting States.<sup>26</sup> Of the principal trading partners of the United States, only the United Kingdom is not yet a Contracting State.<sup>27</sup> U.S. businesses that contract with enterprises in other Contracting States will find that the CISG will govern under subparagraph (1)(a) unless they agree to exclude its application. For them, subparagraph (1)(b) is not relevant. While it is true that the subparagraph continues to be relevant when a U.S. business contracts with an enterprise located in a non-Contracting State, the number of such cases will be smaller.

---

22. Reservations under Articles 95 and 96 CISG, Beijing, China, Oct. 21-22, 2013, CISG-AC Opinion No. 15 (Oct. 22, 2013), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html>.

23. *Id.*

24. See, e.g., Gary F. Bell, *Why Singapore Should Withdraw Its [Article 95] Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 9 SINGAPORE Y.B. INT'L LAW 55 (2005); Fan Yang, *The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice*, PACE LAW SCHOOL (Dec. 2006), <http://www.cisg.law.pace.edu/cisg/biblio/yang2.html#1>.

25. The relevant report of the debates at the 1980 conference may be found in United Nations Conference on Contracts for the International Sale of Goods. CISG, *supra* note 1, at 83, 145, 229-30, 236-38, 439.

26. CISG: *Table of Contracting States*, PACE LAW SCHOOL, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last updated Jan. 8, 2016).

27. *Id.*

Appendix B of the Legal Analysis anticipates this diminishing importance of the reservation stating in part, “Widespread adoption of the Convention can be anticipated; hence it is expected that eventually a substantial portion of United States international trade will involve other Contracting States and will receive the benefits of the Convention by virtue of subparagraph (1)(a) of Article 1.”<sup>28</sup>

## **VI. Should the United States Withdraw Its Article 95 Declaration?**

Professor Harry Flechtner has written a brief in support of withdrawal of the article 95 declaration.<sup>29</sup> He puts forward serious arguments in rebuttal of the justifications given originally by the American Bar Association and Appendix B of the Department of State’s Legal Analysis. These arguments should be addressed, but before doing so it should be noted that nowhere does Professor Flechtner suggest that U.S. businesses or lawyers are clamoring for withdrawal. This contrasts sharply with the initial push for adoption of the CISG in the 1980s, when not only the Secretary of State’s Advisory Committee on Private International Law and the American Bar Association supported ratification (with the article 95 declaration) but also a distinguished group of U.S. leaders of export-import corporations endorsed ratification (with the article 95 declaration). As Sherlock Holmes might observe, the failure of these same groups to ask for withdrawal is the dog that did not bark.

In the absence of business and professional support<sup>30</sup> Professor Flechtner relies instead on three basic arguments. The most serious argument—and the one about which I suspect he and I will ultimately agree to disagree on—is that the CISG deals better with issues that arise in the context of international sales than does the Uniform Commercial Code. The second is that in some circumstances a court in another Contracting State will face a difficult question of interpretation. And, third, there is a trend to withdraw declarations and this trend is desirable because it removes unnecessary exceptions to uniformity. These last two arguments, I will suggest, are far less significant so I will begin with his first.

---

28. Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods, *supra* note 16, app. B, at 18.

29. Professor Flechtner is an acknowledged expert in the field of international sales law. He is the editor (perhaps ironically in the present context) of the 4th edition of the Honnold treatise. John Honnold, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 47-47.6 (Harry Fletcher ed., 4th 2009) (*see* § 47-47.6 for discussion of subparagraph (1)(b) and article 95).

30. Soliciting reliable responses from U.S. export-import enterprises may not be worth the time and effort given the limited advantages claimed that arise from withdrawal of the article 95 declaration.



**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

A. COMPARISON OF CISG AND UCC

Professor Flechtner compares Article 2 of the Uniform Commercial Code unfavorably with the CISG.<sup>31</sup> The former he characterizes as a law designed primarily for domestic transactions and a law that has not been updated in at least forty years.<sup>32</sup> The latter, younger (not updated in only slightly over thirty) law, on the other hand, was drafted with the special needs of cross-border contracts for sale in mind.<sup>33</sup> He deploys this comparison in two contexts.<sup>34</sup> He first considers application of the article 95 declaration in U.S. courts, which he suggests “produces results that are arbitrary and counter-productive” or “arbitrary and sub-optimal.”<sup>35</sup> Later he deploys the same contrast to rebut at least one of the justifications given by Appendix B of the Legal Analysis.<sup>36</sup> In both contexts the only example of sub-optimality he gives is the presence in UCC Article 2 of trade terms (“price-delivery” terms) that are no longer consistent with practice.<sup>37</sup> On most of these points, I have reservations.

