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41 CISG and English Sales Law: An Unfair Competition

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I. Introduction

It has been more than thirty years since the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG). It is also widely claimed in academic literature that the CISG is one of the most successful harmonization projects in the field of international commercial law.[1] As of 2012, the CISG has been adopted by seventy-eight countries.[2] It is increasingly being applied both by national courts and by arbitration tribunals.[3]

Despite its widespread adoption, there are a number of shortcomings to its claim of success. First, some major trading countries, such as the United Kingdom and India, have not ratified the CISG. Ironically, the United Kingdom played an influential role in drafting the CISG, but subsequently has refused to ratify it as UK law. British politicians and lawyers are worried that ratification of the CISG would undermine the dominant position of English commercial law in international trade.[4] The mainstream scholarly

[1] Joseph M. Lookofsky, "Loose Ends and Contorts in International Sales: Problems in the Harmonisation of Private Law Rules," 39 *Am. J. Comp. L.* 403 (1991); Kazuaki Sono, "The Rise of Anational Contract Law in the Age of Globalisation," 75 *Tulane L. Rev.* 1185 (2001); Stacey A. Davis, "Unifying the Final Frontier: Space Industry Financing Reform," 106 *Com. L. J.* 455, 477 (2001); Michael Joachim Bonell, "Do We Need a Global Commercial Code?," 106 *Dick. L. Rev.* 87, 88 (2001); Petar Sarcevic, "The CISG and Regional Unification," in *The 1980 Uniform Sale Law. Old Issues Revisited in the Light of Recent Experiences* (ed. Franco Ferrari) (Sellier European Law Publisher, 2001), 3, 15; Sandeep Gopalan, "The Creation of International Commercial Law: Sovereignty Felled?," 5 *San Diego Int'l L. J.* 267, 289 (2004).

[2] Jon C. Kleefeld, "Rethinking 'Like a lawyer': An Instrumentalist's Proposal for First-Year Curriculum Reform," 53 *J. Leg. Ed.* 254, 262 (2003).

[3] See Larry A. DiMatteo et al., *International Sale Law: A Critical Analysis of CISG Jurisprudence* (Cambridge: Cambridge University Press, 2001); Bruno Zeller, *CISG and the Unification of International Trade Law* (Sydney: Cavendish, 2009); Peter Huber and Alastair Mullis, *CISG: A New Textbook for Students and Practitioners* (Berlin: Sellier European Law Publishers, 2007); *Commentary on the UN Convention on the International Sale of Goods* (CISG), 3rd ed. (ed. Peter Schlechtriem and Ingeborg Schwenzer) (Oxford: Oxford University Press, 2010).

[4] Sally Moss, "Why the United Kingdom Has Not Ratified the CISG," 2 *J. of L. & Commercex* 483, (2005–6); Angele Fort, "The United nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom," 26 *Baltimore. L. Rev.* 51 (1997); Nathalie Hofmann, "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonisation of Contract Law in Europe," 22 *Pace Int'l L. Rev.* 141 (2010); Barry Nicholas, "The Vienna Convention on Contracts for the International Sale of Goods," 105 *L. Quarterly Rev.* 201 (1989); Robert G. Lee, "The UN Convention on Contracts for the International Sale of Goods: OK for the UK?," *J. Bus. L.* 131 (1993).

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literature has argued that the proliferation of international trade and economic globalization makes a globally uniform contract law or sales law an imperative.

Second, although many states have adopted the CISG, a large number of businesses have opted to exclude the application of the CISG. Oftentimes, they choose English law, instead of the CISG, as applicable law. For example, some commodity associations, such as the Grain and Feed Trade Association (GAFTA); Federation of Oils, Seeds, and Fats Association (FOSFA); Refined Sugar Association (RSA); as well as Shell and British Petroleum (BP), expressly exclude the CISG in their standard form contracts. All of them prefer English law to the CISG.[5] Apart from these big international commodity trade associations, many non-British merchants also prefer English law over the CISG, even though their countries are member states of the CISG. As a result, English Sales Law is a competitor with the CISG as a suitable international sales law.

Why do so many international traders prefer English Sales Law to the CISG? This chapter aims to provide an answer. It is argued that English Sales Law has a number of competitive advantages, which make it more attractive than the CISG. Through a comparison of the CISG and English Sales Law, this chapter articulates the major competitive disadvantages of the CISG, and then suggests certain improvements for future reform.

