

## CISG AND CONTRACTING PRACTICE: FACILITATING NEGOTIATION OF CONTRACT TERMS

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“Successful contracts provide structure: this is the part that is exciting because it involves seeing the contract in a new way. We all know that contracts are a record of rights and obligations and that should not change. But historically they have not really been effective business instruments because they have been rigid, hard to understand, and seen by many as instruments that have relevance only when things go wrong. But in an agile world, that thinking must change. We need to structure the contract in a way that supports achieving goals and objectives. And we need contracts and contracting processes that are designed to facilitate change, to be adaptive.”

IACCM Report, Most Negotiated Terms 2018

### INTRODUCTION

The International Association for Contract and Commercial Management’s (IACCM)<sup>1</sup> research has shown that poor contracting can lead to +9% of value leakage.<sup>2</sup> At the same time, emerging technologies are

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<sup>1</sup> IACCM is a not-for-profit organization with a vision of “a world where all trading relationships deliver social and economic benefit.” IACCM represents over 50,000 members within more than 19,000 cross-industry organizations across 170 countries. The association supports its members by identifying and promoting the international standards and practices for defining and managing successful trading relationships. IACCM develops and communicates leading practices that support economic growth and organizational success by ensuring commitments are ethical, achievable, and sustainable. Further information about the Association and its work is available at, [www.iaccm.com](http://www.iaccm.com).

<sup>2</sup> *Contracting Excellence: Ten Pitfalls to Avoid in Contracting*, INT’L ASS’N FOR CONTRACT & COMMERCIAL MGMT. 4 (2015), <https://blog.iaccm.com/free-resources/ten-pitfalls-to-avoid-in-contracting>.

changing the way parties negotiate, draft, analyze and manage contracts, resulting in a need for agile and easily adaptable contracting processes.<sup>3</sup>

To achieve adaptability in the context of international trade, practices need to shift from a purely transactional way of contracting to a relational one. The former entails a power-based approach—seeing the contract as a one-time deal with short-term benefits.<sup>4</sup> The latter entails a trust-based relationship with the contract, seen as a framework for enabling the achievement of long-term goals:

A legally enforceable written contract establishing a commercial partnership within a flexible contractual framework based on social norms and jointly defined objectives, prioritizing a relationship with continuous alignment of interests before the commercial transactions.<sup>5</sup>

The IACCM Report on Most Negotiated Terms 2018, however, shows a continued battle over the need for relational contracting and the reality of transactional contracting.<sup>6</sup> The paradox is evident: organizations agree that their contracts should be structured to support business goals and ensure a successful relationship, but they continue to contract in a contradictory manner.<sup>7</sup> Over the past five years, parties across industries and jurisdictions have negotiated contract terms to shield themselves from the consequences of risk occurrence and to ensure minimal adverse impacts.<sup>8</sup> Beyond purely monetary consequences, such an approach prevents the contracts from becoming flexible business assets. The Report recognizes the importance and the impact of law in this context. Law alone, however, cannot be the driver

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<sup>3</sup> See, e.g., *IACCM-Capgemini: Automation Report*, INT'L ASS'N FOR CONTRACT & COMMERCIAL MGMT. 3 (2017), <https://www.iaccm.com/resources/?id=10162> [hereinafter *IACCM*] (“[i]n the last few years that has been changing. Technology advancements such as automation, machine learning and other forms of artificial intelligence have started to permeate the CLM tooling world.”).

<sup>4</sup> David Frydliinger et al., *Unpacking Relational Contracting: The Practitioner’s Go-To Guide for Understanding Relational Contracts*, VESTED WAY 5 (June 15, 2019), [http://www.vestedway.com/wp-content/uploads/2016/10/Unpacking-Relational-Contracting\\_v19.pdf](http://www.vestedway.com/wp-content/uploads/2016/10/Unpacking-Relational-Contracting_v19.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> *The Most Negotiated Terms 2018*, INT'L ASS'N FOR CONTRACT & COMMERCIAL MGMT. 5, 8–9 (June 11, 2019), <https://www.iaccm.com/resources/?id=10243&cb=1552901187&>. The Report is based on the data collected in 2017/early 2018. Since the submission of this article, *IACCM (now operating under a new name: World Commerce & Contracting) published the Most Negotiated Terms 2020 Report. Although the results slightly differ from 2018, the essential dichotomy between adversarial and relational contracting discussed here is still present. The 2020 Report is available at* <https://www.worldcc.com/Research-Analytics/Latest-Research>.

<sup>7</sup> *Id.* at 8–9.

<sup>8</sup> *Id.* at 22–23.

of the change. To achieve the goals of relational contracting, the parties need to embrace and practice proactive contracting. Exercising their autonomy within the applicable legal framework allows them to define their relationship in a manner suitable to both their interests, while at the same time, mitigating or preventing the value leakage.

