

UNIVERSITY OF DERBY

**The Transformation of the UN Convention on Contracts for
the International Sale of Goods (CISG) into the UK Legal
Order:
Two Legislative Models**

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Abstract

A number of common law countries such as Canada, New Zealand and the United States have already successfully implemented the CISG. Furthermore, leading civil law countries such as Germany and the Scandinavian countries have also implemented the UN Convention there is reason to believe that if applied by the UK, it will prove beneficial. From a political perspective, the United Kingdom reflects a negative image as being a reluctant participant in international trade law initiatives. UK law does not have a special body of rules applicable to international sales; it has a body of common rules which are not devised for international transactions. This thesis suggests that the CISG may be transformed in the UK legal order through two legislative models:

1. À la carte Model

The CISG is an ‘à la carte’ Convention; provisions may be selected from the CISG in the same way we choose a meal from a restaurant’s menu. This is the **à la carte model**. In other words, the UK when creating the Act transforming the CISG in the UK legal order may amend the UN Convention 1980 in order to adjust it to the UK legal system. In that sense, the UK may declare at the time of ratification, according to Article 92 of the CISG, to either omit part II or III of the Convention. This model comprises of three sub-models and if implemented will be an ‘add on’ to the Sale of Goods Act 1979.

2. Parallel Model

In legislative terms, the CISG could exist parallel to the Sales of Goods Act 1979, parties wishing to enter into an international transaction may conclude a contract either on CISG terms or under the Sales of Goods Act 1979. In this model a CISG Act will be required. This model will satisfy both the traders who wish to employ modern law especially designed for international contracts and those who are rather conservative and prefer to employ the old and familiar Sales of Goods Act 1979

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Chapter 1

INTRODUCTION

Thesis

This is a thesis which prescribes two legislative models for the transformation of the UN Convention on Contracts for the International Sale of Goods 1980 (CISG) into the UK legal order. It does so by drawing material from the text of the CISG itself, material from jurisdictions which have already incorporated the Convention and material from the UK legal order vis-à-vis European law. This thesis concentrates on two types of analysis; the strictly legal analysis, that is one which concentrates on black letter law and a type of analysis which takes a more contextual approach in the matter by appreciating the domestic UK legal order.

Hypothesis

It would be more beneficial for the UK to proceed with the transformation of the CISG into the UK legal order than resist such transformation, as it did to date. By ‘beneficial’ the author denotes that such a transformation would reduce legal costs and make dispute resolutions less time consuming for traders and practitioners.¹ Moreover it would benefit the UK economy as a whole as all of its main trading partners are contracting States to the CISG and it would facilitate the trading process if the UK proceeded with such a transformation. The validation of hypothesis is expounded upon in the Literature Review Chapter herein.

¹ B Zeller, *CISG and the Unification of International Trade Law* (Routledge 2007) 53

Background

When the UN Convention on Contracts for the International Sale of Goods 1980 (CISG) was being drafted it aimed at simplifying international business transactions either by diminishing legal costs or by making resolutions less time consuming. There was a cooperation of scholars from around the globe in order to create the CISG and that is why it balances elements from both common and civil law systems.² However, the UN Convention has been criticised for a number of reasons, one of them is that it only affects international sales contracts which suggests a diminutive percentage of all the sales contracts concluded within the Contracting countries. These arguments are based on unsubstantial grounds and surveys show that following an initial rejection of the CISG, business people seem more and more willing to recognise the new regime.³

Several States with systems based on common law such as Canada, New Zealand, Australia and the United States have already successfully ratified the CISG.⁴ Furthermore, leading civil law countries such as Germany and the Scandinavian countries have also implemented the UN Convention.⁵ The march of the CISG around the world continues. Another major trading power, Japan, has recently pushed ahead with the incorporation of the Convention.⁶ The author of this thesis is of the firm belief that, if ratified by the UK, the Convention will prove advantageous as most of UK's trading partners have implemented the CISG and would thus facilitate the trading process with them and in turn allow UK commerce to flourish further.⁷ As stated, such a hypothesis will be explored and validated in the Literature Review

² T Keily, 'How does the cookie crumble?' (July 2003) <<http://www.cisg.law.pace.edu/cisg/biblio/keily2.html>> accessed 20 May 2012

³ Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, in *Quo Vadis CISG* (Franco Ferrari ed, 2005) 25 et seq, in particular at 28 (with reference to the commodity trade) and 30 et seq (analysing the main objectives of parties in excluding or not excluding CISG).

⁴ CISG: Participating Countries <<http://cisgw3.law.pace.edu/cisg/countries/cntries.html>> accessed 17 May 2012

⁵ Ibid

⁶ The CISG took effect in Japan on the 1st of August 2009.

⁷ In addition, by advantageous 'the author denotes that such a transformation would reduce legal costs and make dispute resolutions less time consuming for traders and practitioners. Moreover it would benefit the UK economy as a whole as all of its main trading partners are contracting States to the CISG and it would facilitate the trading process if the UK proceeded with such a transformation.' See chapter 1 page 7 of this thesis

Chapter herein. Arguably, from a political perspective, the UK mirrors a negative image as being hesitant participant in international trade law schemes.⁸ What is more important is that UK law does not provide a special body of rules relevant to international sales; it has an established instrument of common law-inspired rules, the Sale of Goods Act 1979, these rules were not always created to accommodate modern international transactions. In essence, this thesis will examine the possibility of transforming the CISG into the UK legal order through two proposed legislative models.

This thesis explores the possibility of two legislative models namely the **à la carte model** and the **parallel model**. The first model which will be analysed in Chapter 3, comprises of three sub-models and if implemented will require a legislative ‘add on’ to the Sale of Goods Act 1979. The second model which will be analysed in Chapter 4 requires a CISG Act. The thesis consists of five chapters, the introductory chapter, the literature review chapter, the à la carte model chapter, the parallel model chapter and the conclusions chapter.

Moreover the author considers the quality of the transposing legislation of great significance. Therefore, two elements were taken into consideration while designing both models: feasibility and adequacy. Legislation has to first be adequately stern so that, when completely implemented, it is competent to attain its goals.⁹ This means that the rules have to be firm enough to make the regulated society act in the way that the legislator wishes.¹⁰ This comprises both the procedural enforcement rules that offer tools for punishing violators and the substantive rules that signify the requisite behaviour. In case legislation is inadequate, its rules are too lenient, and even if they are entirely complied with, the law will be powerless to reach the aims it set out to

⁸ B Nicholas, ‘The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?’ <<http://www.cnr.it/CRDCS/nicholas.htm>> accessed 7 July 2009 Professor Nicholas was the UK’s representative, in the preparatory stages of the CISG. He did not, however, live to see the incorporation of the CISG into the UK legal order.

⁹ P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997) 76-79 and Netherlands Ministry of Justice. Legislation in Perspective, A policy plan for the further development and implementation of the general legislative policy, aimed at improving the constitutional and administrative quality of government policy (Netherlands Ministry of Justice, 1991)

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¹⁰ Ibid

attain.¹¹ Consequently, the law's feasibility is vital as unfeasible legislation is complex or even impossible to apply in practice.¹² A form of unfeasible legislation arises where a particular law's rules are so stern that compliance would result in irrational effects for the regulated, in our case, trading community or even for the greater society.¹³ This type of legislation will be less successfully implemented, first, since the rule-addressees cannot or do not wish to comply. Second, enforcement institutions and courts may not put into effect the rules as they are aware that compliance will result in irrational situations.¹⁴

Another form of unfeasible law takes place where rules attempt to amend or even disallow activities that are widespread in society.¹⁵ That is why the à la carte model took into consideration the fact that the Sale of Goods Act 1979 will not be directly interfered with (unless the first sub-model would be followed which is unlikely), a model that would completely ignore the old and familiar legal instrument would *not* be feasible. On the other hand, in the rather unlikely scenario that the Sale of Goods Act 1979 would be entirely abolished, breaches of contract would also be widespread, and the expenses of enforcement might have established it unfeasible.¹⁶ Furthermore, the parallel model took into account the fact that traders play the leading role in business transactions and were hence through the parallel model granted the freedom of choosing whether or not it would be beneficial for their transaction to employ either the CISG or the Sale of Goods Act 1979. If adequacy requires strict rules, feasibility demands less harsh rules. Weak legislation will generally be possible but in all probability quite inadequate. Hence, feasibility and adequacy are to a certain degree at odds with each other.

¹¹ Ibid

¹² Ibid

¹³ K Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution* (Clarendon Press 1984) 32; C E Wasserman, 'Principles of Environmental Enforcement' (International Conference on Environmental Enforcement, Budapest, September, 1992) 32

¹⁴ Ibid

¹⁵ Ibid

¹⁶ C E Wasserman, 'Principles of Environmental Enforcement' (International Conference on Environmental Enforcement, Budapest, September, 1992) 53

À la carte model

This model would allow the UK legislator to incorporate certain parts of the CISG. The legislator would be offered, effectively, three (3) sub-options in the deployment of such a model.

Sub-model 1: À la carte by omitting Part II of the CISG

Pursuant to CISG Article 92 the à la carte model suggests opting out of Part II¹⁷ (Articles 14-24). Articles 14-17¹⁸ establish the rules related with the offer, Articles 18-22¹⁹ deal with the acceptance of the offer, Article 23²⁰ lays down the rules regards the moment of the conclusion of a contract and Article 24²¹ deals with issues of definition. Moreover, according to Part II of the Convention the ruling concerning the formation of a contract is aimed at the formation of sales contracts, nevertheless, it does not precisely relate to transactions in its entirety.²²

Furthermore in this sub-model the à la carte model took into consideration the fact that the Scandinavian States have issued a declaration not to be bound by Part II of the Convention. However, in October 2009, Denmark, Finland and Sweden withdrew their declaration.²³ In spite of the fact that the reservation has been withdrawn, it has been put into practice and we are aware of the weaknesses and this is what legal certainty is concerned with, the ability to control the outcome. Furthermore, sub-model I (Omitting Part II CISG and incorporating CISG's Part III) is rather improbable for the UK but, if it were to be the selected model for the UK, it would very possibly mean that the CISG's Part III insertion would interfere with sections of the Sale of Goods Act 1979 (amongst which would be such sections as ss 12-15 thereof). Thus, sub-model I is the closest the UK legislator would ever get to abolishing/repealing/interfering with the core of Sale of Goods Act 1979 (ss 12-15 thereof)

¹⁷CISG Article 92(1)

¹⁸CISG Articles 14-17

¹⁹CISG Articles 18-22

²⁰CISG Article 23

²¹CISG Article 24

²²Ibid

²³J Lookofsky, ‘Alive and Well in Scandinavia: CISG Part II’ (1999) 18 J L & Com 289-299

Sub-model 2: À la carte by omitting Part III of the CISG

Pursuant to CISG Article 92 the à la carte model suggests opting out of Part III²⁴ (Articles 25-88). Part III of the Convention, regulates the substantive rules for international sales and comes under the title ‘Sales of Goods’. This part of the CISG lays down the rules that govern the parties’ obligations, the risk of loss and the rights and remedies for breach. The seller is obliged to deliver the right goods, at the right place and time, as required by the CISG rules and as stipulated by the contract.²⁵ Unless otherwise agreed, the goods do not match the contract requirements unless they are both fit for any particular purpose made aware to the seller at the contracting time and for ordinary purposes.²⁶ Every time an obligation breach occurs, one or more CISG remedies for breach arise.²⁷

The à la carte sub-model took into consideration that major differences between Part III of the CISG and the Sale of Goods Act 1979. Applying Part III in the UK could result in a direct conflict between this particular part of the CISG and the equivalent provisions of the Sale of Goods Act 1979.²⁸ For their corporative differences it could prove problematic to adhere to Part III of the CISG. However, the theoretical possibility that Part III could be fully implemented to the abolition of established commercial law rules in the UK remains. Moreover, it is worth mentioning that opting out Part III of the CISG has not been applied by any State so far. However, omitting part III of the Convention is a choice which poses potential for the UK taking into consideration that people in this country would be very reluctant to regulate or reduce the effect of the Sale of Goods Act 1979. Part III of the CISG governs the parties’ obligations, rights, and remedies it also lays down the rules regulating the risk of loss. As mentioned above, the rationale why the author considers that it would be beneficial to opt out of part III of the CISG is that the main dissimilarities between the Sale of Goods Act and the CISG are found in this part.

²⁴ CISG Article 92(1)

²⁵ CISG Article 33

²⁶ For Buyer’s remedies see CISG Articles 45-52

²⁷ The buyer’s remedies are set forth in CISG Articles 45-52, whereas the seller’s remedies are set forth in CISG Articles 61-65

²⁸ C Bianca and M Bonell, *Commentary on the International Sales Law* (Dotta Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594

Sub-model 3: À la carte by taking advantage of the EU experience

Sub-model 3 proposes the CISG to be incorporated into the UK legal order through a statutory instrument. A similar approach was employed when the Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees²⁹ was to be transformed in the UK. The approach by which the Directive has been transported into the UK legal order may pose a safe model of how to implement the CISG into the UK legal order. The author based this reasoning on two grounds. First, the Directive has been significantly influenced by the CISG and second, the Directive has already been effectively implemented in the UK.

1.5 Parallel model

The second model, the ‘parallel model’ embraces Euclidean parallelism, where two lines never converge, that is to say that the Sale of Goods Act 1979 and the UN Convention would be used simultaneously but would not have to converge.³⁰ In this way, the UN Convention 1980 would become an instrument of ‘domestic’ sales law associated to international business dealings in the UK. Thus, there would exist within the UK two parallel bodies of sales law, one applicable to domestic sales and one normally applicable to international sales, which would not ‘converge’ in their field of utilisation. Of course, that is not to say that UK traders would not be able to employ the Sale of Goods Act and the relevant case law for international business transactions, as they do to this day; in a free market economy the choice of tools for trade operations ought to ultimately remain in the hands of the traders.

Pursuant to Article 6 of the CISG the trader is offered the option to employ the CISG or part of its provisions whenever he/she may consider that the Convention is more suitable to govern that particular transaction. Therefore, through the parallel model traders would not be obliged to apply the CISG in their transactions. Despite the fact that the parallel model requires a UK CISG Act, traders who would consider that the

²⁹ The Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12)

³⁰ ‘Euclid’ <http://www.mathopenref.com/euclid.html> accessed 2 February 2012; ‘The Euclidean model for space’ <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

application of the Sale of Goods Act 1979 (SoGA) more beneficial to a particular transaction, or more familiar as an instrument, could actually choose to remain by the established Sale of Goods Act devices and its associated case law.³¹

The significance of the parallel model is that optionality may act as a safety net, in case one legal instrument was to ‘fail’ in a two-option parallel system, the second one could be preferable. Therefore, the parallel model offers us optionality. Traders with no intention of dealing outside UK borders, who, consequently, would only ever work within one system, the Sale of Goods Act 1979, will not have to shift pointlessly to a new legal instrument, the CISG. On the other hand, a UK CISG Act could offer traders who want to expand outside the UK borders the autonomy to opt for a legal mechanism which would diminish costs for business and advance simplification.³²

³¹ L Spagnolo, ‘The Last Outpost: Automatic CISG Opt Outs, Misapplications and The Costs of Ignoring The Vienna Sales Convention For Australian lawyers’(2009) <http://cisg.sk/sk/uploaded_files/Lisa%20Spagnolo%20-%20Last%20Outpost.pdf> accessed 17 February 2012

³² J Felemegeas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’<<http://www.cisg.law.pace.edu/cisg/biblio/felemegeas.html#ch1>> accessed 17 February 2013

Chapter 2

LITERATURE REVIEW & ANALYTICAL PARAMETERS

2.1 Introduction

The UN Convention on Contracts for the International Sale of Goods 1980 (CISG) is said to have resulted out of a largely global scholarly *jurisconsultorium*³³, as it was drawn up in cooperation between scholars from around the globe. The term *jurisconsultorium* was established by Vikki Rogers and Albert Kritzer in their magnificent trade law thesaurus on terminology of international sales and they used it to emphasise the necessity for cross-border consultation in deciding issues of uniform law.³⁴ This literature review chapter will analyse the current situation -what we have-in the UK legal order with regards to the CISG and what we could have, if the CISG is to be implemented in the UK. This chapter is of paramount significance, as it will set the bedrock of the thesis by validating the hypothesis thereof, whilst it will offer the reader an idea of what is to follow in the analysis.

The CISG was promulgated approximately thirty years ago. Tremendous changes have taken place in the world arena to the point that one may conclude that these years seem an eternity.³⁵ There was an immensely different political and socio-economic environment; the Cold War was still a raw reality until 1989.³⁶ The so-called Socialist countries were not the only ones who had strictly centralized and planned economies but also a large number of developing countries, thus playing a somewhat minor role, if any at all, in international trade.³⁷

The necessity of incorporating the CISG in the face of developments in international trade in the last 30 years or so is evident as the CISG was taken as a model by

³³ V M Rogers & A H Kritzer, *A Uniform International Sales Law Terminology*, (Ingeborg Schwenzer & Günter Hager eds 2003) 223-253

³⁴ Ibid

³⁵ M J Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (3rd edn, Martinus Nijhoff Publishers 2005) 305-308

³⁶ Ibid

³⁷ Ibid

individual States, or groups of States, who aimed at reforming their domestic sales laws. In Europe the CISG has led a number of States to update their domestic sales laws and has inspired the Community legislature in drafting the Consumer Sales Directive.³⁸ For instance the creation of the sales section of the new Dutch *Burgerlijk Wetboek* adopted in 1992³⁹ and of the new German sales law contained in the German Civil Code (BGB) as amended by the *Gesetz zur Modernisierung des Schuldrechts* of 2002.⁴⁰ Furthermore, by considerably influencing the work of the Lando Commission⁴¹, the CISG contributed to the preparation of major parts of what may one day develop into a European Civil Code.⁴² Worldwide, both the virtues and the weaknesses of the CISG encouraged the International Institute for the Unification of Private Law (UNIDROIT) to commence a project as ambitious as the preparation of the UNIDROIT Principles.⁴³ Already in their present form besides serving as a foundation of inspiration for law reform projects, the UNIDROIT Principles are increasingly selected by parties as the law governing their contract and implemented by arbitral tribunals in dispute resolution and domestic courts.⁴⁴ The CISG was of course a source of inspiration for the UNIDROIT Principles, but other international legislation is also an obligatory point of reference.⁴⁵ A paradigm outside Europe is the Chinese Contract Law of 1999, extensively inspired not only by the CISG but also by the UNIDROIT Principles.⁴⁶ Taking these developments into account the author

³⁸ The Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12) See also S Troiano, 'The CISG's impact on EU Legislation' (2008) IHL <<http://cisgw3.law.pace.edu/cisg/biblio/troiano.pdf>> accessed 5 May 2009

³⁹ C F E Hondius, 'Rights of the Consumer' in M C Bianca & S Grundmann (eds), *EU Sales Directive* (Intersentia 2002) 150-155

⁴⁰ R Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspective* (OUP 2005) 96; P Schlechtriem, 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe' (2002) Oxford U Comparative L Forum <<http://ouclf.iuscomp.org/articles/index.shtml>> accessed 4 July 2009

⁴¹ Lando Commission is the commission which created the principles of European Contract Law based on the concept of a uniform European contract law system. See 'The Principles of European Contract Law'

<http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm> accessed 13 June 2014

⁴² M Morgan Taylor and A Naidoo 'The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees- Problems of the Time of Conformity for the Quality Obligation' (2002) JCLI <<http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>> accessed 4 July 2009

⁴³ M J Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (3rd edn, Martinus Nijhoff Publishers 2005)

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ C F H Danhan, 'The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China' (2003) 8 Unif L Rev 107

will forward the effecting advantages for the incorporation of the CISG into the UK legal order by critically evaluating the matter. It will be concluded that the British legislator should then reconsider the potentiality of incorporating the CISG; especially considering the incorporation of the same instrument in other common law jurisdictions.⁴⁷

2.2 Hypothesis

The hypothesis of this thesis suggests that transformation of the CISG into the UK legal order through either of these models would be beneficial as the Convention is adjustable to UK legal, economical and socio-political needs. The thesis prescribes two legislative models, the **à la carte model** and the **parallel model** for the effective incorporation of the CISG into the UK legal order. The à la carte model would require a legislative ‘add on’ to the Sale of Goods Act 1979 whereas the parallel model would require a separate legislative Act, a UK CISG Act parallel to the Sale of Goods Act 1979.

Whereas the framework of the CISG is taken into account, the thesis herein manifests a novel approach in the transformation of the CISG in that it considers comparative legal experience from elsewhere. A number of common law countries such as Canada, New Zealand and the United States have already successfully implemented the CISG.⁴⁸ In addition, civil law countries such as Germany and France have also ratified the CISG.⁴⁹ The main reason which led to CISG implementation by 78 countries, as of January 2013, is that the CISG is a well drafted⁵⁰ Convention

⁴⁷ For instance, other common law jurisdictions that have incorporated the CISG in their legal orders are New Zealand, Australia and Canada. See The Sale of Goods Act (United Nations Convention) Act 1994 in New Zealand, the Sale of Goods (Vienna Convention) Act 1986 (Qld); Sale of Goods (Vienna Convention) Act 1986 (NSW); Sale of Goods (Vienna Convention) Act 1986 (SA); Sale of Goods (Vienna Convention) Act 1986 (WA); Sale of Goods Vienna Convention Act 1987 (TAS); Sale of Goods (Vienna Convention) Act 1987 (ACT); Sale of Goods (Vienna Convention) Act 1987 (VIC); Sale of Goods (Vienna Convention) Act 1987 (NT) in Australia and the International Sale of Goods Contracts Convention Act 1991 in Canada.

⁴⁸ CISG: Participating Countries,

<<http://cisgw3.law.pace.edu/cisg/countries/entries.html>> accessed 12 July 2009

⁴⁹ Ibid

⁵⁰ C B M Zuffranieri, Jr and J I Feinstein, ‘UN Sale of Goods Convention May be Trap for the Unwary’ (2003) Lawyers Wkly <<http://www.cisg.law.pace.edu/cisg/biblio/zuffranieri.html>> accessed 3 March 2009

balancing elements both from civil and common law systems.⁵¹ There is reason to believe that if applied by the UK, it will prove beneficial. From a political perspective, the United Kingdom reflects a negative image as being a reluctant participant in international trade law initiatives. English law does not have a special body of rules applicable to international sales; it has a body of common rules, which are not devised for international transactions.

Before examining further what we could have in the UK legal order, the author will identify the significance of taking into account how other common law countries reacted towards international law. The author will also examine further in the analysis how States of civil and continental legal systems have implemented the CISG into their legal order, such as Germany and the Scandinavian countries.⁵² New Zealand, considers the application of international law for the advancement of the common law in a way broadly analogous to the approach taken in the UK and Australia.⁵³ For instance, the introduction of the international law of human rights has played a very significant role in the New Zealand domestic legal system following the ratification of the Bill of Rights Act in 1990.⁵⁴ That Act provided a powerful statutory model for the UK Human Rights Act 1998.⁵⁵ It is evident that New Zealand, as a common law country, played in the past an influential role as a model for the UK (and vice-versa). In this way the UK may follow New Zealand's steps as to how to implement the CISG.⁵⁶

In Canada, the moves towards accepting and employing international law are also obvious, particularly since the 1980s. During most of the twentieth century, in the

⁵¹ J Felemezas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000) Pace Int'l L Rev <<http://www.cisg.pace.edu/cisg/biblio/felemezas.html>> accessed 5 March 2009

⁵² The approaches of the Scandinavian countries and Germany towards the CISG will be analysed in the à la carte model chapter and the approaches of New Zealand, Canada, Australia and Germany will be analysed in the parallel model chapter. The case of Germany will be examined in both models.

⁵³ See for example the use of international law in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257

⁵⁴ New Zealand Bill of Rights Act 1990 <<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>> accessed 4 March 2009

⁵⁵ See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic). Consultations recommending the enactment of human rights legislation have also been conducted in two other States: Tasmania Law Reform Institute, A *Charter of Rights for Tasmania* (TLRI No 10, 2007); Government of Western Australia, A *WA Human Rights Act: Report of the Consultation Committee* (2007)

⁵⁶ Sale of Goods (United Nations Convention) Act 1994

words of Hugh M Kindred, the judiciary of Canada ‘tended to disregard [international law] and even to treat it with the contempt of exclusionary nationalism.’⁵⁷ However, the case of *Baker v Canada (Minister of Citizenship and Immigration)*⁵⁸ was a turning point for the approach of the Canadian judiciary. The current attitude of Canadian courts towards international law leans towards the other end of the scale. There has been such a change in judicial approach in Canada that the difficulty has now become one of establishing how to apply international materials in a just and rational manner.⁵⁹ In this respect, the Canadian courts have struggled, like the courts in Australia and the UK have, with the doctrines of incorporation and transformation and how to react towards international law.⁶⁰

2.3 What we have in the UK: Freedom of Contract

Due to the fact that the UK has not yet ratified the CISG, the Convention does not apply to contracts governed by English law. It may however apply to contracts involving UK traders where conflict of rules lead to the application of the law of a contracting state rather than the law of England.⁶¹ The CISG is an up to date and flexible law as it permits its application in certain occasions, but always allows for alteration and/or exclusion, if properly utilised.⁶² Therefore, the Convention respects and encourages the freedom of parties to contractually opt in to its provisions including the choice to opt out and choose the application of an utterly different body of law.⁶³ Correspondingly, at the moment UK traders wishing to enter a contract

⁵⁷ H M Kindred ‘The use and abuse of international legal sources by Canadian courts: searching for a principled approach’ in O E Fitzgerald (eds), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 5

⁵⁸ [1999] 2 SCR 817

⁵⁹ H M Kindred ‘The use and abuse of international legal sources by Canadian courts: searching for a principled approach’ in O E Fitzgerald (eds), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 5

⁶⁰ O E Fitzgerald, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 35

⁶¹ The current situation regards the CISG in the UK follows the bottom-up approach. See R A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights’ (1992) 59 U Chi L Rev 433-434; J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ (2005) 30 Yale J Int'l L 125

⁶² CISG Article 6 ‘The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.’

⁶³ Ibid

under the CISG may do so by way of the freedom of contract doctrine.⁶⁴ This thesis refers to this situation as **what we have** or as the **free-trade approach**.

Freedom of contract largely relies on the *laissez faire* doctrine, the doctrine which has been developed by one of the greatest classical economists, Adam Smith. ‘Government activity is natural enough and therefore good when it promotes the general welfare and it is an interference with nature and therefore, bad when it injures the general interests of society.’⁶⁵ This is Adam Smith’s concept of the role of government in a society of perfect liberty. Smith was a firm believer, as all classical economists, of a system of *laissez-faire* and freedom of contract.

The UK clearly manifests an environment where commercial operations thrive under the *laaise faire* principle, where the each individual is free to engage in his/her own commercial transaction in a free market. Moreover, the *laissez-faire* allows freedom of contract and private property rights alone to supply the framework for relations between firms, and consumers. Adam Smith’s theory of free trade is directly linked to free-trade; in fact this approach has its roots in Smith’s theory. The free-trade approach closely follows Smith’s theory where each trader is given the freedom to act as he/she deems right when it comes to their trade transactions.

There is no doubt that trade and commerce cannot flourish if liberally made agreements are not normally carried out. Contracts in general and under the CISG may be seen as a process in which traders negotiating with one another can make certain that their pledges will last longer than their unsettled states of mind. Freedom of contract offers a method by which private individuals are allowed, to a certain degree, control, predict and stabilise their future. It enables people to sustain give-and-take commitments and responsibilities, to provide promises others may rely on, to get rid of some hesitation from life, and to generate reasonable expectations for future dealings. Autonomous individuals have the natural right and rational ability to choose their own life actions. A necessary requirement of acting autonomously is the

⁶⁴ S Whittaker, ‘The Optional Instrument of European Contract Law and Freedom of Contract’ <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf> accessed 18 July 2009

⁶⁵ K B Smelie, *A Hundread Years of English Government* (2nd edn, Gerald Duckworth Co. Ltd 1950) 8

opportunity of freely making reciprocally binding agreements. Autonomy hence involves freedom of contract. Improved connections between persons can be established by contract, which lead to common benefit, instead of through compulsion, which does not.

Virginia Postrel, in her book *The Future and its Enemies*⁶⁶, elucidates that, by treating people as equal and liberating generic units, contract allows individuals to build arrangements far beyond the plans of any striking designers. Over-arching rules enable people to utilise their own knowledge, communicate their individuality, and take advantage of their own thoughts only by following the freedom of contract approach.⁶⁷ When individuals are unable to produce binding, enforceable commitments, dynamic development is in a severely inferior position.⁶⁸ The concept of freedom of contract promotes advancement by fostering specialisation and allows an extensive order to progress.⁶⁹ Postrel emphasises the remarkable significance of well-functioning legal systems when strangers get involved in commercial and other situations. Furthermore, she explains that the objective of freedom of contract is not to motivate legal suits but to resolve or evade them.⁷⁰ This author agrees with Postrel to a certain agree, that is this author supports Postrel's view of the relative ability of each idea to endorse human flourishing in the real world since a more politically related categorisation is accomplished by outlining how individuals and groups view the future.

The UN Convention 1980 includes an express recognition of the fundamental principle of freedom of contract in the international sale of goods. The rule of contractual freedom is found in Article 6 which states that parties entering a contract ‘may exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions.’⁷¹ The party autonomy principle is vital to the philosophy

⁶⁶V Postrel, *The Future and Its Enemies: The Growing Conflict Over Creativity, Enterprise, and Progress* (1st edn, Touchstone 1999)

⁶⁷E W Younkins, *Capitalism and Commerce: Conceptual Foundations of Free Enterprise* (Lexington Books 2002) 67

⁶⁸Ibid

⁶⁹Ibid

⁷⁰Ibid

⁷¹CISG Article 6: ‘The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.’

adopted in CISG and highlights the institutional egalitarianism between purchasers and vendors of different Contracting States that it endeavours to establish in its text.⁷²

As alleged, the CISG expressly offers the contracting States parties the right of excluding its application.⁷³ On the other hand, however, the CISG fails to concentrate on the issue of whether the party may apply the Convention when it would otherwise not apply,⁷⁴ that is, where the requisites for its application are not met.⁷⁵

2.3.1 The business world in the UK (and elsewhere) moves much more rapidly than law

Even though globalisation is already upon us in numerous ways, the concept of globalisation is about the future and has only just begun. One should not overlook that law emerges through the different social, political and economic needs. Throughout the past several decades globalisation has had an impact on several, if not all areas of law to a great extent. The first substantial handling of law and globalisation⁷⁶ employed Bourdieu's idea of social fields to illustrate how new transnational and global economic and political developments and political movements altered the role of lawyers, the rationality of legal practices, and the character of the legal field.⁷⁷ Domestic legal fields became more 'internationalised' in two senses. First, legal and political fields which had formerly been predominantly national in terms of background assumptions, actors and orientation were gradually more affected by 'external' factors.⁷⁸ Second, 'domestic' decisions were formed, conditioned, or even actually created elsewhere as transnational legal systems made a way into domestic legal fields.⁷⁹ These alterations improved the status and role of actors with international associations and proficiency, as well as the influence of particular States relative to others. The various social, political and economic trends

⁷² Ibid

⁷³ Ibid

⁷⁴ B Audit, *La vente internationale de marchandises* (Transnational Juris 1990) 40

⁷⁵ M J Bonell, *Introduction to the Convention, in commentary on the international sales law, the vienna sales convention* (Guiffre 1987) 63-64

⁷⁶ D M Trubek, Y Dezelay, R Buchanan and J R Davis, 'Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas' (1994) 44 Case W Res L Rev 407-498

⁷⁷ P Bourdieu 'The force of law: Toward a sociology of the juridical field' (1987) 38 Hastings L J 814-853

⁷⁸ Ibid

⁷⁹ Ibid

shape the law accordingly, therefore the law is required to adapt and allow to be shaped by the evolution of globalisation.

Relatively recent research raises the issue of ‘de-nationalisation’ of much of contemporary rule-making through the legislative process.⁸⁰ It also raises the question of the relationship of ‘international’ rules to ‘domestic’ rules in conditions in which the two are so interconnected that it is no longer feasible to distinguish that one set of rules are international and another set are domestic.⁸¹ Several so-called ‘national’ rules have in effect been ‘de-nationalised’, since their basis, content, rationality and even elucidation or use originates or is influenced by international, transnational or intergovernmental institutions, dispute resolution processes and rules.⁸² This should not be perceived as a matter of extra-territoriality, but instead of the extent to which the rules of regional organizations such as the European Union⁸³ are based on or influenced by ‘international’ rules, including the CISG and the WTO international trade rules or the outcomes of international dispute settlement practices.⁸⁴ Strictly speaking, the sources of ‘international’ and ‘national’ rules are not the same, one should not neglect the different legal systems, and this difference has its legal doctrinal significance in each of the two institutional and normative settings.⁸⁵ Nevertheless, the customary distinction between ‘national’ and ‘international’, or between ‘domestic’ and ‘foreign’, frequently does not sufficiently portray the social practices, cultural understandings, legal content, economic assumptions, and political origins.⁸⁶ There is however, a theory which departs from the orthodox distinction between national and international, the theory of global administrative law.⁸⁷ As an alternative to precisely separating the levels of regulation

⁸⁰ S Sassen, ‘Opening remarks: Producing the transnational inside the national’ in M Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (London: Butterworths LexisNexis, 2002) 189-196

⁸¹ Ibid

⁸² Ibid

⁸³ For instance several States have reformed their domestic laws regarding the sale of goods according to the EU Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12)

⁸⁴ S Troiano, ‘The CISG’s impact on EU Legislation’ <<http://cisgw3.law.pace.edu/cisg/biblio/troiano.pdf>> accessed 7 July 2011

⁸⁵ D M Trubek, Y Dezelay, R Buchanan and J R Davis, ‘Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas’ (1994) 44 Case W Res L Rev 407-498

⁸⁶ Ibid

⁸⁷ B Kingsbury, N Krisch and R B Steward, ‘The Emergence of Global Administrative Law’ (2005) 68 Law & Contemp. Probs. 15

(private, local, national, inter-State), an accumulation of different layers and different actors together shape a variegated ‘global administrative space’ that comprises of transnational networks and international institutions, as well as national administrative associations that function within international administrations or cause trans boundary regulatory effects.⁸⁸ The concept of a ‘global administrative space’ symbolises the shift from those traditional perceptions of international law in which the international is mainly inter-governmental, and there is a rationally sharp separation of the domestic and the international.⁸⁹ In the exercise of global governance, transnational networks of rule-makers, analysts and appliers cause such stern barriers to break down.⁹⁰ Hence, as the business world moves much more rapidly than law the UK should also consider employing the evolving theory of global administrative law in conjunction with the CISG so as to reach the best possible outcome for UK business transactions.

Moreover, it is worth mentioning that certain legal areas have always been more internationalised than others. For instance, fields of law most closely associated with multinational companies, international trade and, such as international business contracts⁹¹ (which can be concluded on CISG terms) have been affected more than family law and property law. Despite the negative effect globalization might have on States’ legal identity, it is rather clear that the internationalised sector has a tendency to grow, regardless of national and local diversity.⁹² Thus, in the face of developments a UK ratification of the CISG could be regarded as a necessity.

Globalization is unstoppable. Even though it may be only in its early stages, it is already intrinsic to the world economy. We have to live with it, recognize its advantages and learn to manage it. That imperative applies to governments, who would be unwise to attempt to stem the tide

⁸⁸ C Brown and K Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 148

⁸⁹ S Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2205) 37 N Y U J Int'l L & Pol 663

⁹⁰ C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 EJIL 190-191; See also M S Barr and G P Miller, ‘Global Administrative Law: The View from Basel’ (2006) 17 EJIL 15-46

⁹¹ M J Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (3rd edn, Martinus Nijhoff Publishers 2009) 68, 256, 355

⁹² L M Friedman, ‘Erewhon: The coming global legal order’ (2001) 37 Stan J Int'l L 347-364

for reasons of political expediency. It also goes for companies of all sizes, who must now compete on global markets and learn to adjust their strategies accordingly, seizing the opportunities that globalisation offers.⁹³

The business world moves much more rapidly than law, and it is not hard to visualise entrepreneurs in two non-Contracting countries wanting to employ the CISG in order to facilitate their negotiations.⁹⁴ ‘Frequently, haggling over a business contract results in the application of the law of some neutral country, whether or not either party has any understanding of that country's law.’⁹⁵ This is certainly less desirable than utilising the UN Convention 1980 as a compromise selection of law. Employing the UN Convention as a compromise selection of law would be more desirable as it would both augment party autonomy, and boost the uniformity of legal rules.⁹⁶ Furthermore, while traditionalists might shake at the prospect of permitting parties to choose non-national law to rule their contract, modern selection of law principles should agree for the choice of a convention constructed particularly for this sort of transaction.⁹⁷

Moreover, English trade law has a good repute of being considerate to the commerce concerns of the parties, pragmatic and useful.⁹⁸ Furthermore, the proficiency of the Judges in the Commercial Court and the approach in which disputes are resolute is supreme. One has to state that, if the CISG is to be adopted, it will provide the courts

⁹³ M L Cattaui, ‘The global economy - an opportunity to be seized in Business World’(1997) ICC <<http://www.iccwbo.org/html/globalec.htm>> accessed 6 July 2009

⁹⁴ K Bell, ‘ The Sphere of Application of the Vienna Convention on Contracts fro the International Sale of Goods’ (1996) <<http://www.cisg.law.pace.edu/cisg/biblio/bell.html>> accessed 27 May 2010

⁹⁵ B B Crawford,’Drafting Considerations Under the 1980 U.N. Convention on Contracts for the International Sale of Goods’, (1988) 8 J L & Com 189

⁹⁶ C Davies, ‘Arthur Marwick’ (1980) 1 JLA <[https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+\(1980\)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiwVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyigjZ&sig=AHIEtbTBXPkhIH_Hath1tWjlS5A8PBkkIw](https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+(1980)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiwVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyigjZ&sig=AHIEtbTBXPkhIH_Hath1tWjlS5A8PBkkIw)> accessed 6 February 2012

⁹⁷ C R Reitz, *The uniform commercial code and the convention on contracts for the international sale of goods, in negotiating and structuring international commercial agreements* (Shelley P Batram & David N Goldswieg, 1990) 12

⁹⁸ A E Williams, ‘Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom’ (2001) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 10 July 2009

the chance to present their clients an even broader variety of services; if the Convention is positively recognised by English legal society, it can be expected that the English Courts can proceed by making a noteworthy input to elucidation of the Convention.⁹⁹ In addition, sustained use of the CISG will cultivate accepting of its provisions and responsiveness of the methods in which it can lessen the complications inflicted by the conflict of domestic laws.¹⁰⁰ In the author's opinion, the rise in competition for work in the region of adjudication creates a more essential need to ensure that the UK is capable to offer its customers complete assortment of services that they can get elsewhere; in addition to the colossal and exceptional advantages of UK law and the superiority of its judges and mediators that they can get nowhere else.¹⁰¹ The exceptionality of judges and arbitrators in England is evident from the fact that numerous foreign parties prefer to have their disagreements determined by the Court even though their case essentially does not associate with the UK at all.¹⁰²

2.3.2 Bottom up approach: Currently the Affected Parties in the UK Govern the Agenda; Not the Legislature

The UK current approach in regards to the CISG adopts, to a certain extent, the bottom-up approach, whereby practitioners and traders are playing the principal role rather than the State's legislators. The practicing lawyers prepare, interpret and put into practice rules in accordance to their expertise on the subject. At the outset, these rules are not formal, but in due course they can be incorporated into law. The exact opposite of the bottom-up approach is the top-down approach where a country's legislators implement rules that regulate the practices and performance of those who are subject to the rules.¹⁰³ The top-down approach is the approach that this thesis' models adopt. Taking into account the fact that the UK has yet to adopt the UN Convention 1980, possibly the bottom-up approach does not function towards a more up to date international practice; perhaps it is time to take into consideration the top-

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ H J Berman and C Kaufman, 'The Law of International Commercial Transactions' (1978) 19 Harv Int L J 221

down approach.¹⁰⁴ Nevertheless, the author will briefly analyse the bottom-up approach so as to provide the reader a clear idea of the UK current approach.

Stories that achieve academic and popular traction are of a common type, they usually focus on an intergovernmental institution generated from a treaty¹⁰⁵ or on a State's treaty-based commitments. They open with envoys at grand negotiating tables, secluded in isolated yet immaculate locations, bickering civilly over the text of a treaty. The peaks are a treaty-signing ceremony, the founding of a new institution, or photo-opportunity events. The denouement is the 'trickle-down', the unavoidably deficient business of transnational practice or translating international law into domestic. The top-down approach requires governmental intervention which is what the UK current approach is struggling to avoid.¹⁰⁶

This long-established, top-down international legislative story tells of State actors creating international law and enforcing it on others who may have been rather isolated, geographically and politically, from the whole lawmaking method. In the meantime, out of the glare of publicity, alternative international lawmaking stories are unfolding. The current situation introduces one such tale, the bottom-up approach.¹⁰⁷ Bottom-up lawmaking stories do not feature a country's policymakers but rather the very practitioners who ought to roll up their sleeves and struggle with the day-to-day

¹⁰⁴ K Georgiadou, 'Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) Pace Int'l L Rev <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>> accessed 9 January 2012

¹⁰⁵ In this the term 'treaty' is employed as defined in the Vienna Convention on the Law of Treaties, May 23, 1969, Art 2, 1155 U N T.S 331, 333 ('Treaty' means an international agreement concluded between States in written form and governed by international law.)

¹⁰⁶ J K Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments'<<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010; K Georgiadou, 'Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) Pace Int'l L Rev <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>> accessed 9 January 2012

¹⁰⁷ R A Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights' (1992) 59 U Chi L Rev 433-434; J K Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 July 2009; K Georgiadou, 'Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) Pace Int'l L Rev <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>> accessed 9 January 2012

mechanics of their trade.¹⁰⁸ Furthermore, another approach which may describe the current situation is the global administrative law theory.¹⁰⁹ Pursuant to this theory the global administrative space is gradually engaged by transnational private regulators, hybrid bodies such as public private partnerships including countries or inter-State organisations, national public regulators whose activities have external effects but may not be regulated by the central executive authority, informal inter-State bodies with no treaty basis and formal inter-State institutions (such as those of the United Nations and therefore the CISG) influencing third parties via administrative-type arrangements.¹¹⁰

These practitioners create, construe, and impose their rules on the basis of their experiences on the ground. Over the passage of time, these rules that are initially informal flourish into law that is just as genuine and just as effective, if not more effective, as the treaties that commence the top-down processes.¹¹¹ In other words, under the long-established top-down approach, State's influential ratify rules that rule the practices and performance of those who are subject to the rules.¹¹² Whereas, under the bottom-up approach, the practices and performance of several actors inform and compose the rules, which, in turn, rule the practices and performance of those very same actors. The significance of the bottom-up approach is how the casual, practice-based rules become law.¹¹³

¹⁰⁸ Ibid

¹⁰⁹ B Kingsbury, N Krisch and R B Steward, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp. Probs. 15

¹¹⁰ S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 N Y U J Int'l L & Pol 663; C Brown and K Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 148; C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 187-214 and M S Barr and G P Miller, 'Global Administrative Law: The View from Basel' (2006) 17 EJIL 15-46

¹¹¹ R A Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights' (1992) 59 U Chi L Rev 433-434; J K Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 July 2009; K Georgiadou, 'Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) Pace Int'l L Rev <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>> accessed 9 January 2012

¹¹² Ibid

¹¹³ Ibid

In a way the bottom-up approach is also closely linked to the medieval Lex Mercatoria.¹¹⁴ The notion of Lex Mercatoria has not emerged in recent years but dates back to the Middle Ages.¹¹⁵ The medieval Lex Mercatoria governed the so called merchants, in other words people involved in trade in special places such as fairs, seaports and markets and was very different from local, feudal, royal, and ecclesiastical law.¹¹⁶ This was a law, a set of rules, which traders themselves established.¹¹⁷

The free-trade approach is similar to the medieval Lex Mercatoria in so many ways; first of all it may be transnational.¹¹⁸ Lex Mercatoria's foundation had a common origin and a loyal reflection of the mercantile traditions.¹¹⁹ Most importantly, it was not controlled by practiced judges but by traders themselves, it was developed and advanced by mercantile businesses and the particular jurisdiction of the trade courts,¹²⁰ commerce practice and the courts of the grand markets and fairs. Furthermore, its trials were quick and informal and finally, it underlined decision of cases *ex aequo et bono* and freedom of contract.¹²¹ Consequently, it perfectly mirrored the need to encourage trade based upon freedom and identified the ability of the traders to standardise their own affairs through their habits, their practices, and their usages.¹²²

The central part of the analysis presented below is the ordinary pattern that each lawmaking procedure follows, which what we have labels 'bottom-up approach'.¹²³ The approach commences with a comparatively small, uniform lawmaking group, reminiscent of a private alliance, which either launches or appropriates an institutional home.¹²⁴ This group generates substantive rules, which are basically organic norms

¹¹⁴ O Volckart and A Mangelst, 'Are the Roots of the Modern Lex Mercatoria Really Medieval?' (1999) 65 Southern Econ J 427

¹¹⁵ Ibid

¹¹⁶ H J Berman and C Kaufman, 'The Law of International Commercial Transactions' (1978) 19 Harv Int L J 221, 225

¹¹⁷ Ibid

¹¹⁸ A Metzger, 'Transnational Law for Transnational Communities: The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities.'(2012) 3 JIPITEC 365

¹¹⁹ Ibid

¹²⁰ In England, these were the so called pie powder and staple courts.

¹²¹ Trakman, *The Law Merchant: The Evolution of Commercial Law*, (Wm S Hein Publishing 1983) 8

¹²² Ibid

¹²³ P S Berman, 'The Globalization of Jurisdiction', (2002) 151 U Pa L Rev 311, 534

¹²⁴ J K Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 July 2009

originating from the practices of practicing lawyers. Moreover, the lawmaking group institutes procedural and remedial rules that concurrently insulate the substantive rules and sustain their elasticity and proximity to actual group practice.¹²⁵ The unofficial, practice-based rules eventually establish themselves in a more official legal system and develop into law.¹²⁶ Essentially, a bottom-up approach is a soft, non-choreographed method that creates hard legal results.

It is not astonishing that top-down international lawmaking governs international legal erudition.¹²⁷ The legal realists hit on international law's credentials as a lawful, isolated discipline activated a retaliation by academics showcasing those international lawmaking tales that appeared and worked most like 'genuine law'¹²⁸. In response to this attack, official international law, specifically the treaty and institutions generated from treaties obtained the disproportionate awareness of international lawyers and legal academics.¹²⁹ Since the bottom-up approach originates from unofficial, impulsive, un-choreographed developments and soft, practice-based rules, it is unappealing fodder to those fending off the legal realists.¹³⁰ As a result, bottom-up approach is being left largely unnoticed as an alternative route to law. The bottom-up approach is fundamentally a tale of practitioners efficiently and successfully

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ A D'Amato, 'Evolution of International Law: Two Thresholds, Maybe a Third' NWUPL <www.aaai.org/ocs/index.php/FSS/FSS09/paper/download/988/1230> accessed 3 March 2010

¹²⁸ F A Boyle, 'The Irrelevance of International Law: The Schism Between International Law and International Politics' (1980) 10 Cal W Int'l J 193, 198 ('[i]nternational law is devoid of any intrinsic significance within the calculus of international political *decision-making*'); S Hoffmann, 'The Role of International Organizations: Limits and Possibilities' (1956) 10 Int'l Org 357, 364, H J Morgenthau, *Politics among nations: the struggle for power and peace* (5th ed, 1978); F A Boyle, *World politics and international law* (Duke University Press 1985);

See generally J D Greenberg, 'Does Power Trump Law?' (2003) 55 Stan L Rev 1789

¹²⁹ A perusal of the tables of contents from the last decade of the *American Journal of International Law*, the *Yale Journal of International Law*, the *Virginia Journal of International Law*, and the *Harvard International Law Journal* reveals that articles on formal treaties, the intergovernmental institutions that treaties constitute, and the incorporation of treaties into U.S. law dominate scholarly discourse. This trend was confirmed at the 2004 Annual Meeting of the American Society of International Law: of twenty-nine panels, eighteen focused on some international treaty regime, including the institutions to which the treaty gave birth; three focused on the incorporation of treaties and other international agreements into U.S. domestic law; and three focused on quintessentially comparative topics. The American Society of International Law, *Mapping New Boundaries: Shifting Norms in International Law*, 98th Annual Meeting Program (Mar 31-Apr 3, 2004), Washington, D C.

¹³⁰ J K Levit, 'A Bottom-Up Approach to International Law making: The Tale of Three Trade Finance Instruments' <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010

controlling their dealings through the establishment and enforcement of their own rules.¹³¹

2.3.3 Opting into and out of CISG -Validation of Hypothesis

This section validates the hypothesis of the thesis which states that it would be more beneficial for the UK to proceed with the transformation of the CISG into the UK legal order than resist such transformation, as it did to date. Based on the form of the thesis statement, the validation strategy is to consider the benefits of transforming the CISG into the UK legal order through two possible legislative models. Transformation of the CISG would provide significant benefits to UK exporters and importers of goods. Parties negotiating international sales contracts often find the ‘choice of law’ to be amongst the most contentious. Each party is familiar with its own domestic sales law, and prefers that its local rules apply to the transaction. A widely acceptable and accepted uniform and generally understood set of rules avoids all of those problems. The CISG attempts to eliminate obstacles by putting into place internationally accepted rules on which contracting parties, courts and arbitrations may rely.¹³² Therefore, the validation of the hypothesis is being carried out by employing general arguments through analysing the economic and political considerations about the potential of such a transformation.

The UN Convention, much to its credit one might say, is an up to date and flexible law that respects and encourages the freedom of parties to contractually opt in its provisions including the choice to opt out and choose the application of an utterly diverse body of law.¹³³ It is the author’s belief that once UK practitioners and traders will be confronted with the choice between national law and the CISG, they will still generally elect, without any hesitation and with little consideration, to employ the familiar and trusted Sale of Goods Act 1979.¹³⁴ While the lack of consideration may

¹³¹ Ibid

¹³² L F Del Duca and P Del Duca, ‘Practice Under the Convention on International Sale of Goods (CISG) A Primer for Attorneys and International Traders’ (1995) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>> accessed 11 July 2009

¹³³ CISG Article 6, (‘The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.’)

¹³⁴ V Susanne Cook, ‘ CISG: From the perspective of a practitioner’ (1998) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/cook.html>> accessed 5 July 2009

be erroneous, the conclusion may well be suitable in many occasions. On the other hand, while there are a number of reasons for evading the application of CISG, there are indeed instances and situations that would make it rather appropriate to opt into CISG.¹³⁵ To be precise on the *raison d'être* for each choice, it would be appropriate to review, from the point of view of the UK trader, the relative economical and political considerations through the free-trade approach.

2.3.3.1 Economic and Political considerations for the UK traders

One may agree that the adoption of this globally-accepted international Convention can only progress the sale ability of English law and the English Courts abroad.¹³⁶ It is well-recognised that the success of the English Commercial Court is such that several foreign parties prefer to have their disputes resolved by the Court although their case actually has no connection with the UK at all.¹³⁷

The free-trade approach offers the trader the facility to standardise its chosen position on selection of law. As CISG presents a neutral law choice, counter parties might agree more willingly upon it as a 'level playing field'. In turn, this diminishes negotiation delays and costs.¹³⁸ Moreover, by employing the free-trade approach none of the parties are required to familiarise themselves with ancillary laws and foreign domestic sales, conclusion of the contract will then be cheaper and quicker.¹³⁹ With the passage of time, nevertheless, the true benefit is possibly to be in diminished compliance costs. As standardisation of a trader's suite of contracts can currently occur with other options of law, in a trading zone that is progressively more pro-

As a result, most reported cases have arisen under CISG merely because the parties, or their counsel, failed to consider the application of CISG and arrived at litigating under CISG by default only.

¹³⁵ L F Del Duca and P Del Duca, 'Practice Under the Convention on International Sale of Goods (CISG) A Primer for Attorneys and International Traders' (1995) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>> accessed 11 July 2009

¹³⁶ B Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (1993) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>> accessed 7 July 2009

¹³⁷ Ibid

¹³⁸ J Lookofsky 'Online with Al K' in Camilla Baasch Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of His Eightieth Birthday* (2008) 287, 291;Corinne Widmer and Pascal Hachem, 'Switzerland' in Franco Ferrari (eds), *The CISG and Its Impact on National Legal Systems* (2008) 281, 281, 286

¹³⁹ C B Andersen and U G Schroeter *Sharing International Commercial Law across National Boundaries: Festschrift for A H Kritzer on the Occasion of His Eightieth Birthday* (Simmonds & Hill Publishing 2008) 287, 291

CISG, practitioners suggesting a preference for the CISG whenever suitable should increase the proportion of contracts under a single law for each trader. As a result this will maximise the benefits of reduced vagueness in performance obligations and compliance costs.¹⁴⁰

English commercial law has a good reputation of being sensitive to the business concerns of the parties, pragmatic and efficient.¹⁴¹ Furthermore, the expertise of the Judges in the Commercial Court and the approach in which disputes are resolved has worldwide recognition. If the CISG is to be adopted it will give the courts the chance to present their clients an even broader range of services; if the CISG is positively perceived by the English legal community, it can be expected that the English Courts can go ahead to make a significant contribution to elucidation of the CISG. Further, continued application of the CISG will cultivate understanding of its provisions and responsiveness of the ways in which it can lessen the problems caused by the conflict of national laws.¹⁴² In the author's opinion, the increase in competition for work in the region of arbitration creates a more essential need to ensure that the UK is capable to offer its customers full range of services that they can get elsewhere; in addition to the colossal and unique benefits of UK's law and the excellence of its judges and arbitrators that they can get nowhere else.¹⁴³ The superiority of judges and arbitrators in England is evident from the fact that many foreign parties prefer to have their disputes resolved by the Court even though their case actually does not associate with the UK at all.¹⁴⁴

Reverting to substantive law matter, the duties of the buyer and seller under the CISG remain broadly similar to English law.¹⁴⁵ However, a number of central UK legal concepts have been omitted in the CISG, including the traditional reliance on damages as the primary remedy, and the distinction between conditions and

¹⁴⁰ Ibid

¹⁴¹ A E Williams, 'Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom' (2001) Pace Int'l L

<<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>>
accessed 10 July 2009

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ CISG Article 35 compared to SoGa 1979 Article 35

warranties.¹⁴⁶ The differences between the CISG and English law are due to two core factors.¹⁴⁷ First, the civil law was a great influence on the CISG which has led to the incorporation of a number of new remedies.¹⁴⁸ Second, the CISG has been specifically designed for international sales.¹⁴⁹ Therefore, the provisions of the Convention have taken into consideration the actuality that in several international sales, goods may well have been transported over thousands of miles, and it would be problematic if they were then discarded.¹⁵⁰ It is suggested that the CISG can be adopted in combination with UK forum clauses. In other words, in this thesis we can have a model whereby British traders can choose the operation of the CISG by way of statute (the so called in this thesis ‘parallel model’ or alternatively the other model forwarded in this analysis, the ‘à la carte model’, which amalgamates the Sale of Goods Act 1979 with provisions of the CISG) by adjudicating matters in UK courts. The high regard which English courts enjoy abroad should make it fairly simple to agree upon this in the majority of cases, as long as the cost of resolving potential disputes in the UK is not too high.¹⁵¹ The foreign party will have the assurance of being able to rely on a neutral law; the English party will have the advantage of being able to take legal action on home territory; and in turn the UK will attract more business.