The discussion proceeds as follows. Part II sets the historical context by briefly reviewing the histories of the CISG and English Sales Law. Part II will show that English Sales Law had been widely used by non-English commercial parties and established a dominant position in international sales law long before the enactment of the CISG. Part III addresses the fragmentary nature of the CISG. Due to the need to reach compromises between common and civil law representatives, the result is a fragmentary body of legal rules. The problems of ambiguity in the CISG and conflicting interpretations produced by its member states are evaluated in Parts IV and V. Finally, Part VI concludes the discussion by offering some suggestions for future reform of the CISG.

II. Histories of English Sales Law and the CISG

To fully understand why many international traders choose English Sales Law instead of the CISG, one has to conduct a comparative study of their developing histories. By the time the CISG was enacted, international traders had used English Sales Law for many years. Therefore, English Sales Law was already in the leading position at the time of the adoption of the CISG.

When examining the history of English Sales Law, one could easily make the mistake of starting with the Sale of Goods Act 1979 or its predecessor, the Sale of Goods Act of 1893. In fact, the history of English Sales Law is inherently linked with the development of English commercial law, which can be traced much further back in time. It is more appropriate to begin the discussion in the seventeenth century.[6] But English law, in general, was not then sufficiently developed to accommodate the needs of a growing commercial marketplace. Merchants had their own laws, such as commercial customs,

[5] Michael Bridge, *International Sale of Goods Law and Practice*, 2nd ed. (Oxford: Oxford University Press, 2007), 509.

[6] William Bernstein, *A Splendid Exchange* (London: Atlantic Books, 2008), 198–214 (international trade had become more widespread before the seventeenth century).

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usages, and *lex mercatoria* to govern their commercial transactions; they established their own merchant courts to settle disputes arising from their commercial transactions.[7]

All of this began to change in the early seventeenth century, when the courts of common law displaced the merchant courts under the direction of Chief Justice Coke. Judges at common law courts did not adopt *lex mercatoria* as a source of law. Though borrowing certain rules from *lex mercatoria*, they primarily applied the principles of common law to solve commercial disputes. This change was clearly a misfortune for medieval merchants. Nonetheless, it was a critical legal development in English commercial law in general, and sales law in particular. It established the jurisdiction of common law courts over commercial disputes.[8]

Gradually, judges adjusted traditional common law principles to meet the needs of merchants. The significant development in English commercial law took place when Lord Mansfield was appointed as Lord Chief Justice of the King's Bench. He is regarded as the founder of English commercial law.[9] During his tenure, Lord Mansfield consolidated a vast body of case law on commercial disputes relating to sales, agency, bailment, and negotiable instruments. By the time of his retirement, English commercial law was much more advanced than the commercial laws in other countries. Lord Mansfield had laid a solid foundation for the Sale of Goods Act of 1893, enacted almost a century after his retirement.

Sir Mackenzie Chalmers[10] drafted the English Sales Law is the Sale of Goods Act of 1893.[11] In 1888, he was commissioned to prepare a bill for the codification of legal rules relating to sale of goods contracts. It was enacted in 1894 as the Sale of Goods Act of 1893. It remained entirely unchanged until 1954, when Section 4 of the Act was repealed. Later, several significant amendments were made by the Misrepresentation Act 1967, the Criminal Law Act 1967, and the Theft Act 1968. More critical textual changes were made by the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, and the Unfair Contract Terms Act 1977. Subsequently, the Sale of Goods Act 1979 consolidated all of these amendments and replaced the Sale of Goods Act of 1893. After 1979, further changes were made in 1994, 1995, and 2002.[12]

It can be seen from this brief review that English Sales Law was considered an advanced body of rules beginning in the nineteenth century. It was a sales law that aimed

[7] Frederic Sanborn, *Origins of the Early English Maritime and Commercial Law* (London: Century Co., 1930); Leon Trakman, *The Law Merchant: The Evolution of Commercial Law* (New York: Fred B Rothman & Co., 1983).

[8] One of the absurd developments made by common law courts is the maxim of caveat emptor, which was not the rule in either the *lex mercatoria* or Roman law. See Walton H. Hamilton, "The Ancient Maxim Caveat Emptor," 50 *Yale L. J.* 133 (1931).

[9] Ewan Mckendrick, *Goode on Commercial Law*, 4th ed. (London: Penguin Books, 2010), 7.

[10] Sir Mackenzie Chalmers (1847–1927) was a celebrated statutory draftsman. He was also the drafter of a number of key commercial law statutes, such as the Bills of Exchange 1882 and the Marine Insurance Act 1906.

[11] See Roy Goode, *Commercial Law*, 2nd ed. (London: Penguin Books, 1995), 187–95; Michael Bridge, "The Evolution of Modern Sales Law," *LMCLQ* 52 (1991).

