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# Implementing the Standby Letter of Credit Convention with the Law of Wyoming

James J. White*

Since the sovereign states that make up the United Nations have not given that body the power to enact binding private law, some local mechanism must be employed in each state to transform any United Nations' convention into the law of a sovereign state. That mechanism is usually the act of a federal executive and federal legislature.

For the first time in American practice, we propose to implement a convention by a federal adoption of law previously enacted by the states–from Wyoming to New York–to implement the Convention on Independent Guarantees and Standby Letters of Credit ("Convention").[1] This state law is Article 5 of the Uniform Commercial Code ("UCC"). In the words of the proposed federal legislation:

> The purpose of this Act is to implement the Convention in the United States. This Act does that by giving effect to the choice of law provisions of the Convention and of Article 5 of the UCC.[2]

Under the rules set out in the proposed legislation, a letter of credit which is covered by the Convention but which has no choice of law provision will be governed, with two limited exceptions, by the law specified in section 5-116 (b) of the 2009 Official Text of Article 5. Section 5-116 (b) in turn directs one to the location of the person against whom liability is asserted (e.g., an issuer who is claimed to have wrongfully dishonored). Where that party is located in a state of the United States, section 5-116 directs–and the federal legislation expressly affirms–the use of the 2009 Official Text of Article 5 as "the Convention" in the United States.

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* Robert A. Sullivan Professor Law, University of Michigan Law School. I thank Mark R. Christy, Michigan 2010 for his fine work.

[1] United Nations Convention on Independent Guarantees and Stand-by Letters of Credit art. 5, U.N. Doc. A/RES/50/48 (Dec. 11, 1995) [hereinafter The Convention].

[2] Committee to Implement the United Nations Convention on Independent Guarantees and Standby Letters of Credit, Report on the Implementation of the United Nations Convention on Independent Guaranties and Standby Letters of Credit 11 (2010), http://www.law.upenn.edu/bll/archives/ulc/igasloc/2010june4_report.pdf.

An UNCITRAL convention is a treaty for the purpose of American constitutional law and it must be adopted like any other treaty.[3] The process to make an UNCITRAL convention into American law has several steps. First a representative of the executive branch signs the convention, and then Congress must somehow "implement" it. Implementation can take several forms. Some conventions are "self-executing." Those require only the consent of the Senate by a two-thirds vote and become effective as domestic law without any other act of either house of congress. Conventions that are not self-executing require some more elaborate action from Congress. If a treaty is not self-executing then implementation legislation is required before it takes effect as domestic law.[4] In this case, the implementation legislation calls for the adoption of state law as the United States' implementation of the convention.

The only other significant private law convention that the United States has adopted, the Convention on Contracts for the International Sale of Goods ("CISG"), was ratified by the United States in 1986. Since that was a self-executing treaty, the text of the CISG became federal law by the Senate's consent without Congressional enactment. Put differently, the CISG became effective as domestic law without any special implementation legislation, such as the legislation being proposed for the Convention.

In pages that follow I explain why the United States might chose to implement the Convention by use of state law, and I consider some of the interpretation issues that may arise from the American mode of implementation.

## Letters of Credit

The Convention was adopted by the United Nations General Assembly in 1995 and signed by the United States in December of 1997.[5] In

[3] U.S. CONST. art. II, § 2, cl. 1 (describing the treaty-making process).

[4] The Supreme Court recently decided for the first time that a treaty-based claim was invalid on the grounds that the treaty in question was not self-executing. Medellin v. Texas, 128 S. Ct. 1346 (2008). The Court stated that a treaty requires implementing legislation to become effective unless "the treaty itself conveys an intention that it be self-executing and is ratified on these terms." *Id.* at 1356. The *Medellin* opinion is likely to deter sponsors from using self-execution to implement a treaty until its meaning is clarified by later cases.

[5] James E. Byrne, *Report to the House of Delegates*, 1998 A.B.A. SEC. BUS. L. REP. 286, *available at* http://www.law.upenn/bll/archives/ulc/igasloc/aba_res.pdf.

