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AMERICAN, ENGLISH AND JAPANESE WARRANTY LAW COMPARED: SHOULD THE U.S. RECONSIDER HER ARTICLE 95 DECLARATION TO THE CISG?

Asa Markel*

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] has been in force for twenty years.[2] Seventy countries have ratified the CISG,[3] including the United States,[4] which effectively applies to the majority of cross-border transactions in goods around the world.[5] However, two of the United States' eight leading trading partners, the United Kingdom and Japan,[6] have not ratified the CISG.[7] Or-

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[1] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://cisgw3.law.pace.edu [hereinafter "CISG"].

[2] The CISG entered into force in 1988. Michael Bridge, *A Law for International Sale of Goods*, 37 Hong Kong L.J. 17, 17 (2007).

[3] Michael Joachim Bonnell, *The CISG, European Contract Law and the Development of World Contract Law*, 56 Am. J. Comp. L. 1, 4 (2008).

[4] Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 Tex. Int'l L.J. 540, 540-41 (1986).

[5] Bonnell, *supra* note 3, at 4.

[6] The U.K. (6th) and Japan (4th) are the only countries among the United States' top eight trading partners, as of March, 2008, that have not ratified the CISG. See *Top Trading Partners – Total Trade, Exports, Imports*, U.S. Census Bureau website, *available at* http://www.census.gov/foreigntrade/statistics/highlights/top/top0803yr.html; *Status: 1980 United Nations Conventions on Contracts for the International Sale of Goods*, UNCITRAL website, *available at* http://www.uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[7] Bonnell, *supra* note 3, at 4. India has also not yet ratified the CISG. *Id.* Hong Kong, though a part of China (a party to the CISG), has not yet adopted the CISG either. Bridge, *supra* note 2, at 19. This article will consider only U.K. sales law, in part for simplicity, since the Indian Sale of Goods Act 1930 (No. 3 of 1930) and Hong Kong Sale of Goods Ordinance (cap. 26) are based on British sales law.

dinarily, the CISG would apply to a cross-border contract dispute, regardless of whether the non-American party's country had ratified it, so long as the proper law (*lex causae*)[8] is the law of an American state.[9] Yet, in spite of the CISG's unanimous ratification by the U.S. Senate,[10] the United States has effectively declared, pursuant to Article 95 of the CISG, that the Convention can only apply where both parties to a contract are nationals of countries that have ratified the Convention.[11] In other words, when American businesses contract to buy or sell goods with British or Japanese traders, American courts are forbidden to apply the CISG. This limitation on American traders' ability to choose the CISG as the law applicable to their cross-border transactions with businesses operating from non-CISG countries is in line with traditional American hostilities toward the party autonomy doctrine. However, it gravely limits American traders' ability to take a neutral, uniform sales law with them as they do business around the world, particularly when trading with businesses in Japan and the United Kingdom.

The CISG offers traders two important advantages in cross-border transactions: legal neutrality and legal certainty. Parties to a cross-border transaction often prefer to utilize a "neutral" law to govern their relationships, so that neither party is required to give up unnecessary ground in the negotiations.[12] Legal certainty is of paramount importance for parties operating from different countries and legal systems, where they are

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Sale of Goods Act, 1893, 56 & 57 Vict., c. 71 (Eng.), *available at* https://www.cisg.law.pace.edu/cisg/biblio/dholakia.html; Bridge, *supra* note 2, at 19.

[8] Francis A. Mann, *Uniform Statutes in English Law*, 94 LAW Q. REV. 376, 392 (1983) (case involving elements from different countries requires conflict analysis to determine "proper law").

[9] CISG, *supra* note 1, art. 1(1)(b).

[10] Tuggey, *supra* note 4, at 540-41.

[11] *See* Michael G. Bridge, *Uniform & Harmonized Sales Law: Choice of Law Issues*, in JAMES L. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 908, 976 (Oxford Univ. Press 2005), *and* VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 12:4 (West 2007) (*citing* State Department Notice, [CM-8/1135], 52 F.R. 46014-02, 1987 WL 147140 (Dec. 3, 1987), *and* Impuls I.D. Int'l, S.L. v. Psion-Teklogi, Inc., 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002).

[12] *See* Bridge, *supra* note 2, at 40 (CISG is "neutral" in that it does not "require either seller or buyer to give ground").

bound together in the same transaction.[13] Thus, while American courts have become the destination of choice for personal injury plaintiffs the world over,[14] commercial parties, concerned about uncertain exposure to damages awards from American juries, have consistently sought to resolve their disputes outside American courts.[15] These commercial and legal realties often mean that commercial parties seeking greater certainty in the resolution of their disputes often litigate or arbitrate in London or other overseas centers. The United States' Article 95 declaration may or may not actually have any effect in foreign courts, yet the declaration's uncertain reach will continue to threaten American traders who may attempt to contract around it.

This article will broadly compare the sales warranty law regimes in place in the United States, United Kingdom (specifically: England and Wales), and Japan. The latter two countries represent important exceptions, since American traders currently have the option of using the CISG in transactions with traders from six of the United States' eight leading trading partners, but not with traders in the United Kingdom and Japan. As both the United Kingdom and Japan are among the United States' top trading partners, American businesses will obviously have frequent dealings with British and Japanese concerns. As major commercial powers, all three countries have highly developed contract law regimes, which address largely the same issues. The law of warranties, as it is known to American lawyers,[16] is crucial in that it governs the parties' continuing rights and liabilities, well after a sale has been completed.

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[13] *See* John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1439 (2003) (certainty outranks fairness in commercial circles).

[14] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981) (discussion of American courts' attractiveness to foreign plaintiffs). Lord Denning once wrote, "As a moth is drawn to the light, so is a litigant to the United States. If he can only get his case into their court, he stands to win a fortune." Smith Kline & French Lab. Ltd. v. Bloch, [1983] 2 All. E.R. 72, 74.

[15] *See, e.g.*, C. v. D., [2007] EWCA (Civ) 1282, [1] (per Longmore, L.J.). ("Bermuda Form" reinsurance contract designed to avoid American courts by designating arbitration in London under New York law). While London has traditionally been the forum of choice for international commercial litigation, there is reason to think that New York is making headway against her British rival. Linarelli, *supra* note 13, at 1432, 1434.

[16] This article will use the American term "warranty" to describe the seller's post-acceptance obligations concerning the fitness and conformity of the goods

Compared with one another, American, British, and Japanese warranty regimes are superficially similar, but will afford parties different remedies under what might be viewed as the same or similar rights. Moreover, the wider contract law regimes of these countries will create still greater disparities in results on account of their differing approaches to statutory and contractual construction, and their opposing views on the applicability of comparative fault in contract matters.

In section II, this article will introduce the CISG and its context in relation to national sales law regimes and other international commercial treaties. The effect of the United States' Article 95 declaration derogating from the CISG will also be introduced, as will the conflicts rules applicable between the American, British, and Japanese legal regimes, made more important by the United States' declaration. Section III will briefly compare the post-acceptance rights and liabilities under American, British, and Japanese law as well as the CISG, to demonstrate that while they appear to afford parties the same or similar rights, these legal systems exhibit some divergence in terms of their approaches to damages, and even greater differences in the courts' very interpretation of the parties' obligations. This article will assume the reader's basic familiarity with American sales law and concentrate on differences between it and British and Japanese sales law. Section IV will demonstrate that, despite criticism of the lack of uniformity in early CISG case law, the CISG is increasingly providing the legal certainty required by transnational businesses, albeit in a manner unfamiliar to common law practitioners. Section V will argue that the United States' Article 95 declaration impedes American traders' use of the CISG as a uniform law, despite the fact that a comparison between American, British, and Japanese law highlights the need for a uniform law. The article will conclude with a recommendation that the United States withdraw its Article 95 declaration.

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sold. As will be seen, this term is not particularly useful in describing the analogous obligations of British sellers.

II. The CISG: A Partial *Lex Mercatoria*

1. *The Scope of the CISG and Related Instruments*

The CISG is meant to create a uniform law for international sales. It represents a compromise between the major legal traditions of the world;[17] it is a particularly necessary compromise given the considerable divergence between the common and civil law approaches to contract law.[18] However, the CISG is a "very incomplete law," which was meant to be supplemented by domestic law.[19] The CISG's drafters wished to avoid impinging on domestic consumer protections,[20] so the Convention excludes contracts involving consumers,[21] and does not govern any personal injury claims arising out of international commercial transactions.[22] The CISG governs the rights of commercial parties to an international sales contract,[23] but does not determine the property rights of the parties over the goods in question, nor does it determine the validity of the very contracts it governs.[24] A practical effect of the CISG's limited scope is that parties will still want to designate the national law they prefer to govern aspects of the transaction the CISG does not cover.[25]

While the CISG is meant to standardize the interpretation and enforcement of international sales contracts, the sales contract is itself only one of six contractual "institutions" normally required for an international documentary sales transaction.[26] Usually, the other five contracts include: (1) the agreement between a bank and the buyer to issue a letter of credit; (2) the

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[17] *See* Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C.J. Int'l L. & Com. Reg. 109, 111 (1988) (CISG drafted to avoid relying on single dominant national system).

[18] *See* Jürgen Basedow, *Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG*, 25 Int'l Rev. L. & Econ. 487, 490 (2005).

[19] Gary F. Bell, *Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 9 Sing. Y.B. Int'l L. 55, 66 (2005).

[20] Tuggey, *supra* note 4, at 542.

[21] CISG, *supra* note 1, art. 2(a).

[22] *Id.* at art. 5.

[23] *Id.* at art. 1.

[24] *Id.* at art. 4.

[25] *See* Bridge, *supra* note 2, at 24.

[26] *See* Linarelli, *supra* note 13, at 1396.

letter of credit itself, as a separate agreement; (3) the carriage contract, which often takes the form of a negotiable bill of lading; (4) the insurance contract; and (5) the bill of exchange.[27] There has been "some" unification of the law for each of these contractual institutions, through various international conventions, including the CISG.[28] Moreover, parties may incorporate uniform texts into their contracts, such as the International Chamber of Commerce's (ICC) Incoterms and Uniform Customs and Practice for Documentary Credits (UCP).[29]

For the lynchpin of an international sale, the sales contract, American law prevents American traders from using the uniform law of the CISG. Nevertheless, for the majority of documents in an international sale of goods, which pertain to the issues of transport and payment, American traders have been permitted to rely on uniform law to govern. Uniform rules on transport and payment help to streamline transactions between American, British, and Japanese traders, since their own national laws on these subjects remain disparate.

While all three countries are parties to the 1999 Montreal Convention concerning carriage by air,[30] the United States continues to cling to the 1924 Hague Rules[31] on carriage by sea,[32] whereas the United Kingdom and Japan have adopted the 1968 Hague-Visby Rules for oceanic carriage.[33] However, American

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See* ICAO Status Chart for 1999 Montreal Convention, *available at* http://www.icao.int/icao/en/leb/mt199.pdf, *and* Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, S. TREATY DOC. NO. 106-45.

[31] *See* International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, *opened for signature* Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155.

[32] *See* Carriage of Goods by Sea Act of 1936 (COGSA), 49 Stat. 1207, reproduced as note to 46 U.S.C. § 30701; Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 301 (1959) (COGSA domesticates 1921 Hague Rules, as modified by 1924 Convention).