[12] In 1994, the Sale of Goods (Amendment) Act 1994, ss1, 3(2) repealed the market overt exception to the *nemo dat* rule; the Sale and Supply of Goods Act 1994 revised the implied term of quality and the rules as to deemed acceptance. In 1995, the Sale of Goods (Amendment) Act 1995 made the prepaying buyer of an individual part of a bulk a co-owner of the bulk. In 2002 the Sale and Supply of Goods to Consumer regulation 2002 implemented the 1999 EC Consumer Sales Directive.

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at meeting commercial needs. To that end, it was constantly revised to accommodate new developments in international trade.

In addition, the dominant position of English Sales Law is also largely attributable to the dominant status of the UK in international trade in the eighteenth and early nineteenth centuries. Within this period, through the expansion of overseas trade, the UK gradually established a leading role in international trade. British merchants, with stronger bargaining power, naturally preferred English Sales law and chose it as the governing law for their international transactions. This enhanced the dominance of English Sales Law in two ways. As parties from other countries became more familiar with its contents, more international traders chose English law to govern their transactions. English courts became the preferred forum to settle international disputes. On the other hand, it created more opportunities for judges to improve English law through their exposure to novel fact patterns. As a result, English law became more advanced than commercial law in other jurisdictions, which, in turn, encouraged more international traders to choose English law.

The central role played by the city of London in international trade also aided the competitive advantage of English Sales Law. London had been an international trading center from Anglo-Saxon times, having a world reputation for its highly developed speciality markets in commodities, financial transactions, and transport and insurance services.[13] This attracted merchants from around the world to do business in London. They employed English barristers and solicitors to represent them in their business transactions. Consequently, English Sales Law became firmly entrenched as the favored law for international transactions.

The British political, business, and legal communities have recognized this competitive advantage. At a meeting convened by the British government in 2004 to discuss whether the UK should ratify the CISG, the major concern was the impact that the CISG would have on English commercial law's leading position in international trade, as well as London's standing in international arbitration and litigation.[14] Although certain leading academic lawyers argued in favor of the need to harmonize international private law,[15] the majority of legal practitioners and judges did not share this view.[16]

The CISG's development was not exposed to the advantages enjoyed by English Sales Law. In 1928 Ernst Rabel, a law professor, suggested to the newly established UNIDROIT Institute that the unification of international sales law should be given the highest priority. In 1930, UNIDROIT set up a committee to produce a uniform international sales law. The Governing Council of UNIDROIT adopted a revised version in 1939. However, the

[13] Pamela Nightingale, *A Medieval Mercantile Community: The Grocers' Company and the Politics and Trade of London* (New Haven: Yale University Press, 1995), 1000–483.

[14] Sally Moss, "Why the United Kingdom Has Not Ratified the CISG," 25 *J. L. & Commerce* 483, 485 (2005–6); John Hobhouse, "International Conventions and Commercial Law: The Pursuit of Uniformity," 106 *L. Quarterly Rev.* 530 (1990); Roy Goode, "Insularity or Leadership?: The Role of the United Kingdom in the Harmonisation of Commercial Law," 50 *Int'l & Comp. L. Q.* 751 (2001).

[15] Goode, "Insularity or Leadership?."

[16] See House of Lords, European Contract Law: the Draft Common Frame of Reference Report with Evidence (2009), available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/95.pdf.

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project was interrupted by World War II. It was not until 1951 that the government of The Netherlands convened a conference in The Hague in which a special Sales Committee was appointed to finish the sales law project. The committee produced two drafts – the Convention relating to a Uniform Law of International Sales (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. These two drafts were adopted at the 1964 Diplomatic Conference in Hague and came into force in 1972. Unfortunately, the two conventions were ratified by only a handful of countries.[17]

In 1966, the United Nations Commission on International Trade Law (UNCITRAL) was established. UNCITRAL established a working group in charge of modifying the Hague Sales Conventions or producing a new text. In 1978 the working group submitted a Draft Sales Convention (New York Draft). A Diplomatic Conference in Vienna was convened to discuss the draft in 1980. The draft was adopted, becoming the CISG.

This comparison of the histories of the CISG and English sales law shows that the latter developed over a considerably longer period of time. Moreover, the CISG did not have the geographical advantage enjoyed by English sales law. The long history of English sales law's use in international trade has positioned it as a strong alternative to the CISG.

III. Problem of Fragmentary Law

From the perspective of a legal practitioner, there are many areas of law, besides the law of sales, governing an international sale of goods transaction, including property, insurance, carriage of goods, and payment law. When choosing the applicable law, the practitioner has to take account of all of the relevant laws governing the transaction. If he or she chooses English law as the applicable law, he or she chooses not only English sales law, but also the whole system of English law. In contrast, the CISG's narrow scope requires the practitioner to select another national law to govern the legal issues not covered by the CISG.

