

SHOULD PAKISTAN ADOPT THE *CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*?

BRUNO ZELLER* AND SARMAD ALI**

This paper demonstrates that Pakistani Sale of Goods laws are outdated as they have not been modernised since the 1930s. This paper will only look at buyer's remedies under the Sale of Goods Act and compare the remedies available under the International Convention for the Sale of Goods (CISG) with the ones currently available in Pakistan and, where applicable, the sub-continent. This paper concludes that Pakistan would benefit from a ratification of the CISG as it would enable the country to take advantage of increased attention by China on its resources and economic opportunities.

I INTRODUCTION

One of the most important achievements of the United Nations Commission on International Trade Law (UNCITRAL) was the creation of the *United Nations Conventions on Contracts for the International Sale of Goods (CISG)*.¹ It fits well into Globalisation, which is not only an economic process, but also a legal one. We have also seen a gradual change in domestic laws adjusting to the needs of a global economy. However, total harmonisation of contract laws has not eventuated. The main problem is that the dream to achieve a global contract law is dependent on political issues.

So far, 87 States have ratified the *CISG*.² Unfortunately, many in South Asia region have not done so and are still relying on *Sale of Goods Acts* that have not been updated since independence from England. Pakistan and India have not yet adopted the *CISG*, despite both countries having participated actively at the 1980 Diplomatic conference putting forward several amendments and proposals.³ Pakistan was represented by two members, namely Mr Mehdi and Mr Inaamullah, both from the Embassy in Vienna.

Free Trade Agreements are increasingly being forged. As a result, uniformity of cross-border trade has been created, but only at the border. The *CISG* will facilitate behind-the-border harmonisation, as seen within the European Union (EU), where most of the *CISG* cases are being decided. The success of the *CISG* in Europe can be measured by the inability of all efforts to create a harmonised contract law, such as the Common Frame of Reference (CFR) and the Common European Sales Law (CESL). However, case law on the *CISG* in China is gathering momentum, and is a significant and valuable source of inspiration for South East Asian countries contemplating to ratify the *CISG*.

The *CISG* is not superior to any domestic law but as will be demonstrated in this paper, its language is easier to understand and will suit small-to-medium sized enterprises (SME) to extend their activities into the international market. It should be noted that adoption of the *CISG* would operate as part of Pakistani or Indian law, not as an alternative to it. The *CISG* will only be applicable to international sales not to domestic ones. In addition, the *CISG* is not a code, so gaps must be filled by domestic law.

This paper will conclude that the *CISG* should be adopted to bring economic transparency and legal uniformity regarding international commercial contracts into the region. It is argued that buyers' and sellers' legal rights will be protected and, therefore, legal commonality within the sub-continental countries would be achieved. This is especially important as China (a *CISG* signatory) is one of the most important export and import countries to Pakistan and India.

*Dr Bruno Zeller, Professor of Transnational Law, School of Law, University of Western Australia, Perth; Adjunct Professor, School of Law, Murdoch University, Perth and Sir Zelman Cowen Centre, Victoria University, Melbourne; Fellow of the Australian Institute for Commercial Arbitration, Panel of Arbitrators – MLAANZ; Visiting Professor, Stetson Law School, Florida and Humboldt University Berlin.

**Sarmad Ali, Advocate High Court, Pakistan, LLB (HONS) (UK), LLM (UK) Northumbria University.

¹ *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 58 (entered into force 1 January 1988) (*CISG*).

² United Nations Commission on International Trade Law, *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* (2017) <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

³ See Vienna Diplomatic Conference, *Summary Records of Meetings of the First Committee, 6th Meeting, 14 March 1980* (29 January 1999) Pace Law School <<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting6.html>>.

In the first part of this paper, a brief history of the *Sale of Goods Act* in Pakistan will be followed by an evaluation of the remedies available to the buyer in case of a breach of contract by the seller. The *Sale of Goods Act 1930* (India) (*SOGA 1930*) is a federal law that is applicable throughout Pakistan. There are separate laws for dealing with consumer-related matters in Pakistan, but they will not be discussed here. The authors have purposefully decided to look at one segment in sales transactions only – namely a breach of contract – to properly highlight differences as well as investigate whether there are commonalities between the two systems of laws.

In the second part of this paper the remedies available under the *CISG* will be discussed briefly. The third (and concluding) part of this paper will demonstrate that Pakistan and India can only benefit by ratifying the Convention. It will be shown that the principles of Pakistani common law and the *CISG* are not the same; however, the differences are not stark and unsurmountable.

