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# **The United Nations Convention on Contracts for the International Sale of Goods: Should Developing Nations Such As Iran Adopt the CISG?**

**Mona Ahadi**

## **Abstract**

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was agreed in 1980. It has been ratified by 79 states. Despite a declaration in the Preamble that it seeks to contribute to the achievement of a New International Economic Order (NIEO) and to promote the development of international trade on the basis of equality and mutual benefit, a disproportionate number of developing countries, including Iran, have not ratified it. This thesis investigates the link between the NIEO and the CISG in relation to both the process of making international sales law and the substance of that law. While the broader remit of this thesis is to investigate why developing countries have failed to adopt the CISG, its primary focus is on Iran and whether it should adopt the CISG. To that end, the author will thoroughly study the advantages and disadvantages of ratification put forward by different nations. The position taken on the CISG by the United Kingdom will also be examined, since the UK has avoided ratifying the CISG. The purpose of this study is to show that Iran is not in a comparable position to the UK with regard to justifying its non-ratification.

A comparison of the legal provisions of the CISG and their counterparts under Iranian law is the ultimate aim of this thesis. To better understand the Iranian law governing contracts of sale, a brief overview will be provided of Iran's position in the world economy and of its legal environment. A careful investigation will then be conducted into the rights, duties, and remedies under the CISG and corresponding ones under the Iranian domestic law of sale. The study reveals that the rights and duties under the CISG resemble those under Iranian law. There are certain remedies in the CISG that do not have a counterpart in Iranian law. In such cases, the practical effect of these differences will be discussed. This will lead to the conclusion that Iran should adopt the CISG, and that is where the author's fieldwork in Iran concerning the practical difficulties that may arise in implementing the CISG in Iran will be discussed in more detail.

**The United Nations Convention on Contracts for the  
International Sale of Goods: Should Developing Nations  
Such As Iran Adopt the CISG?**

**Mona Ahadi**

A thesis submitted for the degree of Doctor of Philosophy in School of  
Law, University of Durham

September 2013

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## **List of Abbreviations**

Case Law on UNCITRAL Texts – CLOUT

Convention on the Limitation Period in the International Sale of Goods – Limitation Convention

Department of Trade and Industry – DTI

General Agreement on Tariffs and Trade – GATT

International Institute for the Unification of Private Law – UNIDROIT

International Monetary Fund – IMF

New International Economic Order – NIEO

Organisation for Economic Co-operation and Development – OECD

Organization of the Petroleum Exporting Countries – OPEC

Sale of Goods Act 1979 – SOGA

Uniform Commercial Code – UCC

Uniform Customs and Practices for Documentary Credits – UCP

Uniform Law on International Sale of Goods – ULIS

Uniform Law on the Formation of Contracts for the International Sale of Goods – ULF

United Nations Commission on International Trade Law – UNCITRAL

United Nations Conference on Trade and Development – UNCTAD

United Nations Convention on Contracts for the International Sale of Goods – CISG

Vienna Convention on the Law of Treaties – VCLT

World Customs Organization – WCO

World Trade Organization – WTO

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Barbara Berry S A de C V v Ken M Spooner Farms Inc [2006] Federal District Court.  
<http://cisgw3.1aw.pace.edu/cases/060413u1.html> accessed 2 July 2013;  
Reversed on appeal, see [2007] Federal Appellate Court [9th Circuit].  
<<http://cisgw3.1aw.pace.edu/cases/071108u1.html>> accessed 5 August 2013.

Barcel S A de C V v Steve Kliff [2006] Juzgado Primero Civil de Primera Instancia [Court of First Instance] de Lerma de Villada.  
<<http://cisgw3.1aw.pace.edu/cases/061003m1.html>> accessed 5 August 2013.

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<<http://cisgw3.1aw.pace.edu/cases/960403g1.html>> accessed 5 August 2013.

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<<http://cisgw3.1aw.pace.edu/cases/060628sb.html>> accessed 5 August 2013.

Fothergill v Monarch Airlines Ltd [1980] 3 WLR 209 (HL).

Furniture Case [1998] Appellate Court Hamm.

<<http://cisgw3.1aw.pace.edu/cases/980623g1.html>> accessed 5 August 2013.

Geneva Pharmaceuticals Tech Corp v Barr Labs Inc [2002] Federal District Court [New York].

<<http://cisgw3.1aw.pace.edu/cases/020510u1.html>> accessed 5 August 2013; CLOUT case No 579 [Federal District Court, Southern District of New York, United States, 10 May 2002].

James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 1 All ER 518 (CA) 522, 524, [1977] 2 WLR 107 (CA) 3, 112–114.

Karachi Gas Co Ltd v H Issaq [1965] EA 42.

Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co [1989] 1 Lloyd's Rep 608.

Mount Albert Borough Council v Australasian Temperance and General Assurance Society [1938] AC 240.

Mushrooms case [1995] Budapest Arbitration proceeding Vb 94124.

< <http://cisgw3.1aw.pace.edu/cases/951117h1.html>> accessed 5 August 2013.

Parev Prods Co v I Rokeach & Sons, Inc 124 F. 2d 147, 149 (2d Cir 1941).

Pepper v Hart [1993] AL 593 (HL), [1993] 1 All ER 42 (HL).

Prodema S A v Michon B V [2007] Rechtbank [District Court] Utrecht.

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Radia v Transocean (Uganda) Ltd [1985] KLR 300.

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<<http://cisgw3.1aw.pace.edu/cases/070220f1.html>> accessed 5 August 2013.

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528.

Waste container case [1995] 1995 Budapest Arbitration proceeding Vb 94131.

<<http://cisgw3.1aw.pace.edu/cisg/wais/db/cases2/951205h1.html>> accessed 5 August 2013.

W T GmbH v P AG [1992] Zivilgericht Kanton Basel-Stadt.

<<http://cisgw3.1aw.pace.edu/cases/921221s1.html>> accessed 2 July 2013.



## **Table of Statutes**

Iranian Civil Code

Iranian Civil Procedure Code

Iranian Commercial Code

Iranian Constitution

Iranian Maritime Code

## **Table of International Conventions**

Convention on the Limitation Period in the International Sale of Goods

Uniform Law on International Sale of Goods

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

United Nations Convention on Contracts for the International Sale of Goods (1980)

[CISG]

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)

Vienna Convention on the Law of Treaties

## **Declaration**

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgement has been made in the text.

## **Statement of Copyright**

'The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.'

## **Acknowledgements**

No task so monumental is done alone. I would not have been able to complete this journey without the aid and support of countless people over the past few years. I must first express my extensive gratitude towards my supervisor, Professor Thomas Allen. His leadership, support, patience, advice, attention to detail, hard work and above all knowledge have set an example I hope to match some day.

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Additionally, I owe thanks to those who directed and assisted me during the course of completion of my fieldwork in Iran. I should also thank Mrs Helen Birkbeck for professionally editing my work for spelling and grammar.

# Chapter One

## 1.1 Introduction

The United Nations Convention on Contracts for the International Sale of Goods was agreed on 11 April 1980 in Vienna. It has been ratified by 79 states<sup>1</sup> that account for a significant proportion of world trade. Despite the declaration in the Preamble about contributing to the achievement of a New International Economic Order (NIEO) and promoting the development of international trade on the basis of equality and mutual benefit, a disproportionate number of developing countries, including Iran, have not ratified it. While the broader aim of this thesis is to investigate why developing countries have failed to adopt the CISG, the primary focus is on Iran and whether or not it should adopt the CISG.

## 1.2 The Need for Legal Harmonisation in International Trade

International trade saw tremendous growth during the twentieth century. This was the result of the development of the market economy, the expansion of markets for manufactured goods, and the emergence of new markets for raw products from developing nations. Modern means of communication facilitated more reliable transactions for traders throughout the world, and technological advancement provided easier and faster transport of goods worldwide. Economic isolation is no longer viable for any state in this modern world owing to the interdependence of commercial markets. Therefore, international trade is seen as absolutely essential in the modern economic world.<sup>2</sup>

Alongside the growth of international commerce, problems have begun to emerge between countries. These have concerned how to regulate international trade when individual states enter into a contract that can be governed by different standards and usages. Therefore, a need has developed for harmonised global trade rules and standards.

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<sup>1</sup> As of 5 March 2013, UNCITRAL reported that 79 states have adopted the CISG. 'CISG: Table of Contracting States' <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 1 July 2013.

<sup>2</sup> See Alison E Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' (2000–2001) *Kluwer Law International* 9.

In response to the changes to practices in the field of international trade, and to remove legal barriers in global transactions, two leading international organisations were founded: the International Institute for the Unification of Private Law (UNIDROIT)<sup>3</sup> and the United Nations Convention on International Trade Law (UNCITRAL).<sup>4</sup> These organisations symbolise the recognition made by nations that a unified body of law is required to promote global commerce.

The importance of a uniform international sales law, however, necessitates more in-depth discussion of the subject. The CISG, which was adopted under the auspices of UNCITRAL, has attracted criticism in this regard. Some argue that the benefits of uniform international business law are minimal.<sup>5</sup> It should be noted that, although the possibility of complete substantive uniformity of CISG application is unlikely, it is not the case either that the CISG has completely failed to remove legal barriers in international law. It is the middle approach, relative uniformity, that has been the source of development of the CISG's jurisprudence.<sup>6</sup> The CISG has succeeded in reducing legal impediments to trade by ensuring a relative level of uniformity. A standard of relative uniformity in the application of the CISG has been envisioned in Article 7, which mandates that 'regard is to be had.' It further states 'the need to promote uniformity in its application' rather than use of words such as *establish* or *create*. It is true that there have been judgements that have shown a homeward trend. This, however, cannot be seen as a failure on the part of the CISG. Ulrich Magnus has rightly pointed out that 'the divergences are less than one could expect bearing in mind that no central CISG court exists.'<sup>7</sup>

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<sup>3</sup> It is an independent intergovernmental organisation which was originally set up in 1926 as an auxiliary organ of the League of Nations. The fruits of its labour were the 1964 Hague Conventions: a Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964; and a Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964.

<<http://www.unidroit.org/>> accessed 1 July 2013.

<sup>4</sup> It was established by the General Assembly in 1966 (GA Resolution 2205 (XXI) of 17 December 1966). United Nations Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, was the result of a legislative effort by the UNCITRAL.

<<http://www.uncitral.org/>> accessed 1 July 2013.

<sup>5</sup> Paul B Stephan, 'The Futility of Unification and Harmonisation in International Commercial Law' (1999) 39 Virginia Journal of International Law 743.

<sup>6</sup> Larry A Dimatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 34 Northwestern Journal of International Law and Business 299.

<sup>7</sup> Ulrich Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations' in Andre Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publisher 2009).

### 1.3 Context of the Research

Unification in the field of international commerce has now witnessed worldwide growth. The World Trade Organization (WTO) and the World Customs Organization (WCO) are the main examples of further stimulus behind the unification movement.<sup>8</sup> This unifying trend is seen as the evolution of a modern *lex mercatoria*.<sup>9</sup> Professor Schmitthoff described 'the emergence of a transnational law of international trade as a new *lex mercatoria*.'<sup>10</sup> This new *lex mercatoria* is having a growing impact on international trade and in particular on international arbitration.<sup>11</sup>

In 1966, UNCITRAL was established by the UN General Assembly<sup>12</sup> and was given a general mandate to promote the progressive harmonisation and unification of international trade law. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is the product of that endeavour.<sup>13</sup> This thesis will use the terms 'CISG' and 'the Convention' interchangeably. On 11 April 1980, the CISG was adopted during a diplomatic conference in Vienna.

The Preamble of the CISG sets out its purpose in stating that:

The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

The CISG is divided into four parts:

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<sup>8</sup> See Sieg Eiselen, 'Adopting the Vienna Sales Convention: Reflections Eight Years down the Line' (2007) 19 SA Mercantile Law Journal 14.

<sup>9</sup> See Aleksandar Goldstajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) ch 3, 55; See Aleksandar Goldstajn, 'Lex Mercatoria and the CISG: The Global Law Merchant' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (2001) 241, 241–2.

<sup>10</sup> Clive M Schmitthoff and Norbert Home, 'Nature and Evolution of the Transnational Law of Commercial Transactions' (1982) Kluwer Law International 19.

<sup>11</sup> Goldstajn, 'Lex Mercatoria and the CISG' (n 9) 243.

<sup>12</sup> GA Resolution 2205 (XXI).

<sup>13</sup> <<http://www.uncitral.org/>> accessed 1 July 2013.

Part I (Articles 1–13) considers the sphere of application and general provisions.

Part II (Article 14– 24) governs the formation of the contract.

Part III (Articles 25– 88) establishes conditions for the sale of goods, which include the obligations of the buyer and the seller and remedies available to them, and the passing of risk.

Part IV (Article 89–101), which contains the final provisions and discusses the administrative provisions and the declarations or reservations that are available to signatory states.

The domestic commercial laws of signatory states are not harmonised by the CISG. The Convention seeks to isolate international sale from the remit of domestic law and to establish unified rules for international sale.<sup>14</sup> Therefore, the CISG is a comprehensive body of law, which regulates formation and performance of contracts of sale, provided that they fall within its scope of application. It also governs the remedies available to parties. Where the domestic law of member states with regard to an issue is covered in the CISG, the CISG supersedes national law. Having said that, national law is not excluded in its entirety, as the CISG allows for several matters to be decided under the applicable national law.<sup>15</sup>

Supporting the autonomy of contracting parties is one of the objectives of the CISG. Article 6 specifies, subject to Article 12, that parties are permitted to exclude the application of the CISG to their contract, or to deviate from or vary the effect of any of its provisions. The provisions of the CISG are legally binding between signatory states, unless its provisions are varied or excluded in part or in entirety by the parties. It is possible to exclude its provisions either explicitly or implicitly.<sup>16</sup> If the provisions are to be excluded implicitly, it is important to ascertain the intent of the parties. In doing this, Article 8<sup>17</sup> of the CISG has to be applied.

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<sup>14</sup> Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 Ohio State Law Journal 265.

<sup>15</sup> These issues are covered in Article 2–5 of the CISG.

<sup>16</sup> *Parev Prods Co v I Rokeach & Sons Inc* 124 F 2d 147, 149 (2d Cir 1941).

<sup>17</sup> Article 8 of the CISG states:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party



Article 1(1) of the CISG, which deals with the scope of its application, states:

This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.

It is clear that the issue of the nationality of parties is unimportant under the CISG. Where a party to the contract has a place of business both abroad and in the same country as the other party, the place of business is the one with the closest relation to the contract and its performance.<sup>18</sup> In accordance with Article 95 of the CISG, a state may decide that it will not be bound by Article 1(1)(b).<sup>19</sup>

The CISG has been ratified by leading trading states<sup>20</sup> worldwide whose combined economies make up nearly two-thirds of all world trade.<sup>21</sup> The most notable trading nation that has not acceded to the CISG is the United Kingdom.<sup>22</sup> On 5 March 2013, UNCITRAL reported that Brazil<sup>23</sup> had acceded to the CISG.<sup>24</sup>

Many developing countries have not yet ratified the CISG, and Iran is one of them. The Iranian Civil Code is the main source of Iranian sale of goods law. It has its basis in the ideas of Islamic law. Islamic law is grounded on divine principles that cannot be

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are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(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.

<sup>18</sup> Article 10 of the CISG.

<sup>19</sup> Article 1(1)(b) of the CISG states:

‘(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(b) when the rules of private international law lead to the application of the law of a Contracting State.’

<sup>20</sup> ‘CISG: Table of Contracting States’ (n 1).

<sup>21</sup> On the basis of statistics published by International Monetary Fund in 1996. As stated in Michael P Van Alstine, ‘Dynamic Treaty Interpretation’ (1998) 146 *University of Pennsylvania Law Review* 687.

<sup>22</sup> United Kingdom does not see ratification of the CISG as a legislative priority. See Sally Moss, ‘Why the United Kingdom Has Not Ratified the CISG’ (2005–06) 25 *Journal of Law and Commerce* 483.

<sup>23</sup> Brazil became the 79th state Party to the Convention. The Convention will come into force for Brazil on 1 April 2014.

<sup>24</sup> <<http://www.uncitral.org/>> accessed 1 July 2013.

compromised, and as a result it is inflexible. However, where appropriate, adjustments have been made to the Iranian Civil Code to bring it more up to date. Such modifications to the Iranian Civil Code were influenced by European codes such as the French and Swiss codes.<sup>25</sup> The language of the Code and its terms are not suitable for international sales in the sense that there are elements of ambiguity and uncertainty in the provisions of the Iranian Civil Code. On top of that, the fact that it is not a well-established and well-known body of law might discourage Iran's trading partners from adhering to the Iranian Civil Code. This could put Iranian commercial traders in a disadvantageous position at the time of choice of applicable law during contract drafting. While each contractual party typically wishes to apply its national law, this may lead to choosing the law of Iran's trading partner (owing to the unpopularity of the Iranian Civil Code and/or unfamiliarity with it). In that case, if a dispute should arise, additional research at significant cost would be necessary to ascertain the actual content of the law chosen.<sup>26</sup> That is where the adoption of the CISG might be beneficial to Iran and any other developing country.

Lord Hobhouse has noted that the CISG provides model codes for nations with no developed legal systems, in particular those that do not have either the experience or the traditions to establish their own laws.<sup>27</sup> This is indeed of great value from the political point of view, since it might not be in the political interests of some countries to apply the law of a particular jurisdiction (such as the Uniform Commercial Code (UCC) or the Sale of Goods Act 1979 (SOGA)) as the model law for a revision of their own domestic sales law.

However, the suitability of the CISG for developing nations goes beyond even this. The CISG was also intended to contribute to the achievement of a New International Economic Order (NIEO). The Preamble refers to the NIEO and the importance of developing trade 'on the basis of equality and mutual benefit.' These objectives reflected the desire to create a structure for international trade that would be fairer to

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<sup>25</sup> Text to n 611 in ch 6.

<sup>26</sup> 'CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani' (April 2010).

<sup>27</sup> John S Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 Law Quarterly Review 530.

developing nations.<sup>28</sup> That is why this study focuses on how NIEO came to be linked with the CISG, and whether any meaning is attached to it.

The importance of Iran's position regarding the adoption of the CISG has thus become pertinent. This is subject to parliamentary approval, however. In accordance with the Iranian Constitution, the law on sales cannot be changed, nor can the CISG be ratified, unless it becomes clear that no conflict exists between the proposed law (in this case the CISG) and the principles of Islamic law.<sup>29</sup> This study therefore examines the possibility of the adoption of the CISG by the Iranian Government. Similarities and dissimilarities will be discussed under both systems. Where the CISG is different from the Iranian Civil Code and has no counterpart in Iranian law, analyses will be undertaken to determine whether such a discrepancy can be overcome or whether it is a threat to legal stability in Iran.<sup>30</sup>

This study will suggest the adoption of the CISG as a solution to the problems and uncertainties that exist under Iranian law with regard to the international sale of goods. The view exists that the case for ratification of the CISG by Iran is strong. There are eight main points, which examine both the supporting and the opposing arguments on its adoption.<sup>31</sup> Key factors supporting ratification are:

- a) The wide acceptance of the CISG worldwide, and the fact that states that have adopted the CISG represent Iran's major trading partners;
- b) The growing rate of acceptance of the CISG;<sup>32</sup>
- c) The states that have ratified the CISG represent every continent, every major legal background, and the main political systems in the world; and

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<sup>28</sup> See generally ch 2.

<sup>29</sup> Articles 71 and 72 of Iranian Constitution state:

Article 71:

'The Islamic Consultative Assembly [*Majlis* (Parliament)] can establish laws on all matters, within the limits of its competence as laid down in the Constitution.'

Article 72:

'The Islamic Consultative Assembly [*Majlis* (Parliament)] cannot enact laws contrary to the usual and *ahkam* of the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.'

<sup>30</sup> See generally ch 7.

<sup>31</sup> See generally ch 4.

<sup>32</sup> As of 5 March 2013, 79 states have adopted the CISG.

d) By way of analogy, the CISG may already be applicable to contracts entered into by Iranian entities by virtue of the principles of private international law.

This last argument is important for Iran. That is because an Iranian court may be called upon to apply the CISG when it is ascertained that the Convention governs the contract of sale. The impact of the CISG will thus be felt in Iran in spite of Iran's non-accession.

#### **1.4 Structure and Goals of the Research**

This thesis will begin with a thorough synopsis of the establishment of a New International Economic Order under the CISG (chapter two). This will be followed by a discussion of the legal importance of the Preamble to the CISG and a legislative study of the north–south debates (chapter three). The purpose of chapters two and three is to investigate the link between the NIEO and the CISG, and to see how the CISG was presented as a tool of development, and why it has perhaps failed to deliver on this promise. This is because developing nations have been much more reluctant to ratify the CISG than the developed nations. It is disappointing that this is the case, as the commercial and political concerns that led to the NIEO also contributed to the negotiation and drafting of the CISG. Earlier attempts at unification – the ULIS and ULF – failed partly because it was felt that Western European nations in the civilian tradition had dominated the drafting process. As the thesis will show, the question of influence on the development of international commercial law was particularly important to the developing nations. Their voice in international commercial law was becoming stronger, and they were successful in obtaining more influence in UNCITRAL and on the Vienna Convention that agreed the terms of the CISG. This gave the CISG greater political acceptability among the developing nations, and helped to counter any argument that the CISG was drafted in order to improve the trading position of the developed nations.

The thesis also shows that this is particularly important in the specific case of Iran. The current political context in Iran means that the ratification of any commercial treaty that is identified with a Western nation, such as the United States, would be opposed by some groups. In Iran, the case for the CISG would be strengthened if it could be

proved that the CISG were a truly international convention. In particular, it would be important to show that it was drafted with the participation of developing nations and that it reflects many of their concerns.

The author therefore considers the NIEO in relation to both the process of making international sales law and the substance of the law. The impact of the NIEO on the substantive content of uniform law necessitates the study of debates at the Vienna Conference between the developed and the developing nations. These debates raised specific issues during the drafting of the CISG,<sup>33</sup> which will be examined accordingly. Finally, a case-law analysis will be conducted with regard to specific drafting matters to see how developing countries have been affected.<sup>34</sup>

The author will then focus on an analysis of reasons in favour of and against the adoption of the CISG (chapter four). Although these reasons may vary from nation to nation, the experiences and logic of each nation serve as a useful guide when evaluating the specific challenges that exist in Iran or any other country in connection with the adoption of the CISG. A comparative analysis will also be made to consider the position of the United Kingdom with regard to the role of the CISG (chapter five). This is important because of the UK's refusal to ratify the CISG to date despite its active role during the drafting process and negotiation of the CISG.<sup>35</sup> Lord Denning once stated ' . . . where we lead, others may follow . . .';<sup>36</sup> Therefore, an overview of arguments against ratification from the standpoint of the UK may become relevant to other non-signatory states to CISG such as Iran. This will lead, however, to the

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<sup>33</sup> Four major Convention issues were discussed: (1) Non-Conforming Procedures; (2) Suspension of Performance; (3) Passing of Risk of Goods in Transit; and (4) Trade Usages. See generally ch 3, Part Two.

<sup>34</sup> See generally ch 3, Part Three.

<sup>35</sup> Bruno Zeller, 'The Development of Uniform Laws – A Historical Perspective' (2002) 14 *Pace International Law Review* 163, 168; Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace International Law Review* 145.

For example, Professor Clive M Schmitthoff of the City of London College was requested to prepare a preliminary report for the Secretary-General on the creation of UNCITRAL. See 'DOCUMENTS A/6396 AND ADD. 1 AND 2; Report of the Secretary-General' (September 1966) <[A/6396 - Report to the Secretary General \("The Schmitthoff Study"\) \(document ultimately was support for the creation of UNCITRAL\)](#)> accessed 2 August 2013.

Barry Nicholas represented the United Kingdom in the drafting of the Convention. See Barry Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (1993) *Centro di Studi e Ricerche di Diritto Comparato e Straniero*.

<sup>36</sup> *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 1 All ER 518 (CA), [1977] 2 WLR 107 (CA).

conclusion that Iran is by no means in a comparable position to that of the United Kingdom. For example, Iran has no economic justification for not adopting the CISG.<sup>37</sup> The ultimate aim of this thesis is to compare the CISG with Iranian law governing contracts of sale. To that end, the author will first provide an overview of the position of Iran in the world economy, its volume of trade and its trading partners. This will be followed by an examination of the legal environment in Iran (chapter six) and a comparison of the rights, duties and remedies available to contracting parties under each system of law (chapter seven). To determine whether or not the CISG should be ratified in Iran, it will be essential to examine whether it is compatible with the Iranian law of sale. It is highly important to create a climate of legal stability in Iran. Conflicting laws regarding sale transactions will threaten legal certainty. The rights, duties and remedies provided for in the CISG will therefore be compared with their counterparts in Iranian law. Where there are differences between the two legal systems, a critical analysis will be conducted to ascertain whether the conflict is resolvable and, if so, how. As far as this study is concerned, the rights and duties enshrined in the CISG and Iranian law bear some degree of resemblance. However, the CISG contains certain remedies that do not exist in Iranian law. In such cases, the practical effect of these differences will be discussed.