Moreover, even as a sales law, the CISG does not cover all of the legal issues relating to sale of goods. The CISG was not intended as a comprehensive law of sales. It is inherently a fragmentary body of legal rules. Its fragmentary feature is one of its major disadvantages in comparison with English sales law. A cursory review of CISG text shows the limited scope of its rules taken as a whole. First, numerous areas of law relating to sales of goods are expressly excluded. CISG Article 4 states that:

> This convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
> (b) the effect which the contract may have on the property in the goods sold.

[17] Peter Schlechtriem, "Introduction," in Schlechtriem and Schwenzer, *Commentary*.

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Article 4 delegates to national law the enforceability of numerous common contract terms, such as retention of title,[18] assignment of contract,[19] set off,[20] penalties,[21] and choice of forum clauses,[22] as well as settlement agreements.[23]

One of the main purposes for the unification of international sales law is to reduce transaction costs associated with international trade. If the parties to a transaction are located in different countries where their national contract laws differ, they have to determine the applicable law to govern their transactions through negotiations. Diverse national contract laws generate unnecessary negotiation costs for the parties in a cross-border transaction. Whichever national contract law is adopted as the applicable law, it will inevitably be unfamiliar to one of the parties, who would have to expend considerable costs in learning the foreign law. Consequently, diverse national contract laws not only generate unnecessary learning costs, but also produce a disincentive to engage in cross-border transactions. A uniform sales law reduces the transactions costs of negotiating and learning an applicable law.[24]

Unfortunately, the CISG fails to achieve the goal of reducing transaction costs relating to international trade.[25] Even when parties choose the CISG as the applicable law, they still need to choose a national law to fill in the "external gaps" in the CISG. So, the savings in negotiation costs by selecting the CISG are negligible. If there were no CISG, the parties would only need to agree on a single body of (national) law. It would be unnecessary for them to choose contract law of one jurisdiction and property law of another. Now with the CISG, the parties first need to decide whether they want the CISG to govern their transaction. If they decide to do so, they have to make a further decision on the question of which national law should be chosen to fill the gaps left by the CISG.

Unlike the CISG, the Sale of Goods Act of 1979 provides a comprehensive body of legal rules. It covers all of the key legal aspects in relation to international sale contracts. In the event of a gap, recourse would be made to general common law of contract. Accordingly, transaction costs associated with the use of English Sales Law are lower than those associated with the CISG.

A further complication in applying the CISG is that it provides a number of reservations that allow countries to opt out of certain parts of the CISG's coverage. These include not being bound by Part II (formation) or Part III (obligations of sellers and buyers) under Article 92; not applying the CISG to certain "territorial units" under Article 93; nonapplication to transactions between countries "which have the same or closely

[18] See *Roder Zelt-und Hallenkonstruktione GmbH v. Rosedown Park Pty Ltd and Reginald R Eustace*, Federal Court, South Australian District, Adelaide, April 28, 1995, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=197&step=FullText.

[19] See Oberster Gerichtshof, April 24, 1997, Zeitschrift für Rechtsvergleichung 89 (1997).

[20] See Oberster Gerichtshof, October 22, 2001, available at http;//cisgw3.law.pace.edu/cisg/wais/db/cases2/011022a4.html; Tribunale di Vigevano, July 12, 2000, in 20 *J. L. & Commerce* 209 (2001).

[21] See Rechtbank van Koohandel Hasselt, June 17, 1998, available at http://www.law.kuleuven.ac.be/int/tradelaw/WK1998–06–17.htm.

[22] See Camara Nacional de los Apelaciones en lo Comercial, October 14, 1993, available at http://www.uc3m.es/uc3m/dpto/PR/dpp03/cisg/sargen6.htm.

[23] See LG Aachen, May 14, 1993, Recht der internationalen Wirtschaft 760 (1993).

[24] Karl Llewellyn, "Why We Need the Uniform Commercial Code," 10 *U. Florida L. Rev*. 367, 369 (1957).