II PART 1: THE SALE OF GOODS ACT 1930

A Historical Development

This paper demonstrates that the current Pakistani Sales of goods act is deficient and that ratification of the *CISG* should be contemplated. It is not to say that the *CISG* is superior to any domestic law, but it is of value, specifically to SMEs.

The *SOGA 1930* was enacted during the British Raj to deal with sale of goods contracts. The Act was introduced in Britain, as well as in its colonies and dominions, including British India, as the consolidated *Sale of Goods Act 1893*, 56 & 57 Vic, c 71 (*SOGA 1893*). When the partition of British India took place on 14 August 1947, two new countries emerged on the world map, India and Pakistan, which enacted the *Federal Laws (Revision and Declaration) Act 1951*, under which were adopted a number of Indian laws (one of which was *SOGA 1930*). However, in the United Kingdom (UK), *SOGA 1930* was replaced by the *Sale of Goods Act 1979* (UK) (*SOGA 1979*), which was further modified in 1994.⁴

Furthermore, prior to the introduction of *SOGA 1930*, the sale of goods contracts in British India were governed under so 73-123 of the *Indian Contract Act 1872*. Once *SOGA 1930*⁵ was proclaimed so 73-123 were repealed. It is interesting to note that principles confined in *SOGA 1930* were taken from the *Indian Contract Act 1872*, which complimented English common law principles.

SOGA 1930 is only used – if at all – for domestic dispute resolutions in relation to the sale of goods. Pakistani courts will also consider *SOGA 1979* while interpreting disputes under the 1930 legislation. In addition, Pakistani courts rely on English jurisprudence. Anecdotally, international corporations or for that matter all international sale of goods contracts include either a foreign system of courts or an arbitration clause. In effect, international cases are not at all or rarely decided in Pakistan. Simply put, *SOGA 1930* is basically not taken into consideration and only a few law schools actually teach it.

B Sale of Goods Contract

It is wise to set out what is considered a sale of goods contract before attempting to discuss the remedies available to the buyer against the seller's breach of the contract of sales. The term of a 'sale of goods' is defined in s 4(1) of *SOGA 1930*:

A contract of sale of goods⁶ is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

Part II s 2 of *SOGA 1979* explains the contract of sale provisions, which are for the purpose of this paper more or less similar to those provided in *SOGA 1930*.

⁴ Most recently, *Sale of Goods Act 1979* (UK) replaced for consumer contracts from 1 October 2015 by the *Consumer Rights Act 2015* (UK); however, in the UK *SOGA 1979* remains the primary legislation for selling / buying goods, more precisely for business-to-business transactions (B2B).

⁵ *SOGA 1930* is also a part of the legal systems not only of Pakistan, but also of India and Bangladesh.

⁶ The expression 'goods' is defined in s 2(7) of *SOGA 1930*.

A learned legal academic Robert Joseph Pothier in his treatise *Du Contrat de Vente* (vol III) provides that a 'sale is consensual, bilateral and cumulative'.⁷ This understanding was observed by the Supreme Court of India that a sale of goods, like any other contract, is a consensual act as the parties to the sale contract are at liberty to determine contractual terms and conditions for themselves and hence settle the contractual terms to suit their purposes.⁸ Furthermore, in a contract of sale, one of the two parties agrees to transfer the property in goods to the other party / buyer; hence, the seller of the goods and buyer of the goods cannot be the same persons. It is a cardinal principle of Pakistani common law that a person cannot buy his own goods.⁹ In addition, a sale is said to be consensual because it is necessary that the parties should agree with their free consent; in contrast, a forced purchase or procurement is an acquisition and not a sale.¹⁰ In general, such transactions are termed quasi contracts of sale or implied contracts of sale meaning, thereby, principles of *SOGA* are not applicable to them.¹¹ In the case of a breach of contract of sale the injured party may claim damages from the defaulting party.

C Remedies Under *SOGA 1930*

It is an established principle that the daily negotiations and property of merchants do not depend on subtleties and niceties, but upon rules easily learned and easily retained because they are dictates of common sense, drawn from the truth of the case.¹² The question here is, why are remedies important in a contractual breach? Only courts can enforce parties' promises as it is a judicial function to enforce laws.

