

## A GLIMPSE THROUGH THE KALEIDOSCOPE: CHOICES OF LAW AND THE CISG (KALEIDOSCOPE PART I)<sup>+</sup>

Lisa Spagnolo\*

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### 1 INTRODUCTION

It has often been lamented that parties frequently opt out from the CISG.<sup>1</sup> We have heard today about the dangers of the homeward trend. Likewise, the CISG cannot hope to attain its goal of reducing transaction costs and facilitating trade if it is unused. The greater the rate of opt-outs, the less likely the CISG will achieve its aim.

How commonplace are exclusions from the CISG? The evidence varies, but we have data for a few jurisdictions. For the US, somewhere in the range of 55-71% of lawyers ‘typically/generally’ opt out.<sup>2</sup> In Germany that figure is probably around 45% of

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<sup>+</sup> Kaleidoscope Part II appears in this volume of the *Vindobona Journal of International Commercial Law and Arbitration (Vindobona Journal)*: “Rats in the Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of Opting In and Out of the CISG” (2009) 13 *Vindobona Journal* 157.

<sup>\*</sup> Faculty of Law, Monash University, Australia. All websites last checked 16 March 2009 unless otherwise stated. This paper was presented 2 April 2009 at MAA “Issues on the CISG Horizon: Conference in Honour of Peter Schlechtriem (1933-2007)” in Vienna. My gratitude to Professor Al Kritzer, Professor Ingeborg Schwenzer, Fan Yang, Ulrich Schroeter and Long Weidi for their comments, and to Priya Akula and Alexander Lütgendorf for their editorial assistance. Thanks to staff at Café Leupold, Wien for their hospitality during completion of this article. Caffeine-induced errors are mine alone.

<sup>1</sup> See for e.g., Kruisinga, S., “(Non-) conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?” (2004), *Intersentia Belgium*, at p. 9; Pistor, K., “The Standardization of Law and Its Effect on Developing Economies” (2002) 50 *American Journal of Comparative Law* 97, at p. 111; Cook, V. S., “The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity” (1997) 16 *Journal of Law and Commerce* 257, at p. 258; Koehler, M. F., “Survey regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of its Application” (October 2006), at p. 1, available at: <<http://cisgw3.law.pace.edu/cisg/biblio/koehler.html>>.

<sup>2</sup> Studies of U.S. lawyers have generally yielded similar survey sizes, thus there are three applicable rates: 55%, 61% and 71%. In 2006-2007, on the basis of a sample size of 47 for the question involved,

lawyers who ‘generally/predominantly’ opt out.<sup>3</sup> In Switzerland it seems the figure is around 41%,<sup>4</sup> while for Austrian lawyers, it is around 55%.<sup>5</sup> Some 37% or less of Chinese lawyers typically opt out.<sup>6</sup>

Fitzgerald found 55% of US lawyers ‘typically’ opt out of the CISG: Fitzgerald, P. L., “The International Contracting Practices Survey Project” (2008) 27 *Journal of Law and Commerce* 1, at p. 64 (Question 11), available at: <<http://ssrn.com/abstract=1127382>>. In 2004-2005 on the basis of a sample size of 48 US lawyers, Koehler found 71% ‘generally/predominantly’ opted out: Koehler, M. F., “Survey regarding the Relevance” *supra* fn 1 (link to Chart ‘Frequency of Exclusion of the Convention’). In 2007 on the basis of a sample size of 46 (mostly litigation) US lawyers, Philippopoulos found an ‘overwhelming majority’ preferred to opt out, although no proportion is stated: Philippopoulos, G. V., “Awareness of the CISG Among American Attorneys” (2008) 40 *Uniform Commercial Code Law Journal* 357, at pp. 361 and 363. Working backwards from the alternative responses, it appears that 61% of respondents preferred to opt out. The study of Professor Gordon is sometimes cited as having found that half the 124 respondents opted out however, the sample size is in fact unclear. Gordon himself does not confirm the number of responses received but mentions that the ‘survey was sent to a random 100’ members of the Florida Bar International Law Section, plus a further 24 members of the Section’s Executive Committee. The sample size must therefore be 124 or less. Further, rather than half of all respondents indicating that they opted out, Gordon states half of those 32% who indicated reasonable or good knowledge of the CISG had opted out or opted in: Gordon, M. W., “Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State’s (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges” (1998) 46 (*Suppl.*) *American Journal of Comparative Law* 361, at p. 368.

<sup>3</sup> A 2004 survey of 479 German lawyers by Justus Meyer found opt-outs were ‘normal’ practice for 45%: Meyer, J., “The CISG in Attorney’s Every Day Work” (2009, English version, unpublished) at p. 6, Question 4, Tables 4A-4C (draft paper on file with the author). The results have previously been published in German: Meyer, J., “UN-Kaufrecht in der deutschen Anwaltspraxis” (2005) 69 *RabelsZ* 457. Note some respondents gave multiple answers: email correspondence with Justus Meyer (held on file with author). In 2004-2005, on the basis of a sample of 33 German lawyers, Koehler found 73% ‘generally/predominantly’ opted out: Koehler, M. F., “Survey regarding the Relevance” *supra* fn 1, (link to Chart ‘Frequency of Exclusion of the Convention’); Koehler, M. F. and Guo, Y., “Combined Charts (Survey Germany USA China) – Frequency of Exclusion” (2008) (spreadsheet held on file with author). As the Meyer’s study involved a much larger sample size, it is primarily relied upon here.

<sup>4</sup> Two studies have been conducted, with results of 41% and 62% respectively. A 2007 study of 393 Swiss lawyers by Justus Meyer found 41% ‘normally’ contracted out: Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3 at p. 6, Question 4, Tables 4A-4C. These results have also been previously published in German: Meyer, J., “UN-Kaufrecht in der schweizerischen Anwaltspraxis” (2008) 104 *SJZ* 421. Note some gave multiple answers: email correspondence with Justus Meyer (held on file with the author). Widmer and Hachem report in 2008 on the basis of a survey of 153 Swiss lawyers that 62% ‘regularly’ opt out. They also found Swiss lawyers 5 times more likely to accept a counterparty’s proposal to opt out rather than opt in: Widmer C. and Hachem P., “Switzerland” in Ferrari, F. (ed), *The CISG and its Impact on National Legal Systems* (2008, Sellier) 281, at pp. 285-286 [hereinafter *National Impact*]. Although responses were received from 170 lawyers, 17 were not involved in international sales: *ibid*, at p. 282. As the Meyer study involved a much larger sample size, it is primarily relied upon here.

<sup>5</sup> A 2007 study of 296 Austrian lawyers by Justus Meyer found 55% ‘normally’ contracted out: Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3 at p. 6, Question 4, Tables 4A-4C. The results have previously been published in German: Meyer, J., “UN-Kaufrecht in der österreichischen Anwaltspraxis” (2008) *ÖJZ* 792. Again, some gave multiple responses: email correspondence with Justus Meyer (held on file with author).

<sup>6</sup> In 2007, on the basis of a sample of 27 Chinese lawyers, Koehler and Guo found that 37% ‘generally/predominantly’ opt out: Koehler, M. F. and Guo, Y., “The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems – An International Comparison of three Surveys on the Exclusion of the CISG’s Application Conducted in the United States, Germany and China” (2008) 20

My question is, why do lawyers opt out? Reasons for a choice of law are very much like the view through a kaleidoscope: fragmented, multi-coloured, and prone to never-ending variations. This paper, Part I, will provide a glimpse of those reasons. I will contend that the same set of reasons are seen very differently by lawyers in different jurisdictions, with the tendency in some jurisdictions for the view to be ‘pro-CISG’ and in others, for a view tending to lead to ‘blind’ or ‘automatic’ opt-outs. Naturally there are less extreme views, but for present purposes, these two polarities will suffice. At the risk of stretching the analogy too far, let me outline first the reasons or fragments, as seen in various jurisdictions. A separate paper (Part II) will explore some theories that help explain how these fragments interact and how the view might change in future.

## 2 COLOURS OF THE FRAGMENTS: FACTORS IN CHOICES OF LAW

In the available space I can only mention a selection of the many possible reasons for various choices of law by lawyers where the CISG is relevant. Some have attracted broad comment, others less so. My slightly visceral and unorthodox approach attempts to provide a colourful, although hopefully not psychedelic experience!

### 2.1 UNFAMILIARITY (BLUE)

This is the ‘grand-daddy’ of reasons. A perennial favourite with CISG commentators, unfamiliarity covers both lack of sufficient knowledge of the CISG and lack of awareness of its existence. Lawyer unfamiliarity seems to vary a great deal by jurisdiction, from high levels of baseline “unawareness” in US where 44% are ‘not at all familiar with it’<sup>7</sup> to much lower rates of ‘unawareness’ in Germany, Austria and

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*Pace International Law Journal* 45. The small sample size tends to corroborate anecdotal observations which suggest the actual level could be even lower: see, e.g., Han who reports Chinese lawyers ‘seldom’ opt out: Han, S., “China” in *National Impact*, *supra* fn 4, at p. 71; Lookofsky, J., “Online with Al K” in *Sharing International Commercial Law across National boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008), 287, at p. 291 [hereinafter, *Kritzer Festschrift*](stating ‘Chinese merchants are ready and most willing to do business on the [basis of the CISG]’); Kritzer, A., “Application and Interpretation of the CISG in the P.R. of China – Progress in the Rule of Law in China” (2007) 40 *Uniform Commercial Code Law Journal* 261; Yang, F., “CISG in China and Beyond” (2008) 40 *Uniform Commercial Code Law Journal* 373, at p. 376: noting that ‘[w]hile the US trend has been for contracting parties frequently to opt out of the CISG [...] the trend in China goes the other way’.