[33] *See* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *opened for signature* Feb. 23, 1968, 1412 U.N.T.S. 128, 1977; Gr. Brit. T.S. No. 83 (Cmnd. 6944); Carriage of Goods by Sea Act, 1971, c. 19 (U.K.), as amended by the Merchant Shipping Act, 1981, c. 10 (U.K.); *Kaijo Buppin Unso Ho* [Law for International Carriage of Goods by Sea], Law No. 172 of 1957 (Japan), as amended by Law No. 69 of 1992 (Japan). Interestingly, both the U.S. and Japan have a two-tiered legal regime for bills of

courts will enforce the parties' designation of the Hague-Visby Rules as the governing law of carriage between foreign and United States ports.[34]

Where the law of payment is concerned, civil law countries consistently follow the 1930 Geneva Convention Providing for a Uniform Law for Bills of Exchange and Promissory Notes,[35] including Japan.[36] In the United States and United Kingdom, on the other hand, the applicable rules derive from the Bills of Exchange Act 1882[37] and Article 3 of the Uniform Commercial Code (UCC).[38] Thus, the common law and civil law worlds continue to disagree on the finer points of payment,[39] although it is hoped that the 1988 U.N. Convention on Bills of Exchange and International Promissory Notes (CIBN)[40] will unify the two divergent laws on payment obligations.[41] Differences in negotiable instruments law can be avoided, however, by use of letters of

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lading, applying different laws to domestic bills and international or interstate bills. *See* Bills of Lading Act of 1916, 39 Stat. 538, 49 U.S.C. § 80101 *et seq.* ("Pomerene Act") (governing international and interstate bills of lading); U.C.C. Article 7 (governing in-state bills of lading); *Kaijo Buppin Unso Ho*, *supra*, art. 10 (applying Japanese Commercial Code provisions, *mutatis mutandis*, to domestic bills of lading). None of these countries has yet seen fit to adopt the United Nations Convention on the Carriage of Goods by Sea, *opened for signature* Mar. 31, 1978, 1695 U.N.T.S. 3, 17 I.L.M. 608 (1978) (the "Hamburg Rules").

[34] *See* Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd., 514 F.3d 621, 642 (6th Cir. 2008) (holding that Hague-Visby Rules govern bill of lading for transport of auto transmissions from France to U.S.).

[35] Geneva Convention Providing for a Uniform Law for Bills of Exchange and Promissory Notes, *opened for signature* June 7, 1930, 143 L.N.T.S. 257; John Honnold, *The United Nations Commission on International Trade Law: Missions and Methods*, 27 A.M. J. COMP. L. 201 (1979).

[36] *See* Weiqun Lin, *On the Legislation of Negotiable Instruments by the Government of the Republic of China*, 3 U.S.-CHINA L. REV. 76 (2006), *available at* http://www.jurist.org.cn/doc/uclaw200606/uclaw20060607.pdf (Japan repealed provisions of its Commercial Code in 1932 and implemented Geneva Convention), *and* Tegata Ho [Law on Bills of Exchange and Promissory Notes], Law No. 20 of 1932 (Japan).

[37] 45 & 46 Vict., c. 61 (Eng.).

[38] *See* CAL. COM. CODE § 3101 *et seq.*; N.Y. U.C.C. § 3-101 *et seq.*

[39] *See* Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, [2001] VICT. UNIV. L. REV. 42, *available at* http://www.austlii.edu/au/nz/journals/VUWLRev/2001/42.html (common law and civil law countries divided according to Geneva System and Bills of Exchange Act, which disagree on important aspects).

[40] *Opened for signature* Dec. 9, 1988, 28 I.L.M. 176 (1988).

[41] *See* D.E. Murry, *The U.N. Convention on International Bills of Exchange and International Promissory Notes with Some Comparisons with the Former and Revised Article Three of the UCC*, 25 U. MIAMI INTER-AM. L. REV. 189, 191 (1993).

credit, where American courts will honor the designation of the UCP as the governing law.[42] Thus, application of the CISG to the underlying sales contract for *all* international sales remains the last hurdle for American traders in reaching legal uniformity in their cross-border transactions.

2. *The Article 95 Declaration: History and Purposes*

Article 95 of the CISG allows a country that has ratified the CISG to restrict the Convention's applicability in certain kinds of transactions. Normally, the CISG will apply to govern sales contracts between parties doing business from two different countries, so long as each country has ratified the CISG.[43] The actual nationality of the parties is immaterial to the CISG's applicability.[44] However, even if one of the parties to a sales contract is not doing business from a country that has ratified the CISG, the CISG will still apply if, under principles of private international law, the law of a CISG country would apply to the transaction.[45] Article 95 allows a country to declare, at the time of its ratification of the CISG, that the CISG will not apply to transactions involving persons or entities doing business from that country, where the other party to the transaction is doing business from a non-CISG country.[46] The United States made an Article 95 declaration when it ratified the CISG, so American courts must ignore the CISG when persons and businesses operating within the United States contract with parties located in non-CISG countries.[47]

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[42] *See* CAL COM. CODE § 5116(a) (parties may designate any law to apply to letter of credit); N.Y. U.C.C. § 5-116(a) (same); MSF Holding Ltd. v. Fiduciary Trust Co. Int'l, 435 F. Supp. 2d 285, 294 (S.D.N.Y. 2006) (designation of UCP as governing law for letter of credit was valid). The UCP is often designated as the governing law for letters of credit, and has accordingly become "well known" among traders and judges. *See* Forestal Mimosa Ltd. v. Oriental Credit Ltd., [1986] 2 All. E.R. 400, 404.

[43] CISG, *supra* note 1, art. 1(1)(a).

[44] *Id.* at art. 1(3).

[45] *Id.* at art. 1(1)(b).

[46] *Id.* at art. 95.

[47] *See, e.g.*, Prime Start Ltd. v. Maher Forest Prod., Ltd., 442 F. Supp. 2d 1113, 1118 (W.D. Wash. 2006) (refusing to apply CISG since neither UK nor BVI are parties to CISG).

Article 95 was added to the CISG at the very last minute.[48] On behalf of socialist countries who were members of the Council for Mutual Economic Cooperation (COMECON), Czechoslovakia demanded that the article be inserted in order to protect the uniform trade law regime between those countries:[49] the COMECON General Conditions for the Delivery of Goods (1958) (as amended).[50] The COMECON General Conditions were comprehensive contract rules that left little room for tailored stipulations between the actual parties to a sales contract.[51] COMECON countries were particularly concerned about predictability in their trade contracts on account of their state-operated enterprises.[52] In fact, parties to contracts in COMECON countries did not deal at arm's-length, but owed one another a duty "to obtain mutually satisfactory results," as measured by the applicable national economic plan.[53] Thus, the CISG, with its tolerance of oral terms and agreements,[54] represented a major compromise for many socialist countries that preferred clear, written terms in cross-border contracts.[55] Ultimately, socialist countries that followed the COMECON General Conditions were concerned about protecting the General Conditions against the usual conflict of laws rules in international mercantile transactions, which might displace the General Conditions with the CISG where the COMECON rules would otherwise apply.[56]

Curiously, when ratifying the CISG, the United States invoked Article 95, a provision designed to protect the mutual-

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[48] *See* Bell, *supra* note 19, at 57.

[49] *See id.*

[50] *See* Detlev Vagts, John Ellicott & Michael Buckley, *Book Review: East-West Trade: COMECON Law, American-Soviet Trade*, 81 AM. J. INT'L L. 315, 316 (1987) (describing COMECON General Conditions). COMECON was established in 1949. Zwart, *supra* note 17, at 115 n. 47. The COMECON General Conditions were adopted in 1958 and amended in 1964, 1968, 1975, and 1979. *Id.* at 115 n. 48.

[51] *See* Robert Braucher, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, 83 HARV. L. REV. 957, 959 (1970).

[52] *See* Zwart, *supra* note 17, at 116.

[53] *See id.* at 114. Since the 1980's, the abolition of central planning in nearly all COMECON countries has created a more "level playing field" in international contract law. *See* Basedow, *supra* note 18, at 489.

[54] *See* CISG, *supra* note 1, art. 11 (allowing oral contracts and parol evidence).

[55] *See* Zwart, *supra* note 17, at 116-17 (socialist countries preferred express contract terms).

[56] *See* Bell, *supra* note 19, at 57.

legislative trade regime of the Soviet Bloc from the normal conflicts of law rules. Apparently, the United States government was concerned that Article 1(1)(b) of the CISG "would displace our own domestic law more frequently than foreign law."[57] However, the government's overall analysis revealed "a discomfort with applying international law rather than domestic law when the country of the other contracting party is not willing to do the same."[58] The ultimate result is that an American party who *wishes* to have the CISG apply to a transaction with a party from a non-CISG country is not free to do so. Thus, the United States government's Article 95 declaration limits private parties' ability to choose a neutral law to govern their transactions. This is in line with the general American distrust of the party autonomy doctrine (allowing parties to choose the law governing their contracts), which has been viewed by American jurists as a usurpation of legislative powers by private parties.[59] Although, it is not in line with global commercial practice in that other legal systems typically permit parties to choose the law to be applied to their contracts.[60]

The United States government's decision to lodge its Article 95 declaration was also based upon the belief that excluding Article 1(1)(b) of the CISG would promote "maximum clarity" in private international law.[61] The government's argument appears to have been that by excluding Article 1(1)(b), the conflict of laws analysis would be simplified: where both relevant countries were parties to the CISG, the CISG would apply, and where an American trader entered into a transaction involving a party from a non-CISG country, the CISG would not apply.[62] While by its own terms this argument appears simple enough, it does nothing to simplify the actual conflict of laws analysis necessary to determine which country's law applies in the first place (regardless of whether the CISG should then also apply).

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[57] *Id.* at 58 (quoting *Appendix B to Letter of Submittal from Secretary of State George B. Schultz*, attached to *Message From the President of the United States Transmitting the United Nations Convention on Contracts for the International Sale of Goods*, S. TREATY DOC. NO. 91 (1983)).

[58] Bell, *supra* note 19, at 58.

[59] Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 530 (2006).

[60] *See id.* at 545.

[61] *See* Bell, *supra* note 19, at 58.

[62] *See id.*

Consequently, in spite of the government's best efforts in lodging the Article 95 declaration, "maximum clarity" in private international law remains elusive.

The Article 95 declaration also appears to be of limited reach. There should be no question that the declaration requires United States courts to refuse application of the CISG to transactions involving parties from non-CISG parties. However, it is unclear whether the declaration actually imposes a legal obligation on a *foreign* court to disregard the CISG where an American party has contracted with a party from a non-CISG country. If the forum is a CISG country, the court may be obliged to apply the CISG in spite of the United States' Article 95 declaration, since the court is duty-bound to regard the United States as a party to the CISG, since the CISG is also a part of the law of the forum.[63] Germany has already moved to solve this problem by making the "remark" that it considers any country that has made an Article 95 declaration to be a non-CISG country whenever a person or business in that country enters into a transaction with a truly non-CISG country.[64] While the effect of Germany's "remark" is unclear in international law, being neither a declaration nor a reservation permitted by the CISG[65] or the Vienna Convention on the Law of Treaties,[66] it is likely a clear authorization to Germany's own courts to ignore the CISG in transactions between, for example, an American party (from a CISG country) and an English party (from a non-CISG country). However, where a dispute is heard in a CISG country other than Germany, it is uncertain whether the foreign court is required to give effect to the United States' Article 95 declaration. Indeed, the United States' declaration has caused some confusion, even in Japan, where one court determined that if California law were to be applied, the CISG would govern the matter in spite of the declaration.[67]

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[63] *See id.* at 62; Bridge, *supra* note 11, at 980-81.

[64] *See* Bell, *supra* note 19, at 62; Bridge, *supra* note 11, at 980.

[65] *See* CISG, *supra* note 1, arts 92-98.

[66] *Opened for signature*, May 22, 1969, 1980 Gr. Brit. T.S. No. 58 (Cmnd. 7964), 8 I.L.M. 679 (1969). *See id.*, arts. 1(d), 19-23.

[67] *See* Nippon Systemware K.K. v. O., 997 HANREI TAIMUZU 286 (D. Tokyo, March, 1998) (Minami, J.), as summarized at http://cisgw3.law.pace.edu/cases/980319j1.html, *rev'd on other bounds by* No.1190-ne-1954 (Tokyo H. Ct., Mar. 24, 1999).