In the sphere of international contracts for the sale of goods, the UN Convention on International Sale of Goods (“CISG” or “Convention”) has the potential to reduce the friction between the parties when negotiating the terms they most frequently focus on, but also to be an instrument in achieving outputs that reflect legal and commercial considerations enabling cross-industry and cross-border parties to contract in a way that creates value and results in socio-economic benefits.

To fully understand the potential CISG brings in the context of negotiating contract terms, it is necessary to explore current negotiation practices as presented in the IACCM Report on Most Negotiated Terms 2018 (*Part I*); understand proactive contracting embedded in the field of contract and commercial management (*Part II*); and finally, place CISG in such context to identify the role it can have in facilitating the contracting practice (*Part III*).

*A. The Current Status of the CCM Practice: The IACCM 2018 Report on Most Negotiated Terms*

For the 17th year in a row, IACCM published the Most Negotiated Terms 2018 Report (the **Report**), gathering data from 2,173 organizations cross-regions. The **Report** identifies: (a) the terms that parties focused on the most in their negotiations—the *most negotiated terms*; (b) the terms that most frequently led to a claim or a dispute—the *most contested terms*; and (c) the terms that are beneficial for a successful long-term business relationship—the *most important terms*.<sup>9</sup> It further compares the data over a five-year span—from 2013 to 2018—demonstrating the extent of a shift in international contracting,<sup>10</sup> and segments the data by industry and jurisdictions, highlighting the different approaches in contracting.<sup>11</sup> As a

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<sup>9</sup> *The Most Negotiated Terms 2018*, *supra* note 6, at 9, 11.

<sup>10</sup> *Id.* at 16–17.

<sup>11</sup> *Id.* at 22–27.

result, the **Report** offers a unique insight into what businesses *actually focus on* and what they *need to (or should) focus on* in their international dealings.

MOST NEGOTIATED TERMS	MOST CONTESTED TERMS	MOST IMPORTANT TERMS
<b>Limitation of Liability</b>	Price / Change / Price Changes	Scope and Goals / Specification
<b>Indemnification</b>	Invoices / Late Payment	Responsibilities of the Parties
Price / Change / Price Changes	Delivery / Acceptance	Price / Change / Price Changes
Termination	Scope and Goals / Specification	Delivery / Acceptance
Scope and Goals/Specification	Payment	Service Levels
<b>Warranty</b>	Change Management	Performance / Guarantees / Undertakings
Performance / Guarantees / Undertakings	Service Levels	Limitation of liability
Payment	Responsibilities of the Parties	Payment
Data Protection / Security / Cybersecurity	Performance / Guarantees / Undertakings	Data Protection / Security / Cybersecurity
<b>Liquidated Damages</b>	Liquidated Damages	Change Management

The parties focus on limitation of liability, indemnities, termination and liquidated damages to allocate risk and shield themselves from the consequences of risk occurrence. Such an approach to negotiation reflects an understanding of a contract as a power-based relationship. The contract is seen as a transactional, one-time deal with short-term benefits. Consequently, the result is a possible value leakage of up to +9% of revenue.<sup>12</sup>

Organizations themselves recognize the need to focus on a different set of terms to drive the value and address the elements that would contribute to a successful ongoing relationship. The top ten most important terms reflect an understanding of the contract as a relationship. These terms create a

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<sup>12</sup> *Contracting Excellence: Ten Pitfalls to Avoid in Contracting*, *supra* note 2, at 4.

framework where the risk is managed (not merely allocated) and mechanisms are created to effectively address changes in the post-award phase. Four out of ten *most important terms*—responsibilities of the parties, delivery and acceptance, service level agreements, and change management—are not in the top ten *most negotiated terms*. In the same vein, organizations identify the *most contested terms*, five of which—invoices and late payment, delivery and acceptance, change management, service levels agreements, and responsibilities of the parties—are not a key concern in negotiations.

Together, the most important and contested terms focus on establishing a relationship where their scope is clear and understandable, the responsibilities are allocated accordingly, the probability of risk is anticipated and managed to ensure successful cooperation with long-term goals. These terms reflect a need for relational contracting that drives value, boosts innovation, and contributes to early dispute identification and prevention. It allows the parties to act proactively to mitigate the probability of risk occurrence and, therefore, prevent value leakage.

Nonetheless, the reality of contracting remains power-based and it has been so in the past five years. The results of the research in the past five years have consistently been the same.<sup>13</sup> A notable shift concerns data protection, security, and cybersecurity—a term that made an interesting jump to the top ten *most negotiated terms* in 2018, although it was previously identified as the most important one. Technological developments and the regulatory responses to data protection (most notably the enactment of the General Data Protection Regulation or *GDPR* in the European Union) are likely the key drivers behind this change.

The results are generally the same across jurisdictions. The English law base focuses more on risk allocation, the civil law base is concerned with the responsibilities of the parties and their intent, and the Islamic law base is focused on the financial aspects.<sup>14</sup> Change management is not a priority in any of the jurisdictions, but limitation of liability, penalties, termination, indemnity, and liquidated damages are. Data protection and security for example, dominates negotiations in the English, French, German and Scandinavian law base. For parties with an Indian, Brazilian, or Islamic law base, data security is not one of the top ten priorities. Liquidated damages are

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<sup>13</sup> *The Most Negotiated Terms 2018*, *supra* note 6, at 9, 16–17.

