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THE CISG IN NEW ZEALAND – WHY IT SHOULD NOT BE IGNORED

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CONTENTS

ABSTRACT

Although the United Nations Convention on Contracts for the International Sale of Goods (CISG) is generally applauded as the most successful international law treaty so far, it appears to be somehow ignored in New Zealand so far. Eight years after coming into force, there is little or no scholarly writing and no significant case law to provide guidance to the legal and business community in the application of the CISG.

This paper argues that New Zealand should give up its ignoring attitude towards the CISG. By comparing some of the main features of the CISG with the respective positions under New Zealand law, it shows that the fear of unfavourable provisions in the CISG is largely unfounded. It continues by emphasising that the present trend of neglecting and excluding the CISG can result in serious consequences for New Zealand traders. Moreover, this paper points out that, in some areas, the CISG has already influenced the interpretation of New Zealand law and assumes that this trend is likely to continue. It therefore comes to the conclusion that New Zealand legal practitioners should break through the vicious circle of non-application of the CISG and take the chance to influence the harmonisation process in judicial decisions through their own interpretation of the CISG.

STATEMENT ON WORD LENGTH

The text of this paper comprises 12,184 words (excluding abstract, table of contents, footnotes and bibliography).

I INTRODUCTION

> "Trade is our lifeblood. We will do whatever we can to secure more access for our goods and services."
>
> *Rt Hon Helen Clark – Prime Minister of New Zealand*

International trade is the economic lifeblood of most countries, and particularly of New Zealand that depends largely on the economic relationship with other countries. In facts: in 2002, the amount of all exports totalled 32.3 billion New Zealand dollars, whereas the amount of all imports added up to 31.8 billion dollars.[1] Together, exports and imports account for more than 50 % of New Zealand's Gross Domestic Product (GDP) that totalled around 120 billion dollars in 2002.[2]

However, international commercial transactions involve risks and uncertainties that do not emerge in domestic transactions. One of the most fundamental legal problems which faces the parties of a contract that crosses national borders is the question of what law applies to the substance of the contract. This is because there may be significant differences between New Zealand law and the law of the country where the other party is domiciled.

The most important international response to the problems arising in this particular area is the United Nations Conventions on Contracts for the International Sale of Goods (CISG) which was incorporated into New Zealand domestic law in 1995. It provides a single set of rules for international sale transactions in order to facilitate international trade.

Although the CISG is generally applauded as the most successful international law treaty so far,[3] it seems to be somehow ignored in New Zealand. Eight years after coming into force, there is still little or no scholarly writing and no significant case law to

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[1] Facts taken from Statistics New Zealand, http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/1167b2c70ca821cb4c2568080081e089/388271de32e09acdcc256b1e007ccc2a?OpenDocument (last accessed 6 November 2003).

[2] See Statistics New Zealand, above as well as the website of the OECD at http://www.oecd.org/dataoecd/8/4/1874420.pdf (last accessed 6 November 2003).

provide guidance to the legal and business community in the application of the CISG. Even more stunningly, it is only mentioned in very few textbooks, and even if mentioned, on a very limited scale.[4] Furthermore, anecdotal evidence indicates that international law firms generally exclude the CISG from the international sale contracts they draft.[5]

This paper intends to show why New Zealand should give up its ignoring attitude towards the CISG. It starts with a brief description of the historical background of the CISG in order to emphasise its objective of facilitating international trade and to enable the reader to understand spirit and purpose of certain provisions as a compromise between different legal systems, especially between the common and the civil law.

The paper then focuses on the role the CISG plays in New Zealand, starting with an analysis of the possible reasons for non-application. To prove that the fear of unfavourable provisions in the CISG is largely unfounded, this paper firstly deals with the scope of application of the CISG in order to emphasise to what extent it is relevant for New Zealand traders. It then compares some of the main solutions of the CISG with the ones of New Zealand national sales law and reveals that, in many cases, both achieve similar results. These findings are backed up by the result of a case analysis which will test a case that has been decided under the CISG for its possible results under New Zealand law. In order to emphasise the consequences that may result from ignoring the CISG, this paper will furthermore present two recent Australian cases.

Finally, this paper comes to the conclusion that New Zealand should break through the vicious circle of non-application of the CISG and should not ignore it any longer.

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[3] Monica Kilian "CISG and the Problem with Common Law Jurisdictions" (2001) Journal of Transnational Law and Policy 217.

[4] For example, David Goddard, Helen McQueen *Private International Law in New Zealand* (New Zealand Law Society, Wellington, 2001) only briefly mentions the CISG in Chapter 10.The situation with Australian textbooks is better: Books like Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999) and Gabriel Moens, Peter Gilles *International Trade and Business: Law, Policy and Ethics* (Cavendish Publishing, London, Sydney, 1998) contain full chapters on the CISG.

[5] Even scholars sometimes give the advice to opt out the CISG, see for example, Tom McNamara "U.N. Sale of Goods Convention: Finally Coming of Age?" http://www.dgslaw.com/articles/485389.pdf (last accessed 6 November 2003), 11.

II HISTORICAL BACKGROUND OF THE CISG

The preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome.[6] After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.[7]

However, these conventions failed to achieve wide acceptance, with only seven European and two other countries becoming party to them.[8] They were in particular criticised for their primarily Western European approach and failure to address the needs of the United States, the developing countries and Eastern Europe.[9] As a result, the United Nations Commission on International Trade Law (UNCITRAL) started preparing a new draft on a more global basis. Over sixty-two nations representing quite different legal systems (common law, civil law and other types of legal systems) participated in the process.[10] Academics, corporations, traders, diplomats, and lawyers all played a role.[11]

The CISG was finally adopted at a diplomatic conference in Vienna in 1980[12] and came into force on 1 January 1988. At that time, already eleven states[13] from all over the world had ratified the CISG, a fact that evidenced the success in preparing a convention with wider acceptability.

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[6] Secretariat of the United Nations Commission on International Trade Law "Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods" http://www.cisg.law.pace.edu/cisg/text/p23.html (last accessed 6 November 2003), under 2.
[7] Secretariat of the United Nations Commission on International Trade Law, above, under 2.
[8] New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23, Wellington 1992), 8.
[9] Tom McNamara "U.N. Sale of Goods Convention: Finally Coming of Age?" http://www.dgslaw.com/articles/485389.pdf (last accessed 6 November 2003), 2.
[10] McNamara, above, 2.
[11] McNamara, above, 2.
[12] New Zealand Law Commission, above, 9.
[13] Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

Up to now, sixty-two states have ratified the CISG,[14] including most of the trading partners of New Zealand, like Australia, the United Sates of America, China and most Member States of the European Union, although it has to be noted that the United Kingdom and Japan, both important trading partners of New Zealand as well, so far have not adopted the CISG.

III THE CISG IN NEW ZEALAND

In New Zealand, the CISG has now been in operation for eight years. It was incorporated into New Zealand domestic law by the Sale of Goods (United Nations Convention) Act 1994, which came into force on 1 October 1995. However, there is only little scholarly writing and no case law of significance in New Zealand to help the business community and guide the legal profession in the application of the CISG.

A Reasons for Non-Application

The following part examines the reasons for non-application of the CISG in New Zealand.

1 CISG unknown to the legal profession

Although the process of adoption was slow, the Sale of Goods (United Nations Convention) Act 1994 came into force with little or no public discussion, a fact, which is surprising in light of the volume of transactions, which are effected.[15] This is probably one of the main reasons why most New Zealand traders and lawyers, especially those who do not routinely conduct international transactions, are unaware or at least unfamiliar with the CISG.

Indeed, New Zealand has to admit that it did not do much to make the public aware of the new piece of legislation. This already became apparent in the Law Commission's Report *"The United Nations Convention on Contracts for the International*

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[14] An updated list of the Contracting States can be found at http://www.cisg.law.pace.edu/cisg/countries/cntries.html (last accessed 6 November 2003).

[15] Duncan Webb "A New Set of Rules For International Sales" (1995) New Zealand Law Journal 85.

Sale of Goods: New Zealand's Proposed Acceptance" [16] that was published in 1992. A closer look into this report reveals that it is not suited to encourage public discussion. In contrast to similar documents of other countries assessing the suitability of the CISG for adoption,[17] the Commission's report does not deal with the disadvantages of the CISG. The Commission rather confined itself to describing the advantages of the CISG. It emphasised in particular that most of New Zealand's trading partners have already become parties to the CISG – a fact it regarded as one of the main reasons for the adoption of the CISG in New Zealand.[18]

The Commission's report finally resulted in the introduction of the Sale of Goods (United Nations Convention) Bill to Parliament in 1993. However, even at that stage the subject did not attract much attention. The main reason therefore probably is that the Sale of Goods Bill was introduced as part of the Law Reform (Miscellaneous Provisions) Bill (No 2). According to the express statement of the Minister of Justice at that time, Honourable D.A.M. Graham, "this type of Bill makes legislative changes that are too substantial for inclusion in the Statutes Amendment Bill but do not warrant taking the time of the House on separate amending Bills"[19] – another fact showing that New Zealand at least did not see the need to promote the adoption of the CISG.