<sup>7</sup> In the US, 44% of lawyers were ‘not at all familiar’ with the CISG: Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 32 (Question 3) (surveying on this question 134 lawyers in 2006-7). See also, Gordon, M. W., “Some Thoughts on the Receptiveness” *supra* fn 2, at p. 371 (reporting that in 1997, US lawyers in Florida had a ‘poor level of knowledge’). The sample size in the Gordon study remains unclear: refer discussion *supra* fn 2. Philippopoulos’s indication that U.S. lawyers rate their professions’ awareness level at 3.12 out of 10: Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2, at p. 364 (Question 9).

Switzerland.<sup>8</sup> For example, it was recently reported that less than 2% of lawyers were unaware of the CISG in Switzerland.<sup>9</sup> Anecdotal accounts sketch the picture of elsewhere, varying from very good familiarity in China and Denmark to it ‘barely register[ing] on the consciousness’ of Canadian lawyers, and the CISG’s ‘sleeping beauty slumber’ in New Zealand.<sup>10</sup> Unfamiliarity has long been blamed for the level of opt-outs.<sup>11</sup>

<sup>8</sup> Meyer found that across Switzerland, Austria and Germany, almost half of the lawyers surveyed spent up to 10% of their workload dealing with CISG disputes: Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3, at p. 4, Question 2, Tables 2A-2C. German lawyers were the most prevalent at the higher frequency end of CISG dispute work, with 18% spending more than a quarter of their workload on CISG disputes (Austria 13%, Switzerland 10%), and 9% of German lawyers spending half or more of their workload this way (3% in Austria and Switzerland): *ibid*, at p. 4, Question 2, Tables 2A-2C. Citing the figures of Meyer and Koehler, Magnus points to high levels of familiarity amongst German lawyers (citing familiarity figures of almost 100%): Magnus, U., “Germany” in *National Impact*, *supra* fn 4, at pp. 143-145. However, he cautions there is a ‘wide range within which the degree of knowledge [amongst German lawyers] varies’: *ibid*, at p. 145.

<sup>9</sup> Widmer and Hachem report that in 2008 that only 2% of Swiss lawyers were not aware of the CISG: Widmer, C. and Hachem, P., “Switzerland” *supra* fn 4, at pp. 284, 287. See also the results of Meyer’s study regarding proportion of workload Swiss lawyers devote to CISG dispute work, *supra* fn 8.

<sup>10</sup> Han reports that to become a lawyer in China it is necessary to ‘understand or even gain mastery’ of the CISG: Han, S., *supra* fn 6, at pp. 71-72; Lookofsky, J., “Denmark” in *National Impact*, *supra* fn 4, at pp. 113-119 (stating Danish lawyers are ‘well acquainted with the CISG’). Although lawyers dealing with international sales in Japan are aware of the CISG, they are ‘not accustomed to using it.’ Despite these conclusions, Hayakawa reports that it ‘would be hard for such lawyers to do business without having at least a basic knowledge of [the CISG]’: Hayakawa, S., “Japan” in *National Impact*, *id.*, 225, at pp. 226-27; Torsello, M., “Italy” in *National Impact*, *ibid*, 187, at pp. 191, 195-96, 208 and 215 (suggesting that while CISG is not popular, there is a trend toward international drafting specialists with English law language skills and they are well-versed in the CISG); McEvoy, J. P., “Canada” in *National Impact*, *ibid*, 33, at pp. 33-34 (stating it ‘barely registers on the consciousness of Canadians’); Butler, P., “New Zealand” in *National Impact*, *ibid*, 251, at pp. 251, 252 and 258 (reporting the CISG is in a ‘sleeping beauty slumber’ in New Zealand); Baretic M. and Nikšić S., “Croatia” in *National Impact*, *ibid*, 93, at p. 94 (reporting a ‘weak awareness’ amongst Croatia lawyers).

<sup>11</sup> See e.g., Reimann, M., “The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care” (2007) 71 *RabelZ* 115, at p. 126 (agreeing that in the U.S. unfamiliarity is significant in opt-outs); Kilian, M., “CISG and the Problem with Common Law Jurisdictions” (2001) 10 *Journal of Transnational Law and Policy* 217, at pp. 230 and 238; Ziegel, J., “The Scope of the Convention: Reaching Out to Article One and Beyond” (2005-6) 25 *Journal of Law and Commerce* 59, at pp. 67-71; Kruisinga, S., “(Non-)conformity”, *supra* fn 1, at p. 9 (stating that one of the reasons for opting out ‘could be that lawyers [are] more familiar with their own national law’); Nottage, L. R., “Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s View from Australia and Japan” (2005) 36 *Victoria University of Wellington Law Review* 815, at fn.8; Murray Jr, J. E., “Symposium-Ten Years of the United Nations Sales Convention: The Neglect of CISG: A Workable Solution” (1998) 17 *Journal of Law and Commerce* 365, at pp. 365, 371-72; Cook, V. S., “CISG: From the Perspective of the Practitioner” (1997-8) 17 *Journal of Law and Commerce* 343, 349 (1997-8); Gordon, M. W., “Some Thoughts on the Receptiveness” *supra* fn 2, at p. 368 (arguing on a non-empirical basis US opt-outs in 1997 were being caused by unfamiliarity); Dodge, W. S., “Teaching the CISG in Contracts” (2000) 50 *Journal of Legal Education* 72, at pp. 74-78; Akaddaf, F., “Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?” (2001) 13 *Pace International Law Review* 1, at p. 4.

One might rightly question how someone unaware of the CISG can opt out. Total lack of awareness will obviously lead to its inadvertent default application in many cases through either the choice of the law of a Contracting State or failure to make any choice at all.<sup>12</sup> In other words, extreme unfamiliarity whereby the existence of the CISG is unknown can be the reason for *not* opting out.<sup>13</sup>

Unfamiliarity also exists when there is insufficient familiarity to properly determine whether the CISG is the better choice of law in a given situation. Even in jurisdictions with familiarity levels close to 100%, the depth of familiarity held by lawyers will naturally vary.<sup>14</sup> Knowledge of the CISG might comprise in its entirety of simply knowing it is ‘something to be excluded’ and no more. Alternatively, knowledge might be slightly better, but still too sketchy to enable any meaningful assessment of advantages and disadvantages.<sup>15</sup>

In this paper, I focus solely on the choices of law advised by lawyers. For lawyers, opting out as a means of avoiding an unfamiliar law is arguably an abdication of professional responsibility.<sup>16</sup> The important and complex question of the ethics involved in ‘blind’ or ‘automatic’ opt-outs will be revisited in Part II.

The evidence available shows that in the U.S., when asked to nominate a single reason for opting out, around 16% of lawyers stated that they opted out ‘principally’ due to unfamiliarity with the CISG.<sup>17</sup> However, when permitted to give multiple responses, 54% of U.S. lawyers indicated one of their reasons for opting out was that the CISG was ‘not widely known’,<sup>18</sup> as did 52% in Germany.<sup>19</sup> Yet in China, only 27% thought

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<sup>12</sup> Thus application of the CISG could occur either through Art. 1(1)(a) where both are apparently from Contracting States, or through Art. 1(1)(b) if the choice of law is that of a Contracting State, provided conflict rules of the forum uphold that choice and no issue arises due to an Art. 95 reservation.

<sup>13</sup> There is anecdotal evidence to this effect. See, e.g. Baretić, M. and Nikšić, S., “Croatia” *supra* fn 10, at pp. 94-95 (suggesting lack of awareness of CISG as one reason why Croatian lawyers tend *not* to opt out).

<sup>14</sup> Magnus, U., “Germany” *supra* fn 4, at p. 145. For example, although 98% of Swiss lawyers were aware of the CISG, 93% of Swiss lawyers had a ‘basic’ or better knowledge of the CISG, 37% had a ‘good’ knowledge, and one stated CISG work formed the predominant part of his practice: Widmer, C. and Hachem, P., “Switzerland” *supra* fn 4, at pp. 284 and 287.

<sup>15</sup> Ferrari, F., “General Report” in *National Impact*, *supra* fn 4, 413, at pp. 474-75. See, discussion: Spagnolo, L., “The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers” (2009) 10 *Melbourne Journal of International Law* 141.

<sup>16</sup> *Ibid.*

<sup>17</sup> Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 65 (Question 12): arguing the figure in fact would be higher were one to re-categorize responses masked as different responses. It is worth noting that only 45 lawyers responded to this question, so the sample size was quite small, and respondents were not allowed multiple answers. Reasons for opt-outs were not sought by Gordon: *supra* fn 2.