<sup>14</sup> *Id.* at 22.

of greater importance in the French and German law base, and a key priority for the Islamic law base, while not important for the Indian and Brazilian base.

Overall, the French law base is the closest to relational contracting, with eight out of the top ten *most important terms* addressed in negotiation. This is followed by the English, Scandinavian and Brazilian law bases with seven, the German and Hispanic law base with six, and the Islamic law base with five out of the top ten *most important terms* addressed in negotiation.

In seeking possible reasons that explain the dichotomy in the need for relational contracting and the reality of transactional contracting, the **Report** recognizes the role that traditional legal theory has with its tendency to promote a greater focus on minimizing the risk consequences rather than on reducing risk probability.<sup>15</sup> To make the context more complex, new technologies (such as Blockchain, Smart Contracts, Smart Legal Contracts, Artificial Intelligence, Internet of Things) are starting to profoundly impact contracting practices. To drive value, contracts need to be more agile, flexible, and adaptable. Contract and commercial managers' roles are moving from administrative to strategic.<sup>16</sup> At the same time, "lawyers must go the extra mile, cross the bridge, and fully understand both the business and the culture [they] serve in"<sup>17</sup> making the legal industry anything but immune to these changes.

Thus, if contract managers need to look at contracts more strategically, and the lawyers need to enable a framework where such a practice is possible, how does that reflect on the role of the CISG?

First, the parties' traditional understanding of the law as reactive needs to change from to a proactive one. Proactive contracting stands on the idea of freedom of contract widely recognized in different systems, allowing the parties to fine-tune their relationship to fit their commercial needs the best (*explored further in Part II*). Second, the parties need to understand the CISG

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Contract and Commercial Management: Role and Direction*, INT'L ASS'N FOR CONTRACT & COMMERCIAL MGMT. 5 (2018), <https://www.iaccm.com/resources/?id=10464>.

<sup>17</sup> KAI JACOB ET AL. (EDS.), *LIQUID LEGAL: TRANSFORMING LEGAL INTO A BUSINESS SAVVY, INFORMATIONAL ENABLED AND PERFORMANCE DRIVEN INDUSTRY*, SPRINGER (2017) ("Lawyers have been trained in a way that makes them risk averse, because their trade is essentially to protect their client's interests and assets. . . . They have flourished because they protect their clients from the uncertainty, unpredictability and ambiguity of our world. . . . [C]ontract standards and automated data extraction—the sort of initiatives that make contracts and legal service faster, more affordable, and of direct relevance to today's business challenges.").

to proactively approach and leverage it for their interests. While the freedom of contract is recognized, the difference of legal systems and the applicability of different legal rules can be an obstacle in this process. It is precisely in that context that CISG can reduce or eliminate the friction during negotiation, allowing the parties to focus their resources on negotiating terms that are beneficial for their relationship (*explored further in Part III*).

*B. Commercial and Contract Management: Contracts as Business Assets and Legal Tools in International Trade*

Today, the exchange of goods and services via a global network of contracts regulating different types of relationships form most of the global economy.<sup>18</sup> The role of contracts has been changing to reflect the social environment in which it operates.<sup>19</sup> It is, therefore, not a surprise that in today's multifaceted global economy, in the midst of rapid technological development, contracts are no longer static tools defining rights, obligations and indemnities.<sup>20</sup> Rather, to succeed in the market and achieve competitive advantage,<sup>21</sup> organizations are focusing increasingly on contracting, with contracts as the end product.<sup>22</sup>

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<sup>18</sup> Kaisa Sorsa, *Proactive Contracting and Risk Management*, PROACTIVE MANAGEMENT AND PROACTIVE BUSINESS LAW 173–273 (2011).

<sup>19</sup> George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 674 (2010), <https://ssrn.com/abstract=1664561> (“At one time the dominant model in business was the sale of finished products using “finished” contracts that provided clear specification of goods sold and clear delineation of rights and duties. In today’s world, the object of the contract—what is agreed upon—is becoming more indefinite and complex. For example, there has been a shift from ready-made products to full-package services and life-cycle products.”).

<sup>20</sup> Sorsa, *supra* note 18, at 175–76; Siedel & Haapio, *supra* note 19, at 674 (“This perspective changes the emphasis from contract law to a contracting process, where the contract becomes more of a management tool than a legal tool. This mindset is consistent with changes in business practice over the past several years. [. . .] In this world, business relationships are governed less by traditional contracts and more “by the interdependence between the partners and the need for securing one’s” own reputation.”).

<sup>21</sup> See generally Robert C. Bird, *Law, Strategy and Competitive Advantage* (2011), <https://ssrn.com/abstract=1327795> (explaining the use of law for competitive advantage); Helena Haapio, *Chapter VIII: Proactive Law: Cross-Border Contracting*, in THOMAS D. BARTON, PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE 93–106 (2009).