To cater for a breach in a sale of goods contract, *SOGA 1930* embodies several remedies in ch VI.¹³ Generally, in case of a breach of contract, a number of remedies is available to the injured party, such as award of damages, rescission, specific performance and restitution. The scope of these remedies, as well as the whole legal process of sale of goods contract of *SOGA 1930*, is highly outdated and, as noted above, little jurisprudence is available in Pakistan to understand the scope of these remedies.

As international disputes involving contracts are rarely if at all decided in Pakistan, it is arguable that courts applying *SOGA 1930* do not consider the international factor. However, it must be noted that a mature domestic sales law can govern international sales as demonstrated in the UK. Unfortunately, the same cannot be said in relation to *SOGA 1930*, which was devised 90 years ago.

Since the adoption of *SOGA*, commercial dealings have increased in volume, complexity and international character. Pakistan must modernise its contract law to compete with a growing internationalisation in the subcontinent, especially with the increased interest of China to link its trade with Europe by creating the One Belt One Road Project.¹⁴

Pakistani domestic law is generally adopted by the contracting parties when entering into regional or national trade, but it is ignored when entering into international sales. As a result, the jurisprudence on this law in Pakistan is next to zero. The remedies portion of *SOGA 1930*, as far as its interpretation is concerned, is much ignored, and since its adoption, nothing much has been written in Pakistan to bring *SOGA 1930* under closer legal examination. The following discussion will consider remedies available to the buyer under *SOGA 1930* with reference to English authorities where required.

⁷ Robert Joseph Pothier, *Traité des Retraits, pour Servir D'Appendice au Traité du Contrat de Vente*, (Che Debure, revised ed, 1781) <<https://hdl.handle.net/2027/nyp.33433024475117>>.

⁸ *Agricultural Market Committee v Shalimar Chemical Works Ltd* (1997) 5 SCC 516.

⁹ *State of Gujrat v Ramanlal S & Co*, AIR 1965 Guj 60.

¹⁰ Specific Performance listed in ss 58, 59 embodies a remedy in case of breach of warranty, and remedy of price listed in s 55 of the Act. Seller's Remedies against Buyer – ss 55, 56.

¹¹ Specific performance – Subject to the provisions of ch II of the *Specific Relief Act 1877*, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

¹² *Hamilton v Mendes* (1761) 97 ER 787, 795.

¹³ Specific Performance listed in ss 58, 59, embodies a remedy in case of breach of warranty, and remedy of price listed in s 55 of the Act. Seller's Remedies against Buyer – ss 55, 56.

¹⁴ See, eg, McKinsey and Company, *China's One Belt, One Road: Will it Reshape Global Trade?* (July 2016) <<https://www.mckinsey.com/global-themes/china/chinas-one-belt-one-road-will-it-reshape-global-trade>>.

The *SOGA 1930* regime has three types of remedies: the seller's remedies against the buyer (suit for price: s55, and damages for non-acceptance: s 56); the buyer's remedies against the seller (ss 57, 58, 59); and remedies available to both the seller and the buyer (remedies available to both buyer and seller – s 60 dealing with repudiation of contract before the due date and s 61 relates to interest by way of damages and special damages). As noted above this article will only investigate some of the remedies available to the buyer against the seller.

1 *Specific Performance: Section [58]*

This remedy is an exceptional one available to the buyer, embodied in s 58 of *SOGA 1930*¹⁵. The same remedy is also embodied in s 52 of *SOGA 1979*. The remedy of specific performance can be regarded as particularly significant in the context of international trade contracts. Specific performance is a discretionary remedy and more precisely it is an equitable remedy described in *SOGA 1930* as well as in *SOGA 1979*. In the civil law doctrine, the remedy is mandatory as the court can pass an order for specific performance, which needs to be complied with. In common law the court in its discretion can order specific performance whenever damages would not be an adequate remedy. For example, in *Behnke v Bede Shipping Co* the buyer could specifically recover the ship when the purchaser failed to pay for it.¹⁶

In common law, in the first place, the contract must be for the sale of specific or ascertained goods. For example, in *Re Wait* it was held that the buyers were not entitled to recover goods by a decree of specific performance as the goods were neither specific nor subsequently ascertained.¹⁷ Where the seller refuses to deliver the goods in a case of the contract for the sale of specific or ascertained goods the court may require him to deliver the goods in compliance with terms of the contract instead of permitting him to retain them on payment of damages.¹⁸ The courts of Pakistan may make orders of specific performance in case of a breach of contract subject to provisions stated in the *Specific Relief Act of 1877*. Furthermore, the scope of remedy of specific performance as per *SOGA 1930* is very narrow and unclear.