The study will conclude with a recommendation on whether or not Iran should adopt the CISG. It seeks to take into account the practical difficulties involved in adopting the CISG, including the obstacles to a smooth transition to the CISG. With this in mind, the writer conducted a survey in Iran to measure the level of familiarity with the CISG, the knowledge of the CISG and the attitude of Iranian academics/lawyers, the business community and Government officials to the CISG. This survey forms the basis of chapter eight. The fieldwork included unstructured interviews with leading figures in

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<sup>37</sup> One of the reasons put forward by the business community against ratification of the CISG was that 'there was a danger that London would lose its edge in international arbitration and litigation.' See Moss, 'Why the United Kingdom Has Not Ratified the CISG' (n 22).

Law Reform Committee's argument against ratification is:

If the Convention were ratified by the UK and . . . came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country.'

See Law Reform Committee in reply to the Department of Trade and Industry's 1980 inquiry.

See Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) 26 University of Baltimore Law Review 51.

business, law and Government in Iran with regard to the area of international trade. The goal was to determine: (i) whether they are familiar with the CISG; (ii) whether they support/oppose its introduction, with reasons why; and (iii) whether there are any other insights/observations on the potential difficulties of implementation.

To this end, the author will provide an overview of her fieldwork in Iran concerning the practical difficulties that may arise in implementing the CISG in Iran (chapter eight).

### **1.5 Summary**

This research has been undertaken to provide an answer to what has been discussed above. Iran needs to enhance its position in the international trade market and become a more active member of the international community. Although there have been some studies that suggest that Iran should ratify the CISG, the Government has to date never seriously investigated accession to the CISG. The Government's failure to analyse the likely outcome of ratifying the CISG in Iran necessitates the conducting of research in this field. It must be established whether Iran will benefit from accession to the CISG and whether it is possible to predict the likely challenges posed by ratification. Iran needs to boost its national economy through foreign trade and exports. If adoption of the CISG helps to achieve this end by opening up new trade opportunities, then it should be ratified. This, however, is subject to its providing no major obstacles.

The initial approach is that Iran should ratify the CISG in order to develop a climate of trust through which stronger commercial relations may be formed with foreign nations. International trading contracts are often fulfilled over long distances and mostly via sea transport. This provides plenty of possibilities for breach of contract to take place. In such cases, trading partners may find it more satisfactory and convenient to deal with a country that is subject to the same law that they are. The aim of this study is to demonstrate that the CISG bears similarities to Iranian law and that any differences can be resolved. It should be noted, however, that Iran might be required to sacrifice some of the convenience of its national law in order to achieve legal certainty with regard to international sales transactions.

## Chapter Two

# The Establishment of a New International Economic Order Under the United Nations Convention on Contracts for the International Sale of Goods

### 2.1 Introduction

The CISG is an instrumental treaty unifying the law on international sales contracts. It has been ratified by 79 states,<sup>38</sup> among them most of the great trading nations of the world. These include the USA, Russia, China and most of the states of the European Union. The major absentees from the CISG are India, South Africa and the United Kingdom. Many developing countries have also not yet ratified the CISG. For instance, adoption of the CISG in Africa,<sup>39</sup> the Caribbean and the Pacific and by Arab countries<sup>40</sup> has happened 'on a leopard skin pattern.'<sup>41</sup> As far as a uniform law is concerned, the growing list of states that have ratified the CISG is more impressive than those of its precursors, the Convention on a Uniform Law on the International Sale of Goods (ULIS) and the Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). As explained in the previous chapter, the acceptance of the CISG in Iran and other developing countries depends partly on political factors. If the CISG is regarded as a truly international convention, with benefits for developing countries as well as developed ones, it is less likely to encounter resistance. This chapter argues that the history and content of the CISG show that it should be regarded in this way.

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<sup>38</sup> 'CISG: Table of Contracting States' (n 1).

<sup>39</sup> From African countries, only Burundi, Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia have ratified the CISG. See 'CISG: Table of Contracting States' (n 1).

<sup>40</sup> Among Arab countries, only Egypt, Iraq, Lebanon and Syria have ratified the CISG. See 'CISG: Table of Contracting States' (n 1).

<sup>41</sup> Luca G Castellani, 'Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 241, 246.



### 2.1.1 Earlier Attempts at Unification of Sales Law

The International Institute for the Unification of Private Law (UNIDROIT)<sup>42</sup> decided that work towards a uniform international sale of goods law should proceed under the auspices of the League of Nations.<sup>43</sup> The crucial factor in this movement was the feasibility and desirability of unification.<sup>44</sup> The unifying movement of the 1930s led to the submission of a draft text to the Hague Conference and it was finally tabled at the 1964 Hague Conference.<sup>45</sup> The result of this diplomatic conference, which had 28 participating states, was the adoption of two uniform laws: (i) the Uniform Law on the International Sale of Goods (ULIS); and (ii) the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

The Hague Conventions came into force in 1972, though they were ratified by only nine states. With the exception of two non-European nations, the signatory states were all from Western Europe.<sup>46</sup> The limited number of accessions to the 1964 Hague Conventions led the United Nations Commission for International Trade Law (UNCITRAL)<sup>47</sup> to review the unification project.

### 2.1.2 Establishment of UNCITRAL and the Unification of Sales Law

UNCITRAL was established by the UN General Assembly in 1966 'to promote the progressive harmonisation and unification of the law of international trade.'<sup>48</sup> The first

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<sup>42</sup> The purpose of UNIDROIT is to 'study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States.'  
<<http://www.unidroit.org/dynasite.cfm?dsmid=103284>> accessed 1 July 2013.

<sup>43</sup> Kazuaki Sono, 'The Vienna Sales Convention: History and Perspective' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) ch 1, 1, 2. See Sieg Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1999) 116 *South African Law Journal* 323, 334.

<sup>44</sup> Sono, *ibid.*

<sup>45</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>46</sup> Belgium, the Federal Republic of Germany, Israel, Italy, the Netherlands, San Marino, The Gambia and the United Kingdom ratified the 1964 Hague Convention. Israel ratified only ULIS. See Muna Ndulo, 'The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' (1989) 38 *International and Comparative Law Quarterly* 1, 2–4.

<sup>47</sup> 'In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles . . . The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.'  
<<http://www.uncitral.org/uncitral/en/about/origin.html>> accessed 1 July 2013.

<sup>48</sup> GA Resolution 2205 (XXI).

session of UNCITRAL, in 1968, was given over to the consideration of ways of encouraging wider adherence to the Hague Conventions.<sup>49</sup> At that time, the Hague Conventions were not yet in force<sup>50</sup> and ULIS and ULF had been ratified by three and two states respectively.<sup>51</sup> In 1968, during its first session, the Commission found it desirable to consider the intentions of countries towards adopting the Hague Conventions. Therefore, the Commission requested the Secretary-General to send a questionnaire to member states of the United Nations or any of its specialised agencies. In the event of their having no intention of adopting the Conventions, they wanted to know the reasons for this. The two substantive sessions in 1969 and 1970 analysed the feedback submitted to UNCITRAL.<sup>52</sup> The two main reasons for non-ratification were as follows: (i) lack of international representation in the law-making process<sup>53</sup> of ULIS and ULF (for example, Latin America, Asia and Africa each had only one representative<sup>54</sup>); and (ii) lack of ‘material stipulations of the conventions.’ The deficiencies in material stipulations included lack of attention to international shipments, not maintaining the balance between the rights of sellers and those of buyers, and not paying attention to commercial practice and the scope of their application.<sup>55</sup> It was also stated that the outcome of the Conventions, which were drafted primarily by the developed nations, were mistrusted by the developing and socialist bloc countries.<sup>56</sup>

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<sup>49</sup> Working Group II, 1968–1978: International Sale of Goods, 1<sup>st</sup> session, 5–16 January 1970, New York [A/CN.9/31 - Analysis of replies and comments by governments on the Hague Conventions of 1964](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL6/900/23/PDF/NL690023.pdf?OpenElement), 160. <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL6/900/23/PDF/NL690023.pdf?OpenElement>>

<sup>50</sup> UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS in the United Nations Audiovisual Library of International Law.

<[http://untreaty.un.org/cod/avl/pdf/ha/ccisg/ccisg\\_ph\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/ccisg/ccisg_ph_e.pdf)>

<sup>51</sup> ULIS was ratified by Belgium, the United Kingdom, and San Marino. ULF was ratified by the United Kingdom and San Marino.

Working Group II, 1968–1978: International Sale of Goods, 1<sup>st</sup> session, 5–16 January 1970, New York (n 49) 161.

<sup>52</sup> *ibid.*

<sup>53</sup> See Loukas Mistelis, ‘Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law’ in Ian Fletcher, Loukas Mistelis, and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell 2001) 3. Dr Mistelis states: ‘[A] great deal of “harmonised law” was negotiated and drafted without participation of the majority of emerging markets, or at least, before the majority of these States (in the former Soviet Union and the large number of ex-colonies) assumed legal personality in public international law.’

<sup>54</sup> Sono, ‘The Vienna Sales Convention: History and Perspective’ (n 43) 3.

<sup>55</sup> Eiselen, ‘Adoption of the Vienna Convention’ (n 43) 335.

<sup>56</sup> *ibid.*

A lack of support for the development of the Hague Conventions was thus apparent. Having said that, UNCITRAL did not give up on unification, but instead decided to make another attempt at drafting an acceptable text. Unification in the field of international sales law had a high priority on UNCITRAL's agenda. Therefore, a Working Group, comprising 14<sup>57</sup> members from a wide range of political, legal and economic backgrounds, was created by UNCITRAL to take over this project.<sup>58</sup>

ULIS and ULF formed the basis for the Working Group's further proceedings.<sup>59</sup> The Working Group held nine sessions in total between 1970 and 1977.<sup>60</sup> The first seven sessions were allocated to considering ULIS, and the last two to considering ULF.<sup>61</sup> The Working Group's drafts were debated at the annual meetings of UNCITRAL. In 1978, UNCITRAL combined the Working Group's drafts on Sales and Formation into a single document: the 1978 Draft Convention on Contracts for the International Sale of Goods.<sup>62</sup> UNCITRAL also recommended that the General Assembly hold a diplomatic conference to consider its 1978 draft text.<sup>63</sup> This draft, which was open to comment by all members of the UN, along with the comments received, formed the basis of the 1980 Vienna Diplomatic Conference.<sup>64</sup> The CISG was agreed by 62<sup>65</sup> states at the

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<sup>57</sup> The original representatives were from Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the USSR, the United Kingdom and the United States. Working Group II, 1968–1978: International Sale of Goods, 1<sup>st</sup> session, 5–16 January 1970, New York [A/CN.9/35 - Report of the Working Group on the international sale of goods, first session](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/001/02/PDF/NL700102.pdf?OpenElement) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/001/02/PDF/NL700102.pdf?OpenElement>> Representatives from Austria, Czechoslovakia, the Philippines, and Sierra Leone were added later, in Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales Law' (2005) 25 *International Review of Law and Economics* 446, 450.

<sup>58</sup> Gillette and Scott, *ibid.* See Sono, 'The Vienna Sales Convention: History and Perspective' (n 43) 4.

<sup>59</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 336; Sono, *ibid.* 6, stating: 'many of their [ULIS and ULF] substantive approaches have indeed been retained in the Vienna Sales Convention in a simplified and practical fashion.'

<sup>60</sup> See <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Sale\\_of\\_Good.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Sale_of_Good.html)> accessed 1 July 2013.

<sup>61</sup> UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (n 50).

<sup>62</sup> 'Summary of UNCITRAL legislative history of the CISG.'

<<http://www.cisg.law.pace.edu/cisg/linkd.html>> accessed 1 July 2013.

<sup>63</sup> *ibid.* See Peter Winship, 'The Scope of the Vienna Convention on International Sales Contracts' in Nina M Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Juris 1984) ch 1, 1, 14.

<sup>64</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 337.

<sup>65</sup> Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, the Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, the Philippines, Poland, Portugal, the Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet

Vienna Conference. After receiving its tenth ratification, it came into force on 1 January 1988.<sup>66</sup>

### 2.1.3 Adoption of the CISG and the NIEO

It has been claimed that the CISG promotes international trade by facilitating the buying and selling of raw materials, commodities and manufactured goods.<sup>67</sup> It is also said that it reduces uncertainty and legal disputes.<sup>68</sup> Given the unequal bargaining position of traders in developing countries, it is more than likely that a foreign law will be applied to their contracts. Whether the CISG provides any solution to this problem and/or takes into account the position of developing countries is of considerable importance.

In order to answer this question, it is important to find out what the CISG provides for the countries (primarily developing ones) that ratify it. It is also important to discover whether the CISG intended to include the developing nations in the international trading system.

A study of the legislative history of the CISG shows that it was drafted to include more developing countries in global commerce and in the development of international commercial law. This should be clear from the Preamble,<sup>69</sup> the first, second and third

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Socialist Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, Yugoslavia and Zaire. Venezuela sent an observer, in Gillette and Scott, 'The Political Economy of International Sales Law' (n 57) 450.

<sup>66</sup> According to Article 99 of the CISG, the Convention was to enter into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession. China, Italy, and the United States were the 9th, 10th, and 11th Contracting states in December 1986.

<sup>67</sup> John P McMahon, 'Applying the CISG Guides for Business Managers and Counsel' (2010).

<<http://www.cisg.law.pace.edu/cisg/guides.html>> accessed 1 July 2013.

<sup>68</sup> *ibid.*

<sup>69</sup> The Preamble to the CISG states:

THE STATES PARTIES TO THIS CONVENTION,  
BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,  
CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,  
BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

paragraphs of which refer, respectively, to: (i) the 'establishment of a New International Economic Order'; (ii) 'equality and mutual benefit'; and (iii) 'different social, economic and legal systems' and 'removal of legal barriers in international trade.' Such allusions were seen to include more developing nations, firstly at the time of drafting and secondly upon receiving ratifications.

It is also important to understand what the New International Economic Order is. The concept was established by a different UN Resolution in order to help developing countries achieve larger shares of, and incomes in, the world's markets. At first glance, this allusion in the Preamble to the CISG may sound very promising in terms of attracting a higher rate of participation from the developing world; closer examination reveals, however, that the transformation of the concept of the NIEO into legally binding rules poses a considerable challenge. The mere allusion in the Preamble raises the question of whether any meaning is attached to it and to what extent the CISG was intended to further it.

To investigate this question, this chapter will carry out a detailed analysis of the NIEO. Part One will examine the nature, emergence and development of the NIEO from its origin to its establishment by the UN General Assembly. Part Two continues with the development of the NIEO and how it became linked to the United Nations Commission on International Trade Law.

## **Part One**

### **2.2 A New International Economic Order: An Overview**

#### **2.2.1 Introduction**

It was during and shortly after the Second World War that a new liberal international economic system emerged under the hegemony of developed nations in North America and Western Europe. This system was based on three main institutions: (i) The International Monetary Fund (IMF); (ii) The World Bank; and (iii) The General Agreement on Tariffs and Trade (GATT). As the developed nations dominated these

institutions, they held the political and economic power to run the world economy. Although underdeveloped regions such as Asia, the Middle East, Africa and Latin America were all part of the world economy, they were unable to offer a 'challenge to the economic dominance of the west.'<sup>70</sup> On top of that, they were unable to take part in decisions that influenced the distribution of resources. The emphasis on the removal of trade barriers, the free movement of capital across borders, and the establishment of a monetary system that was formed by North America, Western Europe and Japan, as a post-war international economic system, benefited them and scarcely considered Third-World interests.<sup>71</sup> Not surprisingly, the Third World became enormously 'dissatisfied with the system that affected their economies but excluded them from its management.'<sup>72</sup> In their view, their exclusion from the management of the world economy resulted in an unequal distribution of resources and the growth of dependent economies.

Therefore, developing nations, which accounted for 70% of the entire population of the world,<sup>73</sup> attempted to increase their input into the management of the international economic system. Some developing countries, taking a more pragmatic approach to multilateral management, insisted on playing a more important role within the existing dominant regime. Others completely disagreed with the liberal foundation of international management, since such open monetary trading and financial systems ensured their underdevelopment and subordination to the developed countries. In order to develop their economies, these countries tried to protect themselves from international economic dominance and to make their development a major objective and responsibility of the system. The oil crisis of the 1970s resulted in an effort on the part of developing countries to change the rules of the game and to create this so-called New International Economic Order.<sup>74</sup>

Before turning to the next section and examining the development of the NIEO and how it eventually became linked to UNCITRAL, it is worth mentioning that the NIEO's

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<sup>70</sup> Adeoye Akinsanya and Arthur Davies, 'Third World Quest for a New International Economic Order: An Overview' (1984) 33 *International and Comparative Law Quarterly* 208.

<sup>71</sup> *ibid.*

<sup>72</sup> Joan E Spero, *The Politics of International Economic Relations* (3rd edn, 1977) 29.

<sup>73</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>74</sup> Joan E Spero and Jeffrey A Hart, *The Politics of International Economic Relations* (6th edn, 2003) 6.

demands are still being put forward today by the Head of UNCTAD.<sup>75</sup> In 2011, UNCTAD published a report, *Development-led globalization: Towards sustainable and inclusive development paths*.<sup>76</sup> This report, which favours ‘development-led globalization’ as opposed to ‘finance-driven globalization,’ emphasises the adverse effect of liberalisation and deregulation on the potential gains from trade for developing countries. It continues that ‘stable monetary and financial arrangements are a pre-condition for making trade and investment work for inclusive growth and development.’<sup>77</sup> UNCTAD criticises the policies advocated by the International Monetary Fund and the World Bank in favour of unregulated financial markets. This is very much in line with the view put forward by Joseph Stiglitz in his important book *Globalization and Its Discontents*.<sup>78</sup> He suggests that globalisation should be embraced, as long as the characteristics of each individual country (including its own terms, history, culture and traditions) are taken into account. According to Stiglitz, problems arise when globalisation is imposed unfairly and implemented too fast, in the wrong order and on the basis of inadequate and faulty economic analysis. He adds that this is what we are witnessing today, which has resulted in destitution, frustration and conflict. He believes that the worldwide economic reform that was launched by the IMF and the World Bank in the 1990s has caused this global meltdown. He holds that sequencing and pace of reform were ignored when designing reform packages. Moreover, capital account liberalisation was a mistake too. He argues that, if things had been done differently (with sequencing, pace of reform and capital account liberalisation in mind), the outcome as regards social conditions would have been better.<sup>79</sup> It is true that ‘industrial development remains a priority for many developing countries because of the big opportunities it provides to raise productivity and incomes, and to get the most from international trade.’<sup>80</sup> With the importance of NIEO demands in mind, the author now returns to the main theme of this chapter, which is the development of the NIEO.

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<sup>75</sup> Mark Tran, ‘UN calls for overhaul of global financial system to benefit the poor’ (2012) <<http://www.theguardian.com/global-development/2012/feb/07/un-urges-overhaul-global-financial-system>> accessed 6 February 2014.

<sup>76</sup> Report of the Secretary-General of UNCTAD to UNCTAD XIII, ‘Development-led globalization: Towards sustainable and inclusive development paths’ (2011) <[http://unctad.org/en/docs/tdxiii\\_report\\_en.pdf](http://unctad.org/en/docs/tdxiii_report_en.pdf)> accessed 6 February 2014.

<sup>77</sup> *ibid.*

<sup>78</sup> Joseph E Stiglitz, *Globalization and Its Discontents* (Penguin 2002).

<sup>79</sup> *ibid.*

<sup>80</sup> Report of the Secretary-General of UNCTAD to UNCTAD XIII (n 76).

### **2.2.2 The Nature of the New International Economic Order**

The very first question that comes to mind is what the New International Economic Order means and what it implies. It has been argued<sup>81</sup> that this term is one of those 'propaganda slogans' that have emerged in today's politics. It does indeed comprise a series of purposely ambiguous or vaguely defined objectives. What the phrase implies is the feeling that those unfamiliar with it are 'one down' on those who use it, and those familiar with it are privileged. The term has three major points of significance: first, it concedes the malfunctioning of existing international economic relations, which are in need of amendment, replacement or updating via a new system; second, the inappropriate policies of the developed countries, past and present, should be compensated for by accepting the obligations of the New International Economic Order; and, finally, these changes in the international order are substantially subject to the transfer of political power from the major countries.<sup>82</sup>

### **2.2.3 The Emergence of Third-World Demands**

The emergence of a New International Economic Order dates from the 1960s, when the United Nations General Assembly instituted a 'Development Decade.'<sup>83</sup> This Development Decade aimed to assist the less developed nations by obtaining 5% annual growth in national income via expanded international commerce, the movement of international capital, and the assistance of 1% of the developed nations' national income. The developing nations' spokesmen condemned 'the existing international economic system which had a structural bias in favour of the developed countries while relegating the developing countries to the status of mere primary producers for the factories in the developed countries.'<sup>84</sup>

It was Raul Prebisch<sup>85</sup> who eloquently expressed the developing nations' viewpoints. He claimed that the operation of the GATT was beneficial only to the developed

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<sup>81</sup> Harry G Johnson, 'The New International Economic Order' The University of Chicago Graduate School of Business, Selected Papers No 49.

<sup>82</sup> *ibid.*

<sup>83</sup> GA Resolution 1710 (XVI) of 19 December 1961.

<sup>84</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>85</sup> Secretary-General of UNCTAD (1965–1969), and executive secretary of the United Nations Economic Commission for Latin America (ECLAC) (1948–1963).

<[http://unctad.org/Sections/wcmu/docs/prebisch2009\\_lectures\\_en.pdf](http://unctad.org/Sections/wcmu/docs/prebisch2009_lectures_en.pdf)> accessed 2 August 2013.



nations, and proposed a comprehensive international programme that would make the developed nations compensate the less developed ones for their 'disproportionate' earnings from international commerce. To that end, he suggested that the developed nations should make trade concessions to the developing nations. He further proposed the establishment of a compensatory scheme of finance through which the developing countries would receive capital grants whenever there was a downward trend in their foreign exchange gains (as a result of fluctuations in the international market). 'Prebisch advocated a united front on the part of developing countries with a view to applying sustained political pressure in the conduct of their relations with the developed countries.'<sup>86</sup> However, the UN did not support such a complete and radical change to the old norms governing international economic relations. The United Nations Conference on Trade and Development<sup>87</sup> in particular was not in favour of it.<sup>88</sup>

#### **2.2.4 The United Nations Conference on Trade and Development and the NIEO**

The United Nations Conference on Trade and Development (UNCTAD) was founded as a consequence of demands made by the developing member states of the UN. They used their numerically superior voting power in the General Assembly to found a permanent international institution to safeguard the interests of the less developed countries against the GATT's inadequacies.<sup>89</sup>

UNCTAD turned out to be a *locus* of reform of the international economic system for the developing nations. In other words, it was regarded as an 'important intervener on behalf of less developed countries in their relations with advanced industrial States.'<sup>90</sup> Within UNCTAD, the most influential group was known as the Group of 77.<sup>91</sup>

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<sup>86</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>87</sup> UNCTAD is a forum used by the developing nations to echo their quest for a New International Economic Order.

<sup>88</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>89</sup> Robert F Meagher, *An International Redistribution of Wealth and Power: A Study of Economic Rights and Duties of States* (1979) 30.

<sup>90</sup> Robert S Walters, 'UNCTAD: Intervener Between Poor and Rich States' (1973) 7 *Journal of World Trade Law* 528.

<sup>91</sup> The process of decision-making in UNCTAD takes place in the context of the group system. The member states of UNCTAD are divided into four groups: A, B, C and D. The formal purpose of such a

The Group of 77 consisted of developing countries in America, the Middle East, Asia and Africa. UNCTAD, as a vehicle for negotiations with regard to the developing countries' economic desires and for communication and 'interest-articulation' between the North and the South, was successful because it was able to substitute an alternative for the old theory of liberal international trade.<sup>92</sup> The main focus of the Group of 77 was the establishment of a 'General Preference Scheme' through which the countries of North America, Western Europe and Japan gave special trade preferences to less developed countries exporting manufactured and semi-manufactured goods.<sup>93</sup> An 'Integrated Programme for Commodities' was also proposed, as a mechanism by which the prices of exports could be stabilised at an equitable level for the less developed countries.<sup>94</sup>

Repayment of debt was also a key concern for UNCTAD. As part of the quest for a new and fairer international economic order, the Group of 77 started campaigning for a generalised cancellation of official debts. In addition, compensation was discussed for the developing nations for the deterioration in their terms of trade with the developed nations. UNCTAD was unable to go beyond the study of problems concerning the 'transfer of technology to the developing nations and formulation of a code of conduct against the restrictive business practices of multinational corporations.' Therefore, concern was raised that UNCTAD served merely as a 'forum where less developed countries can share information and propose unified action to deal with their common concern as weak States playing host to multinational corporations.'<sup>95</sup>

While UNCTAD acted as an advocate for Third-World member states, its influence was limited for several reasons. First, like the General Assembly's decisions, the decisions

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division was the election of representatives to the Trade and Development Board (TDB) according to geographical and socio-economic criteria. Group A included African and Asian state members and Yugoslavia and was allocated 22 seats in the TDB. Group B included market-economy countries, with 22 seats. Group C included Latin American and Caribbean countries with nine seats. Group D included the socialist countries of Eastern Europe with six seats. Also, at UNCTAD I, 77 developing countries with common interests formed the Group of 77 (G-77) as an effective political group. The Group of 77 consists of the developing countries of Groups A and C.

See 'UNCTAD: A BRIEF HISTORICAL OVERVIEW' (UNCTAD/GDS/2006/1).