In addition, if English law is selected to govern those areas of the contract which are excluded from the CISG and the English courts are preferred as the forum for any disputes, the English courts will in all possibility continue to uphold the fundamental principle of certainty. And, as far as documentary sales are concerned, commercial court judges will have a strong incentive to identify trade terms such as FOB and CIF as prevailing contradictory provisions of the CISG.¹⁵² This will allay yet another concern of those who have remained sceptical. An issue raised by those who are in favour of the CISG is that once ratification has been finalised, the UK courts will be

¹⁴⁶ Law Reform Commission of Hong Kong Report, Sale of Goods and Supply of Services (Law Reform Com, 1990) <www.hkreform.gov.hk/en/docs/rservices-e.doc> accessed 15 July 2009

¹⁴⁷ A E Williams, ‘Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom’ (2001) Pace Int’l L

<<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 10 July 2009

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Ibid

able to have a say on the jurisprudence of the CISG and offer valuable case precedents to which courts in other countries may have regard.¹⁵³

Moreover, it is worth mentioning that traders are going to gain a lot from ratification of the Convention, as it is effectively on their behalf that the attempts at harmonisation have been undertaken this century.¹⁵⁴ One might say that those who may gain most from the accession of the CISG are small traders.¹⁵⁵ That is due to the fact that such traders have too little bargaining power to impose their own choice of law.¹⁵⁶ Furthermore, the Convention will evade the costs and obstacles of working within an unfamiliar legal system and at the same time, the accessibility of the CISG as a neutral law will open up many potential markets, such as those in Eastern Europe, for English traders.

Generally, the CISG seems to have achieved its goals since it is a well-drafted law that reflects what the parties expect from an international sales transaction.¹⁵⁷ The reason for this is that the delegates that were involved in the negotiation and creation of the CISG represented a combination of different legal traditions and countries including representatives from civil law, common law, third world countries and socialist. Each representative aimed at endorsing a harmonised law that was similar to their national legal tradition and as a result the final text of the CISG reflects an often hard won compromise connecting these diverse legal traditions. What is more significant is that practitioners around the world interpret the CISG as a good law which does not overtly or covertly favour either side of a transaction. Thus, it promotes honorable and fair solutions.¹⁵⁸ That is probably due to the fact that when the CISG was drafted it included elements representing all legal systems and

¹⁵³ Ibid

¹⁵⁴ S E Nikolova, 'UK's Ratification of the CISG – An Old Debate or a New Hope for the Economy of the UK on Its Way Out of the Recession: The Potential Impact of the CISG on the UK's SME' (2012) Pace Int'l L <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1027&context=pilronline>> accessed 2 March 2012

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ J Felemezas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/felemezas.html>> accessed 12 July 2009

¹⁵⁸ T Keily, 'How does the cookie crumble?' July 2003 Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/keily2.html>> accessed 10 July 2009

economic stages of development around the world.¹⁵⁹ The greatest example however of the CISG's success is that the major and influential trading nations, such as the North American countries, including the United States, Canada and most European States are parties to the CISG.¹⁶⁰

Adopting the CISG gives the contracting parties the advantage of a widely accepted and understood text. The UN Convention 1980 does not seek to deprive parties of the freedom of contract; its provisions merely act as a gap filler governing the parties' rights and obligations where the contract is silent on these issues. There are, as already mentioned, considerable differences between the contract law of individual countries and a common core has to be found. A genuine attempt is made by the CISG so as to eliminate obstacles to cross-border contracts.

2.3.4 The response of large and influential organisations

Why has the UK not ratified the CISG yet? 'The short answer is that Ministers do not see the ratification of the Convention as a legislative priority.'¹⁶¹ Ratification of the Convention requires legislation and the CISG must wait in the queue for its turn along with the UK government's many other legislative priorities.¹⁶²

At this point a question arises, why do UK politicians not consider the Convention as a priority? It seems that there is not much interest in the country to ratify the CISG and it is rather obvious that other issues have priority in the Parliamentary sessions so far. For instance, about every six months a letter is given to Ministers asking about ratification, most of the times from the same person, asking why the UK has failed yet to ratify the CISG and when it is planning to do so.¹⁶³ This, however, does not illustrate that the fact that the UK has not ratified the CISG is having an adverse effect on the British economy. If it caused any problem the Ministers would be alarmed and

¹⁵⁹Ibid

¹⁶⁰CISG: Participating Countries <<http://cisgw3.law.pace.edu/cisg/countries/cntries.html>> accessed 12 July 2009

¹⁶¹S Moss, 'Why the UK has not ratified the CISG' (2005-06) JLC 483-48

¹⁶²R Bradgate, *Commercial Law* (3rd edn Butterworts 2000) 727-728

¹⁶³S Moss, 'Why the UK has not ratified the CISG' (2005-06) JLC 483-485

probably take actions towards ratifying the CISG. Instead the usual answer is that the UK will ratify the CISG if and when Parliamentary program allows.¹⁶⁴

In addition, formal consultations took place to decide whether the UK should ratify the CISG or not.¹⁶⁵ However, none of the consultations can be said to have revealed any strong desire for the UK to ratify. The first consultation was held in 1989, 1,500 documents were issued but only 55 responded; 28 in favour, 27 opposed and 10 neutral.¹⁶⁶ The second consultation was held in 1997, 450 documents were issued and to a great disappointment only 36 replied; 26 in favour, 7 against and 3 neutral. Clearly, this was barely a ringing approval for accession.¹⁶⁷

Considering the technical nature of the subject and its rather uncontroversial nature, one might say that the low level of responses should not have been a surprise. However, what stood out and was really unexpected from the few responses the documents received is that some large and influential organisations opposed to ratification. In the 1989 consultation, this list included the Commercial Courts Committee, Shell, British Petroleum (oil company) (BP), and the Confederation of British Industry (CBI).¹⁶⁸ In the 1997 consultations, the organisations which opposed ratification included the Law Society of England and Wales, the Commercial Bar Association and BP.¹⁶⁹

The organisations that replied in favour included: British Airways, British Telecom, British Gas and the Law Commission of England and Wales.¹⁷⁰ What came as a great revelation is that some organisations that were originally in 1989 in favour of accession seemed to have had a change of mind by 1997.¹⁷¹ Hence, as it is evident

¹⁶⁴ Ibid

¹⁶⁵ Department of Trade and Industry (UK), United Nations Convention of International Sale of Goods: a consultative document (London: Department of Trade and Industry, 1989) and Department of Trade and Industry (UK), United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): a consultation document (London: Department of Trade and Industry, 1997)

¹⁶⁶ S Moss, ‘Why the UK has not ratified the CISG’ (2005-06) JLC 483

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Ibid

from the examples provided, it is not surprising that the UK politicians do not see ratifying the CISG as their main priority.¹⁷²

One may suggest that another possible factor negatively influencing the UK from ratifying the Convention is that surprisingly very large and dominant organisations opposed ratification. Two examples of such organisations are the Commercial Bar Association and the Law Society of England and Wales.¹⁷³ If these two major organisations whose operations are directly linked to the CISG, due to its legal commercial nature, fail to see the significance of the Convention, then any effort to apply the CISG will face several obstacles.¹⁷⁴

Moreover, after the second consultation in 1997, a draft bill was drawn, however the bill failed to take effect.¹⁷⁵ The reason provided for walking out of this decision was that the Peer who was going to introduce it as a private Member's Bill fell seriously ill. Ever since, any other proceedings made towards accession remained unfinished, basically due to lack of interest.¹⁷⁶ Forwarding the clock a few years later, in 2004, after realising that taking the primary legislation route would be very difficult as during that particular time the Parliament was very busy, it was decided to turn to other methods of ratifying the Convention.¹⁷⁷

The alternative method was the use of a Regulatory Reform Order (RRO).¹⁷⁸ In order, however, for the RRO route to be followed in legislation a burden must always be either reduced or completely removed.¹⁷⁹ The legal advice given was that the alterations introduced by implementing the CISG would fail to qualify as removal of a burden or a reduction under the tests enclosed in the Regulatory Reform Act.¹⁸⁰ What

¹⁷² Ibid

¹⁷³ Ibid at 484

¹⁷⁴ Ibid

¹⁷⁵ Department of Trade and Industry (UK), United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), position paper (London: Department of Trade and Industry, February 1999).

¹⁷⁶ S Moss, 'Why the UK has not ratified the CISG' (2005-06) JLC 484

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Ibid

¹⁸⁰ Ibid

is more, an RRO would only take effect to England and Wales which meant that the CISG would have to be implemented separately in Scotland and Northern Ireland.¹⁸¹

Therefore, the RRO route was rejected. So once again the idea of ratifying via primary legislation was on the table again. Two meetings were held, the first for members of the business community and the second for academics and arbitrators. At the meeting held for the business community, the overall view was why try to fix something if it is not broken. A very cynical point of view, the author would say, as it is more sensible to prevent something from breaking instead of waiting until after the worst occurs to take action.¹⁸²

Nonetheless, at this meeting, arguments put forward opposing implementation included:

- Disputes would arise due to implementation.
- London would be in danger of losing its edge in international litigation and arbitration. That is, an increase in the uniformity of international trade law rules would possibly offer more opportunities for arbitration of international trade disputes in forums outside long-established centres such as London.¹⁸³
- The CISG would be good news for lawyers but bad news for clients.¹⁸⁴
- The meeting held for academics and arbitrators was generally more positive. The arguments included:
 - If the Convention is not adopted, it may adversely affect London as a forum for arbitration and litigation.¹⁸⁵
 - From a political perspective, the United Kingdom reflects a negative image as being a reluctant participant in international trade law initiatives. This is

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ J Douglas, ‘Arbitration of International Sale of Goods Disputes under the Vienna Convention’ (2006)

<[http://docs.google.com/viewer?a=v&q=cache:6ufTEPY9gDQJ:archive.sclqld.org.au/judgepub/2007/douglas270506.pdf+Department+of+Trade+and+Industry+\(UK\)](http://docs.google.com/viewer?a=v&q=cache:6ufTEPY9gDQJ:archive.sclqld.org.au/judgepub/2007/douglas270506.pdf+Department+of+Trade+and+Industry+(UK))

accessed 17 November 2010

¹⁸⁴ S Moss, ‘Why the UK has not ratified the CISG’ (2005-06) JLC 485

¹⁸⁵ Ibid

especially true considering that the overwhelming majority of the trading nations have implemented the CISG.¹⁸⁶

- Still, if the Convention is not adopted, UK corporations will not be able to ignore it completely. In situations where a UK company deals with a foreign company which has adopted the CISG, they may well press for the Convention to apply.¹⁸⁷

Even though both meetings were useful once again the element of lack of interest was evident as they were poorly attended, and a genuine representative view from those affected by the CISG had not been received.¹⁸⁸

Finally, it should be emphasised that if the business community really wishes the UK to employ the convention, such a desire should be made clear to the government. One might say that now is the most appropriate time for the business community to take actions towards the CISG. That is due to the fact that, when the meeting for the business community was held in 2004, British economy was relatively healthy, thus there was nothing to fix, as it was mentioned in the meeting.¹⁸⁹ After October 2008, however, business in the UK is experiencing a financial crisis, it is suffering, and hence it seems unlikely that the UK can forever remain aloof from the Convention as the number of State parties to it grows.¹⁹⁰ So if the UK business community is interested in joining the CISG, the onus is now on the business to acknowledge those feelings to the government as robustly as possible. As Lord Justice Steyn predicted in an Oxford lecture in 1991: ‘...If the United Kingdom does not ratify the convention now, commercial realities will compel ratification later.’¹⁹¹

2.4 Positioning of UK Law vis-à-vis International Law Incorporation in the UK Legal Order

The next thing to be argued is the process by which international law is incorporated into the municipal law of a sovereign State. The primary objective of this section is to

¹⁸⁶ Ibid

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Sir J Steyn, ‘The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?’ (Law Lecture at the Royal Bank of Scotland, 1991)

¹⁹¹ Ibid

examine the controversy of the doctrine of incorporation and the doctrine of transformation theories of international law.¹⁹² The theoretical account of this matter aims at providing the implementing legislator, as well as the reader, answer as to how these two proposed models could become part of the UK's domestic law. A State incorporates a convention or a treaty by passing domestic legislation that gives effect to the convention/ treaty in the domestic legal order.¹⁹³ However, whether incorporation is required rests on a State's municipal law. Certain States adopt a monist approach where conventions and treaties become law without incorporation, if their provisions are considered judged adequately self-explanatory.¹⁹⁴ On the other end of the scale are the dualist countries which necessitate all conventions and treaties to be incorporated before they can have any domestic legal effects.¹⁹⁵ For an appropriate answer to the issues described above, the author considers to be essential to outline and analyse the doctrine of incorporation and transformation through leading arguments of these schools, and on these grounds to take a final statement in concluding paragraph of this section.

The United Kingdom's approach in regards of customary international law is based on the 'doctrine of incorporation'.¹⁹⁶ According to the 'doctrine of incorporation' international law is automatically incorporated in municipal law. The 'doctrine of incorporation' goes back in time, since the case of *Buvot v Barbuit* (1736)¹⁹⁷ in which Lord Talbot remarkably stated that 'the law of nations, in its full extent, was part of the law of England.' Furthermore, in the case of *West Rand Central Gold Mining Co v R* [1905]¹⁹⁸, the court's decision found that a customary rule can only be applied where it was agreed to by the United Kingdom and reasonable and suitable evidence

¹⁹² K Lipstein, *Principles of The Conflict of Laws: National and International* (Martinus Nijhoff Publishers 1981) 63-66

¹⁹³ D J B Svantesson, 'The Relation between Public International Law and Private International Law in the Internet Context' (Australasian Law Teachers Association Conference, Hamilton New Zealand, July 2005)

¹⁹⁴ Both monist and dualist approach will be analysed in the à la carte model chapter. B Marian, 'The Dualist and Monist Theories. International Law's Comprehension of these Theories' <http://revcurrentjur.ro/arkiva/attachments_200712/recjurid071_22F.pdf> accessed 5 May 2011

¹⁹⁵ Ibid

¹⁹⁶ R O Keefe, 'The Doctrine of Incorporation Revisited' (2008) Oxford J <<http://bybil.oxfordjournals.org/content/79/1/7.full.pdf>> accessed 5 May 2011

¹⁹⁷ *Buvot v Barbuit* (1736) 3 Burr1481

¹⁹⁸ *West Rand Central Gold Mining Co v R* [1905] 2 KB 391

had been established that ‘it can hardly be supposed that any civilised State would repudiate [the rule]’.¹⁹⁹

Another significant case in regards to the doctrine of incorporation is the case of *Chung Chi Cheung v R* [1939]²⁰⁰ in which Lord Atkin had made a remarkable statement:

The court acknowledges the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.²⁰¹

Therefore, there were two qualifications formulated in regards of the application of the doctrine of incorporation. In order for a customary rule to be part of English law, it must not be inconsistent with the statutes or with prior judicial decisions of final authority. In addition to this, the ‘doctrine of incorporation’ is the leading practice of the English courts in regards of customary international law.²⁰² Moreover, it should be stated that the incorporation doctrine is not the same as practiced in the 18th century.

The doctrine of incorporation can be characterised as the leading principle employed by the UK as regards the application of customary international law which is based on the monistic approach.²⁰³ This doctrine illustrates that a specific rule of international law will become part of municipal law without an express adoption. Therefore, it is problematical on how to covenant with inconsistencies between international and municipal law. According to the doctrine of incorporation, customary international law will automatically become part of the legal system. In the case of *Trendtex Trading Corp v Central Bank of Nigeria* [1977]²⁰⁴ there was an issue raised of

¹⁹⁹ Ibid

²⁰⁰ *Chung Chi Cheung v R* [1939] AC 160 (PC)

²⁰¹ Ibid

²⁰² R O Keefe, ‘The Doctrine of Incorporation Revisited’ (2008) Oxford J <<http://bybil.oxfordjournals.org/content/79/1/7.full.pdf>> accessed 5 May 2011

²⁰³ Ibid

²⁰⁴ *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, CA

whether the customary rule which was recognised by British courts was frozen by the doctrine of precedent and was deemed to alter international custom. The majority of the court took the view that ‘English courts must at a given time discover what the prevailing international law rule is and apply that rule’. The facts of the case find the Bank of Nigeria claiming to be an immune from the jurisdiction of the court under the principle of sovereign immunity. Moreover, Brownlie²⁰⁵ believes that one of the main principles in Britain’s law is that customary international law can be considered to be part of British law as long as there is no conflict with any Act of Parliament or judicial decision.

2.4.1 The doctrine of transformation in the UK

The difference between the doctrine of transformation and the doctrine of incorporation is that the doctrine of transformation requires an intentional Act on the part of the State concerned, whereas the doctrine of incorporation asks that international law is automatically adopted. The doctrine of transformation was seen in the case of *R v Keyn (The Franconia)* (1876)²⁰⁶ in which a German vessel collided and managed to sink an English vessel which was 3 miles away from the English coast. The court held that it lacked jurisdiction since there was not sufficient evidence that 3-mile limit had established the rule of customary international law. Besides, if there is a conflict between international law and British statute as in the case of *Mortensen v Peters* (1906)²⁰⁷, the statute will be enforced. In the particular case, Mortensen who was the Danish Master of the Norwegian ship was convicted by a Scottish Court. The reason behind this was that the otter trawling in the Moray Firth was contrary under the Herring Fishery (Scotland) Act 1889.

2.4.2 The UK approach towards Treaties/Conventions

In addition, a convention or treaty will not be part of the British national law, unless the treaty is specially incorporated by a legislative measure. As a consequence, a convention/treaty does not automatically become part of English law. In order for this

²⁰⁵ I. Brownlie, *Principles of Public International Law* (5th edition, Clarendon Press 1998) Ch 2

²⁰⁶ *R v Keyn (The Franconia)* (1876) 3 Ex D 63

²⁰⁷ *Mortensen v Peters* (1906) 8 F (J) 93

to happen, the Parliament needs to pass an Act in order for the treaty to be part of UK domestic law. Consequently, if a treaty gets transformed by statute into UK law, it will have full legal effect. Usually, this is done by an ‘enabling Act’ which consists of a ‘schedule’ containing the provisions of the convention or treaty. Therefore, the ‘doctrine of transformation’ can be regarded as an action required by the Parliament in the parliament’s attempt to domesticate international law. In order to be specific, treaties which (1) involve any alteration of the common or statute law; or (2) affect the rights and obligations of British subjects definitely require an enabling Act of Parliament in order to be effective in the United Kingdom.²⁰⁸

According to the doctrine of incorporation, international law is part of UK public law automatically; it does not require the involvement of a constitutional ratification process.²⁰⁹ Under the transformation doctrine any rule of international law is required to be altered, or specifically implemented so as to be valid within the UK’s legal order.²¹⁰

*It is, thus, rather clear that the à la carte model or parallel model would have to be deployed in the UK legal order under the doctrine of transformation.*²¹¹ Both models require a legislative interference in order for them to be implemented in the UK legal order. In addition, the models will adjust the CISG to the UK needs in order for the UK to implement it just as the doctrine of transformation entails.²¹²

2.5 What we could have in the UK: Thesis Models

The author suggests that the CISG may be applied in the UK legal order in two different ways:

1. À la carte model

²⁰⁸ E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ These models will be introduced further in the analysis

²¹² E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

The CISG is an ‘à la carte’ Convention; provisions may be selected from the CISG in the same way we choose a meal from a restaurant’s menu. In other words, the UK traders could apply only some of the Convention Articles when a contract is concluded; contracts should not comply with all the CISG provisions.

Fundamental breach -- OK, but strange; Nachfrist -- we don’t understand it, we never heard of it, but we like it; Price reduction -- we don’t understand it, and we don’t like it; specific performance -- we hope your courts will not resort to it as much as they may.²¹³

In his quote Farnsworth was referring to the American common law approach in the application of the CISG comparing it with the continental approach. Since the UK falls under common law systems as well it is strongly advisable to create a CISG Act by choosing the Articles which can be implemented in the UK legal order and by ignoring the rest which may be ‘non-suitable’ or ‘non-comprehensible’. However, it is significant to mention that pursuant to Unfair Contract Terms Act 1977 section 6, ss 12-15 of the Sales of Goods Act 1979 are mandatory and therefore, cannot be ignored or replaced by CISG Articles. The à la carte model may be implemented through three sub-models:

1. à la carte model by either omitting part II of the CISG
2. à la carte model by either omitting part III of the CISG
3. à la carte model by taking advantage of EU directive experience.

2. Parallel model

The CISG may exist parallel to the Sales of Goods Act 1979; parties wishing to enter into an international transaction may conclude a contract either on CISG terms or under the Sales of Goods Act 1979. In this model a CISG Act will be required. This stands for the Parallel model and may be the simplest to put in practice. The full abolition of the Sale of Goods Act 1979 is highly unlikely to happen. Thus, the Parallel model will satisfy both the traders who wish to employ modern law (as compared to the initial Sale of Goods Act 1893) especially

²¹³ A E von Overbeck presidency, Wiener Übereinkommen von 1980, Colloquium Lausanne 19/20 November 184, Zurich: Schulthess (1985) 105

designed for international contracts and those who are rather conservative and prefer to employ the old and familiar Sale of Goods Act 1979.

What we could have mainly depends on three factors:

- The proposed legislative transposition of the CISG in the UK legal order that will designate a specific path that may be followed.
- The effectiveness of these proposed two models, their social ontology, the nature of their social and political reality.
- And more significantly, United Kingdom's eagerness for progress and development in the legal, economic and political field.

Both proposed models are generated for the purpose of ordering and making our view of reality less complicated while still representing their fundamental characteristics. For instance the first model, the à la carte model is based on the powerful presumption that the UK will not in the near future entirely abolish the Sale of Goods Act 1979. Therefore, the author drafted the three sub-models in such a way so as to maintain part of the Sale of Goods Act 1979. The author sought to retain the mandatory provisions (ss 12-15) of the Sale of Goods Act 1979 in order to maintain a balance between the old and familiar Act and the relatively new Convention. In other words, the models were drafted in such a way so that the Sale of Goods Act 1979 will be given a certain priority. *However, it is worth mentioning that if the UK chooses to transform the CISG through sub-model I of the à la carte model, it would very possibly mean that the CISG's Part III inclusion would interfere with sections of the Sale of Goods Act 1979, even with the mandatory sections.²¹⁴* This model would require a legislative add-on to the Sale of Goods Act 1979.

The analysis will now briefly turn to the second model. Instead of criticising traders for their reluctance to depart from their old and familiar Sale of Goods Act 1979, it is more sensible to argue in relation to one of the most brilliant virtues of the CISG, freedom of contract.²¹⁵ In other words, the trader is being offered the right to choose when a contract is being formed whether to employ the CISG or the Sale of Goods

²¹⁴ Sale of Goods Act 1979 ss 12-15, See also Unfair Contract Terms Act 1977 s 6

²¹⁵ CISG Article 6

Act 1979. Nevertheless, whilst the author is of the view that the CISG will prove beneficial for the UK, it is only rational for one to be able to respect the country's fear towards the new. This model would come in the form of a separate legislative Act parallel to the Sale of Goods Act 1979.

2.5.1 Differences and similarities between the CISG and the Sale of Goods Act 1979

Before analysing in depth the differences and similarities of the CISG and the Sale of Goods Act 1979, a comparative chart will display a sample of their differences and similarities:

<u>Differences</u>	<u>Similarities</u>
Description of Goods	Quality and Fitness Obligations
Termination of Contract	Documentary Obligation
Breaches of Time	
Curing Defective Performance	

In order to proceed with the first model, namely the à la carte model, it is vital to distinguish the differences and similarities of the CISG and the Sale of Goods Act 1979 as it is necessary to develop a general idea of what should be included and excluded in the `a la carte model.

Accepting the saying that the best is the enemy of the good is definitely required when participating in any area of uniform legal activity such as the CISG.²¹⁶ No country, whether of common law or civil law spirit, can be supposed to implement an instrument that does not involve at least some measure of departure from treasured legal traditions.²¹⁷ Part of this chapter will compare CISG provisions to the Sale of Goods Act 1979 by highlighting their differences and similarities. There is a natural tendency to compare the accepted and familiar provisions of the Sale of Goods Act

²¹⁶ M Bridge, 'A Law for International Sales' (2007) 37 HKLJ 17

²¹⁷ Ibid

1979²¹⁸ to the new provisions of the CISG.²¹⁹ This approach is sound when used as a point of reference for UK practitioners and merchants, but critiquing the CISG simply for being different from the Sale of Goods Act 1979 status quo will not further the debate, since difference, in itself, is not negative. Occasionally different may be better, or it may be purely an evenly good alternative solution in an imperfect world.

The sales statute that can accommodate with ease and parity the variety of types of goods and the transactions in which they are purchased and sold has not yet been drafted and may never be.²²⁰ Neither the CISG nor the Sale of Goods Act 1979 is adequately protean to embrace in such strength the contradictory values of different sales environments.²²¹ The fact that they both accord an extensive degree of freedom to the contracting parties to depart from the presumptive rules of performance that they enclose, which indicates some reining in of ambition is not accidental.²²² However, that does not imply that the starting-points of the Sale of Goods Act 1979 and the CISG are the same. The Sale of Goods Act 1979 makes it relatively easy to terminate contracts.²²³ On the other hand the CISG is a sales instrument that makes it difficult to terminate (or avoid, in the language of the CISG itself) a contract.²²⁴

²¹⁸ The original Sale of Goods Act 1893 was an attempt to codify much of the common law on sale contracts. The Act, therefore, was shaped by the fact that the case law on sales was mainly concerned with the purpose of consumption. By the late twentieth century there was recognition that the principles derived from such contracts might not serve the needs of consumers. Thus, the 1979 redraft occurred.

²¹⁹ Generally, English-speaking countries adhere to the ‘Common Law’ system, which derives its origin from England. The rest of the world adheres, in one form or another, to the ‘Civil Law’ approach, which seeks continuity and guidance from generally worded ‘codes’ and general principles. For a brief overview concerning the relationship between CISG and the ‘Common Law’ and ‘Civil Law’ legal systems, see B B Crawford, ‘Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods’, (1988) 8 J L & Com 187; L F Del Duca & P Del Duca, ‘Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)’, (1996) 29 UCC LJ 99; M Stocks, ‘Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510’, (1993) 87 NW UL Rev 1415; P Winship, ‘Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners’, (1995) 29 Int'l Law, 525.

²²⁰ For the difficulties in subjecting all domestic sales transactions, commercial and consumer, to the same sales law, see M Bridge, ‘Do We Need a New Sale of Goods Act?’ in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths LexisNexis 2006) 15-47

²²¹ M Bridge, ‘A Law for International Sales’(2007) 37 HKLJ 17

²²² Ibid

²²³ Ss 13-15 and S 11(2). See *Jackson v Rotax Motor & Cycle Co* [1910] 2 KB 937. This is because so many of the implied terms are contractual conditions that give rise to termination rights whenever they are breached, regardless of the factual consequences of the breach.

²²⁴ CISG Article 25

2.5.1.1 Quality and Fitness Obligations

The CISG and the Sale of Goods Act 1979 have a lot in common. They both provide an outstanding place to fitness for purpose²²⁵ to emphasise the quality of the goods that the seller must deliver in the absence of any other express quality standard in the contract.²²⁶ It is a matter of fact that CISG's language follows very closely the language of the Sale of Goods Act 1979.²²⁷ Furthermore, both instruments lack any express guarantee against hidden defects, a characteristic feature of civil law.²²⁸

However, the CISG and the Sale of Goods Act 1979 differ in two places in this area. First, the CISG records the vendor's express obligations regarding the quality and description of the goods,²²⁹ the latter not having the technical implication that it has under the Sale of Goods Act 1979. Unlike Article 2-313 of the American Uniform Commercial Code, the Sales of Goods Act 1979²³⁰ ignores express warranty obligations. Secondly, and more significantly, the CISG does not provide an implied term of satisfactory (or merchantable)²³¹ quality. Satisfactory quality is a very complicated concept to elucidate; it depends on a market place in which goods are sold to a variable standard.

2.5.1.2 Description

One may say that civil lawyers may be more attracted to the CISG, since it modernised a body of law that was much grounded in the historical traditions of Roman law.²³² A distinction that has appeared in the civil law in practice, is the distinction between the seller who delivers non-conforming goods (a *peius*, to use the Latin terminology) and the seller who delivers goods that are not of the contract kind

²²⁵ The Sale of Goods Act requires 'reasonable' fitness and the CISG just fitness. There is unlikely to be a real difference between the two standards: Art 7(1) of the CISG requires the Convention to be interpreted in accordance with good faith and the concept of reasonableness in English law commonly produces the same results as good faith and fair dealing.

²²⁶ Sale of Goods Act 1979, s 14(3); CISG Art 35(2)

²²⁷ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 20

²²⁸ For example, the French Civil Code, Art 1641

²²⁹ Article 35(1)

²³⁰ Its predecessor, the Uniform Sales Act 1906, also had a provision on express warranty (s 12).

²³¹ Sale of Goods Act 1979 s 14(2), as amended, 'merchantable' has been replaced by 'satisfactory'.

²³² M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 21

at all (an *aliud*) and hence has not delivered at all.²³³ The existence of this kind of distinction, however, is not tolerated by the CISG.²³⁴ It does not embrace the concept of description to single out goods that are different in nature or kind from those the seller was obliged to supply, despite the fact that it recites in Article 35 a duty on the seller to deliver goods that respond to their contractual description.²³⁵

Regarding the supply of something different, description does undeniably have that meaning in the modern law of sale under the Sale of Goods Act 1979.²³⁶ Nevertheless, a distinction between the supply of non-conforming goods and the supply of different goods is of little practical significance. Article 2 of the American Uniform Commercial Code minimises description so as to render it just an aspect of the seller's express warranty obligations.²³⁷ It is therefore an enigma why the concept of description still has a part to play in the Sale of Goods Act 1979. The CISG in comparison to the UK Sale of Goods Act 1979 provides a clearer and simpler sense of purpose in the areas of fitness for purpose, quality and description.²³⁸

Express terms play a more significant role in the CISG as in international sales implied terms of description, quality and fitness are likely to play only a background role. Having said that, the simpler and leaner characteristics of the CISG are suitable for contracting parties which operate across contractual frontiers.²³⁹ The rules in the Sale of Goods Act 1979 which are more complex and merely depend on an understanding of the historical background are not so suitable for this sort of transactions. Moreover, where express quality and analysis clauses intervene they play a very restricted part in international commodity sales. Concerning description,

²³³ On the distinction between the seller's delivery obligation and the guarantee against latent defects, see J Huet, *Les principaux contrats spéciaux* (2nd edn, LGDJ 2001) 11238 *et seq*

²³⁴ CISG Article 35

²³⁵ *Ibid*

²³⁶ *Reardon Smith Ltd v Yngvar Hansen Tangen (The Diana Prosperity)* [1976] 1 WLR 989.

²³⁷ Article 2-313(1)(b). The antecedent Uniform Sales Act 1906 had a provision on express warranty (s 12) broad enough to catch description but it also had a provision on the implied warranty of correspondence with description (s 14). The draftsman of that Act, Williston, had some difficulty in explaining why both provisions were needed: see S Williston, *The Law Governing Sales of Goods* (Baker Voorhis & Co Inc rev edn 1948) s 223a.

²³⁸ J M Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations on Contracts for the International Sale of Goods* (Kluwer Law International 2008) 81

²³⁹ B Zeller, 'Making the right choice of law: how the CISG can solve your problems. An intercontinental exchange of views' http://www.lawcouncil.asn.au/ILS/images/pdfs/2007_International_Australian-European_Lawyers_Conference - Making the right choice of law by Dr Bruno Zeller.pdf accessed 14 June 2014

for instance, matters, in contemporary times; it will be invoked to strike down an examination section given that an autonomous examiner's certificate of analysis and quality is binding on the parties.²⁴⁰ Examination sections of this kind play a priceless part in mitigating contractual performance and in pre-empting disputes. One may argue that the endurance of a body of law that compromises their effectiveness is not advantageous.

2.5.1.3 Termination of the Contract

The provisions laid down by the CISG and the Sale of Goods Act 1979 on termination of a contract for breach are rather different. The former, make it hard to avoid (that is, terminate) a contract and hence appear intended to avoid the economic waste that occurs when manufactured goods are rejected.²⁴¹ Whereas the latter, backed up by case law developments, appear as though they were designed with volatile markets in mind, thus the relative simplicity with which a contract may be terminated.²⁴² In accordance with Article 25 of the CISG, a contract can be avoided (terminated) for fundamental breach, which is defined as a foreseeable and substantial deprivation of a party's contractual expectation.²⁴³ Despite the fact that this is not identical to a substantial breach of contract, one may say that it falls short of the precise standard for a discharging breach established by intermediate stipulation authorities in English law.²⁴⁴ In case the purchaser is still able to use non-conforming goods supplied by the seller, as a rule of thumb, then under the Convention the breach will not amount as fundamental.²⁴⁵

If the UK adopted the CISG, there could arise some difficulty in implementing the CISG in conjunction with existing contract law. One of the dangers of uniform legislation, and the UK has a great deal of familiarity of this in the light of its membership of the European Community, lies in its incorporation with native legal

²⁴⁰ See *Vigers Bros v Sanderson Bros* [1901] 1 QB 608 (rejection clause did not apply to breaches of description).

²⁴¹ CISG Article 25

²⁴² Sale of Goods Act 1979 ss 13-15 and 11(2)

²⁴³ CISG Article 25

²⁴⁴ For example, *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26

²⁴⁵ See, eg, Bundesgerichtshof 3 April 1996 (Germany) (translated at <<http://cisgw3.law.pace.edu/cases/960403g1.html>>); Schweizerisches Bundesgericht 28 October 1998 (Switzerland) (CLOUT No 248)

structures and patterns of thought.²⁴⁶ The subject of validity is being excluded from the CISG's scope.²⁴⁷ The significance of this undefined expression is imprecise but it is quite capable of approving the rescission of contracts for misrepresentation. There is a consensus that other vitiating factors, largely recognised across a range of legal systems, like illegality, as well as mistake²⁴⁸ and duress, are excluded from the CISG. The complex issue arising from the meeting point of national law and the CISG concerns a misrepresentation with some inducing effect on the drafting of a contract of sale which also becomes a term of the contract.²⁴⁹ So far as avoidance under the CISG calls for a fundamental breach of that term, it is decidedly peculiar if that same contract could be rescinded under English law under the much less challenging test of an actionable misrepresentation.²⁵⁰ Even though different in concept, rescission and avoidance, both produce an escape from the contract. This is one of the relatively few seriously underprovided features of the CISG as the approach they have implemented has been unreasoned and mechanical.²⁵¹

2.5.1.4 Breaches of Time and Documentary Obligations

English law takes a harsh view of time obligations when dealing with international sales. The feature of this development is that it runs entirely against the grain of the Sale of Goods Act 1979, which established that the time of payment is presumptively not of the essence of the contract.²⁵² In offering better protection for the consumer, the Sale of Goods Act 1979 has shifted from the common principle of *caveat emptor*, by which it was for the consumer to make sure goods did not suffer from any defects, to another arrangement where the seller is required to make certain that goods do not suffer from particular types of defects, or that the consumer is made aware of such defects prior to the sale.²⁵³ As far as time obligations are concerned the CISG has adopted a somewhat different approach. To begin with, the CISG established a

²⁴⁶ A good example of this is the Commercial Agents Directive (86/653/EC), transposed by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No 3173) as amended.

²⁴⁷ A Newhouse and T Tsuneyoshi, 'CISG – A Tool for Globalization (1): American and Japanese Perspectives' <<http://www.ritsumei.ac.jp/acd/cg/law/lex/rhr29/AdamTanaka.pdf>> accessed 14 June 2014

²⁴⁸ There is a case for arguing that Article 79 on exemption from liability is capable of applying to initial impossibility (or mistake) as well as subsequent impossibility and frustration.

²⁴⁹ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 2

²⁵⁰ CISG Article 25

²⁵¹ CISG Article 49(1)

²⁵² Sale of Goods Act 1979 s 10(1)

²⁵³ Sale of Goods Act 1979 s 14(1)

certain right of avoidance reserved for time breaches, called *Nachfrist*.²⁵⁴ Through this device, the Convention enables buyers and sellers to stipulate an additional period of time of reasonable extent for the other to perform and, at the end of this time, to avoid the contract if performance is still unforthcoming.²⁵⁵ This is rather similar to making time of the essence at common law, the implementation of which idea is not clear-cut in sale of goods transactions. This may be seen as another route to contractual avoidance, different from fundamental breach.

It is evident in various ways that English law embraces documentary performance in a strict manner. The rules governing CIF performance and documentary compliance with letters of credit exist in parallel lines, in both cases; the standard of compliance is a harsh one.²⁵⁶ As for the CISG and its approach for documentary duties, it is a blank page. The Convention in this respect is not different from Sale of Goods Act 1979 itself, which is silent on the matter of the seller's documentary duties and the legal costs of a breach in relation to them. At least some reference to the duties themselves is being made by the CISG,²⁵⁷ while the UK Act does not offer any reference to them at all. Of course, the actual point is that there has been time to build up a prosperous body of case law on documentary duties under the Sales of Goods Act 1979.²⁵⁸ Even after approximately 30 years of its implementation, there is inadequate evidence in the case law of any distinct approach in the CISG to the sternness of the seller's documentary duties and the cost of non-conformity in the documents.²⁵⁹

2.5.1.5 Curing Defective Performance

Under the Sale of Goods Act 1979, there is no condition made for cure and there are daunting barriers to any attempts that might be developed through case law innovation. If the UK Act otherwise authorizes termination and rejection of the

²⁵⁴ CISG Articles 47 and 63. Article 47, is also known as *Nachfrist* and will be discussed in more detail later on.

²⁵⁵ Ibid

²⁵⁶ M Bijl, 'Fundamental Breach in Documentary Sales Contracts
The Doctrine of Strict Compliance with the Underlying Sales Contract
<<http://www.cisg.law.pace.edu/cisg/biblio/bijl.html>> accessed 15 June 2014

²⁵⁷ CISG Article 30

²⁵⁸ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 27

²⁵⁹ Ibid

goods,²⁶⁰ then any such novelty would fly in the face of the Act's language. Nonetheless, English law does unofficially recognise cure prior to delivery, in those circumstances where a formal offer has been made but has not been accepted by the purchaser.²⁶¹ Even though the CISG is more informative on the seller's documentary performance than the Sale of Goods Act 1979, while the Convention is sparing of detail, it does contain a specific rule entitling a seller to cure documentary non-conformity.²⁶² A seller who delivers documents earlier to the stipulated time may up to the fixed delivery time 'cure ... any lack of conformity in the documents'.²⁶³

2.5.1.5.1 Acceptance and Restitution

The benefit of discarding goods under the Sale of Goods 1979 is rather easily lost, particularly by the passage of time.²⁶⁴ Even though rejection of the goods and termination of the contract under the Sale of Goods Act 1979 are more likely to occur than avoidance under the CISG, the regulations leading the continuing accessibility of avoidance rights with the restitutive alterations that are required to be made are considerably more complicated.²⁶⁵ Foremost, under the Convention the right of avoidance is not time restrained. The UN Convention 1980 does not offer any provisions concerning affirmation and waiver, although strong arguments can indeed be advanced that principles of this nature can be inferred from the CISG as a whole, further to the provision that entails tribunals to fill gaps in the Convention with the assist of general principles supporting the Convention as a whole.²⁶⁶

2.5.1.5.2 Specific Performance, Price Reduction and Damages

²⁶⁰ Sale of Goods Act 1979 s 11(2)

²⁶¹ K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 15 June 2014

²⁶² Ibid

²⁶³ CISG Article 34

²⁶⁴ Sale of Goods Act 1979 s 35

²⁶⁵ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 32

²⁶⁶CISG Article 7(2)

Specific performance, price reduction and damages are the area of remedies that reveals the most significant differences between the Sale of Goods Act 1979 and the CISG. Foremost, under common law systems specific performance is a rare remedy in the sales of goods.²⁶⁷ The majority of items can be obtained in market conditions, sometimes subject to delay.²⁶⁸ This indicates that damages will infrequently be the insufficient remedy that grants a precondition to specific performance. Nonetheless, English courts can be criticised for being in the past too cautious in the award of specific performance.²⁶⁹ In the CISG, the civil law approach is apparent in the way that a seller or a purchaser, as the case may be, is able to require performance from a party that failed to pay.²⁷⁰ The philosophy of the CISG is, however, at disagreement with the common law even though commercial expediency will in many situations lead a seller or purchaser to search for an alternative source in order to obtain or dispose of goods, prior to carrying a damages claim against the other party.²⁷¹

2.5.1.5.3 Risk

Even though the CISG failed to offer a provision for the passing of property, it had to take a position on risk.²⁷² This is due to the fact that, although risk is occasionally thought of as being a property notion, is in fact a contractual one. Its intention is to settle on whether the purchaser must pay despite the seller's failure to supply undamaged goods or even to supply the goods at all.²⁷³ The significant point is the idea of the *transfer* of risk rather than plainly the idea of risk.²⁷⁴ The effect of the transfer of risk is that the seller in certain circumstances is excused from the responsibility of delivery and the responsibility to deliver conforming goods. On the other hand, the Sale of Goods Act 1979 offers a narrow opinion on the transfer of risk

²⁶⁷ N Boghossian, 'A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods' <<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>> accessed 16 June 2014

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ CISG Articles 46(1) and 62

²⁷¹ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 36

²⁷² CISG Articles 66-70

²⁷³ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 37

²⁷⁴ If the risk has passed to the buyer, the buyer has to pay and is not protected by the doctrine of frustration. If the risk remains on the seller, the seller may, depending on the circumstances, be protected by frustration.

and even the *presumptive* rules it lays down²⁷⁵ have no relevance in practice when it comes to Cost, Insurance, and Freight (CIF) and Free on Board (FOB) contracts.²⁷⁶

2.5.2 Mandatory rules of the CISG and the Sale of Goods Act 1979

The parties' freedom of contract is restricted by the so-called mandatory rules. In this respect there are some provisions from both the CISG and Sale of Goods Act 1979 which are mandatory. A rule is mandatory when parties cannot contract out from it when drafting a contract. The distinction between mandatory and non-mandatory rules is well recognised in the civil law countries.²⁷⁷ On the other hand, this distinction was in the past unknown in the common law. It has become known with the introduction of the Unfair Contract Terms Act 1977.²⁷⁸ Furthermore, if the question whether a statutory provision is mandatory or not is not established by the statute, then it is up to the court to decide the matter.²⁷⁹

2.5.2.1 CISG Mandatory rules

The UN Convention 1980 includes an express recognition of the fundamental principle of freedom of contract in the international sale of goods.²⁸⁰ The party autonomy principle is vital to the philosophy adopted in CISG and highlights the institutional egalitarianism between purchasers and vendors of different Contracting States that it endeavours to establish in its text.²⁸¹ The precise limitations of this principle are, however, sometimes complex to classify.²⁸²

²⁷⁵ Sale of Goods Act 1979, s 20

²⁷⁶ *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402; *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder (The Julia)* [1949] AC 283

²⁷⁷ These norms are referred to in French as *normes fixant leur propre domaine d'application* or *lois de police*, in German as *zwingende Vorschriften* or *Eingriffsnormen*.

²⁷⁸ Unfair Contract Terms Act 1977 s 6

²⁷⁹ O Lando, *Principles of European Contract Law* (Kluwer Law International 2003) 101

²⁸⁰ CISG Article 6

²⁸¹ *Ibid*

²⁸² M J Bonell, *Introduction to the Convention, in commentary on the international sales law, the vienna sales convention* (Guiffre 1987) 51-64

As a matter of fact during the preparation of the CISG not many States expressed doubts about the principle of the parties' autonomy as such. The only issue that was of concern was that economically stronger parties could abuse this principle by imposing their own contractual terms or national law which could be less balanced than those provided by the CISG.²⁸³

Article 6 of the CISG provides that:²⁸⁴

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 6 establishes Article 12 of the CISG as the sole provision in the Vienna Convention that parties are not allowed to derogate from. Hence, Article 12 is the only provision under the CISG which is clearly mandatory. By 'clearly mandatory' the author denotes that even though some observers have suggested that other

²⁸³ UNCITRAL yearbook I (1968-1970) 168, II (1971) 43-44, III (1972) 73

²⁸⁴ Article 6 CISG

provisions such as Articles 4²⁸⁵, 7²⁸⁶, 28²⁸⁷ and 89²⁸⁸ are also mandatory, it is agreed that none of these provisions restrict the parties' freedom of contract.²⁸⁹

The absence of restrictions should not come as a revelation as the UN Convention's scope is limited to transactions and matters which, within the diverse domestic laws, are traditionally ruled by provisions of a non-mandatory nature.²⁹⁰ Nonetheless, Article 4 of the CISG, which is sometimes implied to be a mandatory provision²⁹¹, will give potentially rise to confusion. Article 4 of the UN Convention 1980 provides that:²⁹²

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with:

²⁸⁵ C F M J Bonell, 'Article 6' in Cesare Massimo Bianca & Michael Joachim Bonell (eds), *Commentary on International Sales Law* (Giuffre 1987) no. 3.4: 'the prevailing view in UNCITRAL was in favour of the widest possible recognition of the parties' autonomy;' K Siehr, 'Artikel 6' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 1997) no. 1: the drafters of the CISG wanted to grant the parties a wide discretion in drafting their contract; *see also* Landgericht [Regional Court] Stendal, Germany, 12 October 2000, Internationales Handelsrecht 2001, at 32, where the court stated that CISG Art. 6 affirms the principle of party autonomy; for English translation of the text of this case, go to <<http://cisgw3.law.pace.edu/cases/001012g1.html>>

²⁸⁶ C F M J Bonell, 'Article 7' in Cesare Massimo Bianca & Michael Joachim Bonell (eds), *Commentary on International Sales Law* (Giuffre 1987) no. 3.3 : 'the prevailing view in UNCITRAL was in favour of the widest possible recognition of the parties' autonomy;' K Siehr, 'Artikel 6' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 1997) no. 1: the drafters of the CISG wanted to grant the parties a wide discretion in drafting their contract; *see also* Landgericht [Regional Court] Stendal, Germany, 12 October 2000, Internationales Handelsrecht 2001, at 32, where the court stated that CISG Art. 6 affirms the principle of party autonomy; for English translation of the text of this case, go to <<http://cisgw3.law.pace.edu/cases/001012g1.html>>

²⁸⁷ C F M J Bonell, 'Article 6' in Cesare Massimo Bianca & Michael Joachim Bonell (eds), *Commentary on International Sales Law* (Giuffre 1987) no. 3.4 : 'the prevailing view in UNCITRAL was in favour of the widest possible recognition of the parties' autonomy;' K Siehr, 'Artikel 6' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 1997) no. 1: the drafters of the CISG wanted to grant the parties a wide discretion in drafting their contract; *see also* Landgericht [Regional Court] Stendal, Germany, 12 October 2000, Internationales Handelsrecht 2001, at 32, where the court stated that CISG Art. 6 affirms the principle of party autonomy; for English translation of the text of this case, go to <<http://cisgw3.law.pace.edu/cases/001012g1.html>>

²⁸⁸ F Ferrari, Artikel 6 in Peter Schlechtriem (ed), *Kommentar zum Einheitlichen UN-Kaufrecht*, (3rd, Mohr Siebeck 2000) no. 9, with numerous references to international case law.

²⁸⁹ F Ferrari, Artikel 6 in Peter Schlechtriem (ed), *Kommentar zum Einheitlichen UN-Kaufrecht*, (3rd, Mohr Siebeck 2000) no. 11. Derogating from CISG Article 4 would make little sense, as it would lead to the Convention being applicable to questions of contractual validity and transfer of property on which it contains no rules.

²⁹⁰ C F M J Bonell, 'Article 6' in Cesare Massimo Bianca & Michael Joachim Bonell (eds), *Commentary on International Sales Law* (Giuffre 1987) no.2.1. Alfonso-Luis Calvo Caravaca, 'Articulo 6' in Luis Díez-Picazo y Ponce de León (ed), *La Compraventa Internacional de Mercaderías: Comentario de la Convención de Viena*, (1998) 93

²⁹¹ CISG Article 4

²⁹² Ibid

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) ...

The significance of the exclusion clause is that the contract's substantive validity as well as that of the individual contract usages and clauses, if not enclosed by the CISG, has to be established by the relevant domestic law.²⁹³ However, the issue which domestic law is more relevant to apply, has to be determined by the conflict of laws rules of that country, in our case the UK. It seems that Article 4 leaves plenty room for the application of mandatory provisions that deal with matters of validity.²⁹⁴ As the CISG fails to classify and thus limit the term 'validity', the à la carte model will leave it to the Sale of Goods Act 1979 to establish when a cause of invalidity occurs and its consequences.²⁹⁵

2.5.2.2 The Sale of Goods Act 1979 mandatory rules

The Sale of Goods Act 1979 takes a different approach on freedom of contract. According to statutory restriction included in the Unfair Contract Terms Act 1977 which limits the right of the parties to contract out of the Implied Terms (ss 12 - 15)²⁹⁶, the parties are able to agree on the terms of their contract.

The author when drafting the à la carte Act paid particular attention to the wording of the sections under the Sale of Goods Act 1979. For instance 'Unless otherwise agreed' occurs on several occasions.²⁹⁷ Furthermore, one also took into consideration the somewhat outmoded character of certain sections of the Sale of Goods Act 1979 which are not suitable in the modern commercial context, and thus avoid their inclusion in the à la carte Act.²⁹⁸

The introduction of the Unfair Contract Terms Act 1977 established a very clear limitation on the freedom of contract notion. Primarily, it deals with the terms as to quality; sample, title and description implied under ss 12-15 Sale of Goods Act

²⁹³ CISG Article 7(2)

²⁹⁴ H Eberstein, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* (Caemmerer Von E and P Schlechtriem 1990) 45-85

²⁹⁵ Ibid

²⁹⁶ Unfair Contract Terms Act 1977 s 6

²⁹⁷ For instance, Sale of Goods Act 1979 ss 32(2) and 32(3)

²⁹⁸ For instance Sale of Goods Act 1979 s 3

1979.²⁹⁹ It makes a distinction between the consumer transactions and non-consumer transactions, and generally speaking, it disables sellers to exclude or limit liability for breach of the implied terms as to title.³⁰⁰ Moreover, where the buyer is a consumer then this Act deems it impossible for a vendor to restrict or exclude the other implied terms just referred to.³⁰¹ According to the Unfair Contract Terms Act 1977, as the law in the UK stands currently, contracting out of the implied terms in ss 12 – 15 (Sale of Goods Act 1979) is not possible, thereby establishing ss 12-15 as mandatory.³⁰² However, one should not overlook the fact that if sub-model I (which excludes Part II CISG) were to be the chosen model for the UK, it would very likely mean that the CISG's Part III inclusion would interfere with sections of the Sale of Goods Act 1979 (amongst which would be such sections as ss 12-15 thereof).

2.5.3 CISG advantages: A brief exposition

When it comes to the parallel model, the sensible path to follow is to provide traders and the UK both the advantages and disadvantages of the CISG so as to give a broad idea of the reality and enable them form their own opinion as to what is more beneficial.

The CISG seeks to promote a set of uniform rules that would govern certain aspects of making and performing every day commercial contracts for the Sale of Goods.³⁰³ The Convention's objective was ‘to adopt legal rules which would contribute to the removal of legal barriers in international trade and promote international trade’³⁰⁴ and to establish a uniform law³⁰⁵ of international sales so as to complete the work started

²⁹⁹ Unfair Contract Terms Act 1977 s 6

³⁰⁰ Ibid

³⁰¹ Unfair Contract Terms Act 1977

³⁰² Unfair Contract Terms Act 1977 s 6

³⁰³ J P McMahon , ‘When the UN Convention on Sales Applies and Why It Matters to You and Your Clients’, (1996) Pace Int'l L

<<http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>>

accessed 2 July 2009

³⁰⁴ The Preamble of the United Nation Convention on International Sale of goods, <<http://www.cisg.law.pace.edu/cisg/text/preamble.html>>

accessed 2 July 2009

³⁰⁵ These rules were agreed in the shape of Uniform law on the international Sales of Goods (ULIS) with a separate Uniform law on the formation of the contract (ULIFS). See N Boghossian, ‘A Comparative Study of a Specific Performance Provisions in the UN Convention of the International Sale of Goods. Pace Review of the Convention on Contracts for the Goods, History of Negotiation’ <<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>>accessed 3 July 2009

by the Hague Convention 1964³⁰⁶, which was not successful in gaining widespread acceptance.³⁰⁷

Thus, the Convention established Article 7, one of the most significant and criticised articles of the CISG, in order to promote uniformity and good faith in its application in international trade.³⁰⁸ Uniformity is illustrated by the fact that the parties having their places of business in different States.³⁰⁹

The fact that the parties have places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by, the parties at any time before or at the conclusion of the contract.³¹⁰

The contractual obligations of each party are similar to those in English law, goods must be delivered according to the quantity and quality described in the contract.³¹¹ In addition, other provisions are similar to sections 14(3) and 15 Sale of Goods Act 1979. The remedies, however, available when a breach of contract occurs are different in some ways from those in English law. That is the buyer is able to avoid the contract in the event of a ‘fundamental breach’ of contract³¹² but also can demand replacement or repair of the goods delivered.³¹³ Moreover, the way damages are assessed are quite similar to those under the Sale of Goods Act 1979, thus the Convention provides for either party to recover damages.³¹⁴

Due to the fact that the UK has not yet ratified the CISG, the Convention does not apply to contracts governed by English law³¹⁵. It may, however apply to contracts involving UK traders where conflict of rules lead to the application of a contracting

³⁰⁶R G Lee, ‘The UN Convention on Contracts for the International Sale of Goods: OK for the UK?’ (1993) JBL 131-148

³⁰⁷R M Goode , *Commercial Law, The Vienna Convention on the International Sales of Goods*, (2nd edn, Penguin Books 1995) 962

³⁰⁸G Brandner, ‘Admissibility of Analogy in Gap-filling under the CISG’ (1999) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/brandner.html#intro>> accessed 5 July 2009

³⁰⁹CISG Article 1(2)

³¹⁰Ibid

³¹¹CISG Article 35(1), 35(2)(a)

³¹²CISG Article 49

³¹³CISG Article 46

³¹⁴CISG Article 74

³¹⁵R Bradgate, *Commercial Law*, (3rd edn, Butterworts 2000) 792-793

state rather than the law of England³¹⁶. There are so far four reported CISG cases involving UK traders.³¹⁷ Furthermore, even though the Convention does not provide a complete code for international sales, it is probably overstated that it would be necessary to resort to existing domestic law.³¹⁸ The bright line distinction between conditions and warranties in English law has been significantly weakened by the recognition of the intermediate category of ‘innominate’ terms and the introduction of limitations on the right to reject the goods for breach of condition in s 15A of the Sale of Goods Act.