<sup>18</sup> In a study of 48 US lawyers in 2004-2005: Koehler, M. F., and Guo, Y., “The Acceptance of the Unified Sales Law” *supra* fn 6, at §IV.

that this was a reason to opt out.<sup>20</sup> Insufficient familiarity seems significant in choice of law decisions in other jurisdictions too.<sup>21</sup>

## 2.2 LEARNING COSTS OF BECOMING FAMILIAR (YELLOW)

Increasingly, commentators mention the time, cost and effort of becoming familiar with the CISG as a reason for opt-outs in certain jurisdictions.<sup>22</sup> Professor Flechtner aptly refers to these costs as ‘start up’ costs since a large upfront expenditure is required initially but, like a manufacturing plant, once the investment in CISG knowledge is made, it can thereafter be amortised over long periods.<sup>23</sup> There is much evidence to support the idea that the costs of becoming familiar with the CISG, or learning costs, are significant in lawyers’ choices of law.<sup>24</sup>

<sup>19</sup> *Ibid.* Unfamiliarity was not listed amongst options for respondents to select in the Meyer studies, in which the most frequent reason for opt-outs given by German, Austrian and Swiss lawyers was ‘not enough legal certainty’. However, Meyer concludes from individual comments the reason for opt-outs may be that many lawyers and clients are unfamiliar with the CISG: Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3, at p. 8, Question 5, Tables 5A-4C.

<sup>20</sup> Koehler, M. F., and Guo, Y., “The Acceptance of the Unified Sales Law” *supra* fn 6, at § IV.

<sup>21</sup> Anecdotaly, Hayakawa lists insufficient familiarity as one of the reasons for opt-outs in Japan: Hayakawa, S., *supra* fn 10, at pp. 225 and 227; McEvoy, J. P., “Canada” *supra* fn 10, at pp. 34, 37, 40, 46-49 and 60-66. Widmer and Hachem’s Swiss survey did not specifically provide ‘unfamiliarity’ as an option for respondents as to why they opted out. However, 42% responded that one reason for opt-outs was ‘lack of certainty’ (multiple responses were permitted), which the authors attribute in part to insufficient familiarity and consequent lack of confidence rather than lack of awareness: Widmer, C. and Hachem, P., “Switzerland” *supra* fn 4, at p. 285.

<sup>22</sup> Ziegel, J. S., “The Future of the International Sales Convention from a Common Law Perspective” (2000) 6 New Zealand Business Law Quarterly 336, at p. 346 (mentioning ‘economic’ reasons including ‘constraints of time and resources [that] may limit the amount of research they are willing to do’); Ziegel, J. S., “The Scope of the Convention” *supra* fn 11, at p. 345 (referring to costs of becoming familiar with the CISG as ‘economic’ reasons for paucity of CISG cases in the US); Flechtner, H. M., “Changing the Opt-Out Tradition in the United States” paper presented at ‘Modern Law for Global Commerce’ Congress to Celebrate the 40th Annual Session of UNCITRAL, Vienna, 9–12 July 2007 Spagnolo, L., *supra* fn 15, at p. 164.

<sup>23</sup> Flechtner, *ibid.*

<sup>24</sup> Koehler surmised that ‘a large number of the respondents have not yet taken the trouble to compare the legal aspects of the [CISG and non-CISG domestic law] in detail’: Koehler, M. F., “Survey regarding the Relevance” *supra* fn 1, at p. 10. One respondent remarked ‘you can’t teach an old dog new tricks’ and another pointed out the ‘steep learning curve’ that lawyers faced in order to ‘buy into the CISG’: *ibid.*, at p. 3. A respondent to Fitzgerald’s study commented that internal legal teams of multinational companies ‘do not have the time or occasion to try to determine whether the CISG [...] might actually be favourable in a particular situation and choose instead to exclude their application because of the need for consistency in template agreements’. Ironically, the same respondent then detailed the apparent difficulties faced by such lawyers - how a ‘cookbook’ of differences between U.S. and local law was kept when foreign domestic law applied because the ‘internal legal group [was] responsible for highlighting the differences [between U.S. and] non-U.S. law’: Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 106. In the Philippopoulos study there were also comments to the effect that parties ‘would rather simply opt out of the CISG than to take the time to learn its provisions’ and that they found it ‘very confusing to figure out how it differs from reliance on [the UCC]’ or at least, did not want to ‘spend the time and money to figure it out so they automatically opt out’: Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2, at pp. 365-66. See also, Gopalan, S., “A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law” (2008) 39

An interesting question is whether ‘start up’ costs are higher for some lawyers than others. Does the cost of becoming sufficiently knowledgeable about the CISG vary from jurisdiction to jurisdiction? Isn’t it just as time consuming to pick up a book, read an article, or look at cases, in Germany as opposed to say, the U.S.? There are three key differences between jurisdictions that might persuade us to resolve this question in the negative.

### 2.2.1 EDUCATION DIFFERENTIAL

I think the gut reaction of most of us is that the standard of legal education holds much of the answer. The extent to which law students are exposed to the CISG might range from a mere mention in contract law/private obligations subjects, to constant reference by way of comparison or as a fundamental teaching tool in others. The extent to which law schools incorporate teaching on the CISG is a good indicator of the depth of familiarity of lawyers in the jurisdiction. In countries where study of the CISG is compulsory, well-integrated within texts, or examinable, lawyers tend to be more familiar with it. Law courses in China, Denmark and Germany fit at least some of these criteria.<sup>25</sup> In China, the CISG is part of the compulsory curriculum, and examinable within the National Judicial Examination for qualification.<sup>26</sup> Exposure in law school is minimal in Australia, New Zealand, Canada and Italy, where familiarity is anecdotally low, at least amongst domestic lawyers.<sup>27</sup> There are some signs of improvement in educational exposure in the US.<sup>28</sup> Elsewhere, the extent of exposure varies.<sup>29</sup>

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*Georgetown Journal of International Law* 327, at p. 336 (arguing ‘learning externalities are a key contributor to the lack of impact’ of the CISG); Gillette C. P. and Scott, R. E., “The Political Economy of International Sales Law” (2005) 25 *International Review of Law and Economics* 446, at p. 478: noting that ‘attorneys have incentives to avoid learning about novel law, and thus they incorporate [familiar law] into their contracts’.

<sup>25</sup> Likewise, German students seem to have more exposure to the CISG. Despite the fact that the CISG is generally optional in German law schools, it is ‘part of the ordinary curriculum of most German law faculties,’ and ‘almost every standard commentary on the German Civil code’ includes CISG commentary: Magnus, U., *supra* fn 4, at p. 145. In Denmark, the CISG is integrated into the curriculum of the University of Copenhagen: Lookofsky, J., “Denmark” *supra* fn 10, at p. 119: arguing that this fact has helped ensure Danish lawyers are ‘well acquainted with the CISG’.

<sup>26</sup> Han, S., “China” *supra* fn 6, at pp. 71-72.

<sup>27</sup> Torsello, M., “Italy” *supra* fn 10, at p. 208: asserting Italian law schools provide students with limited exposure within contract law, but more frequently within comparative private law and international business transaction subjects; McEvoy, J. P., “Canada” *supra* fn 10, at pp. 33-34: observing in Canada that it is covered only in optional subjects; Butler, P., “New Zealand” *supra* fn 10, at pp. 252: stating that it is generally not taught as part of compulsory contract courses, and only minimal attention within private international or international commercial law subjects. This author can report that the CISG at undergraduate level generally receives passing reference within compulsory contract law, and limited attention within optional subjects in Australian law schools.

<sup>28</sup> Fitzgerald’s survey of U.S. law professors in 2006-7 revealed a substantial improvement in CISG coverage within undergraduate courses, and in U.S. casebooks since Gordon’s survey some 10 years earlier: Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at fn.108-112 and accompanying text, Questions 32 and 33; Gordon, M. W., “Some Thoughts on the Receptiveness” *supra*

Obviously, the less exposure a lawyer has had to the CISG at law school, the more inclined the lawyer will be toward exclusion in practice.<sup>30</sup> A widespread exclusion practice might encourage the jurisdiction's law schools not to cover the CISG in depth, creating a vicious circle that further entrenches high start up costs within that jurisdiction. Compulsory inclusion of CISG at law school forces investment in basic familiarity. Nonetheless, there is more to it than just legal education.<sup>31</sup>

### 2.2.2 DISPUTE WORK DIFFERENTIAL

Exposure to the CISG via litigation or arbitration work forces practising lawyers to invest in 'start up' costs whether they like it or not.<sup>32</sup> It follows that in jurisdictions producing greater quantities of CISG dispute work, there are bound to be more lawyers who have made the investment in familiarisation with the CISG. So which are the countries that have produced the most CISG cases? Has that fed back into greater levels of familiarity with the CISG or affected opt-outs?

It is extremely hard to tell. Even determining CISG case numbers is far from an exact science. Our best guide is the Pace Law School website, but it does not provide us with a complete picture. For example, arbitration is vastly underreported other than in a few jurisdictions.<sup>33</sup> The website has only reported one AAA case, does not report Australian arbitration cases, nor does it contain many ICC cases. Admittedly, in some jurisdictions, internal reporting is limited and delayed. For example, many Chinese court cases are not reported at all, and only selected arbitral cases more than 3 years old are reported by CIETAC.

Thanks to the efforts of Pace's network of volunteer translators and the willingness of CIETAC to co-operate, the Pace website contains some 341 translated Chinese cases,<sup>34</sup> but there are many more that are either unreleased or un-translated.<sup>35</sup> The 21

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fn 2, at pp. 364-67. Fitzgerald found that 76% surveyed covered CISG within basic contracts courses, but in 95% of cases it was only mentioned occasionally or in passing. He further found 86% covered CISG in basic sales courses, in 46% of cases forming a substantial part of sales coursework: *ibid*, Questions 29, 30, 33 and 35.

<sup>29</sup> In Switzerland the CISG is taught within the compulsory contract law course, but both emphasis and examinability vary greatly: Widmer, C. and Hachem, P., "Switzerland" *supra* fn 4, at pp. 284, 287-89 and 292.