(a) *Limits and Ambiguity in Section 58 of SOGA*

The provision of s 58 was originally introduced in the mid-19th Century to encourage a more liberal granting of specific performance.¹⁹ Section 58 had the opposite effect as it only talks about specific or ascertained goods, rather than all goods. Section 58 makes no reference to buyer and / or seller, but as an alternative refers to 'plaintiff' and 'defendant'. However, s 58 is listed in *SOGA* under the heading 'Buyer's Remedies', which suggests it is only available to buyers. Michael Furmston argues that in theory a seller can sue for specific performance, and few commentators believe that only the buyer has the right to ask for specific performance.²⁰ To the contrary, JN Adams argues that only the buyer has a right to ask the court for granting a decree of specific performance.²¹ Jurisprudence can be found such as in *Buxton v Lister*²² where the court assumed that a seller could obtain an order for specific performance. The seller generally has the right to be paid and the buyer needs to accept the goods. If any of the duty is breached this will give right to the injured party to claim damages and/or seek specific performance decree.

Specific Performance, in relation to the buyer, is the remedy where the court orders the seller to perform his existing duty under the contract which has been breached or the seller failed to perform his existing duty because of his own fault. While considering specific performance the court places the onus on the buyer to

¹⁵ Specific performance – Subject to the provisions of ch II of the *Specific Relief Act 1877*, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

¹⁶ *Behnke v Bede Shipping Co Ltd* [1927] 1 KB 649.

¹⁷ [1927] 1 Ch 606.

¹⁸ *Sale of Goods Act 1930 (Act No III of 1930): Amendments and Case Law* (2011) 199.

¹⁹ Ontario Law Reform Commission, *Report on Sale of Goods* (1979) vol 11, 437.

²⁰ Michael Furmston, *The Sale and Supply of Goods* (Taylor and Francis, 2nd ed, 1990) 173.

²¹ Patrick S Atiya and John Adams, *The Sale of Goods* (Pearson, 9th ed, 1995) 507; Specific performance is an available remedy for unascertained goods.

²² (1746) 26 ER 1020, 1021.

prove that goods were specific and ascertainable as seen in the case of *Messrs Petro Commodities Pvt Ltd v Rice Export Corporation of Pakistan*.²³

In cases where time is of the essence – that it has become an implied condition – and the seller has not been able to deliver the goods on time, the buyer may seek a specific performance order in his favour as noted in *Andhra Pradesh Tobacco Growers Cooperation Union Ltd v Anjaneya Tobacco Co.*²⁴ The court opined that the time of performance was of the essence of the contract. The quantity of tobacco was sold but the buyer failed in taking delivery. In addition, further time was allowed to him despite there being no response from the buyer. The court observed that the buyer's failure disentitled him from claiming specific delivery of the goods.²⁵ It is also worth noting that where the court has awarded a decree of specific performance and the defendant is not complying with the order of the court, the sanction would be penalties such as fines or even imprisonment for contempt of court.

2 Non-delivery: Section [Section 57]

Section 57 of the *SOGA 1930* states:

Where the seller wrongfully neglects or refuses to deliver²⁶ the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

The damages for non-delivery by the seller are calculated on the basis of difference between the contract price of the goods and the market price on the day of the breach of contract by the seller. This pattern of calculation of damages owed to the buyer would not be applicable if the goods are readily available in the market place.²⁷ Furthermore, in cases where the buyer paid the price of the goods in advance, he will only be entitled for the refund of the price paid in advance. However, apart from a refund, if the buyer wants to recover damages he could only be able to do so if he can prove the difference between the market price and the contract price, otherwise the buyer cannot have the decree beyond a refund of the price. A problem arises where there is no market of the goods, meaning that the difference between the contract price of the goods and the market price cannot be determined at all. The court in such situations allowed the buyer to receive compensation for loss of profit, which may be calculated according to the price at which the buyer had contracted to resell the goods.²⁸

In *Sitaram Srigopal v Daulati Desi*,²⁹ the goods were sold to the Appellant, which were purchased at an auction but never delivered to the Appellant. The Appellant paid the sales price of the goods in advance but because of non-delivery the Appellant claimed a refund of the price paid in advance and also claimed damages on the basis of the difference between the contract price and market price of the goods on the day of the breach of contract.