The CISG has been a tremendous international success. Its main goals and objectives are to create a uniform body of international sales law with almost universal acceptance. And article 6 gives a broad contractual freedom, as once was said ‘Article 6 enables them to exclude the application of the Convention and to derogate from or vary the effect of any of its provisions’.³¹⁹ The fact that the economic powerhouse of China has its Foreign Economic Contracts Law of 1985 modeled after the Convention shows how much advantageous the CISG is. In addition, China’s domestic law is not the only one that has been affected by the CISG. The CISG has also had a positive impact on New Zealand domestic courts in the sense that New Zealand courts have found the contract interpretation method of the Convention very constructive.³²⁰ For instance Article 8(3)³²¹ of the CISG encourages the arbitral tribunal or the court to engage any surrounding circumstances, including the parties’ pre- and post- contractual conduct. In New Zealand, a shift regarding the application

³¹⁶ Ibid

³¹⁷ *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69; *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2005] EWHC 1565 (Ch); *Chartbrook Limited v Persimmon Homes Limited et al.* [2009] UKHL 38 and *Kingspan Environmental Limited, Tyrrell Tanks Ltd, Rom Plastics Limitd, and Titan Enviormental Ltd v Borealis A/S and Borealis UK Ltd* [2012] EWHC 1147

³¹⁸ Ibid

³¹⁹ S Dholakia, ‘Ratifying the CISG- India’s Options’<<http://www.cisg.law.pace.edu/cisg/biblio/dholakia.html>> accessed 5 July 2012

³²⁰ See for instance: *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523; *Thompson v Cameron HC Auckland* (27 Mar 2002) AP117/SW99; *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 and *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617, 627

³²¹ CISG Article 8(3): In determining the intent of a party or the understanding a reasonable person 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.*

of pre-and post-contractual conduct to contribute to contract interpretation has occurred. In the last few years judicial and scholarly writing has questioned the usual justification of why pre-contractual (and post-contractual) material is seen as not of the essence.³²² In *Vector Gas Ltd v Bay of Plenty Energy Ltd* Mc Grath J, sitting in New Zealand's Supreme Court, noted that 'over the past 40 years the common law has increasingly come to recognise that the meaning of a contractual text is clarified by the circumstances in which it was written and what they indicate about its purpose'³²³ The CISG influence is apparent here in regard to the issue of the degree to which pre- and post-contractual behaviour can be taken into account when interpreting a contract.³²⁴

2.5.4 Disadvantages of the CISG: A brief exposition

As far as the disadvantages are concerned, critics dealing with the CISG have said that in case the UK joins the Convention, it may lead to uncertainty.³²⁵ It may be necessary to turn to rules of domestic law which might not match those of the Convention in order to resolve questions dealing with the passing of property and the validity of a contract. It is also said that the English law provisions may prove to be more certain than the corresponding provisions of the Convention when applied. In particular, it is argued, the fundamental breach test which determined when a party is entitled to terminate the contract is less certain in its application than the bright line rule produced by the classification of terms into conditions and warranties. In addition and more significantly the way the convention deals with contracts differs with the common forms of international sale contracts, such as Cost, Insurance, and

³²²Compare D McLauchlan, 'Contract Interpretation: What Is It About?' (2009) Sydney Law <http://sydney.edu.au/law/slrl/slrl31/slrl31_1/McLauchlan.pdf> accessed 3 March 2012; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [72](SC) per McGrath J

³²³[2010] 2 NZLR 444 [77] (SC)

³²⁴It has to be noted that McGrath J dismissed the idea that prior negotiations could form part of the factual matrix.

³²⁵A E Williams, 'Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom' <<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 5 March 2012

Freight (CIF) and Free on Board (FOB).³²⁶ The application of CIF and FOB completely distinguishes the division responsibility between the vendor and the purchaser in relation to their mutual rights and duties, especially, the execution of the sale contract.³²⁷

According to the editors of Benjamin's Sale of Goods:

It is often vague or open textured terminology would, if it were to displace the present relatively settled English judge-made rules governing contracts on such terms, be a source of considerable (and regrettable) uncertainty.³²⁸

There is some force in this statement as well as others like the one of Barry Nicholas also illustrates a certain degree of exaggeration 'would not therefore achieve one of the main objectives of the uniform laws.'³²⁹

2.5.4.1 The parole evidence rule

A major obstacle in relation to the incorporation of the CISG in the UK legal order would be the fact that it lacks some of the fundamental common law concepts such as consideration, Statute of Frauds and the parole evidence rule.³³⁰ The non-existence of such concepts in the Convention's text has presented UK courts with some challenges as to how to deal with parties' arguments based on these concepts.

The parole evidence rule essentially states that any parole (oral or any other extrinsic) evidence cannot be allowed to alter, contradict or explain the terms of a written contract.³³¹ In interpreting an integrated and unambiguous contract, a court may thus

³²⁶ R Bradgate, *Commercial Law* (3rd edn, Butterworts 2000) 792-793

³²⁷ Incoterms 2010

³²⁸ *Ibid*

³²⁹ B Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (1993) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>> accessed 7 July 2009

³³⁰ M Kilian 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 J Transnat'l L and Policy 230

³³¹ G H Treitel, *The Law of Contract* (9th edn, Sweet & Maxwell 1995) 176-177

not take into account evidence of the parties intentions regarding the contract, or evidence of prior or contemporary agreements among the parties. On the other hand, Article 8(3) of the CISG, in association with Article 8(1), grants that when it comes to interpreting a party's statements and conduct '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.' It has always been a rather common perception among scholars that Article 8(3) of the CISG overrules any domestic parole evidence rule.³³² Nonetheless, it has become evident in two United States cases that the Convention's position in relation to the parole evidence rule causes a problem for common law courts.

In *Beijing Metals & Minerals v American Business Centre Inc* 1992³³³, the Court of Appeals for the Fifth Circuit, without resolving the choice of law question, asserted that the parole evidence rule would apply in spite of whether the CISG or Texan law governed the dispute. Thus, the testimony about oral terms under the state's parole evidence rule was excluded.³³⁴ A Federal District Court, six years following the latter case, simply ignored Article 8(3) of the CISG in *MCC-Marble Ceramic Center Inc v Ceramica Nuova D'Agostino SpA*, even though the parties to this case settled that the CISG ruled their dispute.³³⁵

Both judgments reveal a significant degree of ignorance and unwillingness to deal with the CISG more closely. In their haste to reach the safe harbour of domestic law, the Courts failed to even make an attempt to construe the Convention in an approach that would reach a result consistent with the parole evidence rule. It therefore might be said that such 'homesick' courts, as they may be characterised, pose a threat to the unification goal of the CISG.

2.5.4.2 Consideration under the CISG

³³² J O Honnold, *Uniform Law For International Sales* (3rd edn, Kluwer Law International 1999) 121; A H Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law and Taxation Publishers 1989) 125; J H Dalhuisen *Dalhuisen, International Commercial, Financial and Trade Law* (Hart Publishing 2000) 262-3

³³³ *Beijing Metals & Minerals v American Business Centre Inc* (1993) 993 F 2d 1178 (5th Cir)

³³⁴ *Ibid* 1182-83

³³⁵ *MCC-Marble Ceramic Centre Inc v Ceramica Nuova D'Agostino SpA* (1998) 114 F 3d 1384 (11th Cir) Kehoe J

As far as the relation between the CISG and the common law doctrine of ‘consideration’ is concerned, the Convention and the Sale of Goods Act 1979 do not agree. The Convention’s approach towards consideration is illustrated by Article 29(1) of the CISG, whereby ‘[a] contract may be modified or terminated by the mere agreement of the parties.’

Based on the Secretariat Commentary, the closest counterpart to an official commentary, this provision was intended to ‘eliminate’ and ‘overrule’ the common law consideration requirement.³³⁶ This fundamental objective was recognised in *Shuttle Packaging Systems LLC v Jacob Tsonakis*. Here the court did not accept the defendants’ argument that a complementary agreement between the parties was not effective due to lack of consideration. Moreover, the court referred to Article 29 of the CISG and held that “under the Convention, a contract for the sale of goods may be modified without consideration for the modification.”³³⁷

In *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc*, however, the District Court of New York a different approach to consideration under the Convention.³³⁸ In this case a Canadian manufacturer of chemicals provided the plaintiff United States company with sample of a chemical ingredient and arranged to support the company’s request for approval by the Food and Drug Administration (FDA) as the supplier of the ingredient for the production of the drug. Following the approval the plaintiff put forward a purchase order, which the Canadian firm failed to accept due to obligations under another contract. The Canadian defendant, amid other things, alleged that consideration was lacking as a question of validity. With no closer assessment of the Convention’s position towards consideration, the Court found that ‘[u]nder the CISG, the validity of an alleged contract is decided under domestic law, CISG Art 4(a)’ and regarded consideration as a validity matter to be governed by

³³⁶ Secretariat Commentary on Article 27 of the 1978 draft (draft counterpart of Article 29) paras 2.3 <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html>> accessed 20 July 2009

³³⁷ *Shuttle Packaging Systems, LLC v Jacob Tsonakis, INA SA and INA Plastics Corporation* (17 December 2001) 1:01-CV-691 (WD Mich SD)

³³⁸ *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* (2002) 201 F Supp 2d 236 (SD NY)

internal domestic law. The Court then discussed and permitted consideration under New Jersey law.

This case demonstrates what has been criticised as the ‘black hole’ function of Article 4 of the CISG.³³⁹ Article 4(a) of the CISG grants that unless otherwise expressly provided, the Convention has nothing to do with the validity of the contract. As anticipated by a number of scholars the very rationale for excluding issues of validity from the CISG, the differing and strongly felt national traditions, have seduced judges into too eagerly identifying issues of validity in an argument in order to be able to return to national law solutions, turning Article 4(a) of the CISG into a ‘black hole’ for formerly non-validity questions.³⁴⁰

2.5.4.3 The Reliance on CISG Precedents

Kilian alleges that ‘the unwillingness of common law judges to apply the CISG is due to the lack of precedents among common law jurisdictions applying CISG, simply because common law judges want to get their precedents in first’.³⁴¹ For instance, United States judges, have in fact repeatedly lamented that ‘there is virtually no case law under the Convention’³⁴² or ‘little to no case law on the CISG in general’.³⁴³ This is merely due to the fact that there is great reluctance on behalf of common law courts to refer to scholarly opinion. However, as the following will show, this aspect does not pose a significant threat to the further development of common law case law.

2.5.4.4 Courts' reluctant reference to scholars

The case of *MCC-Marble* has been characterised as ‘remarkable’ merely due to the fact that the Court of Appeal referred to and relied on scholarly studies for support of

³³⁹ P Winship ‘Commentary on Professor Kastely’s Rhetorical Analysis’ (1987-88) 8 NWJILB 623, 636

³⁴⁰ Ibid 637; J O Honnold, *Uniform Law For International Sales* (3rd edn, Kluwer Law International 1999) 283, paras 204.2-204.4

³⁴¹ M Kilian ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 J Transnat'l L and Policy 233

³⁴² *Delchi Carrier SpA v Rotororex Corp* (1995) 71 F 3d 1024, 1027-28 (2nd Cir)

³⁴³ *Helen Kaminski v Marketing Australia Products* (1997) No 96B46519 (SD NY)

its decision.³⁴⁴ Moreover, it has been noted that this is ‘a civil law rather than a common law practice.’³⁴⁵ It is undeniably a fact that judges in the United Kingdom and the United States have been mostly reluctant to have recourse to scholarly writing.³⁴⁶ This reluctance is indeed a great obstacle in implementing the CISG. Taking into account that common law courts tend to rely on precedents to a much greater degree than civil law courts and the lack of precedent case law given, a general reluctance to consider scholarly authority adds to the complicatedness of construing the Convention and achieving reliable judgments in CISG cases for common law courts.

However, as Ferrari and Honnold have observed, reference to scholarly writing has become more and more familiar in common law countries, especially in interpreting international conventions such as the CISG.³⁴⁷ The case of *Usinor Industeel v Leeco Steel Products* in the United States, for instance, Judge Lindberg, after noting that ‘federal case law interpreting and applying the CISG is scant’ did not hesitate to discuss and refer to the scholarly writings of Honnold and other academics to settle on whether Article 4(b) of the CISG was applicable in this particular case.³⁴⁸ In New Zealand, Robert Fisher has stressed the benefit of reference to academic authorities: ‘Legal academics are more likely than Judges and practitioners to study, work, and read internationally and across disciplines. They specialise in ways that can sometimes be difficult for general practitioners and Judges to emulate. ...’³⁴⁹ In fact, an empirical study by Smyth has illustrated that the New Zealand Court of Appeal frequently cites academic authorities in its judgments, though not as regularly as Australian or United States courts.³⁵⁰

2.5.5 Methodology

³⁴⁴ H Lutz, ‘The CISG and Common Law Courts: Is There Really a Problem? <<http://www.victoria.ac.nz/law/research/publications/vuwl/pubs/vol-35-2004/issue-3/lutz.pdf>> accessed 17 June 2014

³⁴⁵ M Kilian ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 J Transnat'l L and Policy 233

³⁴⁶ F Ferrari ‘Uniform Interpretation of The 1980 Uniform Sales Law’ (1994-95) 24 Ga J Int'l & Comp L 183, ch VIII

³⁴⁷ J O Honnold ‘The Sales Convention in Action – Uniform International Words: Uniform Application?’ (1988) 8 J L and Commerce 207-208

³⁴⁸ *Usinor Industeel v Leeco Steel Products* (2002) 209 F Supp 2d 880 (ND Ill ED)

³⁴⁹ H R Fisher ‘New Zealand Legal Method: Influences and Consequences’ in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths 2001) 25, 42

³⁵⁰ *Ibid* 101,117

2.5.5.1 Qualitative Research Element

The approach employed in building the models and for the effective legislative transposition of the CISG in the UK Legal Order is a qualitative one. The reason for this is that it enabled the author to study and observe the current situation on this topic in an objective way so as to reach a valid conclusion.³⁵¹ The author refers to a valid conclusion in the sense that this is a thesis which resulted in a certain original and ‘genuine’ findings. By ‘genuine’ the researcher suggests that this thesis research findings precisely mirror the situation at hand and by certain she denotes that the research findings are supported by evidence.³⁵² Law researchers tend to use the qualitative research as they usually examine social processes, study artefacts or records that form or are created by these processes, and talk to people who are affected or involved by the processes being studied.³⁵³

In addition, a systematic way of researching was that the author kept only the information likely to be used in the thesis.³⁵⁴ Omitting unnecessary and irrelevant information aided in saving up time and preventing the research of being directed in the wrong pathway.³⁵⁵ Furthermore, failure to ensure that all sources used were of a respected and reliable status would result in a poor-conducted work.³⁵⁶ In addition evidence of previous successful or failing implementations of the CISG was provided and searching for these on the internet was more efficient.³⁵⁷ The time frame ranged back to the creation of the CISG in 1980 to date.³⁵⁸

³⁵¹ S B Coutin, ‘Qualitative Research in Law and Social Sciences’ <<http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf>> accessed 13 July 2009

³⁵² N Golafshani, ‘Understanding reliability and validity in qualitative research’ (2003) 8(4) *The Qualitative Report* 597–607

³⁵³ S B Coutin, ‘Qualitative Research in Law and Social Sciences’ <<http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf>> accessed 13 July 2009

³⁵⁴ K Morrison, *Research Methods* (Routledge 1993) 112-117

³⁵⁵ C D Hale, ‘Research Design: Qualitative Methods’ <http://www.charlesdennishale.com/books/eets_ap/9_Qualitative_Research_Designs.pdf> accessed 13 July 2009

³⁵⁶ Ibid

³⁵⁷ For instance see J Lookofsky, *Understanding the CISG in Scandinavia: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2nd edn, DJOF Publishing 2002), J Lookofsky, ‘Alive and Well in Scandinavia: CISG Part II’ (1999) 18 J L & Com 289-299, ‘United Nations Convention On Contracts For The International Sale Of Goods, 1980 (CISG) United Nations (UN)’ <<http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/>> accesse 23 June

The author employed the documentary analysis method as her main approach of research. Documentary analysis is a type of qualitative research in which documents are construed by the researcher to give opinion and denotation around an assessment topic.³⁵⁹ Documentary evidence ranges from official and private documents to memos and personal letters. To a certain degree all these involve specific documents or texts.³⁶⁰ The level at which this is done can range from technical discourse analysis to simply reading texts with the aim of gaining information of a person's or organisation's viewpoint or policy.³⁶¹

The researcher has engaged data collection of primary sources through two different ways:

- i. Official Documents: These involved UK statutes such as the Sale of Goods Act 1979³⁶² and the Unfair Contract Terms 1977³⁶³. Nevertheless, it also involved international legislation such as the CISG, The New Zealand Sale of Goods Act (United Nations Convention) Act 1994³⁶⁴ and the Canada International Sale of Goods Contracts Convention Act 1991³⁶⁵. Moreover, another form of

2014, P Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012, S Farran, 'Legal Culture and Legal Transplants: England and Wales' <<http://biblio.juridicas.unam.mx/libros/7/3194/11.pdf>> accessed 16 February 2012, J

Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 474; M F Koehler and G Yujun 'The Acceptance of the Unified Sales Law (CISG) in different Legal Systems' (2008) 20 Pace Int'l L Rev 45, U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Seller European Law Publishers 2008) 146, P Butler, 'The Use of the CISG in Domestic Law' (2011) Pace Int'l L Rev <www.cisg.law.pace.edu/cisg/biblio/butler7.html> accessed 7 February 2012 and P Butler, 'Celebrating Anniversaries' (2004/5) Pace Int'l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

³⁵⁹ J Grix, *The Foundations of Research* (2nd edn, Palgrave Mcmillan 2010) 131

³⁶⁰ U Flick, *An Introduction to Qualitative Research* (3rd edn, Sage 2006) 247

³⁶¹ J Grix, *The Foundations of Research* (2nd edn, Palgrave Mcmillan 2010) 131

³⁶² Sales of goods Act 1979 <http://www.legislation.gov.uk/ukpga/1979/54/pdfs/ukpga_19790054_en.pdf> accessed 3 July 2009

³⁶³ Unfair Contract Terms <http://www.legislation.gov.uk/ukpga/1977/50/pdfs/ukpga_19770050_en.pdf> accessed 3 July 2009

³⁶⁴ New Zealand Sale of Goods Act (United Nations Convention) Act 1994 <<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 5 April 2010

³⁶⁵ Canada International Sale of Goods Contracts Convention Act 1991 <<http://laws-lois.justice.gc.ca/eng/acts/I-20.4/page-1.html>> accessed 5 April 2010

official documents that was employed by the author regards documentary analysis was courts' decisions (case law).

- ii. Personal Documents: These involved communication via email with CISG experts from the UK and abroad. Furthermore, personal documents engaged conference notes, the author attended and presented her thesis models in conferences held within the UK. This has benefited her research as she kept notes of other people's ideas regards her models. In addition, the researcher has also published two articles in two different legal journals.³⁶⁶ The feedback from the Peer that reviewed the articles prior to publication has been very insightful; it has helped the author develop her research further.

At this point it is worth mentioning that the author considered carrying out interviews which she could not complete due to the poor response she has had from UK CISG experts. The author has contacted numerous academics of which most of them did not even reply and only five agreed to answer the questions. The researcher's aim was to gather material from at least 20 academics; therefore her interviews were not completed. The author, did, however complete all the required procedures in order to proceed with the inviting of the CISG experts. She created the interviews questions which have received ethical approval. The interview element, however, was not one which fully materialised and, as such, it was abandoned.

2.5.5.2 Comparative Legal Research Element

Besides the documentary analysis, not only does the author proceeded with a comparison of the CISG provisions with the equivalent provisions of the Sale of Goods Act 1979 but in addition to that she examined in a comparative fashion indicative legal systems from around the world vis-à-vis with the CISG implementation. The author chose some indicative countries as a source of inspiration based on how they ratified the CISG and on how their incorporated other

³⁶⁶ For more information see K Georgiadou, 'Transposing the CISG into the UK legal order: two legislative models' (2013) 24 Int'l Company & Com L Rev and 1. K Georgiadou, 'Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) Pace Int'l L Rev Online Companion <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>>

Conventions/Treaties into their legal systems. The indicative countries were chosen based on mainly on the fact that they each represent a different legal system:

- New Zealand is a common law system based strictly on the English legal system.³⁶⁷
- Australia is a common law system but its legal system is quite complex as Australia operates a federal system of government.³⁶⁸
- Germany is a leading system of the civil law world³⁶⁹
- Scandinavian States have a certain civilian character to them; they are distinguished by their traditional character and for the fact that they did not adopt elements of Roman law and that is why they formed their own civil law subcategory.³⁷⁰
- Canada is a hybrid legal system, it relies heavily on English law except in Quebec, where a civil law system based on French law prevails in most matters of a civil nature.³⁷¹

Therefore, the States chosen by the researcher as a source of inspiration were ideal in the sense that each represented a different legal tradition and approach which were very insightful for the creation of this thesis' models.

Comparative law studies have always existed; nonetheless the term ‘comparative law’ emerged in the nineteenth century. Comparative lawyers have always faced hostility, summed up in Lord Bowen's observation that ‘a jurist is a man who knows a little about the law of every country except his own’.³⁷² The ordinary lawyer's unease with comparative law is not due to the fact that it is a difficult subject. ‘Comparative law is

³⁶⁷ Ministry of Justice, *The New Zealand Legal System* <<http://www.justice.govt.nz/publications/global-publications/t/the-new-zealand-legal-system>> accessed 25 June 2014

³⁶⁸ Australian Government Department of Foreign Affairs and Trade , *Legal System* <https://www.dfat.gov.au/facts/legal_system.html> accessed 25 June 2014

³⁶⁹ U Bernitz, ‘What is Scandinavian Law? Concept, Characteristics, Future’ <<http://libguides.law.umn.edu/content.php?pid=409007&sid=3346168>> accessed 25 June 2014

³⁷⁰ U Bernitz, ‘What is Scandinavian Law? Concept, Characteristics, Future’ <<http://www.scandinavianlaw.se/pdf/50-1.pdf>> accessed > 25 June 2014

³⁷¹ Department of Justice, *Canada's System of Justice* <<http://www.justice.gc.ca/eng/csj-sjc/>> accessed 25 June 2014

³⁷² H C Guneridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Wildy & Sons 1971) 23

a difficult subject, but so are the British law of real estate and the French law of torts.³⁷³ However it may well as he cannot benefit himself of his training in the 'system' of municipal law; he has instead to advance his own technique of dealing with legal questions'.³⁷⁴ As Guneridge says, 'there is no 'comparative' branch or department of the law in the sense in which a lawyer speaks of 'Family Law' or 'Maritime Law'.³⁷⁵

One may agree that 'comparative law' may in fact be a misleading term.³⁷⁶ It just happens to be the long-established label given to this technique. The way Germans refer to it (*Rechtsvergleichung*) 'comparison of laws', or the Russians (*Sravnitel' noe pravovedenie*) 'comparative study of laws', may perhaps be more accurate.³⁷⁷ One may add that the French *droit compare* (law compared) is also somewhat more precise than the English version.³⁷⁸

Pursuant to Constantinesco,³⁷⁹ the Germans use a noteworthy distinction in terminology whereby the term *comparative law* suggests the method and the autonomous science, *comparative method* is employed to indicate comparative law as a method, and the autonomous discipline is referred to either as Theory of Comparative Law or Science of Comparative Laws.³⁸⁰ This distinction is useful in illuminating the methodology of this thesis. The researcher has selected '[t]he comparative method' is concerned with the useful practice of comparison of laws in law reform.³⁸¹ Nevertheless the autonomous discipline of comparison of laws is employed in examining the subjects of law reform, the comparative method and the

³⁷³ T Koopmans, *Constitutional Protection of Equality* (A W Sijthoff 1975) 3

³⁷⁴ Ibid

³⁷⁵ H C Guneridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Wildy & Sons 1971) 1

³⁷⁶ R B Schlesinger, *Comparative Law: Cases - Text - Materials* (3rd edn, The Foundation Press 1970) 1

³⁷⁷ R David and J E C Brierley, *Major Legal Systems in the World Today* (Stevens & Sons 1968) 2

³⁷⁸ R B Schlesinger, *Comparative Law: Cases - Text - Materials* (3rd edn, The Foundation Press 1970) 1

³⁷⁹ L J Constantinesco, *Traite de Droit Compare* (Librairie Generale de Droit et de jurisprudence 1972) 6

³⁸⁰ K Zweigen and H Kolz, *An Introduction to Comparative Law* (2nd edn, OUP 1987) 29

³⁸¹ L Meintjes van der Walt, 'Comparative method: Comparing legal systems and/or legal cultures?'<file:///C:/Users/KATERINA/Downloads/comparative_method-libre.pdf> accessed 23 June 2014

combination of these two elements.³⁸² This thesis' approach is not merely an analysis of these subjects in one or two jurisdictions; it is a study of these subjects in a number of different legal systems in a comparative fashion.

Furthermore, Gutteridge comments that 'comparative law involves a great deal more than a mere description of the laws of a foreign country'.³⁸³ He discusses the generally acknowledged distinction between descriptive comparative law (comparison introduced for the mere reason of attaining information as to foreign law) and applied comparative law (comparative research launched with some other purpose in view).³⁸⁴ Descriptive comparative law does not focus to the solution of any problem of an abstract or a practical nature. The author of this thesis, however, does not simply comparatively describe law reform; she employs the applied comparative law method since her comparative research was introduced with the purpose of creating two models that could be applied in practice by the UK legislators and in turn by UK traders. The researcher did so by comparing different legal systems (common law, civil law and the Scandinavian mixed legal system). Through this comparison the researcher examined how the chosen States introduced the CISG into their legal systems including the drawbacks and advantages of such a ratification how much they put the Convention into practice and how could such an approach function in the UK legal system.

2.5.5.3 Empirical Legal Research Element

Empirical research is a method employed by researchers in order to gain knowledge by means of direct and indirect observation or experience.³⁸⁵ The record of a researcher's direct observations and/or experiences is known as empirical evidence and it can be examined quantitatively or qualitatively.³⁸⁶ The researcher of this thesis

³⁸² E J Eberle, 'The Method and Role of Comparative Law' https://law.wustl.edu/WUGSLR/Issues/Volume8_3/Eberle.pdf accessed 24 June 2014

³⁸³ H C Guneridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Wildy & Sons 1971) 7

³⁸⁴ Ibid

³⁸⁵ D C Mitchell 'Some Key Concepts for the Design and Review of Empirical Research' <<http://www.ericdigests.org/2003-4/empirical-research.html>> accessed 15 June 2014

³⁸⁶ D Yanow and P Schwartz-Shea *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (2nd edn, M E Sharpe 2012) 147

has analysed the empirical evidence in a qualitatively manner. Through making sense of empirical evidence in qualitative form, a researcher can answer empirical questions, which ought to be clearly expressed and answerable with the evidence gathered (usually called data).³⁸⁷ Therefore, empirical research methods are a type of research methods in which empirical observations and/or experiences are gathered so as to answer particular research questions.³⁸⁸ At the outset of an empirical research a question is formulated.³⁸⁹ In this thesis the research question is:

Will it be beneficial for the UK to proceed with the transformation of the CISG into the UK legal order?

In order for the question to be empirically tested, the research question is required to be transformed into a theoretical model.³⁹⁰ The theoretical model is usually created based on examination of the literature. The theoretical model shapes the basis both for gathering and analysing data, and may be altered as a result of the research.³⁹¹ In order to test and answer the empirical research question the researcher transformed it into two theoretical models, the à la carte model and the parallel model.

The reason why the researcher of this thesis has chosen to employ the empirical research methodology is that since the last third of the 20th Century empirical research has delivered the judiciary, the law reform bodies, the government, the regulatory bodies and numerous institutions of all kinds with fundamental insights into how the law functions in the real world.³⁹² Therefore in the same way empirical research has in the past led into the efficient reformation of laws, the researcher has considered that such an approach would have been fruitful in the creation of this thesis suggested models which adopt and adjust, to a certain degree, another legal instrument into the UK's commercial legal system. Moreover, empirical legal

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ D Moody, ‘Empirical Research Methods’ <<http://www.itu.dk/~oladjones/semester%203/advanced%20it%20mgt%20and%20software%20engineering/project/materials/what%20is%20empirical%20research1.pdf>> accessed 16 June 2014

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² D H Genn, M Partington and S Wheeler, ‘LAW IN THE REAL WORLD: Improving Our Understanding of How Law Works’ <http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf> accessed 16 June 2014

research has proved to be constructive in revealing and explaining the practices and techniques of legal, regulatory, compensation and dispute resolution systems and the effect of legal phenomena on a range of social institutions, on business and on citizens.³⁹³ For instance, numerous common law practitioners undertake qualitative empirical legal research on a frequent basis and the case-based method of establishing the law through analysis of precedent is in fact a form of qualitative research using documents as source material.³⁹⁴

In addition, empirical legal research is now acknowledged as having a central position in legal scholarship alongside the doctrinal, text-based body of legal research in jurisprudence and substantive law and practice.³⁹⁵ Empirical legal research helps to build our theoretical understanding of law as a social and political phenomenon and contributes to the development of social theory. Therefore, empirical research helps us to understand the law better and an empirical understanding of the law in action helps us to understand society better.³⁹⁶

2.6 Literature Review Conclusion

In closing, the literature review objective was to provide the reader a brief overview **on what we have**³⁹⁷ and **what we could have**³⁹⁸ if these two models proposed herein were to be implemented in the UK legal order. A sincere attempt was put to examine the two situations paying particular attention to the freedom of contract, the fact that the business world in the UK (and elsewhere) moves much more rapidly than law, the bottom-up/top-down approach, economic and political considerations for traders, the response of large and influential organisations, the lack of interest on behalf of the UK to implement the CISG, the hypothesis of the thesis, the validation of the hypothesis, the thesis' models, the differences and similarities of the CISG and the Sale of Goods Act 1979, the mandatory rules of both the CISG and the Sale of Goods

³⁹³ Ibid

³⁹⁴ L Wembley ‘Qualitative Approaches to Empirical Legal Research’ in P Cane and H M Kritzer (eds) *The Oxford handbook of Empirical legal Research* (OUP 2010) Ch 38

³⁹⁵ W Twining, *BLACKSTONE'S TOWER The English Law School* (Sweet & Maxwell 1994) 145

³⁹⁶ J Baldwin and G Davis, ‘Empirical Research in Law’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 880-881

³⁹⁷ The current situation in the UK regards the CISG.

³⁹⁸ The potential situation if either of the two models were to be implemented in the UK.

Act 1979, the doctrine of transformation, the advantages and disadvantages of the CISG and the methodology of the thesis.

In view of the fact that the UK has not yet adopted, the UN Convention 1980, the CISG does not apply to contracts governed by English law. It may though apply to contracts relating to UK traders where conflict of law steers to the application of a contracting State rather than the law of England.³⁹⁹ The UN Convention 1980 is an up to date and flexible law as it permits its application in certain occasions, but always agrees for alteration and/or exclusion, if appropriately employed.⁴⁰⁰ Therefore, the CISG values and promotes the freedom of parties to contractually opt into its provisions together with the choice to opt out and decide on the application of an entirely diverse body of law.⁴⁰¹ Accordingly, currently UK traders wishing to draft a contract under the CISG may do so by way of the freedom of contract doctrine.⁴⁰²

What we have in the UK at the present time ‘seems to come into full agreement with the second area of Adam Smith’s *laissez-faire*, according to which each trader is at liberty of engaging in his/her own commercial transaction in a free market. Additionally, the *laissez-faire* approves freedom of contract and private property rights alone to arrange for the structure of relations between firms and consumers. Nevertheless, the traders’ freedom of contract is narrowed to some extend by the so-called mandatory rules of the Sale of Goods Act. However, if sub-model I of the à la carte model (opting out from Part II CISG) were to be the preferred model for the UK, it would very possibly mean that the CISG’s Part III inclusion would interfere with sections of the Sale of Goods Act 1979 (amongst which would be such sections as the mandatory ss 12-15).

³⁹⁹ The current situation regards the CISG in the UK follows the bottom-up approach. See R A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights’ (1992) 59 U Chi L Rev 433-434; J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 July 2009

⁴⁰⁰ CISG Article 6 ‘The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.’

⁴⁰¹ *Ibid*

⁴⁰² S Whittaker, ‘The Optional Instrument of European Contract Law and Freedom of Contract’ <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf> accessed 18 July 2009

In addition, the procedure by which law becomes part of a legal system without legislation is known as ‘bottom-up approach’⁴⁰³. The approach starts with a comparatively small, uniform lawmaking group, evocative of a private alliance, which either launches or appropriates an institutional home.⁴⁰⁴ This group produces substantive rules, which are basically organic norms occurring from practicing lawyers performs. Furthermore, the lawmaking group introduces procedural and remedial rules that simultaneously insulate the substantive rules and endure their elasticity and proximity to actual group practice.⁴⁰⁵ The unofficial, practice-based rules in due course establish themselves in a more legitimate legal system and develop into law.⁴⁰⁶ In essence, a bottom-up approach is a soft, non- choreographed process that generates hard legal results. This is the method adopted by the free-trade approach (what we have).

As far as the hypothesis of the thesis is concerned, the author recommends the possibility of applying one of the two proposed legislative models, either the **à la carte model** or the **parallel model** for the effective incorporation of the CISG into the UK legal order. The à la carte model would require a legislative ‘add on’ to the Sale of Goods Act 1979 whereas the parallel model would require a separate legislative Act parallel to the Sale of Goods Act 1979. Incorporation of the CISG into the UK legal order via either of these models would be beneficial as they are both adjusted to the UK legal, economical and socio-political necessities.

The first model, the à la carte model took into account the differences and similarities of the two legal instruments as it is necessary to have a general idea of what should be included and excluded in the à la carte model. A key obstacle in attempting to implant a foreign notion into domestic law is the substantial difference in policy between the international instrument and the domestic law, in this case the Convention and the Sale of Goods Act 1979. The suggestions of lifting up the threshold for breach and providing measures to assist parties resolve differences stem mainly from a body of law that aims at keeping contracts intact. One may claim that

⁴⁰³ Paul Schiff Berman, ‘The Globalization of Jurisdiction’ (2002) 151 U Pa L Rev 311, 534

⁴⁰⁴ J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 July 2009

⁴⁰⁵ Ibid

⁴⁰⁶ Ibid

the Sale of Goods Act 1979 aims not only at easing the sale of goods but also aims at easing its breach. This statement is, of course, inaccurate. A proposal, though, on adopting a policy in pursuit of preserving contractual relationship is worthy of reference.

Regardless of their dissimilarities, the CISG and the Sale of Goods Act 1979 have a lot in common. Both the CISG and Sale of Goods Act 1979 offer an outstanding place to fitness for purpose⁴⁰⁷ to underline the quality of the goods that the seller must deliver in the deficiency of any other express quality standard in the contract.⁴⁰⁸ As a matter of fact, the Convention's language follows very closely the language of the Sale of Goods Act 1979.⁴⁰⁹ Moreover, both instruments do not offer any express guarantee against hidden defects, a representative element of civil law.⁴¹⁰

As regards the supply of something different, description does indeed have significance in the modern law of sale under the Sale of Goods Act 1979.⁴¹¹ Nevertheless, a difference between the supply of non-conforming goods and the supply of different goods is of little practical significance. It is hence a contradiction why the notion of description still has a part to play in the Sale of Goods Act 1979. The UN Convention 1980 in contrast to the UK Sale of Goods Act 1979 provides a clearer and easier sense of purpose in the areas of fitness for purpose, quality and description.⁴¹²

In respect of contract termination as result of a breach, the provisions laid down by the CISG and the Sale of Goods Act 1979 are rather different. The CISG, is more strict in avoiding (terminating) a contract and therefore appear intended to avoid the economic waste that takes place when manufactured goods are rejected.⁴¹³ While the Sale of Goods Act 1979, supported by case law developments, acts as though it was

⁴⁰⁷ The Sale of Goods Act requires 'reasonable' fitness and the CISG just fitness. There is unlikely to be a real difference between the two standards: Art 7(1) of the CISG requires the Convention to be interpreted in accordance with good faith and the concept of reasonableness in English law commonly produces the same results as good faith and fair dealing.

⁴⁰⁸ Sale of Goods Act 1979, s 14(3); CISG Art 35(2)

⁴⁰⁹ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 20

⁴¹⁰ For example, the French Civil Code, Article 1641

⁴¹¹ *Reardon Smith Ltd v Yngvar Hansen Tangen (The Diana Prosperity)* [1976] 1 WLR 989

⁴¹² J M Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations on Contracts for the International Sale of Goods* (Kluwer Law International 2008) 81

⁴¹³ CISG Article 25

designed with volatile markets in mind, that is why it facilitates the termination of a breached contract.⁴¹⁴

As far as dealing with sales time obligations is concerned, English law takes a strict view. The particularity of this development is that it runs entirely against the point of the Sale of Goods Act 1979, which established that the time of payment is presumptively not of the essence of the contract.⁴¹⁵ In relation to time obligations the CISG has applied to a certain extent a different tactic. The UN Convention 1980 established a certain right of avoidance reserved for time breaches, called the *Nachfrist*.⁴¹⁶ The CISG offers buyers and sellers the choice to stipulate an additional period of time of reasonable extent for the other to perform and, at the end of this time, to avoid the contract if performance is still unforthcoming.⁴¹⁷

When it comes to curing defective performance, the Sale of Goods Act 1979 does not make available any condition for cure and there are daunting barriers to any attempts that might be developed through case law innovation. If the UK Act otherwise approves termination and rejection of the goods,⁴¹⁸ then any such originality would fly in the face of the Act's language. However, English law does informally approve cure prior to delivery, in those circumstances where a proper offer has been made but has not been accepted by the purchaser.⁴¹⁹ Regardless of the fact that the CISG is more enlightening on the seller's documentary performance than the Sale of Goods Act 1979, while the Convention lacks the detail, it does include a specific rule allowing a seller to cure documentary non-conformity.⁴²⁰

Current attitudes in the UK to the UN Convention 1980 vary. A number of English observers follow fully the 'No Surrender' attitude typified by criticism of the CISG as 'a further erosion of our own excellent municipal law.'⁴²¹ Others accord it only

⁴¹⁴ Sale of Goods Act 1979 ss 13-15 and 11(2)

⁴¹⁵ Sale of Goods Act 1979 s 10(1)

⁴¹⁶ CISG Articles 47 and 63. Article 47, is also known as Nachfrist and will be discussed in more detail later on.

⁴¹⁷ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 26

⁴¹⁸ Sale of Goods Act 1979 s 11(2)

⁴¹⁹ K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 15 June 2014

⁴²⁰ Ibid

⁴²¹ A Forte, 'The United Nations Convention on contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) Pace Int'l L Rev

<<http://www.cisg.law.pace.edu/cisg/biblio/forte.html#61>> accessed 3 August 2009

reluctant acceptance: the UN Convention is ‘probably as good as can be expected.’⁴²² On the other hand, however, are those who support it, the Department of Trade and Industry and, most eloquently, the Scottish Law Commission, to which may be added the voice of Professor Roy Goode.⁴²³ As can be seen from the basis of the arguments in this dissertation, the author is in favour of accession as well. However, it would appear to the case that the lethal blend of antipathy and apathy has ensured that the government of the United Kingdom will do nothing until the English legal profession dynamically presses for change. Taking into consideration the Vienna Convention on Contracts for the Sale of Goods, a measure intended to endorse harmony, the United Kingdom is a disunited kingdom.

The author also took into account that law emerges through various social, political and economic needs. Different social, political and economic developments form the law accordingly; therefore the law is required to adjust and allow to be formed by the development of globalisation. Regardless of the negative impact globalisation might have on countries’ legal identity, it is quite obvious that the internationalised sector has a tendency to expand, despite national and local diversity.⁴²⁴ The business world moves much more rapidly than law, and it is not difficult to envisage entrepreneurs in two non-Contracting States wishing to utilise the CISG in order to facilitate their negotiations.⁴²⁵ Utilising the UN Convention 1980 as a compromise selection of law would be more beneficial as it would both enhance party autonomy, and advance the uniformity of legal rules.⁴²⁶ In addition, while traditionalists might not wish parties to select non-national law to govern their contract, contemporary choice of law principles should agree for the choice of a convention created particularly for this sort

⁴²² Feltham, ‘The United Nations Convention on Contracts for the International Sale of Goods’ (1981) J Bus L 346

⁴²³ A Forte, ‘The United Nations Convention on contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom’ (1997) Pace Int’l L Rev<<http://www.cisg.law.pace.edu/cisg/biblio/forte.html#61>> accessed 3 August 2009

⁴²⁴ L M Friedman, ‘Erewhon: The coming global legal order’ (2001) 37 Stan J Int’l L 347-364

⁴²⁵ K Bell, ‘ The Sphere of Application of the Vienna Convention on Contracts fro the International Sale of Goods’ (1996)

<<http://www.cisg.law.pace.edu/cisg/biblio/bell.html>>

accessed 27 May 2010

⁴²⁶ C Davies, ‘Arthur Marwick’ (1980) 1 JLA <[https://docs.google.com/viewer?a=v&q=cache:54p0WeiCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+\(1980\)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHXShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtbTBXPkhIH_Hath1tWjls5A8PBkkIw](https://docs.google.com/viewer?a=v&q=cache:54p0WeiCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+(1980)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHXShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtbTBXPkhIH_Hath1tWjls5A8PBkkIw)> accessed 6 February 2012

of transaction.⁴²⁷ Consequently, in the face of developments a UK ratification of the CISG could be considered as an inevitable requirement.

A principal dilemma in seeking to implant a foreign notion into domestic law is the considerable difference in policy between the Convention and the Sale of Goods Act 1979. The suggestions of lifting up the threshold for breach and providing procedures to assist parties resolve differences stem mainly from a body of law that aims at keeping contracts intact. One may conclude that the Sale of Goods Act 1979 seeks not only to ease the sale of goods but also seeks to ease its breach. This conclusion is, of course, erroneous. A suggestion, however, on adopting a policy in quest of maintaining contractual relationship is worthy of mention. A number of the sections refer to this Article, mainly those dealing with the right to demand adequate assurance and instalment contracts, effectuate a goal furthering continuation of a contract.

The analysis of the two selected types of benefits the CISG, that is the economic and political advantages, most likely is not adequate to persuade those who persistently criticise the unification of international sales law and, in particular, the UN Convention 1980⁴²⁸ of its intrinsic merits. Nevertheless, the above examination reveals that the CISG really provides for rational solutions. For instance, the granting of additional time under Articles 47 and 63 (these two Articles of the CISG grant the additional time in performing a contract), are tailor-made for problems which only occur under the CISG.

Yet, as may be seen from the author's observations regarding the price-reduction remedy and the liberty to cure, the CISG also contains provisions which unquestionably better accord with commercial reality than the solutions provided by the Sale of Goods Act 1979. Equally, one can -by way of contractual terms- have these 'add ons' in a contract which is largely drafted under the Sale of Goods Act 1979.

⁴²⁷C R Reitz, *The uniform commercial code and the convention on contracts for the international sale of goods, in negotiating and structuring international commercial agreements* (Shelley P Batram & David N Goldswig, eds 1990) 12

⁴²⁸J S Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Conformity' (1990) 106 London Q Rev 530, 530

It is rather obvious that, for the reasons expanded above, British traders would considerably gain from the application of the CISG, which for example, is likely to facilitate the conclusion of transactions with partners from developing countries,⁴²⁹ it is this author's firm belief that the United Kingdom should at last overcome its reluctance and ratify the UN Convention 1980. Furthermore, it is strongly recommended that those provisions of the CISG, which have already demonstrated to lead to economically sensible results, may be considered for introduction into domestic sales law.

Furthermore, there are many other benefits to be gained from the UK's future participation. Unfortunately, there is only room in this thesis to consider the main advantages, and the author has selected to raise the most contentious issues in an attempt to confront the main apprehensions about implementation of the CISG head on.⁴³⁰

In synopsis, as far as the disadvantages are concerned it can be said that the lack of common law concepts no longer offer an insurmountable obstacle to the courts. The problem of the parole evidence rule has been developed by a clear and concise court decision that now provides valuable precedent for CISG case law. Regarding the doctrine of consideration, courts should use the guidance presented by Professor Honnold and acknowledge a general non-requirement of consideration in CISG cases. The paradigm of the parole evidence rule specifically gives reason to believe that common law courts are able and willing to engage with the Convention without bias as a new agreement.⁴³¹

Accepting the significance of international law does not mean that domestic law will be consigned to the sidelines of UK's legal system. In fact, under both the proposed models, domestic law is given great validity. The 'legal transformation' making its

⁴²⁹ J Steyn, 'A Kind of Esperanto?' in Peter Birks (ed), *In The Frontiers of Liability* (OUP 1994) 17

⁴³⁰ A Garther, 'Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law' (2001) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html#104>> accessed 4 August 2009

⁴³¹ C B Andesen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>> accessed 7 June 2009

way through the proposed models does not substitute domestic law with international law, where the second suffers from a democratic deficit.⁴³² In contrary, international law provides an opportunity to improve both the relevance and usefulness of national law by making certain, that all persons in society will fully comprehend, and apply, the freedoms that they benefit from within their polity.

Integrating comfortable municipal jurisdictionalism with international and local realities represents one of the major challenges lawyers of the common law tradition face today. If we take into consideration the common law tradition methodology and history and the judicial actors who are in charge, it is extremely improbable that an adjustment will not be reached.

In addition, the author also took into consideration the method by which the UK usually adopts in order to implement a convention into its legal order. A convention or a treaty will not have effect in British national law, unless the convention/treaty is specially integrated by a legislative measure. Hence, a convention or a treaty does not automatically have direct legal effect in English law. In order for this to transpire, the Parliament is required to pass an Act in order for the convention/treaty to be part of UK domestic law. Subsequently, if a treaty gets transformed by statute into UK law, it will have full legal effect. This is known as the ‘doctrine of transformation’.⁴³³

Pursuant to the transformation doctrine the **à la carte model** or **parallel model**⁴³⁴ could be deployed in the UK legal order through legislation. Therefore, both models necessitate legislative action for them to be deployed in the UK legal order.⁴³⁵ Furthermore, the models will ‘fine-tune’ the CISG to the UK needs in order for the UK to implement it, just as the doctrine of transformation entails. As such, the models proposed in this thesis come in full agreement with the doctrine of transformation

⁴³² H M Kindred ‘The use and abuse of international legal sources by Canadian courts: searching for a principled approach’ in O E Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 130

⁴³³ E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

⁴³⁴ These models will be introduced further in the analysis

⁴³⁵ E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

Chapter 3

À LA CARTE MODEL

3.1 Introduction

This chapter will focus on the first proposed model, the à la carte model. The name ‘à la carte’ emerged from the fact that the CISG is an ‘à la carte’ Convention; provisions may be selected from the CISG in the same way we choose a meal from a restaurant’s menu. In other words, the UK may incorporate only some of the Convention’s Articles just like traders operating under the CISG would be able to omit certain of the CISG’s provisions from their contractual arrangement based on the freedom of contract doctrine; CISG contracts should not comply with all the CISG provisions. States and traders alike are free to use the CISG the way they wish (subject to the relevant CISG clauses in relation to the matter in question). This is a benefit endowed by the CISG that its precursors’ did not allow; to give parties or States wishing to implement it a certain flexibility and freedom to adjust it in a practical and desirable manner.⁴³⁶ Furthermore, this chapter will propose three sub-models; à la carte by omitting Part II of the CISG, à la carte by omitting Part III of the CISG and à la carte by taking advantage of European experience.

3.2 CISG: à la carte for traders and à la carte for the implementing legislator

Turning to the UK, it is significant to mention that some sections of the Sales of Goods Act 1979 are mandatory, and therefore, cannot be ignored or replaced by CISG Articles.⁴³⁷ Thus, the à la carte model would not interfere or would not have to interfere with the core of the Sale of Goods Act. This model would require a legislative ‘add-on’ to the Sale of Goods Act. Nonetheless, it would be certainly advisable that a CISG Act is promoted by choosing the Articles which can be

⁴³⁶ CISG Article 6 ‘The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.’

⁴³⁷ According to the Unfair Contract Terms Act 1977 contracting out of the implied terms in ss 12 – 15 (Sale of Goods Act 1979) is not possible, thereby establishing ss 12-15 mandatory

implemented in the UK legal order and by ignoring the rest which may be non-suitable for or non-comprehensible to our jurisprudence. Such an Act (or even a Statutory Instrument) would be autonomous additional to the Sale of Goods Act but not independent of the Sale of Goods Act. This, one posits, would be a key difference with this thesis second model, the parallel model. By ‘non-suitable’ and ‘non-comprehensible’ the author suggests that not all CISG Articles are able to accommodate the UK business transactions needs and furthermore not all CISG Articles are straight-forward for UK practitioners and traders to understand and in turn put in practise, either because they have been criticised for uncertainty or simply because they have civil law origins.⁴³⁸ The researcher proposes that this model may be put into practice through three possible channels. A discussion will take place on whether the CISG may be transposed through the à la carte model by either omitting part II (possibility No1) or III (possibility No2) of the Convention. Moreover, the possibility of transposing the CISG in the same way as certain EU directives that have already been implemented into the UK legal order (possibility No3) will be discussed.

3.2.1 À la carte for traders

Even though the à la carte model will introduce three legislative sub models, an à la carte model from the traders experience could not necessarily be discarded. After all, the freedom of contract doctrine is at the very heart of UK commercial law; indeed at the heart of international trade law. The current situation regards the CISG in the UK follows the bottom-up approach.⁴³⁹ Bottom-up approach stories do not involve a country’s legislators but rather the very practitioners who struggle with the everyday mechanics of their profession.⁴⁴⁰

These practitioners create, construe, and impose their rules on the basis of their experiences and are just as operative, if not more operative, as the treaties that

⁴³⁸ Some civil law provisions adopted by the CISG are the *Nachfrist*- Articles 47 and 63, Price reduction- Article 50 and Specific performance -Articles 46 and 62.

⁴³⁹ R A Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights’ (1992) 59 U Chi L Rev 433-434; J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010

⁴⁴⁰ J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010

commence the top-down procedures.⁴⁴¹ In other words, under the long-established top-down approach, States' legislators ratify sets of laws that regulate the practices and performance of those who are subject to the laws.⁴⁴² On the other hand, under the bottom-up law making, the exercises and performance of several actors advise and compose the rules, which, as a result, rule the exercises and performance of those very same practitioners. The significance of the bottom-up approach is how the casual, day to day exercised rules become bylaw.⁴⁴³

A cooperation of practitioners generates practical rules, which are basically gradual informal understandings originating from the performance of practicing lawyers. Furthermore, the law making group institutes adjective and remedial rules that concurrently protect the substantive rules and sustain their elasticity and closeness to actual group practice. The unofficial, performance-based sets of laws eventually establish themselves in a further official legal system and develop into law. Essentially, a bottom-up approach is a soft, non-choreographed method that creates solid legal outcomes.

It is not astonishing that top-down transnational law governs international legal erudition.⁴⁴⁴ The legal realists hit on international law's qualifications as a lawful, isolated discipline activated a retaliation by academics displaying those international law enacting tales that appeared and worked most like 'genuine law'.⁴⁴⁵ In reply to this outbreak, official international law, specifically the treaty and institutions generated from treaties obtained the disproportionate awareness of international

⁴⁴¹ Ibid

⁴⁴² Ibid

⁴⁴³ Ibid

⁴⁴⁴ A D'Amato, 'Evolution of International Law:Two Thresholds, Maybe a Third' NWUPL <www.aaai.org/ocs/index.php/FSS/FSS09/paper/download/988/1230> accessed 3 March 2010

⁴⁴⁵ The principal realist argument claims that in an anarchical world of nation-States, countries chase their self- interest restricted only by their own ability. International law, thus, is not law at all but a sharp and temporary echo of State ability, interests, and likings. The realists leave a small chance of opportunity for legal institutions and basically confront the significance of international law. See F A Boyle, 'The Irrelevance of International Law: The Schism Between International Law and International Politics' (1980) 10 Cal W Int'L J 193, 198 ('[i]nternational law is devoid of any intrinsic significance within the calculus of international political *decision-making*'); S Hoffmann, 'The Role of International Organizations: Limits and Possibilities' (1956) 10 Int'L Org 357, 364. For an additional variety of the realist evaluation, see H J Morgenthau, *Politics among nations: the struggle for power and peace* (5th ed, 1978); F A Boyle, *World politics and international law* (Duke University Press 1985). In further polished types of the realist evaluation, State interests are somewhat imitative of the arrangement of the international system. See K N Waltz, theory of international politics (1979). See furthermore J D Greenberg, 'Does Power Trump Law?' (2003) 55 Stan L Rev 1789 (a modern analysis of the realist evaluation).

lawyers and legal academics.⁴⁴⁶ Since the bottom-up approach originates from unofficial, impulsive, un-choreographed developments and soft, performance-based sets of laws, it is unappealing food to those attacking the legal realists.⁴⁴⁷ As a result, bottom-up approach is being left largely unnoticed as a substitute method to law. The bottom-up approach is essentially a tale of practitioners competently and successfully controlling their dealings via the establishment and implementation of their own sets of laws.⁴⁴⁸

In addition, the bottom-up approach is closely linked to the interactional theory of international law-making in the sense that the interactional framework recognises the significance of robust participation by intergovernmental organizations, civil society organizations, other collective entities, and individuals. One may argue that the interactional theory of international legal obligation examines the relationship between shared understandings and legal norms in international society. Legal norms emerge from shared social understandings. These understandings may involve simply a basic acceptance of the necessity for law to form particular social interactions within a society, or they may be more substantive and value-laden. Nevertheless, shared understandings alone do not create law. There are several social norms that never grasp the level of legal normativity.⁴⁴⁹

This theory was originally established by Lon Fuller and was eventually developed and analysed by numerous academics.⁴⁵⁰ Fuller highlighted the necessity for reciprocity between citizens and officials in the establishment and safeguarding of all law.⁴⁵¹ He demonstrated that what is frequently thought to be a vertical relationship (of authority and subordination) has in fact strong horizontal characteristics, a

⁴⁴⁶ The American Society of International Law, Mapping New Boundaries: Shifting Norms in International Law (98th Annual Meeting Program, Washington, D C, 2004)

⁴⁴⁷ J K Levit, 'A Bottom-Up Approach to International Law making: The Tale of Three Trade Finance Instruments' <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010

⁴⁴⁸ Ibid

⁴⁴⁹ J Brunnée and S J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 340-341

⁴⁵⁰ C Murphy, 'Lon Fuller and the moral Value of the rule of Law' (2005) 24 Law and Philosophy 240-241; G J Postema, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) ; J Brunnée and S J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 340-341; J Raz, *The Authority of Law* (Clarendon Press 1979) 223-226 and H L A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 350

⁴⁵¹ L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969)

suggestion that makes Fuller's work very relevant to international law. According to Fuller's theory, reciprocity signifies that law-givers should be able to expect that citizens will 'accept as law and generally observe' the promulgated body of rules.⁴⁵² In order for these rules to guide their actions, they must meet the requirements of legality. Therefore, conversely, citizens must be able to expect that the government will abide by and apply these rules, and that official actions will be congruent with posited law and consonant with the requirements of legality.⁴⁵³ The criteria of legality proposed by Fuller are largely accepted. Nonetheless, a few prominent legal theorists have argued that the criteria are solely about efficacy.⁴⁵⁴

3.2.3 Private and Public Law Considerations for the Implementing Legislator

This thesis is mainly concerned with private international law but the thesis models ratification and incorporation relates to public international law. Public international law governs any issues that arise concerning the relations between States.⁴⁵⁵ On the other hand, private international law determines which jurisdiction and which legal system apply in case of a conflict of laws.⁴⁵⁶ The connective link between these two areas of law in this thesis is that public international law deals with arrangements controlled by conventional agreements, generally known as treaties.⁴⁵⁷ Therefore, when legislators wish to incorporate a treaty/convention such as the CISG, they have to turn to public international law.⁴⁵⁸ A State has to decide whether international law is going to be adopted automatically in the domestic law of the country, or if it requires any kind of incorporation by a legislative measure. This created considerable academic debates especially over monism and dualism.⁴⁵⁹

⁴⁵² Ibid at 235

⁴⁵³ Ibid

⁴⁵⁴ J Raz, *The Authority of Law* (Clarendon Press 1979) 223-226 and H L A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 350

⁴⁵⁵ D J B Svantesson, 'The Relation between Public International Law and Private International Law in the Internet Context' (Australasian Law Teachers Association Conference, Hamilton New Zealand, July 2005)

⁴⁵⁶ Ibid

⁴⁵⁷ K Lipstein, *Principles of The Conflict of Laws: National and International* (Martinus Nijhoff Publishers 1981) 63-66

⁴⁵⁸ Ibid

⁴⁵⁹ B Marian, 'The Dualist and Monist Theories. International Law's Comprehension of these Theories' <http://revcurrentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf> accessed 5 May 2011

3.2.3.1 Monism and Dualism

Kelsen's Pure Theory of Law provides a lot of guidance regards monism and how international law should be perceived. A major question which often arises is when there is a conflict between International Law and Municipal Law which one would prevail?⁴⁶⁰ There is a conflict on this issue by many, thus, there are two major theories according to the relationship of international and national law.⁴⁶¹ These are the monist theory and the dualist theory.⁴⁶²

Kelsen was one of the first people to support the monist approach⁴⁶³. Kelsen used to see the supremacy of international law as it was a consequence of his 'basic norm' of all law. The reason of regarding international law as supreme is because it derives from the States.⁴⁶⁴ Monists believe that international and domestic law are components of the same legal system. Additionally, in case of conflict, deference shall be given to international law.⁴⁶⁵ Regards States, a monist State is one which accepts and adopts automatically international law as part of its domestic law. Furthermore, all monists acknowledge the superiority of international law over domestic law.⁴⁶⁶

Moreover, Dixon's view on the matter of the monist theory is that international and national law are two mechanisms of a single body which is called 'law'.⁴⁶⁷ According to Dixon, 'law' is to be seen as a single body of which 'international' law and 'national' law are forms of manifestation.⁴⁶⁸ If there is a conflict between the two bodies, international law should prevail. Thus, according to Dixon, international law is supreme.⁴⁶⁹

Furthermore, Hersch Lauterpacht who was a judge of the International Court of Justice saw international law as supreme over national law⁴⁷⁰. In addition to this, he

⁴⁶⁰ Ibid

⁴⁶¹ Ibid

⁴⁶² Ibid

⁴⁶³ Ibid

⁴⁶⁴ Ibid

⁴⁶⁵ Ibid

⁴⁶⁶ Ibid

⁴⁶⁷ M Dixon, *Textbook on International Law* (6th edn, OUP 2007) 4-6

⁴⁶⁸ Ibid

⁴⁶⁹ Ibid

⁴⁷⁰ H Lauterpacht, *Recognition in International Law* (Cambridge University Press 2012) 48-51

saw the ‘State’ as a group of individuals rather than a legal entity. In Hersch Lauterpacht’s view, international law should be supreme and should prevail over national law since it guarantees individual liberty.⁴⁷¹ Therefore, he as well believes in the hierarchy of legal orders having however, the natural law on top and then international law followed by national law.⁴⁷²

To monists, if there is a conflict between national and international law, the theorists believe that international law has to prevail since the courts should work in a form of hierarchy⁴⁷³, having international law on the top as stated above. Consequently, this is the reason why many countries adopt Treaties and ratify them within their domestic legal system.