[25] Arthur Rosett, "Critical Reflections on the United Nations Convention on Contract for the International Sale of Goods," 45 *Ohio St. L. J*. 265, 266–7 (1984).

related legal rules" under Article 94; nonapplication in cases covered by Article 1(1)(b) jurisdiction (Article 95); and the ability to opt out of the "no writing" requirements of Articles 11 and 29 (Article 96). For example, the Scandinavian countries have made declarations to opt out of CISG Part II (rules governing the formation of the contract). The United States, China, the Czech Republic, Singapore, St. Vincent, the Grenadines, and Slovakia have made declarations against the application Article 1(1)(b) jurisdiction.[26]

These reservation options were inserted into the CISG as compromises and to make it attractive to as many countries as possible.[27] For example, developed countries in general prefer strict rules on the need for written documents and the necessary time for the inspection of goods because their traders have high levels of literacy and technological sophistication. On the contrary, developing countries favor more liberal rules on these issues. For example, significant debates took place at the diplomatic conference on the rule governing the time periods within which the buyer must give notice of nonconforming goods. Many Eastern European and Asian states were not prepared to adopt the principles of contractual autonomy and the primacy of customs and trade practices that are customary in the developed countries.[28] The incorporation of reservations was needed to reach a compromise. As a consequence, the CISG inevitably became a fragmentary body of legal rules due to the reservations and declarations made by its member states.[29]

The fragmentary feature of the CISG significantly undermines its attractiveness to commercial parties. From a commercial party's point of view, it would be better to exclude the application of the CISG in favor of a national law. This is one of the key reasons why many commercial parties and leading international commodity trade associations expressly opt out of the CISG and choose English law to govern their transactions.

IV. Ambiguities in the CISG

Another disadvantage of the CISG is that the CISG contains numerous general principles and abstract legal terms. This makes it very difficult for commercial parties to foresee how a rule will be applied in practice. Uncertainty in the application of law is a risk that businesses hope to avoid.

The CISG prefers general principles and abstract terms to specific rules and clear standards. For example, there are more than thirty instances in which the CISG measures the parties' conduct, defines rights or obligations, or requires certain actions or notices by referencing "a reasonable person, reasonableness, or unreasonableness."[30] Another

[26] For general discussion of the conflict of law problems, see Franco Ferrari, "What Sources of Law for Contracts for the International Sale of Goods? Why One Has to look beyond the CISG," 25 *Int'l Rev. L. & Economics* 314 (2005); James J. Fawcett, Jonathan M. Harris, and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford: Oxford University Press, 2005), 981–4.

[27] Clayton P. Gillette and Robert E. Scott, "The Political Economy of International Sales Law," 25 *Int'l Rev. L. & Economics* 446, 460–2 (2005).

[28] CISG Advisory Council, "Opinion No. 2, Examination of the Goods and Notice of Non-Conformity, Articles 38 and 39," available at http://cisgw3.law.pace.edu/cisg/CISG-AC-op2.html.

[29] Gyula Eörsi, "A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods," *Am. J. Comp. L.* 333, 349–50 (1983).

[30] Michael Van Alstine, "Dynamic Treaty Interpretation," 146 *U. Penn. L. Rev.* 687, 751–2 (1998); Gillette and Scott, "The Political Economy of International Sales Law," 474.

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example is the definition of fundamental breach, which permits a party to terminate a contract and claim damages. Considering the seriousness of contract avoidance, a clear definition or criteria should be provided for making the determination of fundamental breach. Instead, it is defined ambiguously in Article 25:

> 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 this same kind in the same circumstances would not have foreseen such a result. (Emphasis added.)

The "precise meaning of the terms substantially and reasonable is unclear. The official explanatory note by UNCITRAL is tautological and very confusing, just reproducing Article 25 with no clear, practical guidance."[31]

Why did the drafters of the CISG prefer general principles to specific rules? A number of reasons can be put forward: general principles and vague standards were needed to reach compromise; general principles allowed for flexible application across national legal traditions; and the drafters were mostly academics and government officials, and not representatives from international trade associations.[32] Some commentators have suggested that the drafters may have pursued (national) self-interests at the expense of the primary users of the uniform law.[33] Consequently, the drafters of the CISG preferred a general principle to specific rules, vague terms to clear standards, ambiguous jargon to intelligible language, because compromise on more specific rules was not possible. General principles and vague terms can be interpreted in many, even contradictory, ways. Therefore, each state could and some have interpreted the CISG to conform to their own national legal systems. These factors help explain the dissonance between the widespread adoption of the CISG at the government level and the widespread rejection of the CISG at business-to-business level.

As a consequence, the CISG is drafted in abstract language, containing more general and vague principles than clear and specific rules. For international traders, general principles and abstract terms generate a high level of uncertainty in the application of the CISG, which makes it very difficult for them to manage potential legal risks associated with the transaction. So, the best way to solve this legal uncertainty is to exclude the application of the CISG.

In contrast, the Sale of Goods Act 1979 was developed by the interaction between judges and merchants over hundreds of years. Merchants have played a significant

[31] A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of nondelivery of the goods by the seller or nonpayment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party. *UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods* (Austria: United Nations Publication, 2010) 40.

[32] For general discussions of the history of the CISG, see Peter Huber, "Comparative Sales Law," in *The Oxford Handbook of Comparative Law* (ed. M. Reimann and R. Zimmermann) (Oxford: Oxford University Press, 2008), 937.

