

CISG: Key to a Uniform International Sale of Goods Law?

LLM RESEARCH PAPER

LAWS 541: INTERNATIONAL COMMERCIAL CONTRACTS

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



2020

Contents (References – table of contents)

CONTENTS		2
<i>Abstract</i>		3
<i>I</i>	<i>Introduction</i>	4
<i>II</i>	<i>Background – the CISG</i>	5
<i>A</i>	<i>Introduction and Key Provisions</i>	5
<i>B</i>	<i>Drafting of the CISG</i>	6
<i>1</i>	<i>CISG commentary</i>	6
<i>2</i>	<i>Articles 1 and 2</i>	6
<i>3</i>	<i>Article 4</i>	8
<i>III</i>	<i>Autonomous Interpretation and Application of the CISG</i>	9
<i>A</i>	<i>Article 6 and 7</i>	9
<i>B</i>	<i>Application of the CISG</i>	10
<i>D</i>	<i>Autonomous Interpretation and Legal Pluralism</i>	10
<i>IV</i>	<i>UNIDROIT Principles</i>	11
<i>V</i>	<i>Commodity Sales</i>	13
<i>A</i>	<i>English Law versus the CISG</i>	13
<i>B</i>	<i>Incoterms</i>	14
<i>C</i>	<i>Conflict with English law</i>	14
<i>VI</i>	<i>Conclusion</i>	15
BIBLIOGRAPHY		16

Abstract

This paper attempts to review whether the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) is an urgent necessity for facilitating the unification of international sale of goods law. This paper examines the reasoning behind the drafting choices of key provisions of the CISG as well as the rationale for the gaps in coverage. Additionally, this paper discusses autonomous interpretation of the CISG provisions and the gap-filling and unifying role of UNIDROIT contract principles. This paper also considers the prevalence of English law in commodity sales and speculates if this is due to any deficiencies in the CISG.

Word length

The text of this paper (excluding abstract, table of contents, and bibliography) comprises approximately 5949 words.

Subjects and Topics

The United Nations Convention of Contracts for the International Sale of Goods (CISG)
Uniform Law/Unification
UNIDRIOT Principles
Autonomous Interpretation
Legal Pluralism
Commodity Sales

I Introduction

In 1949, HC Cutteridge stated that unification is of urgent necessity requiring lengthy efforts by countries to remove inconvenience from the international sphere, and it cannot be a mere academic exercise but rather requires careful consideration and winning over of interests concerned before undertaking any action.¹ The drafting of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and ratification by countries required careful consideration and winning over of interests concerned, which has contributed towards the unification of the international sale of goods law. The uniform interpretation and implementation of the CISG requires lengthy efforts by the United Nations Commission on International Trade Law (UNCITRAL) and countries but the CISG in itself is not an urgent necessity for facilitating the unification of international sale of goods law.

Harmonisation and unification of international trade law is the process by which law facilitating international commerce is created and adopted.² Conceptually, harmonisation is the process of altering domestic laws to increase the predictability of international commercial transactions while unification is the adoption by states of common legal standards governing aspects of international commercial transactions.³ When a state ratifies the CISG it is making an undertaking to the other member states that it will treat the CISG's rules as part of its domestic law.⁴ Therefore, technically speaking the adoption of the CISG by states contributes to the unification of international sale of goods law. However, there are deliberate gaps in the CISG, which means it is not a complete statement of international sale of goods law.⁵ The deliberate gaps in the CISG are due to diverging interests and lack of consensus in certain areas of the law. These are unlikely to be easily overcome as these unreconcilable differences are due to different legal systems and traditions.

Hence, the gaps in the CISG means the CISG in itself cannot be the sole driver of the unification of international sale of goods law. It also highlights the limitations of treaties as instruments of unification. However, the gaps in the CISG have to a certain extent been filled by soft law such as the International Institute for the Unification of Private law (UNIDROIT) contract principles, and merchant law such as Incoterms have led to further harmonisation of international sale of goods law. Additionally, the prevalent use of English law in commodity sales further suggests that the key to unification and adoption of certain laws is legal certainty, predictability of outcomes and autonomous interpretation. The CISG has contributed towards a more uniform international sale of goods law. However, unification can also be achieved by other means such as soft law. This is evidenced by the use of soft law to fill the gaps in the

¹ HC Cutteridge, *Comparative Law* (2nd ed, Cambridge) 157.

² United Nations Commission on International Trade Law (UNCITRAL) "Frequently Asked Questions – Mandate and History" <www.uncitral.un.org>.

³ United Nations Commission on International Trade Law (UNCITRAL) "Frequently Asked Questions – Mandate and History" <www.uncitral.un.org>.