The incorporation of international law into domestic law, according to monists, must be done faithfully within the State’s national courts.⁴⁷⁴ Thus, in order for one to be able to identify the conditions of incorporation of international law into municipal law in a given State, one has to be able to observe constitutional scripts.⁴⁷⁵

On the other hand, dualists support the view that international law and national law are two different, separate and independent legal systems. If there is a conflict between the two, international courts should apply international law and national courts, apply municipal law.⁴⁷⁶ In addition to this, they support that international law exists to regulate the relationship between the States, while domestic law controls duties and rights of individuals within the State⁴⁷⁷. Additionally, there are extreme dualists who argue that international law is not actually law, but a mechanism of international morality.⁴⁷⁸

On the other hand, there are moderate dualists who acknowledge that international law is law; however there must be a process of incorporation which requires

⁴⁷¹ Ibid

⁴⁷² Ibid

⁴⁷³ N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’ <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid

⁴⁷⁶ Ibid

⁴⁷⁷ H Triepel cited by G Slyz, ‘International Law in domestic courts’ (1995-1996) 28 N Y U J Int'l L & Pol

⁴⁷⁸ S McDougal, ‘The impact of International Law Upon National Law: A policy-Oriented Perspective’ (1959) 4 S D L Rev 18

recognition of the custom force⁴⁷⁹. Moreover, they support that there is a basic difference between the two legal systems. That is, that the former grew out of the norm while the latter was produced by national legislation⁴⁸⁰. However, most scholars seem to believe that the matters should be faced in accordance practice and not in accordance theory. The great difference amongst the monists and the dualists is that the dualists believe that domestic law shall enjoy primacy over international law.⁴⁸¹ This is due to the fact that domestic law consists of international law as well, through the process of indirect incorporation.⁴⁸²

Furthermore, it is worth mentioning the Fitzmaurice Compromise⁴⁸³ which recognises international and municipal law as operating in two separate areas. On the other hand when a conflict arises the conflict is one of legal obligations and not of the legal systems per say. In addition to this, it is presumed by many common law States (e.g. UK, USA) that the legislator does not have the intention to violate international law. The contrast of monism and dualism is considered by Fitzmaurice to be unreal, artificial and strictly beside the point. He believes that international and domestic laws are two different fields and are not supposed to operate as one since they do not work in the same field. Therefore, there should be no conflict between the two. Consequently, international law is supreme in its domain as well as national law. It is important to state that Fitzmaurice denies that there is a common ground between the two as well as difference in the subject matter. The comparison between domestic and international law by Fitzmaurice is like the relationship between the system of law of two different countries (i.e. England and France). He believes that the discussion of supremacy of international law in the international field is useless since it is supreme in its field.

⁴⁷⁹ H Triepel cited by G Slyz, ‘International Law in domestic courts’ (1995-1996) 28 N Y U J Int'l L & Pol

⁴⁸⁰ S Gaius Institutes quoted by R Ludwikowski, ‘Supreme law or basic law? The decline of the concept of constitutional supremacy’ (2001) Cardozo J.Int'l & Comp.L

⁴⁸¹ N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’ <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁴⁸² Ibid

⁴⁸³ J G Merrills, *Sir Gerald Fitzmaurice and the Discipline of International Law, Opinions on the International Court of Justice, 1961-1973*

Triepel, one of the well-known dualists of the late 19th century, believes that international and national law are entirely different in their nature.⁴⁸⁴ This is because international law controls the relations between States, whereas national law regulates the rights of an individual within a State. Triepel believed that the two legal systems are different regard of their origin and therefore, what they serve. Indeed, one can say that the basis of international law is the common will of all States, whereas national law is the will of the State itself.⁴⁸⁵

3.2.3.1.1. United Kingdom's Dualism in the Sphere of International Law Incorporation

As previously stated, dualists regard international and domestic law as separate. Therefore, one can say that international law can only apply when transformed into municipal law. The incorporation of laws can be by an Act of parliament as we see in the case of United Kingdom or if it is given effect by the courts of the State.⁴⁸⁶ The United Kingdom is an example of the dualist model when dealing with international law.⁴⁸⁷ Consequently, a treaty/convention such as the CISG will not take effect in English municipal law if the parliament does not make it part of it by an act of parliament⁴⁸⁸. Therefore, when a treaty/convention is incorporated into domestic law, it is enforceable in the courts of the State as well. As a consequence, one can say that the parliament is supreme since it passes legislation which can be regarded as contradictory with any international treaty obligations which might be binding the United Kingdom at an international level⁴⁸⁹.

Moreover, the CISG will not be part of British national law, unless the Convention is specially incorporated by a legislative measure. As a consequence, the CISG does not automatically become part of English law. In order for this to happen, the Parliament

⁴⁸⁴ H Triepel cited by G Slyz, 'International Law in domestic courts' (1995-1996) 28 N Y U J Int'l L & Pol

⁴⁸⁵ Ibid

⁴⁸⁶ N Sukalo, 'How International Law is Incorporated into Municipal Law and Why it is Important' <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁴⁸⁷ Ibid

⁴⁸⁸ UN Department of Economic and Social Affairs Division for Social Policy and Development, *International norms and standards related to disabilities* (2003) <<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 17 May 2011

⁴⁸⁹ Ibid

needs to pass an Act or a statutory instrument in order for the treaty to be part of British municipal law.⁴⁹⁰ Accordingly, if the CISG gets transformed by statute into UK law, it will have full legal effect. This may be accomplished through the creation of an ‘enabling Act’ which will consist of a ‘schedule’ containing the provisions of the Convention as the à la carte model entails. An ‘enabling Act’ is required for the CISG to have full legal effect as conventions/ treaties which (1) involve any alteration of the common or statute law; or (2) affect the rights and obligations of British subjects definitely require an enabling Act of Parliament in order to be effective in the United Kingdom.⁴⁹¹

Thus, a convention or treaty has to be incorporated in the United Kingdom’s domestic law in order to be effective and this is done through an Enabling Act which protects against possible abuse by the Executive. In the case of *Parlement Belge*⁴⁹² that we are going to see in more detail later on, there was a statement for when an Enabling Act is required. ‘If the Crown had power without the authority of parliament by this treaty to order... This is a use of the treaty making prerogative of the Crown which I believe to be without precedent and in principle contrary to the laws of the constitution.’⁴⁹³

Moreover, Wallace⁴⁹⁴ also believes that for a treaty to become part of the British domestic law there needs to be an Enabling Act which can be regarded as a legislative measure. The executive function of creating treaties goes along with the royal prerogative. For instance, there was a coalition by the Belgian Parliament with an English ship. The defendants were arguing that their ship was not open to the jurisdiction of the United Kingdom’s court because the ship was property of the King of the Belgians. Their second argument was in regards of a ‘convention’ by the Queen with the King of Belgians which had placed the ship in the category of a public ship of war. The *obiter dicta* of Sir Robert Phillimore was that:

⁴⁹⁰ N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’ <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁴⁹¹ *Ibid*

⁴⁹² *Parlement Belge* [1879] 4 P D

⁴⁹³ *Parlement Belge* [1879] 4 P D 129

⁴⁹⁴ R Wallace, RMM *International Law* (4th edn Sweet & Maxwell, 2002)

(1) Since the Parlement Belge was a ship conveying mails and carrying commerce, she could not be regarded as a public ship which was exempted from process of law and (2) affirming the principle that treaties that affected private rights required the sanction of the legislature to be operative help that the convention had not been confirmed by any statute of Parliament and hence had no legal effect in the UK.⁴⁹⁵

However, the Court of Appeal reversed the decision due to the fact that immunity sought was available at customary international law and indeed at common law. The Court of Appeal decision was based on the old ‘absolute immunity’ theory.⁴⁹⁶ Thus, Phillimore’s ruling can now be regarded as good law.

Therefore, for the CISG to become part of UK law, legislation must be the case. Legislation creates law from the top down by producing general principles that settle future disputes. This is known as the top-down law making approach and it requires governmental intervention by the implementing legislators.⁴⁹⁷ Contrary to the bottom up approach, legislation creates law from the top down by producing general principles that will govern future disputes.

The à la carte model and its three sub-models would be incorporated in the UK legal system through legislation, namely the top down lawmaking approach. Such an approach could prove advantageous as the top down lawmaking process draws attention to social forces. It highlights the implementing legislator’s attention to social trends and economic factors, elements that are both involved in business transactions settled by the CISG.⁴⁹⁸ The top down approach of lawmaking ought to craft budgets for the political bodies, it signifies and craft laws of wide-ranging applicability.⁴⁹⁹ The legislators’ authorisation requires that they aim not in serving the welfare of individuals, but of the public as a whole, which sometimes demands

⁴⁹⁵ *Parlement Belge* [1879] 4 P D 129 at 154

⁴⁹⁶ M Lobban, ‘Custom, common law reasoning and the law of nations in the nineteenth century’ in A Perreau-Saussine and J B Murphy (eds), *The Nature of Customary Law Legal, Historical and Philosophical Perspectives* (CUP 2007)

⁴⁹⁷ *Ibid*

⁴⁹⁸ B Zeller, ‘Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’ (2003) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>> accessed 3 March 2010

⁴⁹⁹ J J Rachlinski, ‘Bottom-up versus Top-down lawmaking’ (2006) 73 CLS 937

sacrificing individual interests to the collective good.⁵⁰⁰ Furthermore, the top down approach enables the legislators to implement any conceivable solution to a problem. Legislators are allowed to subsidise or tax a business transaction; they can control exactly how a transaction may be carried out or even prevent a transaction altogether.⁵⁰¹ This variety of power is almost certainly crucial to solving some trading issues that are not amenable to the resolution by adjudication.⁵⁰² However, in the same way the scope of legislative power endows the authority required in targeting several business transaction issues, it might generate a cognitive trap for legislatures. Such a trap can be created as the implementing legislators might be tempted to employ their impressive regulatory power in manners that are excessively ambitious.⁵⁰³

3.3 The à la carte model may be transposed into the UK legal order through three sub models

The author took into consideration four key elements when drafting the à la carte model in order to ensure the quality of the legislation in terms of its ability for implementation, flexibility, legal certainty, adequacy and feasibility. These four elements are essential when constructing a piece of legislation and are to the benefit of the implementing legislator as they measure the quality of the legislation. This is also advantageous and would facilitate the implementing legislator's work, as it would control the outcome of such an implementation.⁵⁰⁴

⁵⁰⁰ J Madison, 'The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation' (1788) <http://www.constitution.org/fed/federa57.htm> accessed 5 March 2010

⁵⁰¹ J J Rachlinski, 'Bottom-up versus Top-down lawmaking' (2006) 73 CLS 955

⁵⁰² Ibid

⁵⁰³ Ibid

⁵⁰⁴ Few studies have linked the quality of legislation to its capacity for implementation. The present author makes an attempt, based primarily upon the studies of the enforceability of law derived from a framework devised by P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997). For an overview of his framework and its relation to the quality of legislation in terms of implementability see b Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement, Theory and Cases* (Leiden University Press 2006) chapter 2

According to some scholars, ambiguity and vagueness in legal rules should be strictly avoided⁵⁰⁵, legal drafts ought to be as certain as possible.⁵⁰⁶ Legally certain law allows for more predictability which gives people the right to become aware of what is expected of them.⁵⁰⁷ Legal certainty is also significant as it diminishes the exercise of discretion by the different parties involved in the implementation procedure.⁵⁰⁸ This is of great importance as it guarantees that legislation accomplishes what it has been set out to achieve. Legal rules that are ambiguous and vague might be construed in a variety of approaches, and the final outcome may not be what the implementing legislator initially had envisioned.⁵⁰⁹ The à la carte model offers **three sub models** which will be later analysed in this chapter, two of them have been applied and tested either by other countries or by the UK.

1. The first sub model, namely the à la carte by omitting part II of the CISG

has been applied by the four Scandinavian countries, however this reservation was afterwards removed by Denmark, Finland and Sweden.⁵¹⁰ Despite the reservation withdrawal it has been tested and we are aware of the drawbacks⁵¹¹ and this is the significance of legal certainty, to be able to regulate the outcome. In addition, sub-model I (Omitting Part II CISG and incorporating CISG's Part III) is quite unlikely for the UK but, if it were to be the chosen model for the UK, it would very likely mean that the CISG's Part III inclusion would interfere with sections of the Sale of Goods Act 1979 (amongst which would be such sections as ss 12-15 thereof). Therefore, sub-model I is the closest the UK legislator would ever get to abolishing/repealing/interfering with the core of Sale of Goods Act 1979 (ss 12-15 thereof).

⁵⁰⁵ For an explanation of the two terms see A R B Seidman, and N Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) 262, 263

⁵⁰⁶ G C Thornton, *Legislative Drafting* (3rd edn, Butterworths 1987) 56; see A R B Seidman, and N Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) 255; L Fuller *The Morality of Law* (Yale University Press 1976) 38-39, 63, 65, 79; B Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 66

⁵⁰⁷ A R B Seidman, and N Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) 255

⁵⁰⁸ GI Democracy Rule of law report, *Sustainable Governance Indicators* (2009) <http://www.sgi-network.org/pdf/SGI09_Democracy_RuleOfLaw.pdf> accessed 1March 2010

⁵⁰⁹ Ibid

⁵¹⁰ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 J L & Com 289-299

⁵¹¹ The drawbacks of all three sub-models will be discussed later on in this chapter under the title 'possible criticisms of the à la carte model'.

2. **The second sub-model, namely the à la carte by omitting part III of the CISG** has not been applied by any State so far. Nevertheless, opting out of part III of the Convention is a possible choice for the UK taking into account that people in this country would be very unwilling to regulate or reduce the effect of the Sale of Goods Act 1979.⁵¹² This part establishes the parties' obligations, rights, and remedies it also lays down the rules controlling the risk of loss. The reason why the author considers that it would be beneficial to opt out of part III of the CISG is that the main differences between the Sale of Goods Act and the CISG are found in this part.
3. **The third sub model is the à la carte by transforming the CISG in the UK legal order by means of Statutory Instrument** (based on the legal model of implementation of EU matters).⁵¹³ This sub model was inspired by the approach taken to transport the EU Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees in the UK.⁵¹⁴ There are number of reasons why this model poses a safe approach and would thus lead to legal certainty. The Directive has been already effectively implemented in the UK legal order and the Sales of Goods Act 1979 will be given priority.

However, in spite of natural restrictions to accomplishing legal certainty due to the inevitable existence of unpredictability and uncertainty in society, legal certainty is a vital objective in law making processes.⁵¹⁵ The only sub model which would be probably criticised for not being certain is the second one, the à la carte by omitting part III of the CISG as no State so far has made a reservation under Article 92 to opt out of part III. Perhaps, the reason of this would be that such an approach does not seem to have been followed anywhere else in the world. Therefore, there are no other States approaches to compare and adopt and no precedent which might make one claim that it could lead to uncertainty.

⁵¹² C Bianca and M Bonell, *Commentary on the International Sales Law* (Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594.

⁵¹³ Statutory Instruments dating back to 1987 available at <www.opsi.gov.uk/stat.htm>

⁵¹⁴ The Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12)

⁵¹⁵ GI Democracy Rule of law report, *Sustainable Governance Indicators* (2009) <http://www.sgi-network.org/pdf/SGI09_Democracy_RuleOfLaw.pdf> accessed 1March 2010

At the same time, the à la carte model provides great flexibility as it endows the implementing legislator the power to adjust the CISG into the UK's economic, political and legal system. Flexibility is a key element in constructing effective legislation; it illustrates the quality of legislation in terms of its ability for implementation.⁵¹⁶ The à la carte model is specifically designed so as to be adequately flexible to correspond to a range of interests in commerce and to be adjustable to the variety of circumstances which occur in the trading world. However, flexibility is very significant but, all too often, a contradictory aim in lawmaking processes.⁵¹⁷ A number of academics have argued that extremely precise, legally certain legislation is defective in that it is incapable of adjusting itself to modern society's complex social affairs.⁵¹⁸ Therefore, some academics have argued for a legitimate law or reflexive law which mirrors, as much as possible, the interests of the different stakeholders in the social order.⁵¹⁹ Nonetheless, if law does not do so, it will lose legitimacy and in due course fail to be applied appropriately. Likewise, other scholars have said that legislation should be made in such a way so as to deal with the complexity of the real world in which no two cases are truly fully the same.⁵²⁰ In order to serve in a flexible way, the à la carte model is somewhat abstract and open rules are employed as they are able to better illustrate the complex interests of society. Moreover, open rules can be construed to fit a range of cases.⁵²¹

A significant problem with regard to flexibility, is that abstract legislation presents far less control over the variety of expected outcomes in that it consents to a high level of

⁵¹⁶ M Ozaki, *Negotiating Flexibility: The Role of the Social Partners and the State* (English Labour Office 1999) 45

⁵¹⁷ M Ozaki, *Negotiating Flexibility: The Role of the Social Partners and the State* (English Labour Office 1999) 47

⁵¹⁸ This point is made most clearly by Luhmann and Habermas. For an overview of their arguments see G Teubner, 'Substantive and reflexive elements in modern law' (1983) 17 L S Rev 244-246 and 268, see M Rheinstein, *Max Weber on Law in Economy and Society* (Simon and Schuster 1954) 303-318 On this point, see also D Kennedy, 'The disenchantment of logically formal legal rationality or Max Weber's sociology in the genealogy of the contemporary mode of Western legal thought' (2004) 55 Hastings Law Journal 1031-1076. The origins of this line of thought can be traced to early sociologists of law including E Ehrlich, *Fundamental Principles of the Sociology of Law* (Arno Press, 1936) and R Pound, 'The limits of effective legal action' (1917) 27 International Journal of Ethics 150-167

⁵¹⁹ For an overview of the literature see G Teubner, 'Substantive and reflexive elements in modern law' (1983) 17 L S Rev. Teubner quotes the following authors: P Nonet and P Selznick *Law and Society in Transition: Toward Responsive Law* (Harper 1978) and J Habermas, *Legitimation Crisis* (Beacon 1975)

⁵²⁰ E Bardach and R A Kagan, *Social Regulation: Strategies for Reform* (Transaction Publisher 1982) 59

⁵²¹ G Teubner, 'Substantive and reflexive elements in modern law' (1983) 17 L S Rev 244 and H L A Hart, *The Concept of Law* (Clarendon Press 1961) 125-127

discretion on behalf of both the regulated and the regulating communities. Hence, the à la carte model in terms of its ability for implementation would require both legal certainty and flexibility in order to be a truly good piece of legislation. Flexibility would be required to apply the law to the complexities of the trading world and to balance the diverse interests in commerce amply to preserve the law's legitimacy and legal certainty would be required to regulate the outcomes of the implementation process.⁵²²

3.4 Article 92 Reservation

One of the ingredients which made CISG successful lies in the way it was drafted, which was supported by a lengthy procedure, born from the vestiges of the ineffective of the 1964 Hague Conventions Uniform Law on the International Sale of Goods⁵²³ and Uniform Law on the Formation of Contracts for the International Sale of Goods⁵²⁴. Unfortunately, these precursors did not prove to be very fruitful, with only nine states ratifying them.⁵²⁵

Uniform law accommodating commercial transactions offers a common platform for international operators in Contracting States, diminishes the transaction expenses and some of the disadvantages related with forum shopping.⁵²⁶ One of the reasons why the CISG's predecessors, ULIS⁵²⁷ and ULFIS⁵²⁸, were not very successful in their operations is that they were very drastic in their association to domestic law. They completely excluded municipal law for those affairs dealt with and required an autonomous application and interpretation⁵²⁹ with no room for domestic law to interfere by means of local conflict rules. Nonetheless, this drastic shift and departure

⁵²² Here the author has been influenced by Jong's concept of enforceability which also makes certainty and adaptability vital. See P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997). For more about the concept of enforceability see B Van Rooij, 'The enforceability of Chinese water pollution regulations, what room for improvement' (2002) China Perspectives 40-53

⁵²³ULIS

⁵²⁴ULFIS

⁵²⁵ The nine States are: Belgium, Germany (Federal Republic), Gambia, Israel, Italy, Luxembourg, The Netherlands, San Marino, and the UK.

⁵²⁶ G Wagner, 'Transaction Costs, Choice of Law and Uniform Contract Law' (2007) <<http://www.uncitral.org/pdf/english/congress/WagnerG.pdf>> accessed 14 April 2010

⁵²⁷ Uniform Law on the International Sale of Goods.

⁵²⁸ Uniform Law on the Formation of Contracts for the International Sale of Goods

⁵²⁹ Article 17 ULIS

from the traditional way of resolving sales law conflicts failed. One of the main reasons why these two instruments did not prove to be very successful was that the exclusion of conflict of laws and the radical assault on the traditional way of resolving sales law conflicts proved to be impractical.⁵³⁰ Not all matters accommodated by the uniform sales laws could be advanced within these laws' systems.⁵³¹

Thus, the genesis of the CISG aimed in ensuring the advancement of uniform sales law which was flexible, facilitating the business transactions. Representatives from all UN members were asked to take part so as to guarantee the suitability of the CISG.⁵³² The flexibility of the CISG was achieved, by way of reservations vis-à-vis unique public policy.⁵³³ Article 92 is one paradigm of a reservation which endows flexibility. According to Article 92(1) which is found in Part IV, **a Contracting State is entitled to the right of declaring that is not bound either by Part II or by Part III of the CISG.**⁵³⁴ Part II of the Convention deals with a number of issues that occur from the drafting of the contract by the exchange of both offer and acceptance. When the drafting of the contract takes place in this fashion, the contract is established when the acceptance of the offer becomes effective.⁵³⁵ It is worth mentioning that Part II is not to be employed to a sales contract between a party in a Contracting State and a party in a reservation State.⁵³⁶ Part III of the CISG on the other hand, governs the sales of goods and it provides the substantive rules for international sales.⁵³⁷

3.4.1 Sub-model I: À la carte by omitting Part II of the CISG

Part II of the CISG includes the most significant provisions regards contract formation. Nevertheless, it is worth mentioning that this is not the only part that contains provisions which deal with contract formation. Other articles which refer to the formation of a contract are Articles 4, 6 and 13.

⁵³⁰ J O Honnold *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999)

⁵³¹ Ibid

⁵³² The drafting was initially grounded on two Conventions, one on formation and one on substantive issues. These two Conventions were not joined to create a 'double Convention' until late in the drafting.

⁵³³ For more details on the drafting of the CISG, see J O Honnold *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999)

⁵³⁴ CISG Article 92(1)

⁵³⁵ See CISG Article 18

⁵³⁶ CISG Article 92 <<http://www.cisg.law.pace.edu/cisg/text/e-text-92.html>>

⁵³⁷ CISG Part III <<http://www.cisg.law.pace.edu/cisg/text/treaty.html>>

The structure of Part II is as follows, Articles 14-17⁵³⁸ establish the rules related with the offer, Articles 18-22⁵³⁹ deal with the acceptance of the offer, Article 23⁵⁴⁰ lays down the rules regards the moment of the conclusion of a contract and Article 24⁵⁴¹ deals with issues of definition.

The drafting of Part II contract formation took into consideration the fact that States parties have different legal backgrounds. The central argument raised the issue of whether a contract should be made with the communication or acknowledgment of the statement of acceptance.⁵⁴² Here the Roman legal background of civil law from the continental Europe has predominated. Therefore, the acknowledgment of the statement of acceptance is the requirement for the formation of a contract.⁵⁴³ On the other hand, the Anglo-American doctrine of common law found its way into the CISG through the general possibility to withdraw the offer.⁵⁴⁴

Furthermore, pursuant to Part II of the Convention the ruling regarding the formation of a contract is aimed at the formation of sales contracts, however, it does not precisely relate to transactions in its entirety.⁵⁴⁵ Thus, a large amount of existing provisions could also be employed to the creation of other international commercial contracts.⁵⁴⁶ In addition, a UNIDROIT research group, which deals with the preparing of general contractual rules, applied Part II of the Convention as the underpinning for their work.⁵⁴⁷

Sub-model I proposes a declaration on part of the UK to transpose the CISG by omitting part II thereof pursuant to Article 92. The only States that have made declarations under Article 92 (1) to opt out of Part II so far are the four Scandinavian countries.⁵⁴⁸ However, in October 2009, the Ministries of Justice of Denmark, Finland and Sweden decided that their countries would apply Part II by withdrawing

⁵³⁸ CISG Articles 14-17

⁵³⁹ CISG Articles 18-22

⁵⁴⁰ CISG Article 23

⁵⁴¹ CISG Article 24

⁵⁴² F Enderlein and d Maskow, ‘ International Sales Law’ (1992) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>> accessed 14 June 2011

⁵⁴³ Ibid

⁵⁴⁴ Ibid

⁵⁴⁵ Ibid

⁵⁴⁶ Ibid

⁵⁴⁷ Ibid

⁵⁴⁸ J Lookofsky, ‘Alive and Well in Scandinavia: CISG Part II’ (1999) 18 J L & Com 289-299

their long-standing Article 92 declaration.⁵⁴⁹ Norway has not made such a declaration but is also considering this.⁵⁵⁰ Pursuant to this reservation the Scandinavian countries at the time of ratification declared that they would not be bound by the contract formation provisions under Part II of the CISG.⁵⁵¹ Hence by transforming the CISG these four countries omitted initially eleven provisions from the original Convention's version in force in countries that did not make the Article 92 reservation.⁵⁵² This meant that for parties located in Finland, Norway, Denmark or Sweden involved in a commercial transaction within the capacity of the CISG, the contract formation rules applicable to the operation would depend on the relevant law pursuant to the rules of private international law.⁵⁵³

The Scandinavian legislators put two arguments forward to support the Article 92 reservation.⁵⁵⁴ First, in regard to revocability of offers, the rules found in Part II were criticized as excessively influenced by the analogous common law rules. In particular, the Scandinavian legislators considered Article 16(1) as rather foreign to Scandinavian law as it allows the offeror to revoke *tilbagekalde* prior to acceptance.⁵⁵⁵ However, this is an argument which cannot be put forward by the UK as Article 16(1) is not unfamiliar to UK law. On the contrary, maintaining Article 16(1) of the CISG might be rather advantageous as an Article generated from common law⁵⁵⁶ will be familiar and easier to interpret for the UK. Second, in general it was feared that if a reservation to omit Part II was not declared uncertainty would

⁵⁴⁹ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

⁵⁵⁰ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html>>

⁵⁵¹ CISG Article 92 <<http://www.cisg.law.pace.edu/cisg/text/treaty.html>>

⁵⁵² Articles 14-24. Article 14 provides the definition of offer, when a proposal for concluding a contract is sufficiently definite. Article 15 When offer becomes effective; prior withdrawal. Article 16 Revocability of offer. Article 17 Rejection of offer followed by acceptance. Article 18 Acceptance: time and manner for indicating assent. Article 19 'Acceptance' with modifications. Article 20 Interpretation of offeror's time-limits for acceptance. Article 21 Late acceptances: response by offeror. Article 22 Withdrawal of acceptance. Article 23 Effect of acceptance: time of conclusion of contract. Article 24 When communication 'reaches' addressee.

⁵⁵³ J Lookofsky, *Understanding the CISG in Scandinavia: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2nd edn, DJOF Publishing 2002)

⁵⁵⁴ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 J L & Com 289-299

⁵⁵⁵ Pursuant to the avoidance rule relevant in Scandinavian national law (*Aftaleloven*, in Denmark), every communicated offer is a 'firm' offer binding upon the offeror for a reasonable period of time. The Danish government's stance on this point is verified in the remarks to the legislation implementing Denmark's CISG ratification. See *Folketingstidende* 1988-89 tillæg A, sp 1015

⁵⁵⁶ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 J L & Com 289-299

be created.⁵⁵⁷ This was justified on the ground that Part II deals only with contract formation, but not contract validity and this would lead to uncertainty as to when a valid and binding international sales contract had been made. Article 4 of the CISG, often gives rise to confusion.

Article 4 of the Vienna Convention 1980 provides that:⁵⁵⁸

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;

It seems that Article 4 leaves plenty of room for the application of mandatory provisions that deal with matters of validity.⁵⁵⁹ As the CISG fails to classify and thus limit the term ‘validity’, the à la carte model by omitting CISG Part II will allow the Sale of Goods Act 1979 to establish when a cause of invalidity occurs and its consequences.⁵⁶⁰

The UK may implement the CISG by making a reservation not to be bound by Part II of the Convention. The legal effect of such a declaration does not solely depend on UK’s intent but is also a matter of international treaty interpretation.⁵⁶¹ To be more precise, Article 92 provisions should be examined together with Part 1 which deals with the Convention’s sphere of application.⁵⁶²

The main rule in Article 1(1) established that:

- (1) This Convention applies to sales of goods between parties whose relevant places of business are in different States: (a) when the States

⁵⁵⁷ Ibid

⁵⁵⁸ CISG Article 4

⁵⁵⁹ C Von E and P Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, (4th edn, C H Beck 2004) 41-137

⁵⁶⁰ Ibid

⁵⁶¹ J Lookofsky, ‘Alive and Well in Scandinavia: CISG Part II’ (1999) 18 J L & Com 289-299

⁵⁶² All CISG Contracting States, including the Scandinavian States, are bound by the rules in Part I.

are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.⁵⁶³

Moving forward to the relevant parts of CISG Article 92, we see that:

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention . . .⁵⁶⁴

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph, in respect to Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect to matters governed by [Part II].⁵⁶⁵

According to paragraph (1) of Article 92, the UK may declare that it will not be bound by Part II of the Convention. However, paragraph (2) establishes that such a reservation means that in matters regulated by Part II the UK is not to be considered a Contracting State within Article 1(1).

Evidently, as far as contracts concluded between a UK trader who would be bound by the Article 92 reservation and a party located in a Contracting State which has not (for instance USA) are concerned, the contact formation rules do not apply by virtue of subparagraph (a) of Article 1(1). For the UK would not be a ‘Contracting State in matters governed by Part II’,⁵⁶⁶ and Part II can only apply by virtue of subparagraph (a) when both States are ‘Contracting States’ in Part II.

In addition, in 1987 it was suggested that Part II of the Convention may in some occasions apply regardless of an Article 92 reservation.⁵⁶⁷ When Denmark ratified the Convention with a reservation to omit part II, a Dutch scholar expressed the view that even Scandinavian courts should regard themselves bound (by Article 1) to apply

⁵⁶³ CISG Article 1(1)

⁵⁶⁴ CISG Article 92 continues, ‘. . . or that it will not be bound by Part III of this Convention.’

⁵⁶⁵ CISG Article 92

⁵⁶⁶ CISG Article 92(2)

⁵⁶⁷ C Bianca and M Bonell, *Commentary on the International Sales Law* (Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594.

CISG Part II in instances where the 1(1)(b) rule directs to the law of a CISG State which has not declared such a reservation.⁵⁶⁸

3.4.2 Sub-model II: À la carte by omitting Part III of the CISG

Sub-model II proposes a declaration on part of the UK to transpose the CISG by omitting part III thereof pursuant to Article 92. No country so far has made a reservation under Article 92 to opt out of part III (Articles 25-88)⁵⁶⁹. However, omitting part III of the CISG is a possibility for the UK considering people in this country would be very reluctant to manipulate or reduce the effect of the Sale of Goods Act 1979. This part deals with the parties' obligations, rights, and remedies it also lays down the rules controlling the risk of loss. Moreover, each breach of an obligation established by the CISG gives rise to one or more remedies, the three main remedial types are damages, avoidance and specific performance.⁵⁷⁰

Part III of the Convention, regulates the substantive rules for international sales and comes under the title 'Sales of Goods'. This part of the CISG lays down the rules that govern the parties' obligations, the risk of loss and the rights and remedies for breach. The seller is obliged to deliver the right goods, at the right place and time, as required by the CISG rules and as stipulated by the contract.⁵⁷¹ Unless otherwise agreed, the goods do not match the contract requirements unless they are both fit for any particular purpose made aware to the seller at the contracting time and for ordinary purposes.⁵⁷² Every time an obligation breach occurs, one or more CISG remedies for breach arise.⁵⁷³

The reason as to why the author believes that it would be beneficial to omit part III of the CISG is that the major differences between the Sale of Goods Act and the CISG are found in this part. The differences and similarities were examined in the literature

⁵⁶⁸ As long ago as 1989, it was foreseen that even Scandinavian courts would occasionally be bound to employ the rules in CISG Part II, the Article 92 declarations notwithstanding. Joseph Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1991) 39 Am J Comp L 405

⁵⁶⁹ CISG Articles 25-88

⁵⁷⁰ CISG Part III

⁵⁷¹ CISG Article 33

⁵⁷² For Buyer's remedies see CISG Articles 45-52

⁵⁷³ The buyer's remedies are set forth in CISG Articles 45-52, whereas the seller's remedies are set forth in CISG Articles 61-65

review chapter and the greatest difference between the two instruments arises under the termination of the contract. The CISG makes it hard to terminate a contract whereas the Sale of Goods Act makes it easier. An Article which deals with termination of contract under the CISG is the first provision found in Part III, Article 25.⁵⁷⁴ In accordance to Article 25 of the CISG, a contract can be terminated for ‘fundamental breach’⁵⁷⁵; this will lead to complication as this notion is not employed in the UK. Another significant provision which is largely unknown to the UK legal system is Article 47, also known as *Nachfrist*.⁵⁷⁶ The Convention allows the parties involved in a contract to stipulate an extra period of time of rational extent for the other to execute their part of the deal and, at the end of this time, to ‘avoid the contract if performance is still unforthcoming’.⁵⁷⁷ On the other hand, English law has a different approach regards time obligations when dealing with international sales.⁵⁷⁸ Hence, if the UK transforms the UN Convention, there might arise some complexity in implementing the CISG in conjunction with current contract law. More specifically opting in Part III of the Convention will result in a direct conflict between this particular part of the CISG and the equivalent provisions of the Sale of Goods Act. For their corporative differences it would be problematic to adhere to Part III of the CISG.

In addition, the Sale of Goods Act 1979 takes a different approach on freedom of contract. According to statutory restriction included in the Unfair Contract Terms Act 1977 which limits the right of the parties to contract out of the Implied Terms (ss 12 - 15)⁵⁷⁹, the parties are able to agree on the terms of their contract. The introduction of the Unfair Contract Terms Act 1977 established a very clear limitation on the freedom of contract notion. Primarily, it deals with the terms as to quality; sample, title and description implied under ss 12-15 Sale of Goods Act 1979.⁵⁸⁰ According to the Unfair Contract Terms Act 1977 contracting out of the implied terms in ss 12–15 (Sale of Goods Act 1979) is not possible, thereby establishing ss 12-15 mandatory, as the law in the UK stands currently. Therefore, as the à la carte model is theoretical,

⁵⁷⁴ CISG Article 25

⁵⁷⁵ Ibid

⁵⁷⁶ CISG Article 47

⁵⁷⁷ Ibid

⁵⁷⁸ Sale of Goods Act 1979 ss 10(1) and 14(1)

⁵⁷⁹ Unfair Contract Terms Act 1977 s 6

⁵⁸⁰ Sale of Goods Act 1979 ss 12-15

one should not exclude the theoretical possibility that ss 12-15 may well no longer be mandatory upon deployment of sub-model I. The Convention's equivalent rules are laid down in Part III. In this vein, another argument is put forward for omitting Part III as it is rather complex to evade the Sale of Goods Act 1979 mandatory rules.

The sellers' obligations are established in Chapter II (Articles 30-52)⁵⁸¹, whereas the buyers' obligations are set forth in Chapter III (Articles 53-59)⁵⁸². Article 30 synopsises the different duties of the seller, that is the seller ought to distribute the right goods, at the precise place and time as defined by the CISG rules and contract. The injured buyer is offered by the CISG a variety of remedies for the seller's breach of obligation. However, the CISG and the Sales of Goods Act 1979 differ in two instances. First, the CISG regulates the seller's express duties regarding the quality and description of the goods,⁵⁸³ not having the procedural implication occurring under the Sale of Goods Act 1979. The Sales of Goods Act 1979⁵⁸⁴ ignores express contract duties.⁵⁸⁵ Secondly, and more significantly, the Convention does not provide an implied term of 'merchantable (or satisfactory)'⁵⁸⁶ quality,⁵⁸⁷.

The CISG does not embrace the notion of description to distinguish goods that are different in nature or kind from those the trader was necessitated to provide, despite the fact that it recites a duty on the seller to deliver goods that respond to their contractual portrayal.⁵⁸⁸ The word ought to be implicit in a way as a part of the seller's obligation to conform its express quality duties in the agreement.⁵⁸⁹ When the trader illustrates a device as having a specific production ability, then that is an express, descriptive duty as to its performance potentials.⁵⁹⁰

⁵⁸¹ CISG Articles 30–52 (Chapter II)

⁵⁸² CISG Articles 53–59 (Chapter III)

⁵⁸³ CISG Article 35(1)

⁵⁸⁴ Its predecessor, the Uniform Sales Act 1906, also had a provision on express warranty (s 12).

⁵⁸⁵ CISG article 35

⁵⁸⁶ In s 14(2) of the Sale of Goods Act 1979, as amended, 'merchantable' has been replaced by 'satisfactory'. Merchantable quality is a very complicated concept to elucidate; it depends on a market place in which goods are sold to a variable standard.

⁵⁸⁷ Sale of Goods Act 1979 s 14

⁵⁸⁸ CISG Article 35

⁵⁸⁹ P Schlechtriem, 'The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods' (1984) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem10.html#1>> accessed 14 April 2010

⁵⁹⁰ Ibid

Moreover, under Articles 66-70 of the CISG the passing of risk is controlled. Even though these Articles refer to the passing of risk, they do not actually define it.⁵⁹¹ Moreover, the most significant rules concerning risk are those which take effect when the contract of sale entails ‘carriage of the goods’.⁵⁹² On the other hand, the Sale of Goods Act 1979 offers a narrow opinion on the transfer of risk and even the *presumptive* rules it lays down⁵⁹³ have no relevance in exercise when it comes to FOB and CIF contracts.⁵⁹⁴ This is exclusively due to case law progress. Traders in the industry of purchasing and vending goods across international borders have every ground to be irritated with the the transfer of risk provisions in the CISG.⁵⁹⁵ The basic rule and its exception it’s not just the only one that gives rise to concern. The retrospective transfer of risk that is permitted by English law in the case of CIF contracts is sanctioned under the CISG as well, but the Convention alludes to goods vended in transit and transfers risk, either from the handing over of the goods to the transporter issuing the transport document or from the contract date.⁵⁹⁶ CIF contracts are often, in the commodities trade, concluded prior to shipment and the goods are afterwards shipped but are not identified to an exacting contract until sometime following shipment.⁵⁹⁷ Moreover, even if the rule of retrospective transfer is relevant in such a case, it endures the same flaw as occurs in the case of FOB contracts, when alluding to a handing over of the goods to the carrier and not to shipment.⁵⁹⁸

In addition, price reduction, damages and specific performance is the area of remedies that reveals the most significant dissimilarities between the Sale of Goods Act 1979 and the CISG.⁵⁹⁹ Foremost, under common law systems specific performance is an

⁵⁹¹ J Erauw, ‘CISG Articles 66-70: The Risk of Loss and Passing it’ <<http://www.uncitral.org/pdf/english/CISG25/Erauw.pdf>> accessed 17 April 2010

⁵⁹² CISG Article 67

⁵⁹³ Sale of Goods Act 1979 s 20

⁵⁹⁴ *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402; *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder (The Julia)* [1949] AC 283

⁵⁹⁵ E Alazemi, ‘Passing of Risk in International Contracts of Sale of Goods;A Comparative Study Between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sale of Goods Act 1979’ Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html>> accessed 14 April 2010

⁵⁹⁶ CISG Article 68

⁵⁹⁷ E Alazemi, ‘Passing of Risk in International Contracts of Sale of Goods;A Comparative Study Between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sale of Goods Act 1979’ Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html>> accessed 14 April 2010

⁵⁹⁸ Ibid

⁵⁹⁹ M Bridge, ‘A Law for International Sales’ (2007) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

uncommon remedy in the commerce transactions. The majority of goods can be obtained in market state, occasionally subject to delay.⁶⁰⁰ This fact indicates that damages will infrequently be the insufficient remedy that grants a requirement to specific performance.⁶⁰¹

In promoting the concept of a contracting party's performance interest, the principle of *pacta sunt servanda*, in civil law systems has played a key role.⁶⁰² In the CISG, the civil law methodology is apparent in the manner that a vendor or a purchaser, is able to necessitate execution of duties from a party that failed to pay.⁶⁰³ In instances of those judges that would not in their domestic systems consent to specific performance in a corresponding case, an exception is being awarded.⁶⁰⁴ Moreover, a purchaser receiving non-conforming goods may not entail a seller to perform by replacing the goods delivered with conforming goods in situations where the vendor's breach is not a fundamental one.⁶⁰⁵ Once again, the requiring of performance ahead of damages is not expressly ranked by the CISG. The viewpoint of the CISG is, however, at disagreement with the common law although commercial convenience will in many situations lead a seller or purchaser to search for another source in order to obtain or dispose of goods, prior to carrying a damages request against the other party.⁶⁰⁶

The fact that damages are *prima facie* pursuant to the Sale of Goods Act 1979 calculated by 'reference to the market'⁶⁰⁷ instead by 'reference to any resale by the seller'⁶⁰⁸ in the event of a purchaser's breach or alternative transaction settled by the purchaser is what makes it different from the CISG.⁶⁰⁹ On the contrary, in the event of non-delivery or non-acceptance, a party's damages are calculated pursuant to the market prevailing on the stipulated day of distribution.⁶¹⁰ Often, this rule is,

⁶⁰⁰ Ibid

⁶⁰¹ Ibid

⁶⁰² E J Powell and S McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' <<http://saramitchell.org/pmjop07.pdf>> accessed 11 January 2010

⁶⁰³ CISG Articles 46(1) and 62

⁶⁰⁴ CISG Article 28

⁶⁰⁵ CISG Article 46(2)

⁶⁰⁶ M Bridge, 'A Law for International Sales' (2007) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

⁶⁰⁷ Ibid

⁶⁰⁸ Ibid

⁶⁰⁹ Sale of Goods Act 1979, ss 50(3) and 51(3)

⁶¹⁰ Sale of Goods Act 1979 s 51

deceptively, refer to as the ‘breach date rule’⁶¹¹, when in actual ‘fact it is the market on the date’⁶¹² instantly ‘preceding the breach’⁶¹³ that is taken into consideration.

A British judge, in a case concerning the collapse of the London tin market in the 1980s analysed to a certain extent the logical underpinnings of the market damages rule.⁶¹⁴ The seller’s and purchaser’s actual loss is not included when damages are calculated, for if they were, the seller or purchaser would in fact have to enter into a second transaction, while the seller may choose instead to keep the goods or the purchaser to spend money on a different venture.⁶¹⁵ A number of interesting features are offered by the absence of any reference to a party’s subsequent behaviour. It entails an abandonment of factual causation, as long as proof of a claimant’s actual loss is ignored.⁶¹⁶ The task of the trial judge is also simplified. A cautious examination of the reasonableness of a party’s performance in disposing of or obtaining over an extended period large amount of market-sensitive goods in order to evade exciting the market takes place by evidence of the state of the market at the appointed date.⁶¹⁷ In addition, complex tracing exercises entailing traders engaged in parallel multiple dealings concerning the same type of goods are evaded. Above all, possibly, the sale of goods contract is in effect exemplified by the market damages rule as a market differences contract.⁶¹⁸

Based squarely on the text of the Sale of Goods Act 1979 itself, the English courts approach usefully elucidate a lot of market hedging activity that takes place nowadays. However, it barely seems suitable for those sales where the purchaser is keen to utilise the goods or where damages have to be calculated to reveal the sub-standard condition of goods retained or vended on by the purchaser.⁶¹⁹ In situations similar to this, the English Court of Appeal, in a case decided approximately fifteen years ago⁶²⁰, the purchaser of defective raw materials had vended on the bulk of the

⁶¹¹ M Bridge, ‘A Law for International Sales’ (2007) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

⁶¹² Ibid

⁶¹³ Ibid

⁶¹⁴ *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 1 All ER 1056.

⁶¹⁵ M Bridge, ‘A Law for International Sales’ (2007) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

⁶¹⁶ Ibid

⁶¹⁷ Ibid

⁶¹⁸ Ibid

⁶¹⁹ Sale of Goods Act 1979, s 53

⁶²⁰ *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87

goods in a manufactured form. Although it had received grievances from sub-purchasers due to the sub-standard goods it manufactured, there was no indication before the court that the purchaser had sustained trading losses in disposing of these goods.⁶²¹ Thus, the purchaser was only granted nominal damages in respect of the on sold goods. The Court of Appeal's decision led to at least two major criticisms. First of all, the market rule can usefully grant reimbursement to a purchaser who is powerless, as often will be the case, to demonstrate the loss of status and of repeat orders from these disappointed sub-purchasers.⁶²² The purchaser gets something at least for a loss that cannot be proven but is real. Secondly, at a time when the House of Lords was compromising with the idea of a performance interest in a building contract case,⁶²³ the Court of Appeal was departed from this same approach, regardless of its statutory basis, in a sale of goods case. Therefore, the purchaser of the defective goods should have received more than nominal damages as he paid too much for them. The seller would have been able to command only a considerably inferior price if they had been vended in their defective condition.⁶²⁴

A tribunal under the CISG, in calculating damages for non-acceptance or non-delivery will adopt the same attitude as an American counterpart employing the rules in Article 2 of the Uniform Commercial Code. It will first look at any alternate transaction and only when no such transaction is accomplished shall it turn to the current price of the goods.⁶²⁵ Even though the Sale of Goods Act 1979 approach might appear to be more suitable to the commodities markets, it is remarkable to see that the standard form commodities contracts subsidised by organisations like the Grain and Feed Trade Association take an analogous approach and start with the alternate transaction.⁶²⁶

The CISG method has the virtue of being more suitable and understandable to the business related purpose of several contracts, particularly those concerning industrial goods. The Sale of Goods Act 1979 tactic, nevertheless, may perhaps be the easier to employ. On the other hand, the CISG offers a wide-ranging damages rule, analogous

⁶²¹ M Bridge, 'A Law for International Sales' (2007) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

⁶²² Ibid

⁶²³ *Alfred Macalpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518.

⁶²⁴ M Bridge, 'A Law for International Sales' (2007) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

⁶²⁵ Articles 75-76 CISG

⁶²⁶ GAFTA 100, cl 23

to the common law remoteness rule for breach of contract, additional to the rules dealing with alternative transactions and to the current price.⁶²⁷

Major differences between the CISG and the Sale of Goods Act 1979 found under Part III of the CISG

<u>CISG</u>	<u>Sale of Goods Act 1979</u>
Article 50-Price reduction in case goods do not conform with the contract.	The SoGA does not provide a price-reduction remedy to the buyers.
Article 47-Nachfrist, additional period of time for the other to perform.	The SoGa takes a strict view of time duties; an additional period of time for the other party to perform is not available.
Article 25-A contract can only be terminated for fundamental breach. The CISG makes it hard to terminate a contract.	The SoGA makes it easier to terminate a contract. Ss 13-15 include the conditions of a contract and for any breach the buyer is allowed to discard the goods and terminate the contract.
Articles 66-70-Passing of risk is only transferred if goods are ‘clearly identified to the contract’.	S 20 offers a narrow opinion on the transfer of risk and the presumptive rules it lays down.

3.4.3 Sub-model III: A la carte by taking advantage of European experience

Principal laws in the UK follow a specific procedure in order to have effect; they firstly pass through the Parliament taking the form of bills. Once these bills progress by completing all of their stages, they become Acts of Parliament. Ministers are often granted powers by Acts of Parliament to make more detailed rules, regulations or orders by means of Statutory Instruments. The capacity of these powers varies to a great extent, from the technical to much wider powers. Statutory Instruments are a type of legislation which permits the provisions of an existing Statute to be altered or be subsequently brought into force without requiring the Parliament to pass a new

⁶²⁷ Article 74 CISG

Act.⁶²⁸ These instruments are also known as subordinate, delegated or secondary legislation.⁶²⁹ The procedure adopted to make Statutory Instruments is governed by the Statutory Instruments Act 1946.⁶³⁰ This Act changed the previous system in which statutory instruments were created under the Rules Publication Act 1893.

It would, therefore, be strongly advisable for the UK to transform the CISG into the UK legal order by means of Statutory Instrument; in this way a secondary legislation will be created amending the existing primary legislation, that is the Sale of Goods Act 1979. A similar approach was employed when the Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees⁶³¹ (hereinafter ‘the Directive’) was to be transformed in the UK. The author appreciates that this is a consumer law directive; nonetheless we could expand that consumer law implementation we already have to the sphere of trader *vis- à -vis* trader law. Furthermore, the fact that this particular directive has its roots in CISG jurisprudence, gives the author reason to believe that the expansion of the directive’s approach is something that could in principle occur.

The Directive was implemented under Article 95 of the EC Treaty, which governs internal market matters, and Article 153 thereof, which governs consumer protection matters. Cross border sales, in principle, would be motivated by a set of minimum rules conforming to one principle and standard on the sale of consumer goods. This is attained by the abolition of some competition altered differences joined with the improved consumer faith from the assured protection. (The consumer faith objective is highlighted in Recital 5 of the Directive). Pursuant to Article 2 of the Directive, the trader must comply to a minimum quality duty regards the goods vended. In 2002 the DTI published the draft Regulations. The selected process of implementation was by regulations that amended the Sale of Goods Act 1979 to integrate the prerequisites of the Directive. In principle this method aimed at evading the perplexity that would probably occur from the implementation of a dual regime similar to that ruling the application of exemption clauses. Nevertheless, application of the CISG in the UK by modifying the Sale of Goods Act 1979 may prove to be the cause of as much

⁶²⁸ Statutory Instruments dating back to 1987 available at <www.opsi.gov.uk/stat.htm>

⁶²⁹ See <http://www.parliament.uk/about/how/laws/delegated/>

⁶³⁰ See <http://www.legislation.gov.uk/ukpga/Geo6/9-10/36>

⁶³¹ The Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12)

perplexity as a dual regime. The prerequisites and paternalistic ideas of the UN Convention should be incorporated within the Sale of Goods Act 1979 framework with tremendous care.⁶³²

The most significant reason for proposing the CISG to be transposed in the UK in a way similar to that of the Directive is that the Convention has influenced the drafting of this particular Directive.⁶³³ The CISG's has had to a certain degree an impact on the progress en route for uniformity of law in international business transaction affairs.⁶³⁴ It is not then a sole issue of significance to the number of States that have implemented the Convention and to the contract of sale law, as significant as those issues are. The solutions and attitude of the CISG have fed into unofficial collations such as the Unidroit Principles of International Commercial Contracts and the Lando Principles of European Contract Law. These are mechanisms that are principally appropriate to enlighten the growing new lex mercatoria,⁶³⁵ which is itself mainly a creation of the escalation of international commercial arbitration.

The CISG, furthermore, has had an insightful influence on domestic laws. As a consequence of its alleged superior atonement to contemporary trading conditions than old-style domestic laws, the CISG has directly inspired the reform of national sales laws⁶³⁶. Moreover, it has directed to the reforming of domestic law by the instrumentality of a European Union Directive on Consumer Sales Guarantees.⁶³⁷ The Directive is both analogous to and dissimilar from the CISG. The CISG has gained validity from its extensive recognition, so that focusing on it for legislative insight causes no severe jeopardy of disapproval by analysts. It is acknowledged that the Directive, mostly by virtue of provisions adopted by the CISG, fuelled a

⁶³²M Morgan Taylor and A Naidoo 'The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees- Problems of the Time of Conformity for the Quality Obligation' (2002) JCLI < <http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>> accessed 6 July 2011

⁶³³S Troiano, 'The CISG's impact on EU Legislation' (2008) IHL <<http://cisgw3.law.pace.edu/cisg/biblio/troiano.pdf>> accessed 5 May 2009

⁶³⁴For an in depth analysis of the uniformity of the CISG, see C B Andersen, *Uniform Application of the International Sales Law* (2007 Kluwer Law International)

⁶³⁵The expression is here used in a neutral way, without regard to whether it is descriptive or prescriptive.

⁶³⁶For instance, the Norwegian Sale of Goods Act 1988 (16-437) (available at <<http://www.jus.uio.no/lm/norway.sog.act.1988>>), which applies to international and domestic sales alike (although there are certain provisions applicable to international sales: see Chapter XV).

⁶³⁷Directive 1999/44/EC of the European Parliament and the Council on certain aspects of the sale of goods and associated guarantees.

reformation of provisions in the German Civil Code which governs the law of obligations.⁶³⁸

3.4.3.1 German Experience with regard to the Incorporation of Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees

Germany incorporated the CISG into its legal order in 1991.⁶³⁹ In Germany, the CISG has been transformed into national law and was enacted as statute on the 1st of January in 1991.⁶⁴⁰ Germany had been quite effective in the international application of the UN Convention, since for a considerable time German courts played a chief role in the resolution of cases vis-à-vis the CISG. It is, thus, no revelation that the first CISG cases issued in UNCITRAL⁶⁴¹, in its database CLOUD⁶⁴² were one Italian decision and seven German. Moreover, in 2000 one third of the six hundred CLOUD reported cases were of German derivation. Therefore it should not come as a surprise that several other jurisdiction courts have mentioned and embraced German CISG judgments when employing the UN Convention.⁶⁴³ More importantly, in 2002, the CISG crept into the German Civil Code⁶⁴⁴ through the European Consumer Sales Directive⁶⁴⁵ which in turn has borrowed elements from the CISG. The significance of the reformation of the German Civil Code after the

⁶³⁸ P Schlechtriem, ‘The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe’ (2002) OUCLF <<http://ouclf.iuscomp.org/articles/index.shtml>> accessed 7 July 2011. The German reforms went beyond than the Directive in addressing liability for damages in the lack of fault; the Directive itself does not deal with the remedy of damages.