In this way, the introduction of the Sale of Goods Bill stood side by side with the introduction of forty-six other legal measures,[20] mostly Amendment Bills like the Forest Amendment Bill, the Motor Vehicle Dealers Amendment Bill and the Sale of Liqueur Amendment Bill. Throughout the debates, it was only mentioned in the first reading, which took place on 21 September 1993, but without any discussions about its content.[21]

Even amongst legal scholars, the adoption of the CISG was not a popular subject to write about. Throughout the legislation process, there was only one article published,

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[16] New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23, Wellington 1992).
[17] For example Sieg Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1996) 116/2 South African Law Journal 323.
[18] New Zealand Law Commission *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23, Wellington 1992) 44-45.
[19] (21 September 1993) 538 NZPD 18158.
[20] (21 September 1993) 538 NZPD 18158.
[21] (21 September 1993) 538 NZPD 18158-18159.

illustrating the main provisions of the CISG and basic differences to New Zealand sales law.[22]

Even today, eight years after the CISG came into force, the situation did not change noticeably. Scholarly writing is still almost non-existent. Moreover, the CISG is only mentioned in very few New Zealand textbooks on commercial law, and even if mentioned, only to a very limited extent.[23] This fact reflects another problem of the CISG: It seems that it is only subject to very few lectures at universities, or at least not subject to compulsory ones.[24]

2 CISG is 'foreign law'

As scholars from other common law jurisdictions note, even lawyers who are aware of the existence of the CISG are suspicious about and even afraid of the CISG.[25] It is a general problem that legal practitioners appear to be loath to apply law that was not subject to their legal education and with which they are therefore unfamiliar. This is true all the more if law is concerned that has not been created from within and, moreover, that may conflict with well-established domestic common law or codes.[26] , As a result, New Zealand lawyers frequently advise their clients to simply opt out of the CISG, a possibility that is provided for in Article 6. Moreover, most international law firms use standardized trade terms, which cover most of the field being covered in the CISG. Therefore, they simply do not see the necessity to let the CISG, an unknown and untested legal regime, govern such contracts.[27]

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[22] C C Nicoll "The United Nations Convention on Contracts for the International Sale of Goods: The Vienna Sales Convention 1980" (1993) NZLJ 305, continued at 316.
[23] See footnote 4.
[24] The course outline of the course "The Law of Contract", held by Professor Prebble at the Victoria University of Wellington in 1999, available at http://www.vuw.ac.nz/~prebble/Contractclassinfo.html (last accessed 6 November 2003) may serve as an example: it makes clear that the course only gives a "brief reference" of the CISG.
[25] Monica Kilian "CISG and the Problem with Common Law Jurisdictions" (2001) Journal of Transnational Law and Policy 217, 227.
[26] Kilian, above, 218-219.
[27] Sieg Eiselen "Adoption of the Vienna Convention for the International Sale of Goods in South Africa" (1996) 116 South African Law Journal 323, 362.

3 *CISG contains unfavourable provisions compared to New Zealand law*

As another reason for the exclusion of the CISG from international sales contracts it is submitted that the CISG contains unfavourable provisions compared to New Zealand national sales law. Lawyers argue that they would rather include single provisions of the CISG into their draft contracts than the CISG as a whole.

4 *No significant case law*

Moreover, there is no case law of significance in New Zealand involving the CISG. As a result, lawyers, who are aware and maybe even familiar with the CISG, face the problem that the outcome of litigation in this area is uncertain and, to a certain degree, unpredictable and therefore often advise the exclusion of the CISG.

One might think that the lack of case law in this area mostly results from the fact that most international commercial disputes are resolved by arbitration rather than by litigation. Indeed, more than 90% of these disputes are decided by international arbitral tribunals.[28] However, this is not only true for New Zealand, but for all other member states of the CISG as well. In contrast to New Zealand, though, many of these countries, in particular those with a civil law system, have produced a considerable number of cases.

Indeed, as of 15 October 2003 the most famous database that contains a collection of the worldwide-published cases on the CISG, the website of the Pace University Law School, New York, lists only one reported New Zealand case.[29] In contrast, there are more than 300 reported German cases and more than 50 reported cases from France. Research in New Zealand databases[30] brought up an additional eight cases. The most important ones will be reported in the following.

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[28] K P Berger *The Creeping Codification of the Lex Mercatoria* (Kluwer, The Hague, 1999) 65.
[29] This website is available at http://joe.law.pace.edu/ (last accessed 6 November 2003).
[30] Brookers Online Library and Butterworth Online.

(a) *Crump v Wala*[31]

The first New Zealand case referring to the CISG dates back to 1993, when New Zealand had not yet become a member of the CISG. In *Crump v Wala* Hammond J referred to the buyer's right of avoidance for breach of contract under Article 49 CISG solely to illustrate that in his opinion the buyer's rights of rejection under New Zealand law were insufficient.[32] However, the facts of the case and the decision had no further connection to the CISG. Both the seller and the buyer had their places of business in New Zealand, and the case was decided under the domestic provisions of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979.[33] Therefore, the reference to the CISG only had the character of an obiter dictum which Hammond J made clear when he explicitly "return[ed] to the facts of [the] particular matter"[34] in the paragraph following after the reference to the CISG.

(b) *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd*[35]

The case *Attorney-General & NZ Rail Corporation v Dreux Holdings Lt,* decided in 1996, concerned the interpretation of a call option in an agreement between New Zealand Rail Corporation and Dreux Holdings Ltd. The counsel of Dreux suggested that for interpreting the contract the court should take into account the conduct of the parties subsequent to entering the contract. In a majority judgment, Richardson P, Keith and Blanchard JJ were able to decide the particular case without having to refer to the subsequent conduct of the parties. However, they noted that considering subsequent conduct is a well-established international practice, recognised inter alia, in the CISG.[36] Their Honours continued:[37]

> It should not go unnoticed that the United Nations Convention on Contracts for the International Sale of Goods, [...], is now, by virtue of the Sale of Goods (United Nations Convention) Act 1994, part of New Zealand law.

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[31] *Crump v Wala* [1993] 6 TCLR 40 (HC) Hammond J.
[32] *Crumb v Wala*, above, 47.
[33] *Crumb v Wala*, above, 41-42.
[34] *Crumb v Wala*, above, 47.
[35] *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* [1996] 7 TCLR 617 (CA).
[36] *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd,* above, 627.

Furthermore, they pointed out that[38]

> [t]here is something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice. The UK position may need to be rethought in view of developments elsewhere.

(c) *BP Oil (NZ) Limited v Rhumvale Resources Limited*[39]

In *BP Oil (NZ) Limited v Rhumvale Resources Limited* the Court of Appeal had to deal with the alleged breach of a sale and license agreement between BP and Rhumvale. To solve that issue, it had to consider an earlier agreement Rhumvale had undertaken with a Swiss manufacturing company, Egapro. This agreement had been concluded in 1990 and provided that Swiss law governed it. The court concluded that since neither Switzerland nor New Zealand were a party to the CISG at the time of the conclusion of the agreement, according to Article 100(2) CISG the Convention did not apply.

(d) *Yoshimoto v Canterbury Golf International Ltd*[40]

In *Yoshimoto v Canterbury Golf International Ltd,* decided in 2000, the Court of Appeal was concerned with the interpretation of a clause in a commercial contract. To support his interpretation of the respective clause, Thomas J considered extrinsic evidence.[41] His Honour listed several reasons why he thought that in this case extrinsic evidence was both receivable and reliable. He pointed out, however, that there is the right to appeal against his decision to the Privy Council in London and that recent cases "illustrate the reluctance of the English Courts to look at extrinsic evidence as an aid to interpretation"[42]. He went on emphasising that "it would, of course, be open to this Court to seek to depart from the law as applied in England on the basis of [New Zealand's] implementation in 1995 of the United Nations Convention on Contracts for the International Sale of Goods" and referred expressly to the provisions of Article 8 of the

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[37] *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd,* above, 627.
[38] *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd,* above, 627.
[39] *BP Oil (NZ) Limited v Rhumvale Resources Limited* [1997] 8 TCLR 116 (CA).
[40] *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (CA).
[41] *Yoshimoto v Canterbury Golf International Ltd,* above, 535.
[42] *Yoshimoto v Canterbury Golf International Ltd,* above, 546.