<sup>22</sup> See Sorsa, *supra* note 18, at 175–76 (“[C]ontracting is a way of seeing contractual relationship as a particular form of the organization of a firm and contracting as a governance form for optimizing business results in the same way as management theory sees the ways and means for optimizing companies’ goals and resources.”); see also Siedel & Haapio, *supra* note 19, at 26.

Contracting is the integrated process through which the parties align their commercial and legal interests, and ensure that the contracts serve their enforcement, collaborative and adaptable purpose.<sup>23</sup> The process has a strategic or operational element—*commercial management*, and a transactional element—*contract management*.<sup>24</sup>

Commercial management is the process through which a company addresses the commercial interests to be reflected in the contract. This includes gathering, assessing and reconciling required performance commitments, while considering the needs and interests of all relevant stakeholders, ensuring their affordability and sustainability. As a starting point, it is necessary to identify roles and responsibilities, as well as equip individuals to perform the assigned roles and responsibilities. The latter can include investment in staff, professional development, and/or an investment in new systems for managing contracting processes. The next element is developing standard terms to reflect business policies and strategies. Closely connected is monitoring and reporting a goal to identify the effectiveness of the existing processes, and to identify market trends and development which can affect the previously identified terms, roles and responsibilities.

Contract management supports commercial management through the implementation and oversight of legally enforceable performance commitments, both outbound (to the market) and inbound (from the market). It converts commercial policies, practices, and technical capabilities into specific terms and conditions that are offered to or required from its suppliers, customers or business partners. Through active monitoring of performance needs and outcomes, contract management informs commercial management with regard to actual and required commitment capabilities, together with their financial and risk impact. This process includes several phases which reflect a contracting lifecycle from determining whether to contract with a potential partner, to negotiating and signing the contract, managing its implementation and closing out once its purpose is achieved.<sup>25</sup>

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<sup>23</sup> *Id.* at 203–07.

<sup>24</sup> See TIM CUMMINS ET AL., CONTRACT & COMMERCIAL MANAGEMENT: THE OPERATIONAL GUIDE 2–9 (Jane Chittenden ed., 2011); see also Sorsa, *supra* note 18, at 179.

<sup>25</sup> Evaluation phase: determining whether to contract or not, to develop a contract model to a bid or support a contracting process. Approval phase: ensuring stakeholders' review and approval of the decision to bid. Negotiation phase: establishing strategy, fall-backs, trade-offs; seeking to reach a consensus around the particular relationship. Drafting phase: preparing the required transactional documents or variations



The complexity of the global economy requires a shift from the traditional, reactive approach to contracts, to a dynamic, proactive approach.<sup>26</sup> Traditionally, the approach to contracting has focused on the ways to mitigate or overcome past negative experiences.<sup>27</sup> The traditional purpose of the contract is to safeguard or enforce the obligation in case of a dispute between the parties;<sup>28</sup> in doing so, the terms of the contract often reflect the goal of safeguarding one's position in court, ensuring that, in case of a dispute, the deciding body will render a favorable decision.<sup>29</sup> IACCM's research indicated the typical practices, ranging from the lack of clear scope and goals, protracted negotiations focused mainly on risk allocation, to limited use of contract technology and weak post-award process governance.<sup>30</sup>

Proactive contracting, on the other hand, is the process of drafting contracts that focuses on people, process and methods of contracting, to ensure an alignment of commercial and legal interests of both parties to ensure a smooth business relationship.<sup>31</sup> The core ideas of proactive

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to standard terms. Implementation phase: signing the contract and communicating the signed version with all parties involved. Management phase: overseeing and reporting on performance; handling claims and disputes; negotiating and recording changes. Close out phase: deciding whether to renew the contract or not.

<sup>26</sup> See Sorsa, *supra* note 18, at 175–76; CUMMINS ET AL., *supra* note 24, at 2–9; Frydinger et al., *supra* note 4; Siedel & Haapio, *supra* note 19.

<sup>27</sup> See also *Opinion of the European Economic and Social Committee on "The proactive law approach: a further step towards better regulation at EU level,"* 175 OFFICIAL JOURNAL OF THE EUROPEAN UNION 26, ¶ 1.3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008IE1905> [hereinafter *EESC Opinion*] (“For too long, the emphasis in the legal field has been on the past. Legislators and the judiciary have responded to deficits, disputes, missed deadlines and breaches, seeking to resolve and remedy. Disputes, proceedings, and remedies to force compliance cost too much.”).

<sup>28</sup> Björn Eckhard & Thomas Mellewigt, *Contractual Functions and Contractual Dynamics in Inter-Firm Relationships: What We Know and How to Proceed* 14 (2006), <https://ssrn.com/abstract=899527>.

<sup>29</sup> See IACCM, *supra* note 3.