2008, an American committee ("Committee") appointed by both the Uniform Law Commission and American Law Institute and working in conjunction with Mexican and Canadian authorities began considering the ratification of the Convention by the United States.[6] At this writing the Committee has produced proposed American Understandings and American commentary to accompany the Convention. The Convention will shortly be put before Congress for its consideration.[7] It will be accompanied with the Committee's and the State Department's proposal for American ratification.

As described earlier, the current plan for implementation of the Convention is to have Congress find that the various states' adoption of Article 5 of the Uniform Commercial Code is implementation. So instead of making the text of the Convention federal law either as a self-executing treaty or by enactment as part of the United States Code, as Congress might have done, Congress is adopting the Official Text of Article 5 as the Convention.[8]

To understand why Americans might regard the adoption of a state law as the appropriate method of implementing an UNCITRAL convention, one needs to understand something about the making of commercial law under American federalism. Until the early part of the 20th century it would have been common understanding among lawyers in the United States that both practice and the United States Constitution made commercial law a subject for state, not federal enactment. Of course, Congress always had the power to enact laws–such as those dealing with bankruptcy–where the

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[6] Memorandum from James E. Byrne, Director, Institute of International Banking Law & Practice, to Edwin Smith, Chair, Drafting Committee for Implementation of the U.N. Convention on Independent Guarantees and Standby Letters of Credit (Oct. 22, 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/igasloc/jeb_memo.pdf.

[7] Memorandum from James J. White, Reporter, the Committee to Implement the UN Convention on Independent Guarantees and Stand-by Letters of Credit, to Uniform Law Commissioners (June 1, 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/igasloc/2009june1_memo_pdf.

[8] Under the supremacy clause of the US Constitution "[t]reaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land … ." U.S. Const. art. II, § 2, cl. 1. A self executing treaty is equal in status to congressional legislation and will preempt contrary state law. The implementation legislation required for a non-self-executing treaty is also a piece of federal legislation. In both cases, when there is a conflict between a treaty and a legislative act "the one last in date will control the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888). Presumably Congress' blessing of Article 5 as the Convention will make it into federal law for that purpose as well, but that hypothesis has not been tested.

Constitution specifically granted the power to Congress.[9] Since the 1930's, the states' grip on commercial law has gradually weakened. The decisions in the 1930's and 1940's greatly expanded the conception of interstate commerce and broadened Congress' power to reach into apparently local affairs under the commerce clause of the Constitution.[10]

Despite the gradual encroachment on the states' monopoly, the most extensive and carefully drafted commercial law still comes from the states. The UCC, enacted by all of the states, governs not only the sale of goods, but also personal property security interests and even letters of credit. That law is generally superior to the law that Congress produces not only because of the care devoted to it, but also because it is more stable.[11] Much of the uncertainty in federal commercial law (such as the tax and bankruptcy codes) is introduced by the frequent Congressional amendments that those laws suffer at the hands of powerful special pleaders.[12] Presumably, because of the high cost of getting legislation through many state legislatures, state commercial law has escaped that kind of piecemeal change.

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[9] U.S. CONST. art. 1, §1.

[10] *See*, *e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941).

[11] *See, e.g.,* VA. CODE ANN. § 8.1A-103 (2003), and MICH. COMP. LAWS § 174-1962-1-2 (1962).

[12] A nice illustration of the confusion and uncertainty that Congress can sow is the "hanging paragraph" that it inserted in Section 1325(a) of the Bankruptcy Code in 2005. The text of the paragraph is incomprehensible to someone who does not know its history. Hanging from 11 USCS § 1325(a), the paragraph reads: For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing. One bankruptcy court complained of the "maddeningly inconsistent body of decisions." In re Westfall, 376 B.R. 210, 213 (Bankr. N.D. Ohio 2007). Another has pointed out that one of the problems is that "Congress failed to define "purchase money security interest" in the hanging paragraph or elsewhere." Reiber v. GMAC, LLC *(In re* Peaslee*)*, 547 F.3d 177, 184 (2d Cir. 2008). All of the many cases turn on the meaning of the purchase money phrase where a debtor has added the outstanding balance on a trade into the balance on his new car. The first court of appeals decision to address the meaning of this paragraph was *In re* Graupner, 537 F.3d 1295 (11th Cir. 2008). The court discusses the wide divergence of opinions in the district courts and bankruptcy courts regarding the issue and agrees with other courts that have said that the text is poorly drafted.