<<http://www.transnational.deusto.es/IP2011/docs/unctad%20history.pdf>> accessed 2 August 2013.

<sup>92</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>93</sup> 'UNCTAD: A BRIEF HISTORICAL OVERVIEW' (n 91).

<sup>94</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>95</sup> D H Blake and R S Walters, *The Politics of Global Economic Relations* (1976) 186.

taken by UNCTAD had no legally binding effect on members, and were regarded merely as recommendations. Second, the disparate demands of developing nations had not been harmonised to provide a basis for a bargaining position in negotiations between developed and developing nations. This would have been one way of ensuring equitable distribution of new economic earnings among the developing nations. Therefore, it led to conflicts and frustrations. Lastly, a lack of political will on the part of the developed nations to accept dramatic concessions (since doing so could and would lead to a transfer of their wealth and international political power to the less developed nations) made the developing nations' efforts seem absurd.<sup>96</sup> For all these reasons, the developing nations realised that UNCTAD would not be able to obtain any real concessions from the developed nations.<sup>97</sup>

### **2.2.5 The United Nations General Assembly and the NIEO**

The Third World soon realised that UNCTAD was more of a forum for the articulation of interests and ideas than an organisation that was 'action-oriented.' This led to the adoption of a new strategy through which an alteration of the norms conducting international economic relations might be achieved. They also urged the codification of these norms in a legal document.<sup>98</sup>

Putting pressure on the developed nations through the United Nations was first suggested by the Mexican president,<sup>99</sup> who emphasised that the developing nations would need to 'remove economic co-operation from the realm of good will and crystallize it in the field of international law . . . A just order and a stable world are not possible as long as obligations and rights which protect the weak States are not created.'<sup>100</sup> He further emphasised the need for the codification of facets of international economic relations into a legal document. These included, among other things:

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<sup>96</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>97</sup> G Williams, *Third World Political Organization* (1981) 35.

<sup>98</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>99</sup> President Luis Echeverria, President of Mexico 1970–1976. See 'Proceedings of United Nations Conference on Trade and Development, Third Session' (1972) vol 1, 30. TD/180, Vol I  
<[http://unctad.org/en/Docs/td180v011\\_en.pdf](http://unctad.org/en/Docs/td180v011_en.pdf)> accessed 2 August 2013.

<sup>100</sup> *ibid.*

- a. The freedom to dispose of natural resources;
- b. The subjection of foreign capital to domestic laws; and
- c. The transfer of technology.<sup>101</sup>

The developing nations were strongly of the opinion that, if the above-listed norms were codified in a legally binding document, an equitable distribution of global natural resources and wealth would be achieved.<sup>102</sup>

A more thorough economic co-operation among the developing nations was suggested during the fourth Summit Conference of Non-Aligned Groups in 1973 (they shared the view of Luis Echeverria). The outcome of this conference was the Programme of Action which established the structure of the New International Economic Order; this included the recommendation that sovereignty over natural resources and also national control over private foreign investment in developing countries should be increased.<sup>103</sup>

Therefore, demands for the establishment of a New International Economic Order shifted to the agenda of the General Assembly. The General Assembly adopted a Declaration and a Programme of Action on the Establishment of a New International Economic Order in May 1974<sup>104</sup> and the Charter of Economic Rights and Duties of States in December 1974.<sup>105</sup> The Resolutions accepted the basic principles of the Declaration and the Programme of Action on the Establishment of a New International Economic Order, which read as follows:

The need to secure progress towards equality of nations through an equitable sharing of world resources, transfer of technology, and a just and equitable relationship between the prices of raw materials exported from and the manufactured goods imported by the developing countries, and full exercise of

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<sup>101</sup> 'Proceedings of United Nations Conference on Trade and Development, Third Session' (n 99).

<sup>102</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>103</sup> *ibid.*

<sup>104</sup> GA Resolution 3201 (S-VI) of 1 May 1974. [A/RES/S-6/3201](#).

GA Resolution 3202 (S-VI) of 1 May 1974. [A/RES/S-6/3202](#).

<sup>105</sup> GA Resolution 3281 (XXIX) of 12 December 1974. [A/RES/29/3281](#).

sovereignty over natural resources and other economic activities, including the control of transnational corporations.<sup>106</sup>

Moreover, the attempts necessary for the realisation of the above-mentioned goals were described in the Programme of Action. This highlighted the need for a complete change in the international monetary system and called for a new international economic structure, which should increase the developing countries' share in world industrial production.<sup>107</sup>

The Charter of Economic Rights and Duties of States (Resolution 3281 (XXVIII) of 12 December 1974) stressed some of the provisions of the Declaration and the Programme of Action. In very general language, it called for the indexation of prices and the acceptance of cartelisation. Article 2(C) of the Charter called for the expropriation of foreign property on payment of 'appropriate compensation.'<sup>108</sup> These issues were at the heart of the debate. More generally, the member states were encouraged to collaborate in order to 'strengthen and continuously improve the efficiency of international organisations in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries . . .'<sup>109</sup> It is noteworthy that the Resolutions never explained how the interests of developing countries would be advanced through the unification of private commercial law. Nevertheless, the United Nations Commission on International Trade Law (UNCITRAL), which was in charge of the preparation of the CISG, saw unification as a key element in a programme of development. This leads on to Part Two, in which this issue will be further explored.

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<sup>106</sup> Akinsanya and Davies, 'Third World Quest for a New International Economic Order' (n 70).

<sup>107</sup> *ibid.*

<sup>108</sup> . . . [t]o nationalise, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of choice of means.

<sup>109</sup> Article 11 of GA Resolution 3281 (XXIX) (n 105).

## Part Two

### 2.3 The United Nations Commission on International Trade Law and the NIEO

The study of the NIEO so far has shown that it was mainly about public trade law. The questions that need to be answered are: how did the NIEO come to be linked with UNCITRAL, and how did it become relevant to private trade law? These will be answered, firstly, by describing the Commission and its origins; secondly, by considering the Commission's programme of work and its relationship with the international sale of goods; and, finally, by considering why the NIEO was included in the programme of work of the Commission, in particular with regard to the international sale of goods.

#### 2.3.1 Origins of the Commission

The United Nations Commission on International Trade Law (UNCITRAL), the fruits of whose labour is the CISG, was established by General Assembly Resolution 2205(XXI) of 17 December 1966<sup>110</sup> in order to make it possible for the United Nations to be more actively involved in reducing and removing legal impediments to the flow of international trade. In establishing UNCITRAL, the General Assembly recognised that conflicts and divergences arising from the laws of different states in relation to international trade can act as an obstacle to its development. It also recognised that the interests of all peoples, in particular those of developing countries, require a high degree of development of international trade. Therefore, the General Assembly considered 'it desirable that the process of harmonization and unification of the law of international trade be substantially co-ordinated, systematized and accelerated and that a broader participation by States be secured . . .'<sup>111</sup>

The events that resulted in the establishment of the Commission began with the placement of an item entitled 'Consideration of steps to be taken for progressive

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<sup>110</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME I: 1968–1970' A/CN.9/SER.A/1970, Part One, ch II, sect E. <[http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb\\_1968-1970\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968-1970_e.pdf)> accessed 1 July 2013.

<sup>111</sup> *ibid.*

development in the field of private international law with a particular view to promoting international trade' on the agenda of the twentieth session (1965) of the General Assembly, in pursuance of an initiative taken by the Hungarian government.<sup>112</sup> In relation to this agenda item, a preliminary survey on the unification of international trade law was prepared by the UN Secretariat for the Sixth Committee of the General Assembly.<sup>113</sup> The survey reflected the problems with which parties to international trade transactions were faced as a result of the great variety of and disparities between different national laws. It also included a review of some means by which a unification of the laws of international trade might be achieved. In line with the recommendations of the survey, the General Assembly<sup>114</sup> requested that a comprehensive report on the progressive development of international trade law be conveyed by the Secretariat.

Professor Clive Schmitthoff of the City of London College was commissioned by the Secretariat to provide a preliminary study of the subject as an antecedent to its own report. The Secretariat also conferred with the secretariats of relevant United Nations organs and regional economic commissions, specialised agencies and other international governmental and non-governmental organisations. The report stated that some progress had been achieved towards unification and harmonisation of international trade law in certain areas. However, it also noted certain deficiencies. First, given the time and effort already put into unification, progress had been only gradual. Second, given the recent independence of many developing countries, they had had only a small degree of participation in those efforts. Third, non-governmental agencies active in the field had a membership that typified all of the principal geographic regions or all of the major economic systems around the globe. Fourth, there had been a lack of co-operation and co-ordination among active agencies in the field.<sup>115</sup> The report suggested the establishment by the General Assembly of a new

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<sup>112</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME I: 1968–1970' (no 110) Part One, ch I, sect A.

<sup>113</sup> *ibid* Part One, ch I, sect C.

<sup>114</sup> *ibid* Part One, ch II, sect A.

<sup>115</sup> *ibid* Part One, ch II, sect B.

United Nations organ to systematise and accelerate the unification and harmonisation process of international trade law and to deal with the shortcomings.<sup>116</sup>

At the twenty-first session (1966) of the General Assembly, the Sixth Committee considered the report.<sup>117</sup> Professor Schmitthoff's recommendations were approved. In accordance with the recommendations and deliberations of the Sixth Committee, the establishment of the Commission was adopted by the General Assembly.<sup>118</sup>

### **2.3.1 Programme of Work**

The General Assembly did not assign UNCITRAL specific tasks; instead, at the first session of the Commission in 1968, after taking into account a number of recommendations by member states, nine topics were adopted by the Commission as the essence of its prospective programme of work. These were: the international sale of goods, international commercial arbitration, transportation, insurance, international payments, intellectual property, the elimination of discrimination in laws affecting international trade, agency, and legalisation of documents.<sup>119</sup> The international sale of goods was among those topics given priority.<sup>120</sup> UNCITRAL explained that it deserved priority because 'divergencies arising from the laws of different States in matters relating to international trade law constitute one of the obstacles to the development of world trade.'<sup>121</sup> However, it noted that progress on unification had been disappointing, owing partly to 'the small degree of participation in this field on the part of many developing countries.'<sup>122</sup>

#### **2.3.2.1 International Sale of Goods**

Given the wide scope and complex nature of this topic, the Commission decided to focus on specific aspects of the international sale of goods: time limits and limitations on the international sale of goods, and the two 1964 Hague Conventions.<sup>123</sup> The

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<sup>116</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME I: 1968–1970' (no 110) Part One, ch II, sect B.

<sup>117</sup> *ibid* Part One, ch II, sect D.

<sup>118</sup> *ibid* Part One, ch II, sect E.

<sup>119</sup> *ibid* Part Two, ch I, sect A, para 40.

<sup>120</sup> *ibid*.

<sup>121</sup> GA Resolution 2205 (XXI).

<sup>122</sup> *ibid*.

<sup>123</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME I: 1968–1970' (no 110) Part Two, ch I, sect A, para 48.



Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) resulted from the work of the Commission in these areas.

### **2.3.2.2 Contracts for the International Sale of Goods**

As mentioned above, UNIDROIT had begun work in 1930 on the unification of the laws on the international sale of goods. The two Hague Conventions were concluded in 1964, although they were not yet in force by the time of UNICITRAL's first session in 1968. The Commission therefore began by assessing the position of states with regard to the Hague Conventions. At the Commission's request, the Secretary-General sent a questionnaire to member states of the UN and its specialised agencies. This questionnaire aimed to discover whether states intended to adhere to the Hague Conventions, and, if not, to debate the shortcomings of these Conventions. In the interim, the Commission also called upon states to submit their studies on the 1964 Hague Conventions.<sup>124</sup>

The second (1969) and third (1970) sessions of the Commission were devoted to the analysis of replies and studies received.<sup>125</sup> At the second session, the suitability and practicality of the uniform laws annexed to the Hague Convention were defended by various representatives, who argued that there was no need for their revision at that time. Other representatives held a different view. They questioned the suitability of ULF and ULIS for worldwide acceptance. For example, the Union of Soviet Socialist Republics noted that the 1964 Hague Conference included only 28 states, among which only three were socialist and two were developing. Therefore, the Hague Conventions were not the product of the all-embracing vision of the majority of states that was to be expected from international instruments of such a kind. The United Arab Republic also expressed the view that developing countries were concerned with some of the principles of uniform sales laws.<sup>126</sup>

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<sup>124</sup> *ibid.*

<sup>125</sup> *ibid* Part Three, ch I, sect A.1.

<sup>126</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME I: 1968–1970' (no 110) Part Three, ch I, sect A.1.

In the light of its analysis, the Commission decided to set up a Working Group on the International Sale of Goods, to determine whether the uniform laws could be revised in such a way that would attract wider acceptance by countries with different social, legal and economic systems, or whether it would be better to produce a new text. It advised considering methods that would make a revised text more widely acceptable.<sup>127</sup> The Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on Formation of Contracts for the International Sale of Goods (ULF) provided the starting point for the revised text.<sup>128</sup>

By 1975, revisions of a number of articles of ULIS had been carried out by the Working Group, and it was decided that the revised text should not be drafted in the form of a uniform law annexed to a convention, but as an integrated convention.<sup>129</sup> In 1976, the Working Group accepted the draft text of the Convention on the International Sale of Goods.<sup>130</sup> On the basis of this draft, the Commission also approved the Convention on the International Sale of Goods in 1977.<sup>131</sup>

After completion of the revision of ULIS, the eighth and ninth sessions of the Working Group were devoted to a consideration and revision of the formation and validity of contracts for the international sale of goods. The basis of such a revision was the 1964 Hague Uniform Law on Formation and the UNDRUIT draft law for the unification of certain rules regarding the validity of contracts for the international sale of goods. The draft text of the Convention on the Formation of Contracts for the International Sale of Goods was approved by the Working Group in 1977.<sup>132</sup> At the request of the Working Group, a commentary on the Draft Convention was produced by the Secretariat.<sup>133</sup> The

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<sup>127</sup> *ibid* Part Two, ch II, sect A, para 38.

<sup>128</sup> *ibid* Part Two, ch III, sect A, para 72.

<sup>129</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME VI: 1975' A/CN.9/SER.A/1975, Part Two, ch I, sect 1, para 13.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb\\_1975\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf)> accessed 1 July 2013.

<sup>130</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME VII: 1976' A/CN.9/SER.A/1976, Part Two, ch I, sect 1.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb\\_1976\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb_1976_e.pdf)> accessed 1 July 2013.

<sup>131</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME VIII: 1977' A/CN.9/SER.A/1977, Part One, ch II, sect A, para 34.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb\\_1977\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf)> accessed 1 July 2013.

<sup>132</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME IX: 1978' A/CN.9/SER.A/1978, Part Two, ch I, sect A.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb\\_1978\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf)> accessed 1 July 2013.

<sup>133</sup> *ibid* Part Two, ch I, sect D.

Draft Convention on the International Sale of Goods and the Draft Convention on the Formation of Contracts were then integrated into one text,<sup>134</sup> which formed the Draft Convention on Contracts for the International Sale of Goods.<sup>135</sup>

The Commission recommended that the General Assembly hold a diplomatic conference to consider its Draft Convention.<sup>136</sup> This conference was held in Vienna in 1980, and the United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted by representatives of the 62 countries that participated in the Conference on 10 April 1980 in Vienna.<sup>137</sup>

### **2.3.3 Legal Implications of the New International Economic Order**

It was not obvious that the United Nations had any jurisdiction in relation to private transactions for the sale of goods. Hence, it is worth asking how it came about that international sales became the subject of an UNCITRAL study and a UN convention. As stated earlier, the comments of some of the respondents to the questionnaire circulated by UNCITRAL concentrated on the lack of participation by the developing nations. The situation was different during the drafting of the CISG, however, as countries with different economic, political and legal systems were present and 62 states participated in the proceedings. This is reflected even in the Preamble to the CISG, which emphasises the importance of the developing world by including:

THE STATES PARTIES TO THIS CONVENTION, BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order . . .

How this New International Economic Order came to be linked with UNCITRAL and how it became relevant to private trade law lead us to the next section.

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<sup>134</sup> *ibid* ch II, sect A, para 18.

<sup>135</sup> *ibid* para 27.

<sup>136</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME X: 1979' A/CN.9/SER.A/1979, Part One, ch I, sect C.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1979-e/yb\\_1979\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1979-e/yb_1979_e.pdf)> accessed 1 July 2013.

<sup>137</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME XI: 1980' A/CN.9/SER.A/1980, Part Three, ch I, sect A.

<[http://www.uncitral.org/pdf/english/yearbooks/yb-1980-e/yb\\_1980\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1980-e/yb_1980_e.pdf)> accessed 1 July 2013.

In 1974 and 1975, the UN General Assembly at its sixth and seventh special sessions adopted Resolutions 3494 (XXX) and 31/99, which dealt with economic development and the establishment of a New International Economic Order. The Commission, as one of the organs of the UN, was called upon to take account of the relevant provisions of these Resolutions. In response to this, the Commission included in its programme of work the topic of the legal implications of the New International Economic Order,<sup>138</sup> and took into account the ways in which it could effectively achieve the goals introduced in the Resolutions by the General Assembly.

A Working Group on the New International Economic Order was established by the Commission and assigned the task of recommending specific topics that could become part of the Commission's programme of work. In order to assist the Working Group, the Secretariat was asked to provide the Commission with a report that would set forth subject areas that were relevant in the context of the development of the NIEO and which would be suitable for consideration, accompanied by background studies where appropriate. In addition, governments were invited to submit their proposals and visions on subject areas that might be covered by the Commission.<sup>139</sup>

The review of the subject areas as set forth in the report of the Secretary-General revealed divergent visions for the sphere of competence of the Commission and the interpretation of its mandate. One view held that the Commission had achieved valuable work in different areas within the context of existing legal systems. However, supporters of this view argued that the need to establish a New International Economic Order required the Commission to take a wider approach to legal matters, including legal relationships that had a public law character.<sup>140</sup> According to this view, the Commission was required to identify and consider the principles of international public law that influence the structure of international private law. It was also held that the Commission should carry on with its logical approach to dealing with specific

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<sup>138</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME IX: 1978' (no 132) Part One, ch II, sect A, paras 67 (c) (vi), 68, 69.

<sup>139</sup> *ibid* para 71.

'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME X: 1979' (no 136) Part One, ch II, sect A, para 100.

<sup>140</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME XI: 1980' (no 137) Part Two, ch V, sect A, para 11.

topics involving harmonisation, unification and the progressive development of international trade law. Reference was even made to the work of the Commission in the field of the carriage of goods by sea, formulated by the Asian-African Consultative Committee. The UN Convention of 1978 (Hamburg Rules), which established an equitable balance of interests between the rights and obligations of the carrier and the shipper, had made a significant contribution towards the establishment of a New International Economic Order, and this approach could be followed in other specific subject areas that were of special importance to developing countries.<sup>141</sup>

The report of the Working Group showed that the harmonisation, unification and review of contractual provisions governing international contracts in the area of industrial development, such as contracts on research and development, consulting and engineering, contracts for the supply and construction of large industrial works, transfer of technology, service and maintenance, technical assistance, leasing, joint ventures, and industrial co-operation in general would be of great significance to developing countries and the Commission's programme of work in relation to the New International Economic Order.<sup>142</sup>

However, what is still unclear is how the international sale of goods, which was not included in the list of suggested topics, became relevant in the context of the New International Economic Order. The answer, in this writer's opinion, could include the following reasons: (i) the international sale of goods is of great relevance to the establishment of a New International Economic Order because international sales involve parties from developing countries as well as developed countries, and the developing countries had already expressed dissatisfaction with their position with regard to the 1964 Hague Conventions; (ii) the international sale of goods was already included in the Commission's programme of work with a high priority attached to it. However, whether one can interpret the relevance of the UN Convention on Contracts for the International Sale of Goods to the establishment of a New International Economic Order in line with the view that

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<sup>141</sup> *ibid.*

<sup>142</sup> *ibid* paras 31 (4) and 32.

the need to establish a new international economic order, the Commission should now take a broader approach to legal matters . . . the Commission should consider and identify the principles of international public law that underlay the structure of international private law.<sup>143</sup>

is still not very evident.

## 2.4 Conclusion

The campaign for the NIEO was the result of the Third World's dissatisfaction with a system that governed their economies but forbade them to manage them. The two General Assembly Resolutions, the Declaration on the Establishment of a New International Economic Order<sup>144</sup> and the associated Programme of Action on the Establishment of a New International Economic Order,<sup>145</sup> were the fruit of pressure on the part of developing nations.

Equity, sovereign equality, interdependence, common interest and co-operation among all states, irrespective of their economic and social systems, along with terms of trade, international monetary policy, foreign investment and the conduct of multinational corporations, the transfer of technology, and the control and ownership of natural resources, were the common themes addressed in UN Resolutions. These Resolutions failed to explain how the unification of private commercial law would advance the interests of developing countries. Therefore, UNCITRAL identified unification as a key element in a programme of development. UNCITRAL was set up in 1966, under a General Assembly Resolution declaring that the 'interests of all peoples, and particularly those of the developing countries' demanded better conditions for the development of international trade.<sup>146</sup>

This study has made an attempt to demonstrate how the NIEO became linked to the CISG. A historical overview of the NIEO shows that it was initially developed to address

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<sup>143</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME XI: 1980' (no 137) Part Two, ch V, sect A, para 10.

<sup>144</sup> GA Resolution 3201 (S-VI).

<sup>145</sup> GA Resolution 3202 (S-VI).

<sup>146</sup> GA Resolution 2205 (XXI).

public law issues. The question of how the NIEO was ever introduced within the remit of private law is still a mystery, since the examination of UNCITRAL's mandate and programme of work does not provide an answer. However, it became evident from the outset that there was a low rate of participation in international trade on the part of developing nations and also disparities in this field. These were seen as obstacles to the development of trade; therefore, international sales law was identified as an area requiring attention. UNCITRAL set up a Working Group with responsibility for preparing a proposal for new uniform laws on international sales. The Group met in nine sessions between 1970 and 1978, and produced a draft treaty in 1978. The United Nations called a diplomatic conference and in 1980 the text of the CISG was agreed. It is worth mentioning that the CISG is suitable for developing countries, such as Iran. A study of the legislative history of the CISG suggests that developing countries should feel that their inclusion in the process of drafting and agreeing it might give them confidence that their interests were being considered.

The Preamble to the CISG refers to the 'New International Economic Order.' Whether any meaning or importance is attached to this allusion to the NIEO in the specific provisions of the CISG will be discussed next. The next chapter will examine the importance of the preamble to conventions in general, and in particular the significance of the Preamble to the CISG and the role it plays in the interpretation of the CISG.

## Chapter Three

# A New International Economic Order: The Legal Importance of Preambles and a Legislative Study of the North–South Debates

### 3.1 Introduction

The previous chapter described the general background to the political debates on international commercial law and trade at the time that the CISG was drafted. This chapter takes this forward by making a detailed study of the CISG itself. This is crucial for an understanding of whether the CISG does in fact reflect the needs of developing countries such as Iran. As part of this, it is also important to understand the issues relating to the interpretation of the CISG, and whether the CISG continues to reflect the interests of both developing and developed nations.

Iran supported the drafting of the CISG during its early stages. It was among the 14 states comprising a Working Group established by the United Nations Commission on International Trade Law (UNCITRAL) in 1969.<sup>147</sup> As explained in chapter two,<sup>148</sup> the Working Group was authorised to prepare revisions of the 1964 Conventions or to develop a new text that would be more widely accepted by countries with different legal, political and economic backgrounds. As a developing country, Iran did not feel threatened by the idea of a uniform law as such, but there were concerns among the developing countries that a uniform law might not reflect their interests.

UNCITRAL laid the foundations for discussing certain changes within international trade. An investigation into the events and provisions of the 1980 Diplomatic Conference, held under the auspices of UNCITRAL, enables a fuller understanding of the impact of North–South relations on the final stages of the drafting of the CISG.

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<sup>147</sup> 'UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, YEARBOOK VOLUME VI: 1975' (n 129) Part Two, ch I, sect 1.

<sup>148</sup> See ch 2, 2.1.2.



Developing countries accounted for 46.8% of the nations in attendance<sup>149</sup> and as a result they influenced the actual agreement on international trade.<sup>150</sup> At the most fundamental level, they differed on the importance of the core principle of freedom of contract. The developing countries demanded greater protection for their traders in transactions with parties from the industrialised nations. In contrast, the developed nations wanted more freedom of contract for their traders in all transactions, whether with parties from developed or developing countries.<sup>151</sup>

The negotiations over the CISG illustrate how North–South relations were perceived within the context of international trade law. Although the conference was not completely dominated by the issues dividing the developed and developing nations, the debates and discussions between the two groups reflected the conflicting points of view of the competing economic systems. The study and analysis of these debates provides important insight into North–South trade relations and also into arrangements for contracts between countries with different expectations.

There is no doubt that the differences between developing and developed countries were important.<sup>152</sup> Professor Farnsworth, an American representative at the Vienna Conference, stated:<sup>153</sup>

While there are differences between the common law and civil countries among the developed nations, it has been somewhat surprising to me that the developing nations are primarily “developing” and only very secondarily by tradition divided into common law or civil law.

During the Conference it was suggested that influential developed countries must agree on a balance of power with the whole world; otherwise, the unification of

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<sup>149</sup> Gyula Eorsi, ‘A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods’ (1983) 31 *American Journal of Comparative Law* 333, 335.