The apex court opined that the buyer needed to establish convincing and reliable evidence to establish either that the goods were in brand new condition at the time of the sale or of the market price of goods of similar specifications.³⁰ The buyer was held to be entitled to be refunded only the price paid by him and not the damages.³¹ In *Seedalu Suppliers v H P State Cooperative Marketing*³² the price of the goods to be delivered to the buyer were paid in advance but the seller failed to hand over the goods to the buyer and sold it to any other person at a higher price. The seller attempted to supply to the buyer only a fraction of the actual delivery. However, the quality and description of the goods under the contract did not conform to the original contract and hence eight per cent interest by way of damages was given to the buyer to recover his money.

²³ [2014] SCMR 922.

²⁴ (1998) 5 ALD 188.

²⁵ *Ibid.*

²⁶ Section 33 provides that delivery of goods sold may be made by doing something that the parties agree shall be treated as delivery or or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

²⁷ *Sale of Goods Act 1930 (Act No III of 1930)*, above n 18, 195.

²⁸ *Coastal International Trading Co v Maroil AG* [1988] 1 Lloyd's Rep 92.

²⁹ (1979) 4 SCC 351.

³⁰ *Ibid.*

³¹ *Ibid.*

³² [1995] ALHC 373 (HP).

The buyer must mitigate his loss as much as possible taking reasonable steps but not at the cost of his business reputation.³³ The general principle with respect to the duty of mitigation is that ‘the buyer should not be called upon to risk his capital in the service of diminishing the seller’s liability’.³⁴ The rules stated in *SOGA 1930* do not require the seller to dispose of the goods at once on the buyer’s breach or the buyer to buy elsewhere at once after the seller’s breach.³⁵

3 Remedy for Breach of Warranty: [Section 59]

Section 59³⁶ of *SOGA* explains circumstances where the buyer can bring a suit against the seller for breach of a warranty. The general principle is that a breach of warranty by the seller does not entitle the buyer to reject the goods. The remedy for breach of warranty is embodied in s 59 of *SOGA 1930*. In *Gopalakrishna Pillai v K M Mani*³⁷ where the buyer elected to treat the breach of condition as breach of warranty, the buyer could not reject the goods. The loss incurred by the buyer in case of the breach of warranty was determined based on the loss directly and naturally resulting in the ordinary course of events.³⁸ In *Mason v Burningham*,³⁹ *Burningham*,³⁹ the buyer of a second-hand typewriter spent some money in getting it overhauled. Afterwards, it was found that it was stolen and the police seized it. This was considered as a breach on the part of the seller of the warranty of quiet possession. The court was of the opinion that the buyer was entitled to recover damages including the cost spent in getting it overhauled. The buyer did the natural thing in getting it overhauled in order for him to work properly and effectively. The court further observed that the amount the buyer had spent was a loss directly and naturally resulting from the breach.

(a) Limit of Direct and Natural Factors of the Breach

A seller would only be responsible for the direct and natural consequences of his breach. In *Bostock Co v Nicholson*⁴⁰ the buyer bought sulphuric acid and the seller wrongly warranted it to be commercially free from arsenic. The buyer used the acid for making glucose and sold it to the brewers for brewing beer. The acid was poisonous and killed people who consumed the beer. The court allowed the buyer to recover the damages for the price paid, and for damages to others in compensation and for loss of goodwill.

(b) Limit of Seller’s Liability

The limit of the seller’s liability was explained by the House of Lords in *Lexmead Ltd v Lewis*⁴¹ wherein a farmer negligently continued to use his trailer even though he had become aware of a fault in the coupling mechanism. The farmer had an accident that resulted in the death of two people. The farmer and manufacturer were both held liable in negligence. ‘In their Lordships’ opinion, the implied warranty on the coupling continued until the time when the farmer discovered that the handle of the locking mechanism was missing. Thereafter, the warranty ceased’.⁴² Therefore, the farmer could not claim that the accident was linked to the retailer’s breach.

³³ *James Finlay & Co Ltd v N V Kwik Hoo Tong Handel Maatschappij* [1928] All ER Rep 110.

³⁴ Michael Bridge, ‘Market Damages in Sale of Goods Cases: Recent Developments’ [1994] (March) *Journal of Business Law* 152, 154.