The states have fought federal intrusion, and Congress has shown neither the interest nor the patience necessary to produce first-rate commercial law.[13] The American law that covers standby letters of credit, the topic of the Convention, is Article 5 of the UCC. Completely revised in 1995, Article 5 is up-to-date and consistent with commercial practices both in the United States and abroad. In fact, revised Article 5 doubtless had an influence on the drafting of the Convention.

Even if Article 5 is up-to-date and conforming to commercial practice, the fact that the text of the Convention in the United States will be the UCC and not that of the Convention and that an American judge will usually interpret the Convention not by use of its language but by use of the words in Article 5, will present nettlesome issues. In the pages that follow I discuss some of those.

## Official Text

An American court applying the Convention will be directed to look at the text of the UCC,[14] not at the text of the Convention. In the case of the CISG, Senate ratification of the CISG as a self-executing treaty made the text of that convention American federal law. Had it chosen to follow the route that is being proposed for the letter of credit convention, Article 2 of the Uniform Commercial Code, not the CISG itself, would be the text of that convention in the United States. So under the CISG approach there is but one text; under the current approach for the Convention, there will be two.

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[13] Both the United States Income Tax Code and the Bankruptcy Code are covered with ugly patches and stuffed with amendments that make them unintelligible to the average lawyer. For example, *see* Thomas E. Lauria & Kevin McGill, *Strict Construction of the Bankruptcy Code: Is the Ability to Avoid Clean-up Obligations and Substantive Consolidation at Risk?* (2006), *available at* http://www.whitecase.com/files/Publication/04bead52-fe7e-4c01-8cde01e64b3886c6/Presentation/PublicationAttachment/8e626ef206df-4af0-a9d710 e582f7370f/article_Strict_Construction_of_ the_Bankruptcy_Code.pdf.

[14] Memorandum from James J. White, Reporter, the Committee to Implement the UN Convention on Independent Guarantees and Stand-by Letters of Credit, to Uniform Law Commissioners (June 1, 2009), *available at* http://law.upenn.edu/bll/archives/ulc/igasloc/2009june1_memo.pdf. Because the Convention is in direct conflict with Article 5 on setoff, and on the time of expiration of a letter that does not state a time of expiration, new federal or separate new state law will deal with those issues.

When litigation over a standby letter of credit covered by the Convention occurs in a foreign state, the court there will look to the text of the Convention. An American court dealing with the same issue will often use the text of Article 5 of the UCC.[15] To the extent that ambiguities lie undiscovered in the words of the Convention or the words of Article 5, the American mode of implementation may produce conflicting interpretations of the correlative sections in the Convention and in Article 5 of the UCC.[16]

Consider the case of "document." That word is defined both in Article 5 of the UCC and in Article 6 of the Convention. Article 6(g) defines the word as "a communication made in the form that provides a complete record thereof." Under this definition a digital message can qualify as a document. By contrast Section 5-102(6) has an extensive definition of the same word that excludes digital documents unless the digital format is a "medium permitted by the letter of credit or … by the standard practice referred to in section 5-108(e) … ."

The United States commentary to Article 6 of the Convention asserts:

> That "document" is defined broadly enough to include digital documents does not by itself authorize one who is making presentation under the Convention to present documents in digital or other non-paper form. Thus where there is no authority in the undertaking or in the practice applicable to the undertaking to authorize the use of a digital document, the presentation of a digital document would render the presentation non-complying both under the Convention and under Article 5 of the UCC."[17]

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[15] *Id*. at 1-2.

[16] *See id*. The direction in Article 13 of the Convention to determine rights and obligations in part by "the provisions of this Convention" will not direct a court to the text of the Convention because the text of Article 5 of the UCC will be "the Convention" in the United States.