<sup>30</sup> Accord, e.g., Widmer, C. and Hachem, P., "Switzerland" *supra* fn 4, at p. 288; Gordon, M. W., "Some Thoughts on the Receptiveness" *supra* fn 2, at p. 368.

<sup>31</sup> This is also known as a co-ordination problem in economics: see, e.g. Liebowitz, S. J., and Margolis, S. E., "Path Dependence, Lock-in and History" (1995) 11 *Journal of Law, Economics and Organization* 205, at p. 213; Liebowitz S. J. and Margolis S. E., "The Fable of the Keys" (1990) 33 *Journal of Law and Economics* 1, at pp. 1-2.

<sup>32</sup> Flechtner, H. M., "Changing the Opt-Out Tradition" *supra* fn 22.

<sup>33</sup> Russia, Serbia and China report many more arbitration cases than other jurisdictions. Confidentiality of arbitral proceedings is often proffered in justification of the reluctance to report arbitration proceedings. It is true that de-identification requires (minimal) resources. However, the process can yield valuable guidance for future decision-making.

<sup>34</sup> Case numbers are reported in the summary at <<http://cisgw3.law.pace.edu/cisg/new-features.html>>.



cases in translation reported for 2005 at the time of writing possibly represent just 11% of the likely Chinese CISG cases in that year, although this proportion is soon to expand as more cases are released.<sup>36</sup> For China, the proportion of case numbers reported precludes comparison as yet.<sup>37</sup>

There are other problems in this exercise. Underreporting of cases varies widely between jurisdictions and depends greatly on the pro-activeness of individual reporters. Also, conversion rates of disputes into decisions might vary between jurisdictions.

It must therefore be conceded that comparative measures of dispute work are necessarily speculative. With this in mind, if we take the number of cases on the Pace website<sup>38</sup> and divide by the population of the jurisdictions involved then we arrive at a tentative but nonetheless quite interesting figure that I will call ‘cases per million capita’ (cpmc).<sup>39</sup> We can also derive a similar figure; ‘cases per trillion trade dollar’

<sup>35</sup> It is difficult to ascertain total numbers of Chinese CISG cases. Only selected court decisions are released: Han, S., “China” *supra* fn 6, at p. 73. Also, CIETAC (Chinese International Economic and Trade Arbitration Commission) releases only selected arbitral decisions after three years: Mitchard P., “Is CIETAC Leading Arbitration in Asia into a New Era of Transparency?” (2009) *Asia Pacific Arbitration Review*, at fn 27 and accompanying text, available at: <<http://www.GlobalArbitrationReview.com>>. Nonetheless, it seems safe to assert that the number of Chinese CISG cases is enormous. CIETAC will soon overtake all other international arbitral bodies in terms of case numbers: Yang, F., “CISG, CIETAC Arbitration and the Rule of Law in the PR of China: A Global Jurisconsultorium Perspective” in *Kritzer Festschrift*, 600, at p. 601.

<sup>36</sup> Despite the impressive number of Chinese CISG cases reported on the Pace Website, these represent a fraction of the total Chinese CISG cases. For example, in 2008, CIETAC accepted 1230 new cases, including 548 [or 45%] international cases: *TDM News Digest*, Issue 12, Week 12, and 16 March 2009, available at: <<http://www.transnational-dispute-management.com/news/tdmnewsdigest.htm>>. In 2005, 905 cases were handled by CIETAC across its Beijing, Shanghai and South China offices available at <[http://www.hkiac.org/HKIAC/HKIAC\\_English/main.html](http://www.hkiac.org/HKIAC/HKIAC_English/main.html)> (follow the link to ‘Statistics’). Assuming the same proportion of international to domestic cases in 2005 as 2008, and assuming half involved the CISG (a conservative estimate given opt-out levels in China), there were probably around 181 CISG CIETAC cases in 2005. At the time of writing, Pace has reported in translation 21 of these, representing around 11%. This proportion is expected to grow even later this year, as more cases are released from 2005 by CIETAC offices in Beijing and South China following the end of the 3 year delay. The author thanks Fan Yang and Professor Albert Kritzer for sharing their views on this issue (all mistakes remain mine, however).

<sup>37</sup> In the sense that, the number of Chinese cases reported still appears to be a fraction of the total. Therefore, the cpmc for China is unknown (see discussion *infra*, at fns 37 and 38 and accompanying text). It is not possible to quantify the number of Chinese CISG cases. Using translated cases as proxy, 0.3 undoubtedly under represents the true figure available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>> (total number of Chinese CISG cases ‘is considerably more than that listed’ on the Pace Website); email correspondence with Long, Weidi, Professor Albert Kritzer and Fan Yang (held on file with the author); see also *supra* fns 44 and 57.

<sup>38</sup> Where additional information is available, I have modified case numbers: see, *infra* fns 46, 48 and 49.

<sup>39</sup> According to the US Census Bureau, populations in 2009 were Australia 21.3m, Austria, 8.2m, Canada 33.5m, China 1,338.6m, USA 307.2m, Germany 82.3m, Netherlands 16.7m, New Zealand 4.2m, Russia 140m and Switzerland 7.6m, available at: <<http://www.census.gov/cgi-bin/ipc/idbrank.pl>>.

(cptd) by dividing the number of cases by the jurisdiction's combined import and export in trillion U.S. dollars (USD).<sup>40</sup> I have indicated in bold jurisdictions in which case numbers are perhaps more accurate than others. Unhighlighted jurisdictions are unlikely to fall but may climb in ranking for this reason.

Without wishing to overstate the accuracy of the results, from them we can at least get a rough feel for lawyers' *relative* level of dispute work exposure. Each measure hints at the likelihood an individual lawyer will encounter a CISG case, but with different underlying assumptions: cpmc assumes the proportion of lawyers within populations does not vary widely across jurisdictions; cptd assumes the number of lawyers in a jurisdiction does not increase with trade volumes.

The latter is perhaps less likely to hold true since greater trade profits probably attract more lawyers, thus diluting the potential forced exposure of each.

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I would like to thank Professor Ingeborg Schwenzer for suggesting this calculation. All errors remain mine. I have utilised the widely accepted 'short scale definition' of trillion. Total trade figures for 2007 in trillion USD were: Australia 0.141122; Austria 0.156661; Canada 0.416431; China 1.218; Germany 1.329053; Italy 0.5; Netherlands 0.476804; New Zealand 0.026949; Russia 0.351919; Switzerland 0.164808; USA 1.162980; United Nations Statistics Division (UNSD), "UNSD Annual Totals Trade (ATT) 2000-2007" (10 October 2008, 2nd edn), available at: <[http://unstats.un.org/unsd/trade/imts/UNSD%20Annual%20Totals%20Table%20\(ATT\)%202000-2007%20\(as%20of%2010%20Oct%202008\).xls](http://unstats.un.org/unsd/trade/imts/UNSD%20Annual%20Totals%20Table%20(ATT)%202000-2007%20(as%20of%2010%20Oct%202008).xls)>; *see also*, UNSD "Introduction of the UNSD Annual Total Table (ATT)" available at: <[http://unstats.un.org/unsd/trade/imts/Introduction%20to%20the%20UNSD%20Annual%20Total%20Table%20\(ATT\).pdf](http://unstats.un.org/unsd/trade/imts/Introduction%20to%20the%20UNSD%20Annual%20Total%20Table%20(ATT).pdf)>.

<b>Table 1: CISG Cases Per Million Capita (cpmc)<sup>41</sup></b>	<b>Table 2: CISG Cases per Trillion Trade Dollar (cptd)<sup>51</sup></b>
Switzerland 22.2 <sup>42</sup>	Switzerland 1025
Austria 16 <sup>43</sup>	Austria 836
<b>Netherlands 11.3<sup>44</sup></b>	<b>Netherlands 394</b>
Germany 5.5 <sup>45</sup>	Germany 342
<b>New Zealand 2.4<sup>46</sup></b>	<b>New Zealand 371</b>
Russia 1.8 <sup>47</sup>	Russia 705
<b>Canada 0.8<sup>48</sup></b>	<b>Canada 60</b>
<b>Australia 0.7<sup>49</sup></b>	<b>Australia 106</b>
USA 0.4 <sup>50</sup>	USA 100

- <sup>41</sup> Ranking does not alter when related proceedings are excluded: see *infra*, fn 63.
- <sup>42</sup> Showing 169 Swiss cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, a count of cases excluding related proceedings revealed 152 Swiss cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#switzerland>>. Elsewhere I have incorrectly referred to the number of Swiss cases: *supra* fn 17, at p. 161.
- <sup>43</sup> Showing 131 Austrian cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. Exclusion of related proceedings revealed 99 Austrian cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#austria>>.
- <sup>44</sup> Showing 188 Dutch cases: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, a count of cases excluding related proceedings revealed 154 Dutch cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#netherlands>>.
- <sup>45</sup> Showing 454 German cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. Exclusion of related proceedings revealed 344 cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#germany>>.
- <sup>46</sup> Showing 9 New Zealand cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#newzealand>>, not including related proceedings. Pace lists 9 cases, while Butler lists 7 cases. One case listed by Butler does not appear on Pace: Butler, P., “New Zealand” *supra* fn 10, at p. 254. Pace lists 3 cases not listed by Butler, which refer to the CISG only in passing. For consistency, the New Zealand total is therefore 10.
- <sup>47</sup> Showing 248 Russian cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, a count of cases excluding related proceedings revealed 242 Russian cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#russian>>.
- <sup>48</sup> Showing 15 Canadian cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, exclusion of related proceedings revealed 13 cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#canada>>. McEvoy lists 21, including 10 ‘passing mentions’ not listed on Pace (two of which are related) and another in which it was mentioned but not applied: McEvoy, J. P., *supra* fn 10, at fn.75 and 77. Pace lists 4 cases not listed by McEvoy (including two related cases and one in which CISG was relevant but not mentioned). For consistency the total is 25 cases (21 excluding related proceedings).
- <sup>49</sup> Showing 15 Australian cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, a count of cases excluding related proceedings revealed 12 Australian cases, including cases where the CISG is mentioned in passing available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#australia>>.
- <sup>50</sup> Showing 116 US CISG cases available at: <<http://cisgw3.law.pace.edu/cisg/new-features.html>>. As at 18 July 2009, a count of cases excluding related proceedings revealed 90 US cases available at: <<http://www.cisg.law.pace.edu/cisg/text/casedit.html#us>>.
- <sup>51</sup> Each cptd calculation consisted of taking case numbers: *supra* fn 42, and dividing them by the total trade in USD shown above: *supra* fn 39. Rankings alter slightly on exclusion of related proceedings: see *infra*, fn 63.

