Is the CISG Irrelevant?

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John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, **U. Penn. J. Int'l L.** (forthcoming 2016), available at SSRN.

Very few American contract courses cover the CISG. (My book gestures at coverage; my course doesn't.) That was true before the recent lamented trend toward a one-semester course, and it is increasingly the rule today. Why? Contract professors I've talked to on this subject typically justify themselves by asserting that the CISG is rarely relevant in domestic practice. But such casual empiricism, when asserted in a company mixed with comparativists, can seem irresponsible. What if we're wrong?

Now comes John Coyle to test that conventional account. Of course, there's nothing easier to publish than a surprising empirical finding. (That such findings are rarely replicable is an embarrassment.) Articles confirming instead of rebutting our priors are thus especially important to celebrate. Coyle tells teachers of contract law that we've gotten it basically right: the CISG is less popular than the Congress. He does so in a mixed-methods paper notable for its carefulness and restraint. I like it lots.

Coyle's approach starts by noting recent surveys finding that most domestic practitioners urge their clients to opt out of the CISG when otherwise applicable. But, as Coyle notes, such surveys are bedeviled by various methodological problems. He thus starts afresh by looking at the CISG's use in material contracts on EDGAR. He finds ~5,000 contracts from 1988 to 2014 which include the term "international sale of goods." That's 0.7% of a population of approximately 700,000 filed agreements. As Coyle notes, his identification strategy has limits: (1) EDGAR's material contract database is not representative of all corporate contracts, and (2) since the CISG is a default rule, identifying contracts which specifically address it may offer a distorted lens. That is, parties wishing the CISG to apply can simply be silent. Perhaps a large number of the 695,000 contracts that he did not identify intended to adopt the CISG by default. Similarly, parties that chose the law of a particular state may have intended for the Convention to apply under the treaty power. Thus, Coyle's 5,000 contract sample, however large, may be unrepresentative if used as a proxy for parties' attitudes toward the CISG.

But the contracts do tell us something. Coyle uncovers a number of curious facts. *First*, 69% of the contracts in the sample excluded the CISG unnecessarily—i.e., the contract was not a sale of goods, or the CISG was not ratified in the counterparty's home country, or the contract was between wholly domestic parties. This either reflects an overweening fear of the CISG or boilerplate error. *Second*, the absolute number of contracts affirmatively choosing the CISG was negligible: 61 out of 5092, and the trend is against adoption. Coyle contacted the firms opting in, and found that a striking number now routinely opt out, or claimed that the instance of opting in was a one time concession to a counterparty. As Coyle summarizes: "Whatever the intrinsic merits of the CISG, and notwithstanding the broad support that it enjoys within the academic community, the treaty has made scant little headway in gaining adherents among lawyers in the United States in the twenty-eight years since it entered into force." (P. 24.)

These data would be themselves quite illuminating, but Coyle adds to our understanding by compiling a secondary dataset of supply contracts filed with the SEC between 2011 and 2015. Identifying a universe

of 5549 contracts, he reviewed each to see whether one party was international and thus subject to the CISG. From the 248 *international* supply contracts that remained, he focused on 44 contracts where the CISG applied but the parties had been silent—i.e., the parties appeared to have chosen the CISG by default. He then wrote each of the companies involved and asked, in essence, what were you thinking?

The responses offered powerful evidence that the CISG isn't an intentionally chosen, thoughtful, default norm—none of the contacted firms appeared to have intentionally been silent. Attorneys' excuses for their (resulting) mistaken choice of the CISG ranged from puzzled to rueful to apologetic. (As Gulati and his co-authors have found in another context, attorneys' bad choices can always be rationalized, but rarely explained.) In any event, this extra research provides some comfort to those worried about Coyle's identification strategy (discussed above) but little to comparativists who thought that the silent majority was with them.

Coyle concludes by arguing that the CISG "has no real constituency among public companies in the United States." Indeed, as he points out, it is rarely applied in litigated cases, and only then when the parties have failed to adopt the normal practice of excluding it. Coyle argues that the result is an interpretive jurisprudence developed on the backs of suckers, whose lawyers aren't thoughtful, or well-trained, enough to exclude the convention from their agreements. The CISG ends up looking less like a majoritarian, and more like a penalty, default.

This leads, of course, back to a pedagogical question. Given that domestic firms apparently do *not* want the CISG to apply, should we, as contracts teachers, be in the business of drilling students on the convention solely so that it can be routinely excluded? This seems a bit like teaching students all about the life cycle of e. coli so they can avoid a restaurant with a bad health grade. Perhaps courts ought to adopt a different default rule, at least when parties chose the law of a particular state.

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