⁴ Katrina Winsor "What is the CISG?" [2011] NZLJ 31.

⁵ At 31.

CISG. Additionally, other forms of unification also have the benefit of being a quicker process and are agile enough to adapt to changing technology and commercial practice.

II Background – the CISG

A Introduction and Key Provisions

The CISG currently has 93 member states,⁶ and is heralded as the most successful international treaty in the private law arena.⁷ It approximately governs 80 per cent of worldwide trade since the top trading countries are all member states with the notable exception of the United Kingdom.⁸ The CISG ‘...applies to contracts of sales of goods between parties whose places of business are in different States...’.⁹ That is, if the states are contracting states,¹⁰ or if the rules of private international law lead to the application of the law of a contracting state.¹¹ The CISG covers the formation of the contract, the seller’s and buyer’s obligations and the remedies available to the parties in such transactions.¹² The CISG expressly excludes certain sales including non-commercial transactions,¹³ and does not cover validity of contracts nor the effect the property may have on the goods sold.¹⁴

This CISG often applies by default due to the operation of art 1. Therefore, contracting parties would need to actively opt out of the CISG rather than opt in.¹⁵ Article 6 allows contracting parties to exclude the application of the CISG. Moreover, the opt out provision in art 6 allows express terms of the contracting parties to prevail over the CISG thereby maintaining the principle of freedom of contract.¹⁶ Article 7(1) requires any interpretation of the CISG to take into account its international character while promoting uniformity in its application and also requires the observance of good faith. Additionally, art 7(2) mandates that matters not expressly settled in the CISG must be settled based on general principles, or in the absence of such principles based on the law determined by the rules of private international law. The CSG now applies by default in all member states but the process to achieve such an uptake has been lengthy and required careful drafting and deliberate gaps in coverage.

⁶ United Nations Treaty Collection “10. United Nations Convention on Contracts for the International Sale of Goods” (18 September 2020) <www.treaties.un.org>.

⁷ Ingeborg Schwenzer and Christopher Kee “International Sales Law – The Actual Practice” (2011) 29 Penn State International Law Review 425 at 428.

⁸ At 428.

⁹ United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 1 (opened for signature 11 April 1980, entered into force 1 January 1988), art 1.

¹⁰ Article 1 (1) (a).

¹¹ Article 1 (1) (b).

¹² Winsor, above n 4, at 31.

¹³ United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 2 (opened for signature 11 April 1980, entered into force 1 January 1988), art 2.

¹⁴ Articles 4 (a) and 4 (b).

¹⁵ Winsor, above n 4, at 31.

¹⁶ At 31.

B *Drafting of the CISG*

1 *CISG commentary*

The CISG is regarded as a modern sales law as it is based on picking the best solutions from the world-wide collection of domestic sales law.¹⁷ However, there are deliberate gaps in the CISG and certain drafting choices made due to differing national interests arising from different legal systems and traditions. From a practical point of view, for the CISG to be ratified and adopted by a great number of states it needed to be palatable to a wide range of nations. The CISG does not have an official published commentary.¹⁸ However, the 1978 Secretariat Commentary¹⁹ acts as a quasi-official commentary for the final text of the CISG.²⁰ The lack of official commentary might be due to various reasons. There was no formal debate over the commentary and also fears that the text of the CISG might be ignored in favour of a more easily read unofficial commentary.²¹ Nevertheless, the 1978 Secretariat Commentary is an important source for the policies and drafting choices of specific provisions in the CISG.²²

2 *Articles 1 and 2*

Article 1(1) makes it clear that the CISG only applies when the place of business of the contracting parties are in different states. It does not consider nationality, place of incorporation or place of head office.²³ However, if the place of business is in the same state domestic law would apply.²⁴ This means that the CISG does not displace the need for domestic sales law. This likely made the CISG more appealing to nations as it would not encroach on states' ability to make domestic sales law and policies while promising to provide more legal certainty and reduce transactional costs of international trade. In addition, the effect of art 1 includes default application of the CISG even if not expressly stated by the contracting parties.²⁵ The default application of the CISG to international sales of goods contracts would provide more legal certainty while the term 'place of business' is wide enough to capture most international sales of goods transactions without encroaching on domestic sale transactions or law.

Moreover, the focus of art 1 being on parties whose place of business were in different states was due to three reasons: (1) to reduce forum shopping; (2) to avoid needing to resort to rules of private international law; and (3) to provide a modern sales law applicable to international

¹⁷ Peter Schlechtriem "Of Words and Issues – Finding a Common Language" in Pace Law Review (ed) *Review of the Convention for the International Sale of Goods 2003-2004* (Sellier, Munich, 2005) at 85.