Karl Llewellyn, the principal draftsman of UCC Article 2 (Sales), is turning over in his grave as Professor Flechtner writes.<sup>38</sup> From the beginning, Llewellyn self-consciously introduced into Article 2 a number of rules for cross-border sales, especially those involving carriage by sea.<sup>39</sup> Among these terms were trade terms, such as F.O.B. and C.I.F.<sup>40</sup> He was well aware, however, that mercantile usage changes over time. His Code was to be “semi-permanent”: its provisions are to be read “to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.”<sup>41</sup> He defined “agreement” of the parties to include usages of trade<sup>42</sup> and provided a lengthy section elaborating on “usage of trade.”<sup>43</sup> By agreement, a seller and a buyer may vary the effect of virtually all of the provisions in Article 2.<sup>44</sup>

With these flexible Code provisions in place, Professor Flechtner’s objection to the price-delivery terms is of minor significance. The UCC

---

31. Flechtner, *supra* note 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Flechtner, *supra* note 4.

38. Here I must confess interest. I am presently at work on a history of the Uniform Commercial Code, which will bear out the statements asserted in this paper. Llewellyn alone, of course, is not responsible for drafting the Code but this paper refers to “his” text because his ideas were the principal sources for UCC Article 2.

39. These include, inter alia, all or part of UCC §§ 2-319 to 2-325, 2-504 to 2-506, 2-513, 2-514, 2-613 to 2-616, 2-707.

40. U.C.C. §§ 2-319(1) & 2-320(1) (2014).

41. U.C.C. § 1-103(a)(2) (2014) (originally § 1-102(2)(b)).

42. U.C.C. § 1-201(b)(3) (2014) (originally § 1-201(3)).

43. U.C.C. § 1-303 (2014) (originally § 1-205).

44. U.C.C. § 1-302 (2014) (originally § 1-102(3)).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2017]      SHOULD U.S. WITHDRAW CISG ARTICLE 95 DECLARATION?      225

trade terms are expressly stated to be subject to agreement otherwise and the Incoterms® may be evidence of that usage when a term is used for ocean carriage—as U.S. courts appear to state when they enforce Incoterms® when the CISG applies to the sale.<sup>45</sup> Moreover, the perceived defect has apparently not caused problems in practice.<sup>46</sup> Digests of UCC cases list very few international trade cases where the Code trade terms have been interpreted by the courts.<sup>47</sup>

In the absence of further examples of how the CISG deals with international sales in a more “optimal” way than UCC Article 2, it is difficult to assess Professor Flechtner’s conclusion that the CISG is superior. But it should be noted that in some respects the CISG is less “optimal.”<sup>48</sup> The Convention’s treatment of documentary transactions in particular is cursory at best and sometimes inconsistent with established law and practice.<sup>49</sup> For example, it is not clear that a seller presenting nonconforming documents has the general right to cure even after the time for tender of the documents.<sup>50</sup> Similarly, fancy legal footwork is necessary to avoid the rule that risk passes at the time of tender of the documents while the goods are in transit, rather than at the time of shipment, which has been the established rule.<sup>51</sup>

The Convention is also less receptive of trade usages than the Code when the parties have not expressly agreed to the usages.<sup>52</sup> In response to delegations from developing countries who objected to being bound by usages created by developed countries, the 1980 diplomatic conference decided that unless a seller and buyer adopt usages<sup>53</sup> they would only be bound by “a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”<sup>54</sup> Although it is now probably too late to challenge the decisions, U.S. courts have followed neither the letter nor the spirit of paragraph (2) when they have held that Incoterms® bind parties even though these courts have not

---

45. See *infra* note 66 and accompanying text.

46. *Id.*

47. It is true that the unsuccessful revision of Article 2 a decade ago did propose to delete the trade term provisions (§§ 2-319 to 2-325) but the proposal was originally agreed to because of the alleged wide-spread use of Incoterms® and the perceived preference to leave definition of these terms to usages, whether or not codified.