CISG.[43] He repeated his view expressed in *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* that the approach of New Zealand courts to the interpretation of statutes should be consistent with the best international practice, but also very much doubted that they would be allowed to do so by the Privy Council.[44] His Honour pointed out that England had not yet adopted the CISG and had shown little readiness to allow New Zealand courts any latitude in the interpretation of contracts.[45]

(e) *Bobux Marketing Ltd v Raynor Marketing Ltd*[46]

In *Bobux Marketing Ltd v Raynor Marketing Ltd* it was again Thomas J who, very briefly, referred to the CISG. The case involved the interpretation of a distribution agreement, in particular of the termination clause, which stated, inter alia, that the contract could be terminated in the event of its breach. In a dissenting judgment, his Honour concluded that the parties' obligations under the contract were subject to an obligation to act in good faith and that in the event of a breach of this obligation, each party had the right to terminate the contract.[47] To reason the notion of the general duty of good faith in the performance of contractual obligations, he, inter alia, referred to Article 7(1) of the CISG as an example for a general obligation of good faith in international trade law.[48]

(f) *Thompson v Cameron*[49]

The case *Thompson v Cameron* showed again the possible influence of the CISG on New Zealand domestic law. It, inter alia, dealt with the question whether a New Zealand court could consider pre-contractual negotiations and subsequent conduct of the parties for interpretation of an ambiguous contract. Referring to *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* Chambers J stated that the Court of Appeal had not expressed a firm view on the admissibility of evidence by subsequent conduct in

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[43] *Yoshimoto v Canterbury Golf International Ltd,* above, 547.
[44] *Yoshimoto v Canterbury Golf International Ltd,* above, 547.
[45] *Yoshimoto v Canterbury Golf International Ltd,* above, 547-548.
[46] *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA) Thomas J dissenting.
[47] *Bobux Marketing Ltd v Raynor Marketing Ltd*, above, 511, 517.
[48] *Bobux Marketing Ltd v Raynor Marketing Ltd*, above, 515.
[49] *Thompson v Cameron* (27 March 2002) High Court Auckland, AP 117-SW99, B 1257-IM01, Chambers J.

that case.[50] However, he argued that the Court of Appeal had shown a tentative view in favour of this approach. Consequently, Chambers J allowed one of the parties to give evidence on pre-contractual negotiations as well as on subsequent conduct. In the end, however, his Honour did not need to rely on such evidence to resolve the dispute.[51]

(g) *KA (Newmarket) Ltd & Ors v Hart & Anor*[52]

KA (Newmarket) Ltd & Ors v Hart & Anor was the first case where the CISG was actually being held applicable. It involved several claims arising from franchise agreements for the sale and distribution of interior decoration of the "KA" brand. One of these agreements was concluded between the Australian plaintiffs and a New Zealand resident. Health L held that one of the plaintiffs' claims was wrongly based on the breach of a term implied into the above-mentioned agreement by the New Zealand Sale of Goods Act 1908. However, as his Honour pointed out, the Sale of Goods Act only applies to domestic New Zealand transactions. In contrast, for contracts for the sale of goods between Australia and New Zealand the CISG is the applicable law. [53]

(h) Case law from other countries

The fact that New Zealand traders and lawyers cannot rely on New Zealand case law dealing with the CISG would be acceptable if there were case law from other common law jurisdiction, in particular from Australia and the United Kingdom, they could refer to. However, this is not the case.

Australia, on the one hand, already ratified the CISG in 1989. Just a few years ago, in 1999, one of the most famous Australian scholars in the area of the CISG, Bruno Zeller, noted that there is still little scholarly writing and no case law of significance regarding the application of the CISG.[54] It seems, though, as if there has been a slight change during the last four years. Five of the eight Australian cases reported on the Pace

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[50] *Thompson v Cameron*, above, para 20.
[51] *Thompson v Cameron*, above, para 21.
[52] *KA (Newmarket) Ltd & Ors v Hart & Anor* (10 May 2002) High Court Auckland, CP 467-SD01, Heath J.
[53] *KA (Newmarket) Ltd & Ors v Hart & Anor*, above, para 68.

website date from the year 1999 and later. However, Bruno Zeller still notes "a lack of basic understanding of the CISG"[55] expressed in these judgments.

The United Kingdom, on the other hand, has not yet ratified the CISG. According to scholars and textbooks, the refusal of the United Kingdom to adopt the CISG mostly results from the belief in the superiority of the English Sale of Goods Act and the fear that the CISG will lead to a diminished role for English law within the international trade arena.[56]

B Summary

The problems regarding the non-application of the CISG could be summarised as follows: Many traders and lawyers are simply unaware of the CISG. The ones, who are aware of the CISG, seem nevertheless to exclude or advise exclusion of the CISG because of two reasons. First, due to the lack of case law, the outcome of litigation involving the CISG is uncertain and unpredictable. Second, traders and lawyers blame the CISG for being inconsistent with basic common law concepts and for containing unfavourable provisions compared to New Zealand domestic law.

The existing case law, however, supports the presumption that at least New Zealand judges are aware of the CISG and would even favour the application of the CISG to a larger extent. Although not dealing with the CISG substantially, case law tends to indicate that New Zealand traders could even benefit from a greater application of the CISG. The following parts shall prove this by comparing main solutions of New Zealand sales law with the ones of the CISG.

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[54] Bruno Zeller "Is the Sale of Goods (Vienna Convention) Act the perfect tool to manage cross border legal risks faced by Australian Firms?" (1999) http://www.murdoch.edu.au/elaw/issues/v6n3/zeller63nf.html para 3 (last accessed 6 November 2003).

[55] Bruno Zeller's comments on Australian case law are available at http://www.business.vu.edu.au/cisg/ (last accessed 6 November 2003).

[56] Robert G Lee "The UN Convention on Contracts for the International Sale of Goods: OK for the UK?" (1993) JBL 131, 132; Barry Nicholas "The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?", http://www.business.vu.edu.au/cisg/ (last accessed 6 November 2003); Roy Goode *Commercial Law* (3ed, Penguin Books, London, 1995) 926.

IV WHEN IS THE CISG RELEVANT FOR NEW ZEALANDERS?

The CISG does not apply to every sales contract that crosses national borders. Before starting with a comparison of the substantial solutions, the scope of application of the CISG needs to be determined in order to show to which extent the CISG replaces New Zealand national law, and hence is relevant for New Zealand traders.

A Spatial Prerequisites of Application

The spatial application of the CISG is described in Article 1(1). It states:

> 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.

Thus, as far as New Zealand traders are concerned, the CISG applies in respect of all transactions between them and their trading partners in Australia, China, Germany and the United States (Article 1 (1a)). Moreover, it is even conceivable that a contract between two New Zealand businesses would be governed by the CISG. This would be the case where a New Zealand company or citizen conducted their business from another contracting state.

Article 1(1)(b) extends the application of the CISG to contracts where either one or both parties do not have their place of business in a contracting state. This provision has two effects: First, if the parties to a contract have expressly selected a system of law to govern their contract (such a "choice of law clause" is commonly found in international sales contracts), that choice will generally be given effect. In New Zealand, for example, a court will only deny the effectiveness of such a clause, if it is included in the contract in bad faith, or for reasons contrary to public policy (for example to avoid the application of a mandatory New Zealand statutory provision).[57] Thus, if the parties to a

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[57] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290 (PC); David Goddard and Helen McQueen *Private International Law in New Zealand* (New Zealand Law Society, Wellington, 2001) 131-132.

contract chose the law of a contracting state to govern their contract, the CISG will apply, as it is part if the domestic law of each contracting state. In this case neither of the parties needs to have a place of business in a contracting state.

Second, if the contract does not include a choice of law clause, a court will generally conclude that the proper law of a contract is the system with which the transaction has its closest and most real connection.[58] In this case, the court will consult the circumstances surrounding the contract.[59] Relevant factors comprise, for example, the language in which the contract is drafted or the reference to certain statutes of one country. Thus, where a contract has its closest relationship with New Zealand law, it would be governed by the CISG, even if one of the parties has his or her place of business in a non-contracting state, for example in Japan or in the United Kingdom.

B Other Prerequisites and Restrictions of Application

The CISG does not apply to contracts for the sale of goods intended for the personal use of the seller.[60] The decisive criterion in this respect is the intended use in a particular case.[61] Thus, the CISG may apply to a sales contract between two private persons if, for example, the respective goods are intended for resale.[62]

Moreover, the CISG only applies to "contracts of sale of goods".[63] Rather than giving a definition of goods, Article 2 contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sale by auction, on execution or otherwise by law) or the nature of the goods (for example shares, ships and electricity).

Several provisions make clear that the subject matter of the CISG is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. For example, the CISG is not concerned with the validity of the contract

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[58] Goddard and McQueen, above, 132.
[59] Goddard and McQueen, above, 132.
[60] See Article 2 (a) CISG.
[61] Frank Dietrich "Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG" (1996) 8 Pace International Law Review 303, 306.
[62] Dietrich, above, 307.
[63] See Article 1 (1) CISG.

and the effect, which the contract may have on the property in the goods sold.[64] Questions concerning these matters have to be answered according to the law applicable by virtue of the rules of private international law.[65]

V COMPARATIVE ANALYSIS

The foregoing chapter has illustrated the cases in which CISG is applicable in New Zealand. If such a case occurs, this gives rise to two questions: In which way do the provisions of the CISG depart from the respective position under New Zealand law? Does the applicability of the CISG result in disadvantages for New Zealand traders?