³⁵ *Sale of Goods Act 1930 (Act No III of 1930)*, above n 18, 198.

³⁶ Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the good; but he may, (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) sue the seller for damages for breach of warranty.

³⁷ [1984] 2 SCC 83.

³⁸ [1949] 2 All ER 134.

³⁹ *Ibid.*

⁴⁰ [1904] 1 KB 725.

⁴¹ [1982] AC 225.

⁴² Anne Riches, ‘Recent Cases’ (1981) 55(10) *Australian Law Journal* 753.

III PART 2: BUYER'S REMEDIES UNDER THE CISG

A Introduction

As mentioned above only the buyer's remedies will be discussed in this paper. It will assist industry and governments in viewing the CISG's ability to reform the transnational law of Pakistan and bring it into line with global commerce.

Before the buyer's remedies are discussed, a preliminary understanding of the CISG is of specific importance for the Pakistani and Indian legal profession. The CISG can come into play even if Pakistan or India has not ratified the convention. For example, a Chinese exporter (a major trading country of Pakistan) insists that Chinese law is applicable. This means that all the Chinese law is applicable and as China has ratified the CISG the convention will be the governing law pursuant to art 1 of the CISG. The article states:

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
 - (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damages.

In the example above, the Chinese seller insists on Chinese law. Article 1 is applicable as both businesses are in different states and subs (b) notes that the conflict rule points to the law of China, which is a contracting state. The CISG is an opt-out convention. To opt out of the CISG a party can have recourse to art 6, which allows either a partial or total opting out of the CISG, but preferably it should be expressly stated. Using our example again, the conflict of laws clause in brief would say that Chinese law is applicable with the exclusion of the CISG. The reason to state an application of art 6 expressly is to avoid uncertainties as some courts have suggested that an implied exclusion is also possible.⁴³ However, the mere reference to domestic law in the parties' pleadings is not in itself sufficient to exclude CISG.⁴⁴

Article 2, specifically art 2(a), excludes consumer sales from the sphere of the CISG and art 3 notes that it only applies to goods and not services. However, art 3 still considers mixed contracts as goods if the supply of goods is the dominant feature. Therefore, the CISG might not be a perfect tool as it has exceptions and gaps that need to be filled by the otherwise applicable law. This should not be a surprise or cause any problems to any common-law country as many statutes are also not complete statements of law, that is, they are not codes. To fill the gaps requires the aid of the judge-made common law. In addition, specifically in Pakistan and India, and now to a lesser degree in Australia, the system still relies on a foreign law, namely English law, to fill the gaps. Hence, working with the CISG does not require a complete change, merely an adaptation to a similar, but at the same time different, system.

In sum, it is argued that the CISG, despite non-accession by India and Pakistan, via the route of private international law rules on choice of law and party autonomy, can be the governing law. As a matter of private international law, it would apply as *part of* Pakistani or Indian law and not operate *in conflict* with Pakistani or Indian law.

B Buyer's Remedies

There are two courses of action a buyer can take if the seller has breached the contract, which crystalize the available remedies. The CISG takes the stand that if a contract is broken it is basically still alive and certain

⁴³ See, eg, *Rheinland Versicherungen v S r l Atlarex* Tribunale (Regional Court) di Vigevano, No 405, 12 July 2000, see <<http://cisgw3.law.pace.edu/cases/000712i3.html>>; Oberlandesgericht München [Minich Court of Appeal], 7 U 2070/97, 9 July 1997, see <<http://cisgw3.law.pace.edu/cases/970709g1.html>>; Landgericht München [Munich Regional Court], 21 O 23393/94, 29 May 1995, see <<http://cisgw3.law.pace.edu/cases/950529g1.html>>; [Oberlandesgericht Celle [Court of Appeal], 20 U 76/94, 24 May 1995.

⁴⁴ *Rheinland Versicherungen v Atlarex*, Tribunale (Regional Court) di Vigevano, No 405, 12 July 2000, see <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

remedies are available for the aggrieved party. This corresponds only to a breach of warranty under common law as the contract is also still alive.

However, if the breach is of a fundamental nature the contract can be avoided. The common law terminology for such a breach corresponds again broadly to a breach of a condition.

However, the difference between the two systems is that the *CISG* unlike the common law determines when avoidance can occur based on the severity of the breach, rather than by the classification of the term.