Despite the different assumptions underlying the two measures, there is a modest degree of consistency in the rankings. It is true that Russia and Germany hold different positions in each list. Yet, on both cpmc and cptd measures, U.S.A., Canada and Australia consistently rank in the bottom three jurisdictions, separated by a considerable degree from the others. Switzerland and Austria rank highly on both measures but, as indicated, Germany or indeed Russia could climb the rankings beyond the positions shown.<sup>52</sup>

Accepting all of the concerns mentioned above, could we nonetheless hypothesise on the basis of this data that lawyers from the Netherlands or Russia have had more CISG dispute work exposure than Australian or Canadian lawyers? Does it allow us to speculate that German, Austrian and Swiss lawyers should on average be far more familiar with the CISG, just by virtue of dispute work, than a lawyer from the US?

Relatively speaking, I submit that, at the least, the last conclusion is accurate. The results in relation to these countries are consistent with empirical studies. According to Profesor Meyer's study, the overwhelming majority of German, Austrian and Swiss lawyers, have encountered the CISG in dispute work at least once, if not more often.<sup>53</sup> Around 70-78% of lawyers in those countries have dealt with CISG in litigation and would have to varying degrees invested in CISG start up costs as a result.<sup>54</sup> Very high baseline Swiss familiarity levels also show correlation with Switzerland's much higher cpmc relative to the US cpmc.<sup>55</sup> Further, high baseline unfamiliarity in the US corresponds with low US cpmc relative to Switzerland.<sup>56</sup> Likewise, Austria and Germany also far outrank the U.S. in terms of cpmc and cptd, as they do in terms of empirical familiarity levels, as discussed above.<sup>57</sup> This is quite remarkable given all the flaws in available data mentioned above.

The data above does not depict absolute levels of dispute work exposure, but indicates *relative* exposure in various jurisdictions.<sup>58</sup> It demonstrates that lawyers in Canada, the U.S.A. and Australia have *relatively* low exposure to CISG dispute work by comparison with other jurisdictions where exposure is relatively higher, although the

<sup>52</sup> In the 12 months to July 2009, only 16 German CISG cases were reported on the Pace website.

<sup>53</sup> Meyer, J., "The CISG in Attorney's Every Day Work" *supra* fn 3, at p. 4, Question 2, Tables 2A-2C (finding 70-78% of Swiss, German and Austrian lawyers had encountered CISG disputes at least once).

<sup>54</sup> Meyer, *ibid*.

<sup>55</sup> Widmer, C. and Hachem, P., "Switzerland" *supra* fn 4, at pp. 284 and 287 (finding only 2% of Swiss lawyers unaware of the CISG); see *infra*, fn 63.

<sup>56</sup> Fitzgerald, P. L., *supra* fn 2, at p. 32 (finding 44% of US lawyers were 'not at all familiar' with the CISG).

<sup>57</sup> *Ibid*, §2.1.

<sup>58</sup> Exclusion of related proceedings from case numbers results in the same cpmc ranking but with slightly different figures: Switzerland 20; Austria 12.1; Netherlands 9.2; Germany 4.2; New Zealand 2.4; Russia 1.7; Canada 0.6; Australia 0.6; and U.S.A. 0.3. In the case of cptd, exclusion of related proceedings only reverses the ranking of Russia and Austria, and reverses the order of Netherlands and New Zealand: Switzerland 922; Russia 688; Austria 632; New Zealand 371; Netherlands 323; German 259; Australia 85; USA 77; and Canada 50.

internal ranking within high and low exposure groups is less certain, and subject to change based on more accurate case reporting. Yet, the identity of those in the lowest three ranks vis-à-vis the higher ranks are less prone to change.<sup>59</sup> In fact, more accurate case reporting is only likely to heighten the chasm.

To what extent does the forced exposure by dispute work explain opt-outs? It is pertinent to note two complications here. The first is that opt out decisions are influenced by multiple reasons not just familiarity or start-up costs, so we can only ever expect a weak correlation if any. Another complication is blockage to the flow of information from dispute work to opt-outs in the form of organisation of legal work. In some jurisdictions, there is a degree of separation of court work from non-court work (e.g. barristers distinguished from solicitors). Further, in some there is a pragmatic separation within firms of litigation lawyers from ‘front end’ lawyers who broker and draft deals. While the two might meet over drinks on a regular basis, it is doubtful the talk centres on CISG very often. In such jurisdictions, even forced exposure via litigation will take longer to filter into ‘front end’ choice of law decisions. This division of work has long been true of the U.S. but is becoming more common even in Europe.<sup>60</sup>

Despite all of the flaws and complications just stated, it is possible to discern a weak link between cpmc, cptd and opt-outs, with the notable exception of Austria.

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<sup>59</sup> In the U.S.A., the number of court cases is likely to be fairly accurate, but few U.S. arbitration decisions are reported, so it could be argued the U.S. would climb the rankings upon inclusion of arbitration cases. On the other hand, Australia and Canada are unlikely to yield much greater case numbers with the inclusion of arbitration, while the number of cases in jurisdictions such as Germany would also likely be boosted even further by more frequent reporting. It is suggested that, for these reasons, the U.S.A. is unlikely to move beyond the last three ranks even on more accurate case data.

<sup>60</sup> The essentially American/English influenced phenomenon of dividing law firms into departments focussed respectively on negotiation/drafting on the one hand, and litigation/dispute work on the other, is now having a wider influence. The practice has long been followed in Australia, especially in large to medium sized firms. Traditionally, such divisions were not seen in German law firms, but the trend is now becoming apparent in larger law firms in Germany and Switzerland. Germany’s system of compulsory internships requiring experience in a wide range of areas over 2 years may help mitigate this influence to a small degree, and it is still not unusual to have lawyer represent the same client. The author is indebted to discussions with Professor Ingeborg Schwenzer and Dr. Ulrich Schroeter on this issue in relation to Swiss and German firms (errors remain mine of course). With regard to Italy, see Torsello, M., “Italy” *supra* fn 10, at pp. 195-96: noting the rise of specialist drafters of international standard contracts in Italy, due to the need for legal English language skills.

**Table 3: Rate of Lawyers Generally Opting Out<sup>61</sup> by cpmc and cptd**

	Proportion of Lawyers Generally Opting Out	Cpmc	Cptd
Switzerland	41%	22.2	1025
Germany	45%	5.5	342
United States of America	55-71%	0.4	100
Austria	55%	16	836

The ‘medium’ opt-out jurisdictions of Germany and Switzerland share high measures of dispute work exposure. The Swiss appear to have greater exposure relative to the Germans, and tend to opt out less. By stark contrast, lawyers in the ‘high’ opt-out U.S.A. have vastly poorer exposure to CISG dispute work. Although the correlation is not strong, we might conclude a tenuous but inverse relationship between dispute work exposure and opt-outs. The Austrian position stands in contrast. It either demonstrates weakness in the correlation itself, or it could simply be illustrative of the complications discussed above, including case reporting issues. Arguably, the data provides corroborative but not conclusive evidence that higher exposure to CISG dispute work reduces the tendency to opt out.

### 2.2.3 DOMESTIC LAW DIFFERENTIAL

Perceptions of the size of start up or learning costs can be influenced another way. Where domestic law has been influenced by or modelled on the CISG, lawyers might perceive costs of becoming familiar with the CISG as lower.<sup>62</sup> This situation exists to an increasing degree in many parts of the world, notably including China and increasingly, the EU member states.<sup>63</sup>

<sup>61</sup> Utilising largest/more recent sample size: For China, Koehler, M. F. and Guo, Y., “The Acceptance of the Unified Sales Law” *supra* fn 6; for Germany, Switzerland and Austria, Meyer, “The CISG in Attorney’s Every Day Work” *supra* fn 3; for the U.S., as each of three surveys achieved similar sample sizes, see Koehler, M. F., “Survey regarding the Relevance” *supra* fn 1; Philippopoulos, “Awareness of the CISG” *supra* fn 2; Fitzgerald, “The International Contracting Practices” *supra* fn 2.