The following chapter will reveal that the differences between the CISG and New Zealand law are not as drastic as it may seem. Moreover, the CISG even includes provisions from which New Zealand traders could benefit. To demonstrate this, it will compare some exemplary features of the CISG in the area of contract formation and breach of contract with the respective position under New Zealand law.

A Formation of the Contract

The rules regarding formation of the contract between the parties, dealing with offer and acceptance, are set out in Part II of the CISG.

Article 14 CISG requires the offer to be sufficiently definite and to indicate the intention of the offeror to be bound in the case of acceptance. According to Article 18 (1) CISG, a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Moreover, Article 18 (1) provides that silence or inactivity does not in itself amount to acceptance.

These rules parallel the common law concept. First, the formation of a contract does not require an express agreement between the parties. It is not necessary to identify particular acts constituting offer and acceptance. It rather is sufficient that the parties

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[64] See Article 4 (a) and (b) CISG.
[65] Julius von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht* (Sellier – de Gruyter, Berlin, 1994) Article 4, para 19.

have conducted themselves on the basis that a contract exists between them.[66] Second, like in common law, a party generally cannot deem another to be party to a contract, if the latter does not respond to the first party's offer.[67]

Part II of the CISG yet also introduces some departures from the common law regarding offer and acceptance that are illustrated in the following.

1 Consideration

The CISG, unlike the common law, does not require consideration for a contract to be enforceable. The approach of the CISG towards consideration is reflected in Article 29 (1), providing that "[a] contract may be modified by the mere agreement of the parties". According to the Secretariat Commentary, the closest counterpart to an Official Commentary, this provision was intended to eliminate the consideration requirement, "an important difference between the civil law and the common law in respect of the modification of existing contracts".[68] However, it is submitted that the rules on consideration remain in force despite the applicability of the CISG:[69] According to Article 4 (a), the CISG is not concerned with the validity of a contract. Hence, as consideration is a validity issue, it is subject to domestic law and not the CISG.

This approach, however, seems to contradict the intention of the drafters of the CISG. As Honnold has stated: "…[O]n each occasion when [the] question [of consideration] came to the fore (Articles 16, 29) the Convention rejected "consideration" as a barrier to enforcing the agreement."[70] Honnold regards this rejection as "one of the gen-

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[66] Staudinger, above, Article 14 , para 11, Article 18, para 10.
[67] An exception from this rule can be made, for example, where despite the silence of the offeree assent may be interfered from previous conduct.
[68] Secretariat Commentary on Article 27 of the 1978 draft (draft counterpart of Article 29) para 2, http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html (last accessed 6 November 2003).
[69] *Geneva Pharmaceuticals Technology Corp. v Barr Laboratories, Inc., et al.* (2002) 201 F Supp 2d 236 (SD NY). C C Nicoll "The United Nations Convention on Contracts for the International Sale of Goods: The Vienna Sales Convention 1980" (1993) NZLJ 305, 307 also takes this approach into account.
[70] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999) paras 204.2-4.

eral principles on which the Convention is based and [that] therefore should be given effect under Article 7 (2)". Most scholars and textbooks agree with that view.[71]

In fact, as to the formation of the contract, the absence of the consideration requirement is not likely to give rise to problems, because in the majority of cases it is easy to find consideration in a contract of sale. As to the modification of a contract, a New Zealand buyer should be aware that, for example, he or she may rely on a post-contractual promise of a German seller to reduce the contractually agreed price for the goods, even if there is no consideration for such promise. On the other hand, this is also true in reverse. In general, this constitutes a departure from the existing New Zealand position. However, it should be noted that in some cases the common law doctrine of estoppel provides for holding a person to his or her promises. This doctrine was traditionally confined in many ways and, in particular, operated only to relieve one party from his or her contractual obligations: it was not a cause of action.[72] However, the doctrine of estoppel has been developing rapidly in recent years. In New Zealand, as well as in other common law jurisdictions, courts have already overridden many of the traditional restrictions.[73] In particular, estoppel was even used to create a cause of action.[74]

Thus, even New Zealand traders cannot always count on not being held to their promises if they are given without consideration. Especially where a contract is already in place, the doctrine of frustration as well prevents a party's mere "technical" defence that it has given a promise without consideration. Therefore, it seems to be adequate to say that although the CISG abolishes the doctrine of consideration, this will not result in many practical problems for New Zealand traders and lawyers.

2 Irrevocability of offers

Article 16 (2) again is a departure from the common law requirement of consideration. Under common law, the offeror's promise that the offeree will have a specific pe-

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[71] Gabriel Moens, Peter Gilles *International Trade and Business: Law, Policy and Ethics* (Cavendish Publishing, London, Sydney, 1998), 17; Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999), 8.
[72] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 134.
[73] See discussion in Burrows, Finn, Todd, above, chapter 4.7.3 and 4.7.5.
[74] *McDonalds v Attorney General* (20 June 1991) High Court Invercargill CP 13/86, 34 Holland J.

riod for acceptance, is not binding unless there was consideration for keeping the offer open.[75]

Though Article 16 (1) CISG reflects this common law principle by declaring an offer to be generally revocable, Article 16 (2) restricts the offeror's power to revoke on two alternative grounds: first, if the offer indicates that it is irrevocable, and, second, if it was reasonable for the offeree to rely on the offer as being irrevocable.

It has to be noted, however, that this rule is not accepted in all common law jurisdictions. Under the United States Uniform Commercial Code (UCC), for example, an offer to sell goods may, in certain circumstances, be irrevocable. According to Section 2-205 UCC, an offer by a merchant in writing by which the merchant promises that the offer will be held open, is not revocable. Moreover, there are official recommendations in other common law jurisdictions to revise the rules on the revocability of offers.[76]

For New Zealand sellers, Article 16 (2) CISG provides a clear advantage: They can rely on any offer stating that it is open for acceptance until a certain day. During that period, they can calculate with such an offer and are even able to invite other offers without having to fear that the offer will be revoked. In contrast, New Zealand buyers have to be aware that a sentence like "If I do not hear from you within 10 days, my offer lapses" added to an offer made by telephone, may bind them to this offer for ten days. Thus, New Zealand traders need to be careful with formulating their offers, especially if the other party comes from a civil law country. However, it should be noted that this care is also needed in cases where the CISG does not apply. As long as the parties have not made a choice of law, they can never be sure of which country's law applies in their case. In international trade, it therefore seems to be always advisable for New Zealand traders to make clear that they do not intend to be bound to their offers. This will be sufficient to avoid the consequences of Article 16 (2).

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[75] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999), para 140.
[76] Honnold, above, para 142.

3 *Postal acceptance*

Another difference between the CISG and New Zealand domestic law is the shift away from the common law "postal acceptance rule". This rule states that where post is the accepted means of communication, an acceptance is effective as soon as it is despatched.[77] Under the CISG, however, an acceptance does not become effective until it reaches the offeror (Article 18 (2)). The meaning of "reaches" is defined in Article 24. As practical problems of proof would arise if "reaches" depended on evidence that the acceptance came to the personal attention of the offeror,[78] it is sufficient that the acceptance is delivered "to his place of business or mailing address". Therefore, a facsimile containing an acceptance that arrives in the offeror's business office in Wellington on Saturday evening has already reached the offeror by that time, although the offeror will probably not see it until Monday morning.[79]

It seems, however, as if the CISG's departure from the postal acceptance rule might not play an important role in practice. In times of modern communication technology, international sales contracts are mostly concluded via email or facsimile communication. The author is not aware of any New Zealand case law regarding the issue of when electronic acceptance is effective. However, one may assume from the Australian case *Hamon-Sobelco Australia Pty Ltd v Reese Bros Plastics Limited*[80] that the postal acceptance rule at least does not apply to facsimile communications. In this case, Smart J referred to Australian and English case law and stated that, according to these decisions, "telex and facsimile transmissions were forms of instantaneous or near instantaneous methods of communication and that with these the contract is made when the acceptance is received."[81] As to communication via email, Australian[82] and New Zea-

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[77] Gabriel Moens, Peter Gilles *International Trade and Business: Law, Policy and Ethics* (Cavendish Publishing, London, Sydney, 1998), 10.
[78] Honnold, above, para 179.
[79] Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999), 10; Julius von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (CISG)* (13ed, Sellier – de Gruyter, Berlin 1994), Art. 24, para 16.
[80] *Hamon-Sobelco Australia Pty Ltd v Reese Bros Plastics Limited* (1988) 5 Butterworths Property Reports 11-106 (SC NSW) Smart J.
[81] *Hamon-Sobelco Australia Pty Ltd v Reese Bros Plastics Limited,* above, 11-112.
[82] Kathryn O'Shea, Kylie Skeahan "Acceptance of Offers by E-Mail – How Far Should the Postal Acceptance Rule Extend?" (1997) 13 Queensland University of Technology Law Journal 247, 256-262.

land[83] scholars have put forward convincing arguments against an application of the postal acceptance rule to that form of communication. It therefore seems to be likely that New Zealand courts will not apply the postal acceptance rule to computer communications, so that – like under the CISG – the contract will be formed the moment the message of acceptance reaches the offeror's computer.