⁶³⁹ In the former German Democratic Republic (GDR), the CISG took effect even a little earlier, specifically on the 1st of March in 1990. Although this could have resulted in problems in the wake of the German reunification, on the 3rd of October where the East and the West were rejoined, in practice there were no such problems.

⁶⁴⁰ Bekanntmachung über das Inkrafttreten des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf [Entry Into Force of United Nations Convention on the International Sale of Goods], Jan. 1, 1991, BGBI. II 1990 at 1477

⁶⁴¹ The United Nations Commission on International Trade Law, See <<http://www.uncitral.org/>> accessed 5 March 2011

⁶⁴² Case Law on UNCITRAL texts, it was established in 1993. See <http://www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en> accessed 5 March 2011

⁶⁴³ For instance, *Medical Marketing International v Internazionale Medico Scientifica, S.R.L.*, 99-0380, 1999 WL 311945, 1999 U.S. Dist.

⁶⁴⁴ For the 2002 German Civil Code see <<http://www.fd.ul.pt/LinkClick.aspx?fileticket=KjHyaFOKmw%3D&tqid=505>> accessed 12 April 2011

⁶⁴⁵ The Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12)

Directive is that the Directive's application finally led in the implementation of the general contract law, more specifically of the remedies in case of breach of contract, to the exemplary of the CISG.⁶⁴⁶

Although Germany is a system of law falling under the civil legal system category, it is a great point of reference for this thesis model, as the CISG has been transformed into national law partly through the Directive, which is one of the à la carte's sub-models. The CISG found its way through the German legal order through two ways; the 1991 statute incorporation⁶⁴⁷, which will be discussed in this thesis second model-the parallel model and the 2002 BGB⁶⁴⁸ reformation after the Directive which is very significant as this particular Directive has roots in CISG jurisprudence.

The concept behind the German *Schuldrechtsreform*⁶⁴⁹ was the advancement of the European private law and the necessity to implement the European Sales Directive which as already mentioned originates partly from the CISG.⁶⁵⁰ One might say that the CISG can be perceived as fertile soil on which the reform of the BGB's general law of obligations was planted. Even though the CISG was not the central purpose for reform its presence added to the climate for alteration and acted as the main motivating source for the amendment of the law.⁶⁵¹

It is thus, no exaggeration that the CISG is seen as an instrument for the development of uniform domestic law within the European Union. The author would go further saying that the CISG has served as a model for reform outside the European Union as well. What's more important is that the way the Directive has been transported into the UK may serve as a safe approach of implementing the UN Convention in the UK legal order. This author justifies this approach as safe on three grounds:

⁶⁴⁶ P Schlechtriem, 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe' OUCLF (2002) <<http://ouclf.iuscomp.org/articles/index.shtml>> accessed 7 July 2011

⁶⁴⁷ Bekanntmachung über das Inkrafttreten des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf [Entry Into Force of United Nations Convention on the International Sale of Goods], Jan. 1, 1991, BGBI. II 1990 at 1477

⁶⁴⁸ For the 2002 German Civil Code see <<http://www.fd.ul.pt/LinkClick.aspx?fileticket=KpjHyaFOKmw%3D&tabid=505>> accessed 12 April 2011

⁶⁴⁹ Reform of the law of obligations

⁶⁵⁰ D Staudenmayer, 'Die EG-Richtlinie über den Verbrauchsguterkauf' (1999) NJW 2393

⁶⁵¹ R Herber, 'The German Experience' in Ferrari (eds), *The 1980 Uniform Sales Law. Old issues revisited in the Light of Recent Experiences* (Sellier 2003) 59

1. The Directive has been significantly influenced by the CISG to the point that this experience could be taken for the purposes of the CISG implementation in the UK;
2. The Directive has been already effectively implemented in the UK legal order;
3. The Sales of Goods Act 1979 will be given priority.

3.4.3.2 UK Experience with regard to the Incorporation of Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees

In the UK, there has been a certain irony in respect of the CISG ratification. Although in the late 1990s⁶⁵² it came close to adopting the CISG it was postponed when the sponsor⁶⁵³ of a bill in the House of Lords fell ill, as a result the prepared bill was never displayed and the UN Convention has not yet been adopted by the UK. Transposed into English law by regulations in 2002⁶⁵⁴, the EU Consumer Sales Directive has nonetheless passed over elements of the CISG into English law, through into consumer sales law, even if it possibly will yet be some time before the UN Convention itself is applied in the UK.

Within the European Union the question of harmonisation of law is not one that can be expanded at any length here, nevertheless it is worth mentioning that the Consumer Sales Directive, in the UK, has been transposed in such a manner that existing law, so far as it is more approving to the consumer buyer, has been preserved.⁶⁵⁵ This is of great significance as one of the reasons opposing the CISG is that the UK wishes to maintain the Sale of Goods Act 1979. In the sphere of consumer law European Directives, which are instruments of minimum harmonisation, do allow this.⁶⁵⁶ The procedure is fascinating for the story enlightens about the association among

⁶⁵² After a consultation exercise carried out in 1997

⁶⁵³ Lord Clinton Davies

⁶⁵⁴ The Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002 No. 3045)

⁶⁵⁵ The regulations transposing the Directive added new provisions, sections 48A-F, to the existing Sale of Goods Act 1979.

⁶⁵⁶ Pursuant to Article 8(2) of the EU Consumer Sales Directive: ‘Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.’

transposed law and values and existing law and values. In the Directive's case, remedies for breach of contract under the Sale of Goods Act 1979 were left intact by the regulations implementing the Directive, although they disagree with the attitude of contract endurance that pervades the Directive⁶⁵⁷ and that is to be found in a forward way in the CISG.⁶⁵⁸ In addition, new remedies transposed from the Directive were not followed by a restraint in the Directive that they are not to be employed in instances where the non-conformity of goods delivered is insignificant in character.⁶⁵⁹ As a result, the amended Sale of Goods Act 1979 includes different rules of breach and remedies with minor attempt being made to intercede between them by way of provisions settling the selection of remedies.

Due to its crucial importance, the transposition of the Directive compelled many EU Member States to fully reconsider the law of sales and its association with the general law of obligation. By implementing the so called 'big solution' a number of these countries, such as Germany, have chosen to restructure comprehensive part of their codes.⁶⁶⁰ In these States the CISG's impact has spread throughout the domestic law of obligations further than the scope of application of the Directive and, therefore, of the CISG.⁶⁶¹ In other words the Consumer Sales Directive is the living paradigm of the UN's Convention's indirect impact on the legislation of EU Member States. This means that the UK whether like it or not has indirectly through the philtre of the EU Consumer Sales Directive been 'contaminated' by the CISG 'virus'.⁶⁶² It is therefore evident that the UK has merely adopted the CISG through the Directive and the way it has been transposed into the UK may be taken as a great paradigm of how the CISG

⁶⁵⁷ The implied terms of description quality and fitness for purpose found in sections 13-14 of the Sale of Goods Act 1979 are all promissory conditions, this denotes that any breach irrespective of consequences (though see now section 15A, which was added in 1995) leads in termination rights. Pursuant to the Sales Directive, the idea of contract survival confirms that 'rescission' is a last ditch remedy and every attempt is made to advance the contract to discharge by performance.

⁶⁵⁸ Contractual avoidance concerning quality and related performance matters necessitates there to be a fundamental breach of contract (Article 25), which is an effects-based test.

⁶⁵⁹ See Article 3(6) of the Sales Directive: 'The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.'

⁶⁶⁰ See Schlechtriem , '10 Jahre CISG-Der Einfluss des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts' (2001) IHR 12-18

⁶⁶¹ See for instance Glockner, 'Die Umsetzung der Verbrauchsguterkaufrichtlinie in Deutschland und ihre Konkretisierung durch die Rechtsprechung' (2007) JZ 654; R Herber, 'The German Experience' in Ferrari (eds), *The 1980 Uniform Sales Law. Old issues revisited in the Light of Recent Experiences* (Sellier 2003) 59

⁶⁶² The strength of this impact depends also on mandatory nature of both the Directive and the national provisions which transpose the Directive into national law (see Article 7 Consumer Sales Directive), while the CISG mostly contains default rules.

should be employed in the UK legal order. It is no wonder that a French scholar went so far as to portray the EU Consumer Sales Directive as a ‘Trojan Horse’, generated to permit uniform sales law to penetrate the domestic private law of sale through the back door.⁶⁶³

3.5 Possible criticisms of the à la carte model

3.5.1 À la carte by omitting Part II of the CISG

The author is aware that sub-model I of this thesis model may be critisized on three grounds. Firstly, the Scandinavian States that have made a reservation pursuant to Article 92 not to be bound by Part II of the CISG are not common law countries. However, why ought one to base their argument on common law systems only? The approach that civil law States have followed might be more effective than the approach of common law States. That is why the author of this thesis has researched both common law and civil law States in order to efficiently draft her models.

Secondly, the fact that in October 2009, the Ministries of Justice of Denmark, Finland and Sweden decided that their countries would apply Part II by withdrawing their long-standing Article 92 declaration.⁶⁶⁴ The fact that the reservation has not proved successful for these three Scandinavian countries does not mean that it will not benefit the UK legal order as the UK would probably prefer sub-model II considering it would not be most willing to abolish much of Sale of Goods Act for international business transactions. Transforming an international law into a domestic legal system is not as simple in practise as it is in theory. The method by which the new set of rules would be integrated into a country’s legal system is comparable to that of

⁶⁶³ Raynard, ‘De l’influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s’inspire d’une convention international pour compliquer, encore, le recours de l’acheteur, Revue trimestrielle de droit civil’ (1997) Rev Trim Dr civ 1020, 1024: ‘Ainsi le droit communautaire s’apprete a jouer un rôle inattendu de Cheval de Troie pour permettre au droit de la vente internationale d’investir le droit civil de la vente interne’. The translation in english sais something along these lines : ‘As the Community law is about to play the unexpected role of the Horse of Troy allowing the law of international sale to enter into domestic law.’

⁶⁶⁴ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

transplanting an organ from a healthy human body to a sick human body.⁶⁶⁵ In turn these rules are called legal transplants; nevertheless, as a human body may discard such a transplant, the transformation of a set of rules into a domestic legal system may be unsuccessful.⁶⁶⁶

Thirdly, one of the Scandinavian legislators' arguments to support the Article 92 reservation⁶⁶⁷ was that the rules found in Part II were criticised as extremely affected by the analogous common law rules. More specifically, the Scandinavian legislators regarded Article 16(1) as rather unfamiliar to Scandinavian law as it allows the offeror to revoke *tilbagekalde* prior to acceptance.⁶⁶⁸ However, this is an argument which cannot be put forward by the UK as Article 16 (1) is not unfamiliar to UK law. Therefore, sub-model I of the à la carte model may be criticised on the ground that it does not provide adequate reasons for omitting Part II of the CISG. In addition, sub-model I may also be criticised on the ground that it would interfere or even abolish the core of the Sale of Goods Act 1979 (mandatory provisions found under ss 12-15). Thus, sub-model I (Part II CISG exclusion-Part III CISG's incorporation) is highly unlikely to be chosen by the UK as the preferred way of transforming the CISG into its legal order.

3.5.2 À la carte by omitting Part III of the CISG

Sub-model II of this thesis model may be criticised on the fact that no country so far has made a reservation pursuant to Article 92 to omit part III (Articles 25-88). However, opting out of part III of the CISG is an option for the UK bearing in mind that people in this country would be very unwilling to manipulate or reduce the effect of the Sale of goods Act 1979.⁶⁶⁹ This part deals with the parties' obligations, rights, and remedies it also lays down the rules regulating the risk of loss. The reason as to

⁶⁶⁵ C Brants, 'Legal Culture and Legal Transplants' (2011) 1 Isaidat Law Review 5-6

⁶⁶⁶ Ibid

⁶⁶⁷ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 J L & Com 289-299

⁶⁶⁸ Pursuant to the avoidance rule relevant in Scandinavian national law (*Aftaleloven*, in Denmark), every communicated offer is a 'firm' offer binding upon the offeror for a reasonable period of time. The Danish government's stance on this point is verified in the remarks to the legislation implementing Denmark's CISG ratification. See *Folketingstidende* 1988-89 tillæg A, sp 1015

⁶⁶⁹ C Bianca and M Bonell, *Commentary on the International Sales Law* (Dotta Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594.

why the author considers that it would be advantageous to omit part III of the CISG is that the key differences between the Sale of Goods Act and the CISG are found in this part.

3.5.3 À la carte by taking advantage of European experience

The sub-model III may be criticized on the ground that statutory instruments imply that the Parliament has not dedicated sufficient time to examine the legislation.⁶⁷⁰ Nevertheless, one of the reasons put forward by the Parliament for not implementing the CISG so far is that the UK will ratify the CISG if and when Parliamentary program allows.⁶⁷¹ Therefore, an implementation of the CISG through a statutory instrument will be less time consuming and will in turn facilitate the process for the Parliament.

3.6 Conclusion

In synopsis, this chapter proposed and prescribed the **à la carte model**. The name of this model was inspired by the fact that its proposal is to choose provisions from the CISG in the same way we select a meal from a restaurant's menu. UK traders under this model may employ only certain Articles from the Convention when a contract is being concluded; contracts should not act in accordance with all CISG provisions. This model would require an 'add-on' to the Sale of Goods Act. The proposed model suggests creating a CISG Act or even a CISG Statutory Instrument by selecting the Articles which can be implemented in the UK legal order and by overlooking the rest which may be non-suitable or non-comprehensible.

The author suggests that this model could be put into practice through three possible ways:

4. à la carte model by either omitting part II of the CISG
5. à la carte model by either omitting part III of the CISG

⁶⁷⁰ House of Lords, *The Management of secondary legislation* (National Government Publication 2006) 198

⁶⁷¹ R Bradgate, *Commercial Law*, (3rd edn Butterworts, 2000) 727-728

6. à la carte model by taking advantage of EU directive experience

The à la carte model suggested employing Article 92(1) of the CISG enabling the UK to state at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. These two situations were separately analysed. As the CISG does not classify and thus limit the term ‘validity’, the advantages of the UK declaring to omit Part II is that it the Sale of Goods Act 1979 will decide to establish when a cause of invalidity occurs and its consequences.⁶⁷² However, certain complications arise by such declaration; it is worth mentioning that that the reservation has no effect in non-Reservation States and non-Contracting States. This disadvantage was one of the reasons which led in October 2009, the Ministries of Justice of Denmark, Finland and Sweden to announce that their countries would implement Part II by withdrawing their long-standing Article 92 declaration.⁶⁷³ Norway has not made such an announcement but is also considering this.⁶⁷⁴ It appears that omitting Part II pursuant to Article 92 did not prove practical for most of the Scandinavian States. That does not necessarily mean that it will not work for the UK; one should take into consideration that the Scandinavian countries and the UK adhere to two different legal systems, the former follows a civil law approach whereas the latter follows a common law approach. However, the UK could not necessarily subscribe to sub-model I in that it would have actually to implement under such a sub-model Part III of the CISG, presumably interfering with the Sale of Goods Act to a considerable extent.

Turning to sub-model II, the advantage of omitting Part III pursuant to Article 92 is that the UK will avoid several conflicts between the CISG and the Sale of Goods Act 1979 considering that their major differences are found in this part. One may claim that opting in Part III of the Convention will result in a direct conflict between this particular part of the CISG and the equivalent provisions of the Sale of Goods Act 1979. For their corporative differences it would be challenging for the UK to adhere to Part III of the CISG. Nevertheless, despite the benefits of employing this approach

⁶⁷² Ibid

⁶⁷³ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

⁶⁷⁴ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html>>

it will probably be criticised on the ground that no State so far has made a reservation under article 92 to opt out of part III.

In addition, the approach by which the Directive has been transported into the UK may pose a safe model of how to implement the UN Convention in the UK legal order. The author justifies this approach on the grounds that, the Directive has been significantly influenced by the CISG, the Directive has been already effectively implemented in the UK legal order and the Sales of Goods Act 1979 will be given priority. In principle this method aims at avoiding the confusion that would most likely arise from the implementation of a dual regime analogous to that ruling the use of exemption clauses. However, implementation of the CISG in the UK by statutory instrument may prove to be the source of as much confusion as a dual regime. The delegates putting this idea from theory to practise should keep in mind that the requirements and paternalistic flavour of the CISG must be placed within the Sale of Goods Act 1979 framework with tremendous care.⁶⁷⁵

Furthermore, when drafting models that require legislation one should take into consideration the implementing legislator. When a treaty/convention is to be incorporated, legislators have to turn to public international law. A country has to decide whether international law is going to be implemented automatically in the national law of the State, or if it entails any kind of incorporation by a legislative measure.

Kelsen's Pure Theory of Law offers a lot of direction regards monism and how international law should be observed. Kelsen was one of the first scholars to embrace the monist approach⁶⁷⁶. Kelsen used to consider the supremacy of international law as it was a consequence of his 'basic norm' of all law. Monists consider international and domestic law to be mechanisms of the same legal system.⁶⁷⁷ Moreover, in case of conflict, precedence shall be given to international law. In regards of countries, a

⁶⁷⁵ M Morgan Taylor and A Naidoo 'The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees- Problems of the Time of Conformity for the Quality Obligation' (2002) JCLI <<http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>> accessed 6 July 2011

⁶⁷⁶ B Marian, 'The Dualist and Monist Theories. International Law's Comprehension of these Theories' <http://revcurrentjur.ro/arkiva/attachments_200712/recjurid071_22F.pdf> accessed 5 May 2011

⁶⁷⁷ Ibid

monist country is one which agrees and implements automatically international law as part of its national law.⁶⁷⁸

Whereas, dualists believe that international law and national law are two different, unconnected and autonomous of each other legal systems.⁶⁷⁹ If there is a conflict between the two, international courts should employ international law and national courts, employ domestic law.⁶⁸⁰ An example of a dualist scholar is Triepel. Triepel considers that international and national law are completely different in their nature.⁶⁸¹ Pursuant to dualism, international law regulates the relations between nations, whereas national law controls the rights of an individual within a nation. Triepel considered that the two legal systems are diverse in regards of their origin and thus, what they serve.⁶⁸²

The United Kingdom is an example of a dualist model in the sphere of international law. In the United Kingdom case the incorporation of a treaty or convention can normally be the case by an Act of Parliament.⁶⁸³ Therefore, a treaty/convention such as the CISG will not take effect in English domestic law if the legislature does not make it part of it by an act of parliament⁶⁸⁴. Consequently, for the CISG to be incorporated into the UK legal order, legislation must take place. In contrary to the bottom-up approach, legislation creates law from the top down by generating general principles that resolve possible disputes. This is known as the top-down law making approach and it entails governmental involvement by the implementing legislators.⁶⁸⁵

In addition, the researcher took into account four key elements when drafting the à la carte model so as to guarantee the quality of the legislation in terms of its capability for implementation, flexibility, legal certainty, adequacy and feasibility. These four

⁶⁷⁸ Ibid

⁶⁷⁹ N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’ <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁶⁸⁰ Ibid

⁶⁸¹ H Triepel cited by G Slyz, ‘International Law in domestic courts’ (1995-1996) 28 N Y U J Int'l L & Pol

⁶⁸² Ibid

⁶⁸³ N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’ <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

⁶⁸⁴ UN Department of Economic and Social Affairs Division for Social Policy and Development, *International norms and standards related to disabilities* (2003)

<<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 17 May 2011

⁶⁸⁵ Ibid

elements are vital when creating a piece of legislation and are to the advantage of the implementing legislator as they measure the quality of the legislation. This is also beneficial and would simplify the implementing legislator's work, as it would control the outcome of such an implementation.⁶⁸⁶

Moreover, one should also consider the possible criticisms of a model in order to be objective. The first sub-model of the à la carte model might be criticised on three grounds. Firstly, the Scandinavian countries that have made a reservation pursuant to Article 92 not to be bound by Part II of the CISG are not of a common law origin. Nonetheless, one should take into account that the approach that civil law States have followed might be more effective than the approach of common law States. Secondly, Denmark, Finland and Sweden withdrew their long-standing Article 92 declaration.⁶⁸⁷ The fact that the declaration has not proved advantageous for these three Scandinavian States does not mean that it will not benefit the UK legal order. Furthermore, as a human body may reject such a legal transplant, the transformation of a set of rules into a domestic legal system may be unsuccessful.⁶⁸⁸ Thirdly, one of the Scandinavian legislators' reasons to support the Article 92 reservation⁶⁸⁹ was that the rules pursuant to Part II were criticized as extremely influenced by the corresponding common law rules. More precisely, the Scandinavian legislators regarded Article 16(1) as rather alien to Scandinavian law as it permits the offeror to revoke *tilbagekalde* prior to acceptance.⁶⁹⁰ Nevertheless, this is an argument which cannot be put forward by the UK as Article 16(1) is not unknown to UK law. Yet, this is a reason which cannot be put forward by the UK as Article 16(1) is not alien to UK law. Thus, sub-model I of the à la carte model may be criticised on the ground that it does not make available sufficient arguments for omitting Part II of the CISG.

⁶⁸⁶ Few studies have linked the quality of legislation to its capacity for implementation. The present author makes an attempt, based primarily upon the studies of the enforceability of law derived from a framework devised by P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997). For an overview of his framework and its relation to the quality of legislation in terms of implementability see b Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement, Theory and Cases* (Leiden University Press 2006) chapter 2

⁶⁸⁷ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

⁶⁸⁸ Ibid

⁶⁸⁹ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 JL & Com 289-299

⁶⁹⁰ Pursuant to the avoidance rule relevant in Scandinavian national law (*Aftaleloven*, in Denmark), every communicated offer is a 'firm' offer binding upon the offeror for a reasonable period of time. The Danish government's stance on this point is verified in the remarks to the legislation implementing Denmark's CISG ratification. See *Folketingstidende* 1988-89 tillæg A, sp 1015

Moreover, sub-model I may also be criticised on the ground that it would interfere or even abolish the mandatory provisions of the Sale of Goods Act 1979 found under ss 12-15 thereof. Therefore, sub-model I (Part II CISG exclusion-Part III CISG's incorporation) is highly improbable to be chosen by the UK as the approach transforming the CISG into its legal order.

The second sub-model of the à la carte model may be criticised on the fact that no State so far has made a reservation found under Article 92 to omit part III (Articles 25-88). The argument put forward by the author in favour of such a reservation is that it would be gainful to opt out of part III of the CISG as the main differences between the Sale of Goods Act and the CISG are found in this part.⁶⁹¹ Generally speaking, sub-model II is possible in theory, but may be challenging as an exercise.

Finally, the third sub-model may be criticized on the ground that statutory instruments suggest that the Parliament has not devoted adequate time to examine the legislation.⁶⁹² However, one of the arguments put forward by the Parliament for not incorporating the CISG so far is that the UK will implement the CISG if and when Parliamentary agenda allows.⁶⁹³ Thus, the ratification of the CISG via a statutory instrument will be less time consuming and will in turn simplify the procedure for the Parliament.

⁶⁹¹ C Bianca and M Bonell, *Commentary on the International Sales Law* (Dotta Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594

⁶⁹² House of Lords, *The Management of secondary legislation* (National Government Publication 2006) 198

⁶⁹³ R Bradgate, *Commercial Law* (3rd edn Butterworts, 2000) 727-728

Chapter 4

PARALLEL MODEL (Parallel Existence of Both the CISG and The Sale of Goods Act 1979 in the UK)

4.1 Parallelism

This chapter will prescribe the second proposed model, the parallel model. The name emerged from the fact that this model proposes the parallel existence in the UK legal order of both a CISG Act and the Sales of Goods Act 1979. In other words, the model allows parties wishing to enter into an international transaction to conclude a contract either on CISG terms or under the Sales of Goods Act 1979. This model too requires legislation. A CISG Act would be created as legislative acknowledgment of the Convention by the UK parliament, an acknowledgement which could in turn result in a widespread acceptance of this legal instrument by the UK trading community. Recognition is given to the fact that UK traders can already deploy the CISG by way of the freedom of contract doctrine.⁶⁹⁴ Since the full abolition of the Sale of Goods Act 1979 is highly unlikely, the parallel model would satisfy both the traders who wish to employ modern law⁶⁹⁵ especially designed for international contracts and those who are rather conservative and prefer to employ the old and familiar Sale of Goods Act 1979.

Before one proceeds with the substantives of the model, it is worth exploring the notion of parallelism to which the model in question relates. Parallelism is a term found in our everyday lives and in almost every aspect of the society. We often use it to give directions, ‘parallel road’⁶⁹⁶ and to refer to the hypothetical set of multiple possible universes, ‘parallel universe’⁶⁹⁷. Nonetheless, the term ‘parallel’ is very old, it is actually ancient, as it was established by the Greek mathematician Euclid, often

⁶⁹⁴For instance see *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69, *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2005] EWHC 1565 (Ch) and *Chartbrook Limited v Persimmon Homes Limited et al.* [2009] UKHL 38

⁶⁹⁵ As compared to the initial Sale of Goods Act 1893

⁶⁹⁶ J Nicol, ‘The origin of the parallel roads of Glen Roy’ (1869) Q J Geol Soc Lond 282

⁶⁹⁷ B Greene, *The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos* (Random House 2011) 5

referred to as the ‘Father of Geometry’.⁶⁹⁸ Euclid had a unique fascination with parallel lines. He discovered that systems of parallel lines were great tools in verifying abstract geometrical truths.⁶⁹⁹

In geometry parallelism is a term that refers to a Euclidean space property of two or more planes or lines, or a combination of these. Two lines in a plane that do not touch or intersect at a point are said to be parallel. Similarly, two planes, or a plane and a line in three-dimensional Euclidean space that do not share a point are called parallel lines. A further definition of parallel line regularly used which applies only in the 2-dimensional plane used is that two lines are parallel if they do not intersect.⁷⁰⁰ These are lines that meet *ad infinitum*, that is to say never.⁷⁰¹ Straight planes or lines that always have a constant distance from each other no matter how far they are extended are called parallel.⁷⁰²

The parallel model of this thesis follows Euclidean parallelism, as in two lines never intersecting, that is CISG and the Sale of Goods Act 1979 would not conflict one another. In that sense, the CISG would become a body of domestic sales law applicable to international transactions in the UK. Thus, within the UK there would exist two parallel instruments of sales law, one related to domestic sales and one related to international sales and which would not ‘intersect’ in their field of application. In other words, the Convention would become domestic law which would lay down the rights and obligations for parties involved in international commercial transactions⁷⁰³ and UK traders would be able to choose between the CISG and the Sale of Goods Act 1979.

⁶⁹⁸‘Euclid’ <http://www.mathopenref.com/euclid.html> accessed 2 February 2012

⁶⁹⁹ ‘The Euclidean model for space’ <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

⁷⁰⁰ Ibid

⁷⁰¹ Ibid

⁷⁰² A Atwell, ‘Hyperbolic Geometry’ Kenyon College <<http://documents.kenyon.edu/math/atwell.pdf>> accessed 3 February 2012

⁷⁰³ I Schwenzer and P Hachem, ‘The CISG - Successes and Pitfalls’ (2009) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html>> accessed 10 February

4.2 Two systems operating in one regime-Optionality

Despite the power of globalisation, various systems still prevail in the world. Certainly, there are points of overlap and convergence. Yet, for all intents and purpose, significant differences persist between the principle forms of legal systems.⁷⁰⁴

The CISG was developed by UNCITRAL as a multilateral treaty that sets out substantive provisions of law to govern the formation of international sales contracts. Its overall goal is to promote worldwide uniformity in dealing with sales disputes arising from international trade. Therefore, one may conclude that the Convention is a tool for globalisation or that it was generated through globalisation, however, uniformity is difficult to achieve in practice, taking into account the complexity of international trade and the differences in the legal regimes involved.⁷⁰⁵ Consequently, the CISG has awarded traders the right of optionality; it is rather obvious that there is a correlation between globalisation, the CISG and optionality.

Globalisation illustrates the business perspective or orientation based on a belief that the world is developing into harmonisation and that dissimilarities among markets are not only becoming less significant, but for certain services or goods, will in fact vanish.⁷⁰⁶ Nonetheless, one might say that a globalised legal environment is rather complex.⁷⁰⁷ States, as in the UK case, cannot or do not wish to abolish their national laws, as a result very often we see two regimes operating in one system⁷⁰⁸ and this is what the parallel model suggests. In the last thirty years or so, there have been numerous key forces that have encouraged the shift toward globalisation. These consist of:

⁷⁰⁴ A Gibson, ‘Publications of New Jersey’s Business Faculty’(Seton Hall University, October 2009) <<http://www.njprofoundation.org/pdf/bi2008.pdf>> accessed 3 March 2012

⁷⁰⁵ A Newhouse and T Tsuneyoshi, ‘CISG – A Tool for Globalization (1): American and Japanese Perspectives’ <<http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr29/AdamTanaka.pdf>> accessed 5 March 2012

⁷⁰⁶ R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷⁰⁷ Ibid

⁷⁰⁸ Ibid

1. ‘Lowering of trade and investment barriers’⁷⁰⁹, at first in the course of a trading regime called the GATT⁷¹⁰ (drafted through various negotiations, known as *Trade Rounds*⁷¹¹), advancement of Intellectual Property Rights (IPRs)⁷¹², and the establishment of the World Trade Organization (WTO)⁷¹³;
2. ‘The development of information technology’⁷¹⁴, mainly in finance, banking, medical technology and E-Commerce;
3. ‘Economic transformation through privatisation’⁷¹⁵ efforts all over the world, either through political privatisation (generated by an alteration in the governing economic attitude in a nation) or economic privatisation (generated by the collapse of the previous command-and control regime)⁷¹⁶.

A State’s legal system supplies the methods and means which control business transactions, defines both the rights and duties of parties involved in business dealings, specifies the boundaries within which individual traders and companies carry out their transactions, and addresses the process of legal treatment to those who

⁷⁰⁹ R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷¹⁰ The General Agreement on Tariffs and Trade (GATT) was originally created by the Bretton Woods Conference as part of a comprehensive plan conceived of by the United States and Great Britain for economic recovery after World War II. The GATT was organized in order to reduce barriers to international trade through the systematic reduction of tariff barriers, quantitative restrictions and subsidies on trade through a series of intergovernmental agreements. The GATT was an *agreement, not an organization*. The founder of the GATT envisioned that it would one day become a full international organization like the World Bank or IMF called the International Trade Organization. However, the agreement was never ratified, and the GATT remained in its original form. The functions of the GATT have been replaced by the World Trade Organization which was established through the final round of negotiations in the early 1990s.

⁷¹¹ Rounds are a cycle of multilateral trade negotiations under the authority of the GATT, culminating in simultaneous trade agreements among participating countries to reduce tariff and non-tariff barriers to trade. Eight ‘Rounds’ have been completed thus far: Geneva, 1947-48; Annecy, France, 1949; Torquay, England, 1950-51; Geneva, 1956; Geneva, 1960-62 (the Dillon Round); Geneva, 1963-67 (the Kennedy Round); Geneva, 1973-79 (the Tokyo Round); and Geneva, 1986-1993 (the ‘Uruguay Round’). The present round of negotiations is termed the ‘Doha Round’.

⁷¹² R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷¹³ See <<http://www.wto.org>> accessed 3 February 2012

⁷¹⁴ R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷¹⁵ Ibid

⁷¹⁶ For instance the case study of economic privatisation in Poland, see R J Hunter Jr and L V Ryan CSV, ‘Privatization and Transformation in Poland’ (2004) Vol 49 The Polish Review No 3 919-943

consider they are entitled to some type of remedy in the legal system.⁷¹⁷ Each nation has established a comprehensive regime for deciding which law is more appropriate in any given case and where legal action should take place if a dispute between transnational parties arises.⁷¹⁸ Individual traders and larger companies involved in multinational business dealings ought to include a choice of forum clause which would predetermine the forum for any dispute that may arise in the contract⁷¹⁹ and a choice of law clause that stipulates which law will settle a dispute.⁷²⁰ In order to resolve legal disputes occurring under international contracts, many States subscribe to the United Nations Convention on Contracts for the International Sale of Goods 1980.⁷²¹

When working in an international business transaction environment it is also fundamental to understand the legal environment within which one operates. In general, legal traditions vary significantly from nation to nation in terms of managing the several main legal variables which may include ‘tradition, precedent, usage, custom, or religious precept.’ Moreover, in attempting to understand one legal system, it is vital to recognise who is the decision maker within a country’s legal system.⁷²² However, in order to avoid the complications that would arise from this situation; the parallel model awards the role of the decision maker to the trader. The trader is free to choose between the Sale of Goods Act 1979 and the CISG 1980 and of course the trader will choose what is more beneficial for the particular transaction.

⁷¹⁷ R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷¹⁸ Ibid

⁷¹⁹ T R Armstrong, ‘The Importance Of Clarity In Drafting Choice Of Forum Clauses In International Commercial Contracts’ (Clark Hill, 2011)<<http://www.thorpreed.com/secondary.aspx?id=44&p=0&LibraryID=225>> accessed 5 March 2012

⁷²⁰ Marks & Weinberg, ‘Choice of Law and Forum Selection Provisions’<<https://docs.google.com/viewer?a=v&q=cache:wEV9dQGHM5cJ:www.leaselawyer.com/casesandarticles/Articles/ChoiceofLawandForumSelectionPr.pdf+choice+of+forum+clause+definition&hl=en&gl=cy&pid=bl&srcid=ADGEESg30U-BJ5YZPtByiH4a30ggJojePzm1BLncScmLoGafzLu5Rio1DImA88XqRL2KOYhoYcXXY6syeqOhBYG9ZJCyfow9jDfnSNbmE6OhtXTvKvp6ai3xYHFsOgXJQX2o0MrL&sig=AHIEtbRpW6XXv5X9bkz2V6l3M7stmotNQ>> accessed 7 March 2012

⁷²¹ R J Hunter and R E Shapiro, ‘A Primer on Important Legal Aspects of the International Business Environment’(2008) 2 JMIB

⁷²² Ibid

Furthermore, optionality is of great significance in the business transaction world. A simple example is how a contract is being formed; offer, acceptance, agreement.⁷²³ That is the buyer is given the option to accept the offer made by the seller.⁷²⁴ Similarly we will see how optionality is essential in this thesis' second model, the parallel model. Furthermore, the need for optionality is reinforced by the fact that the CISG is a legal instrument where the trader plays a vital role.⁷²⁵ Optionality may be also seen as a safety net. If one legal instrument were to fail in a two-option parallel system, the second one would continue to operate.

The parallel model would provide for an optional scenario. This is a common-sense approach. Traders with no intention of trading beyond the UK borders, who, therefore, will only ever work within the Sale of Goods Act 1979, will not be obliged to shift needlessly to a new legal instrument, the CISG. On the other hand, it endows traders, who wish to expand beyond the UK borders, the freedom to choose a legal instrument which would reduce costs for business and increase simplification.

The outbreak of the economic crisis in 2008⁷²⁶, as in most economies around the globe, has had a negative impact on the British economy. Thus, in July 2010, the Green Paper: Financing a Private Sector Recovery was presented to the Parliament by the UK Secretary of State for Business, Innovation and Skills concerning the status of the British economy.⁷²⁷ In this paper, both the Chancellor of the Exchequer, George Osborne, and the Secretary of State for Business, Innovation and Skills, Vince Cable, highlighted the call for revitalisation directed by an augmentation in business investment and a sustained growth in the private sector.⁷²⁸ In this way the business

⁷²³ E Mckendrick, *Contract Law* (9nd edn, Palgrave Macmillan 2011) 22

⁷²⁴ Ibid

⁷²⁵ J Felemegeas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2001) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/felemegeas.html#ch1>> accessed 17 February 2012

⁷²⁶ The international economic crisis appeared its effects in the middle of 2007 and into 2008. Around the globe stock markets have collapsed as a result enormous financial institutions have fallen and even wealthy States' governments had to face its impact.

⁷²⁷ Department for Business Innovation and Skills, *Financing a private sector recovery* (Green Paper,Cm. 7923, 2010) 7

⁷²⁸Ibid

community and the British economy would grab the opportunities offered by a recovering global economy.⁷²⁹

As the needs of the UK business community alter, this fact of life should be mirrored in the choices made by the traders. The UK Parliament ought to recognise that the development of international trade around the globe has inspired the need for widespread harmonisation of the legal instruments that make international trade possible, such as the CISG enabling traders from different States, beliefs and cultures to carry out business under equal and comprehensible terms.⁷³⁰ Opting into the CISG by choosing to employ its set of rules would diminish the uncertainties and potential unnecessary expenditures related conducting trade under unfamiliar rules.⁷³¹ In other words, following the negative impact of the crisis on the British economy, traders should realise that at the moment the most suitable harmonization mechanism to be applied in the UK to meet the requirements of the nation and the economy is the UN Convention. A legal officer at the United Nations Commission on International Trade Law (UNCITRAL) Secretariat, Professor Castellani addressed the subject matter:

As small and medium sized enterprises . . . have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of the CISG. Small and medium sized enterprises constitute the backbone of a modern and balanced economy. They support economic diversification and may therefore significantly contribute to achieving sustainable growth. In conclusion, they may play an important role in addressing those structural problems . . . The CISG may be instrumental in making this role effective.⁷³²

Several rights and freedoms exist, such as the freedom to move and live where you wish, freedom to choose a partner and create a family, freedom of press and freedom

⁷²⁹ Department for Business Innovation and Skills, *Financing a private sector recovery* (Green Paper, Cm. 7923, 2010) 3

⁷³⁰ A E Williams, ‘Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom’ (2001) Pace Int’l L < <http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 5 February 2012

⁷³¹ R Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 32-46

⁷³² L G Castellani, ‘Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2009) 13 V J Int’l Com L & Arb 241, 246

to work and trade. However, it is vital to all such freedoms and rights that one should be able to first of all make up one's mind without being dictated what choices to make.⁷³³ One would say that a government is an enormous monopoly that establishes the way organisations and people act to a large extent. What kind of freedom can be created by employing monopoly force of a legal system?⁷³⁴ However, optionality offered by the parallel model rejects such legal constructions. The objective of the parallel model is that once it is there, optionality will continue not because it is being imposed but because it is appreciated. The importance of this is that traders would not be enforced to use one legal instrument or the other; they would have the freedom to accept or reject the CISG accordingly. Furthermore, it must be stated that optionality, which the parallel model promotes otherwise, embraces freedom of contract.⁷³⁵

4.3 Legal Pluralism

Not only would the parallel model employ freedom of contract but in addition to this legal pluralism would ask from us to apply a model that would go beyond legal singularity. Dualism, in the case of the parallel model, stands for a pluralism of a sort. In any case, the international legal system mirrors two conflicting sets of forces; one set moving towards interconnection and unity and the other one toward fragmentation.⁷³⁶ Nevertheless, as these two sets of forces intermingle, a new form of international system is coming forward. Paradoxically, this new type of international system is neither entirely unitary nor absolutely fragmented and it may be described as pluralist.⁷³⁷ A pluralist legal system recognises a spectrum of equally and different legal normative options by international tribunals and institutions and national governments, but does so within the framework of a worldwide system.⁷³⁸ An eminent scholar, Anthony Appiah, described the pluralist legal system notion in terms

⁷³³ See <<http://www.optionality.net/mag/feb96a.html>> accessed 5 February 2012

⁷³⁴ Ibid

⁷³⁵ European Commission, *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* (Green Paper, Com 348, 2010) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>> accessed 6 February 2012

⁷³⁶ W B White, 'International Legal Pluralism' (2004) 25 Mich J Int'l L 977

⁷³⁷ Ibid

⁷³⁸ Ibid

of a system that celebrates, ‘difference [but] remains committed to the existence of universal standards.’⁷³⁹

In its modern structure, international legal pluralism offers several benefits. It accepts the value of variety in the options, approaches and traditions of international actors such as traders who are presented with the opportunity of optionality by choosing the appropriate procedure for their commercial dealings.⁷⁴⁰ Therefore, this system operates on the pragmatism that the ultimate harmonisation cannot exist as each State has different political, cultural, social and legal behaviour, but it functions within what David Held characterises ‘a framework of universal law.’⁷⁴¹ In other words, the legal pluralism notion of the international system distinguishes and perhaps flourishes on the diversity of the system. According to legal pluralism an extensive spectrum of courts will employ, develop and construe the corpus of international law.⁷⁴² Countries will counter differing sets of duties that may even be construed differently by a variety of tribunals and may sometimes clash. More importantly, international and national procedures will cooperate and influence each other, leading in new fused rules and methods.⁷⁴³

Nevertheless, despite the numerous benefits of pluralism, this notion of the international legal system is not a solution for all threats presented by fragmentation. The complexity of conflicting duties remains; additional attempts at legal development will be required to cure them.⁷⁴⁴ However, this pluralist visualisation provided by the parallel model, does offer an optional and possibly influential means of conceptualising the potential progress of international law. The parallel model embraces legitimate divergence of States, leading in a more legitimate and effective UK legal system regards private international law.⁷⁴⁵

⁷³⁹ A Appiah, ‘The American University in an Age of Globalization’ (Princeton-Oxford Conference on Globalization at Oxford University, June 15 2002)

⁷⁴⁰ W B White, ‘International Legal Pluralism’ (2004) 25 Mich J Int'l L 978

⁷⁴¹ D Held, ‘Law of States, Law of Peoples: Three Models of Sovereignty’ (2002) 8 Legal Theory 38

⁷⁴² Ibid

⁷⁴³ Ibid

⁷⁴⁴ W B White, ‘International Legal Pluralism’ (2004) 25 Mich J Int'l L 979

⁷⁴⁵ Ibid

4.4 Freedom of contract and efficiency of the parallel model

Freedom of contract has been set by the EU Commission and several international institutions as an essential point of reference for the potential progress of European and International contract law.⁷⁴⁶ Additionally, a starting point in party autonomy or freedom of contract is illustrated in both EU and international private law⁷⁴⁷ and in private international law provisions which in some instances prohibit an abuse of the freedom of contract⁷⁴⁸ and in others where they encourage its application so as to protect weaker parties.⁷⁴⁹

Nevertheless, as these paradigms make clear in international law, freedom of contract is no more than a starting point, given the array of current political and social factors which call for its requirement.⁷⁵⁰ It is the author's conviction that in contemporary international law there lies under the flag of freedom of contract a significant duality of vision, that is the notion of freedom of contract may be seen from two different points of views. The first perspective reflects freedom of contract as an economic belief in which markets of all types are to be rooted.⁷⁵¹ From this point of view, the law's task in supporting or even establishing freedom of contract lays in guaranteeing that commercial and legal institutions are launched so as to support an open and free market. More precisely, the task of contract law is primarily to support and smooth

⁷⁴⁶ EC Commission, *First Annual Progress Report on European Contract Law and the Acquis Review* (EC Com No 456, 2005) para. 2.6.3

⁷⁴⁷ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I') (the 'Rome I Regulation') [2008] Art. 3

⁷⁴⁸ Directive (EC) 2000/35 of the European Parliament and of the Council of 29 June 2000 on combating late payments in commercial transactions, recital 19 ('This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor'). The directive applies to 'commercial transactions', defined as 'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration'[2000] Arts. 1 & 2(1)

⁷⁴⁹ The residual need to protect the parties' 'contractual autonomy' can be seen in the fact that Directive (EC) 93/13 on unfair terms in consumer contracts does not apply to terms which have been individually negotiated nor to those which reflect the 'main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language'[1993] Arts. 3, 4(2). Cf H E Brandner and P Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 CMLR 64

⁷⁵⁰ S Whittaker, 'The Optional Instrument of European Contract Law and Freedom of Contract' <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf> accessed 18 February 2011

⁷⁵¹ Ibid

the process of market business dealings.⁷⁵² The second perspective reflects freedom of contract as an ethical notion. Pursuant to this point of view the justification for contractual obligations lies in the option of the individuals party to the contract; this vision of freedom of contract is broadly known as ‘party autonomy’ or as ‘contractual autonomy’. Moreover, it is rather obvious that this perspective of freedom of contract emerged from the philosophy of Kant and Rousseau.⁷⁵³ For that reason, as the parallel model promotes optionality, it adopts the second perspective of freedom of the contract, the one that enables traders to employ the legal instrument which is more suitable to their transaction. Taking into account that the parallel model promotes individual autonomy, does not mean that it does not agree with the first vision of freedom of contract which promotes market transactions.

The CISG firmly promotes the freedom of contract notion; hence, parties wishing to exclude its application are free to do so.⁷⁵⁴ The possibility of excluding some of its provisions is also available.⁷⁵⁵ Unfortunately, the first reaction of some UK importers and exporters will probably be to seek to opt out of the CISG as they would be unfamiliar with it. Nonetheless, simply writing into a contract that the Sale of Goods Act 1979 will apply does not suffice. Pursuant to the parallel model, the CISG would be part of UK domestic law and in instances where a trader would wish to apply the Sale of Goods Act 1979 and opt out of the Convention would be required to say so expressly. In New Zealand for instance, the option of opting in and out of the CISG seems to be disregarded reasonably frequently.⁷⁵⁶ However, if the parallel model is employed in the UK that may prove to be advantageous for the UK traders. For instance, a UK-based importer might make an agreement to buy goods from Canada and the contract may just state that the law of British Columbia will apply. If this would be the case, most UK-based importers and the practitioners advising them would be in the dark about the details of British Colombian law. If, nonetheless, no specific reference excluding the UN Convention would be made, then because the UK (hypothetically speaking) and Canada would both be signatory parties to the CISG,

⁷⁵² Ibid

⁷⁵³ Ibid

⁷⁵⁴ Article 6 CISG

⁷⁵⁵ Article 12 CISG

⁷⁵⁶ K France, ‘International Sale of Goods’ (W Williams publications, 2012) <<http://wynnwilliams.co.nz/Publications/Articles/International-Sale-of-Goods>> accessed 17 March 2012

then the Convention is likely to apply. In principle then, the CISG would automatically apply to both the UK trader and the Canadian trader.

In addition, another benefit of being able to opt out entirely or part of the Convention is that it can also be applied with other trading arrangements.⁷⁵⁷ The CISG is an international trading instrument especially designed to offer flexibility and that is why flexibility was used as the bedrock for the drafting of the parallel model.⁷⁵⁸ For instance, the UN Convention offers its own rules about when risk regards the goods passes from the purchaser to the seller.⁷⁵⁹ If other common trading arrangements, such as the rules established by the International Chamber of Commerce for the interpretation of trade terms, Incoterms, are employed, then the particular Incoterm applied can substitute the specific rules in the CISG concerning the passing of risk.⁷⁶⁰

The parallel model supports the notion that ‘every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties.’⁷⁶¹ Handling freedom of contract, however, can prove to be very onerous as the subject carries a heavy ideological charge. Freedom of contract may be seen as an option between heavy-handed government control and individual liberty.

The law regard freedom of contract concerns those options available to the buyer and seller as to whom they conduct business transactions with. It also concerns the options which determine what they wish to contract for and on what conditions. It emerges from the classical model of contract where the bottom-up approach is of the greatest significance.⁷⁶² As mentioned in the literature review chapter, government intervention is kept to the minimum. Adam Smith⁷⁶³ as Atiyah⁷⁶⁴ were central to this

⁷⁵⁷ Ibid

⁷⁵⁸ Yet the CISG has not been designed to cater for all contingencies in the commodities market.

⁷⁵⁹ CISG Articles 66-70

⁷⁶⁰ Ibid

⁷⁶¹ Chief Justice Erle in *Clarke v Watson* (1865) I 8 CBR, US 278

⁷⁶² F H Buckley, *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 26

⁷⁶³ R L Heilbroner, *The essential Adam Smith* (OUP 1986) 149-151 and K B Smelie, A Hundred Years of English Government, (2nd edn, Gerald Duckworth Co. Ltd 1950) 8

⁷⁶⁴ C Davies, ‘Arthur Marwick’ (1980) 1 JLA 4

<[https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+\(1980\)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFn](https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+(1980)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFn)

classical model.⁷⁶⁵ Their fall came about when consumer welfarism, reliance and pragmatism replaced the bargaining model and the *laissez faire* approach.⁷⁶⁶

The concept of freedom of contract has come under a critical gaze as statutory legislation has been introduced in the UK which implications such freedom of options.⁷⁶⁷ There are several examples of legislative interference with the freedom of contract and a wide range of legislation was passed that helped reform the law of contract, two of them are the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.⁷⁶⁸ Freedom of contract highlights the need for certainty, predictability, and stability.

Nonetheless, when building a model, such as the parallel model proposed herein, it is vital to also test its practicability otherwise the model would only function properly in theory. One, who would consider the absolute application of freedom of contract efficient, would only see through rose-tinted spectacles. Economists believe that by applying ultimate freedom of contract would eventually result in market failure.⁷⁶⁹ The main reason being that freedom of contract without any sort of regulation or restraint would only function properly in a perfectly efficient market.⁷⁷⁰ Such a perfectly efficient market can only exist when for example the seller and the buyer gain the exact same benefits from a business transaction.⁷⁷¹ Hence, freedom of contract may be maintained to a great extend in the parallel model by giving the trader a leading role that would be somewhat regulated only during the consultation and the enactment of the CISG Act where the government would have the responsibility of the decision maker. As Jean-Jacques Rousseau said, ‘man was born free, and he is everywhere in chains’.⁷⁷² Obviously, Jean-Jacques Rousseau was referring to a more

[VZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHXShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtbTBXPkhIH_Hath1tWjlS5A8PBkkIw](http://www.juridicainternational.eu/Various-Approaches-to-Unfair-Terms-and-Their-Background-Philosophies) accessed 6 February 2012

⁷⁶⁵ By classical model the author means the model of minimum legal interference on part of the government.

⁷⁶⁶ Ibid

⁷⁶⁷ T Wilhelmsson, ‘Various Approaches to Unfair Terms and Their Background Philosophies’ (2008) Juridical Int’l 51-57 <<http://www.juridicainternational.eu/Various-Approaches-to-Unfair-Terms-and-Their-Background-Philosophies>> accessed 6 February

⁷⁶⁸ Ibid

⁷⁶⁹ H Collins, *The Law of Contract* (4th edn, LexisNexis Butterworths 2003) 25-26

⁷⁷⁰ A W Lo, ‘Efficient Markets Hypothesis’<http://web.mit.edu/Alo/www/Papers/EMH_Final.pdf> accessed 21 February

⁷⁷¹ R Hagen, *Modern Portfolio Theory* (Dow Jones-Irwin 1979) 11-13

⁷⁷² J Rousseau, *The Social Contract* (originally published in 1792 cover copyright by Cosimo Inc. 2008)

literal interpretation of his statement, perhaps he wanted to say that everywhere we go, there are rules to follow, there are laws to obey and absolute freedom does not exist.

4.5 New Zealand, Australia, Canada and Germany experience on the CISG

New Zealand, Australia and Canada have always had a legal reliance on the British legal system until the mid-1970s, when the UK entered the EU.⁷⁷³ Thus, the parallel model has drawn certain comparative information from the systems in question for three reasons:

1. They are all common law States;
2. Some of them have in the past played an influential role as models of implementation for the UK;
3. During the colonial times, Australia, New Zealand and Canada relied on the British legal system.

However, one should not ignore the approaches which civil law States have followed as they might be equally, or more effective than those of these largely common law systems. One such case is that of Germany as its 493 reported CISG cases⁷⁷⁴ imply that the Convention is being preferred by German traders in their international business transactions.

4.5.1 The legal reliance of New Zealand, Australia and Canada until the 1970s on UK law

Nonetheless, in order to comprehend the significant role the UK litigation had during the colonial times for these three countries, the author will briefly travel in the past.

⁷⁷³ English cases and statutes are still taken into consideration by courts in Australia, New Zealand and Canada, but not to the large extend they used to.

⁷⁷⁴ Germany has as of May 2013 493 CISG cases reported. See <<http://www.cisg.law.pace.edu/cisg/text/casecit.html#germany>> accessed 18 February 2012

During the colonial era, the court of appeal from the colonial Supreme Courts was the Privy Council and this court consisted of English judges and place in London. Following the Federation⁷⁷⁵, the Privy Council maintained this role until the mid-1970s when appeals were severely reduced before being eventually abolished in the mid-1980s.⁷⁷⁶ For much the larger part of that era Australia's, New Zealand's and Canada's common law was England's and the legal system was English-oriented. These States were colonised long after they officially ceased to be British colonies.⁷⁷⁷ As a result, the UK's values and needs were reflected in the common law.⁷⁷⁸ For instance, the Australian law of trespass was the UK's law of trespass, even though there were significant differences in population distribution, social practises and size among the two States.⁷⁷⁹ Similarly, the Australian law of contract was the same as that of the UK; it had the same virtues that UK contract law of the 20th century maintained.⁷⁸⁰ These States' legal reliance on the British legal order until the mid 1970s is evident.⁷⁸¹ Thus, during the preparation of this thesis vis-à-vis the parallel model, these States have acted as a source of inspiration as to how to transform the CISG in the UK legal order, not only due to their common law system and the fact that they are all CISG signatory countries but also due to their British law heritage.

This was the situation between Australia, New Zealand, Canada and Britain; however, following the mid-1970s considerable change took place. One of the major reasons this situation changed was the UK's entry into the then European Economic Community.⁷⁸² The British Commonwealth as the main point of attention for Britons was displaced by Europe and this had a significant effect upon States such as Australia and Canada and New Zealand. Those effects became almost immediately

⁷⁷⁵ Originally there were six colonies governing the Australian continent. In 1901, a written constitution which was a combination of the British parliamentary system and the United States constitution unified them all together into present day Australia. See Paul Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁷⁷⁶ P Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁷⁷⁷ Ibid

⁷⁷⁸ S Farran, 'Legal Culture and Legal Transplants: England and Wales' <<http://biblio.juridicas.unam.mx/libros/7/3194/11.pdf>> accessed 16 February 2012

⁷⁷⁹ P Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁷⁸⁰ Ibid

⁷⁸¹ Ibid

⁷⁸² Ibid

apparent in trade but most fundamentally in legal attitudes towards the UK.⁷⁸³ For instance, in Australia following the abolition of the Privy Council appeals, they had to ‘go their own way’ and it was then up to the judges to decide the directions which they would take.⁷⁸⁴ This was bewildering for the Australian legal order, the courts did not know if they were guided by Britain, or if they were to cast their net more widely. Approximately a decade later on, in the 1980s and early 1990s, the High Court fortuitously consisted of outward and liberal cast of mind judges.⁷⁸⁵ That period of time the Chief Justice observed the need, as he stated on several occasions, to adjust the common law to the Australian needs and conditions.⁷⁸⁶ In that effort, the Chief Justice, openly supported the view that while Australian would refer to English cases and statutes, it would only be influential to the extent that it had an ability to persuade.⁷⁸⁷

For the reasons mentioned above, the British influence was and still is fundamental for Australia, New Zealand and Canada. Nevertheless, the difference between these countries and the UK is that these three States have developed their law influenced by international law in order to accommodate modern business transactions, whereas the UK refuses to do so.⁷⁸⁸ In all three countries the CISG has been incorporated through Acts into domestic law and being applied according to international law principles.⁷⁸⁹ We have seen that during colonial times, not that long ago, the UK legal system played a very significant role for the legal systems of these countries. One might say that this is one of the reasons why the UK is being so reluctant in ratifying the CISG; the UK might fear that it would no longer be the centre of litigation as it used to be for these countries.⁷⁹⁰ However, the objective of this thesis is not to discover the reasons

⁷⁸³ S Farran, ‘Legal Culture and Legal Transplants: England and Wales’ <<http://biblio.juridicas.unam.mx/libros/7/3194/11.pdf>> accessed 16 February 2012

⁷⁸⁴ P Finn, ‘The Common Law in the World: The Australian Experience’ (February 2000) Pace Int’l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁷⁸⁵ Ibid

⁷⁸⁶ Ibid

⁷⁸⁷ Ibid

⁷⁸⁸ Ibid

⁷⁸⁹ The Sale of Goods Act (United Nations Convention) Act 1994 in New Zealand, the Sale of Goods (Vienna Convention) Act 1986 (Qld); Sale of Goods (Vienna Convention) Act 1986 (NSW); Sale of Goods (Vienna Convention) Act 1986 (SA); Sale of Goods (Vienna Convention) Act 1986 (WA); Sale of Goods Vienna Convention Act 1987 (TAS); Sale of Goods (Vienna Convention) Act 1987 (ACT); Sale of Goods (Vienna Convention) Act 1987 (VIC); Sale of Goods (Vienna Convention) Act 1987 (NT) in Australia and the International Sale of Goods Contracts Convention Act 1991 in Canada.