[17] Commentary for the United Nations Convention on Independent Guarantees and Standby Letters of Credit 5 (March, 26 2008), *available at* http://www.law.upenn.edu/bll/archives/ulc/igasloc/2008march26%20ccd.pdf. The commentary includes a proposed "understanding" with respect to the definitions. Because the understanding does not apply to terms that are defined in the Convention it does not technically apply to the hypothetical. The understanding reads as follows, "terms used but not defined in the Convention, (a) have the same or substantially similar meanings to the terms defined in the official text of Article 5 of the UCC …, or (b) if there is no definition in UCC Article 5, have the meanings found elsewhere in the UCC, or (c) if there is no definition in the UCC, have meanings equivalent to the same or substantially similar terms used in Article 5 of the UCC

To test the accuracy of the American commentary, consider a hypothetical case. Assume a standby letter of credit without a choice of law clause issued by an American Bank to a French beneficiary that calls for the presentation of a document without specifying the medium in which the document must be formed. Assume the beneficiary presents a document in digital format to the American issuer and the issuer declines to pay on the ground that the document was not in writing. If the beneficiary sues the issuer in the United States for its failure to pay, a court would look at Article 5 of the UCC and at the United States commentary and conclude that no "document" had been presented and thus no proper presentation was made. If, on the other hand, the case were brought in a foreign court, the court would presumably look to the text of the Convention and to any commentary or understanding in the foreign court's jurisdiction, but not at Article 5 of the UCC and not at the United States commentary. Unless its own commentary called for a different result, the foreign court would conclude that a "document" had been presented and that the presentation was proper. So the issuer would have liability for failing to pay if the case were tried abroad, but not if it were tried in the United States.

I am assuming that an American court would regard the United States commentary concerning the definitions at least as persuasive and possibly as conclusive. I am also assuming that the foreign court would look to the mode of implementation in its own country and would not feel bound to deviate from the text of the Convention simply because a semi-official committee in some other country stated its opinion to the contrary.

Whether the Committee's commentary on the general consistency between the Convention and the UCC has been too sanguine remains to be seen. If I am correct about the two courts' search for governing law, we have one example where the same case gets different results in an American court and a foreign court. I have identified only one potential point of conflict. Driven by their clients' interest, clever lawyers will surely find many more.

## Opting Into the Convention Text

Because the United States proposes to implement the Convention by use of the UCC and to direct its courts to apply the text of the UCC in lieu of the Convention's text, foreign banks or lawyers acting on behalf of foreign beneficiaries or banks may wish to limit an American court to the

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(e.g., "documentary" and "non-documentary" as used in the Convention or the UCC to describe a type of undertaking, condition or presentation). *Id.* at 12.

Convention's text and to prevent it from using the text of the UCC. Can that be done?

The Committee intended so. When this issue was raised, the Committee was unanimous that the law should be interpreted to grant the power to the parties to a letter of credit to force an American court to interpret the rights under the letter of credit by use of the text of the Convention and not the text of the UCC. Section 5(a) of the proposed federal act that will be put before Congress currently directs an American court to use the "text" of the Convention to any letter "that expressly states that it is governed by the Convention… ."[18]

**American Case Law**

What does the direction to use Article 5 as the text portend for case law? In cases covered by the Convention, are American courts to rely on American cases interpreting Article 5? And what if an American case interpreting a provision of Article 5 disagrees with a case in a foreign jurisdiction interpreting the analogous point under the Convention?

Article 5 of the Convention directs that "regard be had to [the Convention's] international character and to the need to promote uniformity in its application…." The most obvious reading of that exhortation is that an American court should regard foreign courts' interpretation of the Convention to be persuasive if not binding.

But the American commentary supports the opposite inference: "Article 5 [of the Convention] does not mean that a court interpreting the Convention should ignore the local law that may implement the Convention but merely that the court should pay due attention to cases that interpret the Convention…."[19] The reference to "local law" is broad enough to include not only Article 5 of the UCC but also cases decided under the UCC.

Assume a standby that calls for payment only on presentation of a certificate of default by Robert Stein, the mayor of Ypsilanti. Assume that

[18] Committee to Implement the United Nations Convention on Independent Guarantees and Standby Letters of Credit, Report on the Implementation of the United Nations Convention on Independent Guaranties and Standby Letters of Credit 8-9 (2010), *available at* http://www.law .upenn.edu/bll/archives/ulc/igasloc/2010june4_report.pdf.