<sup>150</sup> Amy H Kastely, ‘Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention’ (1988) 8 *Northwestern Journal of International Law and Business* 574, 608–620.

<sup>151</sup> Albert 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).

<sup>152</sup> E Allan Farnsworth, ‘Developing International Trade Law’ (1979) 9 *California Western International Law Journal* 461, 465; See Alejandro M Garro, ‘Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods’ (1989) 23 *International Lawyer* 443, 469.

<sup>153</sup> Farnsworth, *ibid.*

commerce and contract law would be restricted to the developed world.<sup>154</sup> Also, to ensure that the new system functioned, all parties were required to be flexible, open and perceptive to the needs of other trading parties from the rest of the globe.<sup>155</sup> The North–South debates over the CISG coincided with changes in international markets.<sup>156</sup> The financial, capital and commercial markets were becoming increasingly integrated at the global level. This was accompanied by changes in the bargaining position of nations as market participants.<sup>157</sup> During the 1970s, Asian countries such as Hong Kong, Singapore, South Korea and Taiwan, emerging as a capital market, became almost new strong nations. The wealth of OPEC countries stood in opposition to their relative underdevelopment,<sup>158</sup> meaning that the traditional formula that a country receiving technology had a weaker bargaining position was no longer always true.<sup>159</sup> On top of that, the Third-World quest for a New International Economic Order strongly demanded an equal distribution of economic power.<sup>160</sup> The previous chapter considered the historical development of the NIEO and the role of UNCITRAL in its implementation.

This chapter is an attempt to investigate the link between the NIEO and the CISG. One of the intentions behind the CISG was to contribute to the achievement of an NIEO. Indeed, the Preamble refers to the NIEO and the importance of developing trade ‘on the basis of equality and mutual benefit.’ These objectives reflected the desire to create a structure for international trade that would be fairer to developing nations. A study of these questions is important for Iran as a non-signatory state. This is because the perception may still exist that the CISG tends to favour sellers of manufactured goods in the industrialised countries at the expense of buyers in developing countries such as Iran. In addition to this, Iran lacks bargaining power compared with its trading partners in developed countries. It is not important whether Iran is at the selling or the buying end of an international contract. As sellers of commodities, Iranian traders are

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<sup>154</sup> Garro, ‘Reconciliation of Legal Traditions’ (n 152) 468.

<sup>155</sup> Rosett, ‘Critical Reflections on the United Nations Convention’ (n 14) 268–69.

<sup>156</sup> Norbert Horn, ‘Uniformity and Diversity in Commercial Contract Law’ in Norbert Horn and Clive M Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (1982) 4–5.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> Horn, ‘Uniformity and Diversity in Commercial Contract Law’ (n 156).

<sup>160</sup> Pedro Roffe, ‘Transfer of Technology: UNCTAD’s Draft International Code of Conduct’ (1985) 19 *International Lawyer* 689, 689–92; Seymour J Rubin, ‘Economic and Social Human Rights and the New International Economic Order’ (1986) 1 *American University International Law Review* 67, 80–85.

'confronted with a powerful world market of buyers, and, as buyers of industrial products, they encounter the know-how and economic power of their co-contractor.'<sup>161</sup> Therefore, it needs to be made clear that this chapter is more about the present importance of these questions for Iran, rather than their historical importance. To that end, Part One of this chapter provides information on the significance of the preamble to a convention in general, what the Preamble to the CISG is used for, and how this might affect the position of Iran in deciding whether or not to adopt the CISG. Part Two then examines four major issues and the related provisions of the CISG in which the developing nations sought to protect their interests. The negotiations over these matters were of great importance to the developing nations, and indeed to the developed nations too, as a failure to take the interests of the developing nations into account had contributed to the failure of the ULIS and ULF. Part Three analyses case law on the CISG, the post-ratification effect of the CISG on developing countries, and whether an analysis of CISG case law reveals evidence of any of those concerns raised by developing countries during negotiations. This will enable a conclusion to be reached on whether the adoption of the CISG, as drafted and interpreted, should be regarded as furthering the interests of developing countries such as Iran.

## **Part One**

### **3.2 Preamble to the UN Convention on Contracts for the International Sale of Goods and Import of NIEO**

The Preamble to the CISG states the following:

The States Parties to this Convention,  
Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

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<sup>161</sup> Van der Velden, 'The Law of International Sales: The Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980 – Some Main Items Compared' in Voskuil and Wade (eds), *Hague-Zagreb Essays 4 On the Law of International Trade* (1983) 68.

Considering that the development of international trade on the basis of equality and mutual benefits is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows: . . .

The Preamble to the CISG thus refers to an important concept: the establishment of a New International Economic Order (NIEO). This suggests that the CISG might have something more to offer developing nations than the ULIS and ULF. This fact might have been the driving force behind the desire of the developing countries to participate in the drafting process. But does the Preamble, on its own, have any impact on interpretation? A study of the Commission's programme of work has failed to reveal the intention of the drafters in making this allusion to the NIEO. It is therefore important to examine the extent to which an interpretative role and significance are given to the Preamble, and whether it is given this role to interpret other provisions of the CISG. If so, can one interpret other provisions of the CISG in the light of the NIEO? To answer these questions, the general principles governing the relevance of a preamble to a convention will be considered first. A brief overview of the Preamble to the CISG will then be provided, followed by a consideration of what this Preamble is used for. The relationship between the CISG and the Vienna Convention on the Law of Treaties (VCLT) will then be examined, since the VCLT influences the interpretation of the CISG. Finally, the significance of the Preamble to the CISG will be considered.

### **3.2.1 The Preamble**

What needs to be clarified is what the preamble of a treaty denotes and what its functions are. Treviranus argues that the preamble sets out the reasons for the conclusion of the treaty by representing the shared principles of and defining the retrospective, current and prospective state of relations among the contracting parties. As long as the bilateral relations, which stipulate contractual commitments, are defined as preconditions for the conclusion and implementation of a treaty, such a

clause is regarded as legally significant for implementation and termination purposes. In addition to these reasons, the object and purpose of the concluded treaty is set forth in its preamble.<sup>162</sup>

Article 31(2) of the Vienna Convention on the Law of Treaties 1969 states that the text and all components of a treaty, including the preamble, can be used for the purposes of interpretation.<sup>163</sup> The preamble is a part of the context and primary source of interpretation; the decisions of international courts and tribunals affirm such importance being attached to the preamble.<sup>164</sup> In other words, the preamble is the essence of a treaty, since it establishes the meaning of the provisions of that treaty and makes clear their purpose. This applies particularly to preambles that establish a certain regime or close co-operation.<sup>165</sup>

### 3.2.2 Overview

The background, nature, general purposes and approaches of the CISG are laid out in the Preamble to the Convention. It opens with the statement that parties to the Convention are states, and closes by declaring that the Convention is an agreement between those states. There are three principal clauses in between, the first two of which position the CISG in the context of broader international programmes and goals, while the third specifies the specific purposes and methods of the Convention.

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<sup>162</sup> Hans-Dietrich Treviranus, 'Preamble' in *Encyclopaedia of Public International Law Volume 7* (1992) 393–394.

<sup>163</sup> This will be discussed in more detail later in this chapter. See Part One, 3.2.4.

<sup>164</sup> See *Asante Technologies v PMC-Sierra* [2001] Federal District Court [California].

< <http://www.cisg.law.pace.edu/cases/010727u1.html> > accessed 5 August 2013; CLOUT case No 433 [Federal District Court, Northern District of California, United States, 30 July 2001].

In order to show an intent that the CISG should supersede internal domestic law on matters within its scope, the court cited language from the second main clause of the Preamble ('the development of international trade on the basis of equality and mutual benefit') and the third main clause of the Preamble ('the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade').

See *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc* [2002] Federal District Court [New York].

< <http://cisgw3.law.pace.edu/cases/020510u1.html> > accessed 5 August 2013; CLOUT case No 579 [Federal District Court, Southern District of New York, United States, May 10, 2002].

The court cited language from the third main clause of the Preamble ('the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade') in order to establish that the CISG superseded contract claims based on internal domestic law.

<sup>165</sup> Treviranus, 'Preamble' (n 162) 393–394.

The first clause ('Bearing in mind . . .') recommends that the CISG comply with the 'broad objectives' of UN Resolutions to establish a 'New International Economic Order.' The second clause signifies that promoting 'friendly relations among States' through 'the development of international trade on the basis of equality and mutual benefit' is the general purpose of the CISG. In the third clause, the particular purposes are indicated: 'the development of international trade' and 'the removal of legal barriers in international trade' that is in line with harmonisation of law. The third clause further mentions particular aspects of the CISG as a set of 'uniform rules' which 'takes into account the different social, economic and legal systems.'<sup>166</sup> In Article 7(1) of the CISG, emphasis is added on the uniformity and no superiority of particular legal and socio-economic traditions. This article mandates the need to interpret the Convention with regard 'to its international character and to promote uniformity in its application.'<sup>167</sup>

### 3.2.3 What Is the Preamble to the CISG Used For?

The main question in relation to the Preamble is whether any interpretative role is given to it.<sup>168</sup> There are two schools of thoughts on this subject. Schlechtriem argues that '[t]he Preamble to the Convention . . . refers to the public international law obligations and goals of the signatory states and may not be used for the interpretation and gap-filling of the substantive legal provisions . . .'<sup>169</sup> Evans takes a similar view, suggesting that: ' . . . the character of the Convention is essentially technical and that rules of interpretation are already to be found in Article 7(1). In consequence, the scope for interpretation in the light of the Preamble may not be very wide . . .'<sup>170</sup> When it comes to the interpretation of the CISG, it should be noted that its Preamble and Article 7 lack 'any specific methodology' for how to interpret it. In

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<sup>166</sup> Loukas Mistelis, 'Preamble' in Stefan Krol, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011).

<sup>167</sup> 'UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods' (2008).

<[http://www.uncitral.org/pdf/english/clout/08-51939\\_Ebook.pdf](http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf)> accessed 2 July 2013.

<sup>168</sup> Mistelis, 'Preamble' (n 166).

<sup>169</sup> Peter Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods* (Manz: Vienna 1986) as stated in footnote no 111.

<sup>170</sup> Malcolm Evans, 'Preamble' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffrè: Milan 1987) 25.

fact, the purposes of the Convention, *inter alia* to promote a New International Economic Order, as laid out in the Preamble, do not provide such practical utility.<sup>171</sup>

Against these views, Kastely argues that the Preamble ‘informs many other provisions.’<sup>172</sup> Enderlein and Maskow maintain that the Preamble cannot be dismissed:

The principles it contains can be referred to in interpreting terms or rules of the Convention, such as the terms of “good faith” (article 7, paragraph 1) or the rather frequent and vague term “reasonable.” It could also be used to fill gaps because those principles can be counted among, or have an influence on, the basic rules underlying the Convention (article 7, paragraph 2). The spirit of the Preamble should also be taken account of when agreed texts of sales contracts are to be interpreted.<sup>173</sup>

A study of case law suggests that references are indeed made to the Preamble to the CISG. For example, in 2002, the court found that ‘[t]he intent of the contracting parties to the CISG can be discerned from the introductory text.’<sup>174</sup> In another case, in 2001, the issue was how to decide whether state law or the CISG governed the sales contract. The court held that the CISG’s ‘expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty pre-empt state law causes of action.’<sup>175</sup>

Mistelis<sup>176</sup> argues that:

‘despite the character of the Preamble as an expression of political declaration of the Contracting States which may well contrast with the technical/normative

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<sup>171</sup> Michael Maggi, *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002–2003* (Kluwer Law International 2004) 25.

<sup>172</sup> Kastely, ‘Unification and Community’ (n 150) 594.

<sup>173</sup> Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana 1992) 20.

<sup>174</sup> See *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc* [2002] Federal District Court [New York]. < <http://cisgw3.law.pace.edu/cases/020510u1.html> > accessed 5 August 2013; CLOUT case No 579 [Federal District Court, Southern District of New York, United States, May 10, 2002].

<sup>175</sup> See *Asante Technologies v PMC-Sierra* [2001] Federal District Court [California]. < <http://www.cisg.law.pace.edu/cases/010727u1.html> > accessed 5 August 2013; CLOUT case No 433 [Federal District Court, Northern District of California, United States, 30 July 2001].

<sup>176</sup> Mistelis, ‘Preamble’ (n 166).

nature of the substantive provisions of the Conventions, it may be used for the compliance of possible interpretations with the spirit of the Convention, especially in legal cultures where the Preamble is looked at customarily.

### **3.2.4 The Relationship Between the CISG and the VCLT**

The suggestion that the Vienna Convention on the Law of Treaties is also applicable in the interpretation of the CISG raises the question of how connected these two sets of conventions are. One can argue that the CISG is primarily a private law convention, since it deals with the rights and obligations of buyers and sellers, rather than a public law convention, which deals with the rights and obligations of states; therefore, how did the VCLT become relevant to the interpretation of a private law convention (in this case the CISG)? As the CISG lacks any tools or methods for interpreting the interpretative article, it cannot interpret itself.<sup>177</sup> Therefore, it is suggested that this should be left to the VCLT or to the 'rule of customary public international rules,'<sup>178</sup> and, at the very least, the VCLT can be used for pragmatic purposes (such as determining the meaning of 'principle' under CISG Article 7(2)).<sup>179</sup>

According to Roth and Happ, in the interpretation of the CISG Articles 31 to 33 of the VCLT should be taken into account.<sup>180</sup> They argue that the rules of the VCLT and valid customary international law are consistent.<sup>181</sup>

There is no convincing argument against interpreting all the provisions of the CISG according to international law rules. Since the CISG is a treaty governed by international law, it must be interpreted according to rules of international law as set forth in Art 31–33 of the VCLT.<sup>182</sup>

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<sup>177</sup> Bruno Zeller, 'Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) according to Principles of International Law – a reply.'

<[http://eprints.vu.edu.au/812/1/Zeller\\_InterpUNConvContracts.pdf](http://eprints.vu.edu.au/812/1/Zeller_InterpUNConvContracts.pdf)> accessed 2 July 2013.

<sup>178</sup> *ibid.*

<sup>179</sup> Joseph Lookofsky, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law' (2005–06) 25 *Journal of Law and Commerce* 87.

<sup>180</sup> M Roth and R Happ, 'Interpretation of the CISG According to Principles of International Law' (1999) vol IV *International Trade and Business Law Annual* 1, 5.

<sup>181</sup> *ibid.*

<sup>182</sup> Roth and Happ, 'Interpretation of the CISG According to Principles of International Law' (n 180) 11.



But to what extent does the VCLT have an impact on the interpretation of the CISG? In other words, does the VCLT still apply to interpretations of the CISG if a state has not ratified it but has ratified the CISG? Although the VCLT cannot be used if it is not ratified,<sup>183</sup> in public international law, 'when a meaning in a provision is unclear courts employ VCLT as the method of interpreting the meaning of the questionable provision.'<sup>184</sup> Articles 31 and 32 of the VCLT have been adopted by international courts as customary international law and, pursuant to this status of customary international law, are used to interpret public treaties almost universally in international courts.<sup>185</sup> As discussed in the previous section, the Preamble to the CISG could be also interpreted in the light of the VCLT, Article 31(2) of which pays regard to the interpretation of the treaty in accordance with its context, including its Preamble. Therefore, one could argue that the establishment of a New International Economic Order, as contained in the Preamble to the CISG, is given an interpretative role, even if the scope for interpretation may not be very wide.

### **3.2.5 The Significance of the Preamble to the CISG**

In order to assess the importance of the Preamble, it might be particularly pertinent to indicate the driving forces behind the inclusion of a mention of the NIEO in the Preamble, and whether the CISG contributes towards the establishment of the NIEO. Finally, it is worth asking: should such an inclusion of the NIEO have an impact on the interpretation of the CISG?

So far, it has been established that the Preamble to the Convention indicates the aim and underlying objective of the Convention, and, more generally, the motivation for creating this set of uniform laws on the international sale of goods.<sup>186</sup> As Felemegas argues, 'the Preamble to the CISG seems to describe the character of the union among the States who have authored the text with those who read it. The words of the

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<sup>183</sup> Zeller, 'Interpretation of the United Nations Convention on Contracts for the International Sale of Goods' (n 177).

<sup>184</sup> Keith William Diener, 'Recovering Attorneys' Fees under CISG: An Interpretation of Article 74' (2008) 1 Nordic Journal of Commercial Law.

<sup>185</sup> See Case Concerning Legality of Force, *Serbia and Montenegro v Portugal* [2004] ICJ LEXIS 14 [102]. 'The Court will thus proceed to the interpretation . . . of the Statute, and will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties.'

<sup>186</sup> Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, OUP 2005) 13.

Preamble seem to emphasise the conscious act of agreement by the member States.<sup>187</sup> And:<sup>188</sup>

The wording used in the Preamble indicates that the union of nations by CISG is the result of careful consideration and express agreement . . . However, the fact that most of this is in standard treaty language clearly undercuts the strength of any proposal to attach greater meaning or importance to the CISG Preamble . . .

Therefore, it is fair to say that, among other things, contributing to a new international order is the purpose of the CISG. The writing and reading of the CISG, along with the actual political and economic community, determine the relationship among the states that have already joined or will join this Convention.

Professor Kastely argues that the Preamble to the CISG forms a community that is 'both consensual and motivated by self-interest' and the main focus of which is 'on the possibility of encouraging international trade, to the benefit of both industrialised and the developing nations.'<sup>189</sup> Professor Winship, on the other hand, argues that the text of the Preamble contains altruistic elements and is free from any self-interest.<sup>190</sup> He emphasises certain phrases in the Preamble to the CISG that for the first time recognise specific concerns of developing nations.

Felemegas argues that 'the act of joining the community formed by CISG' is 'an apt recognition of the equal status of less developed countries.' He continues that a danger exists that analysing the 'unification on equal terms,' which created relief and euphoria after its official introduction to the world, may obscure the benefits that were granted to the developing countries. In other words, if the developing nations cannot ascertain the real benefits that can be achieved from the CISG, it may turn into 'a symbolic gesture.' Therefore, it is only the correct interpretation and uniform

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<sup>187</sup> John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000–2001) *Kluwer Law International* 115.

<sup>188</sup> *ibid.*

<sup>189</sup> Kastely, 'Unification and Community' (n 150).

<sup>190</sup> Peter Winship, 'Commentary on Professor Kastely's Rhetorical Analysis' (1988) 8 *Northwestern Journal of Law and Business* (1988) 623.

application of the text that can protect it.<sup>191</sup> Professor Bonell argues that the preamble to an international agreement indicates ‘the aim of the agreement and any specific considerations underlying it.’ He then concludes that the CISG has a more advanced preamble than other Conventions developed within UNCITRAL.<sup>192</sup> The Preamble to the United Nations Convention on the Limitation Period in the International Sale of Goods (1975) has similarities with the Preamble to the CISG. It states that:

Considering that international trade is an important factor in the promotion of friendly relations among States;

Believing that the adoption of uniform rules governing the limitation period in international sale of goods would facilitate the development of world trade . . .

Whether this similarity in the repetition of clauses can be regarded as a reconfirmation of notions and principles, or merely as a matter of stylistic formula and nothing more, is still an open question.<sup>193</sup>

Kastely states that ‘the use of [such] form and the lack of dispute reflects the broad acceptance of the principles underlying the Preamble,’<sup>194</sup> while Winship suggests that ‘the language in paragraphs two and three, which is also found in prior treaties, could reflect indifference to the use of language that has become familiar and considered innocuous.’<sup>195</sup> Felemegas also believes that such a standard form of language in the CISG Preamble limits the intrinsic importance attached to it.<sup>196</sup> Having said that, the incorporation of certain ideas derived from the concerns of Third-World countries, which had previously never been addressed, makes this preamble unique.<sup>197</sup> The significance of the wording of the Preamble to the CISG and the weight that one can place on it can be determined by the VCLT. As discussed earlier, Article 31(2) of the VCLT, which regards the preamble of a treaty as part of the context for the purpose of interpretation of the treaty, should be taken into account in the interpretation of the

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<sup>191</sup> Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods’ (n 187).

<sup>192</sup> Michael J Bonell, ‘Introduction to the Convention’ in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffr : Milan 1987) 1.

<sup>193</sup> Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods’ (n 187).

<sup>194</sup> Kastely, ‘Unification and Community’ (n 150).

<sup>195</sup> Winship, ‘Commentary on Professor Kastely’s Rhetorical Analysis’ (n 190).

<sup>196</sup> Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods’ (n 187).

<sup>197</sup> *ibid.*

CISG. However, the problem is that the rules for the interpretation of the CISG are accommodated in Article 7 of the Convention. Bonell<sup>198</sup> has stated in this regard that:

The scope for interpretation in the light of the Preamble may not be very wide and it will be of interest to see how far the case law may accord its provisions the status of something more than general declarations of political principle.

This author is of the opinion, however, that such an interpretive role exists for the Preamble to the Convention, in particular in the light of the establishment of the NIEO; however, such a role has a very limited scope. Therefore, given the important diplomatic conference and textual compromises that were accommodated in the Convention, the value of the Preamble to the CISG should not be entirely disregarded. Nevertheless, no expansive interpretive role is justified for the Preamble.

Many commercial lawyers in the developed world believed that the NIEO was all about process and inclusion and that it lacked substance. But whether or not the NIEO had an impact on the substantive content of the private law governing international trade is an important point, which leads on to a study of the specific drafting issues that arose during the most important round of negotiations in the legislative history of the CISG, that between the developed and the developing countries of the world.

## **Part Two**

### **3.3 Specific Drafting Issues**

The widespread participation of nations with various orientations and ties suggested that negotiations over the CISG would be difficult. The debates were divided not only between common law and civil law, but also along North–South or developed–developing lines. Having said that, the delegates from developing countries did not challenge the general principles of international commercial law as unsuitable to their countries' conditions. Instead, they concentrated on three practical matters. First, their economies relied on the export of raw materials, unfinished goods and

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<sup>198</sup> Bonell, 'Introduction to the Convention' (n 192).

commodities. Of course, there have been occasions when exporting countries have taken advantage of their economic power as commodity exporters (the 1973 OPEC boycott is one example), but generally most commodity-exporting countries are not in such a strong position to establish effective cartels. Instead, it has been in the developed world that the prices in commodity markets have been determined. In addition, trade associations have more power in deciding standard contractual terms. Therefore, the importers of finished goods in developing countries had to negotiate those contractual terms with powerful manufacturers in better bargaining positions. This question of how to protect the exporters of commodities and importers of manufactured goods was a key concern of developing nations at the Vienna Conference.<sup>199</sup>

The second point concerned the network of banking, insurance, shipping, legal and other sorts of expert service that form the basis of international trade. These services tend to be concentrated in the developed countries, and indeed in a small number of important international centres, such as London, New York and Paris. Therefore, provisions that fail to take account of such inequalities could function to the detriment of traders in developing countries.<sup>200</sup> Finally, there was a feeling that developing nations frequently mistrusted the developed world.<sup>201</sup>

These three concerns were raised with regard to four specific issues that divided the delegates on North–South lines: (i) the procedures for notifying the seller of non-conformity; (ii) the circumstances that would allow a party to suspend its performance; (iii) the rules governing the risk of loss of goods sold in transit; and (iv) the role trade usages should play in international sales.

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<sup>199</sup> S K Date-Bah, 'Vienna Sales Convention 1980 – Developing Countries' Perspectives' in Rao Penna et al (eds), *Current Developments in International Transfers of Goods and Services* (Butterworths 1994) 87, 92; Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 350.

<sup>200</sup> Eorsi, *ibid.*

<sup>201</sup> Eorsi, *ibid.*

### 3.3.1 The North–South Issues: The Non-Conforming Procedures (Articles 37–38 (Draft Convention) – Article 39 (CISG))

Part III of the Vienna Convention deals with the substantive obligations of buyers and sellers. This includes the provisions for giving notification of lack of conformity of goods by the buyer to the seller as contained in Article 39. Therefore, a study of the issue of non-conforming goods is important, as it was closely linked with the concerns of developing countries at the time of negotiation. The developing countries were not confident that traders would have the expertise or infrastructure to give prompt and accurate notice according to the standards of some developed countries. In the preparation of the CISG, procedures for non-conformity were considered to be one of the most disputed areas.<sup>202</sup>

Delegates from developing countries at the Vienna Conference were particularly concerned about (i) being penalised unjustifiably when the jurisdiction has no notice-requirement regime;<sup>203</sup> and (ii) its being burdensome to specify the nature of the lack of conformity, in particular when this requires hiring an expert to specify it.<sup>204</sup>

Therefore, the next section considers the drafting history of the provisions of lack of conformity, as this provided a very good basis for the Vienna Diplomatic Conference to reflect the developing countries' concerns in the CISG.

#### A. Drafting History

Article 38(1) of the CISG states: 'The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.' CISG

Article 39(1) also provides that:

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<sup>202</sup> CISG Advisory Council Opinion No 2, 'Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39' (2004). Rapporteur: Professor Eric E Bergsten, Emeritus, Pace University School of Law, New York.

<sup>203</sup> Mr Date-Bah, delegate from Ghana.

'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 16<sup>th</sup> meeting.' <<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting16.html>> accessed 2 July 2013.