[33] Alan Schwartz and Robert E. Scott, "The Political Economy of Private Legislatures," 143, *U. Penn. L. Rev.* 595, 597 (1995); Gillette and Scott, "The Political Economy of International Sales Law," 666–70.

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role in shaping English Sales Law. The Sale of Goods Act 1893, and its successor, the Sale of Goods Act 1979, are largely a codification of the legal rules found in case law. Not only do many common law features remain in the Act, but also case law continually plays a crucial role in legal development and keeps the law responsive to real world change. Common law is developed incrementally. Furthermore, this type of incremental change always starts with a dispute between the contracting parties. In other words, legal changes are initiated by private litigation. As parties' disputes are often related to the legal issues, which are of practical significance, they ensure that the development of English sales law always keeps up with commercial needs. The common law continuously produces or adjusts rules facilitating rather than hindering commercial transactions.[34]

It would be misleading to claim that the Sale of Goods Act 1979 is drafted in plain language, using no general principles or abstract legal jargon. In fact, it is also a piece of ambiguous legislation. But at least it relies less on general principles and ambiguous legal terms than the CISG. For example, the Sale of Goods Act 1979 does not use the concept of fundamental breach. Though the terms "reasonable person," "reasonableness," and "unreasonableness" appear twenty-one times in the act, it should be noted that the text of the Sale of Goods Act is much longer than the CISG.

In addition, when vague terms are used, the Sale of Goods Act provides guidance on how they should be interpreted. Section 14(2) provides an illustration: "Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of *satisfactory quality*." The term "satisfactory quality" is indeed an ambiguous legal jargon. But guidance on how to define satisfactory quality is given in Section 14(2)(A) and (2)(B). Section 14 (2)(A) provides: "For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances." A listing of specific criteria for determining "satisfactory quality" is provided in Section 14(2)(B):

> For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
> (b) appearance and finish,
> (c) freedom from minor defects,
> (d) safety, and
> (e) durability.

Unlike the CISG, which offers no practical guidance for applying many of its abstract legal terms, the Sale of Goods Act does provide instructions when a vague legal term is used. More importantly, ambiguous rules and vague legal jargon in the English sales law have been gradually clarified through the long-term development of case law.

[34] George L. Priest, "The Common Law Process and the Selection of Efficient Rules," 6 *J. Legal Studies* 65 (1977).

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V. Divergent Legal Interpretations

Legal ambiguities are inevitable. One of the advantages of English sales law is that legal ambiguities can be gradually clarified by case law. When a dispute on the interpretation of an ambiguous legal rule in English Sales Law arises, it can be solved by courts. Where the parties argue for different legal interpretations, the court can decide which version of the interpretations should prevail. Once the case is decided, it becomes the law, having a binding effect on future transactions. Consequently, the legal ambiguity is clarified.

Nonetheless, it is likely that with the growth in case law, a legal rule may be interpreted differently or perhaps even contradictorily by courts at the same level. Not only has the legal ambiguity not been solved, but also new confusions in relation to the same rule arise. However, when given issues are addressed by the Supreme Court, the inconsistences among lower court interpretations are harmonized and ambiguities in the law are removed.

Conversely, ambiguities in the CISG have to be solved by judicial interpretations of national courts of its member states. At times, national courts of the member states have made conflicting interpretations of the same rule.[35] The problem of divergent interpretations is illustrated by the various interpretations of CISG Article 9. Article 9 provides:

(1) the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) the parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

The meaning of these provisions has differed between developed countries and developing countries. Developed countries prefer flexibility of contracts, with the use of custom and usage as a means of increasing commercial flexibility and economic efficiency.[36] Their courts have broadly construed these provisions. For example, in the United States, the express terms of an agreement and a usage of trade are construed, whenever reasonable, to be consistent with each other.[37] Conversely, developing countries see this broad approach to the interpretation of Article 9 as too uncertain. They prefer to solely rely on the written rules and expressed agreements of the parties. This is largely because merchants in developing countries have had little influence in the development of trade usages.[38] Therefore, most developing countries take a very narrow approach to the

[35] Lisa M. Ryan, "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations," 4 *Tulane J. Int'l & Comp. L.* 99 (1995–6).

[36] Sara G. Zwart, "The New International Law of Sales: A Marriage between Socialist Third World, Common, and Civil Law Principles," 13 *No. Carolina J. Int'l. & Commercial Regulation* 109, 117 (1988).

[37] Lisa M. Ryan, "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations," 4 *Tulane J. Int'l & Comp. L.* 99, 103 (1995–6).