⁷⁹⁰ S Moss, ‘Why the UK has not Ratified the CISG’, 25 Journal of Law and Commerce 483, 483 (2005-2006) <<http://www.uncitral.org/pdf/english/CISG25/Moss.pdf>> accessed October 2012

behind UK's unwillingness to incorporate the CISG, but to propose and defend two theoretical models which could transpose the CISG into the UK legal system. The cases of New Zealand, Australia and Canada pose great examples when considering ways to transform the CISG in the UK legal order as they are all of common law heritage with legal systems based on British law.

One should bear in mind that the introduction of the common law system was one of adaption, hybridisation and reception, over an extended period of time and even nowadays is subject to adjustment due to novel influences such as regional and global ones.⁷⁹¹ If one takes the system of England and Wales to be the parent, it is often the case that the parent looks to its children⁷⁹², in this case New Zealand, in certain areas of law to see how the law has developed there and whether functional methods can be adopted and adapted in the UK. Therefore, it should not come as a surprise that the parallel model suggests to adopt but adapt to **a certain extent** the New Zealand approach of CISG implementation.⁷⁹³

Although comparing this thesis parallel model to other common law States is of great significance, one cannot ignore the approach that States of civil law have followed regards the CISG; one such paradigm is Germany.⁷⁹⁴ Germany did not ratify the CISG instantly after its enactment in 1988; however it followed soon after in 1991.⁷⁹⁵ Germany had been rather successful in the international application of the CISG, as for a considerable time German courts played a leading role in the resolution of cases concerning the Convention. It is, therefore, no surprise that the first CISG cases issued in UNICITRAL⁷⁹⁶, in its database CLOUD⁷⁹⁷ were one Italian decision and seven German. Furthermore, in 2000 one third of the six hundred CLOUD reported cases were of German derivation. Thus it should not come as a revelation that a

⁷⁹¹ S. Farran, 'Legal Culture and Legal Transplants: England and Wales' <<http://biblio.juridicas.unam.mx/libros/7/3194/11.pdf>> accessed 16 February 2012

⁷⁹² Ibid

⁷⁹³ Ibid

⁷⁹⁴ Germany has as of May 2013 493 CISG cases reported. See <<http://www.cisg.law.pace.edu/cisg/text/casecit.html#germany>> accessed 17 February 2012

⁷⁹⁵ In the former German Democratic Republic (GDR), the CISG took effect even a little earlier, specifically on the 1st of March in 1990. Although this could have resulted in problems in the wake of the German reunification, on the 3rd of October where the East and the West were rejoined, in practice there were no such problems.

⁷⁹⁶ The United Nations Commission on International Trade Law, See <http://www.uncitral.org/>

⁷⁹⁷ Case Law on UNICITRAL texts, it was established in 1993. See <http://www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en> accessed 23 February 2012

number of other jurisdiction courts have referred to and adopted German CISG judgments when employing the UN Convention.⁷⁹⁸

The UK, as a State of foundation for one of the major legal families of systems of the world, one should not consider that the influence on legal culture or the method of legal transplant has been uniform.⁷⁹⁹ In fact in several instances it has been incremental and taken place in conjunction with the endurance of other legal systems, frequently resulting in plural or parallel legal systems in States of reception.⁸⁰⁰

Moreover, it should not be imagined that all legal transplants have endured, or that where they have survived they maintained their former structure. The CISG provides a flexible set of rules and these rules could be adjusted accordingly in the UK legal order so as to accommodate the country's needs and requirements. This could be done through a new Act which would incorporate the CISG into domestic law, in a way similar to that followed by New Zealand and Germany albeit not in a way which is all too similar.

For the purposes of our comparative analysis, in relation to foreign models of incorporation of the CISG, the experience from the following two systems could assist the UK's future efforts in bringing the CISG into its domestic legal order. Reasons in favour of such position are: even though Germany is a civil law country that has a tendency to employ the respective literature where necessary, while cases are less regularly cited, it is a significant point of reference for the parallel model. The way it approaches the UN Convention is worth embracing by the UK.⁸⁰¹ The enormous amount of CISG cases reported in Germany together with the large amounts of German scholarly writing approving the Convention show that the application of the CISG in parallel to the BGB has proved for the most part prosperous.⁸⁰²

⁷⁹⁸ For instance, *Medical Marketing International v Internazionale Medico Scientifica, S.R.L.*, 99-0380, 1999 WL 311945, 1999 U.S. Dist.

⁷⁹⁹ Ibid

⁸⁰⁰ Ibid

⁸⁰¹ J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 474; M F Koehler and G Yujun 'The Acceptance of the Unified Sales Law (CISG) in different Legal Systems' (2008) 20 Pace Int'l L Rev 45

⁸⁰² U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

On the other hand, a significant reason for following New Zealand's approach is that New Zealand considers the application of international law for the development of the common law in a way broadly similar to the approach taken in the UK.⁸⁰³ For instance, the introduction of the international law of human rights has played a very significant role in the New Zealand domestic legal system following the ratification of the Bill of Rights Act in 1990.⁸⁰⁴ That Act offered an influential statutory model for the UK Human Rights Act 1998.⁸⁰⁵ It is obvious that New Zealand, as a common law State, has in the past played a significant role as a model for the UK. In this way the UK may adopt and adjust New Zealand's steps as to how to put into operation the CISG, which is analogous to this thesis parallel model.⁸⁰⁶

4.5.2 Legal Transplantation Theories

The parallel model's research is not only concentrated to the mere examination of case law and statutes of other signatory CISG States. For a more comprehensive research the legal transplantation process is also required to be taken into consideration.⁸⁰⁷ Consequently, in this sub-section of the chapter a number of legal transplants theorists will be analysed that justify the importance of the legal transplantation process. It is worth mentioning that globalisation is often noticed to be the core reason justifying the development of legal transplant in the world economy.⁸⁰⁸ Trading globally has influenced what legal practitioners and scholars need and wish to know about foreign law, more specifically how they transport,

⁸⁰³ See for example the use of international law in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁸⁰⁴ New Zealand Bill of Rights Act 1990 <<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>> accessed 4 February 2012

⁸⁰⁵ See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic). Consultations recommending the enactment of human rights legislation have also been conducted in two other States: Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, 2007); Government of Western Australia , *A WA Human Rights Act: Report of the Consultation Committee* (2007).

⁸⁰⁶ Sale of Goods (United Nations Convention) 1994 Act <<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 3 February 2012

⁸⁰⁷ I J M Valderrama, 'Legal Transplants and Comparative Law' (2004) Int'l L J 261
⁸⁰⁸ Ibid

obtain and process information, and how decisions and contacts are conducted.⁸⁰⁹ Therefore, taking into account the gigantic amount of borrowing⁸¹⁰ and copying in the international legal field comparative research necessitates a more comprehensive approach that also involves the study of legal transplants.

Transforming an international law into a domestic legal system is not as simple in practice as it is in theory. The process by which the new set of rules would be incorporated into a country's legal system is analogous to that of transplanting an organ from a healthy human body to a sick human body. In turn, these rules are called legal transplants; however, as a human body may reject such a transplant, the transformation of a set of rules into a domestic legal system may fail.⁸¹¹ According to Legrand when a statute is transplanted from one State to the next, it has to be translated, which changes the meaning.⁸¹² Legrand believes that when a rule is being incorporated into a legal system it becomes different and that people will interpret it differently as well, that is why he firmly considers legal transplants impossible.⁸¹³

On the other end of the spectrum, we find Watson who believes that legal transplants are possible and he illustrates his opinion through paradigms.⁸¹⁴ Such paradigms are the French *code civil*, the feudal laws in the medieval period, or the reception of the Roman law.⁸¹⁵ According to Watson these are examples of the body of rules and by transferring these rules into a legal system a legal transplant is being created.⁸¹⁶

4.5.2.1 Legal Transplantation Theory I (Pierre Legrand)

A French political thinker and social commentator who lived in the Enlightenment Era, Montesquieu, considered law to be culturally implanted with limited autonomy. Montesquieu believed that 'the political and civil laws of each nation . . . must be so

⁸⁰⁹ D J Gerber, 'Globalisation and legal knowledge: Implications for Comparative Law' (2001) 75 Tulane L Rev 950

⁸¹⁰ A Watson, 'Legal Transplants and European Private Law' (December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

⁸¹¹ C Brants, 'Legal Culture and Legal Transplants' (2011) 1 Isaidat L Rev 5-6

⁸¹² P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119

⁸¹³ Ibid

⁸¹⁴ A Watson, 'Legal Transplants and European Private Law' (December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

⁸¹⁵ Ibid

⁸¹⁶ Ibid

peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another.' This argument is based on the notion that laws reflect social and environmental factors in each State. Legal transformation is path-dependent in the capacity that it can only emerge through the restricted boundaries by underlying alteration stimulated by historical cycles and the social factors. The theory developed from Montesquieu's writings, known as 'Mirror theory', argues that law reflects some aspects of the society or the society as a whole in a theoretically identifiable way.⁸¹⁷ The occurrence of massive legal transfers over the last century, has led contemporary restricted autonomy scholars come to the conclusion that legal rules may be transferred, however they do not believe that epistemological theories and legal cultures cannot travel.⁸¹⁸ For instance Pierre Legrand claims that 'a crucial element of the ruleness of the rule—its meaning—does not survive the journey from one legal culture to another.'⁸¹⁹

This author considers Legrand's definition of legal transplants rather conservative; he implies that legal backgrounds cannot be compared since everything is dissimilar in every State.⁸²⁰ Legrand claims that every individual who is brought up in a certain culture will never comprehend the legal culture of another State.⁸²¹ One explanation for this is that factual regulations exist and their meaning will not alter, for instance in the UK, Australia and Cyprus they drive on the left hand side of the road, whereas in the US, Greece and France they drive on the right hand side. On the other hand, this argument might seem biased and farfetched; it does not however, mean that it is completely wrong. Indeed certain things are factual and cannot change, but this does not suggest that it is impossible for an Englishman to drive in Greece.

The notion of 'legal tradition' implies, among other features, an idiosyncratic cognitive approach to law. In other words, there have developed, and there exist, both a civil law and a common law mentalite'

⁸¹⁷ Charles De Secondat Montesquieu, *De L'espirit Des Drois (The spirit of laws)* (J P Mayer & A P Kerr 1970) 156

⁸¹⁸ P Legrand, 'On the Singularity of Law'(2006) 47 Harvard Int'l LJ 517,522-25 ; P Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 44

⁸¹⁹ P Legrand, 'The Impossibility of Legal Transplants'(1997) 4 MJECL 111, 117

⁸²⁰ P Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 44-45

⁸²¹ A Watson, 'Legal Transplants and European Private Law'(December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

— two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society. For example, the two legal traditions differ in their understanding of facts, rules and rights. Moreover, they foster different views of the nature of legal reasoning, of the role of systematisation and of the management of historical time.⁸²²

When it comes to distinguishing between cultural community, a body of rules and the meaning of rules, Legrand takes a rather firm position. He considers the transplantation of a foreign rule into a legal system impossible as a rule of law is mainly influenced by what it is thought to mean and which culture is thought to apply it, so that transplanting a rule maintains some of its original culture and meaning.⁸²³ Legrand's point is that where a written statutory law is the same within two countries, it will be judicially interpreted differently due to diverse ways of legal thinking and tradition.⁸²⁴

Laws which emerge from legal transfers might appear to be identical and be controlled in the same way by configured associations; however they are incorporated by administrators with fundamentally diverse legal approaches.⁸²⁵ That is why Legrand considers that 'transplants are impossible'.⁸²⁶ The author does not agree with Legrand's theory; she believes that legal transplants are possible. However, the author considers that although legal transplants are possible, they do not necessarily replace existing legal traditions or laws, they may take the form of a foreign instrument which can be interpreted according to a State's existing legal practice. Legrand not only believes that weak legal transfers are short lived or unproductive, but they may also provoke rouse destabilising strain that may lead to larger setbacks than the ones they wished to resolve.⁸²⁷ This is due to the fact that people in recipient States construe the imported wording of legal rules by employing local approaches

⁸²² Pierre Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 45

⁸²³ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL114

⁸²⁴ Ibid

⁸²⁵ Ibid

⁸²⁶ Ibid

⁸²⁷ T V Lee, 'Risky Business: Courts, Culture, and the Market-place' (1993) 47 U Miami L Rev 1335, 1338 and Marcus Radetzki, 'From Communism to Capitalism in Laos: The Legal Dimension' (1994) 34 Asian Surv 799, 802

that reconstitute the legal sense of those manuscripts.⁸²⁸ In the essence of the matter, a similar approach would be required for the effective transfer of legal transplants. That is why a particularly useful example in one's analysis could be the New Zealand and German approach on the CISG.

The analysis laid down by Legrand includes the theoretical elements for a decentred approach to legal transplantation.⁸²⁹ For instance, he emphasises that the 'legal', cannot rationally be detached from the 'non-legal', their cultural context.⁸³⁰ Through his theory he wholly rejects Weber's theory of connecting legal certainty and rationality.⁸³¹ Legrand adopts theories from anthropologists such as Claude Levi-Strauss and Clifford Geertz regard the fundamental cognitive approaches or structures that portray legal culture.⁸³² This illustrates that Legrand's theory explores for legal transplantation consequences beyond the institutions, rules and approaches of the rule of law. Nevertheless, Legrand's scripts focus almost entirely on State institutional concepts of legal transplants.⁸³³ For instance, he talks about diversities separating court culture, legal reasoning and common and civil law approaches without taking into account what everyday people employ in self regulation believe about imported set of rules.⁸³⁴

Legrand's argument that there is a gap created by legal cultural divergence does not take into consideration those legal transplantation experiments that have been carried out efficiently and rapidly.⁸³⁵ Evidence illustrates that legal scholars sharing epistemological, regulatory and educational preferences regularly transfer legal

⁸²⁸ T V Lee, 'Risky Business: Courts, Culture, and the Market-place' (1993) 47 U Miami L Rev 1335,1338

⁸²⁹ P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52, 58-64

⁸³⁰ *Ibid* at 58

⁸³¹ M Weber, *Economy and Society:An Outline of Interpretative Sociology* (University of California Press 1978) 695-699; D M Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) Wis L Rev 720, 731-746; S Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law' (1987) 21 L S Rev 487, 488-493

⁸³² J S Gillespie, *Transplanting Commercial Law Reform: Developing a 'rule of Law' in Vietnam* (Ashgate 2006) 21 and Clifford Geertz, *Local Knowledge* (3rd edn, Basic Books 2000) 218

⁸³³ P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52, 58-64, P Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 45; P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 114

⁸³⁴ *Ibid*

⁸³⁵ I Markovits, 'Exporting LawReform—But Will It Travel?' (2004) 37 Cornell Int'l L J 98-100 and T V Lee, 'Risky Business: Courts, Culture, and the Market-place' (1993) 47 U Miami L Rev 1335-1338

knowledge between different national structures.⁸³⁶ However, globalised legal practices and knowledge spread quickly between national systems and this is evident from the fact that the CISG has so far 80 signatory member States. Moreover, Legrand argues that legal epistemologies in recipient States are time-consuming to transform. Even though certain studies support this observation, there are indeed instances where basic legal epistemologies transformed relatively quickly.⁸³⁷

4.5.2.2 Legal Transplantation Theory II (Alan Watson)

Alan Watson is an academic of legal history and his analysis on the function of Roman law in continental Europe and of English common law has led him to believe that foreign legal transplants are the central instrument by which private law advances.⁸³⁸ Due to the fact that law is for the most part independent from the larger cultural and social surroundings, its transplantation between jurisdictions is, as he put it, ‘socially easy’.⁸³⁹ He described the entity of legal transplants as legal rules, nevertheless by rules he implies ideas.⁸⁴⁰ ‘What is borrowed—or, what migrates, we may add—is very often the idea’.⁸⁴¹ Furthermore, Watson claimed that legal transplants introduced by jurists have been ‘the most fertile source of development’, in Western private law.⁸⁴² According to Watson, their success is merely due to the fact that the transplant of legal rules is ‘socially easy’⁸⁴³ so that ‘the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule.’⁸⁴⁴ Durability is a significant characteristic of legal rules, which makes sense as rules remain for the

⁸³⁶ B Schäfer & Z Bankowski, ‘Mistaken Identities: The Integrative Force of Private Law’ in M Van Hoecke & François Ost (eds) *The Harmonisation Of European Private Law* (Hart 2000) 21; G Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’(1998) 61 MLR 11, 12

⁸³⁷ K Pistor, P Wellons & J Sachs, *The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995* (OUP 1999) 280-284

⁸³⁸ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 21-29, 95

⁸³⁹ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95

⁸⁴⁰ A Watson, ‘Legal Transplants and Legal Reform’ (1976) 92 L Q Rev 79

⁸⁴¹ A Watson, ‘Comparative Law and Legal Change’ (1978) 37 CLJ 313, 315

⁸⁴² A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95

⁸⁴³ A Watson, ‘Legal Transplants and Legal Reform’ (1976) 92 L Q Rev 81

⁸⁴⁴ Ibid

most part untouched by alterations in their environment.⁸⁴⁵ Transplantation of foreign rules by jurists should occur whenever the call for reliability and rationality requires it.⁸⁴⁶

Watson considers law as mainly autonomous and he claims that the advancement of law is triggered by transplanting.⁸⁴⁷ He believes this not because a new rule was the expected outcome of the social structure and would have occurred even without a model to duplicate, but because the foreign rule was acknowledged by lawmakers, and they examined the obvious benefits that could be obtained from it.⁸⁴⁸ Pursuant to Watson's theory, a foreign law is transplanted purely for the reason that it is a good idea.

Furthermore, Watson has shown that substantial, successful borrowing is common in law.⁸⁴⁹ He has illustrated through the French *code civil*, the feudal laws in the medieval period and the reception of the Roman law paradigms rather express statement, that borrowing is frequently a vital feature in legal transformation.⁸⁵⁰ It is rather obvious that Watson equates legal transplants with the notion of legal borrowing.⁸⁵¹ Nonetheless, in the same way he identifies that legal borrowing is of massive significance in legal progress, Watson recognises that the borrowed rule would not function in precisely the same way it did in its other home. 'In no way should one neglect the differences. They are also fundamental in understanding how,

⁸⁴⁵ 'the main point [he] was trying to make in Legal Transplants', his point is that 'however historically conditioned in their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place.' A Watson, 'Legal Transplants and Legal Reform' (1976) 92 L Q Rev 81

⁸⁴⁶ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 57, 88 and E M Wise, 'The Transplant of Legal Patterns' (1990) 38 Am J Comp L 5. Otherwise, the need can be recognised as having deeper roots in the 'normative self-reference and recursivity [that] creates a preference for the internal transfer within the global legal system', in G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 MLR 11, 18

⁸⁴⁷ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95

⁸⁴⁸ A Watson, 'Legal Transplants and European Private Law'(December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

⁸⁴⁹ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 18

⁸⁵⁰ A Watson, 'Legal Transplants and European Private Law'(December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

⁸⁵¹ Alan Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993)

why and when law changes, the direction of legal change, and how law develops in the society in which it operates.'

Watson, contrary to Legrand, considers legal transplants inevitable. Watson's theory comes very close to the author's view that legal transplants are possible and that their successful execution relies largely on the recipient State's need for the alien rule. Watson argues that in the western world, since the Roman Empire they have been a vital, if not the central factor in legal change.⁸⁵² However, the actual concern is whether there should be a planned determined effort, organised by legal experts so as to produce a common law. One might say that diversity in law is like a two-sided coin, it offers benefits, but it also presents shortcomings.

And I would observe that notions of law and legal propriety do not always coincide with national frontiers. A small farmer in the Belgian Ardennes will be closer in his legal conceptions to a small farmer in neighboring Germany than to a businessman from Brussels. It remains to add that in many areas of law parties are in large measure free to make their own arrangements that are different from the statutory law: contracts, marriage agreements, even testate succession. Such provisions can be enshrined in a common code. Not only that, but as the examples of Germany and Switzerland show, a common code may allow for local variations.⁸⁵³

What Watson is trying to say is that it is rather obvious that the word *Brot* in German does not have the exact same meaning as the word *Pain* in French.⁸⁵⁴ Nonetheless, the issue here is that in the context of law, the point is one-dimensional. 'First, *pain* in French and in France is not the same as *pain* in French and in France.'⁸⁵⁵ For a less privileged village individual bread does not have the same meaning as for the wealthy Parisian entrepreneur. First of all, the poor villager has a limited variety of choice, is close to the source of supply and bread's role in the

⁸⁵² Ibid

⁸⁵³ A Watson, 'Legal Transplants and European Private Law' (December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February 2013

⁸⁵⁴ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 117

⁸⁵⁵ A Watson, 'Legal Transplants and European Private Law' (December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February 2013

family's everyday life is different.⁸⁵⁶ Watson mostly proves his point through examples and he suggests that the same is true for law within one State.

4.5.2.3 Legal Transplantation Theory III (Gunther Teubner)

It is rather obvious that Legrand's and Watson's perspective regard legal transplants is conflicting. The former considers the legal transplants impossible⁸⁵⁷ whereas the latter deems the transformation of foreign rules into a State's legal system possible.⁸⁵⁸ To complicate matters even more there is a third scholar who has observed the difficulty of legal transplants, Gunther Teubner.⁸⁵⁹ Teubner's opinion regard legal transplants differs from both Legrand's and Watson's, he prefers to portray a set of foreign rules as an 'irritant' rather than a transplant.⁸⁶⁰ According to Teubner, the effect of transferring a legal notion from one mechanism to another cannot be predicted as structural pairing will change:

When a foreign rule is imposed on a domestic culture...it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events... 'Legal irritations' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.⁸⁶¹

The author wishes to agree with Teubner's theory to a certain degree as the transferring of a rule from one mechanism to another cannot be foreseen since its identity may be altered. Therefore, a legal transplant, as in human bodies, may fail to function properly and it cannot be predicted whether such a transplant may prove to

⁸⁵⁶ Ibid

⁸⁵⁷ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119

⁸⁵⁸ A Watson, 'Legal Transplants and European Private Law'(December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

⁸⁵⁹ G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 11

⁸⁶⁰ Ibid

⁸⁶¹ G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 12

be successful for a State's legal system. One might say that Teubner made use of the term 'legal irritations' so as to avoid, as he characterises, 'the false dichotomy' of interaction or repulsion which is the consequence of thinking with the legal transplant allegory.⁸⁶² Moreover, Teubner's term is constructive in signifying that when a set of rules is transferred into a different legal system it does not automatically substitute existing legal customs and meanings. Contrary, it generates a new set of unpredictable options and effects. Nevertheless, 'legal irritations', as an allegory, is restricted by certain conceptual deficiencies.⁸⁶³ It mirrors the procedures that take place as soon as a set of rules is being transferred into a legal system, however it fails to signify when and why foreign laws are chosen for law transformation.⁸⁶⁴ David Nelken goes a step further in commenting that the allegories 'legal irritations' and 'legal transplants' have some similarities, as they both 'direct our gaze mainly to the regulatory problems of trying to use law to change other legal and social orders'.⁸⁶⁵

It becomes apparent that Teubner takes a larger scope as he takes into consideration law in action. He employs a case-oriented approach as he wants to observe concretely both the implemented laws and the original laws.⁸⁶⁶ Even though Teubner does not see harmonisation occurring, he does notice laws in the book converging, despite the fact that each culture deals with it in their own way.⁸⁶⁷ He therefore, considers that harmonisation is capable of leading in convergence, but also in leading to divergence.⁸⁶⁸

⁸⁶² Ibid

⁸⁶³ J L Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press 2011) 39

⁸⁶⁴ Ibid

⁸⁶⁵ D Nelken, 'Beyond the Metaphor of Legal Transplants Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation' in J Priban and D Nelken (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate Publishing 2001) 269–275

⁸⁶⁶ G Teubner , 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 17

⁸⁶⁷ G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 Am J Comp L 149

⁸⁶⁸ G Teubner , 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 17

4.5.2.4 A comparison of all three theories (Legrand, Teubner and Watson)

<i>Legrand</i>	<i>Teubner</i>	<i>Watson</i>
Legal transplants are impossible	Irritation, not transplant	Legal transplants are possible
Rules cannot travel from one legal system to another	Acceptance or rejection of transplant is a false dichotomy	Continual borrowing of rules, structures and institutions
Rules are not separate from legal culture	Law is no longer connected to the totality of the social, but to different fragments of society	Rules are separate from legal system spirit

To sum up, these three legal analysts, Legrand, Teubner and Watson, have all made significant contributions to the transplantability dispute. The author does not entirely agree with any of the three commentators; she agrees with certain features of all three theories. Nevertheless, the parallel model shares a similar perspective with Watson and Teubner, that transplants are possible and that the accomplishment of a legal transplant relies mainly on the recipient State's need for the foreign legal rule and that the effect of a legal transplant cannot be predicted.⁸⁶⁹ As mentioned above, in section 4.2, the 2010 Green Paper: Financing a Private Sector Recovery which was presented to the Parliament by the UK Secretary of State for Business, Innovation and Skills stressed the importance of the Small and Medium-Sized Enterprises development for the British economy recovery.⁸⁷⁰ These Small and Medium-Sized Enterprises, however, cannot afford to have expert legal advice when drafting their contracts.⁸⁷¹ Thus, it now may be the appropriate time for transplanting the Convention into the UK legal order as the UK needs a foreign rule such as the CISG to play a role in

⁸⁶⁹ A Watson, 'Legal Transplants and European Private Law' (December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February 2012

⁸⁷⁰ Department for Business Innovation and Skills, *Financing a private sector recovery* (Green Paper, Cm. 7923, 2010) 7

⁸⁷¹ The Law Commission and the Scottish Law Commission, *An Optional European Sales Law: Advantages and Problems-Advice to the UK Government* (2011) <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf> accessed 17 February 2012

addressing certain structural issues.⁸⁷² As the CISG is less cost and time consuming⁸⁷³ these enterprises would have more time and money to spend in making their companies more efficient and competitive which would in turn generate a healthier economy.

When transplanting a foreign legal instrument into a country's legal system, it is crucial to examine the approach other States have adopted so as to transplant the new set of rules.⁸⁷⁴ Therefore, besides studying legal transplant theorists, the only way to check if the legal transplantation is possible or not is to see how other States have transplanted the CISG into their legal systems.⁸⁷⁵ To be more precise, to see whether it has worked elsewhere and whether it can work in the UK legal order.

4.5.2.4 The parallel model adopts but adapts the New Zealand and Germany approach of implementation

The parallel model has examined all four States, Australia, Canada and New Zealand; however, it adopts and adapts **to a certain extent** the New Zealand and German approach of implementation for certain reasons which will be analysed further below in this chapter. To ensure that a convention will be implemented by suitable parliamentary action, it is usual to have the rules implementing the convention before ratifying it.⁸⁷⁶ The sensible effect is that it is in principal not relevant in those States whether the uniform law takes the form of a law affixed to a convention, or takes the form of a stand-alone convention.⁸⁷⁷ Here the case of New Zealand is particularly useful to prove the point. The CISG was ratified by New Zealand on the 22nd of September in 1994 and it came into effect on the 1st of October in 1995. The CISG was transformed into New Zealand's legal order through the Sale of Goods (United

⁸⁷² Department for Business Innovation and Skills, *Financing a private sector recovery* (Green Paper, Cm. 7923, 2010) 28-29

⁸⁷³ K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) Pace Int'l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 13 January 2013

⁸⁷⁴ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

⁸⁷⁵ Ibid

⁸⁷⁶ P Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁸⁷⁶ Ibid

⁸⁷⁷ Ibid

Nations) Act 1994 which was adopted on the 4th of July 1994.⁸⁷⁸ In New Zealand both Acts⁸⁷⁹ are used in parallel, the Sale of Goods Act for domestic sale of goods and the Sale of Goods (United Nations) Act 1994 for the international sale of goods.⁸⁸⁰ The 1994 Act includes only six sections and an annex that replicates the Convention's text. Pursuant to section 4 of the 1994 Act, the CISG should have the force of law in New Zealand.⁸⁸¹

In Germany, the CISG has been transformed into national law and was enacted as statute on the 1st of January in 1991.⁸⁸² Even though, Germany is a civil system State, it is a useful point of reference for the parallel model. The CISG is being applied in Germany in a way very similar to this thesis parallel model as the Convention applies to International Business Sales and the BGB⁸⁸³ applies to all domestic sales. Another reason why Germany is a great point of reference is that the CISG has been broadly accepted by German practitioners, scholars and traders.⁸⁸⁴ Although German lawyers very often opted out of The Hague Uniform Law of 1964⁸⁸⁵ and most commercial associations at the time suggested its exclusion, this trend changed considerably when it came to applying the CISG.⁸⁸⁶ Matters in Germany have changed regards the CISG, as for the most part commercial associations do not suggest the exclusion of the Convention⁸⁸⁷. Moreover, generally scholars dealing with the standard forms for international sales contracts⁸⁸⁸ no longer share the same attitude. Nonetheless, there

⁸⁷⁸ Sale of Goods (United Nations Convention) 1994 Act <<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 3 February 2012

⁸⁷⁹ The Sale of Goods Act 1908 <<http://www.legislation.govt.nz/act/public/1908/0168/latest/DLM173958.html>> and The Sale of Goods (United Nations Convention) 1994 Act <<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 3 February 2012

⁸⁸⁰ P Butler, 'Celebrating Anniversaries' (2004/5) Pace Int'l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

⁸⁸¹ Sale of Goods (United Nations Convention) 1994 Act

⁸⁸² Bekanntmachung über das Inkrafttreten des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf [Entry Into Force of United Nations Convention on the International Sale of Goods], Jan. 1, 1991, BGBI. II 1990 at 1477

⁸⁸³ BGB is the German civil code. It governs business transactions and it is analogous to the UK's Sale of Goods Act 1979. See <http://www.gesetze-im-internet.de/bgb/index.html>

⁸⁸⁴ U Magnus, 'CISG's impact on Germany' in F Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

⁸⁸⁵ A Convention relating to a Uniform Law on the International Sale of Goods that entered into force on the 1st of July 1964. See <http://www.unidroit.org/english/conventions/c-ulis.htm>

⁸⁸⁶ Ibid

⁸⁸⁷ Ibid

⁸⁸⁸ J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 463

are scholars which still suggest the opting out of the CISG, therefore, the current situation is divided.⁸⁸⁹

The great number of CISG cases reported in Germany, and the German scholarly writing in favour of the Convention indicate that the application of the CISG in parallel to the BGB has proved for the most part successful.⁸⁹⁰ Even though, Germany is a civil law State that tends to apply the respective literature where required, while cases are less often quoted, the way it approaches the CISG is worth of embracing for the UK.⁸⁹¹ German scholars who analyse the CISG principally point at its solutions and provisions through the lens of international scholarly writing and international court practice.⁸⁹² However, they also focus on the Convention's solutions and provisions which are inconsistent with domestic German law.⁸⁹³ One of the reasons why this is done is to provide an unblemished choice whether to opt out of the CISG or not.⁸⁹⁴

The reason why Australia and Canada acted only as sources of comparative inspiration and their approaches were not adopted and adjusted is that they pose a certain problem.⁸⁹⁵ Both States are federal countries in which the absolute power for the sale of goods law is in the constituent units.⁸⁹⁶ As one would expect, those units do not have the ability to deal appropriately with foreign affairs.⁸⁹⁷ As a result, the federal governments of both States have the power to ratify the Convention, but the implementing set of rules had to be passed by the provinces or states.⁸⁹⁸ The issue which arises from such a complex situation is that there is no guarantee that all of them would do so, or that they would do so within the time frame the federal government wished to ratify.⁸⁹⁹ Therefore, the CISG includes a clause establishing

⁸⁸⁹ Ibid

⁸⁹⁰ U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

⁸⁹¹ J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 474; M F Koehler and G Yujun 'The Acceptance of the Unified Sales Law (CISG) in different Legal Systems' (2008) 20 Pace Int'l L Rev 45

⁸⁹² U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)152

⁸⁹³ Ibid

⁸⁹⁴ Ibid

⁸⁹⁵ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

⁸⁹⁶ States in the case of Australia and provinces in the case of Canada

⁸⁹⁷ Ibid

⁸⁹⁸ Ibid

⁸⁹⁹ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

that the ratification could come with a declaration that it affects only certain territorial units.⁹⁰⁰ Based on these facts, it is obvious that the UK cannot entirely embrace the Australian and Canadian approach of how to implement the CISG, as they both pose a complex situation. The parallel model adopts and adjusts the New Zealand and German approach where both Acts are used in parallel, as it is simpler and more suitable for the UK legal order. Moreover, adopting and adjusting the Australian and Canadian approach would be unrealistic, as it would only cause confusion and further reluctance on behalf of the UK to ratify the CISG. In addition, this would be contrary to one of this thesis' objectives which is to offer simple and realistic model of transforming the CISG into the UK legal order.

Another reason for adjusting the New Zealand's approach **to a certain extent** is that New Zealand considers the application of international law for the advancement of the common law in a way broadly analogous to the approach taken in the UK and Australia.⁹⁰¹ For instance, the introduction of the international law of human rights has played a very significant role in the New Zealand domestic legal system following the ratification of the Bill of Rights Act in 1990.⁹⁰² That Act provided a powerful statutory model for the UK Human Rights Act 1998.⁹⁰³ Certainly, *the fact the UK took into account the NZ approach in the area of human rights legislation would not bind the UK in any possible way in following a similar approach in relation to the NZ approach vis-à-vis CISG incorporation (ergo hoc propter hoc)*. It is evident that though New Zealand, as a common law country, played in the past an influential role as a model for the UK in the area of human rights legislation. In this way the UK may adopt certain of New Zealand's steps as to how to implement the CISG, which is very similar to this thesis' parallel model.⁹⁰⁴

⁹⁰⁰ Article 93 CISG

⁹⁰¹ See for example the use of international law in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257

⁹⁰² New Zealand Bill of Rights Act 1990
<<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>> accessed 4 February 2012

⁹⁰³ See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic). Consultations recommending the enactment of human rights legislation have also been conducted in two other States: Tasmania Law Reform Institute, A *Charter of Rights for Tasmania* (Report No 10, 2007); Government of Western Australia , A WA Human Rights Act: Report of the Consultation Committee (2007)

⁹⁰⁴ Sale of Goods (United Nations Convention) Act 1994

Despite the fact that New Zealand acted as one of the principal sources of inspiration for the parallel model, it is significant to acknowledge that unfortunately the CISG is not being used in New Zealand as much as it could have been.⁹⁰⁵ The lack of scholarly writing and jurisprudence in New Zealand on the Convention seem to imply that ‘the CISG is the sleeping beauty of New Zealand’s statute book’.⁹⁰⁶ The New Zealand case law records confirm just four cases under the search terms ‘Sale of Goods (United Nations Convention) Act 1994’, ‘CISG’ and ‘Vienna Convention’, whereas the Pace Law School Website⁹⁰⁷ includes nine New Zealand cases which refer to the CISG.⁹⁰⁸ Furthermore, anecdotal evidence denotes that business-related law firms in New Zealand when drafting their contracts opt-out from the CISG.⁹⁰⁹ The CISG is barely even taught in law schools and in general the lack of interest in regard to the CISG is such that an opposition against the CISG does not even exist in New Zealand.⁹¹⁰ In synopsis, the CISG has only restricted occurrence in the New Zealand legal scenery. Nonetheless, the first substantive judgment on the CISG was delivered in June 2010.⁹¹¹

However, to the small extent that New Zealand courts have resorted to the CISG, it has had a positive impact on domestic contract law. New Zealand courts have found the contract interpretation approach of the CISG particularly useful. For instance Article 8(3) of the CISG reads:

⁹⁰⁵ P Butler, ‘Celebrating Anniversaries’ (2004/5) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

⁹⁰⁶ Ibid

⁹⁰⁷ Pace Law School Website is the principal CISG database

⁹⁰⁸ P Butler, ‘The Use of the CISG in Domestic Law’(2011) Pace Int’l L Rev <www.cisg.law.pace.edu/cisg/biblio/butler7.html> accessed 7 February 2012

⁹⁰⁹ Ibid

⁹¹⁰ P Butler, ‘Celebrating Anniversaries’ (2004/5) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

⁹¹¹ *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV-2009-409-000363, 30 July 2010, French J): ‘The Smallmons operate a road transport and earth-moving business in Queensland. In 2006, they purchased four trucks to use in their business from a New Zealand company, Transport Sales Limited. The trucks were then shipped to Queensland where the Queensland authorities refused to register them on the grounds of alleged non-compliance with Australian vehicle standards. Although an exemption was later granted, the trucks are registered only on a restricted basis. As the contract did not address registration requirements, the Smallmons contended for an implied term that the trucks must be fit for purpose. Justice French held there was no question that the CISG applied to the contract. The question was whether the implied warranties of fitness for purpose in Article 35(2) of the CISG were breached. As an interpretative aid, both parties had sought to rely on domestic law; however, French J confirmed that such law was inapplicable. Instead, her Honour distilled the applicable principles from international cases and commentary. According to these authorities, a seller is not generally responsible for compliance with the buyer’s regulatory standards unless special circumstances applied. Here, none did. Thus, the claim failed.’

In determining the intent of a party or the understanding a reasonable person 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*.⁹¹²

The elucidation of a contract with reference to ‘negotiations’ and ‘any subsequent conduct of the parties’ is *prima facie* contrary to the parol evidence rule of the common law doctrine. Pursuant to the parol evidence rule the written agreement is the only proof of the parties’ intention;⁹¹³ thus, the legal acknowledgment of further oral agreements between the parties has conventionally been rejected and the conduct to ascertain parties’ intention or the use of extrinsic material has been avoided.⁹¹⁴ Contrary to the common law parol evidence rule, Article 8 and in particular Article 8(3) of the CISG encourage the arbitral tribunal or the court to employ any surrounding circumstances, including the parties’ pre- and post- contractual conduct. Nevertheless, it is worth mentioning that scholars commenting on the CISG have acknowledged that written contracts will be afforded particular consideration under it.⁹¹⁵

In New Zealand, a shift concerning the application of pre-and post-contractual conduct to assist the contract interpretation has occurred. In the last few years judicial and scholarly writing has challenged the conventional justification of why pre-contractual (and post-contractual) material is seen as not of the essence.⁹¹⁶ In *Vector Gas Ltd v Bay of Plenty Energy Ltd* Mc Grath J, sitting in New Zealand’s Supreme Court, noted that ‘over the past 40 years the common law has increasingly come to recognise that the meaning of a contractual text is clarified by the circumstances in

⁹¹² CISG Article 8(3)

⁹¹³ B Zeller, ‘The Parol Evidence Rule and the CISG -- a Comparative Analysis’ (2003) Pace Int’l L Rev <<http://cisgw3.law.pace.edu>> accessed 9 february 2012; see also CISG Advisory Council Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (23 Oct 2004), Rapporteur: Professor Richard Hyland); compare Lord Morris in *Bank of Australasia v Palmer* [1897] AC 540, 545

⁹¹⁴ Ibid

⁹¹⁵ P Schlechtriem and M Schmidt-Kessel, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 203-213

⁹¹⁶ Compare D McLauchlan, ‘Contract Interpretation: What Is It About?’ (2009) Sydney Law <http://sydney.edu.au/law/slrl31/slrl31_1/McLauchlan.pdf> accessed 3 March 2012; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [72](SC) per McGrath J

which it was written and what they indicate about its purpose.⁹¹⁷ The CISG impact is evident here in regard to the issue of the degree to which pre- and post-contractual behaviour can be taken into consideration when construing a contract.⁹¹⁸

In *Attorney-General v Dreux Holdings Ltd*⁹¹⁹, the Court of Appeal had to interpret a contract for the sale of a great amount of parcels of land found to be excess to requirements on the restoration of the railways.⁹²⁰ Counsel for this case advised the Court when interpreting the agreement to take into consideration subsequent behaviour of the parties in its execution. In the end the majority of the Court was able to interpret the agreement without considering the parties' subsequent behaviour. However, the Court did comment as to whether resorting to subsequent behaviour was acceptable. While not communicating a firm view, most of them looked at Article 8(3) CISG. The Court stated that 'there is something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice.'⁹²¹

Moreover, another case example of the CISG impact on New Zealand is the *Yoshimoto v Canterbury Golf International Ltd*⁹²² where a trade contract was at issue. In this case the issue of elucidation involved the contractual matrix, an assessment of the contract and the commercial purpose of the contract.⁹²³ The admissibility of that data and the extrinsic proof of earlier negotiations had to be considered. Thomas J was influenced by Article 8 CISG and referred to it as a tool to construe the contract:

It would, of course, be open to this Court to seek to depart from the law as applied in England on the basis of this country's implementation in 1994 of the United Nations Convention on Contracts for the International Sale

⁹¹⁷ [2010] 2 NZLR 444 [77] (SC)

⁹¹⁸ It has to be noted that McGrath J dismissed the idea that prior negotiations could form part of the factual matrix.

⁹¹⁹ (1996) 7 TCLR 617

⁹²⁰ For case facts see <<http://cisgw3.law.pace.edu/cases/961219n6.html>>accessed 3 March 2012

⁹²¹ *Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617, 627 (CA) Blanchard J

⁹²² [2001] 1 NZLR 523 (CA): the decision was appealed to the Privy Council - no consideration of the CISG

⁹²³ For case facts see <<http://www.unilex.info/case.cfm?pid=1&do=case&id=828&step=FullText>>accessed 3 March 2012

of Goods. Liberal provisions for the interpretation of international sales contracts are included in this Convention.⁹²⁴

In addition, Thomas J cited *Attorney-General v Dreux Holdings Ltd* to highlight the idea that the court should apply the best international practice.

In *Thompson v Cameron*⁹²⁵ the issue was how far post-contractual conduct and pre-contractual negotiations could be taken into consideration so as to agree on the meaning of a contractual term.⁹²⁶ The Court employed *Attorney-General v Dreux Holdings Ltd* and therefore referred to the CISG, however no reference was made to *Yoshimoto v Canterbury Golf International Ltd*. The Court concluded that the state of the law was still vague as to whether post-contractual conduct and pre-contractual negotiations could be taken into consideration and hence, focused on examining only the ‘factual matrix’ having no regard to subsequent conduct and pre-contractual negotiations.⁹²⁷

Furthermore, in *Gibbons Holdings Ltd v Wholesale Distributors*⁹²⁸, New Zealand’s Supreme Court held that evidence of post-contractual conduct was acceptable.⁹²⁹ Despite the fact that no reference was made to the CISG or the Sale of Goods (United Nations Convention) Act 1994, Tipping J referred to Blanchard J’s ruling in *Attorney-General v Dreux Holdings Ltd* where his Honour stated that taking into consideration post-contractual conduct would agree with general international trade practice.⁹³⁰

The final case which illustrates that the CISG has influenced New Zealand’s courts is *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁹³¹ The Supreme Court had to settle on whether pre-contractual negotiations could be taken into consideration. Vector Gas Ltd had a long-term agreement to supply gas to Bay of Plenty Energy Ltd and Vector

⁹²⁴ *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 [88]

⁹²⁵ HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J)

⁹²⁶ For case facts see <<http://cisgw3.law.pace.edu/cases/020327n6.html>> accessed 4 March 2012

⁹²⁷ *Thompson v Cameron* HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J)

⁹²⁸ [2008] 1 NZLR 277 (SC)

⁹²⁹ For case facts see <<http://www.courtsfonz.govt.nz/from/transcripts/documents/WholesaleDistributorsLtdvGibbonsHoldingsLimited.pdf>> accessed 4 March 2012

⁹³⁰ *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 [55]

⁹³¹ [2010] 2 NZLR 444

Gas Ltd gave notice of termination of the contract.⁹³² The legal representatives of both parties involved reached agreement that while waiting the determination of litigation regards the validity of the termination, Vector Gas Ltd would provide Bay of Plenty with gas. An exchange of correspondence took place which referred to a price per gigajoule (GJ) along with transmission expenses and the cost of \$6.50 per GJ was discussed. Nevertheless, a final letter from Bay of Plenty's lawyer caused confusion as it referred to a cost of \$6.50 per GJ without referring to transmission expenses and this was accepted by Vector's legal representative. As a result, the meaning of the agreement was unclear and dispute arose. Vector's lawyer considered \$6.50 per GJ the cost of gas only, whereas the Bay of Plenty's lawyer argued that \$6.50 per GJ also included the transmission expenses.

In *Vector Gas Ltd v Bay of Plenty Energy Ltd* five different opinions were brought forward, with each illustrating, as McLauchlan points out, different perceptive of the principles of contract elucidation.⁹³³ Nonetheless, all judges expressed the same view that Vector's appeal should succeed but their Honours could not agree on how to substantiate this result conceptually. Only Tipping J expressed the view clearly that proof of pre-contractual negotiations was acceptable.⁹³⁴ Unfortunately, none of the judges took into consideration the discussions of their brethren in previous case law alluding to international practice of the Convention which would have given them significant support in their analysis.⁹³⁵ Taking into account that in previous decisions the judges referred to the CISG and international practice as embodied by, for instance, the UNIDROIT principles to reinforce their judgement is unfortunate as it would have again underlined the correlation between domestic and international sale of goods law.⁹³⁶

Nevertheless, in synopsis, it has to be acknowledged that New Zealand's Supreme Court has put New Zealand on the path to construe its domestic agreements in line with Article 8(3) of the UN Convention, the matter of pre-contractual negotiations yet

⁹³² For case facts see <<http://www.courtsfonz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-65-2008-Vector-Gas-v-BOP-Energy.pdf>> accessed 4 March 2012

⁹³³ D McLauchlan, 'Common Intention and Contract Interpretation' (2011) 1 LMCLQ 30-31

⁹³⁴ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [29] per Tipping J

⁹³⁵ P Butler, 'The Use of the CISG in Domestic Law' (2011) Pace Int'l L Rev <www.cisg.law.pace.edu/cisg/biblio/butler7.html> accessed 7 February 2012

⁹³⁶ Ibid

to be finally settled on.⁹³⁷ Article 8(3) is only an example of how the CISG has influenced New Zealand's courts judgements; another example is good faith, found under Article 7 of the Convention.⁹³⁸ The ratification of the CISG by New Zealand has helped in developing New Zealand's domestic contract law by making it consistent with international practise.⁹³⁹ Therefore, the CISG might have fallen into a 'sleeping beauty slumber' in New Zealand, but the Convention has influenced the advancement of domestic contract law which will eventually lead to a more unified approach towards modern commercial transactions.⁹⁴⁰ New Zealand illustrates that if the UK chooses to implement the CISG through a parallel model, even in the worst case scenario where traders choose frequently to opt out of its provisions, it will at least have a positive impact on its domestic contract law.

In addition, it is worth mentioning that a probable explanation for the paucity of CISG case law from New Zealand and in general common law countries, is the fact that the 'cradle of common law'⁹⁴¹, the UK, has yet to ratify the Convention.⁹⁴² Even though the UK took part in the UNCITRAL working group in 1969⁹⁴³ and at the discussions which took place in Vienna, it did not become a signatory State of the Convention in 1980 or in the subsequent years. As analysed in the literature review chapter, the main reason for the UK's reluctance seems to be the rather nationalistic legal stance which the UK seems to have taken in the matter. Others might argue it was not antipathy; it was apathy. Take for instance the Law Society of England and Wales which was concerned that 'the Convention would result in a diminished role for

⁹³⁷ Ibid

⁹³⁸ CISG Article 7: (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

⁹³⁹ P Butler, 'The Use of the CISG in Domestic Law' (2011) Pace Int'l L Rev <www.cisg.law.pace.edu/cisg/biblio/butler7.html> accessed 7 February 2012

⁹⁴⁰ P Butler, 'Celebrating Anniversaries' (2004/5) Pace Int'l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

⁹⁴¹ M Kilian 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 JTLP 233

⁹⁴² Though there has been some support for accession, see Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): A Consultation Document* (DTI, June 1998) paras 22-23; A Gartner 'Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law' (2000-2001) <<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>> accessed 13 February

⁹⁴³ See Report of the Working Group on the International Sale of Goods of its First Session (1970) I UNCITRAL Yearbook 176, 177

English law within the international trade arena.⁹⁴⁴ Goode has noticed ‘a naïve belief’ in the dominance of the UK’s Sale of Goods Act 1979, which has remained basically unaltered for more than one hundred years but which, according to Dalhuisen, has by no means laid down a pattern in international sales.⁹⁴⁵ Nevertheless, the UK’s negative response to the CISG has most probably deprived other common law countries of precious case material that could act as precedent or at least offer direction and assistance.⁹⁴⁶ What the author wishes to say is that the parallel model, which is partly based on New Zealand’s experience, may be criticised on the ground that the CISG is not being used as much as it should have been in New Zealand.

4.6 Possible criticisms of the parallel model

4.6.1 The parallel model and UK’s current approach towards the CISG appear to be very similar

A superficial glimpse of the parallel model’s proposal might make someone wonder whether there is a fundamental reason to transform the CISG through this model as the UK current approach towards the Convention appears to be very similar. Both the parallel model and the UK current CISG approach allow the traders to opt into the Convention whenever they wish and they both agree on the coexistence of the domestic Sale of Goods Act 1979 and the CISG. Therefore, this is one of the major criticisms the parallel model might suffer. However, if one examines in depth the parallel model’s proposal, he or she will conclude that simply allowing the traders to opt into the CISG whenever they wish is very different from passing legislation on the matter.

The first reason why the parallel model would be more beneficial for the UK than the current approach is that one puts forward the idea that the careful implementation in

⁹⁴⁴ Law Reform Committee of the Council 1980 *Convention on Contracts for the International Sale of Goods* (Law Society of England and Wales, 1981), other objections to the Convention were (1) that it would not produce uniformity because of differing national interpretation, (2) that commercial traders could easily avoid the Convention, and (3) that the Convention would more commonly apply by default due to the ‘opt-out’ provision; see also Robert G Lee ‘The UN Convention on Contracts for the International Sale of Goods: OK for the UK?’ (1993) JBL 131, 132.

⁹⁴⁵ R M Goode *Commercial Law* (2 ed, Penguin Books 1995) 926; Jan H Dalhuisen *Dalhuisen on International Commercial, Financial and Trade Law* (Hart Publishing, 2000) 250.

⁹⁴⁶ M Kilian ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 JTLP 233

New Zealand and Germany, which has been observed, could prove beneficial to the UK's efforts in bringing the CISG to life in the international trade law element of its domestic legal order. The parallel model adopts and adjusts the New Zealand and German approach where both Acts, are used in parallel.⁹⁴⁷

Germany's approach regards the CISG is very similar to this thesis' parallel model as the Convention applies to International Business Sales and the BGB⁹⁴⁸ applies to all domestic sales. An additional reason as to why Germany played a significant role for the creation of parallel model is that the CISG has been broadly accepted by German practitioners, scholars and traders.⁹⁴⁹ Even though, German practitioners very often excluded the application of the Hague Uniform Law of 1964⁹⁵⁰, this tendency altered noticeably when it came to applying the CISG.⁹⁵¹ Moreover, by and large academics dealing with the standard forms for international sales contracts⁹⁵² no longer have the same approach. Nevertheless, it is worth mentioning that there are academics which still recommend the exclusion of the CISG, thus, the present situation in divided.⁹⁵³

Furthermore, the large number of cases reported in Germany regard the Convention and the German academic writing in favour of the CISG illustrate that the use of the CISG in parallel to the BGB has proved for the most part effective.⁹⁵⁴ Yet the author's preference in relation to such an approach does not mean that the parallel model could not take the experience from other jurisdictions into account. This is something that the author would like to emphasise'

⁹⁴⁷P Butler, 'The Use of Foreign Jurisprudence by the New Zealand Supreme Court' (2011) Pace Int'l L Rev <www.cisg.law.pace.edu/cisg/biblio/butler7.html> accessed 7 February 2012;For Germany see Bekanntmachung über das Inkrafttreten des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf [Entry Into Force of United Nations Convention on the International Sale of Goods], Jan. 1, 1991, BGBI. II 1990 at 1477 2012 <<http://www.jura.uni-sb.de/cgi-bin/seiten.pl?jahr=1990&teil=II&seite=1477>>accessed 27 March 2012

⁹⁴⁸BGB is the German civil code. It governs business transactions and it is analogous to the UK's Sale of Goods Act 1979. See <<http://www.gesetze-im-internet.de/bgb/index.html>> accessed 27 March 2012

⁹⁴⁹U Magnus, 'CISG's impact on Germany' in F Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

⁹⁵⁰A Convention relating to a Uniform Law on the International Sale of Goods that entered into force on the 1st of July 1964. See <http://www.unidroit.org/english/conventions/c-ulis.htm>

⁹⁵¹Ibid

⁹⁵²J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 463

⁹⁵³Ibid

⁹⁵⁴U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

In any case, the CISG was transformed into the New Zealand's legal order through the Sale of Goods and both Acts are used in parallel-the Sale of Goods Act for domestic sale of goods and the CISG for the international sale of goods.⁹⁵⁵ New Zealand's legal system is based on the British legal system.⁹⁵⁶ The legal system of England and Wales plays the role of a parent who often observes how its children, in this case New Zealand, have developed in certain areas of law and whether functional methods can be adopted and adapted in the UK.⁹⁵⁷ Therefore, it should not come as a surprise that the parallel model suggests to adopt but adapt the New Zealand approach of CISG implementation.

'I have the unfortunate peculiarity of comparing everything that comes my way, the domestic with the foreign, or the present with the past.'⁹⁵⁸ In this respect, one ought to mention that the fact that the parallel model emerged through comparing to the New Zealand CISG experiences is fundamental. This will most possibly aid in predicting and controlling the outcome of such incorporation.⁹⁵⁹ The collecting of facts and information gained through comparative law can act as a crucial bridge to a foreign legal instrument.⁹⁶⁰ In addition, the knowledge collected can prove to be very insightful for the inner engagement to a foreign legal instrument.⁹⁶¹ In this case the knowledge gathered from the New Zealand experience can be applied to the UK legal culture, helping illuminate different angles that may lead to a deeper comprehension of the CISG. The objective of comparative law is comparing the law of one State to that of another.⁹⁶² Usually, the foundation for comparison is a foreign law contrasted against the measure of a country's own law.⁹⁶³

⁹⁵⁵ Sale of Goods (United Nations Convention) 1994 Act <<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 3 February 2012;

⁹⁵⁶ P Finn, 'The Common Law in the World: The Australian Experience' (February 2000) Pace Int'l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

⁹⁵⁷ Ibid

⁹⁵⁸ K Zweigert and K Siehr, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 1945 Am J Comp L 215

⁹⁵⁹ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

⁹⁶⁰ G Swanson, 'Frameworks for Comparative Research : Structural Anthropology and the Theory of Action' in I Vallier (eds) *Comparative Methods in Sociology* (Berkeley 1973) 141

⁹⁶¹ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

⁹⁶² J C Reitz, 'How to Do Comparative Law ' (1998) 46 Wash U Global Stud L Rev 617, 620

⁹⁶³ Ibid

Nevertheless, simply comparing words on a paper does not suffice as law is deeply rooted in culture as well and that is why the fact that New Zealand's legal culture is based on British law foundations. The substantial forces that influence both UK and New Zealand legal tradition were explored, such as legal history, previous legislation, philosophy and ideology.⁹⁶⁴ However, the author did not only compare these two legal systems in order to come to the conclusion that the parallel model would benefit the UK legal order and UK traders. It is also significant to take into account that legislative recognition of the CISG by the UK would lead to a widespread acceptance of the Convention by the UK traders. It is no secret that the Parliament's negative attitude towards the CISG has deprived traders from applying it to their transactions.⁹⁶⁵ Therefore passing legislation on the matter would eventually lead to the creation of more case law and to a more concrete legal certainty regards the CISG.