<sup>62</sup> See also De Ly, F., “The Relevance of the Vienna Convention for International Sales Contracts-Should We Stop Contracting It Out?” (2003) 4 *Business Law International* 241, at p. 244: arguing that one reason for the absence of a ‘general pattern excluding the CISG’ amongst Dutch lawyers might be the similarity between Dutch law and the CISG. De Ly reports that Dutch lawyers and even Dutch trade associations do not tend to exclude CISG: *ibid*, at pp. 244, 245 and fn. 18.

<sup>63</sup> The CISG has had a direct impact on domestic laws in China, Germany, Scandinavia, Japan, Québec, Russia and Estonia. The *PRC Contract Law* took effect on 1 October 1999. It ‘absorbed rules of the CISG on offer and acceptance, avoidance (termination) with a *Nachfrist*, liabilities for breach [...] and] interpretation’ not only for sales, but contract generally: Han, S., “China” *supra* fn 6, at p. 84: citing Professor Liang, the main drafter. However, some differences exist, e.g., Chinese Contract Law has no seller’s right to cure, and fundamental breach is less strict: Han, *ibid*, at pp. 76 and 88. The recent reform of the *German Civil Code* (the *Schuldrechtsreform* of 2002) involved significant discussions of CISG:

My contention is that start up or learning costs help explain the reluctance of lawyers to consider the CISG in choices of law. Within studies conducted thus far, the issue is possibly simply masked by respondents nominating unfamiliarity or uncertainty as the reason for opt-outs, compounded by the fact that reasons for unfamiliarity are not usually probed.

Ultimately it seems reasonable to conclude that in jurisdictions where the CISG is taught prominently and well in law schools, or where the domestic law has been modelled on CISG, start up costs will be lower. Moreover, in jurisdictions where CISG cpmc or cptd is high, many lawyers will have been forced through dispute work to invest in CISG familiarity. Where these three conditions coincide, the environment will be optimal for CISG familiarity, so that one might expect the advantages of the CISG might be better appreciated and less opt-outs might occur;<sup>64</sup> although naturally some opting out will still occur because the CISG will not be the best choice of law in all situations. However, I do not want to give the impression that familiarity, gained by forced investment or otherwise, is sufficient to create a view susceptible to the

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see, e.g., Magnus, U., “Germany” *supra* fn 4, at p. 145; De Ly, F., “Sources of International Sales Law: An Eclectic Model” (2005-6) 25 *Journal of Law and Commerce* 1, at p. 11. German differences include a fault requirement, but there is a strong presumption of fault for breaches: Ferrari, F., *supra* fn 15, at pp. 474-75 (citing §§280(1) and 651f(1) *BGB*). The Dutch *New Civil Code 1992* is similar to the CISG: De Ly, F., *supra* fn 62, at p. 244. In Scandinavian countries other than Denmark, the CISG has had a strong impact on sales law: Ferrari, *ibid*, at pp. 474-75. In the current reforms of the Japanese *Civil Code*, the CISG has impacted upon contract law and the whole code generally: Hayakawa, S., “Japan” *supra* fn 10, at p. 229. The CISG directly influenced Arts. 1456, 1736, 1738-40 of the *Code civil du Québec*, as evidenced by the *Commentaires du ministre de la Justice*: McEvoy, J. P., “Canada” *supra* fn 10, at pp. 42-43. Russian domestic law has been strongly influenced, and ‘many new rules on general contract law have been modelled after the CISG’: De Ly, F., *ibid*, at p. 11; Ferrari, F., *ibid*, at p. 476. In Estonia, the CISG has had a profound impact on sales and contract law in general within the *Civil Code Law of Obligations*: Ferrari, F., *ibid*, at p. 474. Constraints of time led to the CISG being greatly reflected in the Czech *Commercial Code* (Act No. 513/1991 Coll.) in the regulation of domestic purchase contracts and parts of the Czech *Civil Code*: Rozehnalová, N., “Czech Republic” in *National Impact*, *supra* fn 4, at pp. 107-109 and 111. The Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA; in English the Organisation for the Harmonisation of Business Law in Africa) member States have adopted a *General Uniform Act on Commerce*, the Sales Chapter of which is ‘largely inspired by the CISG’: see, Castellani, L., “Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)” (2009) 13 *Vindobona Journal* 241, at p. 244. Baretic and Nikšić note that the Croatian *Civil Obligations Act* ‘closely resembles’ the CISG: Baretic, M. and Nikšić, S., “Croatia” *supra* fn 10, at pp. 94-95. The Slovenian *Obligations Code 2002* (OJ 83/2001) is similar in key concepts of general contract as well as sales law: Možina, D., “Slovenia” in *National Impact*, *ibid*, 265, at pp. 265, 272 and fn.26 The CISG influenced the Greek legislative committee directly, and Greek sales law ‘approximat[es]’ the CISG: Zervogianni, E., “Greece” in *National Impact*, *ibid*, 163, at p. 177. There has also been some indirect influence on French law: De Ly, F., *ibid*, at p. 11. The CISG has also indirectly affected domestic law via the EU *Directive on Unfair Contract Terms and Consumer Guarantees*, Directive 99/44/EC, itself clearly based on the CISG: Ferrari, F., *ibid*, at pp. 472-73. Thus, it has had indirect effect on the domestic law of Denmark: Lookofsky, J., “Denmark” *supra* fn 10, at p. 128; in France, in current *Law of Obligations* efforts: Ferrari, F., *ibid*, at p. 473; and in Italy: see Torsello, M., “Italy” *supra* fn 10, at pp. 222-23.

<sup>64</sup> More than mere awareness of CISG is required to take advantage of it: Ferrari, *supra* fn 15, at p. 428.

CISG.<sup>65</sup> Of course, it contributes to such a view, but other fragments may colour that view to sway the decision in either direction.

### 2.3 BARGAINING STRENGTH (RED)

Bargaining strength probably influences choice of law in at least 26% of cases.<sup>66</sup> In the psychology of a choice of law, bargaining strength is the ‘id’ as opposed to the ‘ego’. The counterparty with superior bargaining strength can and frequently does get their preferred choice of law. Just like any other terms in the bargain, the stronger the market power of the counterparty, the more likely this is. Bargaining strength enables a party to insist on a particular choice of law simply because it can. In such a situation, little other rationale is required. A lawyer in favour of using the CISG will be unable to prevent its exclusion if the stronger counterparty insists on opting out.<sup>67</sup>

The stronger party’s choice might be spurred by unfamiliarity with the CISG, leading to a general automatic opt out stance. It will often be because ‘that’s the way we’ve always done it’<sup>68</sup>, personified in the standard terms and conditions, which I will say something more about in a Part II. It might simply be that the superior party dislikes the CISG for a sensible, rational reason.

However, bargaining power as a factor in choice of law is a two edged sword. Bargaining strength can also work in favour of adopting the CISG.<sup>69</sup> A ‘pro-CISG’ party in a stronger bargaining position can insist on using the CISG, whether by opting

<sup>65</sup> See also Magnus, U., “Germany” *supra* fn 4, at p. 147: lamenting ‘reluctance towards/satisfaction with the CISG depends [...] a great deal on how much practitioners specialise in international sales, how much [exposure they have to] the CISG in their daily work’.

<sup>66</sup> Koehler found that for 26% of US lawyers, one reason for opting out was simply strength of bargaining position: Koehler, M. F., “Survey regarding Relevance” *supra* fn 1, at p. 10.

<sup>67</sup> Some 16% of Swiss lawyers gave as a reason for opting out that the ‘CISG was unacceptable to counterparties’: Widmer, C. and Hachem, P., “Switzerland” *supra* fn 4, at p. 285; Rozehnalová, N., “Czech Republic” *supra* fn 63, at p. 108: noting that those Czech lawyers familiar with the CISG come under pressure to exclude the CISG by foreign counterparties who ‘require the application of their own national law’; Veytia, H., “Mexico”, *supra* fn 4, 231, at pp. 235, 237, 239 and 248: stating that Mexican lawyers often deal with U.S. counterparties who prefer to opt out of the CISG, and in other cases, due to control of some Mexican law firms by U.S. firms, Mexican lawyers have little choice but to use standard form contracts drafted in the U.S. which opt out of the CISG in favour of the UCC. Further, Veytia claims there is a cultural tendency in Mexico to prefer U.S. or European to Mexican solutions, which in a wider societal context is known as ‘*Malinchismo*’; Možina, D., “Slovenia” *supra* fn 63, at pp. 265 and 272 fn.26: similarly in the case of Slovenian lawyers, arguing that lawyers in such a small and new jurisdiction tend to follow the terms proposed by counterparties. In a comment similar to that regarding the effects of US law firm control over Mexican law firms, De Ly notes a similar tendency in Dutch companies controlled by German corporations, whereby exclusion clauses seemed to be copied into general terms of contract, despite the absence of a general tendency to opt out amongst Dutch lawyers: De Ly, F., “The Relevance of the Vienna Convention” *supra* fn 62, at pp. 243-45: discussing the results of field work conducted by one of his students.

<sup>68</sup> Magnus also points to ‘habit and tradition’: Magnus, U., “Germany” *supra* fn 4, at p. 146.