[19] Letter of Submittal, The United Nations Convention on Independent Guarantees and Standby Letters of Credit with the United States Commentary (May 7, 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/igasloc/2009may7_letter.pdf

Stein does not run for reelection and that his successor mayor Luther Jones signs the certificate of default. Assume further that the Supreme Court of Illinois finds the presentation proper. Two years later the identical issue is presented to an Illinois court under an international standby letter of a French bank governed by the Convention and assume that there are French and English cases under the Convention that hold that such a presentation (i.e., a certificate by a successor and not by the person named in the letter) is not compliant with such a letter. Is the court to follow the unanimous reading of the Convention by foreign courts or must it follow Illinois case law?

Following the deviant Illinois case hardly "promotes uniformity" even if one might conclude that paying "due attention" to foreign cases does not require a court to treat them as binding precedent.[20] In my view any court finding itself in that position should, at the least, look for ways to distinguish the local cases and follow the foreign interpretations. After all this is international trade law and a principal purpose of the law is to make the applicable rules the same in all countries that have implemented the Convention.

**Changes in Article 5 of the UCC**

It is easy to adopt Article 5 of the UCC as the Convention, but what about non-uniform provisions? And what about amendments that are adopted in some or many states after the Convention has been implemented? The proposed federal legislation uses the 2009 official text; state deviations must be ignored by a court that is deciding a case under the Convention.

And if after 25 years the Uniform Law Commission undertakes a complete revision of Article 5 of the UCC, then what? In that case the Commission and the ALI could and doubtless should return to Congress for a new federal statute to implement the Convention anew by reference to the newly revised Article 5. But what if there is no new federal enactment after the adoption of a revision to Article 5 of the UCC. Since the current draft of the federal implementing statute makes the 2009 Article 5 the American version of the Convention, state adoption of a new Article 5 (or even the ULA and ALI adoption of a new official text) will bring the ironic

[20] *See* U.C.C. § 5-101 cmt. (1977).

consequence that a new Article 5 would be the current official or state law but the superseded 2009 version would be the Convention.

To continue to apply a repealed version of Article 5 of the UCC to international letters of credit because that former text constitutes "the Convention" in the United States seems absurd. However, the hypothetical case demonstrates a significant potential difficulty that can arise from doing what we now propose. Once the United States makes Article 5 the "text" of a convention, there is a new impediment to the improvement of Article 5 or of any other part of our commercial law that has been used as the mode of adoption of an UNCITRAL convention.[21] And if Congress fails to adopt the Convention anew, there is the possibility that the Convention would consist not of the prevailing Article 5 but of a repealed version.

## Understandings

"Understandings" are the weakest of the unilateral qualifications that a state can make to the terms of a convention.[22] At least in theory an understanding does not change the legal effect of a convention; it merely "clarifies" the meaning.[23] Of course, any lawyer is instinctively skeptical of something that clarifies but does not change. American common lawyers are trained to believe that all formal interpretations of a text, whether by a court, an agency or the Pope, alter the meaning of the text and that is doubly true if the interpreting body is the highest court of the state interpreting state law or a legislature that has adopted the law.

The proposal that will be submitted to Congress states four American Understandings (Understanding(s)). They deal with Article 6 (Definitions), Article 20 (Provisional Court Measures), Article 21 (Choice of Applicable Law), and Article 22 (Determination of Applicable Law).[24] I

[21] All of the original Articles (1, 3, 4, 5, 6, 7, 8 and 9) of the UCC except for Article 2 have been extensively revised and some (3, 4, and 9) have been revised twice.

[22] Other unilateral acts of adopting states are "reservations" and "declarations." A reservation is an outright statement of rejection of the terms of a convention. Article 27 of the Convention prohibits a state that adopts the Convention from stating any reservations. Declarations are sometimes used to select among alternatives that have been left by the drafters for a state's own choice. The Convention, *supra* note 1, art. 25.

[23] *Id.* arts. 25, 27.

[24] Commentary for the United Nations Convention on Independent Guarantees and Standby Letters of Credit 12-13 (March, 26 2008), *available at* http://www.law.upenn.edu/bll/archives/ulc/igasloc/2008march26%20ccd.pdf.

discuss some implications for interpretation of the Convention that arise from the first and the third.

The Understanding on Article 6 adopts the UCC definitions–in Article 5 and elsewhere–for any case where a term is not defined in the Convention but there is a definition of that term (e.g., good faith) or of a substantially similar term in the UCC.