In any case, the uncertainty of Article 95's reach to non-United States courts is a considerable impediment to its purpose of achieving "maximum clarity" in international sales transactions. This open question concerning foreign courts' treatment of the United States' Article 95 declaration is particularly vexing in light of the efforts to which international commercial parties go to avoid American courts and juries. Where a sizeable portion of international sales contracts involving American parties designate other countries as the fora for litigation or arbitration, the Article 95 declaration becomes more futile each time a judge or arbitrator in a CISG country applies the Convention, in spite of the fact that an American court would be forbidden to do so.

3. *Applicable National Laws*

The United States' Article 95 declaration requires American businesses entering into transactions with British or Japanese traders to be more aware of the differences between American, British, and Japanese sales law than legal differences with other top trading partners. In the declaration's wake, American law will not permit the uniform law of the CISG to govern transactions with British or Japanese traders. As discussed above, it is not certain whether a court sitting in a third-country would obey the United States' Article 95 declaration and ignore the CISG if it finds that the law of an American state applies to a transaction with a British or Japanese concern. However, for purposes of this article, it will be assumed that the Article 95 declaration is somehow controlling over non-American courts.

In each American state, that state's version of Article 2 of the UCC will apply to any sales transaction, unless the parties validly designate the law of another jurisdiction as the governing law.[68] Within the United Kingdom, the Sale of Goods

[68] *See, e.g.*, ARIZ. REV. STAT. ANN. § 47-1301(B); CAL. COM. CODE § 1301(b); *see* RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 6(1) (1971) (where statute provides choice of law, statute will be followed). Although New York's version of the UCC does not have a presumptive designation of New York law, so the normal conflict of laws analysis will apply to sales contracts in New York courts. S*ee* N.Y. U.C.C. § 1-105 (no general choice of law provision); Petrobras Comercio Internacional S.A. v. Intershoe Inc., 77 A.D.2d 542, 547 (1980) (court must weigh significance of state contacts to determine law applicable to sales contract). For certain

Act 1979 (SGA),[69] as subsequently amended,[70] ostensibly applies to all sales transactions. However, English case law concerning *international* sales transactions rarely refers to the SGA,[71] and at times makes marked departures from the SGA's express provisions.[72] Nevertheless, English case law on warranty obligations in international sales arrangements has generally tracked the Sale of Goods Acts. Thus, the United States and the United Kingdom each ostensibly maintain unified domestic sales codes.

Japanese law regarding the sales contract (*baibai keiyaku*)[73] is somewhat more varied in its sources than the American and English sales regimes. The Japanese Civil Code includes a section on the law of sales (*baibai*).[74] However, for all "commercial" acts, the Commercial Code is the controlling law.[75] A transaction is a "commercial act" if it involves the

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matters, however, the UCC does contain certain mandatory choice of law designations. *See* ARIZ. REV. STAT. ANN. § 47-1301(C); CAL. COM. CODE § 1301(c); N.Y. U.C.C. § 1-105(2).

[69] *See* Sale of Goods Act, 1979, c. 54, § 1 (U.K.) [hereinafter SGA].

[70] *See* Sale of Goods (Amendment) Acts, 1994, c. 32 and 1995, c. 28 (U.K.). The original statute in this lineage was the Sale of Goods Act 1893. *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 488 n. 256 (2000).

[71] *See* Bridge, *supra* note 2, at 26.

[72] *See id.* at 25 (discussing courts' imposition of time of the essence in international sales). *Compare* SGA, § 10 (time not of the essence unless expressly stipulated otherwise), *and* Bunge Corp v. Tradax S.A., (1981) 2 All E.R. 513, 539-40 (A.C.); *see* Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?*, 12 PACE INT'L L. REV. 1, 25 (2000) (discussing rationale for this jurisprudential departure from statute as the promotion of certainty in international transactions).

[73] The word "contract" in Japanese (*keiyaku*) implies a promise, rather than all of the subsequent rights involved in the course of contractual relations. *See* Kizuki Kuzuhara, *Contracting Between a Japanese Enterprise and an American Enterprise: the Differences in Importance of Written Documents as the Final Agreement in the United States and Japan*, 3 ILSA J. INT'L & COMP. L. 57, 87 n. 175 (1996).

[74] *See* MINPO, art. 555, no. 89; Shinichiro Michida, *Contract Societies: Japan and the United States Contrasted*, 1 PAC. RIM. L. & POL'Y J. 199, 204 (Veronica L. Taylor trans., 1992) (a sales agreement is a species of "consensual" contracts in Japanese law). The general law of contracts is a chapter within the Book of Claims (*saiken*) within the Civil Code. *See id.* at 205, n. 19.

[75] *See* SHOHO, art. 1, no. 48.

purchase of goods (*dosan*)[76] that are meant to be resold at a profit, or involves the use of bills of exchange or other negotiable instruments.[77] Thus, the classic import/export transaction falls within the ambit of the Commercial Code as the goods being imported usually are meant for resale, and payment is ordinarily made by way of a bill of exchange. Where the Commercial Code does not control the issue, Japanese courts will next look to commercial custom (*kanshu*)[78] to decide the matter.[79] Only where there is no applicable rule of the Commercial Code or customary mercantile law will Japanese courts apply the Civil Code to "commercial" transactions.[80]

In the absence of a valid choice of law provision in the sales contract, the parties will be at the mercy of the forum's conflict of laws rules. English courts will look to the Rome Convention to apply "the law of the country with which it [the contract] is most closely connected," in a sales contract between a British party and an American or Japanese concern,[81] regardless of the fact that neither the United States nor Japan are parties to the Rome Convention.[82] Japanese courts will apply the law of the party who will provide the "characteristic performance" of the contract.[83] American courts normally apply the law of the state with the "most significant relationship to the transaction and the parties."[84] However, in the context of sales contracts, most

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[76] The term for "movables" (*dosan*) was first devised when Japanese scholars were translating European civil codes into Japanese. *See* Mark A. Behrens and Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 672 n. 14 (1995).

[77] *See* SHOHO, arts. 501(1), (4), no. 48.

[78] The term *kanshu* is often translated as "custom" or "trade practice." *See* Michida, *supra* note 74, at 219 n. 51.

[79] *See* SHOHO, art. 1, no. 48. *See also* CAL. COM. CODE § 1103(b); N.Y. U.C.C. § 1-103 ("law merchant" may be applied in absence of express UCC provision).

[80] *See* SHOHO, art. 1, no. 48. *See also* HIROSHI ODA, JAPANESE LAW 133, 185 (2d ed. Oxford Univ. Press 1992).

[81] *See* Convention on the Law Applicable to Contractual Obligations, *opened for signature* Jun. 19, 1980, 80/934/EEC, art. 4(1), 1980 O.J. (L 266) 1, 19 I.L.M. 1492 (1980). *See also* Contracts (Applicable Law) Act 1990, c. 36 (U.K.).

[82] *See* Centrax Ltd. v. Citibank N.A., [1999] EWCA (Civ) 892 (U.K.) (applying N.Y. law per choice of law clauses as permitted by Rome Convention), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/1999/892.html.

[83] HO NO TEKIYO NI KANSURU TSUSOKUHO [Act on the General Rules of Application of Laws], Law No. 78 of 2006, art. 7 (Japan).

[84] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188(1).

American courts are commanded to apply the UCC as adopted in their particular state to any contract with "an appropriate relation" to the forum in the absence of a choice of law provision in the contract.[85] Consequently, should parties to an international sales contract find themselves litigating in an American court, the chances are greater that the law of the forum will apply to the contract than if the litigation were to take place in an English or Japanese court.[86]

Regardless of the conflicts rules to be applied, any party to a contract would be understandably uneasy at the prospect of litigating in an alien forum. For example, Japanese jurists have not yet reached a complete consensus regarding the status of foreign companies in Japanese law.[87] Nevertheless, commerce and navigation treaties between the United States, United Kingdom, and Japan should afford American and British companies "national treatment" in Japanese courts.[88] In fact, under the same treaties, individuals and businesses from all three countries should enjoy equal rights in one another's

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[85] *See, e.g.*, ARIZ. REV. STAT. ANN. § 47-1301(B) (Arizona UCC applies if contract bears "appropriate relation to this state"); CAL. COM. CODE § 1301(b) (California UCC applies if contract bears "appropriate relation to this state"); *see* RESTATEMENT (SECOND), § 6(1) (where statute provides choice of law, statute will be followed). *But see* N.Y. U.C.C. § 1-105 (no general choice of law provision); *Petrobras Comercio Internacional*, 77 A.D.2d at 547, 430 N.Y.S.2d at 330 (court must weigh significance of state contacts in determining law applicable to sales contract).

[86] If the court is to apply foreign law to the sales contract, the procedural rules as between the American, British, and Japanese legal systems will differ as to the burden of the parties with respect to proving the law. At common law, foreign law is a question of fact. *See* Lazard Bros. & Co. v. Midland Bank Ltd., [1933] A.C. 289, 297 (U.K.H.L.). Nevertheless, English judges are to decide matters of foreign law without resort to a jury. *See* Supreme Court Act, 1981, c. 54, § 69(5) (Eng.); County Courts Act, 1984, c. 28, § 68 (Eng.). In American courts, foreign law is now a question of law, but still requires its proponent to prove its requirements. *See* FED. R. CIV. P. 44.1; *In re* Parmalat, 383 F. Supp. 2d 587, 595 (S.D.N.Y. 2005) (where parties fail to prove foreign law, court will assume it is identical to law of forum). A Japanese judge will determine matters of foreign law as an issue of law. *See* ODA, *supra* note 80, at 450. This is in keeping with the civil law maxim *jura noscit curia*, or "the judge knows the law." *See* Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J.L & COM. 159, 170 (2005).

[87] *See* Dai Yokomizo, *International Company Law in Japan* (2007) (discussing effect on company law of 2006 private international law amendments), *available at* http://corporation.rikkyo.ac.jp/data/en/Hamburg%20Article%20(DY)%20final.doc.

[88] *See* ODA, *supra* note 80, at 449-50.

courts.[89] Thus, American, British, and Japanese parties should enjoy a level playing field in each other's countries. The only impediment to greater legal efficiency and transparency in commercial transactions between these countries lies in the fact that American law expressly excludes the use of uniform law under the CISG in relations between merchants of these countries.

III. National and Uniform Laws on Implied Warranties

Generally speaking, contract formation issues are rarely the cause of disputes between commercial parties.[90] Yet, a seller's warranties, by their very nature, represent perhaps the longest-term liability on a sales contract, remaining in place well after the actual transaction has been completed, with only the applicable limitations or prescription period to end the seller's lingering liability for the goods sold. As to remedies, much has been made of the different approaches in common and civil law jurisdictions to the alternative remedy of specific performance. It is well-known that civil law jurists look upon specific performance as the preferred remedy,[91] while English judges have required specific performance only in extraordinary circumstances.[92] American judges are more willing than their

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[89] *See* Treaty of Commerce, Establishment and Navigation, U.K.-Japan, Nov. 14, 1962, art. 7(4), 478 U.N.T.S. 84, 1963 Gr. Brit. T.S. No. 53 (Cmd. 2085); Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, art. IV, 4 U.S.T. 2063, 206 U.N.T.S. 190; Convention Concerning Commerce and Navigation, U.S.-Gr. Brit., Jul. 3, 1815, art. I, 8 Stat. 228 (1815), 12 Bevans 49. Moreover, parties from all three countries may resort to consular assistance for gathering evidence in litigation in all three fora. *See* Consular Convention, U.K.-Japan, May 4, 1964, arts. 24, 25, 1966 Gr. Brit. T.S. No. 1, (Cmnd. 2833), 561 U.N.T.S. 25; Consular Convention, U.S.-Japan,,Mar. 22, 1963, art. 17, 15 U.S.T. 768, 518 U.N.T.S. 179; Consular Convention, U.S.-U.K., Jun. 6, 1951, art. 17, 3 U.S.T. 3426, 1958 Gr. Brit. T.S. No. 37 (Cmnd. 524), 165 U.N.T.S. 121.