1 *Fundamental Breach*

A fundamental breach is based on art 25, which is declaratory in nature and states:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

The language in relation to fundamental breach compared with breach of a condition has a different, but at the same time similar, principle embedded within the text. It lists the preconditions for avoidance and is also the base from which substitute goods can be demanded if the goods do not conform to the contract.⁴⁵

Whether a breach is fundamental or not depends largely on the terms of the contract as the article notes that a breach must ‘substantially deprive the [other party] of what he is entitled to’.⁴⁶

Another issue is the foreseeability principle embedded within the article. The important point is that it must have been foreseeable by a reasonable person of the same kind and in the same circumstances as the party in the breach.⁴⁷ In relation to the timing of the foreseeability Schlechtriem notes:

In my opinion, in which the decisive factor is the interest of the party concerned as fixed by the terms of the contract also fixes the conclusion of the contract as the relevant time for knowledge or foreseeability: a contract in which the delivery time is not binding cannot be turned into a transaction where time is of the essence merely because the seller later learns that the buyer has obligated himself to sell the goods at a particular time.⁴⁸

Two other issues must be understood. First, pursuant to article 26 a declaration of avoidance must be sent to the breaching party. A refinement in the *CISG* is the ‘Nachfrist’⁴⁹ principle, which is embedded in art 49. If a breach is not fundamental or it is not clear that it is fundamental the aggrieved party can simply give the other party extra time (Nachfrist) to perform the contract. If that is not the case then the breach becomes fundamental in nature and art 25 does not need to be enlivened. Simply put, Nachfrist is separate to the definition of fundamental breach in art 25 *CISG*. Second, the buyer pursuant to art 82 will lose the right to declare the contract avoided and hence require the seller to substitute goods if he cannot make restitution of the goods ‘substantially in the condition in which he received them’.⁵⁰

2 *Breach of Contract*

The *CISG* primarily keeps the contract alive and, as noted above, the principle of fundamental breach appears to be the last resort should a contract be broken.

Conformity of goods is noted in art 35 stating that ‘a seller must deliver goods which are of the quality, quantity and description required by the contract’ and in addition ‘are continued or packaged in the manner required by the contract’. Article 35 contains words such as ‘fitness for purpose’⁵¹ and ‘particular purpose’⁵² and appears to have been misunderstood in Australian jurisprudence. Courts mistakenly linked this art to s19 of the *Sale of Goods Act* by stating:

⁴⁵ Peter Schlechtriem, *Excerpt from Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (6 June 2000) <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-25.html>>.

⁴⁶ *CISG* art 25.

⁴⁷ Schlechtriem, above n 45 <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a37>>.

⁴⁸ *Ibid*.

⁴⁹ ‘Nachfrist’ is a German word that translates into ‘extra time’.

⁵⁰ *CISG* art 82.

⁵¹ *Ibid* art 35(2)(a).

⁵² *Ibid* art 35(2)(b).

It was not suggested that there was any material difference or inconsistency between the provisions of art 35 and ss 19(a)-(b) and because of that and the way the case was conducted, it is unnecessary to consider whether there is. Counsel proceeded on the basis that there was no material difference or inconsistency.⁵³

The court did not take the *CISG* into consideration and succumbed to the ‘homeward trend’ that is it looked at the *CISG* through domestic lenses, which is contrary to the mandate of art 7. This article in essence demands that ‘[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade’.⁵⁴

Spagnolo also pointed out that (citations omitted):

... the need for both buyer examination and notice of non-conformity within a reasonable time were overlooked. In the haste to distance the case from the *CISG*, valuable argument on these points never surfaced. There was an ambiguous reference to ‘timely notice’ in the seller’s pleadings, but apparently the matter was not pressed as a pre-condition to damages.

The issue was certainly alive on the facts. Notification of the defects seems to have been given in August 1994, or perhaps February 1995. For some of the goods, non-conformities dated back to January 1994. It was therefore possible to argue that the buyer had lost its right to damages, because it took between seven and 13 months to notify the seller, and that this was ‘unreasonable’ within the meaning of art 39(1). Depending on the goods, *CISG* cases indicate that anything from 25 days to four months has been held to be unreasonably long in the context of art 39(1).⁵⁵

The aggrieved party can claim damages and other remedies as contained in the convention. Article 45 sets out the remedies for a breach which not only consist of damages but also includes other remedies such as delivery of substitute goods,⁵⁶ reduce the price⁵⁷ just to mention a few. However, art 45 also notes that the the buyer does not lose the right to damages even if he exercises any of the other remedies.