4.6.2 Freedom of contract

One of the main principles of the parallel model heavily relies on freedom of contract, the freedom awarded to traders to choose which legal instrument is more suitable for their business transactions. Nevertheless, the parallel model might be criticised on freedom of contract as this notion has come under a critical gaze in the UK.⁹⁶⁶ Certain statutory legislation has been launched which might act as an obstacle on such freedom of options.⁹⁶⁷ There are a number of paradigms of legislative intervention with the freedom of contract and a broad range of legislation was passed that helped modifying the law of contract; two of them are the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.⁹⁶⁸ Freedom of contract highlights the need for certainty, predictability, and stability.⁹⁶⁹

⁹⁶⁴ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

⁹⁶⁵ J Linarelli, 'The Economics Of Uniform Laws And Uniform Lawmaking' (2002) Wayne L Rev 36-37

⁹⁶⁶ T Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008) Juridical Int'l 51-57 <<http://www.juridicainternational.eu/various-approaches-to-unfair-terms-and-their-background-philosophies>> accessed 6 February

⁹⁶⁷Ibid

⁹⁶⁸Ibid

⁹⁶⁹ H Dubroff, 'The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic' (2006) 80 St. John's L Rev 567; C Edward 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' (2009) 77 U Missouri-Kansas City L Rev 654

Freedom of contract might also be criticised on the grounds that economists consider that by employing the ultimate freedom of contract would in due course result in market failure.⁹⁷⁰ The main reason supporting this theory is that freedom of contract lacking any sort of control or restraint would only operate appropriately in a perfectly efficient market.⁹⁷¹ Such a perfectly efficient market can only exist when for example the seller and the buyer gain the exact same benefits from a business transaction.⁹⁷² The author partly agrees with this theory as one, who would regard the unconditional application of freedom of contract efficient, would only see through rose-tinted spectacles. For this reason, freedom of contract may be maintained to a great degree in the parallel model by granting the trader a principal part that would be to some extend controlled only during the consultation and the enactment of the CISG Act where the government would have the responsibility of the decision maker.

A man may make such lawful promise as he sees fit, and is only bound by the promise he has made. This necessarily follows because a contract is, in its nature, based upon the consent of the parties, and hence one can only be bound in contract by the promise to which he has assented.⁹⁷³

Pursuant to a free business structure, rationality of the law of contracts has still a further feature; to keep up with the continuous expanding of the market.⁹⁷⁴ The UK legal mechanism has to provide the members of the business society a constantly rising number of representative business transactions contracts and control their consequences.⁹⁷⁵ Nonetheless, it is impossible for the law to foresee the substance of an endless amount of different transactions into which associates of the business society may wish to get involved.⁹⁷⁶ Therefore, the parallel model reinforces traders the freedom of contract. In order to provide the business society the procedure necessary to guarantee for the intentional nature of a transaction has to be reduced to the absolute

⁹⁷⁰ H Collins, *The Law of Contract* (4th edn, LexisNexis Butterworths 2003) 25-26

⁹⁷¹ A W Lo, 'Efficient Markets Hypothesis' <http://web.mit.edu/Alo/www/Papers/EMH_Final.pdf> accessed 21 February

⁹⁷² R Hagen, *Modern Portfolio Theory* (Dow Jones-Irwin 1979) 11-13

⁹⁷³ C D Ashley 'Should There Be Freedom of Contract' (1904) 4 Colum L Rev 423

⁹⁷⁴ M Weber, *The Theory of Social and Economic Organization* (The Free Press 1947) 275

⁹⁷⁵ F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract'(1943) 43 Colum L Rev 629

⁹⁷⁶ Ibid

minimum.⁹⁷⁷ In addition, the common law rules of the law of contract have to stay *Jus dispositivum*, which means that their function has to depend on their neglect to rule otherwise or on the intention of the parties involved.⁹⁷⁸ The law cannot go beyond that, it has to pass on some legislation to the traders. As far as the contracting parties are concerned, the law governing their transactions has to be chosen by them.⁹⁷⁹ Thus, the freedom of contract plays the role of a very practical principle; it is the unavoidable complement of a free business structure.⁹⁸⁰ Consequently, the parallel model points towards *laissez faire* and individuality. That is due to the fact that contract is not a social institution, but a private matter as the judicial system only anticipates for its interpretation, the courts do not put together contracts for the parties.⁹⁸¹

4.7 Conclusion

To conclude, the name of the parallel model emerged from the notion of parallelism. More specifically, the model follows Euclidean parallelism, where two lines never intersect.⁹⁸² This implies that the CISG and the Sale of Goods Act 1979 will be used concurrently, but would never have to interfere with one another, unless traders would use elements of both instruments at the same time based on the doctrine of freedom of contract. Pursuant to Euclidean parallelism within the UK would exist two parallel instruments of sales law, one related to domestic sales and one related to international sales and which would not ‘intersect’ in their field of application. The CISG would become domestic law albeit in the international trade law element thereof which would lay down the rights and obligations for parties involved in international commercial transactions and UK traders would be given the opportunity to choose between the CISG and the Sale of Goods Act 1979 the instrument which would be more advantageous to administrate their transaction.

⁹⁷⁷ Ibid

⁹⁷⁸ A Lenhoff, ‘Optional Terms (Jus dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts (1946) 45 Mich L Rev 39-40

⁹⁷⁹ F Kessler, ‘Contracts of Adhesion-Some Thoughts About Freedom of Contract’(1943) 43 Colum L Rev 629

⁹⁸⁰R Pound, ‘Liberty of Contract’ (1909) 18 Yale Law Journal 454; S Williston, ‘Freedom of Contract’ (1921) 6 Cornell L Q 365

⁹⁸¹ F Kessler, ‘Contracts of Adhesion-Some Thoughts About Freedom of Contract’(1943) 43 Colum L Rev 630

⁹⁸² ‘Euclid’ <http://www.mathopenref.com/euclid.html> accessed 2 February 2012; ‘The Euclidean model for space’ <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

Furthermore, another way of expressing the parallel model could be the notion of parallel universes. Parallel universes, or parallel worlds, or alternate universes, or multiple universes, or megaverse, or multiverse, or metaverse, all have the same meaning and they are all words employed by scientists to describe not just our universe but a range of others that may exist out there.⁹⁸³ In the same way the developments in theoretical physics have led in the consideration of the existence of parallel universes, in legal terms a set of rules that exists in parallel to another statute may also be considered as a parallel universe.⁹⁸⁴ Moreover, parallel universes could be compared to a CISG Act existing in the UK in parallel to the Sale of Goods Act 1979 in the sense that it might be criticised for the complications that may inflict. In other words, in the exact same way there is a veil of mystery as to what happens in an actual parallel universe, the business community might oppose to the parallel model on the grounds of uncertainty.⁹⁸⁵

The parallel model gives optionality a powerful role to play as it recognises and strengthens the significance of optionality in the business transaction world. One might say that optionality is the bedrock of contract law, the buyer is given the option to accept the offer made by the seller; offer, acceptance, agreement and a contract is being formed.⁹⁸⁶ Moreover, the necessity for optionality is reinforced by the fact that the CISG is a legal instrument where the trader plays a central role.⁹⁸⁷ Thus, UK traders will achieve improved business dealings if they are presented with the option of selecting the legal instrument which is more suitable and beneficial for their transactions. More importantly, optionality in a two-option parallel system may act as a safety net, if one legal instrument were to fail, then the second one would continue to function.

⁹⁸³ B Greene, *The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos* (Random House 2011) 4

⁹⁸⁴ A Z Jones, ‘What Are the Types of Parallel Universes?’ <<http://physics.about.com/od/astronomy/f/ParallelUniverseTypes.htm>> accessed 13 February 2012; J Tate, ‘Parallel Universe’ <<http://www.universetoday.com/44769/parallel-universe/>> accessed 13 February 2012

⁹⁸⁵ A E Williams, ‘Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom’ (2001) Pace Int’l L Rev

<<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 5 March 2012

⁹⁸⁶ E Mckendrick, *Contract Law* (9nd edn, Palgrave Macmillan 2011) 22

⁹⁸⁷ J Felemegeas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ (2000) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/felemegeas.html#ch1>> accessed 17 February 2013

Legal traditions vary significantly from nation to nation in terms of managing the several main legal variables which may include ‘tradition, precedent, usage, custom, or religious precept.’⁹⁸⁸ This is why the parallel model offers an optional scenario. Traders who are not planning on trading outside the UK borders and who will therefore only ever work within one system, the Sale of Goods Act 1979, will not be obliged to shift needlessly to a new legal instrument, the CISG. However, more importantly, it offers traders who wish to develop beyond the UK borders the freedom to select a legal instrument which would decrease costs for business and increase simplification.⁹⁸⁹ The trader is offered the right of option, to choose between the Sale of Goods Act 1979 and the CISG and, of course, the trader will choose what is more beneficial for the particular transaction.

In a democratic world a number of rights and freedoms exist and it is vital to all such freedoms and rights that one should be able to first of all make up one’s mind without being dictated what choices to make.⁹⁹⁰ It is often the case that governments display an enormous monopoly that establishes the way organisations and people act to a large extent. What kind of freedom can be created by employing monopoly force of a legal system?⁹⁹¹ On the contrary, optionality offered by the parallel model rejects such legal constructions. One of the parallel model’s objectives is that, once it is applied, optionality will carry on not because it is being imposed but because it is being appreciated and enhanced. More specifically, optionality falls under the freedom of contract principle.⁹⁹²

⁹⁸⁸ J D Daniels, L H Radebaugh and Daniel Sullivan, *International Business* (13th edn, Pearson 2010) 102

⁹⁸⁹ L Spagnolo, ‘The Last Outpost: Automatic CISG Opt Outs, Misapplications and The Costs of ignoring The Vienna Sales Convention For Australian lawyers’ (2009) Pace Int’l L Rev <http://cisg.sk/sk/uploaded_files/Lisa%20Spagnolo%20-%20Last%20Outpost.pdf> accessed 17 February 2012

⁹⁹⁰ <<http://www.optionality.net/mag/feb96a.html>> accessed 5 February 2012

⁹⁹¹ Ibid

⁹⁹² European Commission, *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* (Green Paper, Com 348, 2010) < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>> accessed 6 February 2012

Freedom of contract is very significant to the CISG and through the parallel model parties wishing to exclude its application are free to do so.⁹⁹³ The parallel model endows traders the possibility of excluding some of its provisions.⁹⁹⁴ Nonetheless, it should be mentioned that the first reaction of some UK importers and exporters will probably be to seek to opt out of the CISG as they would be unfamiliar with it. According to the parallel model, the Convention would be part of UK domestic law and in occasions where a trader would want to apply the Sale of Goods Act 1979 and opt out of the Convention would be required to say so expressly. If the parallel model is employed, that may prove to be beneficial for the UK traders and for UK commerce as a whole.

Despite the fact that all four States, Australia, Canada, New Zealand and Germany have acted as sources of comparative inspiration, the parallel model draws elements from the New Zealand and German approach of implementation in the main. Australia and Canada acted only as sources of inspiration on the ground that they pose a certain difficulty.⁹⁹⁵ Both States are federal countries in which the ultimate authority for the sale of goods law is in the constituent units.⁹⁹⁶ Based on this reality, it is rather apparent that the UK cannot adopt and adjust the Australian and Canadian approach as to how to ratify the CISG, since both of these States pose an intricate situation. The parallel model adopts and adjusts the New Zealand and German approach, as it is simpler and more suitable for the UK legal order.

Although Germany is a civil law State which has a tendency to apply the respective literature where necessary, while cases are less frequently cited, it is an important point of reference for the parallel model. The method it approaches the UN Convention is worth considering for the UK.⁹⁹⁷ The immense amount of CISG cases reported in Germany combined with the large amounts of German scholarly writing

⁹⁹³ CISG Article 6

⁹⁹⁴ CISG Article 12

⁹⁹⁵ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

⁹⁹⁶ States in the case of Australia and provinces in the case of Canada

⁹⁹⁷ J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 474; M F Koehler and G Yujun 'The Acceptance of the Unified Sales Law (CISG) in different Legal Systems' (2008) 20 Pace Int'l L Rev .45

approving the Convention show that the application of the CISG in parallel to the BGB has proved for the most part prosperous.⁹⁹⁸

Moreover, drawing elements from the Australian and Canadian approach would only be unrealistic, as it would only cause confusion and further reluctance on behalf of the UK to ratify the CISG.⁹⁹⁹ In addition, this would be in contrary to one of this thesis' objective' which is to offer simple and realistic model of transforming the CISG into the UK legal order.

Furthermore, one might say that one of the major reasons why New Zealand and other common law countries have not fully embraced the CISG is UK's reluctance to ratify the Convention.¹⁰⁰⁰ UK's unenthusiastic response to the CISG has most probably deprived other common law countries of valuable case material that could act as precedent or at least offer direction and assistance.¹⁰⁰¹ The author is aware that the parallel model, which is to a certain degree based on New Zealand's experience, may be criticised on the ground that the CISG is not being employed as much as it should have been in New Zealand.

In addition, the author took into consideration that the transformation process of an international law into a domestic legal system is not as simple in practise as it is in theory. In the same way an organ is being transplanted from a healthy human body to a sick human body, a new set of rules would be incorporated into a country's legal system.¹⁰⁰² That is why these rules are called legal transplants; however, as a human body may reject such a transplant, the transformation of a set of rules into a domestic legal system may not be successful.¹⁰⁰³ In this thesis three major legal transplants' theorists were examined; Legrand, Watson and Teubner.¹⁰⁰⁴ Pursuant to Legrand

⁹⁹⁸ U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

⁹⁹⁹ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

¹⁰⁰⁰Though there has been some support for accession, see Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): A Consultation Document* (DTI, June 1998) paras 22-23; A Gärtner 'Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law' (2000-2001) <<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>> accessed 13 February

¹⁰⁰¹ M Kilian, 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 JTLP 233

¹⁰⁰² C Brants, 'Legal Culture and Legal Transplants' (2011) 1 Isaidat L Rev 5-6

¹⁰⁰³ Ibid

¹⁰⁰⁴ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119; Pierre Legrand, 'On the Singularity of Law'(2006) 47 Harvard Int'l L J 517,522-25 ; P Legrand, 'Against a European Civil

when a statute is being transplanted from one State to the next, it has to be translated, which modifies the meaning.¹⁰⁰⁵ Legrand suggests that when a rule is being incorporated into a legal system it becomes different and that people will construe it differently as well, that is why he firmly believes that legal transplants are impossible.¹⁰⁰⁶ Watson, on the other hand, considers that legal transplants are possible and he illustrates his opinion through paradigms.¹⁰⁰⁷ However, Teubner's opinion concerning legal transplants differs from both Legrand's and Watson's; he chooses to portray a set of foreign rules as an 'irritant' rather than a transplant.¹⁰⁰⁸ In accordance to Teubner, the outcome of transferring a legal notion from one mechanism to another cannot be calculated as structural pairing will alter.¹⁰⁰⁹ Even though, all three legal transplants theorists have made vital contributions to the translatability dispute, the author agrees with certain features of all three theories. More specifically, the parallel model shares the same perspective with Watson, that transplants are possible and that the accomplishment of a legal transplant relies mainly on the recipient State's need for the foreign legal rule.¹⁰¹⁰

Finally, the author is aware that the parallel model will be criticised on two major grounds; on its similarity to the current UK approach towards the CISG and on the fact that the absolute freedom of contract may prove to be problematic. The parallel model's proposal might make someone question whether there is a significant reason to transform the CISG through this model as the UK current approach towards the Convention appears to be very similar. Nevertheless, if one examines in depth the parallel model's proposal, the conclusion would be that simply letting the traders to

Code' (January 1997) 60 MLR 44; P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52, 58-64; A Watson, 'Legal Transplants and European Private Law'(December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February; Alan Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95; A Watson, 'Legal Transplants and Legal Reform' (1976) 92 L Q Rev79; A Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 315; G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 11-17; G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 Am J Comp L 149

¹⁰⁰⁵ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119

¹⁰⁰⁶ Ibid

¹⁰⁰⁷ A Watson, 'Legal Transplants and European Private Law'(December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

¹⁰⁰⁸ G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 11

¹⁰⁰⁹ Ibid

¹⁰¹⁰ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 57, 88

opt in the CISG whenever they wish is very different from passing legislation on the matter.

The first rationale why the parallel would be more advantageous for the UK than the current approach is that there is a comparison to the New Zealand and German CISG experiences. The fact that the parallel model emerged through comparing to the New Zealand and German CISG experiences is vital. This will most possibly serve in predicting and controlling the outcome of such incorporation. The collecting of facts and information gained through comparative law can act as a crucial bridge to a foreign legal instrument.¹⁰¹¹ In this case the knowledge gathered from the New Zealand and German experience can be applied to the UK CISG ratification, helping illuminate different angles that may lead to a deeper comprehension of the CISG.¹⁰¹²

It is also noteworthy to take into account that legislative recognition of the CISG by the UK would lead to a widespread acceptance of the Convention by the UK traders. It is rather obvious that the Parliament's negative stance towards the CISG has deprived traders from applying it to their transactions. Consequently, passing legislation on the matter would in due course lead to the creation of more case law and to a more concrete legal certainty regards the CISG.

The parallel model might be criticised on freedom of contract as this notion has come under a critical gaze in the UK.¹⁰¹³ Certain statutory legislation has been launched which might act as an obstacle on such freedom of options.¹⁰¹⁴ There are a number of paradigms of legislative intervention interfering with the freedom of contract and a broad range of legislation was passed that helped modifying the laws of contract, two of them are the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.¹⁰¹⁵ Moreover, the majority of economists believe that by following the ultimate freedom of contract approach would in the long run result in market failure.¹⁰¹⁶ The main reason being that freedom of contract without any sort of control or limitation would

¹⁰¹¹ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

¹⁰¹² J C Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617, 620

¹⁰¹³ T Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008) Juridical Int'l 51-57 <<http://www.juridicainternational.eu/various-approaches-to-unfair-terms-and-their-background-philosophies>> accessed 6 February 2012

¹⁰¹⁴ Ibid

¹⁰¹⁵ Ibid

¹⁰¹⁶ H Collins, *The Law of Contract* (4th edn, LexisNexis Butterworths 2003) 25-26

only operate properly in a perfectly efficient market.¹⁰¹⁷ However, following the enactment of the CISG through the parallel model, the trader would play the leading role; therefore we would have a balance between minimum government intervention and freedom of contract.

Freedom of contract may be maintained to a great degree in the parallel model by granting the trader a principal part that would be to some extent regulated only during the consultation and the enactment of the CISG Act where the government would have the duty of the decision maker. In addition, freedom of contract plays the role of a very practical principle; it is the unavoidable complement of a free business structure.¹⁰¹⁸ Consequently, the parallel model clearly operates in the premises of *laissez faire* and individuality.¹⁰¹⁹

¹⁰¹⁷ R Hagin, *Modern Portfolio Theory* (Dow Jones-Irwin 1979) 11-13

¹⁰¹⁸ F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract'(1943) 43 Colum L Rev 629

¹⁰¹⁹ Scarlett History of Economic Theory and Thought 'Adam Smith Free Trade International Theory' <<http://www.economictheories.org/2008/07/adam-smith-free-trade-international.html>>accessed 17 March 2010

Chapter 5

CONCLUSIONS

5.1 Introduction

This thesis set out to explore the possibility of transposing the CISG into the UK legal order and prescribed two ways by which the Convention's implementation could occur. As a result the author produced two models for the possible transposition, as in transformation of the CISG into the UK legal order, namely the **à la carte model** and the **parallel model**. The study also sought to examine whether a CISG incorporation through these models would be effective but also to enquire on which grounds these models could be criticised. The general theoretical literature on this subject specifically regards the UK's hesitancy to ratify the UN Convention as inconclusive on a number of vital questions such as why the UK has not ratified the CISG yet and why the parliament does not take into account the necessity of employing it in modern business transactions. However, the author while drafting the two proposed models took into consideration the UK's reluctance on abolishing the Sale of Goods Act 1979; that is why in both models the SoGA is given priority.

5.2 Literature Review & Analytical Parameters Re-Assessment

The first chapter, the literature review provided the reader an analysis **on what we have**¹⁰²⁰ and **what we could have**¹⁰²¹ that is if these two models were to be employed in the UK legal order. A genuine attempt was made to observe the two situations taking into consideration the freedom of contract, the fact that the business world in the UK (and elsewhere) moves much more rapidly than law, the bottom-up/top-down

¹⁰²⁰ The current situation in the UK regards the CISG.

¹⁰²¹ The potential situation if either of the two models were to be implemented in the UK.

approach, economic and political considerations for traders, the response of large and influential organisations, the lack of interest on behalf of the UK to implement the CISG, the hypothesis of the thesis, the validation of the hypothesis, the thesis' models, the differences and similarities of the CISG and the Sale of Goods Act 1979, the mandatory rules of both the CISG and the Sale of Goods Act 1979, the doctrine of transformation, the advantages and disadvantages of the CISG and the methodology of the thesis.

Since the UK has not yet implemented the UN Convention 1980, the CISG does not apply to contracts governed by English law. It may nevertheless apply to contracts concerning UK traders where conflict of rules point to the application of a contracting State rather than the law of England.¹⁰²² The UN Convention 1980 is an up to date and flexible law as it permits its application in certain occasions, but always agrees for alteration and/or exclusion, if appropriately employed.¹⁰²³ Hence, the CISG values and promotes the freedom of parties to contractually opt in its provisions together with the choice to opt out and decide on the application of an entirely diverse body of law.¹⁰²⁴ Consequently, currently UK traders wishing to draft a contract under the CISG may do so by way of the freedom of contract doctrine.¹⁰²⁵ This thesis refers to this situation as **what we have** or as the **free-trade approach**.

What we have in the UK currently falls predominantly under the second area of Adam Smith's *laissez-faire*, by which each trader is free to engage in his/her own commercial transaction in a free market. Furthermore, the *laissez-faire* permits freedom of contract and private property rights alone to provide the structure for relations between firms and consumers. However, the traders' freedom of contract is limited by the so-called mandatory rules.

¹⁰²² The current situation regards the CISG in the UK follows the bottom-up approach. See R A Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights' (1992) 59 U Chi L Rev 433-434; J K Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 Yale J Int'l L 125

¹⁰²³ CISG Article 6 'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'

¹⁰²⁴ Ibid

¹⁰²⁵ S Whittaker, 'The Optional Instrument of European Contract Law and Freedom of Contract' <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf> accessed 18 July 2009

Furthermore the process by which law becomes part of a legal system without legislation is called ‘bottom-up approach’¹⁰²⁶. The approach initiates with a comparatively small, uniform lawmaking group, evocative of a private alliance, which either introduces or appropriates an institutional home.¹⁰²⁷ This group creates substantive rules, which are basically organic norms emerging from the practices of practicing lawyers. Moreover, the lawmaking group introduces procedural and remedial rules that simultaneously insulate the substantive rules and endure their elasticity and proximity to actual group practice.¹⁰²⁸ The unofficial, practice-based rules in due course establish themselves in a more legitimate legal system and develop into law.¹⁰²⁹ In essence, a bottom-up approach is a soft, non- choreographed process that generates hard legal results. This is effectively the free-trade approach (**what we have**).

The hypothesis of the thesis suggested that it would be more beneficial for the UK to proceed with the transformation of the CISG into the UK legal order than resist such transformation, as it did to date. Therefore, the validation of the hypothesis sought to consider the advantages of transforming the CISG into the UK legal order through this thesis’ proposed models. A UK CISG incorporation would offer substantial advantages to UK exporters and importers of goods. Traders involved in international sales contracts negotiations often find the ‘choice of law’ to be amongst the most challenging. Each party is acquainted with its own national sales law, and has a preference for the local rules to apply to his/her transactions. Nevertheless, a broadly acceptable and accepted uniform and generally understood set of rules evades all of those complications. The CISG attempts to eliminate obstacles by putting into place internationally accepted rules on which contracting parties, courts and arbitrations may rely.¹⁰³⁰ Thus, the validation of the hypothesis was carried out through engaging general arguments by way of analysing the economic and political considerations regards the potential of such a transformation.

¹⁰²⁶ P S Berman, ‘The Globalization of Jurisdiction’, (2002) 151 U PA L REV 311, 534

¹⁰²⁷ J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ (2005) 30 Yale J Int’l L 125

¹⁰²⁸ Ibid

¹⁰²⁹ Ibid

¹⁰³⁰ L F Del Duca and P Del Duca, ‘Practice Under the Convention on International Sale of Goods (CISG) A Primer for Attorneys and International Traders’ (1995) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>> accessed 11 July2009

In this regards, the author suggested the possibility of employing one of the two proposed legislative models, either the **à la carte model** or the **parallel model** for the effective incorporation of the CISG into the UK legal order. The à la carte model would require a legislative ‘add on’ to the Sale of Goods Act 1979 and the parallel model would come with a separate legislative CISG Act parallel to the Sale of Goods Act 1979. Incorporation of the CISG into the UK legal order via either of these models would be advantageous as they are both adjusted to the UK legal, economical and socio-political necessities.

The first model, the à la carte model took into consideration the differences and similarities of the CISG and the Sale of Goods Act 1979 as it is necessary to develop a general idea of what should be included and excluded in the à la carte model. A major problem in pursuing to implant a foreign notion into domestic law is the substantial difference in policy between the international instrument and the domestic law, in this case the Convention and the Sale of Goods Act 1979. The proposals of lifting up the threshold for breach and making available procedures to help parties resolve differences stem mainly from a body of law that aims at keeping contracts intact. One may reach the conclusion that the Sale of Goods Act 1979 pursues not only to ease the sale of goods but also pursues to ease its breach. This conclusion is, of course, inaccurate. A proposal, nevertheless, on adopting a policy in quest of preserving contractual relationship is worthy of reference. A number of the sections refer to this Article, mainly those dealing with the right to demand adequate assurance and instalment contracts, effectuate a goal furthering continuation of a contract.

Despite their differences, the CISG and the Sale of Goods Act 1979 have a lot in common. Both the CISG and Sale of Goods Act 1979 provide an outstanding place to fitness for purpose¹⁰³¹ to highlight the quality of the goods that the seller must deliver in the deficiency of any other express quality standard in the contract.¹⁰³² In fact, the Convention’s language follows very closely the language of the Sale of Goods Act

¹⁰³¹ The Sale of Goods Act requires ‘reasonable’ fitness and the CISG just fitness. There is unlikely to be a real difference between the two standards: Art 7(1) of the CISG requires the Convention to be interpreted in accordance with good faith and the concept of reasonableness in English law commonly produces the same results as good faith and fair dealing.

¹⁰³² Sale of Goods Act 1979, s 14(3); CISG Art 35(2)

1979.¹⁰³³ In addition, both instruments do not provide any express guarantee against hidden defects, a typical element of civil law.¹⁰³⁴

Under the Sale of Goods Act 1979, regards the supply of something different, description, is certainly significant.¹⁰³⁵ On the other hand, a distinction between the supply of non-conforming goods and the supply of different goods is of little practical importance. The CISG in contrast to the UK Sale of Goods Act 1979 makes available a clearer and simpler sense of purpose in the areas of fitness for purpose, quality and description.¹⁰³⁶

Regards termination of a contract that has been breached, the provisions lay down by the CISG and the Sale of Goods Act 1979 are rather different. The Convention, is more inflexible in avoiding (terminating) a contract and hence appear intended to avoid the economic waste that occurs when manufactured goods are rejected.¹⁰³⁷ Whereas the Sale of Goods Act 1979, backed up by case law developments, appears as though it was designed with volatile markets in mind that is why it eases the termination of a breached contract.¹⁰³⁸

When it comes to dealing with international sales time obligations, English law adopts a stringent view. The peculiarity of this development is that it runs completely against the point of the Sale of Goods Act 1979, which established that the time of payment is presumptively not of the essence of the contract.¹⁰³⁹ Concerning time obligations the CISG has employed to some extent a different tactic. The CISG established a certain right of avoidance reserved for time breaches, called the *Nachfrist*.¹⁰⁴⁰ The Convention gives buyers and sellers the option to stipulate an additional period of

¹⁰³³ M Bridge, ‘A Law for International Sales’(2007) 37 HKLJ 20

¹⁰³⁴ For example, the French Civil Code, Art 1641

¹⁰³⁵ *Reardon Smith Ltd v Yngvar Hansen Tangen (The Diana Prosperity)* [1976] 1 WLR 989

¹⁰³⁶ J M Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations on Contracts for the International Sale of Goods* (Kluwer Law International 2008) 81

¹⁰³⁷ CISG Article 25

¹⁰³⁸ Sale of Goods Act 1979 ss 13-15 and 11(2)

¹⁰³⁹ Sale of Goods Act 1979 s 10(1)

¹⁰⁴⁰ CISG Articles 47 and 63. Article 47, is also known as Nachfrist and will be discussed in more detail later on.

time of reasonable extent for the other to perform and, at the end of this time, to avoid the contract if performance is still unforthcoming.¹⁰⁴¹

As far as curing defective performance is concerned, the Sale of Goods Act 1979 does not provide any condition for cure and there are discouraging barriers to any attempts that might be developed through case law innovation. If the Sale of Goods Act 1979 otherwise approves termination and rejection of the goods,¹⁰⁴² then any such originality would fly in the face of the Act's language. Nevertheless, English law does off the record agree to cure prior to delivery, in those situations where a proper offer has been made but has not been accepted by the purchaser.¹⁰⁴³ Despite the fact that the CISG is more informative on the seller's documentary performance than the Sale of Goods Act 1979, while the Convention is sparing of detail, it does enclose a specific rule permitting a seller to cure documentary non-conformity.¹⁰⁴⁴

Furthermore, the impression is given that the non-ratification of the CISG by the UK so far is due to pure lack of interest. Currently, there is a variety of attitudes in the UK regards the UN Convention 1980. Quite a few English observers entirely adopt the 'No Surrender' attitude typified by criticism of the CISG as 'a further erosion of our own excellent municipal law.'¹⁰⁴⁵ Others express a reluctant acceptance: the UN Convention is 'probably as good as can be expected.'¹⁰⁴⁶ On the other end of the scale, however, they are those who embrace it, the Department of Trade and Industry and, most eloquently, the Scottish Law Commission, to which may be added the voice of Professor Roy Goode.¹⁰⁴⁷ As it can be observed from the basis of the line of

¹⁰⁴¹ M Bijl, 'Fundamental Breach in Documentary Sales Contracts'

The Doctrine of Strict Compliance with the Underlying Sales Contract
<<http://www.cisg.law.pace.edu/cisg/biblio/bijl.html>> accessed 15 June 2014

¹⁰⁴² Sale of Goods Act 1979 s 11(2)

¹⁰⁴³ M Bridge, 'A Law for International Sales'(2007) 37 HKLJ

¹⁰⁴⁴ M Bijl, 'Fundamental Breach in Documentary Sales Contracts'
The Doctrine of Strict Compliance with the Underlying Sales Contract
<<http://www.cisg.law.pace.edu/cisg/biblio/bijl.html>> accessed 15 June 2014

¹⁰⁴⁵ A Forte, 'The United Nations Convention on contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) Pace Int'l L Rev

<<http://www.cisg.law.pace.edu/cisg/biblio/forte.html#61>>

accessed 3 August 2009

¹⁰⁴⁶ Feltham, 'The United Nations Convention on Contracts for the International Sale of Goods' (1981) J Bus L 346

¹⁰⁴⁷ A Forte, 'The United Nations Convention on contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom',
<<http://www.cisg.law.pace.edu/cisg/biblio/forte.html#61>>

reasoning in this doctoral thesis, the author supports the CISG ratification in the UK legal order as well. Nonetheless, it would appear to be the case that the lethal blend of antipathy and apathy has made sure that the government of the United Kingdom will do nothing until the English legal profession dynamically demands for alteration. Taking into account the fact that the UN Convention 1980 on Contracts for the Sale of Goods was created as an instrument to endorse harmony, the United Kingdom is a disunited kingdom.

Additionally, the author also took into consideration the fact that law develops through the various social, political and economic necessities. The several social, political and economic advancements shape the law accordingly; thus is is vital for the law to adjust and allow to be shaped by the progress of globalisation. Irrespective of the negative effect globalisation might have on States' legal identity, it is fairly evident that the internationalised sector has a tendency to grow, regardless of national and local diversity.¹⁰⁴⁸ The business world moves much more rapidly than law, and it is not hard to visualise entrepreneurs in two non-Contracting countries wishing to apply the CISG in order to simplify their negotiations.¹⁰⁴⁹ Employing the UN Convention 1980 as a compromise choice of law would be more advantageous as it would both augment party autonomy, and progress the uniformity of legal rules.¹⁰⁵⁰ Moreover, while traditionalists might shake at the prospect of approving parties to choose non-national law to rule their contract, modern selection of law principles should agree for the choice of a convention generated particularly for this sort of transaction.¹⁰⁵¹ Therefore, in the face of developments a UK ratification of the CISG could be regarded as an unavoidable necessity.

accessed 3 August 2009

¹⁰⁴⁸ L M Friedman, 'Erewhon: The coming global legal order' (2001) 37 Stan J Int'l L 347-364

¹⁰⁴⁹ K Bell, 'The Sphere of Application of the Vienna Convention on Contracts fro the International Sale of Goods' (1996)

<<http://www.cisg.law.pace.edu/cisg/biblio/bell.html>>

accessed 27 May 2010

¹⁰⁵⁰ C Davies, 'Arthur Marwick' (1980) 1 JLA
<[https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+\(1980\)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtbTBXPkhIH_Hath1tWjlS5A8PBkkIw](https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+(1980)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtbTBXPkhIH_Hath1tWjlS5A8PBkkIw)> accessed 6 February 2012

¹⁰⁵¹ C R Reitz, *The uniform commercial code and the convention on contracts for the international sale of goods, in negotiating and structuring international commercial agreements* (Shelley P Battram & David N Goldswieg, eds 1990) 12

Moreover, the examination of the two selected types of benefits on the CISG, that is the economic and political considerations, most likely is not sufficient to convince those who determinedly criticise of the unification of international sales law and, in particular, the UN Convention 1980¹⁰⁵² of its intrinsic merits. One must also appreciate the CISG on legal considerations too. As such, the above analysis brought to light that the CISG really provides for sensible solutions. For instance, the awarding of additional time under Articles 47 and 63 (these two Articles of the CISG grant the additional time in performing a contract) are tailor-made for issues which only arise under the CISG.

Nonetheless, as may be understood from the author's observations regarding the price-reduction remedy and the liberty to cure, the CISG also contains provisions which unquestionably better accord with commercial reality than the solutions provided by the Sale of Goods Act 1979. Equally, one can by way of contractual terms have these 'add ons' in a contract which is largely drafted under the Sale of Goods Act 1979.

For the reasons analysed above, it is quite evident that British traders would considerably benefit from the implementation of the CISG, which for instance, is likely to simplify the conclusion of transactions with partners from developing countries;¹⁰⁵³ *it is this author's firm belief that the United Kingdom should at last overcome its unwillingness and implement the UN Convention 1980.* Moreover, it is strongly suggested that those provisions of the CISG, which have already proved to lead to economically sensible results, may be regarded for introduction into domestic sales law as the à la carte model suggests.

In addition, there are many other advantages to be acquired from the UK's future participation. Unfortunately, there is only space in this thesis to bear in mind the main benefits, and the author has carefully chosen to advance the most contentious

¹⁰⁵² J S Hobhouse, International Conventions and Commercial Law: The Pursuit of Conformity, 106 London Q Rev 530, 530 (1990)

¹⁰⁵³ J Steyn, *A Kind of Esperanto? In The Frontiers of Liability* (Peter Birks, 1994) 17

issues in an attempt to challenge the main hesitations about implementation of the CISG head on.¹⁰⁵⁴

Regarding disadvantages it can be said that the lack of common law concepts no longer provides an impossible obstacle to the courts. The issue of the parole evidence rule has been settled by a clear and to the point court decision that now makes available valuable precedent for CISG case law. As far as the doctrine of consideration is concerned, courts should employ the guidance offered by Professor Honnold and recognise a general non-requirement of consideration in CISG cases. The example of the parole evidence rule particularly gives reason to believe that common law courts are able and keen to apply the Convention without partiality.¹⁰⁵⁵

Acknowledging the significance of international law does not mean that domestic law will be trampled upon and/or marginalised. As a matter of fact, under both models herein, domestic law is recognised. For instance the first model, the à la carte model is grounded on the actuality that the UK will not in the near future completely abolish the Sale of Goods Act 1979. Thus, the author drafted the three sub-models in such a way so as to preserve part of the Sale of Goods Act 1979. The author attempted to avoid interfering with the mandatory provisions (ss 12-15) of the Sale of Goods Act 1979 so as to maintain a balance between the old and familiar Act and the relatively new Convention (unless Sub-Model I would be followed, in which case the UK legislator could go as far as interfering with ss 12-15 of the Sale of Goods Act, unlikely as this may be as a possibility). Therefore, the models were prepared in such a way so that the Sale of Goods Act 1979 will be given certain precedence. Again, it is worth pointing out that, if the UK chooses to transform the CISG through sub-model I of the à la carte model, it would very likely mean that opting in CISG's Part III would interfere with sections of the Sale of Goods Act 1979, including the mandatory sections.¹⁰⁵⁶ Moreover, under the parallel model the trader will be given

¹⁰⁵⁴ A Garther, '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#104>> accessed 4 August 2009

¹⁰⁵⁵ C B Andesen, 'The Uniform International Sales Law and the Global Jurisconsultorium' <<http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>>

accessed 7 June 2009

¹⁰⁵⁶ Sale of Goods Act 1979 Ss 12-15, See also Unfair Contract Terms Act 1977 Section 6

the autonomy to choose between the Sale of Goods Act 1979 and a UK CISG Act. The ‘legal transformation’ making its way via the suggested models does not replace national law with international law, where the second suffers the defect of a democratic deficit.¹⁰⁵⁷ Conversely, international law offers a chance to advance both the relevance and usefulness of national law by making definite that all persons in society will fully realise, and employ, the freedoms that they gain from within their polity.

Furthermore, the author also took into account the approach by which the UK generally adopts in order to put into operation a convention into its legal order. A convention or a treaty will not have validity in British national law, except the convention/treaty is specially amalgamated by a legislative measure. Therefore, a convention or a treaty does not automatically have direct legal validity in English law. In order for this to occur, the Parliament has to pass an Act in order for the convention/treaty to be part of UK domestic law. Thus, if a treaty gets incorporated by statute into UK law, it will have full legal validity. This is known as the ‘doctrine of transformation’.¹⁰⁵⁸

According to the transformation doctrine, either the **à la carte model** or the **parallel model** would have to be implemented in the UK legal order via legislation. Consequently, both models oblige for a legislature procedure so as to be implemented in the UK legal order.¹⁰⁵⁹ Additionally, the à la carte model aims at fine-tuning the CISG to the UK necessities in order to implement it, just as the doctrine of transformation dictates. That is not to say that the parallel model does not comply with the doctrine in question. Yet, this model (the parallel model) happens to comply in a different way to the way according to which the à la carte model complies with the doctrine in question. In any case, the models recommended in this thesis comply with the doctrine of transformation.

¹⁰⁵⁷ H M Kindred ‘The use and abuse of international legal sources by Canadian courts: searching for a principled approach’ in O E Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 130

¹⁰⁵⁸ E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press 2002) 378

¹⁰⁵⁹ E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

5.3 À la Carte Model Chapter

Moreover, the third chapter, to be precise the à la carte model chapter, suggested the application of the à la carte model. The inspiration for the name of this model is the fact that its proposal is to choose provisions from the CISG in the same way that meals are selected from a restaurant's menu. When a contract is being concluded, the UK may choose to employ only certain articles from the Convention, therefore contracts do not have to conform to all CISG provisions. This model would in fact require a legislative 'add-on' to the Sale of Goods Act 1979. What is suggested, is that by applying the proposed model, a CISG Act would be created or even a CISG Statutory Instrument, with the selection of the Articles, which can then be implemented in the UK legal order and by disregarding the rest, which may be non-suitable or fully understood.

The author suggests that this model could be put into practice through three possible ways:

1. à la carte model by either omitting part II of the CISG
2. à la carte model by either omitting part III of the CISG
3. à la carte model by taking advantage of EU directive experience

Through sub models one and two, the à la carte model recommended the application of Article 92(1) of the CISG, thus enabling the UK to state at the time of signature, ratification, acceptance, approval or accession that it would not be bound by Part II or Part III of this Convention. These two situations were separately analysed. As the CISG does not classify and thus restrict the term 'validity', the advantages of the UK declaring to omit Part II is that it will be up to the Sale of Goods Act 1979 to establish when a cause of invalidity occurs and any possible consequences.¹⁰⁶⁰ Nevertheless, certain complications occur by such declaration; it is worth stating that the particular reservation has no effect in non-Reservation States and non-Contracting States. One of the reasons, which led in October 2009, the Ministries of Justice of

¹⁰⁶⁰ Ibid

Denmark, Finland and Sweden to announce that their countries would implement Part II by withdrawing their long-standing Article 92 declaration¹⁰⁶¹ was one such disadvantage. Although Norway has not made such an announcement, it is also considering this.¹⁰⁶² It would appear that omitting Part II pursuant to Article 92 did not prove practical for most of the Scandinavian States. Of course this does not necessarily mean that such an approach will not work for the UK; one should take into consideration that the Scandinavian countries and the UK follow two different legal systems; the former follows a civil law approach whereas the latter follows a common law approach.

Reverting to sub-model II, the benefit of omitting Part III, according to Article 92, is that the UK will evade a number of conflicts between the CISG and the Sale of Goods Act 1979, considering that their more serious differences are found in this part. One may assert that opting in Part III of the Convention will in fact lead to a direct conflict between this specific part of the CISG and the equivalent provisions of the Sale of Goods Act 1979. For their corporative differences it would be difficult for the UK to comply with Part III of the CISG. However, despite the benefits of applying this method, it will most likely be criticised on the grounds that no State, so far, has reserved the right, under Article 92, to opt out of part III.

Additionally, the method used to transport the Directive into the UK, may prove a safe albeit a conservative model for incorporating the UN Convention in the UK legal order. This approach is justified by the author on the grounds that, the Directive has been significantly influenced by the CISG, while the Directive has already been effectively implemented in the UK legal order and the Sales of Goods Act 1979 will be prioritised. Mainly, this method aims at avoiding the confusion that in all probability would occur from the implementation of a dual regime, analogous to that ruling the use of exemption clauses. Nonetheless, by implementing the CISG in the UK, via statutory instrument, may result in as much confusion as a dual regime. The delegates converting this idea from theory into practise should have in mind that the

¹⁰⁶¹ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

¹⁰⁶² Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html>>

requirements and paternalistic flavour of the CISG can only be incorporated within the Sale of Goods Act 1979 framework with extreme care.¹⁰⁶³

Moreover, when drafting models which may require legislation, one should take into account the implementing legislator as well. When a treaty/convention is to be adopted, legislators have to turn to public international law. A country has therefore to decide whether international law is going to be implemented automatically in the national law of the State, or if it necessitates any kind of specific incorporation, by a legislative measure or Act.

Kelsen's Pure Theory of Law provides considerable direction as regards monism and how international law should be perceived. Kelsen was one of the first scholars to adopt the monist approach¹⁰⁶⁴. Kelsen considered the supremacy of international law as if it was a consequence of his 'basic norm' of all law. Monists consider international and domestic law to be instruments of the same legal system.¹⁰⁶⁵ Moreover, in case of conflict, precedence must be given to international law. With regards to countries, a monist country is one which complies by automatically implementing international law, as part of its national law.¹⁰⁶⁶ Yet, the UK is a dualist system of law, when it comes to its understanding of international law.

Dualists believe that international and national laws are two different, unrelated and separate of each other legal systems.¹⁰⁶⁷ In case of conflict between the two, international courts should use international law and national courts, should use domestic law.¹⁰⁶⁸ An example of a dualist scholar is Triepel. Triepel believes that

¹⁰⁶³ M Morgan Taylor and A Naidoo 'The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees- Problems of the Time of Conformity for the Quality Obligation' (2002) JCLI <<http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>> accessed 6 July 2011

¹⁰⁶⁴ B Marian, 'The Dualist and Monist Theories. International Law's Comprehension of these Theories' <http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf> accessed 5 May 2011

¹⁰⁶⁵ Ibid

¹⁰⁶⁶ Ibid

¹⁰⁶⁷ N Sukalo, 'How International Law is Incorporated into Municipal Law and Why it is Important' <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_itImportant> accessed 17 May 2011

¹⁰⁶⁸ Ibid

international and national laws are very different in their nature.¹⁰⁶⁹ According to dualism, international law regulates the relations between nations, whereas national law controls the rights of an individual within a nation. Triepel believed that the two legal systems are different with regards to their origin and thus, what they serve.¹⁰⁷⁰

In the case of the United Kingdom, the incorporation of a treaty or convention would normally be by an Act of Parliament.¹⁰⁷¹ Therefore, a treaty/convention such as the CISG will not have validity in English domestic law unless the legislature makes it part of it, by an act of Parliament or by secondary legislation.¹⁰⁷² Accordingly, for the CISG to be transposed into the UK legal system, legislation must take place. In contrast to the bottom-up approach, legislation generates law from top down, by producing general principles which resolve possible disputes. This is known as the top-down law making approach and it necessitates governmental involvement by the implementing legislators.¹⁰⁷³

Additionally, the researcher considered four key elements when drafting the à la carte model, thus guaranteeing the quality of the legislation in terms of its capability for implementation, flexibility, legal certainty, adequacy and feasibility. These four elements are of paramount significance when creating a piece of legislation and are to the advantage of the implementing legislator, as they yardstick for the quality of the legislation. This is also beneficial and in simplifying the implementing legislator's task, as it would regulate the outcome of such an implementation.¹⁰⁷⁴

¹⁰⁶⁹ H Triepel cited by G Slyz, 'International Law in domestic courts' (1995-1996) 28 N Y U J Int'l L & Pol

¹⁰⁷⁰ Ibid

¹⁰⁷¹ N Sukalo, 'How International Law is Incorporated into Municipal Law and Why it is Important' <http://www.academia.edu/1114626/How_international_law_is_incorporated_into_municipal_law_and_why_is_it_important> accessed 17 May 2011

¹⁰⁷² UN Department of Economic and Social Affairs Division for Social Policy and Development, *International norms and standards related to disabilities* (2003) <<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 17 May 2011

¹⁰⁷³ Ibid

¹⁰⁷⁴ Few studies have linked the quality of legislation to its capacity for implementation. The present author makes an attempt, based primarily upon the studies of the enforceability of law derived from a framework devised by P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997). For an overview of his framework and its relation to the quality of legislation in terms of implementability see b Van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement, Theory and Cases* (Leiden University Press 2006) chapter 2

Furthermore, one should also consider the possibility of criticising a model, in order for one to reach perfectly objective findings. The first sub-model of the à la carte model might be criticised on three grounds. Firstly, the Scandinavian countries that have made a reservation pursuant to Article 92 not to be bound by Part II of the CISG are not of a common law origin. Nevertheless, one should consider that the approach that civil law States have followed might be more effective than the approach of common law States. Secondly, Denmark, Finland and Sweden have withdrawn their long-standing Article 92 declaration.¹⁰⁷⁵ The fact that the declaration was not successful for these three Scandinavian States does not mean that it will not be of benefit to the UK legal order. Furthermore, as the human body may reject such a transplant, the transfer of a set of rules into a domestic legal system, may also be unsuccessful.¹⁰⁷⁶ Thirdly, one of the Scandinavian legislators' reasons to support the Article 92 reservation¹⁰⁷⁷ was the fact that the rules pursuant to Part II were criticised as having been extremely influenced by the corresponding common law rules. More precisely, the Scandinavian legislators regarded Article 16(1) as rather foreign to Scandinavian law, as it permits the offeror to revoke *tilbagekalde* prior to acceptance.¹⁰⁷⁸ Nonetheless, this is a claim which cannot be put forward by the UK as Article 16(1) is not unfamiliar to UK law. Hence, sub-model I of the à la carte model may be criticised on the ground that it does not offer adequate rationales for opting out from Part II of the CISG.

The second sub-model of the à la carte model may be criticised on the basis that no State so far has made any reservations, found under Article 92, to omit part III (Articles 25-88). The argument suggested by the author, in favour of such a reservation, is that it would be gainful to opt out of part III of the CISG, as the main

¹⁰⁷⁵ Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>, <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

¹⁰⁷⁶ Ibid

¹⁰⁷⁷ J Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 JL & Com 289-

¹⁰⁷⁸ Pursuant to the avoidance rule relevant in Scandinavian national law (*Aftaleloven*, in Denmark), every communicated offer is a 'firm' offer binding upon the offeror for a reasonable period of time. The Danish government's stance on this point is verified in the remarks to the legislation implementing Denmark's CISG ratification. See *Folketingstidende* 1988-89 tillæg A, sp 1015

differences between the Sale of Goods Act and the CISG are to be found in this part.¹⁰⁷⁹

Finally, the third sub-model may be criticised on the grounds that statutory instruments suggest that the Parliament may not have devoted adequate time in the examination of the legislation.¹⁰⁸⁰ However, one of the arguments put forward by the Parliament, for not incorporating the CISG so far, is the logic that the UK will implement the CISG if and when Parliamentary agenda allows.¹⁰⁸¹ Thus, the ratification of the CISG via a statutory instrument will be less time consuming and will in turn make the procedure for the Parliament simpler.

5.4 Parallel Model

In addition, the fourth chapter prescribed the parallel model. The name of the parallel model resulted from the notion of parallelism. More precisely, the model follows Euclidean parallelism, which defines that lines never intersect.¹⁰⁸² This denotes that a CISG Act and the Sale of Goods Act 1979 would exist in the UK at the same time, but would never interfere with one another, unless traders would use elements of both instruments simultaneously, based on the doctrine of freedom of contract. According to the Euclidean parallelism within the UK would coexist two parallel instruments of sales law, one specific to domestic sales and one related to international sales and which would not ‘intersect’ in their field when applied. The CISG would become domestic law although in the international trade law element thereof, which would lay down the rights and obligations for parties involved in international commercial transactions; UK traders therefore would be given the opportunity to choose between a CISG Act and the Sale of Goods Act 1979, the specific instrument which would be more advantageous to administrate their transaction.

¹⁰⁷⁹ C Bianca and M Bonell, *Commentary on the International Sales Law* (Dotta Giuffré 1987) 643 and J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 594

¹⁰⁸⁰ House of Lords, *The Management of secondary legislation* (National Government Publication 2006) 198

¹⁰⁸¹ R Bradgate, *Commercial Law*, (3rd edn, Butterworts 2000) 727-728

¹⁰⁸² ‘Euclid’ <http://www.mathopenref.com/euclid.html> accessed 2 February 2012; ‘The Euclidean model for space’ <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

Moreover, another way of expressing the parallel model could be the principle of parallel universes. Parallel universes, or parallel worlds, or alternate universes, or multiple universes, or megaverse, or multiverse, or metaverse, all have the same meaning and they are all definitions engaged by scientists to describe not just our universe but any number of others that may exist out there.¹⁰⁸³ In the same way the advances in theoretical physics have led in the reflection of the possible existence of parallel universes, in legal terms, a set of rules that exists in parallel to another statute may also be thought as a parallel universe.¹⁰⁸⁴ Also, parallel universes could be considered as the CISG Act existing in the UK, in parallel to the Sale of Goods Act 1979, in the sense that it might be criticised for the complications that may result. In other words, in the exact same way there is a shroud of mystery, as to what happens in an actual parallel universe, the business community might not adopt the parallel model on the grounds of uncertainty.¹⁰⁸⁵

The parallel model provides optionality a powerful tool to use, as it recognises and strengthens the significance of optionality in the world of business transaction. One might say that optionality is the foundation of contract law in that the buyer is given the option to accept the offer made by the seller; offer, acceptance, agreement and a contract is being formed.¹⁰⁸⁶ Furthermore, the requisite for optionality is strengthened by the fact that the CISG is a legal instrument where the trader plays a key role.¹⁰⁸⁷ Therefore, UK traders will achieve better business dealings if they are given the option of selecting the legal instrument, which is more appropriate and advantageous to their transactions. More significantly, optionality in a two-option parallel system may act as a failsafe net, if one legal instrument were to fail, then the second one would continue to function.

¹⁰⁸³ Brian Greene, *The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos* (Random House 2011) 4

¹⁰⁸⁴ A Z Jones, ‘What Are the Types of Parallel Universes?’ <<http://physics.about.com/od/astronomy/f/ParallelUniverseTypes.htm>> accessed 13 February 2012; J Tate, ‘Parallel Universe’ <<http://www.universetoday.com/44769/parallel-universe/>> accessed 13 February 2012

¹⁰⁸⁵ A E Williams, ‘Forecasting the potential impact of the Vienna Sales Convention on International Sales law in the United Kingdom’ (2001) Pace Int’l L Rev

<<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#158>> accessed 5 March 2012

¹⁰⁸⁶ E Mckendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 22

¹⁰⁸⁷ J Felemezas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ (2000) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/felemezas.html#ch1>> accessed 17 February 2013

Legal traditions are different from nation to nation, in terms of managing the several main legal variables, which may encompass ‘tradition, precedent, usage, custom, or religious precept.’¹⁰⁸⁸ Therefore, the parallel model offers an alternative scenario. Traders who are not planning on doing business outside the UK borders and who will therefore only ever work within one system, the Sale of Goods Act 1979, will not be necessitated to shift needlessly to a new legal instrument, the CISG. Nevertheless, more significantly, the model provides traders who wish to develop beyond the UK borders, the option to select a legal instrument, which would cut down costs for business and increase simplification.¹⁰⁸⁹ The trader is offered the benefit of option, to choose between the Sale of Goods Act 1979 and the CISG and, of course, the trader will choose what is more appropriate for the particular transaction.

In a world of democracy, a number of rights and freedoms exist and it is vital for all such freedoms and rights, that one should be able to first of all make up one’s mind without being ordered as to what choices to make.¹⁰⁹⁰ It is frequently the case that governments display an overbearing monopoly which establishes the way organisations and people act to a large extent. What kind of freedom can be created by the monopolising of a legal system?¹⁰⁹¹ On the other hand, the optionality offered by the parallel model rejects such legal impediments. One of the parallel model’s primary objectives is that, once it is applied, optionality will carry on not because it is being enforced but because it is being appreciated and enhanced. More specifically optionality falls under the freedom of contract principle.¹⁰⁹²

Freedom of contract is very significant to the CISG and through the parallel model parties not wishing to exclude its use are free to do so.¹⁰⁹³ The parallel model grants

¹⁰⁸⁸ J D Daniels, L H Radebaugh and Daniel Sullivan, *International Business* (13th edn, Pearson 2010) 102

¹⁰⁸⁹ L Spagnolo, ‘The Last Outpost: Automatic CISG Opt Outs, Misapplications and The Costs of Ignoring The Vienna Sales Convention For Australian lawyers’ (2009) Pace Int’l L Rev <http://cisg.sk/uploaded_files/Lisa%20Spagnolo%20-%20Last%20Outpost.pdf> accessed 17 February 2012

¹⁰⁹⁰ <<http://www.optionality.net/mag/feb96a.html>> accessed 5 February 2012

¹⁰⁹¹ Ibid

¹⁰⁹² European Commission, *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* (Green Paper, Com 348, 2010) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>> accessed 6 February 2012

¹⁰⁹³ CISG Article 6

traders with the possibility of leaving out some of its provisions.¹⁰⁹⁴ Nevertheless, it should be mentioned that probably the first reaction of some UK importers and exporters will be to seek to opt out of the CISG, as they would not be conversant with it. Pursuant to the parallel model, the Convention would be part of UK domestic law and in instances where a trader would wish to employ the Sale of Goods Act 1979 and opt out of the Convention he/she would be required to do so explicitly. Thus, if the parallel model is applied, it may prove to be advantageous for the UK traders and for the UK commerce as a whole.