[90] *See* J. Mark Ramseyer & Minoru Nakazato, Japanese Law: An Economic Approach 47 (Univ. of Chicago Press 1999).

[91] *See* Zwart, *supra* note 17, at 120; Basedow, *supra* note 18, at 492-93; John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 Geo. J. Int'l L. 61, 63-64 (2004).

[92] *See* Piliounis, *supra* note 72, at 11; Michael Bridge, *A Comment on "Towards a Universal Doctrine of Breach – The Impact of the CISG" by Jürgen Basedow*, 25 Int'l Rev. L. & Econ. 501, 510 (2005). The SGA requires that goods be "ascertained" before a judge is granted discretion to employ the remedy of specific performance. *See* SGA, § 52(1). However, even where goods are unascertained, a court may still require specific performance where the buyer has no

English counterparts to afford the remedy of specific performance,[93] but not on the scale of Japanese courts, who follow the civil law way of thinking.[94] Specific performance is not particularly applicable to breach of warranty cases since the contract has already been performed, albeit defectively. Moreover, the law on specific performance will likely remain disparate between countries, as the CISG allows the remedy,[95] but also allows local law to determine when it shall be granted.[96] Accordingly, this article will focus on the scope and availability of monetary damages for breach of warranty claims. Relevant provisions of the CISG will also be examined to illustrate their similarities to or departure from the three national sales regimes being compared.

1. *Post Delivery Remedies: Warranties as Distinct from Contracts Themselves*

Although it exists in nearly all major legal systems, a "warranty" claim varies from system to system, both in its theoretical underpinnings and in its practical scope. In the United States, the UCC differentiates between actions for breach of contract (for non-delivery or for repudiation)[97] and breach of warranty (for the non-conformity of goods already accepted by the buyer).[98] The SGA categorizes the terms and stipulations in a contract as either "conditions," the breach of which allows the buyer to cancel the contract entirely and reject the goods, or "warranties," which entitle the buyer only to claim damages.[99]

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adequate remedy in damages. *See* Sky Petroleum Ltd. v. VIP Petroleum Ltd., [1974] 1 All E.R. 954, 956 (Eng. H.C.). This is comforting news for international traders, for whom the remedy is perhaps more important than for domestic merchants, given the difficulties in finding alternative suppliers in some cross-border scenarios. *See* Piliounis, *supra* note 72, at 10. In all cases, English judges will not require specific performance where the buyer can still obtain supply of the goods sought. *See* Dominion Coal Co. Ltd. v. Dominion Iron & Steel Co. Ltd., [1909] A.C. 293, 299, 311 (U.K.P.C.).

[93] *See* Piliounis, *supra* note 72, at 17.

[94] *See* MINPO, art. 414(1), no. 89; Kuzuhara, *supra* note 73, at 86 n. 173.

[95] CISG, *supra* note 1, art. 46(1).

[96] *See* CISG, *supra* note 1, art. 28; *see also* Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 926 (N.D. Ill. 1999) (availability of specific performance governed by local law under CISG).

[97] *See* CAL. COM. CODE § 2713; N.Y. U.C.C. § 2-713.

[98] *See* CAL. COM. CODE § 2714; N.Y. U.C.C. § 2-714.

[99] *See* SGA, *supra* note 69, § 11(3).

English courts have added a third category of terms in sales contracts, that of "innominate" or "intermediate" terms, for which the remedy will depend upon the nature of the breach.[100] Although, in contracts between merchants, where the breach of a term that is admittedly a condition is "slight," English courts are to treat the inconsistency as a mere breach of warranty.[101]

Japanese contract law follows the civil law position, and requires that the buyer prove fault against the seller in order to recover for breach of contract.[102] This is in large part because the civil law views contracts as setting forth obligations as to the parties' behavior, while the common law views contracts as imposing obligations as to results.[103] On the other hand, Japanese law does not require a buyer to prove the seller's fault for a breach of warranty claim on goods already accepted.[104] Thus, the strict liability aspect of the law of warranty is quite similar when common law and Japanese law are compared. The CISG, on the other hand, does not actually distinguish between claims on the contract as a whole, and claims for breach of warranty.[105] Rather, the seller is obligated, as a general matter, to provide goods that conform to the "quantity, quality and description required by the contract."[106]

Essentially, all four legal systems: American, British, and Japanese sales law, and the CISG, allow for post-acceptance damages remedies based upon non-conformity of the goods, without requiring the buyer to prove fault. As noted above, the UCC conception of breach of warranty is, by definition, distinguished from a breach of contract on a temporal basis: breach of warranty occurs after acceptance of goods, and entitles the buyer to damages. Under English sales law, the implied term of fitness is technically a "condition," entitling the buyer to avoid

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[100] *See Bunge Corp*, 2 All E.R. at 542-43; Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord), [1976] Q.B. 44, 61.

[101] *See* SGA, *supra* note 69, § 15A.

[102] *See* ODA, *supra* note 80, at 191; Behrens, *supra* note 76, at 683; *see also* Shigeru Kagayama, *History of the Civil Code of Japan and Comparison with the Uniform Law* (Aug. 30, 2001), *available at* http://lawschool.jp/kagayama/material/civi_law/history/his_c_civ.html.

[103] *See* Basedow, *supra* note 18, at 496.

[104] *See* MINPO, art. 570, no. 89; ODA, *supra* note 80, at 191.

[105] *See* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 38 – 39 (West 2d ed. 2001).

[106] *See* CISG, s*upra* note 1, art. 35(1).

the contract.[107] It is not a "warranty" *per se* since in English law, unlike American law, the difference between claims in contract and warranty is not temporal, but based upon the availability of avoidance remedies.[108] Japanese law allows the buyer to elect, after acceptance, between remedies for breach of contract (requiring proof of fault) and breach of warranty (a strict liability claim).[109] However, a breach of warranty claim in Japanese law will limit the scope of damages a buyer may recover.[110] The CISG does not distinguish between claims in contract and warranty, though the seller's obligations under Article 35 resemble the Anglo-American implied term of fitness, and thus, approximate implied warranties.

As seen above, the basis for post-acceptance, non-fault-based damages remedies, is usually a term implied into the contract by statutory law. Thus, a seller attempting to limit his or her post-sale liability on the contract must comply with statutory requirements for warranty disclaimers. In the United States, the UCC sets forth a number of formal requirements for disclaimers of implied warranties, but allows disclaimers with

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[107] *See* SGA, *supra* note 69, §§ 14(2), (3), (6).

[108] Under English law, the implied term of quality or fitness will be a condition, even if the transaction is a sale by description or sample. *See id.* §§ 13, 15. A sale by description is made where the seller or its agent describes the goods to be sold. *See* Harlingdon & Leinster Enter. Ltd. v. Christopher Hull Fine Art Ltd., [1991] 1 Q.B. 564, 579. The point of including a description is to allow the buyer to impose strict liability on the seller for nonconformities, since if the description is not found to be a term of the agreement, the buyer will then have the burden of proving its reliance on a fraudulent inducement. *See id.* Similarly, a sale by sample must include an express or implied term to that effect, since the mere exhibiting of a sample does not create a sale by sample. *See* SGA, § 15(1); Meyer v. Everth, (1814) 171 Eng. Rep. 8, 8 (dismissing claim as precluded by parol evidence rule). The point of exhibiting a sample is merely to present to the eye, an intention of the parties that would otherwise be difficult to express in words. Champanhac & Co. Ltd. v. Waller & Co. Ltd., [1948] 2 All E.R. 724, 725-26 (Eng. H. Ct.).

[109] *See* ODA, *supra* note 80, at 191 (*citing* Judgment of the Supreme Court, Dec. 15, 1961 (MINSHU 15-11-2852)). This is in stark contrast to the UCC, where breach of contract and breach of warranty claims are mutually exclusive, governed by whether the goods in issue have already been accepted by the buyer. *See* Desilets Granite Co. v. Stone Equalizer Corp., 340 A.2d 65, 67 (1975) (where revocation is ineffective, breach of warranty damages applied); Gawlick v. Am. Builders Supply Inc., 519 P.2d 313, 314 (App. 1974) (where acceptance is revoked, warranty remedies do not apply).

[110] *See* RAMSEYER, *supra* note 90, at 57-58.

simple phrases such as "as is," or "with all faults."[111] Under English law, the parties are permitted to opt-out of the statutory implied terms by mere agreement,[112] particularly in international sales transactions, where the Unfair Contract Terms Act 1977 does not apply.[113] Similarly, a seller under Japanese law may exclude statutorily implied warranties by "special" stipulation in the contract,[114] tempered only by the seller's duty of good faith[115] and obligation to disclose known defects at the time of sale.[116] The CISG, which should only apply to transactions between merchants,[117] allows the parties to simply exclude implied obligations regarding the conformity of the goods by contract, as with any other term the Convention implies.[118] Considering British and Japanese law, together with the UCC and CISG, American importers should be aware that transactions with all or most of their major overseas suppliers will allow for the exclusion of implied terms regarding conformity, with little or no fanfare.

2. *Implied Warranties of Merchantability and Fitness: Latent Defects*

It has been said that the implied warranty of merchantability[119] is more suited to trade in commodities, since it supposes sales of the same good at differing quality, while imposing a standard level of quality.[120] Since the implied warranty of fitness[121] overlaps with the warranty of merchantability, the CISG does not contain an implied obliga-

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[111] *See* CAL. COM. CODE § 2316 and N.Y. U.C.C. § 2-316. In the context of this article, the Magnuson-Moss Warranty Act should not apply to cross-border international sales between merchants, since that statute governs warranty disclaimers in contracts involving consumers. *See* 15 U.S.C. § 2301 *et seq.* (requiring conspicuous disclaimer of warranties in contracts involving consumers).

[112] *See* SGA, *supra* note 69, §§ 55(1),(2).

[113] *See* Unfair Contract Terms Act, 1977, c. 50, § 26 (U.K.).

[114] *See* MINPO, art. 572, no. 89.

[115] *See* Behrens, *supra* note 76, at 685 (citing MINPO, art. 1, no. 89).

[116] *See* MINPO, art. 572, no. 89.

[117] *See* CISG, *supra* note 1, art. 1(1).

[118] *Id.* art. 6.

[119] *See* CAL. COM. CODE. § (2314) (West 2008); N.Y. U.C.C. § 2-314 (McKinnney 2008) (implied warranty of merchantability).

[120] *See* Bridge, *supra* note 2, at 20.

[121] *See* CAL. COM. CODE § 2315; N.Y. U.C.C. § 2-314; Sale of Goods Act, 1979, c. 54, § 1 (U.K.) (implied warranty or condition of fitness).

tion as to merchantability.[122] Instead, the CISG requires the goods sold to be "fit for the purpose for which goods of the same description would ordinarily be used."[123] Similarly, English law implies that goods will be of "satisfactory quality,"[124] which requires "fitness for all the purposes for which goods of the kind in question are commonly supplied."[125] Both English law and the CISG track a seller's warranty under the UCC that goods "are fit for the ordinary purposes for which such goods are sold."[126] The Japanese Commercial Code, on the other hand, imposes a blanket requirement that goods be free of defects.[127]

Whichever implied obligation is found to apply, the issue of greatest surprise to the parties to a sales contract will undoubtedly be that of latent defects. This article therefore, will focus on damages for breach of the implied term of quality, particularly the implied obligation as to fitness, where the defect in issue was latent. Civil law systems often specify an implied warranty against latent defects,[128] and Japan continues to do so.[129] Common law courts, on the other hand, have had to read an obligation against latent defects into the general implied terms regarding the conformity of goods.[130]

3. *Damages as Post-Acceptance Remedy*

Although approaching the issue from differing theoretical bases, the general civil law and common law rules on damages aim to achieve similar results. Common law contract damages are divided between "nominal" (where the claimant is unable to prove the amount, but is entitled to damages because of the un-

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[122] *See* Bridge, *supra* note 2, at 20. For this and other reasons, the CISG has been described as a modern improvement on national sales laws. *See id.* at 40.