<sup>204</sup> S K Date-Bah, 'The Convention on the International Sale of Goods from the Perspective of the Developing Countries' in *La Vendita Internazionale – La Convenzione Di Vienna Dell' 11 Aprile 1980* (26–28 Settembre 1980) 24.

[T]he buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

For the purposes of this section, it is important to explain why the examination of goods, as specified in CISG Article 38, becomes relevant to the procedures of non-conformity. As Professor Date-Bah, Ghanaian representative at the UN Conference, states, Article 39(1) of the CISG should be read in conjunction with Article 38(1). This is because, when it comes to determining that the lack of conformity ought to have been discovered by a buyer, the ‘relativistic’ language of Article 38(1) should be taken into consideration.<sup>205</sup> Moreover, Article 38 is prefatory to Article 39.<sup>206</sup>

Therefore, this section first considers the duty to examine the goods and then turns to the duty to give notice of lack of conformity.

### **a) The Duty to Examine the Goods Under Article 38**

ULIS was prepared by countries whose legal systems had a strict notice requirement. Consequently, Article 38 of ULIS<sup>207</sup> in its first paragraph provided that ‘the buyer shall examine the goods, or cause them to be examined, promptly.’ Promptness was further defined in Article 11<sup>208</sup> of ULIS as ‘within as short a period as possible, in the circumstances.’ Article 39 of ULIS also provided that notice had to be given ‘promptly

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<sup>205</sup> Date-Bah, ‘The Convention on the International Sale of Goods from the Perspective of the Developing Countries’ (n 204).

<sup>206</sup> ‘Guide to CISG Article 38, Secretariat Commentary.’

<<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html>> accessed 10 February 2014.

<sup>207</sup> Article 38 of ULIS states:

1. The buyer shall examine the goods, or cause them to be examined, promptly.
2. In case of carriage of the goods the buyer shall examine them at the place of destination.
3. If the goods are redespached by the buyer without transshipment and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redespach, examination of the goods may be deferred until they arrive at the new destination.
4. The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.

<sup>208</sup> Article 11 of ULIS states:

‘Where under the present Law an act is required to be performed “promptly,” it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed.’

after [the buyer] has discovered the lack of conformity or ought to have discovered it.’ In other words, notice had to be given within as short a period as possible.<sup>209</sup> As a result of ‘a broader array of legal systems’ during UNCITRAL work, several amendments were made to the strict notice requirement of ULIS Articles 38 and 39.<sup>210</sup> For example, the Canadian delegate held that the requirement to examine the goods ‘within as short a period as is practical’ was too severe, and proposed replacing the original wording with ‘within a reasonable period of time.’<sup>211</sup> It was also stated that, given the pace usual in Third-World countries, promptness was ‘too exacting a standard.’<sup>212</sup> In addition, the examination of technologically sophisticated goods requires highly skilled people, and the scarcity of experts in the developing world makes prompt examination of goods rather unlikely. For instance, if a Third-World country has imported a computer, it will be inappropriate to consider inspection by, for instance, the managing director of the enterprise buying it as equal to a thorough examination. Such an examination requires expertise in the field of computer science, and this may not be promptly available.<sup>213</sup> In the end, the UNCITRAL Working Group decided that the word ‘reasonable’ was too vague and the majority of delegates were against the revised Canadian proposal;<sup>214</sup> therefore, it was decided that the examination should be conducted ‘within as short a period as is practicable in the circumstances’<sup>215</sup> (as required by Article 38(1) of the CISG). As a result of this modification, during the 1980 Diplomatic Conference, there was no major discussion in

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<sup>209</sup> It was only Article 40 of ULIS that moderated this strict regime. It provided: ‘The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.’

<sup>210</sup> CISG Advisory Council Opinion No 2, ‘Examination of the Goods and Notice of Non-Conformity’ (n 202).

<sup>211</sup> Mr Shore, delegate from Canada.

‘LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 14<sup>th</sup> meeting.’

<<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting14.html>> accessed 10 February 2014.

<sup>212</sup> Date-Bah, ‘The Convention on the International Sale of Goods from the Perspective of the Developing Countries’ (n 204).

<sup>213</sup> *ibid.*

<sup>214</sup> ‘LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference’ (n 211).

<<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting14.html>> accessed 10 February 2014.

<sup>215</sup> Working Group II, 1968–1978: International Sale of Goods, 6<sup>th</sup> session, 27 January–7 February 1975, New York.

[A/CN.9/100 - Report of the Working Group on the International Sale of Goods on the work of its sixth session](http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/v016-p49-62-e.pdf) para 59. <<http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/v016-p49-62-e.pdf>> accessed 2 July 2013.



relation to what is today Article 38;<sup>216</sup> however, ‘the discussions on [what is today] article 39 were intense.’<sup>217</sup>

## **b) The Duty to Give Notice of Non-Conformity Under Article 39**

Article 39 of ULIS originally required prompt notice to be given, for example, within as short a period as possible. But this was later amended so that notice had to be given ‘within a reasonable time’ after the buyer had discovered the lack of conformity or ought to have discovered it. It was also said that ‘what is a “reasonable time” was, of course, a question that depended on the circumstances of each case.’<sup>218</sup>

CISG Article 39 provides that:

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

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<sup>216</sup> Article 38 of the CISG states:

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

<sup>217</sup> CISG Advisory Council Opinion No 2, ‘Examination of the Goods and Notice of Non-Conformity’ (n 202).

<sup>218</sup> Working Group II, 1968–1978: International Sale of Goods, 3<sup>rd</sup> session, 17–28 January 1972, Geneva [A/CN.9/62/Add.1 - Progress report of the Working Group on the International Sale of Goods on the work of its third session, held in Geneva from 17 to 28 January 1972](#) para 78.  
<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/200/38/PDF/NL720038.pdf?OpenElement>> accessed 2 July 2013.

The discussions were divided between representatives from developing nations and those from the developed nations.<sup>219</sup> Professor Eorsi, chairman of the Hungarian delegation, who was elected president of the Vienna Conference on International Sales,<sup>220</sup> describes the atmosphere in debates on Article 39 as ‘sometimes rather harsh.’<sup>221</sup> Those who put forward arguments for more modifications in the notice requirement were concerned about unacceptable consequences for buyers from developing countries.<sup>222</sup> The Ghanaian delegate, Professor Date-Bah, made an unsuccessful attempt to introduce an amendment to eliminate the provision requiring notice to be given within a reasonable time and the sanction for the buyer when he fails to give notice.<sup>223</sup> The concerns of delegates from developing countries were partly related to purchases of ‘complex and manufactured’ goods from outsiders that sell ‘shoddy’ goods, where it is only after delivery to unsophisticated buyers that flaws become apparent.<sup>224</sup> More importantly, their other concern was rooted in their inability to give notice in a ‘reasonable time’ because of their developing infrastructures. Furthermore, ‘submitting the written declaration within a reasonable time’ would be a problem for uneducated tradesmen, especially as countries need to run tests on ‘imported, complicated machinery,’ bearing in mind that, ‘not infrequently, delivered goods remain unpacked in the harbour for more than two years or that delivery to their final destination was frequently delayed.’<sup>225</sup> This in fact suggested that such requirements for notification of non-conformity within a reasonable time are often rather difficult and sometimes impossible to comply with.

The Ghanaian delegate also argued that the obligation to specify the nature of non-conformity was too ‘onerous’; especially when it involved the need to hire the services

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<sup>219</sup> CISG Advisory Council Opinion No 2, ‘Examination of the Goods and Notice of Non-Conformity’ (n 202).

<sup>220</sup> See Schlechtriem, *Uniform Sales Law* (n 169).

<sup>221</sup> Eorsi, ‘A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods’ (n 149) 349.

<sup>222</sup> CISG Advisory Council Opinion No 2, ‘Examination of the Goods and Notice of Non-Conformity’ (n 202).

<sup>223</sup> Mr Date-Bah, delegate from Ghana.

‘LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference’ (n 203).

<<http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting16.html>> accessed 10 February 2014.

<sup>224</sup> Rosett, ‘Critical Reflections on the United Nations Convention’ (n 14).

<sup>225</sup> Mr Date-Bah, delegate from Ghana, at the August 1979 Potsdam colloquium of the International Association of Legal Science on the proposed Convention in Eorsi, ‘A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods’ (n 149) 350.

of an expert to specify the nature of the lack of conformity.<sup>226</sup> In a hypothetical example given by Professor Date-Bah, a school orders a photocopying machine, and the machine is examined by the headmaster. He realises that it does not work, but since he does not have the technical expertise to find out why it does not work, he may merely give a notice of lack of conformity without being able to specify the nature of that non-conformity. Since it is the seller who is in breach, it should suffice that his goods are defective, and ascertaining the nature of the lack of conformity should be his responsibility.<sup>227</sup>

The delegate from Ghana sought to introduce a second proposal, which retained the requirement of notice within a reasonable time, but softened the drastic loss of remedy for failure to give notice.<sup>228</sup> Although this second proposal was widely discussed, a substantial majority of delegates were against such an amendment. The debate also concerned the consequences of a failure to give due notice. In many countries, whether developing or developed, the consequences are not necessarily severe. In common law, for example, the usual rule is that a failure to reject goods within a reasonable time is deemed to signify acceptance; however, it does not necessarily follow that the buyer may not claim damages for a breach. Under Article 39(2), the buyer loses the right to rely on non-conformity, even in a claim for damages. Professor Date-Bah, who was strongly in favour of amendments to the notification requirement, was of the opinion that those in jurisdictions with no such rules would be penalised 'unduly,' as they might not be aware of such requirements, and consequently, by not following them, they would lose their rights. He further stated that, as a consequence of not giving notice of non-conformity within a reasonable time, instead of 'complete forfeiture of rights,'<sup>229</sup> mitigation of damages should occur.<sup>230</sup>

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<sup>226</sup> Date-Bah, 'The Convention on the International Sale of Goods from the Perspective of the Developing Countries' (n 204).

<sup>227</sup> *ibid.*

<sup>228</sup> Mr Date-Bah, delegate from Ghana.

'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 203).

< <http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting16.html> > accessed 10 February 2014.

<sup>229</sup> Gabrielle S Brussel, 'The 1980 United Nations Convention on Contracts for the International Sale Of Goods: A Legislative Study of the North-South Debates' (1993) 6 *New York International Law Review* 53.

<sup>230</sup> Mr Date-Bah, delegate from Ghana.

'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 203).

This opinion met with some consensus from the developing countries (including Kenya, Pakistan, Nigeria, Mexico, Singapore and Libya)<sup>231</sup>, one socialist country (China)<sup>232</sup> and one developed country (the UK). The delegate from the UK held that it seemed severe to deprive the buyer of his right to damages on the basis of non-conformity of goods merely owing to his failure to give notification of non-conforming goods within a reasonable time.<sup>233</sup>

Many delegates from the developed world took a different view. For example, the Danish representative<sup>234</sup> criticised and questioned the proposal, since this would favour the buyer and the buyer:

would be able to speculate at the risk of the seller. If he found a lack of conformity, he could simply watch the market for the goods so as to keep them if the price rose. If the price fell, he would invoke non-conformity to avoid the contract and buy the goods he required more cheaply elsewhere.

Moreover, from the Swedish delegate's point of view,<sup>235</sup> the Ghanaian proposal was short-sighted and unreasonable. He stated that:

reduction of damages was an unsatisfactory remedy, and was as hard on the seller as on the buyer. The main purpose of the rule was in fact to secure evidence in the case of dispute. If the seller were to establish the cause of the defects complained of, he would need to know of them at an early stage. It would not help him to know that at some later stage damages might be reduced.

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<sup>231</sup> Mr Waititu, delegate from Kenya; Mr Mehdi, delegate from Pakistan; Mr Osah, delegate from Nigeria; Mr Mantilla-Molina, delegate from Mexico; Mr Khoo, delegate from Singapore; and Mr Elhurvi, delegate from Libya.

'United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records' *A/CONF.97/19*, 321, paras 42, 46, 48, 50, 51; 322, para 59.  
<<http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>> accessed 2 July 2013.

<sup>232</sup> Mr Li Chih-min, delegate from China, stated: 'A buyer who failed to give notice to the seller in due time should not forfeit his right to rely on a lack of conformity of the goods. The Ghanaian proposal maintained a proper balance between the interests of the buyer and of the seller.'

'Official Records' *A/CONF.97/19* (n 231) 321, para 47.

<sup>233</sup> Miss O'Flynn, delegate from the United Kingdom.

'Official Records' *A/CONF.97/19* (n 231) 321, para 49.

<sup>234</sup> Mr Tronning, delegate from Denmark.

<sup>235</sup> Mr Hjernner, delegate from Sweden.

The developed nations also approached the requirement for notification of non-conformity within a reasonable time on the basis of their own infrastructure and educational expertise. It was 'the speedy settlement of disputes' that carried more weight with them than protecting the buyers' right to damages regarding the non-conforming goods.<sup>236</sup> Furthermore, the maintenance of equal bargaining power between buyers and sellers, from the developed nations' viewpoint, was a reflection of sellers' concerns.

Such strong opposition resulted in the withdrawal of the Ghanaian proposal. But, as a result of informal consultations between representatives, it became apparent that a satisfactory compromise was necessary<sup>237</sup> between those who considered a two-year notice limitation to be too short (as contained in current CISG Article 39(2)), and those who considered it adequate.<sup>238</sup> It was also necessary to reconcile those who would use the absence of timely notice of non-conformity as an impediment to recovery with those who would use it to mitigate charges.<sup>239</sup>

As a result, Professor Date-Bah introduced a joint proposal by Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden.<sup>240</sup> Two important elements were maintained: (i) the requirement to give notice of non-conformity to the seller within a reasonable time (as appears in Article 39(1) of the Final Vienna Convention); and (ii) the requirement that notifying the seller take place within two years from 'the date on which goods were actually handed over to the buyer' (as appears in Article 39(2) of the Final Vienna Convention). It would not be possible, however, to rely on Articles 36 or 37 of the Draft Convention if the seller knew or should have known of non-conformity.<sup>241</sup>

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<sup>236</sup> Mr Hosokawa, delegate from Japan.

'Official Records' A/CONF.97/19 (n 231) 322, para 61.

<sup>237</sup> Date-Bah, 'Vienna Sales Convention 1980 – Developing Countries' Perspectives' (n 199) 92.

<sup>238</sup> Jacob S Ziegel, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981).

<sup>239</sup> John Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions that Led to the 1988 United Nations Convention* (Deventer: Kluwer 1989).

<sup>240</sup> Mr Date-Bah, delegate from Ghana.

'Official Records' A/CONF.97/19 (n 231) 345, para 1.

<sup>241</sup> John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999).

In addition, it provided that, in the event that the buyer has a reasonable excuse for not giving the notice required, he does not lose all his rights to rely on non-conformity. In particular, it stated: '[T]he buyer may declare the price reduced<sup>242</sup> . . . or claim damages for loss of profit if he has a reasonable excuse for his failure to give the required notice . . .'<sup>243</sup>

Although there were both developing and developed countries that supported this proposal, some representatives who spoke on the matter held that it was vague, 'left too many issues unresolved'<sup>244</sup> and 'sacrificed clarity for compromise.'<sup>245</sup> They further criticised the omission of a requirement to specify 'the nature of lack of conformity'<sup>246</sup> by the buyer, and the usage of new technical terms that were not yet defined.<sup>247</sup>

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<sup>242</sup> See in particular Article 50 of the CISG, which states:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

See Jacob S Ziegel and Claude Samson, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981).

<<http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>> accessed 2 July 2013.

Professor Ziegel notes:

Art. 50 confers on the buyer a right to reduce the price of non-conforming goods in lieu of claiming damages (assuming there is a right to damages) . . . Art. 50 is based on the notion that it is unjust to require the buyer to pay the full price for non-conforming goods, and the right to claim a price reduction must be carefully distinguished from the right to claim damages.

See Eric E Bergsten and A J Miller, 'The Remedy of Reduction of Price' (1979) 27 American Journal of Comparative Law 255.

See 'Annotated Text of CISG Article 50' [Match-ups with Continental and Common Law domestic rules, doctrine and jurisprudence](#)

<<http://www.cisg.law.pace.edu/cisg/text/comparison50.html#pec>> accessed 2 July 2013.

It notes that, when the non-performance is not excused, the common law approach would be 'where goods are defective the *prima facie* rule is that the buyer can recover as damages the difference between the value of the goods actually delivered and the value which the goods would have had if they had been in accordance with the contract.'

<sup>243</sup> 21<sup>st</sup> meeting.

'Official Records' A/CONF.97/19 (n 231) 345.

<sup>244</sup> Mr Farnsworth, delegate from the United States of America.

'Official Records' A/CONF.97/19 (n 231) 346, para 11.

<sup>245</sup> Mr Olivencia Ruiz, delegate from Spain.

'Official Records' A/CONF.97/19 (n 231) 346, para 13.

<sup>246</sup> Mr Ghestin, delegate from France; and Mr Rognlien, delegate from Norway.

'Official Records' A/CONF.97/19 (n 231) 346, paras 14, 15.

<sup>247</sup> Mr Farnsworth, delegate from the United States of America.

'Official Records' A/CONF.97/19 (n 231) 346, para 13.

In the end, 'in an effort to satisfy the concerns that had been expressed,'<sup>248</sup> it was decided that the major aspects of this proposal would be adopted in a separate article.<sup>249</sup> That took the form of Article 44 of the CISG, which provides that, if there is a 'reasonable excuse' for not giving notice, the buyer may mitigate damages to reduce the price. Professor Date-Bah viewed the insertion of Article 44 as a success for the delegations of some developing countries, and a triumph of the spirit of co-operation with thoughtful delegations from some developed countries.<sup>250</sup>

This author agrees with the view that Article 39, along with Article 44, maintains a sensible balance between the duties of sellers and those of buyers, as was the view of the developing countries. In a way, the core element of compromise on the subject of reasonableness (such as reasonable time and/or reasonable excuse) has improved the position of the buyer in developing countries, in particular when a dispute arises in international sales of manufactured goods.<sup>251</sup> Given the pattern of international trade in developing countries at the time of drafting (and even today), which involved the export of raw materials and import of manufactured goods, their vulnerability regarding the notification of non-conforming goods to the seller was recognised, and appropriate and effective remedies were subsequently fashioned in Articles 39 and 44. This certainly makes the CISG more attractive to a developing country such as Iran.

### **3.3.2 North–South Issues: Suspension of Performance in Anticipation of Breach (Articles 62–63 (Draft Convention) – Articles 71, 72 (CISG))**

Another area of concern to developing countries was the doctrine of anticipatory repudiation. The doctrine, contained in CISG Article 72, stipulates:

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract voided.

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<sup>248</sup> CISG Advisory Council Opinion No 2, 'Examination of the Goods and Notice of Non-Conformity' (n 202). Jacob S Ziegel, 'Report to the Uniform Law Conference of Canada' (n 238).

<sup>249</sup> Date-Bah, 'Vienna Sales Convention 1980 – Developing Countries' Perspectives' (n 199) 93.

<sup>250</sup> *ibid.*

<sup>251</sup> *ibid.* 94.

(2) If time allows, the party intending to declare the contract voided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Moreover, CISG Article 71 in paragraphs 1 and 3 provides that:

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

The developing countries criticised the CISG's suspension and avoidance provisions for two reasons: (i) the repudiating party would be severely penalised,<sup>252</sup> as the provisions deny a right to prior notice as well as the opportunity to give adequate assurances of performance. In addition, even in the event that adequate assurances were given promptly, the outcome of a brief suspension could be seriously damaging; in many cases, the party might breach onward contracts with third parties; and (ii) the grounds for exercising the right should be as objective as possible.<sup>253</sup> The subjective assessment contained in the provisions of suspension could allow abuse by a party who is seeking merely to get out of an unprofitable contract because of, for example, a rising market; or, in bad faith, a party may use the provision to exploit 'the other party's unstable state.'<sup>254</sup>

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<sup>252</sup> Mr Shafik, delegate from Egypt.

'Official Records' A/CONF.97/19 (n 231) 420, para 2.

<sup>253</sup> Trevor Bennett, 'Article 71' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffr : Milan 1987).

<sup>254</sup> M Gilbey Strub, 'The Convention on International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries' (1989) 38 *International and Comparative Law Quarterly* 475, 478.



From the perspective of the developing countries, these provisions of anticipatory breach could 'hold some danger for financially weaker parties'<sup>255</sup> in international trade. It is therefore useful to examine the course of the debate, to see whether their concerns were addressed.

## **A. Drafting History**

### **Suspension of Performance and Avoidance of Contract in Anticipatory Breach**

The 1978 Draft Convention by UNCITRAL provides in its Article 62:

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

At the first committee meeting of the Vienna Diplomatic Conference, the Federal Republic of Germany submitted an amendment<sup>256</sup> to Paragraph 1 of Article 62 (Draft Convention) as follows:

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<sup>255</sup> Date-Bah, 'The Convention on the International Sale of Goods from the Perspective of the Developing Countries' (n 204).

<sup>256</sup> 'Official Records' A/CONF.97/19 (n 231) 129, para 3.

A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, it becomes apparent that a serious deficiency in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

After this amendment was adopted at the twenty-sixth meeting by 18 votes in favour,<sup>257</sup> the Egyptian delegate opened the debate on Draft Convention Articles 62 and 63. He explained that he considered them vitally important to developing countries.<sup>258</sup> His new proposal on Article 62 was as follows:

(1) If, prior to the date for performance of the contract, it becomes apparent that one of the parties will commit a fundamental breach of contract, the other party may notify him of his intention to suspend performance of his obligations if the first party fails to provide adequate assurances, within a reasonable period of time, of properly performing his obligations.

(2) If the party which has been notified fails to provide the assurances described under paragraph (1) of this article, the other party may declare the contract avoided.

He further explained that his concern was rooted in the fact that suspension of performance should be permitted when 'good grounds' existed to conclude that the other party was unable to perform a substantial part of his obligations. In his view, 'it was extremely dangerous to empower the parties to withdraw from their obligations solely on the basis of such a purely subjective assessment of the situation and without any supervision by the courts.'<sup>259</sup> Clearly, he had concerns regarding buyers in developing countries, who could face suspension of performance by sellers from the developed nations on the basis of their subjective determination.

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<sup>257</sup> *ibid* paras 5, 6.

<sup>258</sup> Mr Shafik.

'Official Records' A/CONF.97/19 (n 231) 419, para 54.

<sup>259</sup> 'Official Records' A/CONF.97/19 (n 231) 419, para 55.

The Egyptian proposal was a combination of elements contained in Articles 62 and 63 of the 1978 Draft Convention, combined in such a way that the objective test included in Article 63 was imported into Article 62. On this basis, the aggrieved party was required to give notice of suspension of performance before he could exercise such a right to avoid the contract. In other words, the right to avoid the contract no longer took automatic effect.

The 1978 Draft Convention provided in its Article 63 that 'if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.'

The Egyptian delegate's proposal<sup>260</sup> was that such provisions in Article 63 be replaced with:

(1) If the seller has already dispatched the goods before the grounds described in paragraph (1) of article 62 become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(2) The seller who prevents the handing over of the goods to the buyer under paragraph (1) of this article must immediately give notice to the buyer of his intention to declare the contract avoided should the buyer fail, within a reasonable time, to provide adequate assurances of properly performing his obligations.

As a result of this combined consideration of Articles 62 and 63, the debates about anticipatory breach coincided with discussions on suspension of performance and avoidance of anticipatory breach.<sup>261</sup>

The developing nations were in favour of adopting this proposal. They argued that the amendment maintained a fairer balance between the interests of the developing and

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<sup>260</sup> Mr Shafik.

'Official Records' A/CONF.97/19 (n 231) 130, para 6.

<sup>261</sup> Date-Bah, 'Vienna Sales Convention 1980 – Developing Countries' Perspectives' (n 199) 97.

the developed countries because the economically weaker party is protected by being granted an opportunity to give adequate assurances before entitling the injured party to either suspend or avoid a contract.<sup>262</sup>

Some delegates from the developed nations opposed the Egyptian proposal requiring adequate assurances from the party who was likely to breach the contract.<sup>263</sup> For example, the Swedish delegate stated that establishing such 'an obligatory procedure of waiting for adequate assurances might prove too stringent, because in such a situation quick action might be necessary.'<sup>264</sup> While this proposal on suspension of performance was considered inadequate by some, others, such as the French delegate,<sup>265</sup> preferred it, for two reasons:

First, the criteria it offered were more objective than in the adopted text; and secondly, the system of obligatory notification gave the non-performing party an opportunity to defend its position. The proposed article 62 (2), however, seemed somewhat too stringent in creating automatic avoidance when the party in default had failed to provide assurances.

Turkey and Romania also supported this proposal; they held respectively that it 'would make for a fairer balance between the interests of buyer and seller'<sup>266</sup> and that its provisions would protect the non-performing party against the consequences of avoidance of contract.<sup>267</sup> Moreover, the objective test would assist courts in adjudicating disputes in jurisdictions that have no equivalent to the anticipatory repudiation doctrine under their national law.<sup>268</sup>

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<sup>262</sup> Mr Sami.

'Official Records' A/CONF.97/19 (n 231) 421, para 8.

<sup>263</sup> *ibid.*

<sup>264</sup> Mr Hjerner.

'Official Records' A/CONF.97/19 (n 231) 421, para 12.

<sup>265</sup> Mr Plantard.

'Official Records' A/CONF.97/19 (n 231) 422, para 14.