48. See, e.g., CISG, *supra* note 1, arts. 34, 48, 67.

49. *Id.* art. 34.

50. *Id.* art. 48.

51. *Id.* art. 67.

52. See *id.* art. 9(2).

53. *Id.* art. 9(1).

54. *Id.* art. 9(2).

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

226 THE INTERNATIONAL LAWYER

[VOL. 50, NO. 1

heard evidence that Incoterms® satisfy the detailed particulars of paragraph (2) in a particular case.<sup>55</sup>

In sum, in the absence of examples, the implication by my younger colleague that the age of a text reflects its likely obsolescence is not persuasive.

**B. UNCERTAINTY IN NON-U.S. COURTS**

Professor Flechtner writes that “[h]ow other contracting states that have not made the article 95 declaration will treat the U.S. declaration is profoundly uncertain.”<sup>56</sup> The case he has in mind is a dispute brought before a court in a Contracting State between a U.S. party and a party with its place of business in a non-Contracting State.<sup>57</sup> If the forum’s choice-of-law rules lead to application of U.S. law, must the forum apply the CISG?<sup>58</sup>

The resolution of this question turns on whether the forum concludes that the United States is a “Contracting State” within the meaning of subparagraph (1)(b) of article 1.<sup>59</sup> Commentators differ. Germany was, as Professor Flechtner points out, sufficiently concerned that it has declared that it will not consider the United States a Contracting State in such circumstances.<sup>60</sup>

No commentator, however, has cited a single case where this issue has arisen. A moment’s reflection will suggest several reasons why: the result will often be the same whether the CISG or the UCC applies and most disputes will be litigated where one of the parties is located. Smaller businesses with a single place of business are less likely to agree to incur the expense of going to a foreign neutral jurisdiction. Multinational companies with several places of business, on the other hand, are the very companies that will have planned ahead to address the issue of the applicable law. Moreover, U.S. and multinational companies often arbitrate disputes and arbitrators usually have more leeway in determining the applicable law if the parties have not specifically designated that law.

In sum, while the legal issue is real and its resolution uncertain, it is an issue of profoundly little practical significance.

**C. TREND TO WITHDRAW DECLARATIONS**

The declaration authorized by article 95 is one of five “reservations” authorized by the Convention.<sup>61</sup> Professor Flechtner correctly notes that

---

<sup>55</sup> See *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, UNCITRAL art. 9, para. 18 (2012), <https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

<sup>56</sup> Flechtner, *supra* note 4.

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See CISG, *supra* note 1, arts. 92-96.

States that initially have made declarations under articles 92 and 96 have withdrawn, or contemplate withdrawing, them.<sup>62</sup> He reports also hearing that China plans to withdraw its article 95 declaration.<sup>63</sup> He could have added that very few States have made declarations under any of these articles and that no State has made a new article 95 declaration after becoming a Contracting State.

But what is the significance of this “trend”? Each of the five deals with a distinct issue.<sup>64</sup> Withdrawing declarations under one provision is not necessarily a ground for withdrawing other declarations. In each case, a declaring State will weigh its particular interests with a general interest in the promotion of “uniform law.” The United States recognized these other interests when it made its declaration. The issue is whether that initial calculation was wrong or conditions have changed so that the desire for uniform rules outweighs these other interests.

In sum, the trend provides no answer to the issue of whether or not to withdraw. That other States are reviewing their declarations suggests that it might be timely for the United States to do so also.<sup>65</sup> That other States have decided to withdraw their declarations under articles other than article 95, does not address the weighing of interests that the United States should go through when making a decision on whether or not to withdraw its declaration under that article.

### **VII. Must Senate Be Asked for Its Advice and Consent if It Is Decided to Withdraw the Article 95 Declaration?**

As a matter of public international law, it is clear the United States may withdraw its declaration and what steps it must take to do so.<sup>66</sup> What steps the United States must take as a matter of U.S. law, on the other hand, is less clear. Whether the Senate must be consulted appears to turn on whether the article 95 declaration is a “declaration” or a “reservation” for the purposes of U.S. treaty practice. If it is a reservation the Senate should be consulted.<sup>67</sup>

---

62. Fletcher, *supra* note 4.

63. *Id.*

64. *See* CISG, *supra* note 1, arts. 92-96.