[123] CISG, *supra* note 1, art. (35)(2)(a).

[124] *See* SAG at § 14(2).

[125] *See id.* at § 14(2B)(a).

[126] *See* CAL. COM. CODE § 2314(2)(c); N.Y. U.C.C. § 2-314 (2)(c).

[127] *See* SHOHO, art. 526, no. 48 (buyer shall inspect goods and give notice to seller of discoverable defects).

[128] *See id.* (*citing* C. CIV. art. 1641 (Fr.)).

[129] *See* MINPO, art. 570, no. 89.

[130] *See* Godley v. Perry, (1960) 1 All E.R. 36, 41 (Q.B.); Brittalia Ventures v. Stuke Nursery Co., Inc., 62 Cal. Rptr. 3d 467, 473 (2007) (UCC implied warranties extend to latent defects); DeCrosta v. A. Reynolds Const. & Supply Corp., 375 N.Y.S.2d 655, 659 (N.Y. App. Div. 1975) (purchaser may resort to UCC implied warranties for latent defects).

derlying breach), "general" (those naturally caused by the breach), and "special" damages (arising from special or extraordinary circumstances).[131] English judges have stated that contract damages protect three "interests:" the expectation interest (in the benefit of the bargain or contract price subtracted from the market price), the reliance interest (in the party's incidental costs for the transaction), and the restitutionary interest (which favors the reversal of the other party's unjust enrichment).[132] Civil law jurists recognize a party's "negative" interest (the reliance interest, in being restored to the *status quo ante*) as well as his or her "positive" interest, in being placed in the position he or she would have enjoyed had the contract been fully performed.[133]

Under the common law approach the innocent party will normally recover general damages for the breach of contract, as well as any special damages, pursuant to the rule in *Hadley v. Baxendale*, where the seller reasonaly would or should have been aware of the possibility of such damages at the time of concluding the underlying contract.[134] In the civil law system, courts will take a similar approach, although the scope of damages is usually controlled through the doctrine of "adequate causation," which limits claimants to damages that would have been likely only on account of the breach, rather than the foreseeability rule of the common law.[135] On this point, however, the Japanese have departed from the French and German examples,[136] opting instead to insert the *Hadley v. Baxendale*

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[131] *See* Gotanda, *supra* note 91, at 64-65.

[132] *See* Surrey County Council v. Bredero Homes Ltd., (1993) 3 All E.R. 705, 714 (Eng. C.A.); Jaggard v. Sawyer, (1995) 2 All E.R. 189, 201-02 (Eng. C.A.).

[133] *See* Gotanda, *supra* note 91, at 66.

[134] (1854) 156 Eng. Rep. 145, 151 (L.R. Exch).

[135] *See* Gotanda, *supra* note 91, at 75.

[136] The Japanese Civil Code began as a translation of the then French Civil Code, whose provisions were then rearranged according to the German *Pandekten* system, and to which were incorporated elements of English and indigenous Japanese law. *See* ODA, *supra* note 80, at 129-30; Kagayama, *supra* note 102 (Civil Code incorporated English and Japanese sources); Mikio Yamaguchi, *The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law*, 37 CORNELL INT'L L.J. 357, 370 (2004) (explaining retention of traditional Japanese earnest money contract in Civil Code).

standard into their Civil Code.[137] Thus, in terms of the scope of special damages being governed by the seller's reasonable ability to foresee them, American, British, and Japanese law is more or less harmonized. In harmony with these three national systems, the CISG also takes the common law's foreseeability approach.[138]

In terms of the measure of direct contract damages, however, American traders may notice a fault line between the Anglo-Japanese approach and that taken in the UCC and CISG. Even so, in breach of *warranty* cases, the measure of damages should be the same between all three national systems. In English law, the general measure of contract damages is the difference between the contract price and the price available in the buyer's market on the date of breach.[139] Thus, English courts are not generally interested in the buyer's actual loss, since market data takes the place of "a careful examination of the reasonableness of a party's conduct in disposing of or acquiring" the goods or substitute goods.[140] Japanese contract damages similarly base damages upon the difference between the contract price and the market price.[141] The UCC nominally subtracts the contract price from the market price at the time the buyer learned of the breach,[142] unless the claim is for breach of warranty, where the measure is supposed to be based upon the time of acceptance.[143] However, American courts typically calculate damages not based upon the "market" at the time of breach, but based upon the value of any replacement contract

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[137] *See* MINPO, art. 416(2), no. 89 (special damages only recoverable if foreseeable); ODA, *supra* note 80, at 191; Kagayama, *supra* note 102; RAMSEYER, *supra* note 90, at 58.

[138] *See* CISG, *supra* note 1, art. 74.

[139] *See* Garnac Grain Co. Inc. v. HMF Faure & Fairclough Ltd., (1967) 2 All E.R. 353, 360 (U.K.H.L.). Normally the market is measured at the date when delivery was to occur. *See* Hong Guan & Co. Ltd. v. R. Jumabhoy & Sons Ltd., [1960] 2 All E.R. 100, 107-08 (U.K.P.C.). If there is no market at the destination, the award may take into account another market along with the cost of transporting the goods there. *See* Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301, 316 (U.K.P.C.).

[140] *See* Bridge, *supra* note 2, at 36.

[141] *See* RAMSEYER, *supra* note 90, at 57-58.

[142] *See* CAL. COM. CODE § 2713 (West 2008) (breach of contract damages); N.Y. U.C.C. § 2-713 (McKinney 2008) (breach of contract damages).

[143] *See* CAL. COM. CODE § 2714 (breach of warranty damages); N.Y. U.C.C. § 2-714 (breach of warranty damages).

the buyer enters into, balanced against the buyer's duty to mitigate his or her losses.[144] Under the CISG, courts are meant to take the American position.[145] Nevertheless, for breach of warranty claims, as opposed to breach of contract claims, American courts, like their English counterparts, are to disregard any later replacement contract and, instead, award damages based upon the difference in value between the goods as contracted and as delivered.[146]

As discussed earlier, under Japanese law, the scope of damages available is a key difference between claims in contract as opposed to claims on warranties. A claim in contract requires the buyer to show fault on the part of the seller. If the seller is successful on the claim, the buyer may recover direct damages as well as any special damages that were reasonably foreseeable to the seller at the time of the contract's conclusion.[147] However, if a buyer wishes to rely upon the strict liability of a warranty claim for latent defects, he or she is limited to recovering only general damages, meant to safeguard his or her expectation interest (*shinrai rieki*).[148] Thus, Japanese breach of warranty damages will be more limited that those provided by American and English law.

4. *Divergences*

Although similar on the surface, the four systems diverge in their treatment of post-acceptance damages for non-conformities, not only by their statutory terms, but also according to the larger issues of the legal systems' respective approaches to the time limits for claims, the duty of good faith, and comparative fault in contract claims. To begin with, as between the American, British, and Japanese systems, the question will arise as to whether a buyer must give notice of non-conformity to the seller as a condition precedent to suit on a breach of warranty claim.

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[144] *See* Bridge, *supra* note 2, at 37.

[145] *See id.* (*citing* CISG, *supra* note 1, arts. 75-76).

[146] *See* Noreli Indus., Inc. v. Kleinert's, Inc., 394 N.Y.S.2d 687, 688 (N.Y. App. Div. 1977).

[147] *See* MINPO, arts. 415-16, no. 89; ODA, *supra* note 80, at 174-75.

[148] *See* Behrens, *supra* note 76, at 684.

Under English law, no such notice is required before filing suit against the seller for breach of the implied term of quality.[149] Under the UCC, the buyer is precluded from resorting to any remedies if it did not give notice to the seller within a reasonable time after it discovers or should have discovered the defect.[150] Japanese law generally does not impose a notice requirement for breach of warranty claims,[151] unless the parties are merchants, in which case the buyer must inspect the goods and give notice of any deficiencies without delay.[152] In the case of latent defects, the buyer will usually still have to give notice of any defects within six months of the sale.[153] The CISG, like the UCC and the Japanese Commercial Code, requires that the buyer give notice of deficiencies in quality within a reasonable time of their discovery, or within a maximum period of two years "from the date on which the goods were actually handed over to the buyer."[154] Thus, in cases of latent defects under the CISG, the buyer may be left without a remedy if the defects were not discovered within the two-year notice period.[155]

Apart from the headache of determining whether a buyer is still able to sue for damages on a breach of warranty for latent defects (and, correspondingly, whether a seller is still on risk for the sale), parties should understandably be nervous as to how a court in an alien jurisdiction will interpret the contract itself. Assuming there are no problems between how the language is used in the contract, and how it is understood by the court construing the contract,[156] the wider issue of how the parties' obligations will be enforced looms large. For example, while both

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[149] *See* Bridge, *supra* note 2, at 25.

[150] *See* CAL. COM. CODE § 2607(3)(A) (West 2008); N.Y. U.C.C. § 2-607(3)(a) (McKinney 2008).

[151] *See* MINPO, art. 570, no. 89.

[152] *See* SHOHO, art. 526(1), no. 48.

[153] *See id.*; ODA, *supra* note 80, at 190.

[154] *See* CISG, *supra* note 1, art. 39.

[155] *See Landgericht* [LG] [trial court] Dec. 12, 1995, Neue Juristische Wochenschrift-Rechtsprechungs Report [NJW-RR] 760, 1996 (F.R.G.) *available at* http://cisgw3.law.pace.edu/cases/951212g1.html (last visited Feb. 24, 2009) (denying remedy to buyer under Article 39(2)). The notice requirements of Article 39 have produced more litigation than perhaps any other issue arising under the CISG. *See* FOLSOM, *supra* note 105, at 47.

[156] For a more detailed discussion of linguistic issues implicated in the drafting of international contracts, *see* Steven R. Salbu, *Parental Coordination and Conflict*

the UCC and Japanese Civil Code impose an obligation on the parties to act in "good faith,"[157] the Japanese concept of good faith is considerably broader than the analogous American doctrine. Japanese courts have been permitted to ignore express statutory and contractual terms where the parties' actions do not appear to have been in good faith.[158] English law, on the other hand, does not even recognize an implied term of "good faith,"[159] relying instead on the notion of "commercial reasonableness."[160] Indeed, one would be surprised to find an American or English court rewriting the parties' agreements since a court's equitable powers will not ordinarily extend to subvert rights expressly provided by law.[161] Thus, American and British traders would likely be surprised to encounter a Japanese court with such wide-ranging equitable powers to alter express statutes and contracts. Yet, even as between American and British courts, British judges will be stricter than their Ameri-

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in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns, 43 CASE W. RES. L. REV. 1221 (1993).

[157] *See* both CAL. COM. CODE § 1302 (West 2008) and N.Y. U.C.C. § 1-102 (parties may not contract out of obligation of good faith); MINPO, art. 1, no. 89 (subjecting all statutory rights to obligation of good faith). The Japanese concept of good faith (*shingi*) and fair dealing (*seijitsu*) has been translated as the "duty of good faith and honesty." *See* Michida, *supra* note 74, at 218; Kuzuhara, *supra* note 73, at 70 (duty of "trust and honesty"). At least one scholar views the Japanese doctrine of good faith as equivalent to the American implied covenant of good faith and fair dealing. *See* Kuzuhara, *supra* note 73, at 91; ODA, *supra* note 80, at 134 (describing "doctrine of good faith and fair dealing"). While the Japanese Civil Code also imposes a duty to comply with public policy (Article 90), this duty arises mainly in tort, while the good faith duty of Article 1 is applied where the parties' relationship is contractual. *See* ODA, *supra* note 80, at 135-39.