<sup>30</sup> *Id.*

<sup>31</sup> See Sorsa, *supra* note 18, at 176; see also Jouko Nuottila et al., *Proactive Contracting: Emerging Changes in Attitudes Toward Project Contracts and Lawyers' Contribution*, 2 J. OF STRATEGIC CONTRACTING & NEGOTIATION 1–2, 151–65 (2016); Haapio, *supra* note 21; Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View*, 49 SCANDINAVIAN STUDIES IN LAW: A PROACTIVE APPROACH 21, <http://www.scandinavianlaw.se/pdf/49-2.pdf>; *EESC Opinion*, *supra* note 27, at ¶ 5.3 (“The word *proactive* implies acting in anticipation, taking control, and self-initiation. These elements are all part of the *Proactive Law* approach, which differentiates two further aspects of *proactivity*: one being the *promotive* dimension (promoting what is desirable; encouraging good behaviour) and the other being the *preventive* dimension (preventing what is not desirable, keeping legal risks from materialising).”).

contracting are thinking of contracts as inter-organization connectors, as well as cross-organization connectors.<sup>32</sup> To effectively serve their purpose, contracts are no longer seen in isolation, nor are they seen as static legal tools, but as dynamic business assets.<sup>33</sup> The latter means an approach to contracting with the purpose of not only aligning interests, but creating a flexible framework that is easily adaptable to the complex trade environment that the businesses are currently operating in.

The shift to proactive contracting brings to light the role of contracts as inter-organization connectors: the inherent link between the contract as a document and the business strategies, policies and overall business values.<sup>34</sup> A company's business values, internal policies, and strategies will determine the framing of negotiation and the scope of contract terms that it is willing to accept. Take, for example, companies' production or development processes: as these processes determine the particular features of the product, and the purpose for which these products can be used, they influence the contract terms concerning the use of the product, the negotiation around liability terms, development timeframes, and other product related items.<sup>35</sup> Similarly, the internal accounting processes and policies determine the price negotiation and payment terms.<sup>36</sup> Organizations whose core values are sustainable supply chains and green business expect their counterparts to produce documents confirming their fair-trade policies or employing storage and waste disposal mechanisms that are in line with best practices.

The shift to proactive contracting also brings to light the role of contracts as communication tools and relationship frameworks.<sup>37</sup> Framing a relationship through a set of terms and conditions in a contract is the end product of a discussion and negotiation between the involved parties about

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<sup>32</sup> See Sorsa, *supra* note 18, at 181; Siedel & Haapio, *supra* note 19, at 20 (“Contracts and contract law lie at the core of procurement and sales, and all business functions and activities—including research and development, finance, accounting, strategy, human resources, information technology, operations management, research and development, outsourcing, and networking—depend on the success of the contracting process.”).

<sup>33</sup> See Sorsa, *supra* note 18, at 180–81.

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* at 181.

<sup>36</sup> *Id.* (Other examples include human resource management, which may affect the inclusion of terms preventing labour abuse in supply chains, or marketing, which determines the expectations of end users, and, therefore, becomes a concrete clause once the contract is drafted.)

<sup>37</sup> See Frydinger et al., *supra* note 4.

their business policies and strategies.<sup>38</sup> It is also a roadmap for communication and collaboration in the long term. To act as a connector, and to enable the companies to achieve their profit-making goals, the contract needs to effectively manage three key risks.<sup>39</sup>

First is the *relational risk*, i.e. the probability of a party seeking self-interest, rather than adhering to the agreed terms in the contract.<sup>40</sup> This risk stems from the economic theory of opportunistic behavior. The contract terms, therefore, provide for an incentive to prevent the behavior from occurring, and guidance in case that behavior, resulting in a breach, does occur.<sup>41</sup> Notable examples include dispute resolution clauses, non-disclosure or confidentiality clauses, and clauses concerning protection of intellectual property rights.

Second is the *performance risk*, i.e. the probability of the parties not being able to perform the agreed terms due to their inexperience, lack of ability to manage uncertain, complex tasks, or handle the uncertainties arising out of market and technological shifts that affect the performance.<sup>42</sup> The parties, through a set of contract terms, define their roles and responsibilities, or provide other types of guidance in the performance of the contract.<sup>43</sup> The examples include clauses on reporting lines or contract performance milestones.<sup>44</sup>

Third is the risk of *lack of adaptability*, i.e., the risk that the contractual relationship is not adaptable to the changes that may unexpectedly arise on the market or which might otherwise affect the contract performance (e.g., market shifts, technological advancements, or other events that mostly occur during contract performance).<sup>45</sup> The parties, through their contract terms, aim to reduce the *ex-ante costs* by addressing the unforeseen (or unforeseeable)

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<sup>38</sup> Libby Weber & Kyle J. Meyer, *Using Psychological Theories to Shape Partner Relationships Through Contracting*, 22, 37, <https://ssrn.com/abstract=1094985>; see also Libby Weber & Kyle J. Meyer, *Unpacking Contract Capabilities: Shaping Behavior by Implementing Appropriate Contract Framing*, 7, 9, <https://ssrn.com/abstract=1349247>.