[38] Stephen Bainbridge, "Trade Usages in International Sale of Goods: AN Analysis of the 1964 and 1980 Sale Conventions," 24 *Virginia J. Int'l. L.* 619, 641 (1984); Amy H. Kastely, "Symposium: Reflections on the International Unification of Sales Law: Convention," 8 *Nw. J. Int'l L. & Business* 574, 610.

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interpretation of Article 9. They do not give effect to trade usages unless explicitly agreed by the parties and provided the usages are not in conflict with statutory provisions.[39]

This is just one of many examples of conflicting interpretations among the member states of the CISG. Apart from the interpretation of Article 9, developing and developed countries also differ in their interpretations of Articles 11, 29, 55, and 79.[40] These conflicting legal interpretations have generated a high level of uncertainty in the application of the CISG.

Moreover, this problem is further exacerbated by the fact that no reliable legal institution exists to solve these conflicting interpretations. There is no international supreme commercial court to resolve conflicts and inconsistencies in legal interpretations. Accordingly, there is no uniform interpretation of the CISG. The question of how the CISG is interpreted mostly depends on which member state's court hears the dispute. Undoubtedly, this poses a great level of uncertainty in practice. When deciding whether the CIGS should be chosen as the applicable law, the parties or their lawyers must have sufficient knowledge of differences in legal interpretation among the member states and then choose the one that they favor. This is a very demanding task. These problems make the CISG less attractive to commercial parties than English sales law.

In support of the CISG, national courts can and should reference judicial decisions in other member states. Furthermore, a vast amount of academic literature has been produced that provides some valuable guidance for interpreting and applying the CISG.[41] But it does not necessarily follow that the availability of these sources solves the problem of contradictory interpretations. The fact remains that CISG case law provides alternative interpretations that a court may choose. The problem of conflicting legal interpretations still remains a problem.

The lack of a uniform judicial institution to support the CISG means that it remains a static instrument. The current version of the CISG was enacted in 1980; no revisions have been made. The commercial world has changed dramatically; new technologies, such as the use of electrical documents and signatures and the growth of e-commerce, have had a great impact on international trade. The CISG is unable to meet new developments in the commercial world.[42]

Because the CISG is an international treaty, any amendment and revision must comply with the strict procedures required by international law. No amendment can be made unless it is agreed unanimously by all of the member states. Due to its international law status, its revision is extremely difficult. This makes it almost impossible for the CISG to be updated to reflect developments in commercial practice.[43] If the CISG is not revised in the near future to meet the new needs in the commercial world, then it will increasingly become obsolete.

[39] E. Allan Farnsworth, "Developing International Trade Law," 9 *California Western Int'l L. J.* 461, 465–6 (1979).

[40] Ryan, "The Convention on Contracts."

[41] See http://www.cisg.law.pace.edu/cisg/text/caseschedule.html.

[42] Jennifer E. Hill, "The Future of Electronic Contracts in International Sales; Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods," 2 *Nw. J. Tech. & Intell. Prop.* 1 (2003).

[43] For general discussion of difficulties with international law making, see Francesco Parasi and Vincy Fon, *The Economics of Lawmaking* (Oxford: Oxford University Press, 2009), 207–70.

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In contrast, English sales law has been gradually improved and developed through case law. Though it happens in an incremental way, the legal development and amendments to the Sale of Goods Act are constantly made in order to meet the needs of the commercial world. This is one of the reasons why commercial parties prefer English sales law to the CISG.

VI. Suggestions for Future Reform

Discussions in this chapter show that English sales law has four competitive advantages over the CISG. First, English sales law developed earlier than the CISG. It was well established as the leading international sales law when the CISG was enacted. Second, English sales law is a comprehensive legal system, whereas the CISG is a noncomprehensive law. When commercial parties choose the CISG they have to make a separate selection of a national law to be applied to fill the gaps in the CISG. Third, there are more ambiguities in the CISG than in the Sale of Goods Act 1979. This makes the application of the CISG more uncertain. Fourth, legal ambiguities and conflicting legal interpretations in English sales law are solved through the development of case law. There is no equivalent institution to resolve inconsistencies and conflicts in legal interpretations of the CISG produced by national courts. In order for the CISG to compete with English sales law in the future, the four disadvantages outlined here must be overcome. In this concluding section, three suggestions are offered for improving the CISG.

First, if the CISG intends to attract wide adoption by commercial parties, it is imperative that its primary users, international traders, play a leading role in the revision of the CISG. As previously discussed, the main driving forces behind the unification of international sales law are government officials, law professors, and legal practitioners. The flaw in the drafting of the CISG was a lack of sufficient input from international traders. Consequently, although the CISG has been adopted by many states, international traders have deliberately excluded its application. This is simply because the CISG does not reflect their interests. To solve this problem, more involvement of commercial parties in the future reform of the CISG is necessary. They are the primary users of the CISG; accordingly, the CISG should be sensitive to their interests.