¹⁸ Peter Winship "A Note on the Commentary of the 1980 Vienna Convention" (1984) 18 Int'l Law 37.

¹⁹ *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary")* / UN DOC. A/CONF. 97/5 (1978).

²⁰ Winship, above n 18, at 37.

²¹ At 37.

²² At 38.

²³ Secretariat Commentary, above n 19, at 15

²⁴ At 15.

²⁵ At 15.

transactions.²⁶ This confirms that the sphere of applicability in art 1 was to provide more legal certainty, reduce transactional costs and modernise international sale of goods law. In addition, there is an exhaustive list of exclusions regarding the CISG's applicability in art 2. This includes sales of consumer goods,²⁷ electricity,²⁸ ships and aircrafts.²⁹ These exclusions were to make the CISG more universally acceptable as some legal systems make the distinction between 'civil' and 'commercial' contracts and art 2 excludes contracts that would be characterised as 'civil' contracts.³⁰ The most notable exception in art 2 is consumer goods sales. The rationale for excluding consumer goods sales was due to most consumer sales being domestic sales and to avoid impairing the effectiveness of national consumer protection laws.³¹ The examples given in the secretariat commentary where the consumer sales could be of an international nature were where the buyer was a tourist or if the goods were ordered by mail.³² This was determined to be only a small insignificant number of transactions. However, in 2020, with the rise of online shopping it is questionable if the 1978 rationale for excluding international consumer goods sales still holds up.

The number of international consumer sales have grown significantly since 1978 and it is unlikely to be an insignificant number. Yet even in 2020, it is inadvisable to include consumer sales in a treaty such as the CISG. This is because nations have differing views on acceptable levels of consumer protection,³³ and success of a treaty such as the CISG depends on uptake and that requires universal acceptability. Furthermore, art 2(f) excludes electricity because some legal systems do not categorise it as goods and the international sale of electricity presents unique problems.³⁴ One of the possible problems for selling electricity internationally is that it cannot be stored and distribution is constrained to an integrated wide-area transmission grid. Article 2(e) also excludes sales of ships and aircrafts as some legal systems consider them to be immovables rather than goods.³⁵ This means it would not fall within the sale of goods in some jurisdictions. So, the sphere of applicability of the CISG in art 1 and the express exclusions in art 2 consider practicalities including differences in legal systems and traditions and aims not to be in conflict with national laws and be universally acceptable.

²⁶ At 15.

²⁷ United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 2 (opened for signature 11 April 1980, entered into force 1 January 1988), art 2(a).

²⁸ Article 2(f)

²⁹ Article 2(e).

³⁰ Secretariat Commentary, above n 19, at 15.

³¹ At 16.

³² At 16.

³³ Paul Schiff Berman "The inevitable legal pluralism within universal harmonization regimes: the case of the CISG" (2016) 21 *Unif L Rev* 23 at 26.

³⁴ Article 2(e).

³⁴ Secretariat Commentary, above n 19, at 16.

³⁵ At 16.

3 *Article 4*

Article 4 limits the scope of the CISG to the formation of the contract and the obligations of the seller and buyer under the contract of sale.³⁶ There are no express provisions in the CISG that govern the validity of the contract.³⁷ However, art 4(a) still excludes the validity of the contract from the CISG's coverage. This is because certain provisions such as art 11 might indirectly conflict with domestic legislation. Article 11 states that a contract of sale need not be evidenced by writing, and in some legal systems the writing requirement relates to the validity of the contract.³⁸ This would make art 11 in conflict with the domestic laws of some states. Therefore, art 12 allows states to make a declaration under art 96, which effectively makes art 11 inoperable in their state. Such a declaration would impose a writing requirement as evidence for the formation of the sales contract and also ensure that the operation of the CISG would not be in conflict with domestic laws. This shows that even matters not directly covered under the CISG such as the validity of the contract can still be a major obstacle to universal acceptability, especially, if it is in conflict with domestic legislation. The CISG overcame the conflict with domestic law concerning the validity of the contract by allowing for reservations regarding article 11.

However, allowing such reservations make the operation of the CISG different in some contracting states. This seems inconsistent with the overall goal of unifying international sale of goods law. Additionally, art 4(b) clarifies that the CISG does not govern the passing of title in goods sold.³⁹ Again, this is due to the different rules regarding passing of property in different legal systems and it was seen as impossible to unify the rule.⁴⁰ In some legal systems property passes on conclusion of the contract, in others it passes on delivery and some legal systems impose an additional obligation requiring the seller to transfer the goods free from any claims of third parties.⁴¹ Interestingly, even Incoterms which have their roots in merchant law do not deal with passing of property.⁴² However, Incoterms do deal with passing of risk and it is usually related to which party is in a better position to take out insurance.⁴³ This suggests that some legal matters such as passing of property depends on circumstances and the type of goods. Therefore, it is better left to the contracting parties to decide on the rule and trying to unify certain rules at the international level might be futile and unnecessary.