<sup>39</sup> Eckhard & Mellewigt, *supra* note 28, at 14–15, <https://ssrn.com/abstract=899527>; see also Sorsa, *supra* note 18, at 203–06.

<sup>40</sup> See also Sorsa, *supra* note 18, at 203–04.

<sup>41</sup> *Id.* at 204–05.

<sup>42</sup> Eckhard & Mellewigt, *supra* note 28, at 16–18; Sorsa, *supra* note 18, at 204–05.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 19–21; Sorsa, *supra* note 18, at 205–06.

events that might prevent or impede them in performing the contract successfully.<sup>46</sup> The contract terms are, therefore, risk-preventive terms defining principles and guidelines about how to address the change in circumstances or how to address the effect of the changes to the contract performance.<sup>47</sup> The examples include *force majeure* and hardship clauses, price adjustments, and change procedure mechanisms.

Where done successfully, the parties ensure that their contract achieves the enforcement, collaborative and adaptable purpose. The parties decide how to manage these risks through the negotiation process, where the discussion of reconciling the commercial and legal needs comes to life. The negotiation defines the scope of the relationship that is to be reflected in the particular terms and conditions of the agreement. While in practice, the role of the managers and lawyers differs,<sup>48</sup> the contracting process can only result in enforceable, collaborative and adaptable contracts if it is interdisciplinary.<sup>49</sup> Research advocating for the use of contracts for competitive advantage demonstrates the need for contractual literacy focusing specifically on the understanding and the ability of contract managers to identify and manage the legal risks or effectively address their commercial needs via the legal framework.<sup>50</sup> Moreover, the research concerning the intersection of psychology and contracts focuses on contracts as products of social interaction of different players.<sup>51</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Nuottila et al., *supra* note 31, at 161 (“The results of the study suggest that managers and lawyers shared the same view—that contracts are made to achieve business objectives and benefits. They also mainly agreed on the purpose of contracts. However, managers and lawyers had different perspectives on the lawyer’s role in contributing to the contracting process and contracts. The lawyers saw their role as more essential in contracting than did the managers. The majority of the lawyers also felt that collaboration between business people and lawyers works well in contracting, but managers were somewhat reluctant to agree to this perspective. Most lawyers also felt they have an important role in resolution of disputes: the managers did not agree with this.”).

<sup>49</sup> Haapio, *supra* note 21, at 27 (“Cross-professional collaboration and communication are required, as well as the ability to combine and co-ordinate business, technical, and legal skills and knowledge.”).

<sup>50</sup> *Id.* at 24 (“The goal is to embed legal knowledge and skills in clients’ strategy and everyday actions to actively promote business success, ensure desired outcomes, and balance risk with reward.”).

<sup>51</sup> Weber & Meyer, *supra* note 38, at 37 (“[T]he contract] is the result of a social process (negotiation) between people from different firms who will almost certainly have different expectations of the situation, how to negotiate the contract and what the contract should contain. By successfully managing these expectations through framing, a firm can develop a competitive advantage in contracting. As such, a contract is a blueprint for the relationship, but in a way that is richer than some prior studies

The current negotiation practice, however, demonstrates that the parties focus almost exclusively on allocating the relational risk, reducing their relationship to a deal, rather than creating a successful long-term relationship. The **Report** shows that the parties consistently spend their resources negotiating terms that are not beneficial for their relationship. To free the necessary resources for parties to negotiate terms that affect the value of their contract and their relationship, they need to reduce or even eliminate the bottleneck.

A majority of the countries represented in the Report are signatories to the CISG,<sup>52</sup> and a majority of the most important and contested terms fall under the scope of the Convention and, therefore, can be negotiated under its framework.<sup>53</sup> Additionally, as an instrument based on compromise between different legal systems, with party autonomy as one of its pillars, the Convention is an instrument that can benefit parties in a particular relationship. Therefore, a possible solution for international sales contracts is framing the negotiation under the CISG. The following observations support this approach.

### *C. Role of the CISG in Facilitating Contracting Process in International Trade*

Amid a wave of globalization post-Second World War, the Convention was a compromise between different legal traditions and cultures with a goal of creating a space in which international trade can thrive free of legal barriers. A set of uniform rules, at the time, was seen as a global response to the needs of the business environment for uniformity, predictability and ease of doing business. Promoting international trade also stood on the notion of promoting mutually beneficial and equal trading relationships between the

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have suggested. While the contract does contain the legal description of the exchange and the obligations of the parties, it is not just a process document that the firms will follow like manufacturing workers would follow a work instruction. If the contract is between firms that have not previously worked together, then each party will seek to gain information about the other during the process of designing it. If the parties have worked together, then the prior interaction already led to the development of some expectations and some type of relationship that will affect the design of the current contract. The parties will then adjust their expectations based on the outcome of the exchange.”).