4 Counter offer

Article 19 (1) CISG recognises the common law principle that an acceptance, which contains additions or modifications to the offer, is a counter offer.[84] Article 19 (2), however, departs from this principle by providing that if such additions or modifications do not materially alter the terms of the offer, the acceptance is still valid unless the offeror promptly objects. In Article 19 (3), the CISG specifies that material changes are, inter alia, variations of price, payment, quality and quantity of the goods.

Indeed, Article 19 (3) departs from the generally accepted rule that a contract only includes obligations that both parties have agreed upon. However, it provides a solution to a very common problem of commercial law: Today, seller and buyer very often just exchange pre-printed order and acknowledgment forms without paying attention to discrepancies between these forms. As a result, in many cases a reply to an offer purports to be an acceptance, but states one or more provisions that add to or are inconsistent with provisions in the offer. If, after the delivery of the goods, problems arise, the exact terms of the contract can be unclear.

In the case of the exchange of standard terms and conditions, this problem is referred to as "battle of the forms". Countries from civil as well as from common law jurisdictions have tried to find a satisfactory way to deal with this issue. English courts have adopted the "last shot" approach that, in result, is consistent with Article 19 (2) CISG[85]: If a purported acceptance contains terms that differ from the ones in the offer, it

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[83] Kate Tokeley "The postal acceptance rule and computer communications" (1997) Law Talk No. 485, 13.

[84] See C C Nicoll "The United Nations Convention on Contracts for the International Sale of Goods: The Vienna Sales Convention 1980" (1993) NZLJ 305, 308.

[85] *British Road Services v Arthur V Crutchley Ltd* [1968] 1 All ER 811 (CA) Lord Pearson; *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507, 530 ((CA) Robert Goff L.J.

constitutes a counter-offer. This offer is impliedly accepted, if the parties start to perform the contract.

The position in New Zealand seems to be still uncertain.[86] However, in the light of the decisions in other countries it is more than likely that New Zealand courts, when confronted with the problem, will try to find a sensible solution as well. It might even be assumed that New Zealand courts might be inclined to use the approach of Article 19 (2) CISG in domestic cases as well.

5 Summary

Regarding the formation of a contract, the foregoing comparison has illustrated that, in the area of contract formation, the CISG contains some clear departures from the New Zealand position. However, a closer look has revealed that these differences are not likely to cause problems for New Zealand traders and lawyers. In some areas (postal acceptance, counter-offer), the New Zealand position towards an issue is unclear. In these areas, the solutions of the CISG might influence New Zealand courts when having to deal with the issue. Even in cases where different results emerge (irrevocability of offers), New Zealand traders can easily avoid them by excluding the respective provision of the CISG.

B Remedies for Breach of Contract

The following paragraph will deal with the most crucial area of contract law – the remedies of the buyer and the seller in the event of a breach of contract. As controversies are most likely to occur if one party fails to fulfil its contractual obligations, it is of particular interest for New Zealand traders to know if the remedies available under the CISG are less favourable than the ones under New Zealand law. As the CISG proceeds on the basis of the preservation of the contract, the remedies available to either side indeed seem to be very different from those found in New Zealand, both under common

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[86] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 58.

law and legislation.[87] However, the following comparison will reveal that in most areas the CISG will not lead to different results.

The remedies available under the CISG are set out in its Part III. In summary, a buyer may claim
- specific performance, repair of goods or delivery of substitute goods, Article 46;
- avoidance of the contract, Article 49;
- reduction of the price, Article 50; and
- damages, Articles 45 (1b), 74 – 77.

It has to be noted that the exercise of the buyer's rights are subject to Article 39. This provision requires the buyer to notify the seller of the lack of conformity of the goods within a reasonable time after "he has discovered it or ought to have discovered it". Otherwise, the buyer loses all rights to rely on such lack of conformity.

On the other hand, a seller may claim
- specific performance, Article 63;
- avoidance of the contract, Article 64; and
- damages, Articles 61 (1b), 74 – 77.

Moreover, Article 48 grants the seller the right to cure any breach of contract.

The pivotal element of Part III of the CISG is the concept of fundamental breach. This concept should not be confused with the English law concept of fundamental breach – the effect of a contract provision restricting the buyer's right when goods are defective.[88]

In contrast, under the CISG, certain remedies for failure in performance are given only where the failure constitutes a fundamental breach of the contract. Article 25 defines a breach to be fundamental

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[87] See Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999), 21.

> if it results in such detriment to the other party as substantially 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 fundamental breach requirement plays its most important role in Articles 49 and 64 CISG, which provide for the grounds for buyer and seller to avoid the contract and will be discussed more detailed below.

1 Specific performance

The aim of the CISG to preserve the contract is particularly reflected in Article 46. Article 46 (1) lays down the general rule that the buyer may require performance unless he or she has resorted to a remedy, which is inconsistent with this requirement.[89]

Where the seller has delivered the goods, but they do not conform with the contract the buyer may, after giving notice under Article 39, either require delivery of substitute goods (Article 46 (2)) or request the seller to repair the goods (Article 46 (3)).

Both remedies, however, are subject to additional requirements. The buyer may request delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract. On the other hand, repair of the goods may only be required when this remedy would not be "unreasonable having regard to all circumstances".

Although these remedies are not present in the New Zealand Sale of Goods Act 1908, or at least not to the same extent, they are not unknown to New Zealand lawyers. Though it is true that New Zealand courts will not ordinarily grant specific performance, Section 53 of the Sale of Goods Act allows a court, if it thinks fit, to grant specific performance where a breach of contract to deliver specific or ascertained goods is claimed. In particular, specific performance will be granted if the award of damages is not ade-

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[88] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999), para 181.1.

[89] Inconsistent with the right to performance are the rights to claim damages, to reduce the price and to avoid the contract: Julius von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (*Sellier – de Gruyter, Berlin, 1994), Article 46, para 19.

quate to compensate the buyer for his loss. Moreover, the Consumer Guarantees Act 1993[90] contains remedies that are very similar to those provided in Article 46 (2), (3) CISG.

Furthermore, Article 28 CISG mitigates the general rules of the CISG on requiring performance. It states that "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law". Therefore, a New Zealand court cannot be forced to enforce one party's right to require performance under the CISG, but rather has to grant specific performance only in cases where it would do so under Section 53 of the Sale of Goods Act.

2 Avoidance of the contract

Article 49 (1) CISG provides for two grounds on which the buyer may avoid the contract:

(a) if the failure by the seller to perform any of its obligations amounts to a fundamental breach of contract; or

(b) in the case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with Article 47 or declares that he will not deliver in the period so fixed.

The seller's obligations are laid down in Articles 35, 41 and 42 CISG. According to Article 35 (1), the seller must deliver goods, which are of the quality, quantity and description required by the contract. If the contract does not provide for such requirements, Article 35 (2) sets up the standards which the goods have to conform with. These standards correspond in essence to the conditions regarding description and quality that are implied into a contract by Sections 15 and 16 (a), (b) of the Sale of Goods Act.

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[90] See Section 18 Consumer Guarantees Act.

(a) Avoidance because of fundamental breach

The CISG avoids the distinction of the Sale of Goods Act between conditions and warranties[91]. Instead, the buyer may avoid the contract in the case of non-performance of any of the seller's obligations, as long as the seller's breach is fundamental.

As already seen above, a breach of contract by one party A is fundamental, if it results in such detriment to the other party B as to substantially deprive B of what B is entitled to expect under the contract.[92] In this way, the CISG excludes trivial grounds for avoidance.

The determination whether the injury is substantial "must be made in the light of the circumstances of each case, for example the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party"[93].

There is one important difference to the New Zealand position regarding avoidance of the contract: Under the CISG, avoidance is not barred by the buyer's acceptance of the goods, which is the existing position under the Sale of Goods Act.[94] Other than that, the position under the CISG is not significantly different from the New Zealand one. In particular, the distinction between conditions and warranties is not as relevant as it may seem. This is because the question of the status of a term normally becomes important after the term was broken – and then it is very tempting to determine its status in the light of the effects its breach has caused.[95] This was acknowledged by the English Court of Appeal in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd.*[96] The Court held that very often the question of whether the party can terminate the contract for breach of a term will depend not on the status of the term itself, but rather on

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[91] By Section 13 (2) a condition is defined as a stipulation "the breach of which may give rise to a right to treat the contract as repudiated", and a warranty as a stipulation "the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".
[92] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999) para 304.
[93] Secretariat Commentary on Article 23 of the 1978 draft (draft counterpart of Article 25) para 3, http://joe.law.pace.edu/cisg/text/secomm/secomm-25.html (last accessed 6 November 2003).
[94] Section 13 (3).
[95] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 196.
[96] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 64 (CA) Salmon J.

the seriousness of the breach.[97] Therefore, if the breach of a term, itself of apparently minor significance, caused severe loss or damage, the injured party may be able to treat the contract as repudiated.