<sup>266</sup> Mr Adal.

'Official Records' A/CONF.97/19 (n 231) 422, para 16.

<sup>267</sup> Mr Groza.

'Official Records' A/CONF.97/19 (n 231) 422, para 17.

<sup>268</sup> Mr Adal.

'Official Records' A/CONF.97/19 (n 231) 422, para 16.

The Egyptian amendments were put to the vote and rejected by 19 votes for and 19 votes against. Those who were in favour of rejection stated that in some circumstances it would be too burdensome on the non-defaulting party to give mandatory notification to suspend the contract when the deficiency is so serious and quick action is essential.<sup>269</sup> There was also resistance to combining the remedies: suspension is merely a precautionary measure and is meant to be temporary, whereas avoidance is a complete remedy that a party can resort to when non-performance is imminent.<sup>270</sup> However, it was decided that a new text for Articles 62 and 63 should be drafted by an *ad hoc* Working Group comprising Argentina, Egypt, the Federal Republic of Germany, Finland, France, the German Democratic Republic, Iraq, Mexico, the Republic of Korea and the United States of America.<sup>271</sup>

The desired outcome was to reach a compromise that was not completely objective but which was less subjective than the 1978 Draft Convention.<sup>272</sup> The Working Group submitted<sup>273</sup> that Paragraph (1) be replaced by the following:

- (1) A party may, if it is reasonable to do so, suspend the performance of his obligations when, after the conclusion of the contract, it appears that the other party will not perform a substantial part of his obligations as a result of:
- (a) a serious deficiency in his ability to perform or in his creditworthiness, or
  - (b) his conduct in preparing to perform or in performing the contract.

When the proposal was discussed, it was agreed that (i) the words 'it is reasonable to do so' be deleted; (ii) 'if, after the conclusion of the contract' to replace 'when, after the conclusion of the contract'; and (iii) 'it becomes apparent' to replace 'it appears'.<sup>274</sup> Finally, it was agreed that this amended paragraph be combined with the

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<sup>269</sup> Mr Rognlien, delegate from Norway.

'Official Records' A/CONF.97/19 (n 231) 421, para 4.

<sup>270</sup> Mr Bonell, delegate from Italy and Mr Schlechtriem, delegate from Germany.

'Official Records' A/CONF.97/19 (n 231) 420 and 421, paras 3 and 5.

<sup>271</sup> 'Official Records' A/CONF.97/19 (n 231) 422, paras 21, 23, 25.

<sup>272</sup> Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 351.

<sup>273</sup> 'Official Records' A/CONF.97/19 (n 231) 130, para 14.

<sup>274</sup> *ibid* para 15.

original Paragraphs 2 and 3 of Article 62 of the 1978 Draft Convention. This is now CISG Article 71.

In the end, the phrase 'gives good grounds to conclude' in the 1978 Draft Convention was replaced with 'it becomes apparent' in the CISG, which makes such an assessment of ability to perform less subjective.<sup>275</sup>

With regard to Article 63, it was suggested<sup>276</sup> by the Working Group that the following paragraphs (as Paragraphs 2 and 3) be added to it:

(2) If time allows, the party intending to declare the contract avoided must give notice reasonably in advance to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

It was agreed that the phrase 'give notice reasonably in advance' be replaced with 'give reasonable notice.' It was also decided that the original text of Article 63 of the 1978 Draft Convention be adopted as Paragraph 1 of the new Article 63. Finally, this Paragraph 1, along with amended Paragraphs 2 and 3, were adopted as CISG Article 72. Therefore, the CISG makes a distinction between the right to suspend the contract and the right to avoid the contract. Article 71, dealing with suspension of performance, requires a less draconian test of 'it becomes apparent,' while Article 72, dealing with avoidance of contract, requires a more stringent test of 'it is clear.' This is what the delegate from Norway put forward: 'It must be easier for one of the parties to suspend performance of his obligations than to declare the contract avoided.'<sup>277</sup>

The notion of giving notice to the non-performing party of the other party's intention to avoid the contract so that adequate assurances of performance could be offered (as

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<sup>275</sup> Jacob S Ziegel, 'Report to the Uniform Law Conference of Canada' (n 238).

<sup>276</sup> 'Official Records' A/CONF.97/19 (n 231) 131, para 9.

<sup>277</sup> Mr Rognlien.

'Official Records' A/CONF.97/19 (n 231) 432, para 105.

proposed by the Egyptian delegate),<sup>278</sup> along with the notion of the significance of quick action in a situation to offer adequate assurances (as noted by the Swedish delegate),<sup>279</sup> provided the basis for finding a compromise in Article 72 of the CISG. The outcome of the Egyptian intervention therefore turned out to be greater protection for the financially weaker parties in international trade than would have been achieved under the 1978 Draft Convention. In other words, the interests of developing countries were reflected, to some extent, in the CISG's revised provisions. Having said that, the provisions did not satisfy all interests;<sup>280</sup> as the French delegate stated: 'The provisions of article 62 [CISG Article 71] were dangerous because they would jeopardize still further the situation of enterprises in difficulties.'<sup>281</sup>

### **3.3.3 The North–South Issues: Passing of Risk of Goods in Transit (Article 80 (Draft Vienna Convention) – Article 68 (CISG))**

Another matter relating to North–South trade concerned the allocation of risk of loss or damage to goods in transit.<sup>282</sup> According to Article 80 of the Draft Convention, the risk passes to the buyer from 'the time the goods are handed over to the carrier who issues the documents controlling their deposition.'<sup>283</sup>

The developing countries stated that a retroactive passing of the risk would be disadvantageous to buyers in emerging countries.<sup>284</sup> That is because buyers would take responsibility for the purchased goods and would also bear the risk from the time of handing the goods to the carrier, when the buyers were not and could not be responsible for them.<sup>285</sup> The delegates argued that the risk should transfer to the buyers at the time of conclusion of the contract.<sup>286</sup> Only at that time could the buyers

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<sup>278</sup> 'Official Records' A/CONF.97/19 (n 231) 129, para 10.

<sup>279</sup> Mr Hjerner.

'Official Records' A/CONF.97/19 (n 231) 421, para 12.

<sup>280</sup> Mr Mehdi of Pakistan and Mr Sam of Ghana abstained because, in their view, Article 62 put too much emphasis on the assessment by one party of the other party's situation.

'Official Records' A/CONF.97/19 (n 231) 220, paras 16, 17.

<sup>281</sup> Mr Plantard.

'Official Records' A/CONF.97/19 (n 231) 220, para 14.

<sup>282</sup> Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 352.

<sup>283</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>284</sup> Garro, 'Reconciliation of Legal Traditions' (n 152) 475.

<sup>285</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>286</sup> Mr Date-Bah, delegate from Ghana.

take responsibility for the goods 'in a reasonable and economically efficient way,' as the goods then belong to them.<sup>287</sup> The retroactive provision was, according to the Pakistani delegate, 'unjust.'<sup>288</sup>

The developed countries did not accept this criticism. For example, the Swedish delegate referred to 'common maritime transport of bulk commodities,' whose sales are mainly based on documents. As the buyer would normally either 'take out separate insurance' or have general policy coverage, 'the provision in question would thus in no way have the effect of penalizing him.'<sup>289</sup> The Norwegian delegate argued in support of the proposal, on the basis that it would be impossible to specify when the damage to goods had occurred or even to establish the goods' condition when they were sold.<sup>290</sup>

The Ghanaian delegate supported the Pakistani criticism, however, pointing out that he 'was not concerned that the established practice should outweigh all consideration of logic in the matter. Before the goods were sold to him, the buyer had no interest to protect, i.e. no insurable interest.' He further stated that in Ghana it was not feasible to 'take out insurance against risk,'<sup>291</sup> owing to the differences between an established system and a practical system.

The position of the developing countries was rejected at first,<sup>292</sup> with the Pakistani delegate expressing his regret that 'a large majority of the members of committee had not seen fit . . . for unconvincing reasons to take into account the legitimate interest of

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'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 32<sup>nd</sup> meeting.'

<<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting32.html>> accessed 2 July 2013.

<sup>287</sup> Brussel, 'The 1980 United Nations Convention on Contracts for the International Sale Of Goods' (n 229).

<sup>288</sup> Mr Inaamullah, delegate from Pakistan. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

<sup>289</sup> Mr Hjernner, delegate from Sweden. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

<sup>290</sup> Mr Rognlien, delegate from Norway. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

<sup>291</sup> Mr Date-Bah, delegate from Ghana. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

<sup>292</sup> 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

'Observing that the Indian amendment (A/CONF.97/C.1/L.244) commanded only limited support, he said that if there were no objections he would take it that the Committee wished to reject it and adopt article 80 [became CISG Article 68] with the change proposed by the United States.'



sellers of bulk commodities in developing countries.<sup>293</sup> However, in the plenary session of the Convention, the Pakistani proposal was accommodated as the first sentence of the compromise,<sup>294</sup> which stated that, from the time of conclusion of the contract, the risk passes from the seller to the buyer. However, with a proviso that 'if the circumstances so indicate,' it is assumed that the buyer will bear the retroactive risk from the time the goods are handed over to the carrier.<sup>295</sup>

Article 68 of the CISG now reads as follows:

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.

Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

This compromise is regarded by some commentators as 'failing to provide a workable rule'<sup>296</sup> and to be a 'failure of uniform law.'<sup>297</sup> It is indeed argued that ascertaining 'if the circumstances so indicate' is not an easy task,<sup>298</sup> and that 'an irreconcilable position' has been masked behind 'an illusory compromise.'<sup>299</sup> This suggests that the developing countries did not have an entirely effective voice on this issue. However, it seems that the outcome of this compromise has not been a negative result for developing nations.

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<sup>293</sup> Mr Inaamullah, delegate from Pakistan. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 286).

<sup>294</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>295</sup> Brussel, 'The 1980 United Nations Convention on Contracts for the International Sale Of Goods' (n 229).

<sup>296</sup> Garro, 'Reconciliation of Legal Traditions' (n 152) 476.

<sup>297</sup> Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 352.

<sup>298</sup> Garro, 'Reconciliation of Legal Traditions' (n 152) 475.

<sup>299</sup> *ibid* 476.

### 3.3.4 The North–South Issues: Trade Usages (Article 8 (Draft Vienna Convention) – Article 9 (CISG))

Another issue that was part of the North–South debate and was characterised as ‘fiercely debated’<sup>300</sup> and ‘sharply divided’<sup>301</sup> related to the incorporation of trade usages into the contract.<sup>302</sup> The industrialised nations were strongly in favour of this incorporation, even where there was no explicit agreement between contracting parties, ‘provided that an objective, reasonable person would consider the usages applicable.’<sup>303</sup> The developing nations and the Eastern Bloc were opposed to the incorporation of usages, except where the contracting parties had agreed<sup>304</sup> to their application and also where they did not infringe the statutory provisions of contracting parties.<sup>305</sup>

As mentioned earlier, the call for a New International Economic Order echoed the inequality in the existing economic order;<sup>306</sup> therefore, developing and Eastern Bloc nations had taken this into account when they opposed the developed nations’ demands regarding trade usages.<sup>307</sup> As trade usages usually arose in transactions between parties from the developed nations, they were ‘likely to reflect the interests of such countries.’<sup>308</sup> Therefore, the usages were regarded as ‘neo-colonialist’<sup>309</sup> by many developing and socialist countries. The Yugoslavian delegate stated that ‘commercial usages to date had been formed by a restricted group of countries only whose position did not express worldwide opinion.’<sup>310</sup> The Soviet Union held that

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<sup>300</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>301</sup> Garro, ‘Reconciliation of Legal Traditions’ (n 152) 476.

<sup>302</sup> Brussel, ‘The 1980 United Nations Convention on Contracts for the International Sale Of Goods’ (n 229).

<sup>303</sup> Eorsi, ‘A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods’ (n 149) 342.

See Garro, ‘Reconciliation of Legal Traditions’ (n 152) 478.

<sup>304</sup> Date-Bah, ‘The Convention on the International Sale of Goods from the Perspective of the Developing Countries’ (n 204) 27.

<sup>305</sup> Eorsi, ‘A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods’ (n 149) 342. See Garro, ‘Reconciliation of Legal Traditions’ (n 152) 478.

<sup>306</sup> Rubin, ‘Economic and Social Human Rights and the New International Economic Order’ (n 160).

<sup>307</sup> Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (n 151).

<sup>308</sup> Garro, ‘Reconciliation of Legal Traditions’ (n 152) 477.

<sup>309</sup> Farnsworth, ‘Developing International Trade Law’ (n 152) 465.

<sup>310</sup> Mr Blagojevic, delegate from Yugoslavia.

‘LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 6<sup>th</sup> meeting.’

<<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting6.html>> accessed 2 July 2013.

'usages were often devices established by monopolies.'<sup>311</sup> The delegate from Czechoslovakia expressed his 'grave doubts about its [Article 8 of the Draft Convention] content and principles it set forth.' He further stated that sellers and buyers from many countries, particularly developing countries, had no role in the establishment of trade usages and yet they would apply to them. He continued that their application should be subject to the contracting parties' will.<sup>312</sup>

The opposing point of view of the developing and Eastern Bloc countries on trade usages were based on foreseeability and security,<sup>313</sup> whereas the developed nations were favouring flexibility, which results in economic efficiency instead of fairness.<sup>314</sup> The vague wording of Article 9(2) of ULIS, 'usages which reasonable persons in the same situation as the parties usually considered to be applicable to their contract,' was a matter of concern.<sup>315</sup> This article was criticised both generally and politically and was regarded as 'one-sided as to their content and in favour of those created them.'<sup>316</sup> The debate did not lead to much change and mostly emphasised 'systemic differences of opinions.'<sup>317</sup> Several amendments were proposed: (i) in order to make the usages qualified, the word 'reasonable' to be included; (ii) a limitation to be included which expressed that 'implied usage covered were not contrary to the Vienna Convention'; and (iii) to be specified if the contract and its formation should be covered by the article. It was only this final amendment that gained acceptance.<sup>318</sup> The Soviet Union's delegate stated that 'the present formulation of [Draft] article of 8(2) represented a hard-won compromise which . . . would be undesirable to change at this stage.'<sup>319</sup> That the usage is to be 'widely known'<sup>320</sup> is a reminder of the fact that ' . . . there would be new countries and enterprises entering the international market which

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<sup>311</sup> Kastely, 'Unification and Community' (n 150) 609.

<sup>312</sup> Mr Kopac, delegate from Czechoslovakia. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 310).

<sup>313</sup> Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 342.

<sup>314</sup> *ibid* 343. See Garro, 'Reconciliation of Legal Traditions' (n 152) 478.

<sup>315</sup> C M Bianca and M J Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffr : Milan 1987).

<sup>316</sup> *ibid*.

<sup>317</sup> Winship, 'The Scope of the Vienna Convention on International Sales Contracts' (n 63).

<sup>318</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>319</sup> *ibid*.

<sup>320</sup> Honnold, *Uniform Law for International Sales* (n 241).

would not be familiar with the usages of international trade.<sup>321</sup> Article 9 also supports the developed nations' viewpoint with regard to usages as flexible customs, since this may be used to cover contracting issues that parties have failed to agree on.<sup>322</sup>

The Draft Convention suggests that 'usages will prevail in a conflict between an applicable usage and Uniform Law unless otherwise agreed by the parties.'<sup>323</sup> The final draft is a compromise that stemmed from the input of different political and economic systems and does not provide a clear answer on the role of usage.<sup>324</sup> Nevertheless, despite the strong representations of the socialist and developing countries, the proposal made it through to the final text without significant alteration.

### 3.3.5 Summary

An examination of North–South issues shows that many compromises were made during negotiations. This led to some gaps and inconsistencies, but did not affect the overall usefulness of the CISG. As Professor Winship has stated, 'No legal text is perfect,'<sup>325</sup> but the CISG has certainly been an improvement on its precursors (ULIS and ULF). The Vienna Conference, and the Working Groups that produced the Draft Convention, therefore did provide a forum for developing countries to raise their concerns and make the developed nations listen. As a result, international economic relations were brought into better balance. The CISG begins with the statement that state parties to the Convention have agreed to the broad objectives of the New International Economic Order.<sup>326</sup> As Professor Winship stated, the signatories' agreement 'to join the community formed by the Sales Convention is to recognize the equal status of less developed countries, to remove barriers to self-development, and to create a "New International Economic Order".'<sup>327</sup> In short, the CISG has gone beyond the mere identification of conflicts between North and South; it is indeed a substantial assurance that these inequalities will be changed and a new and balanced order will be established.

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<sup>321</sup> Mr Goldstajn, delegate from Yugoslavia. 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference' (n 310).

<sup>322</sup> Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 343.

<sup>323</sup> Honnold, *Documentary History of the Uniform Law for International Sales* (n 239).

<sup>324</sup> Garro, 'Reconciliation of Legal Traditions' (n 152) 479.

<sup>325</sup> Peter Winship, 'New Rules for International Sales' (1982) 68 *American Bar Association Journal* 1230, 1234.

<sup>326</sup> Preamble to the CISG.

<sup>327</sup> Winship, 'Commentary on Professor Kastely's Rhetorical Analysis' (n 190) 652.

## Part Three

### 3.4 CISG Case-Law Analysis and Its Likely Effect on Developing Countries

As the previous section shows, the developing countries expressed their apprehension in relation to a number of drafting issues. Changes were made that reflected at least some of their concerns. However, whether CISG case-law analysis of these articles is still keeping track of developing countries' concerns is a matter requiring closer examination.

A review of records shows that the developing countries have played little part in the development of interpretation or gap-filling of the CISG. The Pace University database of reports on CISG judgements and arbitrations<sup>328</sup> and UNCITRAL's reporting system for case law on UNCITRAL texts (CLOUT)<sup>329</sup> reveal that the developing nations have been largely unrepresented in the development of a body of judicial interpretation. If China and those European countries that are defined as developing countries<sup>330</sup> are excluded, it will be seen that the number of cases in the database reported by developing nations forms less than 2% of the total cases.<sup>331</sup> Such statistics do not come as a surprise when one takes into account the low rate of ratification by the developing countries and the fact that many jurisdiction clauses require the courts or arbitral panels to be in developed nations. What this suggests is that neither in the development of a body of comparative law nor in the promotion of uniformity have the developing countries had a significant role. Having said that, there are a number of cases that raise those matters that were of concern to the developing world.

The review of case law on Article 39 demonstrates that, among the abundance of reports on this article (mainly from the developed world), evidence justifying the

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<sup>328</sup> 'CISG Database, Country Case Schedule.' <[www.cisg.law.pace.edu/cisg/text/casecit.html](http://www.cisg.law.pace.edu/cisg/text/casecit.html)> accessed 2 July 2013.

<sup>329</sup> Since 1988, UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT) in order to assist judges, arbitrators, lawyers, and parties to business transactions, by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts; and, in so doing, to further the uniform interpretation and application of those texts.

<[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)> accessed 16 February 2014.

<sup>330</sup> 'World Economic Outlook' (April 2011) International Monetary Fund 174, 175, Table E. <<http://www.imf.org/external/pubs/ft/weo/2011/01/pdf/text.pdf>> accessed 3 August 2013.

<sup>331</sup> As of 2 July 2013. 'CISG Database, Country Case Schedule' (n 328).

concerns of the developing world on the matter of lack of conformity is almost non-existent. For example, in the *Baby beef hide case*<sup>332</sup> between a Yugoslav/Serbian seller and a German buyer, the Arbitral Tribunal held that a period of over 20 days is not a reasonable time for giving notice of non-conformity of the goods. The buyer lost his right to rely on a lack of conformity, as he failed to give notice thereof within a reasonable period of time, as required by Article 39 of the CISG. In the *Crystal Sugar Case*,<sup>333</sup> the contract, which was concluded between a Serbian seller and a German buyer, required the sugar to be of Yugoslav origin. Otherwise, the buyer had to pay customs for the import of the sugar. The seller delivered Polish sugar instead of Yugoslav. The court held that the plaintiff (buyer) had lost his right to rely on Article 39(1) of the CISG, as he had failed to notify the seller of lack of conformity of the goods, specifying the nature of the non-conformity, within a reasonable time from the moment he had discovered it or ought to have discovered it. The court found that a simple examination of the origin of the goods could have revealed to the buyer that they were of Polish origin. Therefore, he could have made timely notice of non-conformity, which he failed to do. Additionally, in the *Barcel S A de C V v Steve Kliff* case,<sup>334</sup> an American seller and a Mexican buyer entered into an oral agreement for the purchase of foil trading cards. The delivered goods were toxic and malodorous, which made them unsuitable for use in food packaging. Therefore, the buyer brought an action against the seller owing to non-conformity of the goods. The court held that the buyer had failed to notify the seller of lack of conformity of the goods within a reasonable time, as required by Article 39 of the CISG. The court thus declined the case. Also, in another case, that of *Waste container*,<sup>335</sup> a Hungarian seller and an Austrian buyer signed a contract for the sale of containers. The buyer paid for only part of the delivered goods, and refused to pay for the rest owing to their poor quality. The arbitral court held that the buyer had failed to notify the seller of defects in the goods, as required by Article 39(1) of the CISG; and held that discovery of lack of conformity

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<sup>332</sup> Serbia 12 July 1994 Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce.

<<http://cisgw3.1aw.pace.edu/cases/940712sb.html>> accessed 5 August 2013.

<sup>333</sup> Serbia 28 June 2006 Commercial Court in Cacak.

<<http://cisgw3.1aw.pace.edu/cases/060628sb.html>> accessed 5 August 2013.

<sup>334</sup> Mexico 3 October 2006 Juzgado Primero Civil de Primera Instancia [Court of First Instance] de Lerma de Villada.

<<http://cisgw3.1aw.pace.edu/cases/061003m1.html>> accessed 5 August 2013.

<sup>335</sup> Hungary 5 December 1995 Budapest Arbitration proceeding Vb 94131.

<<http://cisgw3.1aw.pace.edu/cisg/wais/db/cases2/951205h1.html>> accessed 5 August 2013.

within a time frame of 32 days was not reasonable. Therefore, the buyer had to make payment of the outstanding balance. The interpretation of Article 39 thus reveals that no clear evidence exists to support the concerns of developing countries, such as over being unjustifiably penalised. In addition, this article strikes a correct balance between the interests of both developed and developing nations. Indeed, there is no evidence to suggest that buyers from developing countries are more likely to lose their rights for not giving prompt and accurate notice within a reasonable time than are parties elsewhere.

A review of case law on Articles 71 and 72 also reveals that their fears were largely misplaced. There are very few cases that raise the specific queries on suspension that concerned the delegates from the developing countries. The case law shows that, where a simple example of non-payment occurs, without evidence of insolvency or a deterioration in the financial condition of the buyer, sellers sometimes invoke the right to suspension of performance. Suspension is justified under Article 71(1)(b), where a pattern of conduct indicates that there will be further serious breaches. Having said that, suspension of delivery has been used in some cases to force payment of other debts, or of the performance of unrelated obligations, or where there is little evidence that breaches are likely to happen in future. For example, in *Société Mim v Société YSLP*<sup>336</sup> and in *Prodema S A v Michon B V*,<sup>337</sup> suspension of performance was cited to compel the payment of debts or performance unassociated with the contract, with no proof that breaches would happen in the future. This type of conduct on the part of the industrialised world was what the representatives from the developing nations were concerned about. But this is not to say that only parties from the developed world engage in such behaviour, or even that these outcomes are due to suspicion of traders in developing countries. More importantly, there is no evidence to suggest that unreasonable suspensions have had more adverse consequences for buyers from the developing nations than from elsewhere. Therefore, when it comes to the interpretation of Articles 71 and 72, the expectations of the developing world are

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<sup>336</sup> France 20 February 2007 Supreme Court (*Perfume case*).  
<<http://cisgw3.1aw.pace.edu/cases/070220f1.html>> accessed 5 August 2013.

<sup>337</sup> Netherlands 18 July 2007 Rechtbank [District Court] Utrecht.  
<<http://cisgw3.1aw.pace.edu/cases/070718n1.html>> accessed 5 August 2013.

sometimes not met, but this deficiency and inadequacy does not relate to their original concerns.

The study of case law on Article 68 suggests that the grounds for the apprehension of the delegates from the developing world were not as serious as they believed. Very few cases raise the specific concerns about the passing of risk for goods in transit that were worrying the delegates from developing countries. The case law shows that the court has indeed ruled in favour of the buyer where the seller did not prove or submit that the goods were damaged after the passing of risk to the buyer.<sup>338</sup> Yet again, there is no evidence to show that the developing world has been unfairly affected by either the provisions of Article 68 or its interpretation. Indeed, the fact that it is impossible to specify when the damage to the goods has occurred and consequently to establish whether the risk has passed is not a matter of concern solely for the developing world, but is rather of concern to all countries of the world.

Examination of case law on Article 9 shows that, for instance, in *WT GmbH v P AG*,<sup>339</sup> domestic law was regarded as the source of a usage by a Swiss court in a case between a Swiss buyer and an Austrian seller. The decision was criticised,<sup>340</sup> but an American court applied it in a case between an American seller and a Mexican buyer.<sup>341</sup> This suggests that the concerns of the developing countries were justified, as a preference for the home state could work to the disadvantage of their traders. This can be partly refuted, however, by the fact that it not only reflects the concerns of the developing world, but also in a broader context reflects the concerns of all countries of the world that concluding practices and rules at a domestic level can be raised to the level of global usages.