[158] *See* ODA, *supra* note 80, at 9-11; Kuzuhara, *supra* note 73, at 82-83. This is understandable, given that the Civil Code, by its terms, subjects the parties' use of even statutory rights to an obligation of good faith. *See* MINPO, art. 1, no. 89; Kuzuhara, *supra* note 73, at 67; Yamaguchi, *supra* note 136, at 382 (all rights subject to obligation of good faith and fair dealing).

[159] *See, e.g.*, Walford v. Miles, (1992) 2 W.L.R. 174, 183 (UKHL).

[160] *See* Bridge, *supra* note 2, p. 23.

[161] *See* Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd., [1894] A.C. 535, 563 (U.K.H.L.) (per Lord Macnaghten) (covenant invalid at law cannot be enforced in equity); Batt v. City & County of San Francisco, 155 Cal. App.4th 65, 82, 65 Cal. Rptr.3d 716, 728 (2007) (equity cannot evade or subvert legal remedy); Matter of Dane's Estate, 55 A.D.2d 224, 226, 390 N.Y.S.2d 249, 250 (1976) (court cannot apply equity when statute controls case).

can counterparts in holding the parties to the terms of their contractual agreements.[162]

In line with the notion of good faith between the parties there remains the issue of comparative fault on the part of the buyer for the underlying breach. In contract cases, where fault is an issue, Japanese courts are authorized to,[163] and often will, reduce the buyer's damages according to their estimation of the buyer's fault.[164] English courts have opined that a seller may raise the defense of comparative fault[165] in a contract action, but only where the same duty is found to arise independently in both contract and tort.[166] On the other end of the spectrum, American courts recognize comparative fault only in tort cases.[167] While the buyer's duty to mitigate its damages[168] may appear analogous to the Japanese notion of comparative fault in contract, the duty to mitigate governs only the buyer's conduct

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[162] *See, e.g.*, Bridge, *supra* note 2, p. 28 (English standards for documentary performance remain strict); Charles M.R. Vethan, *The Sacred Cow of Equity and Strict Compliance in Letter of Credit Law: Recent Trends and Projections*, 6-SPG INT'L LEGAL PERSP. 45, 95 (1994) (American courts beginning to take flexible approach to enforcing letters of credit, while British courts remain "rigid" and "formalistic"). This phenomenon is in line with the larger trends in statutory construction in both systems, where British courts retain a reputation for stricter statutory construction than American courts. *See* Frank Diedrich, *Maintaining Uniformity in International Uniform law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE. INT'L L. REV. 303, 311 n. 45 (1996); *see* ODA, *supra* note 80, at 11 (British courts maintain stricter statutory construction than Japanese courts).

[163] *See* MINPO, art. 418, no. 89.

[164] *See* Behrens, *supra* note 76, at 712 (courts often reduce contract damages by degree of comparative fault).

[165] The notion of comparative fault is still referred to as "contributory negligence" in English law. *See* Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, §§ 1 and 4 (U.K.) (permitting claimant's contributory negligence to reduce damages awarded).

[166] *See* Barclays Bank plc v. Fairclough Building Ltd., [1995] Q.B. 214, 228-29, [1994] 3 W.L.R. 1057, 1069 (Eng. C.A.) (per Beldam, L.J.) (recognizing applicability of contributory negligence defense to certain class of contract actions where tort and contract duties independently coincide).

[167] *See* Bellier v. Bazan, 124 Misc.2d 1055, 1057-58, 478 N.Y.S.2d 564, 564 (1984) (applying C.P.L.R. § 1411, providing that "culpable conduct" will "diminish" but "not bar" a tort claim); Li v. Yellow Cab Co., 13 Cal.3d 804, 827-28, 119 Cal. Rptr. 858, 874-75 (1975) (adopting comparative fault in tort cases).

[168] *See* CISG, *supra* note 1, art. 77 (allowing reduction in damages for failure to mitigate losses); John Y. Gotanda, *Awarding Damages Under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L L. 95, 104 (2005) (failure to mitigate does not foreclose damages, but reduces them).

in piling up damages, not in performing generally under the contract.[169] Thus, the fact that Japanese courts will, and English courts may, take into account the buyer's own comparative fault in the underlying breach, can result in a surprising reduction in damages for an American claimant.

As seen above, American, English, and Japanese sales law each allow, on a superficial level, a similar post-acceptance damages remedy to a buyer of goods containing latent defects. However, the measure of such damages will vary according to which country's law applies. Thus, an innocent buyer will either be entitled to recover both general damages and special damages, or will be limited to general damages only, depending, for example, on whether Japanese law applies. Yet, before the buyer is even able to seek recovery of damages, it remains that the American, English, and Japanese systems will impose differing notice requirements, time limits, good faith obligations, and comparative fault doctrines that may cut off a portion, or even all, of the buyer's damages for the seller's breach.[170] Clearly, if a uniform law, in the form of the CISG, were available to an American party trading with British or Japanese counterparts, many of these risks could be avoided. Nevertheless, the allure of a uniform law is only as strong as its consistent predictability.

5. *The Limitation Period Problem*

The CISG is silent on one issue of great importance to both sides of a sales transaction: the limitation period for commenc-

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[169] *See* Strebel v. Brenlar Inv., Inc., 135 Cal. App.4th 740, 753, 37 Cal. Rptr.3d 699, 709 (2006) (discussing reach of "avoidable consequences" doctrine). (The doctrine applies in both tort and contract cases. *See* Shaffer v. Debbas, 17 Cal. App.4th 33, 41, 21 Cal. Rptr. 2d 110, 114 (1993).

[170] To say nothing of the question of whether a contract exists at all. American courts are still essentially required to apply the Statute of Frauds, 1677, 29 Car. 2, c. 3 (U.K.), albeit in modified form, to reject oral contracts of more than five hundred dollars' value, unless they have been somehow confirmed in writing. *See* CAL. COM. CODE § 2201 (Statute of Frauds); N.Y. U.C.C. § 2-201 (same). Nevertheless, oral contracts will be enforced under British and Japanese law. The U.K. Parliament has repealed the Statute of Frauds for most contracts. *See* Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34 (U.K.). Japanese law generally has no prohibition on oral contracts in the context of sales. *See* Michida, *supra* note 74, at 208; Todd F. Volyn, *Agreement Consummation in International Technology Transfers*, 33 IDEA 241, 267 (1993).

ing legal proceedings. A separate treaty, the 1974 Convention on the Limitation Period for the International Sale of Goods,[171] is meant to govern a seller's time on risk for cross-border transactions. Consequently, the applicable limitation period for transactions between American, British, and Japanese businesses will be left to the conflicts rules of private international law, regardless of whether the United Kingdom or Japan ratifies the CISG, or the United States withdraws her Article 95 declaration, as neither the United Kingdom nor Japan has ratified the Limitation Convention.[172]

Assuming that the buyer has complied with any applicable pre-suit notice requirements, the question of the applicable limitation period for suit requires a specialized conflict of laws analysis. For example, British courts are to apply the limitations period of the jurisdiction whose law otherwise controls the substantive legal issues in dispute.[173] Whereas, in the United States, courts adhere to the presumption that the forum's limitation period should apply, regardless of the substantive law found to be applicable.[174] Although, where the foreign limitation period extinguishes both the right and remedy, as with a civil law prescription period, an American court will usually apply the foreign prescription period along-side foreign substantive law.[175]

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[171] *See* Convention on the Limitation Period in the International Sale of Goods, *opened for signature* June.14, 1974, U.N. Doc. A/Conf. 63/15 (1974), *reprinted in* 19 I.L.M. 952 (1980) [hereinafter "Limitation Convention"]; Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, U.N. Doc. A/Conf. 97/18, Annex II (1980), *reprinted in* 19 I.L.M. 696 (1980). Both texts are reproduced at S. Treaty Doc. 103-10 (1993).

[172] *See* List of 1974 Convention parties on UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html.

[173] *See* Foreign Limitation Periods Act, 1984, c. 16, § 1 (U.K.). However, even if a foreign limitation period is to be applied, English law will be used to determine the time when proceedings were commenced, ending the limitations period. *See id.*

[174] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, § 142 (1971). Traditionally, American courts had viewed statutes of limitations as "procedural," and therefore, applied the forum's limitation period as a matter of course. *See* DeLoach v. Alfred, 960 P.2d 628, 629 (1998); Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1198-201 (1988) (Souter, J., dissenting).

[175] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 143 (1971). Statutes of limitations in common law jurisdictions normally do not fall into this category. *See, e.g.*, Curwen v. Milburn, (1889) 42 Ch.D. 424, 434-35 (Eng. C.A.) (per Cotton, L.J.) (contract statute of limitations extinguishes remedy, not right). Thus, an En-

As between the United States, United Kingdom, and Japan, the length of the actual applicable limitation period can vary greatly, and have profound consequences for the seller's time on risk for the goods sold. The English limitations period will be six years for any breach of contract or warranty claim.[176] The UCC imposes a four-year limitations period, which for breach of warranty claims, accrues at the time of delivery of the goods.[177] Yet, for contracts with foreign parties, U.S. courts are to apply the Limitation Convention.[178] The Limitation Convention provides a four-year limitation period, like the UCC, but for warranty claims, the Convention's limitation period accrues at the time the buyer gives the seller notice of any nonconformity, or at the expiration of any express warranty period.[179] Unlike the CISG, United States courts are authorized to apply the Limitation Convention even where the non-American party is doing

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glish court will not ordinarily strike out a claim supposedly barred by a statute of limitation, unless the bar is clear, in which case the claim may be struck out as an abuse of process. *See* Ronex Properties Ltd. v. John Laing Const. Ltd., [1983] Q.B. 398, 404, [1982] 3 All E.R. 961, 962 (Eng. C.A.) (per Donaldson, L.J.). An application to strike out a claim is analogous to a motion to dismiss in United States courts, in that it is available where "the statement of case discloses no reasonable grounds" for bringing or defending a claim. *See* ENG. CIV. P.R. 3.4(2)(a); *compare* FED. R. CIV. P. 12(b)(6) (dismissal for failure to state cause of action). If, however, the evidence shows no reason to toll or disregard the limitations bar, a court may grant summary judgment upon a showing that the claimant has "no real prospect of succeeding" on the claim and there is "no other compelling reason" to proceed to trial. *See* ENG. CIV. P.R. 24.2; *compare* FED. R. CIV. P. 56 (summary judgment appropriate where there is no genuine dispute as to material facts).

[176] *See* Limitation Act, 1980, c. 58, § 5 (U.K.) (six-year limitation period for "simple contract" claim); VAI Indus. (UK) Ltd. v. Bostock & Bramley, [2003] EWCA Civ 1069, ¶¶ 10, 22 (Jul. 23, 2003) (per Ward, L.J.) (applying the "simple contract" limitations period of § 5 to breach of warranty claim). The limitation period will accrue from the actual time of breach, regardless of whether damages yet exist. *See* Bell v. Peter Browne & Co., [1990] 2 Q.B. 495, 500, [1990] 3 All E.R. 124, 126 (Eng. C.A.) (per Nicholls, L.J.). This strict rule of accrual is distinct from the English approach to tort claims, which accrue at the time of the claimant's "knowledge" of the cause of action. *See* Limitation Act, 1980, §§ 11(4) and 14.

[177] *See* CAL. COM. CODE § 2725; N.Y. U.C.C. § 2-725.