<sup>52</sup> Exceptions include the United Kingdom, Portugal, parts of the Middle East, Africa, and some parts of South America.

<sup>53</sup> Terms around change management, data protection, security, and cybersecurity, specifying scope and goals and performance guarantees do not fall within the scope of the Convention.

different nation states, which was particularly important in the context of the Cold War and different power structures. The Convention continuously receives scholarly praise as the most successful international treaty, bridging legal traditions, cultures, and practices creating a common language—lingua franca—and thus offering a step toward a more *secure, safer and less expensive world*:

CISG may therefore be not only a bridge between treaty made uniform law and international commercial practice, not only between common law and civil law, not only—in a more general sense—between different legal cultures, concepts and languages, but also between the past and the future. In other words, it is not only a bridge, but an anticipation and anchor for the future.<sup>54</sup>

The signatory countries seem to continue to recognize its relevance. With eighty-nine signatory countries, CISG continues to be a way for States to express their intent for creating and participating in a framework that ensures mutual benefits and equality in trading relationships. They also seem to embrace the CISG as a guiding instrument for reforming or adopting their national contract law. In the Latin America region, for example, eighteen countries have acceded to the Convention.<sup>55</sup> Its popularity lies in the international character of the Convention over the domestic regimes; clarity and simplicity of party autonomy contained in the convention, allowing the parties to adapt substantive provisions to their particular contractual relationship; and the neutrality of the regime the Convention provides for the parties in the cross-border environment.<sup>56</sup>

Looking at the CISG in the context of international trade today, the need for a predictable, yet agile framework, is palpable,<sup>57</sup> especially given the pace of change brought by technological development. Big data, artificial

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<sup>54</sup> János Martonyi, *Introduction*, in THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 5 (2015).

<sup>55</sup> Ana Elizabeth Villalta Vizcarra, *United Nations Convention on Contracts for the International Sale of Goods*, in THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 29–38, 34 (2015).

<sup>56</sup> *Id.* at 35.

<sup>57</sup> Wang Liming, *The United Nations Convention on Contracts for the International Sale of Goods and China's Contract Law*, in THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 39–43 (2015) (“These changes are challenging the conventional wisdom of contract law at both national and international levels. In order to respond to such issues as forms of e-contracts, e-consumer protection, the roles of third parties in e-commerce, both national laws and international conventions need to reform.”).

intelligence, blockchain technology—are all penetrating the sphere of trade and fundamentally changing the way contracts today are drafted, negotiated, and managed.<sup>58</sup> While the new technological changes may affect the traditional notions of contracts and require a shift in the approach, it is the principle of freedom of contract that allows the parties to adapt to the changing environment in an agile manner.

Indeed, it is the party autonomy and freedom of contract that underpinned the creation of the international framework embedded in the Convention.<sup>59</sup> The parties may, through Article 6, vary the effect of its provisions. In other words, the parties may determine how to structure their particular contract terms under the framework of the Convention to adequately reconcile their commercial and legal interests. Such fine-tuning of the relationship is the same principle that underpins the notion of proactive contracting, thereby making the framework of the Convention adaptable to that principle.<sup>60</sup>

Of course, such an approach requires a level of contractual literacy from the participating parties, i.e. understanding the legal framework and the impact it has on terms in the contract and understanding the risks associated with subjecting a contractual relationship to a particular legal framework.<sup>61</sup> Nonetheless, instead of a proactive approach to contracting under the CISG framework, we witness almost routine exclusion of its application. There is a body of research identifying the possible reasons for this exclusion, varying

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<sup>58</sup> *Id.* at 42.

<sup>59</sup> Rui Manuel Moura Ramos, *The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980: Thirty-Five Years on*, in THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 19–28 (2015).

<sup>60</sup> See Sorsa, *supra* note 18, at 179 (“The proactive view to contracting is a consequence of the facts that the principle of freedom to contract is widely acknowledged throughout the world, which turns contracts into important transactional tools in fine-tuning the legal framework regulating the transactions.”).

<sup>61</sup> See Haapio, *supra* note 21, at 93 (“Confusing or ambiguous meanings in the explicit terms of a contract present obvious legal risks. To compound those risks, too often we neglect the invisible terms that exist in business contracts: provisions that do not appear but nonetheless have an impact. Parties should recognize mandatory, requirements that are implied into contracts, and understand the effects of silence in agreements. Doing so can prevent problems and unpleasant surprises.”); see also *id.* at 105 (“Everyone involved needs a true understanding of what the deal is and what cost and risk each has to carry (or pass on in the supply chain). Then we can synchronize our sell-side and buy-side contracts, warranties, and commitments.”).

from a lack of awareness and understanding, to the refusal to deal with any legal framework other than a national law.<sup>62</sup>