<sup>69</sup> *Accord*, Ferrari, F., *supra* fn 15, at p. 428: arguing that lawyers ‘ultimately cannot avoid becoming more knowledgeable about the CISG’ because they will only be able to rely on their standard form opt-out clauses ‘if their clients have more bargaining power than opposing counsel’s clients’.



in directly or indirectly through choice of a Contracting State's law.<sup>70</sup> Unfortunately, not all studies examine the extent of opt-ins, few capture both direct opt-ins and indirect ones, and none seek the reasons for them.<sup>71</sup>

It can be expected that lawyers see the choice of law view very differently where start up or learning costs have been incurred (forced or otherwise). Their view is no longer as dominated by worrying unfamiliarity or costs to rectify this. Such a lawyer might be more inclined to recommend the CISG to clients in strong bargaining positions, where the CISG is the best choice. If 'pro-CISG' views are generally held by lawyers in jurisdictions that often hold the stronger bargaining position, then there should be less 'automatic' opt-outs in all jurisdictions. It is almost impossible to say for certain whether this is occurring. Yet, if we make two simple observations the conclusion follows almost inexorably.

Chinese lawyers are less likely to opt out than their counterparts and are effectively 'pro-CISG'. Not only do Chinese lawyers generally opt out at a comparatively low rate of 37% or less,<sup>72</sup> but the flip-side figure for those that 'seldom or never' opt out is very high at 52%, compared with 21% and 18% in the U.S. and Germany.<sup>73</sup> Over recent years there has been a relative increase in the bargaining power of Chinese traders and a relative decrease in bargaining power in other countries such as the US. It follows that we should see a reduction in opt-outs by U.S. and other counterparties,

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<sup>70</sup> Lookofsky, J., "Denmark" *supra* fn 10, at p. 120: noting anecdotally that Danish lawyers tend not to opt out since they lack bargaining strength to demand a choice of Danish domestic sales law; similarly, Hayakawa reports that 'with the decline of the bargaining power of Japanese companies, it has been getting harder and harder to insert into the contracts a conflict of law clause which designates Japanese law as the applicable law': Hayakawa, S., "Japan" *supra* fn 10, at p. 226. Weakness of bargaining position is also mentioned by Baretić and Nikšić as a reason why Croatian businesses might choose the CISG: Baretić, M. and Nikšić, S., "Croatia" *supra* fn 10, at pp. 94-95.

<sup>71</sup> Widmer, C. and Hachem, P., "Switzerland" *supra* fn 4, at p. 285 asked Swiss lawyers whether they ever chose the CISG as governing law of their sales contracts. Fitzgerald tested the proportion of lawyers that specifically opt in or partially opt into the CISG: Fitzgerald, P. L., "The International Contracting Practices" *supra* fn 2, at p. 64 (Question 11). Caution should be exercised in regard to studies testing the level of 'opt-ins'. Lawyers may choose to indirectly opt in by choice of the law of a Contracting State. While this might not result in a 'yes' to survey questions as to whether the CISG is 'chosen', it can be a deliberate opt in strategy: see, Torsello, M., "Italy" *supra* fn 10, at pp. 195-99: suggesting that some Italian drafters deliberately chose the law of a Contracting State so that the CISG will apply without explicit disclosure to the counterparty.

<sup>72</sup> Han, S., "China" *supra* fn 6, at p. 71: noting Chinese lawyers 'seldom' opt out; Koehler, M. F. and Guo, Y., "The Acceptance of the Unified Sales Law" *supra* fn 6: finding, in an admittedly small sample, that 37% of Chinese lawyers generally opt out.

<sup>73</sup> Over and above the low level of practitioners who generally opt out in China, this sets China apart as a pro-CISG jurisdiction. Koehler, M. F. and Guo, Y., "The Acceptance of the Unified Sales Law" *supra* fn 6, found 52% of Chinese lawyers seldom or never opt out: at § II. Comparatively, 21% of US practitioners and 18% of German practitioners never or seldom opt out: Koehler, M. F., "Survey regarding relevance" *supra* fn 1 (link to Chart 'Frequency of Exclusion of the Convention').

who face increasing numbers of scenarios in which a more powerful Chinese party might insist on the CISG (directly or indirectly).

This may indeed already be slowly happening. Arguably, the trend should be felt most in nations trading most with China. Across time, U.S. opt-outs might be slowly decreasing.<sup>74</sup> Professor Flechtner commented in 2007 that more ‘front end’ queries from U.S. lawyers have been coming his way, rather than simply litigation queries.<sup>75</sup> This could simply be a result of other fragments within the kaleidoscope: U.S. lawyers might now be more familiar for reasons unrelated to Chinese bargaining strength. Perhaps it is a combination of factors.

However, I would suggest that the main driving force behind this shift is the bargaining strength of China. That conclusion finds some support in recent reports of trends away from opting out in nations other than the U.S., where opt-outs are still prevalent, such as Germany and Italy.<sup>76</sup> There are also comments in various empirical surveys and anecdotal accounts indicative of a preference for the CISG where the only other alternative acceptable to the dominant counterparty was Chinese law,<sup>77</sup> or when dealing with European, particularly German, counterparties holding a stronger bargaining position.<sup>78</sup> Although similar patterns of compromise are seen elsewhere when the domestic law is unacceptable for some reason,<sup>79</sup> in China’s case it is the

<sup>74</sup> Note the change from 71% in 2004 to 61% or 55% in 2006-7): Koehler, M. F., “Survey regarding the Relevance” *supra* fn 1; Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2; Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2. Alternatively, differences could simply be due to survey design, sample composition (e.g. Philippopoulos targeted litigators), but are not attributable to sample size (48, 46 and 47 respectively): *ibid*.

<sup>75</sup> Flechtner, H. M., “Changing the Opt-Out” *supra* fn 22: noting in the US pressure exerted by globalisation of legal services markets and observing a ‘change’ in queries he received from practitioners regarding CISG from purely litigious to front end (drafting/choice of law) queries.

<sup>76</sup> A recent anecdotal report is that while opting out is still prevalent in Italy, many specialist drafters are now choosing not to opt out: see Torsello, M., “Italy” *supra* fn 10, at pp. 189, 190, and 195-99. It seems a similar trend is appearing in Germany, where Magnus reports the impression that an increasing number of business associations no longer generally recommend opting out, and that opting out is no longer the norm for standard forms: Magnus, U., “Germany” *supra* fn 4, at p. 146.

<sup>77</sup> One US practitioner commented that ‘[p]articularly in Chinese transactions, the CISG will apply to the international contract’: Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 106. In another study, a US practitioner stated that ‘he prefers the CISG when contracting with Chinese firms because CISG is more easily understandable than the Chinese law alternative’: Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2, at p. 364.

<sup>78</sup> At least 2 US practitioners mentioned such situations: Philippopoulos, G. V., “Awareness of the CISG” *ibid*.

<sup>79</sup> ‘Sometimes [...] a country’s domestic law is less acceptable to the opposing party than the CISG’: Ferrari, F., *supra* fn 15, at p. 430 and fn.102 (Denmark and China); Baretic, M. and Nikšić, S., “Croatia” *supra* fn 10, at p. 95 (Croatia). Japanese companies prefer to have the ‘CISG applied than to be governed by a foreign law which is not necessarily refined and satisfactory by Japanese legal standards’: Hayakawa, S., “Japan” *supra* fn 10, at p. 226. Han partially attributes low opt-out levels in China to the perception that the CISG is considered more ‘acceptable’ in transactions with non-Chinese parties than Chinese contract law: Han, S., *supra* fn 6, at pp. 71-72; Koehler, M. F., and Guo, Y., “The Acceptance of the Unified Sales Law” *supra* fn 6, § V: reporting one Chinese practitioner’s response that it was easier to persuade foreign parties to designate CISG.

combination of China's pro-CISG stance, strong bargaining power and difficulties in access to Chinese law that makes it such a powerful force within choice of law. Chinese lawyers are more likely to want the CISG to apply and their clients are more likely to possess enough economic clout to ensure it does.

## 2.4 SUBSTANTIVE CONCERNS (GREEN)

In his analysis of the causes of opt-outs, Professor Ziegel refers to three reasons for exclusion and elaborates upon 'legal' reasons as including issues of coverage and reservations by Contracting States.<sup>80</sup> Complex perceptions that relate to the CISG's effect range from substantive concerns about the extent of the CISG's coverage to predictability of outcomes. Not all are completely rational. For example, there are still misconceptions, sometimes fuelled by US courts, about a scarcity of cases on the CISG.<sup>81</sup> Nonetheless, when we are analysing reasons for opting out, perception is everything, even if those perceptions are wrong.

Some reasons for exclusion relate to a pragmatic perception of the CISG in action – the reality at ground level of how the CISG 'is' rather than how it 'should be'.<sup>82</sup> Thus, some are indeed rational, and not simply a generalised 'fear of the unknown'.<sup>83</sup>

We can group substantive concerns as:

- Complexity of structure and/or limited coverage; the choice of CISG results in two layers of law rather than a single law to cover all issues, due to the CISG's incomplete scope;<sup>84</sup>

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<sup>80</sup> Ziegel, J. S., "The Scope of the Convention" *supra* fn 11, at pp. 72-73 and *supra* fn 22, at pp. 345-46; McEvoy, J. P., "Canada" *supra* fn 10, at p. 60.