³⁶ At 17.

³⁷ At 17.

³⁸ At 17.

³⁹ At 17.

⁴⁰ At 17.

⁴¹ At 17.

⁴² Juana Coetzee, "Incoterm ® and the standardization of the international sales law" in Djakhongir Saidov (ed), *Research Handbook on International and Comparative Sale of Goods* (Edward Elgar, 2019) 240 at 246-247 footnote 41.

⁴³ At 250.

III *Autonomous Interpretation and Application of the CISG*

A *Article 6 and 7*

Article 7 mandates that the interpretation of the CISG's provisions must take into account its international character and promote uniformity and good faith in international trade. Uniformity is a phenomenon of varying degree of similar effects across national boundaries '...resulting from the application of deliberate efforts to create specific shared rules in some form'.⁴⁴ The CISG can be viewed as a deliberate effort to create uniformity in international sale of goods law. That is, at least in the areas specifically covered under the CISG. Therefore, art 7 was deliberately included in the CISG to discourage differing interpretations of its provisions due to divergences in national concepts and sales of goods law.⁴⁵ For example, the importance and conceptualisation of good faith in civil law and common law is stark. In civil law good faith is central to contract law while in common law good faith is usually a secondary consideration. Moreover, the articulation of good faith in art 7 also reflects the manifestations of good faith in the other provisions of the CISG.⁴⁶ For example, art 6(2) expressly states when an offer cannot be revoked such as by stating a fixed time for acceptance,⁴⁷ or 'if it was reasonable for the offeree to rely on the offer as being irrevocable...'.⁴⁸ Therefore, art 6(2) reflects the element of good faith as it states when it is unfair to revoke an offer. However, good faith in art 7 also has a broader application as it applies to all aspects of the interpretation and application of the CISG.⁴⁹

Article 7 was included in the CISG to avoid diverging interpretations.⁵⁰ The prevailing view among the courts and academics is that art 7 requires provisions in the CISG to be interpreted autonomously and not nationalistically.⁵¹ This is supported by the fact that the drafters of the CISG '...took special care in avoiding the use of legal concepts typical of a given legal tradition...'.⁵² Although, it is acknowledged that it is difficult for courts to look beyond its domestic perspective.⁵³ Nonetheless, this can generally be overcome by avoiding any recourse to domestic concepts even if it is textually identical to expressions in a particular domestic legal

⁴⁴ Camilla Baasch Andersen "Applied uniformity of a uniform commercial law: ensuring functional harmonisation of uniform text through a global jurisconsultorium of the CISG" in Mads Andenas and Camilla Baasch Anderson (ed) *Theory and Practice of Harmonisation* (Edward Elgar Publishing, United Kingdom, 2011) 30 at 31.

⁴⁵ Secretariat Commentary, above n 19, at 17.

⁴⁶ At 18.

⁴⁷ United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 5 (opened for signature 11 April 1980, entered into force 1 January 1988), art 16(2)(a).

⁴⁸ Article 16(2)(b).

⁴⁹ Secretariat Commentary, above n 19, at 18.

⁵⁰ Franco Ferrari "Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law" (2017) 22 *Unif L Rev* 244.

⁵¹ At 245.

⁵² United Nations Commission on International Trade Law (UNCITRAL) *Introduction to the digest of case law on the United Nations Sales Convention A/CN.9/562* (9 June 2004) at [4].

⁵³ Ferrari, above n 50, at 245.

system.⁵⁴ In addition, it can be argued that to ensure uniform application of the CISG the exclusion of the CISG via the opt out provision in art 6 should be interpreted narrowly. It would be a violation of the CISG's terms and the obligations of contracting states to allow domestic law including procedural rules to displace the application of the CISG.⁵⁵ Also, not applying the CISG due to the ignorance of the parties or judges is bad policy and is inconsistent with the opinion of the CISG Advisory Council.⁵⁶ However, it is questionable whether the application of the CISG should override domestic procedural rules.