According to Creig and Davis, particularly three matters can be isolated, which may justify the termination of a contract:[98]

- if the injured party has been substantially deprived of the performance he or she could reasonably have expected;
- if damages, or other compensation, do not adequately protect the expectations of the injured party for the breach that has occurred;
- if the expectations of the party in default are not prejudiced by the termination of further performance.

This test, however, does not apply, where a statutory implied condition is breached, as such a breach, however small, is enough to allow the buyer to repudiate the contract.[99] According to Section 16 (a) of the Sale of Goods Act, it is, for example, an implied condition that the goods shall be reasonably fit for the particular purpose for which they are required, if the buyer, expressly or by implication, notifies the seller of such purpose. Section 15, moreover, states that in the case of a sale by description there is an implied condition that the goods shall correspond with the description. However, as Creig and Davis note, the statutory classification of an obligation as a condition does not necessarily prevent courts from taking the effect of a breach into account: The notions "reasonably fit for the particular purpose" and "correspond with the description" are sufficiently wide and, therefore, allow courts to give due weight to the degree of failure of the goods to comply with a particular purpose or a description.[100]

Moreover, it is important to note that the common law position towards avoidance of the contract as described above, has been adopted by the legislature in New Zealand in the Contractual Remedies Act 1979.[101] Admittedly, New Zealand courts have held that contracts for the sale of goods are still exclusively governed by the Sale of Goods

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[97] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* , above, 64, 70.
[98] D. W. Greig, J. L. R. Davis *The Law of Contract* (Law Book Company, Sydney, 1987), 1214.
[99] Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999), 23; Burrows, Finn, Todd, above, 197, note 195.
[100] Creig, Davis, above, 1238.

Act[102]. This has led to a disharmony between the general law of contract and the law on one of the most common and important categories of contract. The New Zealand Law Commission has noted this disharmony, and has recommended legislation bringing the Sale of Goods Act into line with the Contractual Remedies Act.[103] Nevertheless, as this act provides for a test comparable to the one of Article 25 CISG, this provision is not likely to cause problems for New Zealand lawyers.

(b) Avoidance because of non-delivery

The second ground for avoidance, the non-delivery of the goods within an additional period of time fixed by the buyer, is linked to Article 47 CISG that empowers the buyer to fix an additional final period "of reasonable length" for the seller to perform his or her obligation to deliver the goods. After expiry of the additional period, the buyer may avoid the contract without having to prove that the delay beyond the additional period constitutes a fundamental breach.[104] However, if the circumstances of a contract indicate that any delay in delivery is a fundamental breach, the buyer may avoid the contract under Article 49 (1a), without giving additional time for delivery.[105]

The New Zealand position regarding the effect of late performance is less clear. The problem has traditionally been put by asking whether time is of the essence of the contract[106]: If time was essential, late performance might entitle the innocent party to bring the contract to an end. According to Article 13 (2) of the Sale of Goods Act, the question whether a stipulation as to time of delivery is of the essence of the contract or not depends on the terms of the contract. In summary, it may therefore be said that time is essential to a contract if the parties expressly stipulate that this shall be so, or if the circumstances surrounding the contract imperatively indicate that the agreed date should be precisely complied with.[107]

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[101] Section 7 (4).
[102] *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519 (HC) Hardie Boys J; *Broadlands Finance v Inwood* [1987] 1 NZBLC 102784, 102789 (HC) Heron J; *Crump v Wala* [1993] 6 TCLR 40 (HC) Hammond J.
[103] New Zealand Law Commission *Contract Statutes Review* (NZLC R25, Wellington 1993), 8-12.
[104] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999) para 305.
[105] Honnold, above, para 305.
[106] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 678.
[107] Burrows, Finn, Todd, above, 678.

This position seems to reflect the position of the CISG that a contract may be avoided if the late delivery constitutes a fundamental breach. But even the idea behind the "additional time rule" of Article 47 CISG is not unknown to common law lawyers: In cases where time is not initially of the essence of the contract, time may later be made of the essence if one party delays performance and the other serves a notice fixing a new date for performance making clear that this new date is of the essence.[108] The time so fixed must be reasonable – like under Article 47 CISG – having regard to all circumstances of the case.[109]

3 *Reduction of price*

If the goods delivered do not conform with the contract, the buyer may, without losing the right to claim damages, reduce the price, independent of the circumstance if the non-conformity amounts to a fundamental breach of the contract (Article 50 CISG).[110] The reduction is to be "in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time".

The New Zealand Sale of Goods Act does not contain a provision equivalent to Article 50 CISG. However, the New Zealand position regarding the delivery of non-conforming goods, as laid down in Sections 32 and 54 of the Sale of Goods Act, can lead to similar results.

In the case of short delivery, Section 32 (1) only allows the buyer to reject the goods. However, if the buyer accepts the goods so delivered, he or she must pay for them at the contract rate. In this way the method of calculating the reduced price is different from the one provided for in Article 50 CISG, which refers to the actual value of the goods. Still, if the parties have agreed to a contract price that corresponds with the

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[108] Burrows, Finn, Todd, above, 679; Halsbury *Laws of England* (4ed, Butterworth, London, 1998) vol. 9(1), para 935, *Charles Rickards Ltd v Oppenheim* [1950] 1 All ER 420 (CA) Denning LJ. Admittedly, the New Zealand case law on that matter only involves contracts for the sale of land or property, see for example, *O'Sullivan v Moodie* [1977] 1 NZLR 643 (SC) Mahon J.

[109] Halsbury, above, para 935.

[110] Julius von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (CISG)* (13ed, Sellier – de Gruyter, Berlin 1994), Article 50, paras 13, 30.

actual value of the goods, both provisions seem to result in an identical reduction of the purchase price.[111]

In the case of defects in quality, the Sale of Goods Act does not provide the buyer with a general right to reduce the price[112] unless set up as a defence to the seller's action for the price.[113] Thus, unlike under the CISG, the buyer cannot withhold a part of the purchase price on his own. The buyer, on his part, can only claim damages for breach of warranty.[114] Regarding the calculation of such damages, Section 54 (3) of the Sale of Goods Act states:

> In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

This provision reflects the standard method of calculating damages (as laid down in Article 74 CISG as well), rather than the proportional method of Article 50 CISG. Thus, compared to the New Zealand Sale of Goods Act, the CISG provides the buyer with an additional remedy from which he in particular can benefit if the market price for the defective goods has fallen by the time of delivery. The following case may serve as an example: The market and contract price for a certain quantity of goods is, at the time of conclusion, $12,000, the market price of the delivered defective goods is only $4,000. If the market price has fallen to $8,000 by the time of delivery, Article 50 CISG would entitle the buyer to reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery ($4,000) bears to the value that conforming goods would have had at that time ($8,000). This proportion – one half – would entitle the buyer to reduce the price ($ 12,000) by 50 % to $ 6,000. In contrast, a claim for damages, both under Section 54 (3) of the Sale of Goods Act and Article 74 CISG, would only amount to $4,000 – the difference between the "real" value of the goods at the time of delivery and their market value at that time.

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[111] Anette Gärtner "Britain and the CISG: The Case for Ratification – A Comparative Analysis with Special Reference to German Law" http://www.cisg.law.pace.edu/cisg/biblio/gartner.html, para II A 3b (last accessed 6 November 2003) comes to the same result for English law.
[112] Section 54 (1a).
[113] See Peter A. Piliounis "Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?" (2000) 12 Pace International Law Review 1, 24 for the identical English provision.
[114] Section 54 (1b).

Another advantage of the right to reduce the price is that this right is available even if the seller's liability to pay damages is excluded under Article 79 CISG, because the lack of conformity of the goods "was due to an impediment beyond his control".

In conclusion: Article 50 CISG provides the buyer with an additional remedy that is unknown to the common law lawyer. Still, if it is possible to cure the non-conformity of the delivered goods by reducing the contractual price – an option the parties are free to agree upon even under common law – this may be the easiest way to solve the problem for both seller and buyer.