Damages – an important remedy – is defined in art 74:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

In essence, art 74 attempts to put the party in the same position had the breach not occurred and the contract been properly performed.⁵⁸ The limitations imposed by article 74 are the doctrines of foreseeability and mitigation.⁵⁹ In brief:

Under Article 74, an aggrieved party is entitled to recovery of not only profits lost prior to the judgment, but also for future lost profits, to the extent that such lost profits can be proved with reasonable certainty and subject to the principles of foreseeability and mitigation.⁶⁰

The *CISG* has its own interpretative mandate in art 8. The article notes that any interpretation of conduct and statements of parties must be interpreted according to the intent of the parties that is the subjective intent. However, it is imperative that the evidence put forward whether subjective or objective in nature must be proven objectively and not merely by assertions. Article 8(3) describes the circumstances of a case, which includes the ‘negotiations, any particular practices which the parties have established between themselves, usages and any subsequent conduct of the parties’.

⁵³ *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 (24 April 2003) [235].

⁵⁴ *CISG* art 7(1).

⁵⁵ Lisa Spagnolo, ‘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, 191.

⁵⁶ *CISG* art 46.

⁵⁷ *Ibid* art 50.

⁵⁸ See Peter Schlechtriem et al, *Commentary on the UN Convention on the International Sale of Goods* (Oxford, 2nd ed, 2005).

⁵⁹ *CISG* arts 74, 77.

⁶⁰ *CISG* Advisory Council Opinion No 6, *Calculation of Damages under CISG Article 74* (8 November, 2006)

<<http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html>>.

Only when the subjective intent does not yield any results can the objective intent be used, that is, the reasonable person test. As can be seen, the parole evidence rule is not to be used in the interpretation of the *CISG*.

IV PART 3: CONCLUSION

Even though the *CISG* is a compromise between the common laws and the civil law, some similarities and obviously at times, differences exist between legal principles of awarding of damages under the *SOGA* and the *CISG*. The approach adopted by the *CISG* is much more liberal compared to the *SOGA*. The important fact is that the *CISG* has managed to harmonise the law of international sales. Many attempts have been made in Europe to harmonise contract law, such as the Principles of European Contract Law and the Common Frame of Reference, but they are all now gathering dust on a shelf. The *CISG*, on the other hand, has been ratified by 87 countries and is one of the most successful laws devised by UNCITRAL.

Many similarities exist between Pakistani sales laws and the *CISG* in relation to general principles. However, in the execution, variations are inevitable but because the *CISG* is written in a non-technical language these differences are not a big hurdle.

SOGA requires that the traded goods must conform to the contractual terms, and must be fit for purpose and be of satisfactory quality. Similar provision or requirement can be seen in the *CISG* as well in art 35. Keeping the contract alive in case of breach of the contract on part of the seller is an excellent approach for modern international sales. In contrast, the approach of the *SOGA* in case of the breach of the contract is less attuned to the needs of international trade.

Furthermore, the requirement or rather the option of Nachfrist notice to the party is also of paramount importance in international sales as it encourages trade and helps make sure that the parties to the contract actually fulfil their duties arising under the contract. This requirement or option is not known in *SOGA* as it is emphasised in the *CISG*. The principle encapsulated in art 74 of the *CISG* is another example of excellence. By virtue of art 74 the aggrieved party must establish with reasonable certainty – and subject to the principles of foreseeability and mitigation – damages in case of the breach of the contract. The emphasis on certainty and principle of foreseeability under the *CISG* is much higher in comparison to *SOGA*. The approach of *SOGA* does include the mitigation and foreseeability principles, but there is no mention of reasonableness the way it is stressed in the wording of art 74 of the *CISG*.

The evidence that can be used to prove breach of contract under the *CISG* is not limited to the objective test, which in some cases does not produce the results envisaged by the parties as it is the opinion of the courts ‘second guessing’ the intent of the parties. The subjective test used in the *CISG* does require that the facts must be objectively tested, that is, the conduct and statements ‘are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was’.⁶¹

In summary, this article has demonstrated that the remedial principles under the *CISG* are not fundamentally different and hence do not create a barrier for Pakistan or India to ratify the *CISG* and become part of the international *CISG* family.

⁶¹ *CISG* art 8(1).