B Application of the CISG

The CISG Advisory Council states that during legal proceedings an intent to exclude the CISG under art 6 cannot be inferred merely from the parties failing to plead or present arguments based on the CISG.⁵⁷ Also, courts should not use domestic principles of waiver to determine the parties' intent to exclude the CISG.⁵⁸ The CISG Advisory Council's opinion suggests that the correct application of the CISG is that it must apply even if its application violates domestic procedural rules. The better view might be that the CISG nor its general principles displace domestic procedural rules.⁵⁹ Although, in some circumstances, courts should use their discretion to apply the CISG rather than the relevant domestic law.⁶⁰ The CISG is silent on whether parties can derogate from its provisions due to domestic procedural rules.⁶¹ Additionally, nothing in treaties law suggests that the CISG can override domestic procedural rules.⁶² Therefore, the CISG becomes less uniform in application when domestic procedural rules make the CISG inapplicable where it would otherwise apply.⁶³ This shows that procedural rules can be one of the obstacles to the uniform application of the CISG,.

D Autonomous Interpretation and Legal Pluralism

The CISG is propagated as a success story for uniform law.⁶⁴ It is textually uniform making it a success at creating a uniform text but the applied uniformity fails in case law.⁶⁵ Recently, the idea that shared law needs global scholarship and precedents have become popular and the term global jurisconsultorium has been coined.⁶⁶ For the CISG there is now a collection of global scholarship and precedents freely available such as the Pace Law School database. There is no

⁵⁴ At 245.

⁵⁵ Clayton P Gillette and Steven D Walt "Judicial refusal to apply treaty law: domestic law limitations on the CISG's application" (2017) 22 Unif L Rev 452 at 454.

⁵⁶ At 454.

⁵⁷ CISG Advisory Council *Opinion No 16: Exclusion of the CISG under Article 6* (30 May 2014) at [5].

⁵⁸ At [6].

⁵⁹ Gillette and Walt, above n 55, at 455.

⁶⁰ At 455.

⁶¹ At 454.

⁶² At 454.

⁶³ At 463.

⁶⁴ Andersen, above n 44, at 33.

⁶⁵ At 33.

⁶⁶ At 35.

hierarchy of courts in a global jurisconsultorium.⁶⁷ So, it should be left to judicial discretion to determine the persuasiveness of a precedent.⁶⁸ However, counsel and judges might suffer from the homeward trend.⁶⁹ That is, the citing of foreign cases might be unfamiliar resulting in only consideration of domestic cases.⁷⁰ This can only be remedied through repeated exposure and education possibly starting at law schools. Increasingly, courts including New Zealand courts are recognising the mandate in art 7 to interpret CISG provisions autonomously and to look to overseas authorities for guidance rather than domestic law.⁷¹

However, given the different legal systems and traditions it is questionable whether autonomous interpretation can ever be truly achieved. For instance, it can be argued that legal pluralism is inherent in the CISG making autonomous interpretation impossible.⁷² For example, even when considering international materials, a civil law judge's approach to interpreting 'international character' in art 7 will differ to that of a common law judge. A civil law judge is likely to give more weight to scholarly commentary while common law judges are more inclined to find case law more authoritative.⁷³ Therefore, legal pluralism is not necessarily an issue that needs to be stamped out as long as the universalist aims of the CISG are embraced.⁷⁴ Moreover, legal pluralism and the CISG allowing multiple forms of uniformity might have contributed to its widespread adoption.⁷⁵

IV UNIDROIT Principles

Article 2 deliberately excludes certain matters from the scope of the CISG and some important exclusions include validity of the contract, agency and standard terms.⁷⁶ Additionally, art 7(2) allows matters that are not settled in the CISG, or cannot be settled by the general principles of the CISG to be settled by the applicable law through the operation of the rules of private international law. In other words, art 7(2) allows non-deliberate or hidden gaps to be resolved through private international law.⁷⁷ One of the most common soft law instruments used to fill the gaps in the CISG are the UNIDROIT Principles for International Commercial Contracts (PICC). The advantage of the PICC is that the principles were drafted by legal scholars and considered 'neutral' in scope.⁷⁸ Additionally, the applicability of the PICC is not limited to

⁶⁷ At 40.

⁶⁸ At 40.

⁶⁹ At 42.

⁷⁰ At 42.

⁷¹ *Smallmon v Transport Sales Ltd* CA545/2010; [2011] NZCA 340 at [39].

⁷² Berman, above n 33, at 24.

⁷³ At 25.

⁷⁴ At 25.

⁷⁵ At 25.

⁷⁶ Herbert Kronke "The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond" (2005-6) 25 *Journal of Law and Commerce* 451 at 453.

⁷⁷ At 453.