Often, the scholarship around the CISG focuses on making an argument for the CISG being parties' preferred choice of law.<sup>63</sup> And yet, the parties continuously exclude the application of the Convention, signaling, as end users, that the CISG is not a natural choice for them. At the same time, paradoxically, there is a growing trend of self-regulation, with the companies defining and basing their international dealings on their set of terms and conditions, or on usages already established, rather than on a particular national or international law. The idea to focus on the role of CISG in the negotiation phase of the contracting process has the potential to achieve the subtle impact that some scholars, such as Berman<sup>64</sup> and Kee and Munoz,<sup>65</sup> have suggested. It is not about making the end users "abandon the thoughts of opting out of the CISG"<sup>66</sup> and to make the CISG "*the de facto standard for international contracts*,"<sup>67</sup> but to become part of a common commercial culture and harmonize social practice by helping shape norms and expectations of the business people.<sup>68</sup>

#### CONCLUSION

If the quality of contracting is measured through the mutual benefit and equality of both parties, then there is a need not only to shift to proactive, agile or relational contracting, but also make the CISG an active element of that shift. In the context of modern trade, where the pluralism of legal cultures

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<sup>62</sup> See Bird, *supra* note 21, at 18 ("While the ability to use laws strategically may be widespread, the belief that a firm has the ability to perceive laws as more than compliance rules may be rare indeed. . . . Attitudes toward legal process may also influence the propensity towards strategy. A manager may have a negative experience with litigation or arbitration, either as a defendant or as a non-party participant.").

<sup>63</sup> Kasper Steensgaard, *Boundaries for Expansive Interpretations of the CISG?*, 35 YEARS OF CISG—PRESENT EXPERIENCES AND FUTURE CHALLENGES, ZAGREB 37–56, 40–41, 44 (2015).

<sup>64</sup> Paul Schiff Berman, *The Inevitable Legal Pluralism within Universal Harmonization Regimes: The Case of the CISG*, 21 UNIF. L. REV. 1, 1–18 (2016); GEO. WASH. Public Law Research Paper No. 2016-7; GEO. WASH. Legal Studies Research Paper No. 2016-7, <http://ssrn.com/abstract=2749847>.

<sup>65</sup> Christopher Kee & Edgardo Munoz, *In Defence of the CISG*, 14 DEAKIN L. REV. 1, 99–123, at 117.

<sup>66</sup> Steensgaard, *supra* note 63, at 40–41.

<sup>67</sup> *Id.*

<sup>68</sup> Berman, *supra* note 64, at 9–13.



and traditions is inevitable,<sup>69</sup> having a Convention that embodies and reflects that pluralism is an advantage. From the perspective of contracting as a social interaction between the parties from different legal backgrounds, the CISG has the potential to offer a way forward in reconciling the points of tension in a negotiation.

However, there are two pieces missing. First, a proactive approach to the CISG identifying ways in which it can be used for the parties to achieve competitive advantage.<sup>70</sup> Second, educating the lawyers and the business managers on the ways to address commercial interests via legal terms under the CISG framework. As of the writing of this document, there are around 6.5 million contract and commercial managers who negotiate, draft and manage these agreements.<sup>71</sup> They need to understand the benefit of the CISG in the context of structuring and defining a framework for their business. This even more so, as the organizations shift to reduce the level of legal review to streamline their contracting processes.<sup>72</sup> Understanding the CISG would enable them to achieve two goals. First, reduce the friction that exists in the context of the most negotiated terms, and thereby reduce the time and resources spent. Second, structure the relationship in the context of most important terms to achieve an output reflecting the legal and business needs of the parties of a successful long-term relationship.

This does not mean that the Convention needs to be interpreted beyond its scope to cover all areas of contract law, but rather interpreted in a business-focused manner providing a better framework for a business relationship. The Convention can assist the negotiators to understand a common approach to a particular issue and decide to what extent that is beneficial for their particular relationship. Opting out of particular articles,

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<sup>69</sup> *Id.* at 13.

<sup>70</sup> See Bird, *supra* note 21.

<sup>71</sup> Tim Cummins, *4 Million Contract Management Jobs at Risk*, INT'L ASS'N FOR CONTRACT & COMMERCIAL MGMT. (Feb. 2019), <https://blog.iaccm.com/commitment-matters-tim-cummins-blog/4-million-contract-management-jobs-at-risk>.

<sup>72</sup> Many organizations are under pressure to streamline their contracting process. This often includes initiatives to reduce the requirement for review and approval. However, such changes to procedure often prove challenging as organizations try to reconcile the need for greater speed and efficiency with the potential risk of poor decisions. IACCM, therefore, is undertaking research concerning self-service contracts to assess the types of agreements and the criteria used to determine acceptable levels of risk. Further information is available at <https://www.iaccm.com/services/research-and-advisory/survey/?id=119>.

adjusting some of the default rules to a particular contract, or deciding which aspects of the Convention they do not wish to apply—reflect party autonomy under Article 6 and enable the Convention to achieve its goals. This can lead to a uniform application of the CISG in the international transactions by shaping the commercial expectations and understanding of the practices under this framework.<sup>73</sup>

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<sup>73</sup> See Berman, *supra* note 64.