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<sup>338</sup> See *The Furniture Case*.

Germany 23 June 1998 Appellate Court Hamm  
<<http://cisgw3.1aw.pace.edu/cases/980623g1.html>> accessed 5 August 2013.

<sup>339</sup> Zivilgericht Kanton Basel-Stadt 21 December 1992.

<<http://cisgw3.1aw.pace.edu/cases/921221s1.html>> accessed 2 July 2013.

<sup>340</sup> Albert H Kritzer, *Cross-References and Editorial Analysis*.

<<http://cisgw3.1aw.pace.edu/cisg/text/cross/crosspreamble.html#fn0.html>> accessed 2 July 2013.

<sup>341</sup> *Barbara Berry S A de C V v Ken M Spooner Farms Inc*.

United States 13 April 2006 Federal District Court [State of Washington]

<<http://cisgw3.1aw.pace.edu/cases/060413u1.html>> accessed 2 July 2013.

Reversed on appeal, see United States 8 November 2007 Federal Appellate Court [9th Circuit]

<<http://cisgw3.1aw.pace.edu/cases/071108u1.html>> accessed 5 August 2013.



As far as Article 9 is concerned, it should be noted that, despite the fact that not all the concerns of the developing countries were reflected in it, it seems that those concerns may have been misguided. It is, however, evident that no active participation is taking place on the developing countries' side in law-making based on the CISG.

So far, as this study of the legislative history of the CISG and exploration of CISG case law have shown, where appropriate the CISG took into account conditions in the developing world. The aims of the NIEO were incorporated into the provisions of the CISG when the developing countries raised their concerns. Compromises and concessions were made where their concerns were not in conflict with principles of international commercial law. The case-law analysis also reveals that the developing countries had less to worry about than they initially believed. This is perhaps in agreement with Professor Schmitthoff's view that the three fundamental principles of international trade law do not change in substance throughout the globe.<sup>342</sup> Values, customs and local conditions are important only to a degree that does not require a fundamental rearrangement of substantive law.

### **3.5 Conclusion**

This chapter has attempted to make a close examination of why developing countries might wish to adopt the CISG. What the Convention offers in terms of suitability for developing countries is the fact that it is a neutral law by nature, and no party obtains a particular advantage from its application. The writer is also of the opinion that the CISG provides model codes for nations with no developed legal systems, in particular those that do not have either the experience or the traditions to establish their own laws. This is indeed of great value from the political point of view, since it might not be in the political interests of some countries to apply the law of a particular jurisdiction (especially the Uniform Commercial Code (UCC) or Sale of Goods Act 1979) as the model for a revision of their own domestic sales law.

A study of the failure of the Hague Conventions (ULIS and ULF) offers a salutary warning with regard to the non-participation of the developing world in the legislative process. This experience of non-participation would have resulted in even greater

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<sup>342</sup> [A/6396 - Report to the Secretary General \("The Schmitthoff Study"\) \(document ultimately was support for the creation of UNCITRAL\)](#) (n 35) 5.

disappointment if it had been ignored during UNCITRAL's efforts to develop the CISG. The CISG was fashioned to avoid the fate of the Hague Conventions precisely by reflecting the interests and concerns of the developing world on different matters. These included notifying the seller of non-conforming goods, passing of risk of goods in transit, suspension of performance in anticipation of breach, and incorporation of trade usages.

The concerns expressed were partially, if not fully, reflected in revised or new provisions. Obviously, the CISG could not be optimal for any one group of countries, since such a diverse range of participating states necessitated compromise during negotiations. However, what matters is whether a reasonable balance has been maintained between the rights and obligations of buyers and sellers. In so far as this chapter has looked at specific drafting issues (in this case procedures for non-conformity), a reasonable balance is kept between the duties of the buyer and those of the seller. It is thus the writer's view that the UN Convention satisfies the interests of developing countries.

Whether or not all these efforts by delegations to the Diplomatic Conference have been a success depends upon its ratification by developing countries, since, in the end, it is up to each individual country to decide whether the CISG is compatible with their national law and meets the demands of their business community. Obviously, this cannot be determined until a close examination of other specific drafting issues has been made. Owing to the fact that strong trading nations are signatories to the CISG, it is necessary to consider the reasons for and against ratifying this Convention so as to determine whether it would be in the interests of Iran to join the growing number of signatory states.

## **Chapter Four**

### **Reasons For and Against the Adoption of the CISG with Specific Relevance to Developing Countries**

#### **4.1 Introduction**

Previous chapters have reviewed the history of the CISG, and shown that the claim that it was drafted solely by developing countries is not sustainable. This should counter any arguments that might be made against adoption of the CISG. This chapter concentrates on the positive arguments in favour of the CISG, especially in relation to Iran and other developing countries that have not ratified it.

With this in mind, scholarly assessments of the CISG will be examined. Many critics emphasise its failure to achieve its objectives, while others take a different approach and regard the CISG as a success in terms of achieving a unified international law of sales. Both schools of thought have been supported by different reasoning. For the purposes of this paper it is important to consider both the opposing and the supporting views, since ratification requires a thorough examination of the positions of countries with regard to the CISG. This chapter also examines a specific concern of countries that are considering ratification, namely incompatibility of the CISG with their national law, which is a likely impediment that definitely requires closer attention. The conflict between the CISG and their national law has been resolved by many countries that have decided to adhere to the CISG. Their experiences thus offer considerable guidance in assessing the challenges that lie ahead. At the time of writing this paper, the vast majority of the world's leading trading countries had adopted the CISG, with the exception of the United Kingdom, which has to date failed to ratify it. On the other side of the scale is Germany, which has gone a step beyond adoption and actually based its domestic law reforms on the CISG. Therefore, the reasoning behind one nation's favourable position towards the CISG and another's resistance can be a highly useful source of information for others (in particular developing countries) in deciding whether to adopt it.

Since this chapter focuses on adoption of the CISG primarily by developing countries, it is important to describe what criteria have been taken into account in defining ‘developing nations.’ According to the United Nations Statistics Division, ‘[t]here is no established convention for the designation of “developed” and “developing” countries or areas in the United Nations system.’<sup>343</sup> It further states that ‘[t]he designations “developed” and “developing” are intended for statistical convenience and do not necessarily express a judgement about the stage reached by a particular country or area in the development process.’<sup>344</sup> The World Bank, however, which classifies the countries into four income groups on the basis of Gross National Income (GNI) per capita, refers to all low- and middle-income countries as developing economies but notes that ‘the use of the term is convenient; it is not intended to imply that all economies in the group are experiencing similar development or that other economies have reached a preferred or final stage of development. Classification by income does not necessarily reflect development status.’<sup>345</sup> Although the measure and concept of development differs from country to country, the criteria, which the writer has taken into account when referring to developing countries, are often those that were referred to during the CISG’s drafting process: developing countries are generally exporters of commodities and importers of manufactured goods, as was the case at the Vienna Conference. They also have developing infrastructures, which include the network of banking, insurance, shipping, legal and other sorts of expert service that form the basis of international trade. Some of these criteria might still apply to a country such as Iran. For example, although there is manufacturing industry in Iran, it is not yet strong enough to meet domestic demand; hence, Iran is an importer. But the level of development in Iran is much more advanced than in many of the developing countries in Africa. At the other end of the scale, Iran is not as developed as some of the developing countries in East Asia. But all the existing viewpoints on the adoption of the CISG by the developing countries are being considered, regardless of their degree of industrialisation. The writer is of the opinion that this is because the majority of these viewpoints are shared by these countries, and there are lessons that can be learned on how to surmount the challenges that lie ahead.

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<sup>343</sup> <<http://unstats.un.org/unsd/methods/m49/m49regin.htm#ftnc>> accessed 16 February 2014.

<sup>344</sup> ‘Standard Country or Area Codes for Statistical Use.’

<<http://unstats.un.org/unsd/methods/m49/m49.htm>> accessed 16 February 2014.

<sup>345</sup> ‘How We Classify Countries.’

<<http://data.worldbank.org/about/country-classifications>> accessed 16 February 2014.

With this in mind, this chapter will examine the reasons for and against adoption of the CISG. In doing so, the arguments are listed under eight main headings:

- The CISG is simpler than private international law, as it offers certainty about applicable law, legal efficiency and convenience in agreeing upon governing law;
- The CISG brings the contracting state into harmony with its trading partners that have adopted the CISG in order to increase trade;
- The CISG offers simplicity and clarity as a law for international trade owing to the nature of its rules, its increased level of predictability and its role as an aid in negotiation;
- The CISG is consistent with general principles of international commercial law and trade practices, as it recognises party autonomy and *pacta sunt servanda* and international trade usages;
- The CISG is adaptable to future changes, as it offers stability through its fair and detailed provisions;
- The CISG eases assimilation into domestic law and practice through its compatibility with national laws, its domesticity and popularity, and the extent of its international acceptance;
- The CISG is beneficial to domestic law, as it is more suitable for modern international trade and could lead to domestic reform;
- The CISG protects national sovereignty through its flexible nature, the participative process of its creation, and the opportunities it provides to integrate regionally, to influence its interpretation, to promote arbitration, and to build expertise in comparative and international law.

Each of these categories will be considered critically and, where necessary, comments will be provided. The categories are not mutually exclusive; there is some overlap between them, and they are used only to provide a helpful framework for discussion. This literature review generally considers all the existing viewpoints on the issue of adoption of the CISG, as the vast majority of them are highly relevant to developing countries such as Iran. Consequently, at the end of each main section, the Iranian

situation will be considered. This analysis is important, as it will provide a comprehensive perspective which can lead to a balanced conclusion on whether Iran or any other developing countries should adopt the CISG.

## 4.2 Simpler than Private International Law

### 4.2.1 Certainty as to Applicable Law in International Trade

When engaging in international law, fear of dispute seems to be the main concern. Within the domain of international trade, the multiplicity of foreign laws causes a problem with which law to apply when a legal dispute arises. In determining the appropriate law for international sales contract, the principles of the common law applied by the English courts relies on the *lex loci contractus* (the place where the contract was made) and the *lex loci solutionis* (the place of performance of the contract).<sup>346</sup> Also, Lord Wright stated that ‘the law with which the contract has the closest and most real connection’ is the proper law of contract.<sup>347</sup> The law with the most real and closest connection is determined by the place of contracting, the place of performance, the place of residence or business of the parties and the nature of the subject matter of the contract.

As a result, courts have taken different approaches to determine the proper law, for example the test that the East African Court of Appeal applied in the case of *Karachi Gas Co Ltd v H Issaq*<sup>348</sup> was ‘the law with which the transaction has the closest and most real connection.’ In contrast, in the Kenyan case of *Radia v Transocean (Uganda) Ltd*,<sup>349</sup> the proper law of contract was determined by the *lex loci contractus*. The lack of uniformity in the application of the rules of private international law is thus evident. Not surprisingly, in determining the applicable law, the rules of private international law lead to uncertainty and complexity. It is thus up to the courts to decide which law is applicable in the event of a dispute. This may also go further, as in the case of *Libyan*

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<sup>346</sup> C M V Clarkson and J Hill, *Jaffey on Conflict of Laws* (Butterworths London 1997); (Contracts made after 17 December 2009 are governed by Regulation (EC) No 593/2008; contracts before then but after 1 April 1991 are governed by Contracts (Applicable Law) Act 1990).

<sup>347</sup> *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* [1938] AC 240; See *Bonython v Commonwealth of Australia* [1951] AC 219.

<sup>348</sup> [1965] EA 42.

<sup>349</sup> [1985] KLR 300.

*Arab Foreign Bank v Manufacturers Hanover Trust Co*,<sup>350</sup> in which the court decided that two different laws should be applied to two legs of the contract.<sup>351</sup>

The solution that the CISG provides is that, in the event of a dispute, parties are not confronted with unfamiliar foreign laws.<sup>352</sup> The CISG is becoming better known and more widely used in many states. On top of that, legal commentaries on the articles of the CISG and case law are beginning to be published. Therefore, if developing countries such as Iran adopt the CISG, the foreign precedent decided by the courts of other state parties to the CISG would be opened to their courts. This would obviously be of help to them, and through its adoption developing countries would benefit from a greater degree of legal certainty in matters of international trade.<sup>353</sup>

CISG provisions such as 'a reasonable time after the conclusion of the contract'<sup>354</sup> and 'unless the circumstances indicate otherwise'<sup>355</sup> have attracted a lot of criticism for their vagueness.<sup>356</sup> However, these articles have been drafted in such terms in order to promote flexibility. Given the circumstances of the dispute, it is the court's duty to apply the provisions appropriately. Fairness and flexibility entail uncertainties, yet the CISG has reached a balance between certainty and flexibility, and legal certainty is not endangered by the wording of its provisions.<sup>357</sup> Commentaries on the CISG are available to lawyers in different languages. Moreover, the CISG case law is available in English from UNCITRAL and UNILEX. The internet page published by Pace University Law School is another source of information on the CISG available to lawyers throughout the world.<sup>358</sup> Another great source of information is the CISG Advisory Council,<sup>359</sup> which is a 'private initiative' that considers and renders opinions on controversial and unsettled issues relating to the interpretation and application of the

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<sup>350</sup> [1989] 1 Lloyd's Rep 608.

<sup>351</sup> Eunice Gichangi, 'The United Nations Convention on Contracts for the International Sale Of Goods: A Case for Ratification by Kenya' (2007) 1 Kenya Law Review 305.

<sup>352</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 270.

<sup>353</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>354</sup> Article 33(C) of the CISG.

<sup>355</sup> Article 18 (2) of the CISG.

<sup>356</sup> On Specific Drafting Issues, see ch 3, Part Two.

<sup>357</sup> R M Lavers, 'To Use, or Not to Use' (1993) International Business Lawyer 10, 10–11.

<sup>358</sup> See 'CISG Database.' <<http://cisgw3.1aw.pace.edu/>> accessed 3 August 2013.

<sup>359</sup> It is established in 2001 by Institute of International Commercial Law at Pace University and the Centre for Commercial Law Studies at the Queen Mary University. It is composed of most eminent scholars in international sales law.

See 'CISG Advisory Council' <<http://www.cisgac.com/index.php>> accessed 2 July 2013.

CISG.<sup>360</sup> Such enormous amounts of contemporary information on the interpretation and application of the CISG therefore cannot fail to promote legal certainty.<sup>361</sup>

#### **4.2.2 The Provisions of CISG May Already Apply to Non-Parties to CISG**

The fact that the Convention may already apply to international trade contracts involving a party from any non-contracting state, such as Iran, is a highly motivational factor towards signing it. In accordance with CISG Article 1(1)(b), the Convention will be applicable to the contract, where the rules of private international law lead to the application of the law of a state which is a signatory to the CISG. This applies even in the case that the other party is a non-signatory, unless stated otherwise (under Article 6 of the CISG, parties may exclude the application of the Convention). Therefore, non-parties to the CISG have to take into account the presence of the Convention while they negotiate. A cause for concern is that many traders in Iran and other non-contracting parties may not be aware of the CISG or even of its impact on their contract, and that is because the CISG is not part of their domestic law. Needless to say, this puts them in a somewhat awkward situation. Given the high rate of accession to the CISG, it is evident that it is ever more likely that the CISG be applied to transactions involving non-contracting states. CISG adoption is therefore beneficial to traders in terms of educating themselves on its provisions and their impact on a contract and thus being better prepared when entering into a contract.<sup>362</sup>

#### **4.2.3 Legal Efficiency**

The legal environment surrounding international trade contracts is complicated. As a result, parties to contracts of sale need to familiarise themselves with the (foreign) legal system of their contracting party. This is both expensive and time-consuming,<sup>363</sup> yet nevertheless large entities accomplish it effortlessly; it is more of a hurdle for smaller entities and first-time traders that do not have the same experience and resources.

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<sup>360</sup> Loukas Mistelis, 'CISG-AC Publishes First Opinions' (2003) 15 Pace International Law Review 453.

<sup>361</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 345.

<sup>362</sup> *ibid.* See Gichangi, 'The United Nations Convention' (n 351).

<sup>363</sup> Michael Kabik, 'Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods' (1992) 9 International Tax and Business Lawyer 408, 409.



The legal uncertainty arising from a foreign legal environment could lead a trader to take unnecessary business or legal risks.<sup>364</sup> Adoption of the CISG reduces the time and money spent on analysis of the ramifications of a foreign legal system.<sup>365</sup> It is a fact that the CISG is already applicable to traders in non-contracting states when they trade with entities domiciled in a signatory state whose law applies to the contract of sale. This therefore necessitates partial familiarity with the scope and application of the CISG. However, it is through adoption of the CISG and easier access to that law that legal efficiency is encouraged. Rights, duties and remedies are already established when a contract is governed by the CISG. The CISG is indeed an 'easily accessible single body of law which is written in the language of traders.'<sup>366</sup> In order to enable the drafters to reach a compromise where necessary or preferable, the CISG did not make firm provisions for *all* aspects of international trade. Matters such as disputes over mistakes, capacity, duress, undue influence, liability for pre-contractual misstatement, the validity of standard terms and conditions and specific performance are intentionally left to applicable domestic law.<sup>367</sup>

Therefore the CISG does not completely eliminate the problem and complexity with regard to choice-of-law rules. However, a study of case law shows that the great number of disputes arise from breach of contract, the remedies available and the interpretation of the contract itself.<sup>368</sup> The issues that are sufficiently covered by the CISG and its failure to cover all aspects of a law of contract do not justify non-ratification.<sup>369</sup>

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<sup>364</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 349.

<sup>365</sup> Sara G Zwart, 'The New International Law of Sales: A Marriage Between Socialist, Third World, Common Law and Civil Law Principles' (1988) 13 North Carolina Journal of International Law and Commercial Regulation 109, 114.

<sup>366</sup> *ibid* 115.

<sup>367</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 350.

<sup>368</sup> Robert Goff, 'Force Majeure and Frustration' in *Anonymous La Vendita Internazionale* (Milan 1981) 314 on the Anglo-American legal systems.

<sup>369</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 350.

## 4.2.4 Convenience in Agreeing on Governing Law and Language

### Accessibility

When it comes to determining the governing law of contract for negotiations, the language barrier seems to be a major reason to oppose a specific law. This is simply because the foreign parties have difficulties in understanding it. Although authentic English translation of statutes and regulations can provide a resolution of this issue, the CISG is already available in six official languages.<sup>370</sup> It has also been translated into Persian.<sup>371</sup> This facilitates negotiations in international trade. The translation of the CISG into these six languages is comprehensive and covers all articles of the Convention. At the time of translation, the phrases that had close parallels with any domestic legal system were excluded. The six official texts were translated carefully to avoid any discrepancy in interpretation.<sup>372</sup>

The CISG automatically applies to a contract of international sale when parties have places of business in member countries.<sup>373</sup> After accession, parties no longer need to provide for the specific governing law, as they will be contracting states to the CISG. If a party persists in the application of its own domestic law, the other party can easily demand application of the CISG, as it will be part of both parties' domestic law. Besides, the CISG is fairly and specifically drafted for international commerce.

On top of that, the CISG as a sort of international standard may still be applied on request when negotiation is taking place between parties who have not yet ratified it. The unpredictability of developing countries' legal systems impedes the flow of business. On some occasions, a government or a company in negotiation with a stronger bargaining power may refuse to accept the law of the Western country as the governing law, and internationally accepted legal principles are sometimes the only

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<sup>370</sup> Arabic, English, French, Spanish, Chinese, and Russian. The CISG is however available in numerous unofficial languages such as Persian.

<sup>371</sup> See 'Texts of CISG' < <http://www.cisg.law.pace.edu/cisg/text/text.html> > accessed 16 August 2013.

<sup>372</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 351.

<sup>373</sup> Article 1(1)(b) of the CISG.

alternative. In such circumstances the CISG is perhaps a better option, since 79<sup>374</sup> countries are supposed to understand it.<sup>375</sup>

#### **4.2.5 Unnecessary in the Light of Effective Trade Practices and Standard Contracts**

From a commercial perspective, the need for unification models such as the CISG is questionable.<sup>376</sup> Lord Goff is of the opinion that standardised trade terms are used in most areas of international trade, and cover most if not all aspects of international trade practice. Besides, these standard trade terms are more suitable for the law of international trade. Therefore, it is very unlikely that traders in these areas of international trade will move away from such broadly used and well-known trade terms and instead use a new, untried and unfamiliar law model. Although this criticism is valid, it does not oppose the CISG in cases where standard terms or forms are not in use or are inadequate. It seems that the sceptics have not taken into account the value of the CISG on these occasions. The apprehension that the CISG would be regarded as unnecessary and inappropriate, owing to effective standard terms and practices being already in place, has been to a certain extent correct, as the CISG has been excluded by many traders from their standard contracts.<sup>377</sup> However, the CISG covers a much wider area than standard terms and trade practices do. A large number of transactions are indeed covered by none at all. When the CISG is excluded and the standard terms and trade practices fail to cover individual circumstances, the matter is left to national law. Neither the CISG nor standard-term contracts need to be excluded. Therefore, standard contract terms and trade practices should operate along with the CISG to cover every legal aspect of international trade contracts.<sup>378</sup>

It is also noteworthy that when parties merely apply the standard contract terms, economically stronger parties will deploy their greater bargaining power to safeguard

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<sup>374</sup> As of 5 March 2013, UNCITRAL reported that 79 states have adopted the CISG.

'CISG: Table of Contracting States' (n 1).

<sup>375</sup> Noboru Kashiwagi, 'Accession by Japan to the Vienna Sales Convention (CISG)' (Spring 2007) 4 The University of Tokyo Journal of Law and Politics 92.

<sup>376</sup> Goff, 'Force Majeure and Frustration' (n 368) 312–313.

<sup>377</sup> *ibid* (n 368) 324–325; Jacob S Ziegel, 'The International Sales Convention: Some Considerations' in Louis Perret and Nicole Lacasse (eds), *Actes du Colloque sur la Vente Internationale* (Montreal 1989) 59–60; Lavers, 'To Use, or Not to Use' (n 357) 10–11.

<sup>378</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 363.

their interests. The development of international trade requires a basis of competitive bargaining, and this happens only when boundaries are defined and parties have equal positions. The application of the CISG can safeguard this to a large extent.

Some sceptics also regard legal unification as unnecessary, as they believe that where necessary international traders themselves will make the reforms required, as was the case with Incoterms and UCP.<sup>379</sup> However, it is unlikely that a wider overall unification of international sales law will happen, as the efforts of relevant organisations are restricted to certain parts of international trade and they also lack the required legislative power to make such reforms. Moreover, the fact that the CISG has received support from important trade organisations discredits this argument.<sup>380</sup>

#### **4.2.6 Summary: The Iranian Situation**

As discussed above, the arguments in favour of the CISG's simpler approach when compared to private international law win over the arguments against it. These former arguments, which seem to be universally relevant, are particularly pertinent to a country such as Iran. With regard to which law to apply in international trade, Iran will benefit from the legal certainty that the CISG provides, if it decides to adopt it. Besides, by adopting the CISG Iranian traders will become aware of its provisions and will no longer have to confront an awkward situation in which the rules of private international law lead to the application of the law of a state that is a signatory to the CISG. Adoption of the CISG also promotes legal efficiency, as Iranian traders no longer need to familiarise themselves with the foreign legal systems of each of their contracting parties. Given the number of countries that have acceded to the CISG, and that the Convention is available in six official languages plus its unofficial translation into Persian, it offers convenience to Iranian businessmen during negotiations, as the governing law would be the same. The writer is also of the opinion that the effectiveness of trade practices and standard-term contracts does not make the CISG unnecessary or less effective. On the contrary, the CISG complements standard

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<sup>379</sup> Jeffrey Wool, 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Preliminary Proposal for the Development of a Policy-based Unification Model' (1997) 1 Uniform Law Review 47; Arthur Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 American Journal of Comparative Law 683, 685.

<sup>380</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 363.

contract terms and trade practices. Therefore, certainty, efficiency and convenience alone are sufficient reasons to justify adoption of the CISG by Iran.

### **4.3 Harmony with Trading Partners**

#### **4.3.1 Increase in Trade**

The rapid growth of trade between major trading partners can justify adoption of the CISG. To demonstrate this, the author takes Japan as an example, as it has recently ratified the CISG.<sup>381</sup> In 1990, less than 4% of Japan's export and import trade was with China. This has increased to 20% in recent years and is close to Japan's trade with the United States, which used to be its largest trading partner. Almost 40% of Japan's international trade thus comprises trade with China and the US. But it does not stop here. More than 20% of Japan's international trade includes trade with other East Asian countries excluding China. Given the legal diversity among these countries, and given that many of them are either transition economies or economies in the process of developing their legal infrastructure, the benefits of adhering to one common law of contract is more and more evident. At present, although the only East Asian states that are parties to the CISG are China, Singapore, South Korea and Japan, adoption of the Convention would be a great step forward for the countries of the region in dealing with Asian diversity,<sup>382</sup> and on a larger scale in dealing with the diversity that exists internationally.

#### **4.3.2 Summary: The Iranian Situation**

These arguments become particularly relevant when applied to the current situation in Iran. Iran is currently subject to international trade sanctions owing to its nuclear activities, but, because of the importance and vitality of international trade for Iran, this situation is unlikely to remain the same. The major trading partners of Iran had already adopted the CISG before the placing of tougher economic sanctions on the

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<sup>381</sup> 'CISG: Table of Contracting States' (n 1).