⁷⁸ William F Fox *International Commercial Agreements* (4th ed, Wolters Kluwer 2009) 11-41 at 33-34.

sale of goods contracts and includes other types of specific contracts.⁷⁹ Therefore, the PICC principles can also be used for other contracts including contracts of service. This is in stark contrast to the CISG, which is inherently a political instrument and is limited to international sale of goods contracts. This suggests that the PICC might be a better instrument than the CISG to achieve not only a unified international sale of goods law but a unified international sales law.

However, unlike the CISG, the PICC does not have default application and must be incorporated by at least referencing it in the contract.⁸⁰ This is in line with preserving party autonomy. Also, for the PICC principles to apply by default it would need to undergo a political vetting process similar to the CISG. However, if the PICC principles become a political instrument they would lose their efficacy and face the same problems as the CISG. That is, the need to take into account different legal systems and traditions. This would require compromises on coverage and allowing for deviations in interpretation and application. Therefore, the default application and having undergone a political vetting process makes the CISG more suited than the PICC for paving the way for a unified international sale of goods law.

The CISG was drafted to be universally acceptable to a wide range of legal systems and traditions. This means drafters left deliberate gaps in coverage regarding matters that could not be unified but art 7 allows these gaps to be filled by other private international law. The PICC principles are often used to fill these gaps. However, it is unclear if parties prefer the PICC conceptualisation over the CISG's when it differs. For example, the obligation of good faith is more of an overarching duty under the PICC starting from the pre-contractual phase compared to the more fluid articulation in art 7 of the CISG.⁸¹ The more fluid articulation in the CISG is due to the differences in civil and common law regarding the importance of good faith in contract law. Good faith is usually central in civil law contracts and more of a secondary consideration in common law with the primary focus being on textual interpretation and parties' intentions. Therefore, it is possible that the fluidity of the CISG is one of the reasons parties routinely choose to opt out of the CISG. Parties to international sale of goods contracts are usually commercially savvy and have certain legal expectations. Therefore, they might prefer their sale of goods contracts to be more in line with their own legal system and traditions and do not see a need for a unified neutral international sale of goods law.

Moreover, there is no evidence of any serious flaws with the CISG.⁸² It is neutral and does not favour either the buyer or the seller.⁸³ Nonetheless, parties still routinely opt out of the CISG.⁸⁴ It is possible this might be because unlike the PICC, which is regularly updated (last update was in 2010), the CISG might not reflect current international commercial understandings and

⁷⁹ Kronke, above n 76, at 453.

⁸⁰ Fox, above n 78, 11-41 at 33.

⁸¹ Kronke, above n 76, at 456.

⁸² Henry Deeb Gabriel "UNIDROIT Principles as a Source for Global Sales Law" 58 Vill L R 661 at 664.

⁸³ At 664.

⁸⁴ At 663.

practice. The better view might be because parties are not concerned about the specific law governing the transaction but rather knowing in advance which law will govern that transaction so they can contract out of any undesirable default provisions.⁸⁵ This comes back to knowledge regarding the application of the CISG and the reluctance of domestic courts to apply the CISG. Therefore, more consistent application of the CISG by courts and education regarding the CISG might encourage more international sale of goods contracts to be governed by the CISG.

V Commodity Sales

A English Law versus the CISG

Commodities are substitutable or interchangeable goods that are produced in bulk and producers are usually regulated by a relevant trade body.⁸⁶ Prices fluctuate daily making commodity markets extremely responsive to supply and demand.⁸⁷ This volatility of the commodities market means sale of commodity goods require more certainty and predictability than the sale of other goods.⁸⁸ A unique feature of commodity sales is the number of document or ‘string’ sales. In other words, the main obligation of the seller is to hand over certain documents rather than the obligation to physically deliver the goods to the buyer.⁸⁹ Interestingly, the CISG has generally been excluded from the standard form contracts governing commodity sales.⁹⁰ Instead, these standard form contracts often stipulates application of English law as the proper law of the contract in arbitration proceedings.⁹¹ This is partly due to commodity sales being rooted in English tradition and reluctance of international trade associations to modify their standard forms to include the CISG or other international uniform laws.⁹² This tradition might also explain the United Kingdom’s unwillingness to adopt the CISG.⁹³

The inherent flexibility in the CISG including legal pluralism theoretically makes the CISG’s framework ideal for international commodity sales. It can also be used to fill the gaps in standard form contracts based on internationally recognised trade terms or standard uses.⁹⁴ Trade associations might be reluctant to break the English tradition but parties have the ability to delete or amend provisions in standard form contracts such as the GAFTA 100⁹⁵ as applicable. So, parties do have the ability to choose the CISG as the applicable law rather than English law even in standard form contracts such as the GAFTA 100. For example, the GAFTA

⁸⁵ At 663.