Regardless that all four States, Australia, Canada, New Zealand and Germany have acted as sources of inspiration, the parallel model mainly draws elements from the New Zealand and German method of implementation. Australia and Canada acted only as sources of inspiration on the grounds that they face certain difficulties.¹⁰⁹⁵ Both States are federated countries in which the ultimate authority for the sale of goods law lies with the constituent units.¹⁰⁹⁶ Grounded on this reality, it is rather obvious that the UK cannot adopt and adjust to the Australian and Canadian approach in ratifying the CISG, since they both pose an intricate and peculiar situation. The parallel model adopts and amends the New Zealand and German approach, as they are simpler and more appropriate for the UK legal order.

Despite the fact that Germany is a civil law State which has a tendency to employ the respective literature where necessary, while cases are less frequently cited, it is nevertheless a significant point of reference for the parallel model. The process by which it approaches the UN Convention is worth of embracing by the UK.¹⁰⁹⁷ The large amount of CISG cases reported in Germany combined with the large amounts of German scholarly literature approving the Convention, indicate that the application of the CISG in parallel to the BGB has proved for the most part beneficial.¹⁰⁹⁸

¹⁰⁹⁴ CISG Article 12

¹⁰⁹⁵ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

¹⁰⁹⁶ States in the case of Australia and provinces in the case of Canada

¹⁰⁹⁷ J Meyer, 'UN-Kaufrecht in der deutschen Anwaltspraxis' (2005) 69 RabelsZ 474; M F Koehler and G Yujun 'The Acceptance of the Unified Sales Law (CISG) in different Legal Systems' (2008) 20 Pace Int'l L Rev 45

¹⁰⁹⁸ U Magnus, 'CISG's impact on Germany' in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008)146

On the other hand, an important reason for embracing New Zealand's approach to a considerable extent is that New Zealand deems the application of international law for the development of the common law, in a way akin to the approach taken in the UK.¹⁰⁹⁹ As an example, the introduction of the international law of human rights has played a very significant role in the New Zealand domestic legal system, following the ratification of the Bill of Rights Act in 1990.¹¹⁰⁰ That particular Act offered an influential statutory model for the UK Human Rights Act 1998.¹¹⁰¹ It is obvious that New Zealand, as a common law State, has in the past played a noteworthy role as a model for the UK (and vice-versa). In this way the UK may adopt and adjust New Zealand's actions, as to how to put into operation the CISG, which is quite similar to this thesis' parallel model.¹¹⁰²

Furthermore, adopting elements from the Australian and Canadian approach would only be unrealistic, as it would only cause further confusion and reluctance on behalf of the UK to ratify the CISG.¹¹⁰³ In addition, this would be to the contrary to one of this thesis objective, which is to provide a simple and more representative model to transforming the CISG into the UK legal order.

Additionally, one might say that one of the more serious reasons why New Zealand and other common law countries have not fully embraced the CISG, is the UK's unwillingness to ratify the Convention.¹¹⁰⁴ The UK's indifferent response to the CISG has in all probability deprived other common law countries of useful case

¹⁰⁹⁹ See for example the use of international law in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257

¹¹⁰⁰ New Zealand Bill of Rights Act 1990
<<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>> accessed 4 February 2012

¹¹⁰¹ See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic). Consultations recommending the enactment of human rights legislation have also been conducted in two other States: Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, 2007); Government of Western Australia , *A WA Human Rights Act: Report of the Consultation Committee* (2007).

¹¹⁰² Sale of Goods (United Nations Convention) 1994 Act
<<http://www.legislation.govt.nz/act/public/1994/0060/latest/DLM332322.html>> accessed 3 February 2012

¹¹⁰³ A Janssen and O Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

¹¹⁰⁴ Though there has been some support for accession, see Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): A Consultation Document* (DTI, June 1998) paras 22-23; A Gartner 'Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law' (2000-2001) <<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>> accessed 13 February

material, which could act as a precedent or at least offer direction and assistance.¹¹⁰⁵ The author is aware that the parallel model, which is to a certain point based on New Zealand's experience, may be criticised on the argument that the CISG is not being applied as much as it should have been in New Zealand. This reluctance on the part of the legal profession in New Zealand to embrace the CISG ought not to hinder the final incorporation of the CISG in the UK legal order. Incorporating international instruments such as the CISG is not something which is necessarily judged on their popularity in specific jurisdictions after such instruments have been implemented therein.

Furthermore, the author took into account that the implementation process of international law into a national legal system is not as simple practically as it is theoretically. In the same way an organ is being transplanted from a healthy human body to a sick human body, a new set of rules would have to be incorporated into a country's legal system.¹¹⁰⁶ That is the reason why these rules are called legal transplants; nevertheless, as a human body may discard such a transplant, the transfer of a set of legal rules into a national legal system may not be fruitful.¹¹⁰⁷ In this thesis three major legal transplants' theorists were considered; Legrand, Watson and Teubner.¹¹⁰⁸ According to Legrand's theory, when a statute is being transplanted from one State to the next, it has to be translated, which naturally alters the meaning to an extent.¹¹⁰⁹ Legrand theorizes that when a rule is being transposed into a legal system, it becomes different and that people will understand it differently as well, that is why he steadfastly believes that legal transplants are impossible.¹¹¹⁰ Watson, on the other hand, considers that legal transplants are indeed possible and he exemplifies his

¹¹⁰⁵ M Kilian, 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 JTLP 233

¹¹⁰⁶ C Brants, 'Legal Culture and Legal Transplants' (2011) 1 Isaidat L Rev 5-6

¹¹⁰⁷ Ibid

¹¹⁰⁸ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119; Pierre Legrand, 'On the Singularity of Law'(2006) 47 Harvard Int'l L J 517,522-25 ; P Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 44; P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52, 58-64; A Watson, 'Legal Transplants and European Private Law'(December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February; Alan Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95;A Watson, 'Legal Transplants and Legal Reform' (1976) 92 L Q Rev79; A Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 315; G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 11-17; G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 Am J Comp L 149

¹¹⁰⁹ P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119

¹¹¹⁰ Ibid

opinion through paradigms.¹¹¹¹ However, Teubner's opinion in respect of legal transplants varies from both Legrand's and Watson's; he in fact chooses to portray a set of foreign rules as an 'irritant' rather than a transplant.¹¹¹² Pursuant to Teubner, the outcome of transferring a legal notion from one mechanism into another cannot be premeditated, as structural pairing will alter.¹¹¹³ Despite the fact that all three legal transplants theorists have made fundamental contributions to the translatability argument, the author agrees with certain characteristics of all three theories. To be more precise, the parallel model shares the same viewpoint with Watson, in that transplants are possible and that the success of a legal transplant relies mainly on the recipient State's need for the foreign legal rule.¹¹¹⁴

Finally, the author is aware that the parallel model will be criticised for two main reasons: on its similarity to the current (albeit predominantly unregulated) UK approach towards the CISG and on the fact that the absolute freedom of contract may prove to be challenging. The parallel model's proposal would possibly make someone wonder, whether there is an overwhelming evidence in transforming the CISG through this model, as the UK current approach towards the Convention appears to be very similar. Nonetheless, if one examines in depth the parallel model's approach, the conclusion would be that simply enabling the traders to opt for the CISG whenever they want, is not the same as passing legislation on the matter.

The first rationale as to why the parallel model would be more beneficial for the UK than the existing approach is that there is a comparison to the New Zealand and German CISG experiences. The fact that the parallel model was generated through comparing to the New Zealand and German CISG experiences is extremely important. This will most possibly serve in predicting and controlling the outcome of any such incorporation. The collection of facts and information gained through comparative law, can act as an important bridge to a foreign legal instrument.¹¹¹⁵ In this case, the

¹¹¹¹ A Watson, 'Legal Transplants and European Private Law'(December 2000) vol 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

¹¹¹² G Teubner , ' Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences'(1998) 61 MLR (1) 11

¹¹¹³ Ibid

¹¹¹⁴ A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 57, 88

¹¹¹⁵ E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

knowledge collected from the New Zealand and German experience can be applied to the UK CISG ratification, helping enlighten different angles that may in due course result in a better comprehension of the CISG.¹¹¹⁶

It is also of note that taking into consideration of the legislative recognition of the CISG by the UK, could result in a widespread approval of the Convention by the UK traders. It is quite apparent that the Parliament's negative standpoint towards the CISG has deprived traders from employing it in a useful way to their transactions. Subsequently, passing legislation on the issue would in due course lead to the formation of more case law and to a more concrete legal certainty in respect of the CISG.

The parallel model might be criticised in respect of the freedom of contract and this notion has come under a critical gaze in the UK.¹¹¹⁷ Certain statutory legislation has been introduced, which might act as an impediment to the possibility of freedom of options.¹¹¹⁸ There are several paradigms of legislative intervention concerning the freedom of contract and a broad range of legislation was passed that helped modifying the laws of contract, two of them are the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.¹¹¹⁹ Additionally, the mainstream of economists believe that in embracing the ultimate freedom of contract approach would, in the long run, result in market downturn.¹¹²⁰ The main reason being that freedom of contract without any kind of regulator or restraint would only work properly in a perfectly efficient market.¹¹²¹ Nevertheless, after the enactment of the CISG through the parallel model, the trader would play the prominent role; we would thus have a balance between minimum government intervention and freedom of contract.

Freedom of contract may be preserved to a great degree in the parallel model, by awarding the trader a key role that would be, to some extent, controlled only during

¹¹¹⁶ J C Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617, 620

¹¹¹⁷ T Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008) Juridical Int'l 51-57 <<http://www.juridicainternational.eu/various-approaches-to-unfair-terms-and-their-background-philosophies>> accessed 6 February 2012

¹¹¹⁸ Ibid

¹¹¹⁹ Ibid

¹¹²⁰ H Collins, *The Law of Contract* (4th edn, LexisNexis Butterworths 2003) 25-26

¹¹²¹ R Hagin, *Modern Portfolio Theory* (Dow Jones-Irwin 1979) 11-13

the consultation and the enactment of the CISG Act, where the government would have the distinct responsibility of the decision maker.¹¹²² Moreover, freedom of contract plays the role of a very practical principle; it is the inescapable complement of a free business structure.¹¹²³ Subsequently, the parallel model clearly functions in the premises of *laissez faire* and individuality.¹¹²⁴ The main reason is that contracting is not a social institution, but a private matter, as the judicial system only anticipates for its interpretation and the courts do not put together contracts for the parties.¹¹²⁵

5.5 Concluding Point

In spite of what is often reported about the advantages and disadvantages of a CISG implementation by the UK in scholarly writings this thesis went further and provided two solutions as to *how* the Convention could be transported into the UK legal order. Merely highlighting the benefits of the UN Convention 1980 has shown to be neither comprehensive nor does it seem to be sustainable in the long-term.

In addition, this study sought to resolve the obstacles which could potentially arise during CISG incorporation into the UK. The CISG has been criticised that it creates uncertainty as it is also influenced by civil law systems. The civil law-inspired provisions may at first appear to be an obstacle for the UK's CISG implementation but one should take into consideration that the UK also trades with countries of civil law origin. Moreover, another obstacle to the incorporation of the CISG is the fear on behalf of the UK to lose its identity as an international litigator and arbitrator. Of course this is a possibility that might occur, however international law evolves constantly; if the UK does not follow the changes of modern international business transactions, then it will definitely lose its edge in international litigation and arbitration.

¹¹²² Despite this the government would still consult traders

¹¹²³ F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedm of Contract'(1943) 43 Colum L Rev 629

¹¹²⁴Scarlett History of Economic Theory and Thought 'Adam Smith Free Trade International Theory' <<http://www.economictheories.org/2008/07/adam-smith-free-trade-international.html>>accessed 17 March 2010

¹¹²⁵ F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract'(1943) 43 Colum L Rev 630

The author does not wish by any means to imply that a CISG implementation would only prove beneficial for the UK; there will be instances where employing the CISG will not be advantageous. It is in the author's belief that the study carried out by this thesis leaves no room for further delay and excuses for not transposing the CISG into the UK legal order. So too it is the author's conviction that the models of incorporation offered herein provide an excellent basis for considering the ways, the strategy and the means of incorporation of the CISG in the UK, when this occurs.

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BIBLIOGRAPHY

PRIMARY SOURCES

Domestic – Regional – International

Legislation

Domestic Legislation

Australia

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Human Rights Act 2004 (ACT)

Sale of Goods (Vienna Convention) Act 1986 (NSW)

Sale of Goods (Vienna Convention) Act 1986 (Qld)

Sale of Goods (Vienna Convention) Act 1986 (SA)

Sale of Goods (Vienna Convention) Act 1986 (WA)

Sale of Goods (Vienna Convention) Act 1987 (ACT)

Sale of Goods (Vienna Convention) Act 1987 (NT)

Sale of Goods (Vienna Convention) Act 1987 (VIC)

Sale of Goods Vienna Convention Act 1987 (TAS)

Uniform Commercial Code 1952, Article: 2

Uniform Sales Act 1906 s 12 (2)

Canada

International Sale of Goods Contracts Convention Act 1991

Denmark

Danish Sale of Goods Act 1906

Danish Sale of Goods Act 2003

Finland

Finnish Sale of Goods Act 1987

France

French Civil Code 1804, Article: 1641

Germany

German Civil Code BGB 2002

New Zealand

New Zealand Bill of Rights Act 1990

Sale of Goods (United Nations Convention) 1994 Act

Sale of Goods Act 1908

Norway

Norwegian Sale of Goods Act 1907

Norwegian Sale of Goods Act 1988

Sweden

Swedish Sale of Goods Act 1905

Swedish Sale of Goods Act 1990

United Kingdom

Commercial Agents (Council Directive) Regulations 1993

Human Rights Act 1998

Sale and Supply of Goods to Consumers Regulations 2002

Sale of Goods Act 1893

Sale of Goods Act 1979, Sections: 3, 10 (1), 11(2), 12, 13, 14(1), 14(2), 14(3), 15, 20, 32(2), 32(3), 35, 50(3), 51, 51(3), 53

Unfair Contract Terms Act 1977, Section: 6

United States

Uniform Commercial Code (UCC) 1952

Regional

Commercial Agents Directive (86/653/EC)

Directive (EC) 2000/35 on combating late payment in commercial transactions

Directive (EC) 93/13 on unfair terms in consumer contracts

Directive on Certain Aspects on the Sale of Consumer Goods and Associated Guarantees, (99/44, O J L171/12), Articles: 3(6), 8(2)

Regulation (EC) on the law applicable to contractual obligations ('Rome I') (the 'Rome I Regulation') [2008], Article: 3

Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002 No. 3045)

International

General Agreement on Tariffs and Trade (GATT)

Incoterms 2010

ULFIS- Uniform Law on the Formation of Contracts for the International Sale of Goods 1964

ULIS- Uniform Law on the International Sale of Goods 1964, Article: 17

UN Convention for the International Sale of Goods 1980, Articles: 1(2) 4, 6, 7, 7 (1), 7(2), 8(3) , 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30,31, 32, 33, 34, 35, 35(2), 35(1), 36, 37, 38, 39, 40, 41, 42, 43, 44 (1), 45, 46, 46(1), 46(2), 47, 48, 49, 50, 51, 52,53, 54, 55, 56, 57, 58, 59 61, 62, 63, 64, 65, 66, 67, 68, 70, 74, 75, 76, 79, 92(1), 92(2), 93, 95

Vienna Convention on the Law of Treaties 1969, Articles: 2, 26

Cases

Germany

Schweizerisches Bundesgericht 28 October 1998 (Switzerland) (CLOUT No 248)

New Zealand

Attorney-General & NZ Rail Corporation v Dreux Holdings Ltd (1996) 7 TCLR 617, 627

BP Oil NZ Limited v Rhumvale Resources Limited CA 181/96

Crump v Wala [1994] 2 NZLR 331

Gibbons Holdings Ltd v Wholesale Distributors Ltd [2008] 1 NZLR 277

Ministry of Transport v Noort

Police v Curran [1992] 3 NZLR 260

Smallmon v Transport Sales Limited HC Christchurch CIV 2009-409-363 [2010] NZHC 1367

Tavita v Minister of Immigration [1994] 2 NZLR 257

Thompson v Cameron HC Auckland (27 Mar 2002) AP117/SW99

Tri-Star Customs and Forwarding Ltd v Denning 1 NZLR 33

Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444

Yoshimoto v Canterbury Golf International Ltd [2001] 1 NZLR 52

United Kingdom

Alfred Macalpine Construction Ltd v Panatown Ltd (No 1) [2001] 1 AC 518

Bank of Australasia v Palmer [1897] AC 540, 545

Bence Graphics International Ltd v Fasson UK Ltd [1998] QB 87

Buvot v Barbuit (1736) 3 Burr 1481

Chartbrook Limited v Persimmon Homes Limited et al. [2009] UKHL 38

Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder (The Julia) [1949] AC 283

Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha [1962] 2 QB 26

Jackson v Rotax Motor & Cycle Co [1910] 2 KB 937

Kingspan Environmental Limited, Tyrrell Tanks Ltd, Rom Plastics Limitd, and Titan

Enviornmental Ltd v Borealis A/S and Borealis UK Ltd [2012] EWHC 1147

Mortensen v Peters (1906) 8 F (J) 93

Parlement Belge [1879] 4 P D 129

Proforce Recruit Ltd v The Rugby Group Ltd [2006] EWCA Civ 69

Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402

R v Keyn (The Franconia) (1876) 3 Ex D 63

Reardon Smith Ltd v Yngvar Hansen Tangen (The Diana Prosperity) [1976] 1 WLR 9

Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd [1989] 1 All ER 1056

The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd [2005] EWHC 1565 (Ch)

Trendtex Trading Corp v Central Bank of Nigeria [1977] QB 529, CA

Vigers Bros v Sanderson Bros [1901] 1 QB 608 89

West Rand Central Gold Mining Co v R [1905] 2 KB 391

United States

Beijing Metals & Minerals v American Business Centre Inc (1993) 993 F 2d 1178

Clarke v Watson (1865) I 8 CBR, US 278

Delchi Carrier SpA v Rotororex Corp (1995) 71 F 3d 1024, 1027-28

Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc (2002) 201 F Supp 2d 236 (SD NY)

Helen Kaminski v Marketing Australia Products (1997) No 96B46519 (SD NY)

MCC-Marble Ceramic Centre Inc v Ceramica Nuova D'Agostino SpA (1998) 114 F 3d 1384

Medical Marketing International v Internazionale Medico Scientifica, S.R.L., 99-0380, 1999 WL 311945, 1999 U.S. Dist

Shuttle Packaging Systems, LLC v Jacob Tsonakis, INA SA and INA Plastics Corporation (17 December 2001) 1:01-CV-691 (WD Mich SD)

Usinor Industeel v Leeco Steel Products (2002) 209 F Supp 2d 880 (ND Ill ED)

SECONDARY SOURCES

Books

A H Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law and Taxation Publishers 1989) 125

A R B Seidman, and N Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) 255, 262,263

A Watson, *Legal Transplants: An approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95

André Janssen and Olaf Meyer, *CISG Methodology* (Sellier European Law Publishers 2009) 16

B Audit, *La vente internationale de marchandises* (N Y: Transnational Juris 1990) 40

B Greene, *The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos* (Random House 2011) 5

B Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 66

Brian Greene, *The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos* (Random House 2011) 4

C B Andersen and U G Schroeter, *Sharing International Commercial Law across National Boundaries: Festschrift for A H Kritzer on the Occasion of His Eightieth Birthday* (Simmonds & Hill Publishing 2008) 287, 291

C Bianca and M Bonell, *Commentary on the International Sales Law* (Dotta Giuffré 1987) 643

C F E Hondius, ‘Rights of the Consumer’ in M C Bianca & S Grundmann (eds), *EU Sales Directive* (Intersentia 2002) 150-155

C F M J Bonell, ‘Article 6’ in Cesare Massimo Bianca & Michael Joachim Bonell (eds), *Commentary on International Sales Law* (Giuffre 1987)

C R Reitz, *The uniform commercial code and the convention on contracts for the international sale of goods, in negotiating and structuring international commercial agreements* (Shelley P Battram & David N Goldsweig, 1990) 12

C Von E and P Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, (4th edn, C H Beck 2004) 41-137

C Widmer and P Hachem, ‘Switzerland’ in F Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (Sellier European Law Publishers 2008) 281, 281, 286
Charles De Secondat Montesquieu, *De L'esprit Des Drois (The spirit of laws)* (J P Mayer & A P Kerr 1970) 74,156

Clifford Geertz, *Local Knowledge* (3rd edn, Basic Books 2000) 218

D P O' Brien, *The classical Economist* (OUP 1994) 29-30

E Bardach and R A Kagan, *Social Regulation: Strategies for Reform* (Transaction Publisher 1982) 59

E Ehrlich, *Fundamental Principles of the Sociology of Law* (Arno Press, 1936)

E Lauterpacht, C J Greenwood and A G Oppenheimer, *International Law Reports* (Cambridge University Press, 2002) 378

E Mckendrick, *Contract Law* (9nd edn, Palgrave Macmillan 2011) 22

E W Younkins, *Capitalism and Commerce: Conceptual Foundations of Free Enterprise* (Lexington Books 2002) 67

F A Wolf, *Parallel Universes* (Simon & Schuster 1990) 261

F Ferrari, *Vendita internazionale di beni mobili ambito di applicazione. disposizioni generali* (1994) 124-126

F Ferrari, Artikel 4 in Peter Schlechtriem (ed), *Kommentar zum Einheitlichen UN-Kaufrecht*, (3rd, Mohr Siebeck 2000)

F Ferrari, *Artikel 4*, in Kommentar zum Einheitlichen UN-Kaufrecht (3rd edn, Peter Schlechtriem ed 2000) no.13

F Ferrari, Artikel 6 in Peter Schlechtriem (ed), *Kommentar zum Einheitlichen UN-Kaufrecht*, (3rd, Mohr Siebeck 2000)

F Ferrari, *Artikel 6*, in *Kommentar zum Einheitlichen UN-Kaufrecht*, (3rd edn Peter Schlechtriem, 2000)

F H Buckley, *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 26

G C Thornton, *Legislative Drafting* (3rd edn, Butterworths 1987) 56

G H Treitel, *The Law of Contract* (9 edn, Sweet & Maxwell 1995) 176-177

H Collins, *The Law of Contract* (4th edn, LexisNexis Butterworths 2003) 25-26

H Eberstein, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* (Caemmerer Von E and P Schlechtriem 1990) 45-85

H L A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 350

H L Zetterberg, *Sexual Life in Sweden* (Transaction Publishers 2002) 65

H Lauterpacht, *Recognition in International Law* (Cambridge University Press 2012) 48-51

I Brownlie, *Principles of Public International Law* (5th edition, Clarendon Press 1998) Ch 2

J Steyn, *A Kind of Esperanto? In The Frontiers of Liability* (Peter Birks 1994) 17

J Baldwin and G Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 880-881

J Brunnée and S J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 340-341

J D Daniels, L H Radebaugh and D Sullivan, *International Business* (13th edn, Pearson 2010) 102

J Grix, *The Foundations of Research* (2nd edn, Palgrave Mcmillan 2010) 131

J H Dalhuisen *Dalhuisen, International Commercial, Financial and Trade Law* (Hart Publishing 2000) 262-3

J Habermas, *Legitimation Crisis* (Beacon 1975)

J L Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton University Press 2011) 39

J Lookofsky, *Understanding the CISG in Scandinavia: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (2nd edn, DJOF Publishing 2002)

J M Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations on Contracts for the International Sale of Goods* (Kluwer Law International 2008) 81

J O Honnold, *Uniform Law for International Sales under the 1980 United Nations convention* (3rd edn, Kluwer Law International 1999) 121, 594

J Raz, *The Authority of Law* (Clarendon Press 1979) 223-226

J Rousseau, *The Social Contract* (originally published in 1792 cover copyright by Cosimo Inc. 2008)

J S Gillespie, *Transplanting Commercial Law Reform: Developing a 'rule of Law' in Vietnam* (Ashgate 2006) 21

J H Dalhuisen *Dalhuisen on International Commercial, Financial and Trade Law* (Hart Publishing, 2000) 250

J O Honnold *Uniform Law for International Sales* (2 edn Kluwer Law and Taxation Publishers, Deventer, The Netherlands, 1991) 283, paras 204.2-204.4

K B Smelie, *A Hundred Years of English Government* (2nd edn, Gerald Duckworth Co. Ltd 1950) 8

K Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution* (Clarendon Press 1984) 32

K Lipstein, *Principles of The Conflict of Laws: National and International* (Martinus Nijhoff Publishers 1981) 63-66

K Pistor, P Wellons & J Sachs, *The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995* (OUP 1999) 280-284

K Siehr, 'Artikel 6' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 1997)

L E Trakman *The Law Merchant: The Evolution of Commercial Law* (Wm S Hein Publishing 1983) 8

L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969)

L Krauss, *A Universe from Nothing: Why There Is Something Rather than Nothing* (Free Press 2012) 125-126

L M Friedman, ‘Erewhon: The coming global legal order’ (2001) 37 Stan J Int'l L 347-364

M J Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (3rd edn, Martinus Nijhoff Publishers 2009) 51, 63-64

M Ozaki, *Negotiating Flexibility: The Role of the Social Partners and the State* (English Labour Office 1999) 45

M Rheinstein, *Max Weber on Law in Economy and Society* (Simon and Schuster 1954) 303-318

M Weber, *Economy and Society: An Outline of Interpretative Sociology* (University of California Press 1978) 695-699

M Weber, *The Theory of Social and Economic Organization* (The Free Press 1947) 275

O E Fitzgerald, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 35

P Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (W E J Tjeenk Willink 1997)

P Nonet and P Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper 1978)

P Schlechtriem and I H Schwenzer, *Commentary on the UN Convention on the International Sale of Goods – CISG* (Peter Schlechtriem ed. & Geoffrey Thomas trans., 1st edn, Clarenden Press 1998) 692

P Schlechtriem and M Schmidt-Kessel, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 203-213

R Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell 1998) 32-46

R Bradgate, *Commercial Law*, (3rd edn Butterworts, 2000) 727-728, 792-793

R Hagin, *Modern Portfolio Theory* (Dow Jones-Irwin 1979) 11-13

R L Heilbroner, *The essential Adam Smith* (OUP 1986) 149-151

R M Goode, *Commercial Law, The Vienna Convention on the International Sales of Goods*, (2nd edn Penguin Books, 1995) 962

R Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspective* (OUP 2005) 96

S Williston, *The Law Governing Sales of Goods* (Baker Voorhis & Co Inc rev edn 1948) s 223a

Trakman, *The Law Merchant: The Evolution of Commercial Law* (Wm S Hein Publishing 1983) 8

U Flick, *An Introduction to Qualitative Research* (3rd edn, Sage 2006) 247

U Magnus, ‘CISG’s impact on Germany’ in Franco Ferrari (eds) *The CISG and its Impact on National Legal Systems* (Sellier European Law Publishers 2008) 152

V M Rogers & A H Kritzer, *A Uniform International Sales Law Terminology*, (Ingeborg Schwenzer & Günter Hager eds, 2003) 223-253

V Postrel, *The Future and Its Enemies: The Growing Conflict Over Creativity, Enterprise, and Progress* (1st edn, Touchstone 1999)

V Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement, Theory and Cases* (Leiden University Press 2006) chapter 2

Official Reports

Domestic

Law Reform Committee of the Council, *1980 Convention on Contracts for the International Sale of Goods* (Law Society of England and Wales, 1981)

Department of Trade and Industry (UK), United Nations Convention of International Sale of Goods: a consultative document (London: Department of Trade and Industry, 1989)

Department of Trade and Industry (UK), United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): a consultation document (London: Department of Trade and Industry, 1997)

Department of Trade and Industry (UK), United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), position paper (London: Department of Trade and Industry, February 1999)

Department for Business Innovation and Skills, *Financing a private sector recovery* (Green Paper, Cm. 7923, 2010) 7

The Law Commission and the Scottish Law Commission *An Optional European Sales Law: Advantages and Problems-Advice to the UK Government* (2011) 14

<http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf> accessed 17 February 2012

House of Lords, *The Management of secondary legislation* (National Government Publication 2006) 198

International/European

A WA Human Rights Act: Report of the Consultation Committee (2007)

Australian Government Department of Foreign Affairs and Trade, *Legal System* <https://www.dfat.gov.au/facts/legal_system.html> accessed 25 June 2014

C E Wasserman, ‘Principles of Environmental Enforcement’ (International Conference on Environmental Enforcement, Budapest, September, 1992) 32

Department of Justice, *Canada's System of Justice* <<http://www.justice.gc.ca/eng/csj-sjc/>> accessed 25 June 2014

EC Commission, *First Annual Progress Report on European Contract Law and the Acquis Review* (EC Com No 456, 2005) para. 2.6.3

EECS Department University of California, Berkeley Technical Report No. UCB/EECS-2006-183 December 18, 2006

European Commission, *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* (Green Paper, Com 348, 2010)

Folketingstidende 1988-89 tillæg A, sp 1015

GAFTA 100, cl 23

GI Democracy Rule of law report, *Sustainable Governance Indicators* (2009) <http://www.sgi-network.org/pdf/SGI09_Democracy_RuleOfLaw.pdf> accessed 1 March 2010

Law Reform Commission of Hong Kong Report, *Sale of Goods and Supply of Services* (Law Reform Com, 1990) <www.hkreform.gov.hk/en/docs/rservices-e.doc> accessed 15 February 2010

Ministry of Justice, *The New Zealand Legal System* <<http://www.justice.govt.nz/publications/global-publications/t/the-new-zealand-legal-system>> accessed 25 June 2014

Report of the Working Group on the International Sale of Goods of its First Session (1970) I UNCITRAL Yearbook 176, 177

Report of the Working Group on the International Sale of Goods of its First Session (1970) I UNCITRAL Yearbook 176, 177

Tasmania Law Reform Institute, A *Charter of Rights for Tasmania* (TLRI No 10, 2007)

The American Society of International Law, *Mapping New Boundaries: Shifting Norms in International Law*, 98th Annual Meeting Program (Mar 31-Apr 3, 2004), Washington, D C

The United Nations Commission on International Trade Law, <<http://www.uncitral.org/>> accessed 5 March 2011

UN Department of Economic and Social Affairs Division for Social Policy and Development, *International norms and standards related to disabilities* (2003) <<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 17 May 2011

Academic Articles in Scientific Journals

A Lenhoff, ‘Optional Terms (Jus dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts (1946) 45 Mich L Rev 39-40

A Metzger, ‘Transnational Law for Transnational Communities The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities.’(2012) 3 JIPITEC 365

A Watson, ‘Comparative Law and Legal Change’ (1978) 37 CLJ 313, 315

A Watson, ‘Legal Transplants and Legal Reform’ (1976) 92 L Q Rev 79

B B Crawford, ‘Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods’(1988) 8 JL & Com 187-189

B Kingsbury, N Krisch and R B Steward, ‘The Emergence of Global Administrative Law’ (2005) 68 Law & Contemp. Probs. 15

C Brants, ‘Legal Culture and Legal Transplants’ (2011) 1 Isaidat L Rev 5-6

C D Ashley ‘Should There Be Freedom of Contract’ (1904) 4 Colum L Rev 423

C Edward ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’ (2009) 77 U Missouri-Kansas City L Rev 654

C F H Danhan, ‘The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China’ (2003) 8 Unif L Rev 107

C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 EJIL 187-214

D Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 Legal Theory 1, 38

D J Gerber, 'Globalisation and legal knowledge: Implications for Comparative Law' (2001) 75 Tulane L Rev 950

D Kennedy, 'The disenchantment of logically formal legal rationality or Max Weber's sociology in the genealogy of the contemporary mode of Western legal thought' (2004) 55 Hastings L J 1031-1076

D M Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) Wis L Rev 720, 731-746

D McLauchlan, 'Common Intention and Contract Interpretation' (2011) 1 LMCLQ 30-31

E J Eberle 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 452

E M Wise, 'The Transplant of Legal Patterns' (1990) 38 Am J Comp L 5

F A Boyle, 'The Irrelevance of International Law: The Schism Between International Law and International Politics' (1980) 10 Cal W Int'L J 193, 198

F Ferrari 'Uniform Interpretation of The 1980 Uniform Sales Law' (1994-95) 24 Georgia J Int'l and Comp L 183

F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43 Colum L Rev 629

Feltham, 'The United Nations Convention on Contracts for the International Sale of Goods' (1981) J Bus L 346

G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 Am J Comp L 149

G Teubner, 'Substantive and reflexive elements in modern law' (1983) 17 Law & Soc'y Rev 244-246, 268

G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11, 12

H Dubroff, 'The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic' (2006) 80 St. John's L Rev 567

H J Berman and C Kaufman, 'The Law of International Commercial Transactions' (1978) 19 Harv Int L J 221, 225

H Triepel cited by G Slyz, 'International Law in domestic courts' (1995-1996) 28 N Y U J Int'l L & Pol

I J M Valderrama, ‘Legal Transplants and Comparative Law’ (2004) Int’l L J 261

I Markovits, ‘Exporting LawReform—But Will It Travel?’ (2004) 37 Cornell Int’l L J 98-100

J C Reitz, ‘How to Do Comparative Law’ (1998) 46 Am J Comp L 617, 620

J D Greenberg, ‘Does Power Trump Law?’ (2003) 55 Stan L Rev 1789

J J Rachlinski, ‘Bottom-up versus Top-down lawmaking’ (2006) 73 CLS 937

J K Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’ (2005) 30 Yale J Int’l L 125

J L, ‘Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules’ (1991) 39 Am J Comp L 405

J Linarelli, ‘The Economics Of Uniform Laws And Uniform Lawmaking’ (2002) Wayne L Rev 36-37

J Lookofsky, ‘Alive and Well in Scandinavia: CISG Part II’ (1999) 18 J L & Com 289-299

J Meyer, ‘UN-Kaufrecht in der deutschen Anwaltspraxis’ (2005) 69 RabelsZ 463

J Nicol, ‘The origin of the parallel roads of Glen Roy’ (August 1869) Q J Geol Soc Lond 282

J O Honnold ‘The Sales Convention in Action – Uniform International Words: Uniform Application?’ (1988) 8 J L and Commerce 207-208

J S Hobhouse, ‘International Conventions and Commercial Law: The Pursuit of Conformity’ (1990) 106 London Q Rev 530, 530

K Zweigert and K Siehr, ‘Jhering’s Influence on the Development of Comparative Legal Method’ (1971) 1945 Am J Comp L 215

L F Del Duca & P Del Duca, ‘Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)’ (1996) 29 UCC L J 99

L G Castellani, ‘Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2009) 13 V J Int’l Com L & Arb 241, 246

L Rev 1335, 1338

M F Koehler and G Yujun ‘The Acceptance of the Unified Sales Law (CISG) in different Legal Systems’ (2008) 20 Pace Int’l L Rev 45

M Kilian ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 JTLP 233

M Radetzki, 'From Communism to Capitalism in Laos: The Legal Dimension' (1994) 34 Asian Surv 799, 802

M S Barr and G P Miller, 'Global Administrative Law: The View from Basel' (2006) 17 EJIL 15-46

M Stocks, 'Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510' (1993) 87 NW UL Rev 1415

N Golafshani, 'Understanding reliability and validity in qualitative research' (2003) 8(4) *The Qualitative Report* 597–607

O Volckart and A Mangelst, 'Are the Roots of the Modern Lex Mercatoria Really Medieval?' (1999) 65 *Southern Econ J* 427

P Legrand, 'Against a European Civil Code' (January 1997) 60 MLR 44

P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 119

P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52, 58-64

P Legrand, 'On the Singularity of Law' (2006) 47 Harvard Int'l L J 517,522-25

P S Berman, 'The Globalization of Jurisdiction' (2002) 151 U Pa L Rev 311, 534

P Winship 'Commentary on Professor Kastely's Rhetorical Analysis' (1987-88) 8 Northwestern J Int'l L and Business 623, 636

P Winship, 'Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners' (1995) 29 Int'l Law, 525

R A Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: the Question of Unenumerated constitutional Rights' (1992) 59 U Chi L Rev 433-43

R G Lee, 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?' (1993) JBL 131-148

R J Hunter and R E Shapiro, 'A Primer on Important Legal Aspects of the International Business Environment' (2008) 2 JMIB

R J Hunter Jr and L V Ryan CSV, 'Privatization and Transformation in Poland' (2004) 49 Polish Rev 919-943

R J Hunter, Jr 'A Primer on Key International Intellectual Property (IPR) Issues' (2006) Ejefas103-111

R Pound, 'Liberty of Contract' (1909) 18 Yale LJ 454

R Pound, 'The limits of effective legal action' (1917) 27 IJCE 150-167

Raynard, 'De l'influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s'inspire d'une convention international pour compliquer, encore, le recours de l'acheteur, Revue trimestrielle de droit civil' (1997) Rev Trim Dr civ 1020, 1024

S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 NYU J Int'l L & Pol 663

S Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law' (1987) 21 LS Rev 487, 488-493

S Gaius Institutes quoted by R Ludwikowski, 'Supreme law or basic law? The decline of the concept of constitutional supremacy' (2001) Cardozo J Int'l & Comp L

S Hoffmann, 'The Role of International Organizations: Limits and Possibilities' (1956) 10 Int'l Org 357, 364

S McDougal, 'The impact of International Law Upon National Law: A policy-Oriented Perspective' (1959) 4 S D L Rev 18

S Moss, 'Why the UK has not ratified the CISG' (2005-06) JLC 483-485

S Williston, 'Freedom of Contract' (1921) 6 Cornell L Q 365

T V Lee, 'Risky Business: Courts, Culture, and the Market-place' (1993) 47 U Miami

W B White, 'International Legal Pluralism' (2004) 25 Mich J Int'l L 977-978

Electronic Resources

'Euclid' <http://www.mathopenref.com/euclid.html> accessed 2 February 2012

'Primary and Secondary Sources in Law' <http://library.noctrl.edu/subject/business_law_primary_sources.pdf> accessed 3 February 2010

'The Euclidean model for space' <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

'The Euclidean model for space' <<http://www.theory.caltech.edu/people/patricia/sptmb.html>> accessed 2 February 2012

< <http://www.wto.org>> accessed 3 February 2012

<<http://www.optionality.net/mag/feb96a.html>> accessed 5 February 2012

A Atwell, ‘Hyperbolic Geometry’ (Kenyon College)
<<http://documents.kenyon.edu/math/atwell.pdf>> accessed 3 February 2012

A Convention relating to a Uniform Law on the International Sale of Goods that entered into force on the 1st of July 1964. See
<<http://www.unidroit.org/english/conventions/c-ulis.htm>>

A D’Amato, ‘Evolution of International Law: Two Thresholds, Maybe a Third’ NULS <www.aaai.org/ocs/index.php/FSS/FSS09/paper/download/988/1230> accessed 3 March 2010

A E Williams, ‘Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom’ (2002) <<http://cisgw3.law.pace.edu/cisg/biblio/williams.html>> accessed 5 February 2012

A Forte, ‘The United Nations Convention on contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom’ (1997) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/forte.html#61>> accessed 3 August 2009

A Gärtner ‘Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law’ (2000-2001) <<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>> accessed 13 February 2010

A Newhouse and T Tsuneyoshi, ‘CISG – A Tool for Globalization (1): American and Japanese Perspectives’ <<http://www.ritsumei.ac.jp/acd/cg/law/lex/rjr29/AdamTanaka.pdf>> accessed 5 March 2012

A W Lo, ‘Efficient Markets Hypothesis’ <http://web.mit.edu/Alo/www/Papers/EMH_Final.pdf> accessed 21 February

A Watson, ‘Legal Transplants and European Private Law’ (December 2000) 4.4 EJCL <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 17 February

A Z Jones, ‘What Are the Types of Parallel Universes?’ <<http://physics.about.com/od/astronomy/f/ParallelUniverseTypes.htm>> accessed 13 February 2012; accessed 10 July 2009

B Goldman, ‘Parallel Universes Theory: The Basics’ <<http://www.quantumjumping.com/articles/parallel-universe/parallel-universes-theory/>> accessed 1 March 2012

B Marian, ‘The Dualist and Monist Theories. International Law’s Comprehension of these Theories’ <http://revcurentjur.ro/archiva/attachments_200712/recjurid071_22F.pdf> accessed 5 May 2011

B Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (1993) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>> accessed 7 July 2009

B Zeller, 'Making the right choice of law: how the CISG can solve your problems. An intercontinental exchange of views' <<http://www.lawcouncil.asn.au/ILS/images/pdfs/2007 International Australian-European Lawyers Conference - Making the right choice of law by Dr Bruno Zeller.pdf>> accessed 14 June 2014

B Zeller, 'The Parol Evidence Rule and the CISG -- a Comparative Analysis' (2003) Pace Int'l L Rev <<http://cisgw3.law.pace.edu>> accessed 9 February 2012

B Zeller, 'Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' (2003) Pace Int'l L <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>> accessed 3 March 2010

C B Andesen, 'The Uniform International Sales Law and the Global Jurisconsultorium' <<http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>> accessed 7 June 2009

C B M Zuffranieri, Jr and J I Feinstein, 'UN Sale of Goods Convention May be Trap for the Unwary' (2003) Lawyers Wkly <<http://www.cisg.law.pace.edu/cisg/biblio/zuffranieri.html>> accessed 3 March 2009

C D Hale, 'Research Design: Qualitative Methods' <http://www.charlesdennishale.com/books/eets_ap/9_Qualitative_Research_Designs.pdf> accessed 13 July 2009

C Davies, 'Arthur Marwick' (1980) 1 JLA <[https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+\(1980\)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtBTPXPkhIH_Hath1tWjl5A8PBkkIw](https://docs.google.com/viewer?a=v&q=cache:54p0WeliCk4J:www.la-articles.org.uk/FL-1-4-7.pdf+Arthur+Marwick+(1980)The+Journal+of+the+Libertarian+Alliance+Vol.+1+:+No.4+Winter&hl=en&gl=gr&pid=bl&srcid=ADGEEShSePjievYZ55GRc59sLtcxsWwiVBn_aL9P67hiwABaNpFFnVZUpNE8Isr_yFzfeqj0_CDHie_yoRiLRNN203YcMumxaFHxShQWTCoRx70R24ShEP7OTWgYk-2W0xa8MGyjgjZ&sig=AHIEtBTPXPkhIH_Hath1tWjl5A8PBkkIw)> accessed 6 February 2012

CISG Article 92 <<http://www.cisg.law.pace.edu/cisg/text/e-text-92.html>>

CISG: Participating Countries <<http://cisgw3.law.pace.edu/cisg/countries/cntries.html>> accessed 12 July 2009

Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html>>

Contracting States status available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html>>,

<<http://www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html>> and
<<http://www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html>>

D H Genn, M Partington and S Wheeler, ‘LAW IN THE REAL WORLD: Improving Our Understanding of How Law Works’ < http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf> accessed 16 June 2014

D McLauchlan, ‘Contract Interpretation: What Is It About?’ (2009) Sydney Law < <http://sydney.edu.au/law/slrs/slrs1/McLauchlan.pdf>> accessed 3 March 2012

E Alazemi, ‘Passing of Risk in International Contracts of Sale of Goods; A Comparative Study Between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sale of Goods Act 1979’
<<http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html>> accessed 14 April 2010

E J Powell and S McLaughlin Mitchell, ‘The International Court of Justice and the World’s Three Legal Systems’ < <http://saramitchell.org/pmjop07.pdf>> accessed 11 January 2010

F Enderlein and D Maskow, ‘International Sales Law’ (1992) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>> accessed 14 June 2011
Foreign and Commonwealth Office, UK Treaties < <https://www.gov.uk/uk-treaties>> accessed 19 January 2012

G Brandner, ‘Admissibility of Analogy in Gap-filling under the CISG’ (1999) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/brandner.html#intro>> accessed 5 July 2009

G Wagner, ‘Transaction Costs, Choice of Law and Uniform Contract Law’ (2007) <<http://www.uncitral.org/pdf/english/congress/WagnerG.pdf>> accessed 14 April 2010

H Lutz, ‘The CISG and Common Law Courts: Is There Really a Problem? < <http://www.victoria.ac.nz/law/research/publications/vuwlrv/prev-issues/pdf/vol-35-2004/issue-3/lutz.pdf>> accessed 17 June 2014

H M Kindred ‘The use and abuse of international legal sources by Canadian courts: searching for a principled approach’ in O E Fitzgerald (eds), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law Inc 2006) 5<<http://www.cisg.law.pace.edu/cisg/biblio/keily2.html>> accessed 10 July 2009

I Schwenzer and P Hachem, ‘The CISG - Successes and Pitfalls’ (2009) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html>> accessed 10 February

J Clark, ‘Do parallel universes really exist?’ (How stuff works) <<http://science.howstuffworks.com/science-vs-myth/everyday-myths/parallel-universe4.htm>> accessed 1 March 2012

J Douglas, ‘Arbitration of International Sale of Goods Disputes under the Vienna Convention’ (2006)

<[http://docs.google.com/viewer?a=v&q=cache:6ufTEPY9gDQJ:archive.sclqld.org.au/judgepub/2007/douglas270506.pdf+Department+of+Trade+and+Industry+\(UK\)](http://docs.google.com/viewer?a=v&q=cache:6ufTEPY9gDQJ:archive.sclqld.org.au/judgepub/2007/douglas270506.pdf+Department+of+Trade+and+Industry+(UK))>
accessed 17 November 2010

J Erauw, ‘CISG Articles 66-70: The Risk of Loss and Passing it’
<<http://www.uncitral.org/pdf/english/CISG25/Erauw.pdf>> accessed 17 April 2010

J Felemegeas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ (2000) Pace Int’l L Rev
<<http://www.cisg.law.pace.edu/cisg/biblio/felemegeas.html>> accessed 5 March 2009

J K Levit, ‘A Bottom-Up Approach to International Law making: The Tale of Three Trade Finance Instruments’ <<http://www.lawsch.uga.edu/intl/levit.pdf>> accessed 17 February 2010

J Madison, ‘The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation’ (1788)
<<http://www.constitution.org/fed/federa57.htm>> accessed 5 March 2010

J P McMahon , ‘When the UN Convention on Sales Applies and Why It Matters to You and Your Clients’, International Sale CLE, May 23, 1996<<http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>> accessed 2 July 2009

J Tate, ‘Parallel Universe’ <<http://www.universetoday.com/44769/parallel-universe/>>
accessed 13 February 2012

K Bell, ‘The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods’ (1996)<<http://www.cisg.law.pace.edu/cisg/biblio/bell.html>> accessed 27 May 2010

K France, ‘International Sale of Goods’ (2012) W Williams publications
<<http://wynnwilliams.co.nz/Publications/Articles/International-Sale-of-Goods>>
accessed 17 March 2012

K Georgiadou, ‘Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG’s Incorporation in the UK Legal Order’ (2012) Pace Int’l L Rev Online Companion
<<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1032&context=pilronline>> accessed 9 January 2012

K Winsor, ‘The Applicability of the CISG to Govern Sales of Commodity Type Goods’ (2010) Pace Int’l L Rev
<<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 13 January 2013

K Winsor, ‘The Applicability of the CISG to Govern Sales of Commodity Type Goods’ <http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 15 June 2014

L F Del Duca and P Del Duca, ‘Practice Under the Convention on International Sale of Goods (CISG) A Primer for Attorneys and International Traders’ (1995)
<<http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>> accessed 5 February 2010

L Spagnolo, ‘The Last Outpost: Automatic CISG Opt Outs, Misapplications and The Costs of Ignoring The Vienna Sales Convention For Australian lawyers’(2009) <http://cisg.sk/sk/uploaded_files/Lisa%20Spagnolo%20-%20Last%20Outpost.pdf> accessed 17 February 2012

M Bijl, ‘Fundamental Breach in Documentary Sales Contracts The Doctrine of Strict Compliance with the Underlying Sales Contract’ <<http://www.cisg.law.pace.edu/cisg/biblio/bijl.html>> accessed 15 June 2014

M Bridge, ‘A Law for International Sales’ <<http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>> accessed 28 October 2009

M J Bonell, *An International Restatement of Contract Law* (3rd edn, 2005) 305-308. As quoted in M J Bonell, ‘The CISG, European Contract Law and the Development of a World Contract Law’ <<http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>> accessed 17 December 2009

M L Cattau, ‘The global economy - an opportunity to be seized in Business World’(1997) ICC <<http://www.iccwbo.org/html/globalec.htm>> accessed 6 July 2009

M Morgan Taylor and A Naidoo ‘The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees-Problems of the Time of Conformity for the Quality Obligation’ (2002) JCLI <<http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>> accessed 6 July 2011

Marks & Weinberg, ‘Choice of Law and Forum Selection Provisions’ <<https://docs.google.com/viewer?a=v&q=cache:wEV9dQGHM5cJ:www.leaselawyer.com/casesandarticles/Articles/ChoiceofLawandForumSelectionPr.pdf+choice+of+for+um+clause+definition&hl=en&gl=cy&pid=bl&srcid=ADGEESg30U-BJ5YZPtByiH4a30ggJojePzm1lBLncScmLoGafzLu5Rio1DImA88XqRL2KOYhoYcXXY6syeaqOhBYG9ZJCyfow9jDfnSNbmE6OhtX-TvKVp6ail3xYHFsoGxJQX2o0MrL&sig=AHIEtbRpcW6XXv5X9bkz2V6l3M7stmotNQ>> accessed 7 March 2012

N Boghossian, ‘A Comparative Study of Specific Performance Provisions in the UN Convention of the International Sale of Goods. Pace Review of the Convention on Contracts for the Goods, History of Negotiation’ <<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>> accessed 3 July 2009

N Boghossian, ‘A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods’ <<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>> accessed 16 June 2014

N Rubriky, ‘Is the Dualist-Monist controversy in International Law simply a fiction?’ <<http://mezinardonji.juristic.cz/51001/clanek/mpv1.html>> accessed 17 May 2011

N Sukalo, ‘How International Law is Incorporated into Municipal Law and Why it is Important’

<[http://www.academia.edu/1114626/How international law is incorporated into municipal law and why is it important](http://www.academia.edu/1114626/How%20international%20law%20is%20incorporated%20into%20municipal%20law%20and%20why%20is%20it%20important)> accessed 17 May 2011

P Butler, ‘Celebrating Anniversaries’ (2004/5)
<<http://www.cisg.law.pace.edu/cisg/biblio/butler3.html#ii>> accessed 7 February 2012

P Butler, ‘The Use of the CISG in Domestic Law’ (2011) Pace Int’l L Rev <<http://www.cisg.law.pace.edu/cisg/biblio/butler7.html>> accessed 7 February 2012

P Finn, ‘The Common Law in the World: The Australian Experience’ (February 2000) Pace Int’l L Rev <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

P Schlechtriem, ‘The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe’ (2002) OUCLF <<http://ouclf.iuscomp.org/articles/index.shtml>> accessed 7 July 2011

P Schlechtriem, ‘The Seller’s Obligations Under the United Nations Convention on Contracts for the International Sale of Goods’ (1984) Pace Int’l L <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem10.html#1>> accessed 14 April 2010

Paul Finn, ‘The Common Law in the World: The Australian Experience’ (February 2000) <<http://cisgw3.law.pace.edu/cisg/biblio/finn.html>> accessed 7 February 2012

R O Keefe, ‘The Doctrine of Incorporation Revisited’ (2008) Oxford J <<http://bybil.oxfordjournals.org/content/79/1/7.full.pdf>> accessed 5 May 2011

S Atzeni, ‘Formal Verification of Parallel Computing: ISP - In-Situ Model Checker’ (2009) University of Utah <<http://www.cs.utah.edu/~simone/Thesis/Thesis.pdf>> accessed 10 February 2012

S B Coutin, ‘Qualitative Research in Law and Social Sciences’ <<http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf>> accessed 13 July 2009

S Dholakia, ‘Ratifying the CISG- India’s Options’, <<http://www.cisg.law.pace.edu/cisg/biblio/dholakia.html>> accessed 17 July 2009

S E Nikolova, ‘UK’s Ratification of the CISG – An Old Debate or a New Hope for the Economy of the UK on Its Way Out of the Recession: The Potential Impact of the CISG on the UK’s SME’ (2012) <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1027&context=pilronline>> accessed 2 March 2012

S Farran, ‘Legal Culture and Legal Transplants: England and Wales’ <<http://biblio.juridicas.unam.mx/libros/7/3194/11.pdf>> accessed 16 February 2012

S Moss, ‘Why the UK has not Ratified the CISG’, 25 JLC 483, 483 (2005-2006) <<http://www.uncitral.org/pdf/english/CISG25/Moss.pdf>> accessed October 2012

S Troiano, ‘The CISG’s impact on EU Legislation’ (2008) IHL <<http://cisgw3.law.pace.edu/cisg/biblio/troiano.pdf>> accessed 5 May 2011

S Whittaker, ‘The Optional Instrument of European Contract Law and Freedom of Contract’<
http://ec.europa.eu/justice/news/consulting_public/0052/contributions/333_en.pdf> accessed 18 February 2011

Scarlett History of Economic Theory and Thought ‘Adam Smith Free Trade International Theory’ <<http://www.economictheories.org/2008/07/adam-smith-free-trade-international.html>>accessed 17 March 2010

Secretariat Commentary on Article 27 of the 1978 draft (draft counterpart of Article 29) paras 2.3 <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html>>accessed 20 July 2009

T Keily, ‘How does the cookie crumble?’ (2003)<<http://www.cisg.law.pace.edu/cisg/biblio/keily2.html>> accessed 10 July 2009

T R Armstrong, ‘The Importance Of Clarity In Drafting Choice Of Forum Clauses In International Commercial Contracts’<<http://www.thorpreed.com/secondary.aspx?id=44&p=0&LibraryID=225>> accessed 5 March 2012

T Wilhelmsson, ‘Various Approaches to Unfair Terms and Their Background Philosophies’ (2008) juridical international 51-57 <<http://www.juridicainternational.eu/various-approaches-to-unfair-terms-and-their-background-philosophies>> accessed 6 February

T Wilhelmsson, ‘Various Approaches to Unfair Terms and Their Background Philosophies’ (2008) juridical international 51-57 <<http://www.juridicainternational.eu/various-approaches-to-unfair-terms-and-their-background-philosophies>> accessed 6 February

The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe’ (2002) Oxford U Comparative L Forum <<http://ouclf.iuscomp.org/articles/index.shtml>>accessed 4 July 2009

The Preamble of the United Nation Convention on International Sale of goods, <<http://www.cisg.law.pace.edu/cisg/text/preamble.html>>

U Bernitz, ‘What is Scandinavian Law? Concept, Characteristics, Future’ <<http://www.scandinavianlaw.se/pdf/50-1.pdf>> accessed 25 June 2014

University of Washington, ‘Chapter 1:Introduction: Parallelism = Opportunities + Challenge’ (2007) University of Washington <<http://www.cs.washington.edu/education/courses/csep524/07sp/poppChaper1.pdf>> accessed 10 February 2012

V Susanne Cook, 'CISG: From the perspective of a practitioner' (1998)
<<http://www.cisg.law.pace.edu/cisg/biblio/cook.html>> accessed 5 February 2010