4 Right to cure

In many cases of defective performance the breach can easily be cured, for example by delivering the missing part. The CISG responds to this commercial reality by providing the seller with a right to cure. According to Article 48, the seller has the right to cure any breach to perform his obligations both before and after the agreed date for delivery. However, the right to cure may only be exercised if it does not result in unreasonable delay, inconvenience or uncertainty of reimbursement of the buyer's expenses for the buyer. Moreover, the seller's right to cure is "subject to Article 49" so that in the case of a fundamental breach the seller cannot deprive the buyer of his right to avoid the contract by curing the defect, once the buyer has declared the contract avoided.[115]

The Sale of Goods Act does not contain a provision dealing with the seller's right to cure. However, courts in common law jurisdictions have recognised that if the seller's first tender does not conform with the contract, he is entitled to offer a subsequent tender, provided that it is made within the time allowed for performance.[116] If the second tender is in accordance with the contract, the buyer is bound to accept it.[117] After

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[115] Julius von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch – Wiener UN-Kaufrecht (CISG)* (13ed, Sellier – de Gruyter, Berlin 1994), Article 48, para 17. The details of the relationship between Articles 48 and 49 are highly discussed. However, a review of this discussion is beyond the scope of this paper.

[116] Antonia Apps "The right to cure defective performance" (1994) LMCLQ 525.

[117] Apps, above, 525; Ahmad H. Al-Rushoud "The Right to Cure Defects in Goods and Documents" (1999) LMCLQ 456, 460.

the expiry of the time for performance, though, the seller is generally not allowed to cure the non-conformity any longer.[118]

Admittedly, the solution of the CISG regarding defective performance may lead to uncertainties. In particular, it can be uncertain when a delay or an inconvenience is unreasonable for the buyer. However, it should be noted that the seller's right to remedy defects even after the delivery date is already familiar in practice, as general conditions of business often contain such a provision.[119] Moreover, in the case of a defective performance, the Consumer Guarantees Act 1993, enacted to respond to commercial practice, refers the consumer first of all to his right to require the supplier to remedy such defective performance.[120] Therefore, New Zealand traders and lawyers should already be familiar with contractual relationships that are subject to the seller's right to cure.

Article 48 CISG in particular provides the seller with an advantage. However, giving the seller the opportunity to cure defective performance may even result in benefits for the buyer, as this is the fastest way for him to obtain what he is entitled to under the contract. Risks resulting from uncertainty can be minimised by expressly stipulating the circumstances that allow the seller to cure defects.

D Exemption from Liability

Article 79 CISG deals with the problem of determining which party bears the burden of an unexpected barrier to performance. It provides an exclusion of liability for a defaulting party where the failure was due to "an impediment beyond his control" that "he could not reasonably be expected to have taken … into account". Such impediments could be, inter alia, war embargo and other governmental prohibitions, breakdowns of transport facilities, strikes or the shutdown of a supplier.[121]

The scope of Article 79 is unclear to some extent: Does the exemption apply to *any* failure of a party to perform his obligations, including the delivery of defective

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[118] Apps, above, 538; Al-Rushoud, above, 460.
[119] Peter Schlechtriem *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2ed, Clarendon Press, Oxford 1998) Article 48, footnote 1 to para 1.
[120] See Sections 18, 19.

goods, or does it only apply to delay and non-delivery? The language of Article 79 that provides an exclusion of liability for a party's failure to perform "any of his obligations" purports the view that it is not limited to delay and non-delivery. This notion is furthermore strengthened by the Secretariat Commentary to Article 79. It states the delivery of defective goods as a result of non-conforming packing material that the seller was obliged to use as one possible example for an exemption of liability.[122]

It is important to note that Article 79 only excludes the liability of the excused party to pay damages. It does not prevent the other party from exercising any other right granted by the CISG.[123] In particular, the affected party may still avoid the contract. However, if this party does not do so, the other party is generally still bound to perform his obligations under the contract when, for example, the impediment is removed.

In essence, Article 79 is comparable to the common law doctrine of frustration. According to that doctrine, frustration occurs when, during the course of performance, there is a radical change from the situation that existed at the time when the contract was made, so that further performance of that contract has become incapable.[124] However, a party cannot rely on frustration if it itself is responsible for the frustrating event.[125] The underlying idea of this limitation seems to be comparable to the requirement in Article 79 CISG that the failure to perform has to be beyond the party's control.

However, Article 79 differs from the common law approach in one vital aspect. Under common law, the effect of frustration is to kill the contract and to discharge both parties automatically,[126] whereas under the CISG, performance is just suspended. In this way, the CISG provides the seller with the right to choose whether it wants to avoid the

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[121] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999) para 423.
[122] Secretariat Commentary on Article 65 of the 1978 draft (draft counterpart of Article 79) para 9, example 65D http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html (last accessed 6 November 2003); note however the opposite view of John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999), para 427.
[123] See Article 79 (3).
[124] D. W. Greig, J. L. R. Davis *The Law of Contract* (Law Book Company, Sydney, 1987), 1297. Note that in New Zealand frustrated contracts may be subject to the Frustrated Contracts Act 1944. However, according to Section 4 (5) of this act, it does not apply to most contracts for the sale of goods.
[125] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 724.
[126] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 163 (HL) Viscount Simon LC.

contract or not. The latter option could be particularly recommendable if the impediment that has prevented performance is likely to be removed later.

One problem with the doctrine of frustration is that it is very difficult to predict what factors will be regarded as frustrating the contract. In particular, the question whether a fundamentally different situation has unexpectedly emerged causes problems.[127] In the face of these difficulties, New Zealand traders usually include a *force majeure* clause into their contracts defining the parties' mutual rights and duties if certain events beyond their control occur. As such clauses will prevail over Article 79 CISG, this provision will be of less importance anyway.

E Parol Evidence Rule

The parol evidence rule states that any parole, oral, or any other extrinsic, evidence cannot be permitted to alter, contradict or explain a written contract's terms.[128] In a court proceeding, parties are therefore confined to the document, which contains their agreement and may not adduce evidence that their intention has been misstated in that document.[129] In contrast to that, Article 8 (3) CISG states:

> In determining the intent of a party or the understanding a reasonable would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Although not addressing directly the parol evidence rule, the language of this provision indicates that it is meant to override domestic rules that would bar a court from considering extrinsic evidence[130] and therefore constitutes a significant departure from New Zealand law.

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[127] Robin Burnett *Law of International Business Transactions* (2ed, Federation Press, Sydney, 1999), 31.
[128] G H Treitel *The Law of Contract* (9ed, Sweet & Maxwell, London, 1995) 176-177.
[129] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 166.
[130] John O Honnold *Uniform Law For International Sales* (3 ed, Kluwer Law International, The Hague, 1999) para 109.

However, it has to be noticed that, in practice, the parol evidence rule is subject to a number of exceptions.[131] For example, oral evidence is permitted if the words of a contract are ambiguous or unclear. Moreover, oral evidence may be allowed to prove a certain custom or trade usage between the parties that does not appear on the face of the document.

Moreover, in New Zealand the parol evidence rule has been heavily criticised. According to David McLauchlan[132], it is contradictory that, on the one hand,

> [e]vidence of the actual intentions of the parties is relevant and therefore admissible when the existence of a contract is in issue, nevertheless when it comes to the interpretation of an admitted contract, evidence of the their actual intentions concerning the meaning of the contract is irrelevant and therefore inadmissible.

Indeed, it can be concluded from the cases *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd, Yoshimoto v Canterbury Golf International Ltd* and *Thompson v Cameron* that New Zealand courts now seem to be willing to permit evidence of the parties' pre-contractual negotiations and their post-contract conduct as an aid to determining their intentions regarding the contract. In this way, the CISG seems to already have influenced New Zealand law.

F Summary

The forgoing comparison has disclosed that several issues of the CISG are unfamiliar for New Zealand traders and lawyers, but only on the surface. Very often, New Zealand law simply uses a different language and a different way to achieve similar results. In areas where the CISG introduces new rules (for example the buyer's right to reduce the price or the seller's right to cure), these rules are often responses to commercial reality and in this way are already familiar to New Zealand traders and lawyers from similar provisions in sales contracts. Moreover, the comparison between Article 8 (3) CISG and the parol evidence rule has shown that the CISG has already influenced New Zealand law. It may be assumed that this will happen in other areas as well.

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[131] Burrows, Finn, Todd, above, 167-169.

G Practical Example

In order to demonstrate that the above findings are not only theoretical, the following paragraph will present a case[133], decided by the Appellate Court Hamburg under the CISG and will scrutinise how this case could have been decided under New Zealand law. While one case, of course, is only illustrative, it backs up the thesis that the results under the CISG and New Zealand law are not likely to differ significantly, so that concerns that the CISG could lead to disadvantages for New Zealand traders are not justified.

The case, decided in 1997, involved a contract for the supply of iron-molybdenum from China. [134] The goods, however, were never delivered to the buyer, as the seller itself did not receive delivery of the goods from its Chinese supplier. After expiry of the additional period of time for delivery, the buyer concluded a substitute transaction with a third party and sued the seller for the difference between the price it had to pay to the third party and the price under the contract.