⁸⁶ Katrina Winsor “Commodity goods and the CISG” [2011] NZLJ 157.

⁸⁷ At 157.

⁸⁸ At 157.

⁸⁹ At 157.

⁹⁰ At 157.

⁹¹ At 157.

⁹² At 158.

⁹³ At 158.

⁹⁴ At 157.

⁹⁵ The Grain and Feed Trade Association - Contract No. 100 *Contract for Shipment of Feeding Stuffs in Bulk* (1 September 2010) <www.gafta.com>.

100 expressly excludes the CISG (cl 29) but parties can still choose to delete the domicile provision (cl 27) that makes English law applicable and substitute it for the CISG. Parties might be reluctant to do so due to the express exclusion of the CISG in cl 29. However, the exclusion of the CISG in cl 29 is likely due to possible conflict with English law rather than the CISG being unsuitable for commodity sales. A possible conflict might be the differing legal interpretations for trade terms as well as differing conceptualisations of textually similar terms such as good faith.

B Incoterms

Incoterms allocate the duties and costs of delivery with reference to mercantile customs and practices in the form of three letter acronyms called trade terms.⁹⁶ Trade terms reduce transactional costs as it negates the need to draft comprehensive contracts clauses.⁹⁷ However, since Incoterms are acronyms they require interpretation and different legal systems tend to interpret trade terms differently.⁹⁸ For example, English law places weight on the flexibility of the FOB and determines parties obligations primarily based on their intentions.⁹⁹ This interpretation might differ to other legal systems. Also, trade terms are dynamic and change as trade practices in the transportation of goods evolve.¹⁰⁰ Moreover, parties would need to intentionally incorporate Incoterms into the contract as they are not law. Therefore, even if a party chooses the CISG as the applicable law for commodity sales, art 7(2) allows the rule of private international law to govern matters that are beyond the CISG's scope. The interpretation of Incoterms would be outside the scope of the CISG and parties can either choose English law or their preferred law to govern such matters. Therefore, the CISG does not impact the interpretation of Incoterms or trade terms and would not be a barrier to the CISG being used in commodity sales.

C Conflict with English law

Interpretation of textually similar concepts such as good faith in the CISG is different to that of English law. The articulation of good faith in art 7 and manifestations of it in other provisions of the CISG is more pervasive than in English contract law where the focus is on textual interpretation and good faith is usually only a secondary consideration. Currently, the United Kingdom has not adopted the CISG but most commodity sales are governed by English law. The prevalence of English law in commodity sales means that even if parties choose the CISG as the applicable law they are still likely to choose English law as the law to cover the gaps in the CISG. The concern here is the likelihood of courts imposing the English notion of good faith in a CISG case. This can be avoided by courts keeping in mind the 'international character' of the CISG and utilising the global jurisconsultorium of CISG scholarship and precedent rather than resorting to domestic law and concepts. Therefore, the differing

⁹⁶ Juana Coetzee, above n 42, at 240.

⁹⁷ At 240.

⁹⁸ At 240.

⁹⁹ At 241.

¹⁰⁰ At 241.

conceptualisations of textually similar terms such as good faith is not an issue because it can be resolved by courts ensuring they use international materials and CISG precedents to resolve CISG cases.

VI Conclusion

The widespread adoption of the CISG has been heralded as a success story for a uniform international sale of goods law. However, the CISG in itself is not an urgent necessity. The unification of international sale of goods law is still ongoing and is a lengthy process. To achieve widespread adoption and universal acceptance certain drafting choices were made including deliberate gaps in coverage and exclusions such as in art 2. This was done to account for the different legal systems and traditions. A notable gap in the CISG is the validity of the contract. Moreover, the validity of the contract is not expressly covered in the CISG. Nevertheless, it was an issue due to the writing requirement in art 11, which was in conflict with some states' domestic laws. To resolve this issue the CISG allows states to make reservations regarding the applicability of art 11. This would make the operation of the CISG different in some contracting states making it inconsistent with the goal of a unified international sale of goods law. Although, it would be consistent with legal pluralism suggesting that legal pluralism is inherent in the CISG and is a necessity for achieving widespread adoption and a unified international sale of goods law.