In the year 2050, assume that a Chicago Bank examines a documentary presentation electronically and concludes that the presentation complies with the undertaking. Assume that the applicant objects to the bank's payment on the ground that such a mode of examination does not conform to "reasonable care" that is required by Article 14 of the Convention. May the Bank defend by citing section 3-103(a)(9) of the UCC? That section finds that a bank that examines an instrument by electronic means (and presumably never casts human eyes on it) is acting with ordinary care.[25] Of course, the applicant will argue that the Article 3 definition of ordinary care does not apply to the examination of anything but checks, but if the judge rejects that argument under the UCC, can he then apply the UCC definition to Article 14? The Understanding seems to say so.

At minimum, the upshot of the Understanding on definitions will require foreign and American letter of credit lawyers to have some familiarity not only with section 5-102, but also with sections 1-201, 2-103, 3-103, 4-104, and 9-102, the other UCC definitional sections. The Understanding, as currently written, does not apply to cases where there is a definition in the Convention, but if the Convention **is** Article 5 in the United States that will not matter for cases before American courts. An American court applying the Convention will already have Article 5 of the UCC before it.

When a letter of credit "issued from the United States" provides for the application of the law of a state of the United States, the Understanding concerning Article 21 states that the undertaking is governed by "the substantive law in the UCC." As I suggest above, the Convention may be the substantive law in the UCC in any case, but in a foreign court that would otherwise use the Convention's text, this Understanding would make clear that Article 5, not the Convention is the governing text.

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[25] Assuming, *arguendo*, that "ordinary care" has the same meaning as "reasonable care."

What language in an undertaking is sufficient to "provide for the application of the law of a state of the United States?" Does the choice of the "law of New York" suffice? Some courts have found that similar words choose the CISG (as federal law applicable in the state whose law is chosen), not Article 2 of the UCC as the drafter of the language likely intended.[26] I suspect that the proposed Understanding would change that outcome for the Convention. That conclusion is supported by the current version of the federal implementing legislation that says in Section 5(c) any "undertaking that expressly states that it is governed by the law of a State shall be governed by the law of that State and not by the Convention."[27] Cautious lawyers might wish to refer to the "New York UCC" or use similar language as suggested by the commentary to Article 21.[28] If, as currently proposed, the Convention is implemented by Congress' reference to the Official Text of Article 5 and if the courts take to that plan, the issue will have little practical importance.

## Conclusion

Even if the use of Article 5 to implement the Convention increases the likelihood of conflicts between the Convention's text and the text of Article 5, that increase is trivial. Constructing the American Convention out

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[26] *See, e.g.*, BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003) (stating that "If the parties decide to exclude the Convention**,** it should be expressly excluded by language which states that it does not apply and also states what law shall govern the contract"); Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd*.,* 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007) (stating that "absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG"). The courts reason here that the states are bound by the treaty under the supremacy clause, so merely stating that the "law of New York applies" is not enough. In other words, the CISG is domestic law and applies absent an express intent to opt out, so if the parties just name the law of the state as the choice of law then they are just confirming that the treaty applies. *Cf.* Am. Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61, 63 (D.R.I. 2006) (stating that "subsection 11(h) of the Agreement provides that the Agreement 'shall be construed and enforced in accordance with the laws of the state of Rhode Island.' That provision is sufficient to exclude application of the CISG.")

[27] Committee to Implement the United Nations Convention on Independent Guarantees and Standby Letters of Credit, Report on the Implementation of the United Nations Convention on Independent Guaranties and Standby Letters of Credit 12 (2010), http://www.law.upenn.edu/bll/archives/ulc/igasloc/2010june4_report.pdf.

[28] E.g., "[T]his undertaking ... is governed by the New York UCC and as to matters outside the scope of ISP98 and the UCC, by New York State and United States federal laws." Or "this undertaking is governed by the New York UCC."

of carefully drafted law with which American lawyers and judges are familiar–in style if not in substance–outweighs the risk of conflict. The clarity of the UCC, the presence of its comments, and guidance from cases under the Code, make it far more likely that an American lawyer or judge will find the correct answer in that regime than they would if the Senate were merely to adopt the Convention text as a self executing treaty. So despite the interpretive issues that I raise here, I think we are right to use Article 5 of the UCC as the implementing tool.