65. Fletcher, *supra* note 4.

66. Under both the 1969 Vienna Convention on the Law of Treaties and the CISG itself, the declaration may be withdrawn at any time. *See* Vienna Convention arts. 22 & 23(4); CISG *supra* note 1, art. 97(4) (“Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary”).

67. Note 4 of the Reporters Notes to section 314 of the Restatement (Third) of Foreign Relations Law (1987) states: “4. *Withdrawal of reservation.* If the Senate consented to a treaty subject to a reservation by the United States, the President must request Senate consent to withdraw that reservation. *See, e.g.,* the request for consent to the withdrawal of a reservation to

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

228 THE INTERNATIONAL LAWYER

[VOL. 50, NO. 1

The CISG does not give a definitive answer. Article 95 authorizes a State to declare that it will not be bound by subparagraph (1)(b) of article 1.<sup>68</sup> Article 97 refers to “declarations,” but article 98 refers to “reservations.”<sup>69</sup>

The Restatement (Third) of Foreign Relations Law adopts the definition of “reservation” found in article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties.<sup>70</sup> That definition provides that a reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>71</sup> The article 95 declaration has the legal effect of excluding application of a provision of the convention—subparagraph (1)(b) of article 1—and fits clearly within this definition of reservation.<sup>72</sup>

Even if it is decided that Senate advice and consent is not necessary, there is a prudential reason for consulting the Senate: the withdrawal will displace the state-enacted Uniform Commercial Code more often. The number of such cases may be small but there should be a forum where the merits of withdrawal may be debated.

In sum, if withdrawal requires consulting the Senate, the advantages, if any, of withdrawal may not be worth the time and effort.

### VIII. Conclusion

When Keith Loken asked me last summer for my advice on whether the United States should withdraw its CISG article 95 declaration, I responded off the top of my head that “I am less enthusiastic about withdrawing the declaration than Harry is but it is not a proposal I would lie down on the railroad tracks to stop.” The proposal, however, is certainly worth debating. If it is debated in October, I would hope that both pros and cons would be presented.” To my surprise, I was subsequently asked to be a member of the ACPIL panel discussing the topic.

---

the Patent Cooperation Treaty 28 U.S.T. 7645, T.I.A.S. No. 8733, reprinted at 78 AM. J. INT'L L. 889 (1984).”

68. CISG, *supra* note 1, art. 95.

69. CISG, *supra* note 1, art. 98(1) (“No *reservations* are permitted except those expressly authorized in this Convention.”) (emphasis added).

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313, cmt. a (1987). This comment directs the reader to Comment *b* of section 314 for a distinctive use of the term by the Senate. The latter comment states that the president must include any condition (“reservation, statement of understanding, or other declaration relevant to the application or interpretation of the treaty”) included in the Senate resolution of consent when the president deposits the U.S. instrument of ratification. It goes on to say that if the condition is a reservation then the reservation is the supreme law of the United States. By negative implication, the comment suggests that a Senate condition other than a reservation is not “law” within the meaning of Article VI, clause 2, of the federal constitution.

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313, cmt. a.

72. CISG, *supra* note 1, art. 95.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2017]      SHOULD U.S. WITHDRAW CISG ARTICLE 95 DECLARATION?      229

Even more to my surprise, I found that when I sat down to write my comments I slipped easily into the con side of the debate—although I still would not lie down on the railroad tracks. The justifications given for making the U.S. declaration remain valid although their practical significance has greatly diminished with wide-spread adoption of the CISG. It continues to be unfair that withdrawal of the declaration would displace U.S. domestic state law more frequently than foreign law. The business community is not lobbying for change. If the Senate must be consulted, the time and effort that this would take outweighs the practical value, if any, of withdrawal. It may be aesthetically pleasing to remove carbuncles on uniform laws but this carbuncle is—like the smile of the Cheshire cat—fading away.

**THE INTERNATIONAL LAWYER**  
**A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**