<sup>81</sup> Perpetuating the myth that CISG case law is 'scant' or 'sparse' (in fact there are over 2,000 on the Pace Website): *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, US Ct App, 2nd Circuit, 6 December 1995, available at: <<http://cisgw3.law.pace.edu/cases/951206u1.html>>; *Schmitz-Werke GmbH and Co. v. Rockland Industries, Inc.*, Federal Appellate Ct, 4th Circuit, 21 June 2002, available at: <<http://cisgw3.law.pace.edu/cases/020621u1.html>>; *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F.Supp. 2d 880, 27 March 2002, CLOUT Case No. 613, available at <<http://cisgw3.law.pace.edu/cases/020328u1.html>>; *Genpharm, Inc. v. Pliva-Lachema AS*, US District Ct, for Eastern Dist. Ct of New York, 19 March 2005, CLOUT Case No. 699, available at <<http://cisgw3.law.pace.edu/cases/050319u1.html>>; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, Federal Appellate Ct, 7th Circuit, 23 May 2005, available at <<http://cisgw3.law.pace.edu/cases/050523u1.html>> and Federal District Ct, 28 May 2003, available at: <<http://cisgw3.law.pace.edu/cases/030528u1.html>>; *TeeVee Tunes, Inc. v. Gerhard Schubert GmbH*, Federal District Ct, New York, 23 August 2006, available at <<http://cisgw3.law.pace.edu/cases/060823u1.html>>.

<sup>82</sup> Ferrari, F., "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal* 15.

<sup>83</sup> Fear of the unknown in the generalised sense has often been conveyed regarding US lawyers: Murray, J. E., "Symposium-Ten Years" *supra* fn 11, at p. 365; Cook, V. S., "CISG: From the Perspective of the Practitioner" *supra* fn 11, at p. 351.

- Concerns about particular provisions;<sup>85</sup>
- Concerns about predictability;<sup>86</sup> expressed as ‘lack of case law’ or ‘vagueness of wording,’ but often masking the unfamiliarity of the lawyer.<sup>87</sup> This can

<sup>84</sup> Comments provided by respondents led Meyer to suggest the CISG’s limited scope might play a part in opt-outs in Germanic nations, since continued relevance of domestic law in some aspects in addition to the CISG’s application is perceived as complicating the applicable legal structure: Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3, at pp. 8 and 10. Some comments received by Fitzgerald echo this concern. For example, an academic respondent argued that since local counsel needed to be consulted on areas not covered by CISG, there was little point bothering with CISG: Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 20; Koehler, M. F., “Survey regarding Relevance” *supra* fn 1, at pp. 7, 8 and fn.20: respondent concern at different laws for twin contracts of sale and after sales service, concerns by a number of German lawyers regarding validity exclusion and limitations of liability, and comments regarding intellectual property and confidentiality; Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2, at p. 369: respondent commenting on intellectual property suitability; Widmer and Hachem found that some Swiss lawyers expressed concern over limited coverage, and preference for a single national law rather than a combination of the CISG and domestic law for issues not covered by CISG: Widmer, C. and Hachem, P., “Switzerland” *supra* fn 4, at p. 285. Commentators have also mentioned this aspect, which was listed as one of the legal rationale for opting out by Ziegel: Ziegel, J. S., “The Future of the International Sales Convention” *supra* fn 22, at pp. 344-46 (limited scope); Ziegel, J. S., “The Scope of the Convention” *supra* fn 11, at pp. 72-73; Thieffry, P., “Sale of Goods Between French and US Merchants: Choice of Law Considerations Under the United Nations Convention on Contracts for the International Sale of Goods” (1988) 22 *International Lawyer* 1033; Cuniberti, G., “Is the CISG Benefiting Anybody?” (2006) 39 *Vanderbilt Journal of Transnational Law* 1511 (concluding limitations on scope negatively influence the CISG as a choice of law); McEvoy, J. P., “Canada” *supra* fn 10, at p. 60; Murray, J. E., “Symposium-Ten Years” *supra* fn 11, at p. 372.

<sup>85</sup> Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at pp. 12 and 66 (Question 13): finding 22% of respondents opted out due to CISG provisions, but concluding this was hid some unfamiliarity; Koehler, M. F., “Survey regarding Relevance” *supra* fn 1 (link to Chart: ‘Paramount Reasons for Exclusion of the Convention’): finding 24% of German and 31% of US lawyers are influenced in opt out decisions at least partially by legal aspects; McEvoy, J. P., “Canada” *supra* fn 10, at p. 69. See also, Murray, J. E., “Symposium-Ten Years” *supra* fn 11, at pp. 371 and 372; Murray Jr, J. E., “The Definitive ‘Battle of the Forms’: Chaos Revisited?” (2000) 20 *Journal of Law and Commerce* 1: arguing the CISG approach to ‘battle of the forms’ ‘retrogresses’ to the pre-UCC position; Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2: finding only 2% of US lawyers shared Murray’s concern.

<sup>86</sup> Anecdotally, reasons for opt-outs in Japan include unpredictability of the CISG: Hayakawa, S., *supra* fn 10, at p. 227; Murray, J. E., “Symposium-Ten Years” *supra* fn 11, at p. 372; Walt, S., “Novelty and the Risks of Uniform Sales Law” (1999) 39 *Virginia Journal of International Law* 671, *passim*: discussing risk adverse behaviour by lawyers due to the novelty of CISG.

<sup>87</sup> Fitzgerald, P. L., “The International Contracting Practices” *supra* fn 2, at p. 12; Koehler, M. F., “Survey regarding Relevance” *supra* fn 1, at p. 6; Philippopoulos, G. V., “Awareness of the CISG” *supra* fn 2, at pp. 365-66; Meyer, J., “The CISG in Attorney’s Every Day Work” *supra* fn 3: finding ‘not enough legal certainty’ as most common reason for opting out, but concluding from individual comments that this masks much unfamiliarity; Magnus, U., “Germany” *supra* fn 4, at pp. 146 and 148: observing results in the Koehler and Meyer studies, but arguing vagueness also true of domestic sales law and flexibility necessary, and further, that most uncertain terms in CISG have now been subject of case law making it as predictable as domestic law. See also Ferrari, F., *supra* fn 15, at p. 420; Gillette, C. P. and Scott, R.E., “The Political Economy” *supra* fn 24, at p. 478: predicting attorney preference to wait for case law to reduce uncertainty; Walt, S., *supra* fn 86, *passim*; Murray, J. E., “Symposium-Ten Years” *supra* fn 11, at p. 372; Hayakawa, S., “Japan” *supra* fn 10, at p. 226: arguing increased numbers of CISG cases have now increased its predictability.

sometimes amount to a more sophisticated assessment of homeward trends in some jurisdictions<sup>88</sup> and consequent concern about quality of CISG decisions within them.<sup>89</sup>

- Conflicts issues; sometimes directly opting into the CISG is problematic, and although an indirect opt-in can achieve the same result, the issue might drive some choices.<sup>90</sup>

We can expect to find differences in the type of substantive concerns between jurisdictions. Lower levels of familiarity can leverage an unwarranted impression of uncertainty. While greater familiarity levels might encourage confidence in certainty of outcomes and an appreciation of the CISG's advantages, it should be recognised familiarity could simultaneously prompt concern over homeward trends, and complexity of legal structure.

Thus, while improvements in familiarity should reduce the size of this fragment for jurisdictions prone to opting out, we might anticipate a certain base level of stability in the extent to which substantive concerns remain an important factor.

### 3 CONCLUSION

For each jurisdiction, there will be differences in what lawyers see through the kaleidoscope. On average, the relevant considerations of familiarity, learning costs, bargaining strength and substantive concerns will appear relatively larger or smaller to the lawyer, depending on characteristics pertaining to the lawyer's jurisdiction.

Some jurisdictions, like China, have proved themselves pro-CISG, since from their perspective, the yellow of learning costs has been minimised by CISG imperatives in education and in domestic law. For other jurisdictions such as the US, the view has been dominated by large fragments of yellow and blue: higher start-up costs due to less forced exposure, and greater baseline unfamiliarity.

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<sup>88</sup> Honnold, J. O., "The Sales Convention in Action – Uniform International Words: Uniform Application?" (1988) 8 *Journal of Law and Commerce* 201, at p. 208; Baasch Andersen, C., "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce* 159; Ferrari, F., "Homeward Trend" *supra* fn 82.

<sup>89</sup> Murray, J. E., "Symposium-Ten Years" *supra* fn 11, at pp. 371-372; *see also*, Spagnolo, L., *supra* fn 15, at p. 215: recommending arbitration clauses in Australia due to poor treatment in courts.

<sup>90</sup> This could be explained by two things: Torsello suggests the preference for not disclosing the CISG's application explicitly: *see* Torsello, M., "Italy" *supra* fn 60. I would agree and add that the effect of the 1980 Rome Convention on the Law Applicable to Contractual Obligation, Art. 3 has until now, also influenced this choice, although this may now change after its replacement by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6, Art. 3 and Preamble [13]: for contracts concluded from 17 December 2009; Spagnolo, L., *supra* fn 15, at fns 14 and 17.

The prime driver in choice of law will be the view of the lawyer whose client has superior bargaining power. The extent to which the CISG is prevalent in domestic law influences, legal education and dispute work within a jurisdiction will determine perceived learning costs thus affecting the proportion of lawyers within a jurisdiction that are amenable to utilizing the CISG. A combination of economic strength in clients with lawyers that have pro-CISG views will naturally reduce CISG exclusions. The opposite will follow if bargaining strength is combined with views inclined towards automatic opt-outs.

How individual lawyers reconcile the different fragments within the kaleidoscope as they interact with one another provides an interesting scenario for analysis. The reasons for choice of law decisions and dynamics between counterparties are further analysed in terms of behavioural economics, psychology, neoclassical economics and game theory in Kaleidoscope Part II.<sup>91</sup>

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<sup>91</sup> Spagnolo, L., "Rats in the Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of Opting In and Out of the CISG" (2009) 13 *Vindobona Journal* 157.