Success of the CISG and uniform law depends on the autonomous interpretation of the CISG provisions as mandated in art 7. To achieve autonomous interpretation the 'international character' of the CISG must be considered, and when interpreting CISG provisions, courts should utilise the global jurisconsultorium of CISG scholarship and precedent rather than resorting to domestic concepts and law. However, treaty law does not allow the CISG to be applied if it violates domestic procedural rules making domestic procedural rules one of the main obstacles of the uniform application of the CISG. Furthermore, the PICC principles are often used to fill the gaps in the CISG. The PICC being soft law is easier to update making it more suited to changing technology and commercial practice. However, the PICC is not better than the CISG to provide for a uniform international sale of goods law due to the PICC not having undergone a political vetting process like the CISG. This means the PICC cannot have a default application provision like art 1 of the CISG and will always be contingent on parties incorporating it into their contract. The PICC is meant to reflect commercial practice but it is unclear whether parties prefer the PICC interpretation when it differs to the CISG.

For example, the good faith provision in the PICC is more overarching and is in line with civil law traditions. The less pervasive articulation of good faith in art 7 in the CISG and manifestations in other CISG provisions is due to good faith not being central in common law. So, it is unclear if such differences are the reason for parties routinely opting out of the CISG. Furthermore, commodity sales are still predominately governed by English law. The volatility in commodity markets, the use of standard form contracts and commodity sales usually being document sales means commodity goods require legal certainty and predictability. There is nothing other than tradition preventing the adoption of the CISG in commodity sale contracts.

The use of the CISG will not impact the legal interpretations of Incoterms and trade terms. Also, international interpretations of the CISG provisions will prevent wrongful legal interpretations of textually similar concepts such as good faith in English law. Therefore, the widespread adoption of the CISG is the first step towards a uniform international sale of goods, which will need to be supplemented by autonomous interpretation, uniform application and gap-filling instruments like the PICC.

BIBLIOGRAPHY

PRIMARY SOURCES

A Cases

Smallmon v Transport Sales Ltd CA545/2010; [2011] NZCA 340.

B Treaties

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

SECONDARY SOURCES

C Books

Camilla Baasch Andersen “Applied uniformity of a uniform commercial law: ensuring functional harmonisation of uniform text through a global jurisconsultorium of the CISG” in Mads Andenas and Camilla Baasch Anderson (ed) *Theory and Practice of Harmonisation* (Edward Elgar Publishing, United Kingdom, 2011) 30 at 31.

HC Cutteridge, *Comparative Law* (2nd ed, Cambridge) 157.

Juana Coetzee, “Incoterm ® and the standardization of the international sales law” in Djakhongir Saidov (ed), *Research Handbook on International and Comparative Sale of Goods* (Edward Elgar, 2019) 240 at 246-247 footnote 41.

Peter Schlechtriem “Of Words and Issues – Finding a Common Language” in Pace Law Review (ed) *Review of the Convention for the International Sale of Goods 2003-2004* (Sellier, Munich, 2005) at 85.

William F Fox *International Commercial Agreements* (4th ed, Wolters Kluwer 2009) 11-4.

D Journal Articles

Clayton P Gillette and Steven D Walt “Judicial refusal to apply treaty law: domestic law limitations on the CISG’s application” (2017) 22 *Unif L Rev* 452.

Franco Ferrari “Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law” (2017) 22 *Unif L Rev* 244.

Henry Deeb Gabriel “UNIDROIT Principles as a Source for Global Sales Law” 58 Vill L R 661.

Herbert Kronke “The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond” (2005-6) 25 Journal of Law and Commerce 451.

Ingeborg Schwenzer and Christopher Kee “International Sales Law – The Actual Practice” (2011) 29 Penn State International Law Review 425 at 428.

Katrina Winsor “Commodity goods and the CISG” [2011] NZLJ 157.

Katrina Winsor “What is the CISG?” [2011] NZLJ 31.

Paul Schiff Berman “The inevitable legal pluralism within universal harmonization regimes: the case of the CISG” (2016) 21 Unif L Rev 23 at 26.

Peter Winship “A Note on the Commentary of the 1980 Vienna Convention” (1984) 18 Int’l Law 37.

E Reports

CISG Advisory Council *Opinion No 16: Exclusion of the CISG under Article 6* (30 May 2014).

Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") / UN DOC. A/CONF. 97/5 (1978).

United Nations Commission on International Trade Law (UNCITRAL) *Introduction to the digest of case law on the United Nations Sales Convention* A/CN.9/562 (9 June 2004).

F Internet Sources

The Grain and Feed Trade Association - Contract No. 100 *Contract for Shipment of Feeding Stuffs in Bulk* (1 September 2010) <www.gafta.com>.

United Nations Commission on International Trade Law (UNCITRAL) “Frequently Asked Questions – Mandate and History” <www.uncitral.un.org>.

United Nations Treaty Collection “10. United Nations Convention on Contracts for the International Sale of Goods” (18 September 2020) <www.treaties.un.org>.