[178] *See* Limitation Convention, *supra* note 171, art. 3.

[179] *See id.*, art. 11. This is the main point of divergence between the limitation periods of the UCC and the Convention. *See* Anita F. Hill, *A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2-725 of the Uniform Commercial Code*, 25 TEX. INT'L L.J. 1, 17 (1990). Although, the respective rules for cessation of the limitation periods also differ. *See id.* at p. 22.

business from a country that is not a party to the Limitation Convention, so long as American law otherwise applies.[180]

Ordinarily, the Japanese prescription period should apply in United States courts where Japanese law otherwise applies, since prescription periods, unlike limitation periods, are substantive.[181] The temporal difference in a seller's time on risk under English and American law on the one hand, and Japanese law on the other, is considerable. While the Japanese Civil Code imposes a ten-year prescription period for claims sounding in contract,[182] commercial contract claims are governed by a five-year prescription period.[183] For warranty claims on latent defects, a buyer under Japanese law has only one year in which to bring suit,[184] as compared to six under British law and four under American law.

IV. The CISG as a Uniform Law

The brief discussion of American, British, and Japanese sales laws highlights the need for uniformity by demonstrating the divergences in parties' liability for the same sales transaction depending upon the national law that may be applied, in spite of the superficial similarities between these national laws. The case for retaining the United States' Article 95 declaration, which excludes the CISG where the non-American party does business from a non-CISG country, depends in large part on whether the CISG will provide traders with greater certainty than the current state of private international law, where several countries' laws could apply to the same transaction.

Currently, American traders have resort to the CISG as a uniform law for transactions with parties doing business from the United States' top eight trading partners, except for the

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[180] *See* Limitation Convention, *supra* note 171, art. 3(1)(b) (Convention applies even where one party is not doing business from a contracting state, where private international law principles require application of the law of a contracting state).

[181] *See* Restatement (Second) of Conflict of Laws, § 143 (court should apply foreign limitation period that extinguishes both right and remedy if foreign substantive law applies); Hill, *supra* note 179, at 6 (civil law prescription periods are "substantive," as opposed to "procedural" limitations periods in common law systems).

[182] *See* Minpo, art. 167(1), no. 89.

[183] *See Shoho*, art. 522, no. 48.

[184] *See* Minpo, art. 570, no. 89 (adopting one-year prescription period set forth in Article 566(3)).

United Kingdom and Japan. At least in American courts, the United States' Article 95 declaration should exclude the CISG from applying between American traders and their Japanese and British counterparts. Although it clearly provides parties to an international sales contract with a "neutral" law, the CISG is only really useful to traders if it is truly uniform and predictable. Otherwise, when parties choose the CISG to govern their contract, they will also have to choose the national legal system in which the CISG should itself be construed.[185] Such a turn of events would thrust all traders back into the pre-CISG world, placing them at the mercy of courts' conflict of laws analyses before the outcome of a contract dispute could even begin to materialize.

After coming into force in 1988, the CISG suffered from an initial period of skepticism, but has since become more popular with businesses involved in international transactions.[186] Where it was used, the CISG also initially suffered from a "homeward trend" under which national courts would resort to their own domestic modes of interpretation for its provisions,[187] and which contributed to a lack of uniformity in its interpretation from country to country.[188] As case law interpreting the CISG has developed, more examples of harmonious interpretation between different national courts has developed,[189] as well as a growing trend that favors comparisons of foreign case law before a domestic tribunal reaches its decision in a case involving the CISG.[190] The development of electronic databases that allow judges in different countries to actually read one another's decisions has helped this trend toward a harmonious jurisprudence.[191] These databases include the Case Law on

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[185] *See* Mann, *supra* note 8, at 388 (highlighting instances of national divergences in interpretation of "uniform" laws).

[186] *See* Bonnell, *supra* note 3, at 5.

[187] *See* Diedrich, *supra* note 162, at 304.

[188] *See* Andersen, *supra* note 86, at 162.

[189] *See* Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 265 (2003).

[190] *See* Andersen, *supra* note 86, at 172; *see also* Spiros V. Bazinas, *Uniformity in the Interpretation of the Application of the CISG: The Role of CLOUT and the Digest, in* CELEBRATING SUCCESS: 25 YEARS UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 18, 25 (Sing. Int'l Arb. Ctr. 2005).

[191] *See* Lookofsky, *supra* note 189, at 268.

UNCITRAL Texts (CLOUT) and Digest of the CISG, maintained by the U.N. Commission on International Trade Law (UNCITRAL),[192] and the CISG database maintained by Pace University's law school.[193]

The CISG can provide international traders with certainty and predictability, though this is not obvious to all legal observers. The state of uniformity in national courts' interpretations of the CISG can be deceiving to common law practitioners whose usual indicia of legal certainty are often missing from CISG case law and doctrine. Yet, the CISG as a uniform body of law represents a "unique discipline in law,"[194] and interpreting the CISG properly calls for canons of construction that may seem unfamiliar to common law lawyers.[195] As in the case of uniform laws with which American lawyers are familiar,[196] the CISG requires that courts consider the need for uniformity in construing its provisions, stating:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.[197]

Nevertheless, while interpretation of the CISG should naturally begin with its text,[198] as discussed above, the CISG is a "limited" law that leaves "gaps" in its express coverage of sales law issues.[199] Acknowledging this, the CISG requires that:

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[192] *See* Bazinas, *supra* note 190, at 18.

[193] *See* Andersen, *supra* note 86, at 177.

[194] *Id.* at 162-63.

[195] *See* Diedrich, *supra* note 162, at 312.

[196] *See, e.g.,* CAL. COM. CODE § 1103(a)(3) (UCC to be interpreted to promote uniformity between jurisdictions); N.Y. U.C.C. § 1-102(2)(c) (same).

[197] CISG, *supra* note 1, at art. 7(1).

[198] *See* Lookofsky, *supra* note 189, at 266; Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473, 473 (2001). It has also been argued that proper interpretation of the CISG should focus on the *texte juste*, which for the CISG encompasses both the English and French texts (out of the six authoritative texts), which best reflect the CISG's *travaux préparatoires*. *See* Diedrich, *supra* note 162, at 317-18. Indeed, with English as the *lingua franca* of international commercial activity, the English text may often bear a better relation to any documents in dispute. *See* Bridge, *supra* note 2, at 40 (English as the *lingua franca* of international commerce).

[199] *See* Evelien Visser, *Favor Emptoris: Does the CISG Favor the Buyer?*, 67 U.M.K.C. L. REV. 77, 81 (1998).

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[200]

Gaps that are required to be filled by application of the CISG's "general principles" are called gaps *praeter legem*, and gaps to be filled by the applicable domestic rule under private international law are termed gaps *intra legem*.[201]

From the face of its Article 7, the CISG requires judges and arbitrators to utilize civil law-type construction techniques and approaches to jurisprudence. As with most uniform international laws, the CISG is based largely upon civil law codes,[202] and its mandate to use "general principles" to fill gaps in its express text, is a familiar cannon of construction to civilian lawyers.[203] Yet, whether interpreting the CISG's case law, or its developing jurisprudence, a court's interpretation of the Convention must be "autonomous,"[204] that is: the court's construction of the CISG's terms must be rooted in generally accepted interpretations, and should not rely solely upon legal sources from the forum or even a single foreign legal system.[205]

From a common law practitioner's perspective, CISG jurisprudence is problematic in that there is no clear mandate or capacity for *stare decisis*. This is largely because there is no supranational tribunal whose decisions are binding on national courts,[206] nor is there the political will to create such a tribunal.[207] Nevertheless, existing CISG jurisprudence, while not exactly binding on a national court, should form the parameters within which counsel's choice of arguments are restricted.[208] Indeed, national courts are increasingly acknowledging that they are bound to survey decisions from other jurisdictions

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[200] CISG, *supra* note 1, at art. 7(2).
[201] *See* Visser, *supra* note 199, at 81.
[202] *See* Diedrich, *supra* note 162, at 311.
[203] *See* Hackney, *supra* note 198, at 477; Gotanda, *supra* note 168, at 124-25.
[204] *See* Bazinas, *supra* note 190, at 18; Hackney, *supra* note 198, at 475.
[205] *See* Diedrich, *surpra* note 162, at 313-14.
[206] *See* Andersen, *supra* note 86, at 167.
[207] *See* Diedrich, *supra* note 162, at 337.
[208] *See* Andersen, *supra* note 86, at 167.

before ruling in CISG cases.[209] Some scholars have referred to this trend as *ipso facto stare decisis*,[210] however, the role of decisional law in interpreting the CISG appears to be more similar to the phenomenon of *jurisprudence constante*.[211] This is in part because courts[212] and scholars[213] have advocated an approach to CISG interpretation that utilizes case law and scholarship more in conformity with horizontal civil law norms than the vertical common law approach.[214]

Rather than relying on judicial hierarchy, a legal principle becomes *jurisprudence constante* through consensus between the relevant courts,[215] evidenced by the courts repeatedly com-

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[209] *See id*. National courts have already utilized this comparative law technique when interpreting other uniform law treaties, such as the 1929 Warsaw Convention relating to air carrier liability. *See, e.g.,* Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, proclaimed Oct. 29, 1934 by U.S. President, 137 L.N.T.S. 11, 1933 Gr. Brit. T.S. No. 11 (Cmd. 4282); El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 176 (1999) (examining foreign Warsaw Convention case law); Fothergill v. Monarch Airlines, [1981] A.C. 251, 276, [1980] 3 W.L.R. 209, 218 (U.K.H.L.) (per Lord Wilberforce) (U.K. courts should examine case law of treaty partners in interest of uniformity of Warsaw Convention). Warsaw Convention case law, as regulating private law claims, provides a counterexample to the argument that national courts only feel constrained by foreign decisional law in the context of *public* international law instruments. *See* Andersen, *supra* note 86, at 163 (arguing that courts feel more bound to comparative analysis for treaties affecting *public* international law).

[210] *See* Andersen, *supra* note 86, at 168.

[211] *See* Hackney, *supra* note 198, at 478.

[212] *See* Andersen, *supra* note 86, at 171 (courts have resorted to scholarly writings from differing jurisdictions to decide CISG cases).

[213] *See* Bazinas, *supra* note 190, at 26 (scholarly writings indispensable in their ability to criticize and guide courts toward correct interpretations); Hackney, *supra* note 198, at 477-78 ("doctrine" should be utilized as a secondary source for CISG interpretation); Andersen, *supra* note 86, at 172 (use of scholarship is the "next best thing" to jurisprudence in autonomous interpretation of CISG).

[214] Scholars addressing the CISG have also noted the importance of the CISG's *travaux préparatoires* as aids in interpreting its express provisions. *See* Lookofsky, *supra* note 189, at 266-67. This *travaux* has sometimes been stated to include the earlier, unsuccessful 1964 Convention Relating to a Uniform Law on the International Sale of Goods (ULIS). *See id.*; Convention, *opened for signature* July 1, 1964, 1972 Gr. Brit. T.S. 75 (Cmnd. 5030), 834 U.N.T.S. 107. The use of *travaux* in treaty interpretation has been accepted by national courts with respect to other conventions. *See*, *e.g.,* Mann, *supra* note 8, at 385.

[215] *See* CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 43 (2d ed. 1996).

ing to the same legal conclusion on a specific issue.[216] *Jurisprudence constante* is usually identified in scholarly writings, and civil law lawyers and judges place greater emphasis on legal scholarship (*doctrine*)[217] as authority than common law lawyers.[218] Thus, in a civil law system, jurisprudence forms part of a wider discourse that includes authoritative scholarly writings.[219] Although the notion of consensual precedent may seem alarming to common law lawyers, once formed, it is nonetheless binding.[220]

Ultimately, the CISG calls for civilian approaches to interpretation by and precedent between national courts. These approaches will be unfamiliar to most common law practitioners and judges, and at first glance may appear less certain than the doctrine of *stare decisis*.[221] However, since the civilian approach to legal precedent is the norm in such commercial powers as France, Germany, and Japan, it is clearly capable of creating enough legal certainty to foster the confidence of successful and sophisticated businesses.