The Appellate Court held that the buyer was entitled to damages under Article 75 CISG. It found that the contract had been avoided under Article 49 (1b), because the buyer had fixed an additional period of time for delivery (Article 47 (1)) within which the seller had failed to deliver.[135]

Moreover, the Court found that an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of good faith (Article 7 (1)).[136] Such a declaration is dispensable as long as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made. The Court held that a substitute purchase within two weeks after the failure of performance was made in reasonable time.

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[132] David McLauchlan "A Contract Contradiction" (1999) 30 VUWLR 175.
[133] (28 February 1997) Appellate Court (Oberlandesgericht) Hamburg, 1 U 167/95 <http://www.cisg-online.ch/cisg/urteile/261.htm>.
[134] The facts of this case have been simplified for the purposes of the examination.
[135] Appellate Court Hamburg, above, para I 2b.

The Court continued stating that the seller was not exempt from liability, neither under a force majeure clause of the contract, nor under Article 79 (1), as the seller bears the risk of receiving delivery of the goods from its own supplier.[137] Only if goods of an equal or similar quality were no longer available on the market would the seller be exempted from liability.

Finally, the Court found that according to Article 75 CISG the buyer was entitled to damages amounting to the difference between the contract price and the price it had to pay for the substitute transaction with the third party, although the market price had tripled since the conclusion of the original contract.[138]

Examining these findings under the respective New Zealand position first of all leads to the conclusion that the buyer could have brought the contract to an end under New Zealand law as well. By fixing a new date for performance, the buyer made this date the essence of the contract. The seller's non-compliance with this new date therefore entitled the buyer to terminate the contract.

As to the question whether this termination had to be made known to the seller to be effective, it has to be noted that, of course, common law generally requires communication of a termination. However, in some cases the doctrine of waiver was held to be applicable.[139] In particular, it may be possible to assume that a party is waiving the need for communication of cancellation if the conduct of the party in breach makes it perfectly clear that he or she is not prepared to perform the contract under any circumstances.[140] Therefore, it could be assumed that a New Zealand court would come to the same conclusion as the German Appellate Court relying on waiver instead of the principle of good faith.

Moreover, under New Zealand law as well, the seller would probably not have been excused for non-performance on the grounds that it did not received the goods it-

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[136] Appellate Court Hamburg, above, para I 2b.
[137] Appellate Court Hamburg, above, para I 2d.
[138] Appellate Court Hamburg, above, para I 2d.
[139] See, for example, *Innes v Ewing* [1989] 1 NZLR 598, 625-626 (HC) Eichelbaum J, although in this case the seller had sold the subject matter of the contract without notifying the buyer who had repudiated.
[140] J F Burrows, Jeremy Finn, Stephen M D Todd *Law of Contract in New Zealand* (2ed, Butterworth, Wellington, 2002), 654.

self from its Chinese supplier. Although it is impossible to classify all circumstances to which the doctrine of frustration applies, case law shows that the doctrine of frustration does not apply where one party must take the risk of a special event. Therefore, it is recognised that the mere fact that an event renders the contract more difficult or costly to perform will not generally be regarded as sufficient to frustrate the contract.[141] It has, for example, been decided that a contract to build houses was not frustrated just because it took the builder longer to build the houses and cost him much more than estimated.[142] Bearing this in mind, it seems to be likely that a New Zealand court would have argued in the same way as the German Appellate Court, namely that the seller bears the risk of receiving delivery from its supplier. This applies all the more as, in such a case, the seller can provide the buyer with replacement goods.

As to the question of damages, it first of all has to be noted that the Sale of Goods Act does not contain a provision comparable to Article 75 CISG. It rather determines damages by reference to the prevailing market price in all sales whether or not there has been a substitute transaction.[143] In general, however, Article 75 CISG does not lead to different results, as it requires the substitute transaction to be made "in a reasonable manner and within a reasonable time after avoidance". A cover purchase therefore has to be made at the lowest price reasonably possible.[144] In the case presented above, the substitute transaction was made at market price anyway. Under New Zealand law – like under the CISG – the seller bears the risk of an increase of the market price. Therefore, a New Zealand court would have come to the same result as the German Appellate Court – that the buyer is entitled to damages amounting to the difference between the contract price and the price it had to pay for the substitute transaction with the third party.

VI Developments in Australia – Warnings for the Future

The foregoing chapters have revealed that the fears of the CISG are largely unfounded. In general, the CISG does not lead to results that are inconsistent with the re-

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[141] *British Movietonews Ld v London and District Cinemas Ld* [1952] AC 166, 185 (HL).
[142] *Davis Contractors v Fareham Urban District Council* [1956] AC 696, 729 (HL).
[143] Section 52 Sale of Goods Act.
[144] Secretariat Commentary on Article 71 of the 1978 draft (draft counterpart of Article 75), para 4, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html (last accessed 6 November 2003).

spective New Zealand position. However, proving this might not be enough to encourage a greater use of the CISG. The following chapter will therefore have a look at two Australian decisions that should serve as a warning for New Zealand traders and lawyers, as they illustrate the fatal consequences that may result from ignoring the CISG.

In *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*[145] the Federal Court of Australia explicitly criticised the parties' ignorance of the CISG. In this case, the German seller sued the Australian buyer for non-payment under the contract. The seller claimed that it had retained ownership of the goods sold by virtue of a contractual retention of title clause, and sought an order for the goods to be returned to it and damages to be paid.

Von Doussa J found that, as the claim involved a contract for the sale of goods and both parties had their places of business in contracting states, the contract was governed by the CISG.[146] However, the parties had referred to the contract of sale as being "repudiated", although this "common law concept [is] replaced by the provisions of the Convention."[147] Moreover, von Doussa J expressly criticised the parties' pleadings for being wrongly "expressed in the language and concepts of the common law, not in those of the convention."[148]

In a recent decision, it was the Supreme Court of South Australia that, very heavily, criticised the parties' ignorance of the CISG. The case *Perry Engineering v Bernold*[149] involved an Australian plaintiff, who relied on the South Australian Sale of Goods Act in its claim against the Swiss defendant. The plaintiff therefore referred to a clause in the contract between the parties providing that "all matters [...] arising directly or indirectly therefrom shall be governed in all respect by the laws of the state of South Australia". Burley J, however, found that the CISG is part of the law of South Australia and that therefore not the Sale of Goods Act, but the CISG applied to the case. He went on pointing out that "the statement of claim has been drawn up on the assumption that the South Australian Sale of Goods Act applies. This seems to me to be fatal to the

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[145] *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* [1995] 17 ACSR 153 (FCA).
[146] *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*, above, 157-158.
[147] *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*, above, 168.
[148] *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*, above, 156.
[149] *Perry Engineering v Bernold* [2001] SASC 15 http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010201a2.html (last accessed 6 November 2003).

plaintiff's ability to proceed to judgment."[150] Emphasising the "deficiencies in the statement of claim", Burley J finally declined to assess damages as the plaintiff had pleaded.

VII CONCLUSION

In New Zealand, the CISG has been in force for eight years now. Although a lot of transactions between New Zealand traders and their trading partners are governed by the CISG, case law is still limited. This paper has revealed the possible reasons for not using the CISG. However, the analysis of the existing case law in New Zealand and the two Australian decisions presented above seem to indicate that it is New Zealand traders and lawyers who are ignorant of the CISG rather than New Zealand judges. Moreover, it has become clear that this ignorance may result in serious consequences.

These findings should already be sufficient to encourage New Zealand traders and lawyers to gain more knowledge about the CISG. By showing that many of the solutions under the CISG are not very different from the ones under New Zealand law, this paper should provide an additional incentive to do so.

Moreover, the existing case law has shown that the CISG has the ability to influence New Zealand law. It can be expected that this trend will continue. This is particularly true since the New Zealand Parliament has passed the Supreme Court Act, which abolishes appeals to the Privy Council in London and, instead, forms a body of appointed judges to serve as New Zealand's highest judicial authority. In this way, concerns as expressed by Thomas J in *Yoshimoto v Canterbury Golf International Ltd* that the Privy Council would not allow New Zealand courts to interpret statutes in accordance with international practice are now unfounded.

New Zealand traders and lawyers therefore should be prepared to deal with the underlying ideas and principles of the CISG, even in cases where the CISG does not apply.

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[150] *Perry Engineering v Bernold*, above, paras 15-17.

In order to encourage New Zealand to contribute to the harmonisation process in judicial decisions through its own interpretation of the CISG, all possible efforts should be undertaken to break through the vicious circle of non-application: Judges should further show readiness to apply the CISG. Lawyers should familiarise themselves with the CISG and – until there is relevant New Zealand case law – should not hesitate to refer to case law from other countries in court proceedings. Moreover, the future generation of legal practitioners, represented by law students, should also be familiarised with the CISG. Therefore, professors and lecturers should refer to the CISG in their lectures whenever possible in order to alert students to the issue. This paper is intended to stimulate this process.

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