The experience of the Uniform Customs and Practice for Documentary Credits (UCP) provides valuable insights. Unlike the CISG, the driving force behind the UCP was not a working group of politicians, law professors, and legal practitioners, but its primary users, the bank industry. It was drafted by the International Chamber of Commerce. The latest version is the UCP 600, which came into effect on July 1, 2007. From a practical perspective, the UCP 600 is more successful than the CISG. Arguably, it is the most successful harmonization of international commercial law ever made.[44] The fact that representatives of banks drafted the UCP 600 has contributed significantly to its success. Banks' interests are common in nature; namely, codified customs and practices should ensure that banks are not exposed to excessive risks.[45] Bank interests are reflected throughout – from the general principle of the autonomy to specify duties to the exercise of due care in reviewing documents against payment. The UCP 600 is not strictly a "hard

[44] Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law, Text Cases and Materials* (Oxford: Oxford University Press, 2007), 352.
[45] Id., 350.

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law," but it has been universally adopted by bankers and commercial parties throughout the world. The success of the UCP 600 illustrates the importance of the participation of primary users in the unification of international commercial law, which the CISG drafting process failed to do.

Commercial law possesses a unique feature – by nature, it is private law, meaning the parties have the freedom to decide whether they would like to choose a national sales law or an international commercial law, such as the CISG, to govern their transactions. Generally, much of commercial law, especially sales law, is voluntary in nature (default rules), with few mandatory rules. Framing this problem from an economic perspective, it can be seen that the CISG's targeted audiences was nation sates and not commercial traders. As a result, the CISG is widely adopted by states, but less often used in international trade. Therefore, to correct this mistake, the primary users of the CISG, commercial traders, should be invited to play a significant role in the future reform of the CISG.

Second, the hard law status of the CISG should be changed. As it stands now, the CISG is an international treaty, making it unable to meet new developments in the commercial world. The hard law status of the CISG undermines its ability to compete with English sales law. Sales law, in nature, is a part of a general law of contract. The nonmandatory nature of sales law, as noted earlier, is reflected in CISG Article 6, which provides that: "The parties may exclude the application of this Convention or subject to article 12, derogate from or vary the effect of any of its provisions."[46]

If the CISG becomes a soft law, it will be easier for it to be revised or amended by the drafters to meet the new needs in the commercial world. The question of whether it would be used more widely by commercial parties depends on its quality. If it does better in serving commercial needs than English sales law, it will be used more often. On the other hand, if its default rules were considered to be inefficient, then it would be rejected as a viable alternative law by commercial parties. However, if the CISG is revised and drafted by commercial parties it would be reasonable to expect that significant improvements could be made. This is because commercial parties are experts on commercial practice and the problem of conflicting national interests between the drafters and the primary users will largely be abated. In addition, this change in its status in turn creates incentives for the drafters to produce more efficient and commercially suitable default rules if they want the CISG to be widely used by commercial parties.

Third, a system of international commercial courts should be established. One of the biggest disadvantages of the CISG is that there is no solution for competing or divergent interpretations. The only solution to this problem is to create an international commercial court that is empowered to provide the ultimate authoritative interpretation of the CISG. When there is a difference in the interpretations of a particular article by the member states, the case could be referred to the international commercial court for clarification. This would reduce uncertainty in the application of the CISG and, thereby, make it more attractive to commercial parties.

[46] Article 12 provides that any provision of Article 11, Article 29, or Part II of this convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a contracting state that has made a declaration under Article 96 of this CISG. These parties may not derogate from or vary this effect of this article.

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Currently, there is no way to solve these competing interpretations of the CISG made by national courts of the member states. It is true that law professors play a very important role in solving this problem. A vast amount of academic literature has been produced to clarify the different interpretations of the CISG. Nonetheless, national courts of the member states are under no legal duty to use academic literature. Further, academic debates over the correctness of various interpretations cause additional confusion and uncertainty for the application of the CISG. If the establishment of an appellate institution proves impossible, than the CISG is unlikely to win the competition with the English sales law as the most viable body of sales rules.

From a practical perspective, the commercial parties are concerned with two matters. First, does the sales law provide a body of default rules that are deemed to be practical and efficient? Second, does the court apply and interpret the law consistently? In the end, the CISG, as currently constituted, fails to satisfy both of these fundamental concerns. Because of this, it has not sufficiently harmonized international sales law as claimed by legal academics. English sales law still enjoys the dominant position in the field of international commercial law.