Criticism that national courts have failed to create absolute uniformity in their interpretation of the CISG should not be taken at face value. To begin with, the CISG does not actually require *absolute* uniformity,[222] and discrepancies between judicial systems do not represent any concerted effort to subvert the CISG's uniformity. Nor is complete uniformity practically necessary, as domestic uniform laws often fail to achieve absolute

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[216] F.H. LAWSON, A.E. ANTON, AND L. NEVILLE BROWN, AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 10 (Oxford 3d ed. 1967); *see* DADOMO, *supra* note 215, at 42.

[217] *See* LAWSON, *supra* note 216, at 12 (describing legal scholarship as *doctrine*).

[218] *See, e.g.*, WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 19 (1995) (legal scholarship relied on more in France than in England).

[219] *See* Michael L. Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 114 (1994) (academic writings help to clarify and contextualize terse judicial opinions); DADOMO, *supra* note 215, at 45 (scholarship necessary to clarify French judicial decisions).

[220] *See* DADOMO, *supra* note 215, at 42; LAWSON, *supra* note 216, at 10.

[221] Although the certainty of *stare decisis* itself depends in large part on the jurisdiction concerned. For example, English courts are said to be more likely to strictly follow previous judicial decisions than American courts, who take a principles-based approach to judicial precedent. *See* Wells, *supra* note 219, at 117, 124.

[222] *See* Hackney, *supra* note 198, at 478. Indeed, legal uniformity itself is "not absolute, but functions on many levels." *See* Andersen, *supra* note 86, at 169.

uniformity, but nevertheless continue to function.[223] This includes the UCC, which for most American traders, is the main alternative to the CISG for international sales contracts.[224] Moreover, the trends, both in the availability of CISG case law and in its use by various national courts, continue to grow and should signal greater uniformity of interpretation where the CISG applies. Where judicial consensus on the CISG's *jurisprudence constante* has not been achieved, legal scholarship is more than capable of guiding national judges,[225] and should continue to do so, in line with the civilian bent of the CISG's interpretative requirements.

V. Article 95 as an Impediment to Uniform/Neutral Law

The United States' Article 95 declaration effectively excludes the CISG from American traders' choices as to the law applicable to international sales transactions with countries that have not ratified the CISG. This is certainly true where the parties in such a transaction find themselves litigating in an American court. Assuming that foreign courts do feel bound to ignore the CISG in cases where the United States' Article 95 declaration applies, it does not appear that the parties could even contract around the declaration. One scholar has observed that even if parties attempt to utilize the CISG in such cases, by incorporating the CISG but excluding some of its articles, it is uncertain how those provisions would then be interpreted.[226] Indeed, even if parties included CISG provisions *verbatim* in their contracts, such inclusion would not guarantee the results the parties likely intended since the text of the CISG, by itself, would simply be subject to different national interpretive re-

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[223] *See* Hackney, *supra* note 198, at 475.

[224] *See* Tuggey, *supra* note 4, at 547 (UCC has not achieved complete uniformity between American states).

[225] An excellent example of this sort of scholarship deals with the autonomous approach courts should take with respect to damages awards under the CISG, which also explains why national courts should eschew their tendency to classify too many issues as procedural, and therefore subject to local law. *See* Gotanda, *supra* note 168, generally. It has also been argued that arbitral decisions provide an excellent source for CISG jurisprudence, since arbitral panels are generally "stateless," often may have more experience dealing with transnational commercial disputes that many national courts. *See* Andersen, *supra* note 86, at 169-70.

[226] *See* Bell, *supra* note 19, at 66.

gimes.[227] As discussed above, in the case of American, British, and Japanese courts, these differences in interpretation can be wide-ranging, possibly leading to results the parties had not anticipated.

Giving the CISG the force of law, even in transactions where an American party is contracting with a party from a non-CISG country, is the surest way to guarentee that a court or tribunal will make use of the gloss already given to the CISG's provisions, where the parties intend to apply the CISG. The above discussion of American, British, and Japanese sales law highlights the fact that the various national courts' interpretive lenses will have a tremendous, and varied, impact on the parties' perceived rights. Judicial gloss shapes this interpretive lens by clarifying the meaning and effect of statutory provisions.[228] In the case of the CISG, an overall gloss, combining judicial and scholarly sources, continues to develop and focus the effects of its provisions. This CISG gloss is clearly not a part of a larger UNCITRAL *acquis*, in that countries ratifying the CISG are not simultaneously required to accept all UNCITRAL-drafted treaties, or even the UNCITRAL's Digest of the CISG.[229] However, the existence of the CISG gloss, and the interpretative requirements of Article 7, clearly provides a na-

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[227] *See* Peter J. Mazzacano, *Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective*, 2008 NORDIC J. COM. L. 1, 8-9. Although, arguably, if Article 7(1) were included in the parties' contract, a national court would be required, on some level, to examine foreign case law construing the CISG before ruling in the parties' dispute.

[228] *See* Dolgellau Golf Club v. Hett, [1998] EWCA Civ 621 (Apr. 3, 1998) (per Auld, L.J.) (judicial gloss may establish the "meaning" of statutory term); United States v. Lanier, 520 U.S. 259, 266 (1997) (judicial gloss may clarify an uncertain statute).

[229] The term *acquis* was originally used as *acquis gattien*, to describe the body of law that new members of the GATT/WTO regime were required to accept upon their admission, to harmonize their trade law regimes with those of other members. *See Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, ¶ 4.11 (July 11, 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm. The more well-known *acquis communautaire* of the European Union represents "the whole body of rules, political principles and judicial decisions which new Member States must adhere to, in their entirety and from the beginning, when they become members." *See* Stephen J. Silvia & Aaron Beers Sampson, Acquis Communautaire *and European Exceptionalism: A Geneaology*, ACES WORKING PAPER 2003.1, at 19 (July 2003), *available at* http://www.american.edu/aces/Working%20Papers/2003.1.pdf.

tional court with authoritative guidance on the proper construction of the CISG's provisions.

Clearly, parties seeking a neutral, predictable legal regime to govern their transnational contracts are not interested in merely utilizing the CISG's text as seen through the prism of over a hundred different legal systems with their varying rules of statutory and contractual construction. This glossless approach to the CISG does not differ much from simply drafting a contract for a transnational sale, and subjecting it to the varying conflicts of laws rules of the relevant jurisdictions. Rather, if parties wish to utilize the CISG they will expect the court to apply the CISG consistent with interpretative rules established by the CISG's gloss. Unless the CISG is allowed to have the full force of law in all transnational sales contracts entered into by American traders, there is no guarantee that the CISG's gloss will be applied by foreign courts in place of their own, and little question that the United States' Article 95 declaration will block the use of the gloss by American courts.

Perhaps the best argument for retaining the United States' Article 95 declaration is the perceived lack of uniformity in CISG jurisprudence from country to country. However, as discussed above, this lack of uniformity is diminishing and national courts are considering the CISG gloss, both judicial and scholarly, as it develops before making their own rulings in CISG cases. Although, the case of Japan does highlight an additional problem: if the United States were to withdraw her Article 95 declaration and allow the CISG to apply to transactions between American and Japanese traders, the CISG would simply represent "foreign law" to a Japanese court. Yet, Japanese conflicts rules require Japanese courts to ignore foreign law that does not comply with Japenese public policy.[230] In other words, Japanese courts may still feel required to resort to Japanese "good faith" jurisprudence to derogate from the provisions of the CISG and the parties' contract.[231] The surest solution to this possible interpretative danger is for Japan to simply ratify

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[230] *See Ho no Tekiyo ni Kansuru Tsusokuho*, art. 42, *translation available at* http://www.hawaii.edu/aplpj/articles/APLPJ_08.1_anderson.pdf.

[231] This is not entirely clear given the fact that Japan's conflict of laws statute is so new, and the fact that Japanese courts have traditionally only applied the "public policy" obligations to cases involving tort, reserving the "good faith" principle to contract matters. *See* ODA, *supra* note 80, at 135.

the CISG, in which case the CISG would trump Japanese domestic statutes,[232] likely excising the good faith jurisprudence under Articles 1 and 90 of Japan's Civil Code from CISG cases in Japanese courts.

While the obvious solution for harmonizing transnational contract law between the United States, United Kingdom, and Japan, is for the latter two to simply ratify the CISG. For policymakers in the United States, a positive step would be to withdraw the United States' Article 95 declaration. To begin with, preventing American parties from using the CISG in transactions with Japanese and British concerns, subverts the continuing development of uniformity in the CISG's interpretation. By requiring that courts resort to national law, instead of the CISG, in such transactions, the Article 95 declaration correspondingly lessens the number of judicial decisions that may issue that construe the CISG. As previously discussed, the declaration's reach is not even clear, insofar as it is uncertain whether foreign courts would even give effect to it (whether or not such courts sit in CISG countries) and, as seen above, many international commercial disputes involving American concerns are resolved abroad.

For transactions involving six out of her eight top trading partners, the United States affords her traders the option of using a single, uniform law of sales: the CISG. Yet, for transactions involving parties from the other two: Japan and the United Kingdom, the United States has expressly disallowed American traders from utilizing the CISG. This article has broadly examined the American, British, and Japanese laws on warranties – covering the lingering issue of a seller's post-acceptance responsibility for latent defects in goods sold – and has shown that while these post-acceptance remedy regimes are superficially similar between the three legal systems, they can diverge from one another in the crucial area of the damages allowed. Further, when viewed in the wider context of each country's general contract law, the parties' warranty rights and liabilities will be subject to sometimes vastly differing national systems of statutory and contractual interpretation, and starkly differing views on the effect of comparative fault on contractual

[232] The Japanese Constitution provides that treaties prevail over domestic statutes. *See* ODA, *supra* note 80, at 50.

obligations. This brief comparison of a discrete portion of each country's law of warranties provides a reminder of the need for a single, uniform law of sales, whose rules are accessible and understandable to all international traders.

It is hoped that all of the United States' trading partners will ratify the CISG so that the Convention's provisions can provide a uniform law of sales throughout the world. However, for the time being, it is incumbent upon the United States to withdraw her Article 95 declaration to the CISG, thereby enabling her traders to do business throughout the world, armed with a neutral, uniform sales law which both sides to a contract can expect to be applied in a predictable manner by courts of different countries. The declaration, far from helping American traders in this process, represents merely a retreat to parochialism in an era that has seen the world's rapid shrinking through expanding global trade. Withdrawing the declaration will not require the CISG to be applied to all transnational sales contracts involving American parties, but its withdrawal will allow American traders the choice of utilizing one of the world's most successful uniform legal regimes.[233]

VI. Conclusion

Allowing American traders to use the CISG, regardless of whether or not the other party to a given sales contract is doing business from a country that has ratified the CISG, will create two positive effects. The psychological effect will be that American parties will be able to use a "neutral" law in their dealings with foreign parties, allowing both parties to believe that neither has been given the upper hand from the contract's inception. The practical effect will be that an American business will have the choice of utilizing one basic form of contract for all, or nearly all, cross-border transactions, since there will no longer be a need to distinguish between sales covered by the CISG, and those that are not.[234] Given the state of conflicts of laws rules, it is not even clear that the United States' Article 95 declaration would even protect the superficial and commercially

[233] *See* Visser, *supra* note 199, at 80.

[234] *See* Bell, *supra* note 19, at 67-68; Linarelli, *supra* note 13, at 1401.

irrelevant interest of having "American law" supposedly apply to more transactions than it would were the declaration withdrawn.