<sup>382</sup> Hiroo Sono, 'Japan's Accession to the CISG: The Asia Factor' (2008) 20 *Pace International Law Review* 105.

country.<sup>383</sup> Iran's main and largest trading partner (despite international boycotts) is China, whose trade with Iran in 2009 amounted to US\$26,635,000,000.<sup>384</sup> China is also a contractual party to the CISG. Although there is no evidence to suggest that the CISG has been applied to the contracts between Iranian traders and their trading partners, adoption of the CISG by Iran would bring it into greater harmony with its trading partners. It is also worth mentioning that accepting an international convention like the CISG might help to combat the negative implications of the trade sanctions on Iran's reputation.

#### **4.4 Simplicity and Clarity of the CISG as a Law for International Trade**

##### **4.4.1 The Nature of the Rules and Their Consequences**

The drafters of law at a domestic level have a difficult responsibility: to create a law that is simple to understand but simultaneously complex enough to be applied to a wide range of circumstances, and to ensure that its application has fair consequences. This is also true at an international level, which, apart from the greater need for simplicity, requires fairness and wider application.

A law that is couched in terms simple enough to be understood, is fair and equitable to all parties, the application of which creates certainty, and which is applied consistently in subsequent cases has a tendency to be successful. However, these principles often give rise to uncertain results, as they are not always reconcilable. Therefore, balancing these principles is the only way to succeed. The complexity of the legal environment in the field of international trade intensifies the need for such a balance. In international trade, it is the demands of private international law or the vigour of the parties involved that determine which law applies to a contract. As the domestic law of the stronger party can be applied more forcefully to a contract, the advantage of the uniform application of a single body of law is that it would decrease the complexity of a situation like this. The CISG as a single body of law removes such a problem.<sup>385</sup>

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<sup>383</sup> See ch 6, 6.2.3, Table Two. In 2007, China, Japan, Italy, South Korea, and Germany were Iran's largest trading partners. Japan adhered to CISG in 2008.

<sup>384</sup> IMF, Direction of Trade Statistics, Major Export Markets and Sources of Imports for Iran, 2009.

<sup>385</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

Moreover, in the development of the CISG specific consideration was given to trade usage and commercial practice,<sup>386</sup> which makes it capable of providing a solution to many of the complexities inherent in international trade contracts.<sup>387</sup>

Given the high level of participation in its drafting, the CISG went beyond reaching a balanced socio-economic and political input; it also provided a balanced outlook with regard to the structuring of the rights and obligations of the buyer and the seller.<sup>388</sup> In this respect the CISG has been an improvement on its precursors, ULIS and ULF, which were vague and complex.<sup>389</sup> It is noteworthy that negotiations come at a price, and this price is to make concessions. Therefore, legal certainty was sacrificed in order to generate simple articles.<sup>390</sup>

#### 4.4.2 The Increase in Predictability

During the 1980s, giving top priority to the ratification of the CISG seemed rather difficult, since there were few cases available in English. Today, however, there are a number of useful databases, such as CLOUT, UNILEX and Pace University. CLOUT includes a large number of abstracts in English of cases from contracting states to the CISG throughout the world.<sup>391</sup> CLOUT digests, which are prepared by UNCITRAL, provide an overview of the cases with regard to the CISG.<sup>392</sup> UNILEX<sup>393</sup> also gives information on CISG cases in English. The full text of judgements in the original language or in English is also given in UNILEX. Pace University, on the other hand, lists some 2,900<sup>394</sup> cases on CISG. It also provides an enormous amount of scholarly writing. As noted above, the CISG Advisory Council, which aims at promoting a uniform interpretation of the Convention, provides opinions for a better understanding of issues related to the CISG.

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<sup>386</sup> Kenneth C Sutton, 'The Draft Convention on International Sale of Goods (Part II)' (1977) 24 *Business Law Review* 119.

<sup>387</sup> Kazuaki Sono, 'UNCITRAL and the Vienna Sales Convention' (1984) 18 *International Lawyer* 7, 13.

<sup>388</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>389</sup> Errol P Mendes, 'The UN Sales Convention & Canada Transactions: Enticing the World's Largest Trading Block to Do Business Under a Global Sales Law' (1988) 8 *Journal of Law and Commerce* 109, 121; Peter Winship, 'The New Legal Regime for International Sales Contracts' (1988) 2 *Review of International Business Law* 108.

<sup>390</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>391</sup> See 'CLOUT Abstracts.' <[http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html)> accessed 3 August 2013.

<sup>392</sup> See 'UNCITRAL Digest of Case Law.' <[http://www.uncitral.org/uncitral/en/case\\_law/digests/cisg.html](http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html)> accessed 3 August 2013.

<sup>393</sup> See <<http://www.unilex.info/>> accessed 3 August 2013.

<sup>394</sup> See 'CISG Database' (n 358).

This suggests that the application of the CISG is no longer unpredictable. The ever-growing number of cases concerning CISG and scholarly texts on it is another example of the great interest of member countries in its application; consequently, when it comes to the international sale of goods, the CISG predictably supersedes national codes. For example, most of the cases decided by the Japanese courts with regard to the international sale of goods deal with industrial goods, whereas cases covered by the CISG range from shoes, socks and jewellery to shellfish, new and old machinery and chemical products . . . and the list goes on. Therefore, when for example a Japanese company tries to find out about cases with like products and like circumstances, they are more likely to find it among cases under the CISG.<sup>395</sup>

#### **4.4.3 Aid in Negotiations**

The CISG is designed to be read and understood easily. Contracting parties benefit from this balanced and neutral code, which assists them at the time of negotiation.<sup>396</sup> To a large extent, it is free from legal technicalities in order to be utilised easily by ordinary traders. Since the CISG is drafted appropriately for international trade transactions,<sup>397</sup> unless stated otherwise, it applies to every contract of international sale. With its application, parties' focus in negotiations can be on the commercial aspects of the transaction such as price, date and mode of delivery, size of product and quantity specifications. The CISG provides a comprehensive checklist which enables inexperienced traders to make sure all aspects of the contract are covered during negotiation.<sup>398</sup>

In addition, disputes over choice of law are avoided and the battle of forms is less prominent. Relying on the CISG to deal with the legal details of a contract prevents any disagreement, and as a result a more productive trading contract can be conducted.<sup>399</sup>

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<sup>395</sup> Kashiwagi, 'Accession by Japan to the Vienna Sales Convention (CISG)' (n 375).

<sup>396</sup> Mendes, 'The UN Sales Convention & Canada Transactions' (n 389) 126; John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982) 69; Winship, 'The New Legal Regime for International Sales Contracts' (n 389).

<sup>397</sup> Michael Joachim Bonell, 'The UNIDROIT Principles in Practice: The Experience of the First Two Years' (1997) *Uniform Law Review* 34, 38.

<sup>398</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 351.

<sup>399</sup> *ibid* (n 43) 353.



Next, points that challenge the arguments for simplicity and clarity will be discussed, as it is important to deal with them at this stage.

#### **4.4.4 The CISG – A Compromised Legal Failure**

The drafters of the CISG were involved in series of discussions with participatory countries, and such a widespread participation resulted in a conflict of interests. To harmonise these, the drafters decided on compromise. Some scholars are of the opinion that such compromise solutions create a false illusion of unification.<sup>400</sup> The compromise reached in this case means the CISG superficially covers legal conflicts, while they still stand in practice. Some articles in the CISG have been heavily criticised, such as Article 28 on specific performance, Article 4 on the validity of a contract, Article 5 on exclusion of the liability of seller for any death or injury caused by goods, Article 7 with regard to good faith, and Article 9 on custom and trade usages.<sup>401</sup> Depending on the country, the interpretation of these articles may be diverse.<sup>402</sup>

Disputes over interpretation may also arise from the fact that the CISG has failed to define procedural issues such as burden of proof.<sup>403</sup> Having said that, the CISG is viewed as bringing considerable harmony with regard to significant aspects of trade such as breach of contract and remedies.<sup>404</sup> Since disputes overwhelmingly concern issues of breach of contract, remedies and interpretation of the contract, the CISG is less likely to result in conflict. Specific performance is a remedy that is trusted in international commercial disputes. Therefore, since this remedy is not much used in practice, it is less likely to lead to conflict. In the end, making compromises was inevitable with regard to specific issues; it is not, however, a hindrance to the success of the CISG in practice.<sup>405</sup>

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<sup>400</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 270; Lisa M Ryan, 'The Convention on Contracts for the International Sale of Goods: Divergent Interpretations' (1995) 4 *Tulane Journal of International and Comparative Law* 99, 101–8; Hobhouse, 'International Conventions and Commercial Law' (n 27) 533; Malcolm D Evans, 'Uniform Law: A Bridge too Far?' (1995) 3 *Tulane Journal of International and Comparative Law* 145, 147.

<sup>401</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 357.

<sup>402</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 280–281.

<sup>403</sup> *ibid* (n 14) 281.

<sup>404</sup> *ibid* (n 14) 270–271; Zwart, 'The New International Law of Sales' (n 365) 125–126.

<sup>405</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 357.

#### 4.4.5 Multiplicity of Languages and Interpretation of Styles

It has been stated that the success of the CISG depends on its uniform interpretation and application. The fact that the CISG has been translated into six official languages and contains novel terms that lack clear legal definitions in specific cases makes its uniform interpretation and application a challenge for courts with different legal systems and styles and cultures of interpretation.<sup>406</sup> This endangers the unity and uniformity that the CISG attempts to establish. It gets even worse when the courts are required to develop the CISG. If uniform initial interpretations and applications of the CISG are difficult to attain, its further development seems somewhat impossible. This is partly owing to the more liberal style of civil law courts, which use *travaux préparatoires* freely, and the more traditional style of English courts, which take no notice of *travaux préparatoires* and interpret statutory text strictly based on the language used.<sup>407</sup> Since the civil law approach is accepted by Anglo-American courts in dealing with conventions, there may be a solution for this problem.<sup>408</sup> Lord Denning MR in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*<sup>409</sup> demonstrated this best:

This art. 23, para. 4, is an agreed clause in all international conventions. As such it should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We must, therefore, put on one side our traditional rules of interpretation . . . We ought, in interpreting this convention, to adopt the European method . . .

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<sup>406</sup> John O Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application?' (1988) 8 *Journal of Law and Commerce* 207, 207; Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 272; Evans, 'Uniform Law: A Bridge too Far?' (n 400) 150; Elizabeth Hayes Patterson, 'United Nations Convention on contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination' (1986) 22 *Stanford Journal of International Law* 263, 278–279.

<sup>407</sup> Scott C Styles, 'The Rule of Parliament: Statutory Interpretation After *Pepper v Hart*' (1994) 14 *Oxford Journal of Legal Studies* 151. See *Pepper v Hart* [1993] AL 593 (HL), [1993] 1 All ER 42 (HL)

<sup>408</sup> Arthur Rosett, 'CISG Laid Bare: A Lucid Guide to a Muddy Code' (1988) 21 *Cornell International Law Journal* 575, 586.

<sup>409</sup> [1977] 1 All ER 518 (CA) 522, 524, [1977] 2 WLR 107 (CA) 112–114.

This suggests that Anglo-American courts have well identified the need and responsibility for a uniform interpretation of the CISG through the application of similar interpretation styles.<sup>410</sup> The difference in methods of interpretation is not the main concern, but rather whether courts continue to interpret the novel matters on the basis of familiar approaches and doctrines in their national laws.<sup>411</sup>

#### **4.4.6 Unification is Undesirable and Unachievable**

One of the objections being put forward to the CISG arises from an important opposition to legal unification.<sup>412</sup> Rosett argues that unifying substantive rules of law without contribution and co-ordination from judicial and social contexts, in which the rules are supposed to be applied, is an illusion.<sup>413</sup> He holds that in the event that the social and judicial contexts are not integrated, the outcome will be different and the substantive rules will be applied differently. Therefore, the main and first focus should be on the issue of co-ordination.<sup>414</sup> This however seems very theoretical, failing as it does to take into consideration successful unifying usages and conventions such as Incoterms, UCP, the Hague–Visby Rules, and the Warsaw Convention.<sup>415</sup> The success of the CISG along with these examples validates that, within different legal and social contexts, legal unification is feasible and desirable.

Kotz puts forward a similar criticism of the efficiency of legal unifying efforts. He argues that this selective and partially unifying outcome dominates the time, resources and effort that were taken to create them.<sup>416</sup> He further continues that the simplification is endangered.<sup>417</sup>

If one takes a closer view, it appears justified to ask whether legal unification, inasmuch as it has legal simplification as a goal, does not find itself in the same position as Heracles, who cuts off the one snakehead of the Hydra, only to be confronted by three others in its place.

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<sup>410</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 362.

<sup>411</sup> Honnold, 'The Sales Convention in Action' (n 406) 208 and 211.

<sup>412</sup> Rosett, 'CISG Laid Bare' (n 408) 576.

<sup>413</sup> Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform' (n 379) 687–688.

<sup>414</sup> Rosett, 'CISG Laid Bare' (n 408) 575.

<sup>415</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 365.

<sup>416</sup> Hein Kotz in Eiselen, 'Adoption of the Vienna Convention' (n 43) 365.

<sup>417</sup> *ibid.*

The counter argument, over the issue of the wisdom and economic sensibility of these unifying efforts, is that this argument deals with the future and not with what has already been achieved. The CISG is now in place and the lengthy and expensive process of its production does not change this fact. It is thus wise to use the Convention to get the most value out of the time and cost taken to develop it.

Magnus has correctly stated that, as a result of the nature of legal unification, the outcome will be fragmentary and selective. This however does not imply any adverse quality.<sup>418</sup> Where diversity and uncertainty are present, the best way of attaining unity successfully and usefully within a specific field is to take a realistic approach. Owing to the diversification of the field, a fragmentary outcome is to be expected. The unifying efforts would not be required if there were no diversification. The greater the differences, the slimmer the chance for unification.<sup>419</sup>

The second issue is whether simplification and unification are produced by the CISG or whether it further complicates this area of international sales law. Despite the fact that it has not covered some important aspects that may arise in the field of international sales law,<sup>420</sup> adequate important aspects have been unified and simplified.<sup>421</sup>

Therefore, the CISG has been a success in terms of reaching a balanced agreement over a large number of diverse issues. At the same time, it is also correct that the CISG did not reach a compromise over some other issues, but this did not harm the Convention in general.<sup>422</sup>

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<sup>418</sup> Magnus in Eiselen, 'Adoption of the Vienna Convention' (n 43) 365.

<sup>419</sup> *ibid.*

<sup>420</sup> Zwart, 'The New International Law of Sales' (n 365) 115.

<sup>421</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 366.

<sup>422</sup> Arthur Rosett, 'The International Sales Convention: A Dissenting View' (1984) 18 *International Lawyer* 445, 446–447.

#### 4.4.7 Absence of Legal Principles

The CISG has been criticised for not having underlying principles as a result of its compromised character.<sup>423</sup> It is said that it is 'largely a cut-and-paste job' and that its principles and values are by and large deceptive.<sup>424</sup> In support of this criticism, Wool argues that the rigidity between commercial objectives and a diplomatic effort is unpleasant, as achieving their aims requires a comparative methodology between the two. As a result, 'the unification process is driven without clear-cut principles underlying the eventual outcome.'<sup>425</sup> The best example is the role of good faith, which was a dilemma within the CISG. Despite most legal systems identifying such a principle, it was not included as an independent necessity because there was a fear on the Anglo-American side that by doing so an introduction would be given to *culpa in contrahendo* rules in international trade. It was however introduced differently, and, through an interpretative role which was given to it, it became a source of controversy. Commentators from civil law countries demanded a more substantial role for the usage of this principle within the CISG than commentators from common law countries, who were fearful about it.<sup>426</sup>

This has now been invalidated by a careful analysis of the CISG by scholars. The compromises, which were achieved between developing and developed countries, capitalist and socialist nations, and civil and common law jurisdictions, never minimised or lessened the unity and balance achieved between the buyer's and the seller's interests. The argument that the CISG does not possess underlying principles has been sufficiently invalidated by a thorough analysis of the principles in the CISG by some prominent commentators.<sup>427</sup> Specific principles such as party autonomy, *pacta sunt servanda*, freedom from formalities, *favor contractus*, and protection of reliance have been recognised all through the CISG.<sup>428</sup>

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<sup>423</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 299; Eorsi, 'A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (n 149) 348–349.

<sup>424</sup> Rosett, 'CISG Laid Bare' (n 408) 589.

<sup>425</sup> Wool, 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law' (n 379) 48.

<sup>426</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 289–290; E Allan Farnsworth, 'Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws' (1995) *Tulane Journal of International and Comparative Law* 47.

<sup>427</sup> Farnsworth, *ibid*; Franco Ferrari, 'Uniform Interpretation of the 1990 Uniform Sales Law' (1994–95) *24 Georgia Journal of International and Comparative Law* 183, 219.

<sup>428</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 358.

#### 4.4.8 Novel Language in the CISG

Another criticism that is made of the CISG regards the usage of unfamiliar terminology in the realm of contract law. The concern is over the legal uncertainty that may emerge from these novel terms, as they are broad and inexact in meaning.<sup>429</sup> The sense that Farnsworth describes when one first faces such novel language in the CISG is a feeling of concern and apprehension.<sup>430</sup> For example, 'avoidance' of contract is a new term employed in the CISG. This does not, however, seem necessarily convincing, since these terminologies are being explained in the growing body of CISG precedents. Moreover, the novel terminology used in the CISG was indeed intended to avoid terms that existed in current legal systems and would imply political and theoretical influence. That the likely outcome of this new language would be legal uncertainty was evident to the drafters<sup>431</sup>; however, they were ready to risk this if the result would be the creation of a code free from the influence of foreign legal systems. What is noteworthy is that no insurmountable hurdle has emerged from such novel wording in the CISG; quite the contrary: its usage was meant to connect interpretations and legal ideas from different legal systems.<sup>432</sup> This suggests that no likely dangerous consequences are attached to the novel terminology in the CISG.

#### 4.4.9 Legal Uncertainty

The fact that the CISG includes broad terms and novel terminology and has failed to define these terms comprehensively leads to legal uncertainty, and obviously contradicts the claims of simplification and the need for clarity.<sup>433</sup> Despite the fact that the Convention's flexibility of formulation and adaptability to different circumstances

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<sup>429</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 274–276; Evans, 'Uniform Law: A Bridge too Far?' (n 400) 147; Ryan, 'The Convention on Contracts for the International Sale of Goods' (n 400) 101.

<sup>430</sup> E Allan Farnsworth, 'The Convention on Contracts for the International Sale of Goods from the Perspective of the Common Law Countries' in *Anonymous La Vendita Internazionale* (Milan 1981) 8.

<sup>431</sup> Jan Hellner, 'The UN Convention on International Sale of Goods – An Outsider's View' in E Jayme, G Kegel and M Luther (eds), *Jus Inter Nationes: Festschrift für Riesenfeld* (1983) 79; Bernard Audit, 'The Vienna Sales Convention and the Lex Mercatoria' in T E Carbonneau (eds), *Lex Mercatoria and Arbitration – A Discussion of the New Law Merchant* (1998) 179–180.

<sup>432</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 359.

<sup>433</sup> Wool, 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law' (n 379) 46–47; Hobhouse, 'International Conventions and Commercial Law' (n 27); Robert G Lee, 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?' (1993) *Journal of Business Law* 131, 137; Bianca and Bonell, *Commentary on the International Sales Law* (n 315) 10–11; Evans, 'Uniform Law: A Bridge too Far?' (n 400) 147.

gives the courts more freedom to make just decisions and to interpret it uniformly, it results in uncertainty over predicting the result of any dispute.<sup>434</sup>

That the CISG was drafted in an atmosphere that inclined by nature to civil law is said to result in some degree of legal uncertainty.<sup>435</sup> This however does not seem to be an issue; the real problem is the extent to which this legal uncertainty contradicts such constructive goals of flexibility. The question raised is whether the domain of this legal uncertainty is acceptable enough to perform effectively. The failure of the ULIS and ULF saved the CISG with regard to legal uncertainty. Many principles employed in the CISG had been in place in countries that ratified the ULIS and ULF. Feedback and commentaries were published on the CISG's precursors. Many lessons learned from these reports were taken into account at the time of drafting the CISG.<sup>436</sup> Therefore, the question of the CISG's lack of legal clarity was rendered less serious by the fact that it was preceded by ULIS and ULF.<sup>437</sup> This suggests that the extent of legal uncertainty in the CISG is acceptable and is not an impediment to its ratification.

#### **4.4.10 Summary: The Iranian Situation**

The arguments made against the simplicity and clarity of the CISG as a statute for international law outweigh the arguments in its favour. However, the CISG will be applied by parties as opposed to states. Therefore, Iranian traders will benefit from a CISG which is simple enough to understand and is fair and equitable to all parties. This is of great importance for Iranian traders, as they may not be in a strong bargaining position. With the number of databases now available on the CISG, its predictability is no longer an issue. Iran can take advantage of these databases to increase awareness in the Iranian legal and business community (the author's fieldwork research shows that lack of awareness is one of the reasons that Iran has not acceded to the CISG).<sup>438</sup> It would be an added benefit for Iran to accede to the CISG, as Iranian scholars would be exposed to a wider horizon and would keep up with their international counterparts. Iranian traders would be able to use the CISG as an aid during their

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<sup>434</sup> Farnsworth, 'The Convention on Contracts for the International Sale of Goods' (n 430) 8.

<sup>435</sup> Farnsworth, *ibid* 11–12; Lee, 'The UN Convention on Contracts for the International Sale of Goods' (n 433) 137.

<sup>436</sup> Lee, *ibid*.

<sup>437</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 362.

<sup>438</sup> See ch 8, 8.2.1, sect I.

negotiations, since it provides a comprehensive checklist which covers all aspects of contracts.

The arguments that are made against adoption of the CISG seem to be universally relevant. However, as far as a country like Iran is concerned, the arguments against adoption can be refuted by the sheer fact that the Iranian legal system is by no means at the forefront of well-established legal systems and thus is in no position to assert that the CISG has failed in making a legal compromise or leads to legal uncertainty. As it will be shown in chapter seven, the CISG often offers better solutions to parties in international trade, and creates certainty and confidence for traders where the Iranian Civil Code fails to do so.

Given the position of Iran in the world economy and given that the Iranian legal system is not well known, Iranian traders may find themselves in circumstances in which the law applicable to their contract contains unfamiliar language. However, the novel language in the CISG will no longer be novel once the CISG is adopted and adequately studied. It is indeed a learning cost that needs to be paid once and for all, and then the CISG will be applicable in international trade. This will be discussed later in this chapter.

#### **4.5 Consistency with General Principles of International Commercial Law and Trade Practices**

Professor Schmitthoff, the author of the report<sup>439</sup> to the General Assembly in support of the creation of UNCITRAL, stated that the law of international trade was based on the same three fundamental principles throughout the world: the autonomy of the parties; the faithful fulfilment of contractual obligations (*pacta sunt servanda*); and the wide recognition of arbitral awards.<sup>440</sup> Party autonomy and *pacta sunt servanda* in support of adoption of the CISG will be discussed next, as these two general principles are recognised in the CISG.

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<sup>439</sup> Text to n 114 in ch 2.

<sup>440</sup> [A/6396 - Report to the Secretary General \("The Schmitthoff Study"\) \(document ultimately was support for the creation of UNCITRAL\)](#) (n 35) 5.



#### 4.5.1 Assimilation of International Trade Usage

During the drafting of the CISG, careful attention was given to established international trade practices and usages. This was to safeguard the valuable practices developed through experience. The legal principles placed in Incoterms and the Uniform Customs and Practices of the International Chamber of Commerce (ICC), along with general trade usages and practices, are accommodated within the CISG.<sup>441</sup> This had a great impact on its acceptability by important trading states. It also explains why many large trade organisations approve of the CISG.<sup>442</sup> As explained in chapter three,<sup>443</sup> this has not been free from controversy between developed and developing countries, though.<sup>444</sup> The trade usages were unfamiliar to developing countries. Therefore they opposed their inclusion, as this would disadvantage them because of their lack of knowledge. The developed nations viewed it differently, as omission of these long-established practices would harm international trade by creating uncertainty and confusion. In the end, the CISG formulated the role of trade usages and practices in its current form.<sup>445</sup>

#### 4.5.2 Acknowledgement of *Pacta Sunt Servanda*

*Pacta sunt servanda* is a principal feature of the law of contract. That is why for example the CISG adopted specific performance as a primary remedy. This primacy shows that the CISG drafters truly implemented the norm of *pacta sunt servanda*.<sup>446</sup> Although the CISG does not expressly mention *pacta sunt servanda*, it is implied in numerous provisions of the Convention such as Articles 30 and 53, which define the duty to deliver and the duty to make payment. The binding effect of the contract is particularly shown in Articles 71–73 and 79 of the CISG, which determine that the contract cannot be avoided in cases such as a simple change of circumstances or frustration of contract.<sup>447</sup> Therefore, if no obstacles exist, parties should be faithful in

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<sup>441</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 352.

<sup>442</sup> Patterson, 'United Nations Convention on contracts for the International Sale of Goods' (n 406) 274.

<sup>443</sup> See ch 3, 3.3.4.

<sup>444</sup> Zwart, 'The New International Law of Sales' (n 365) 118.

<sup>445</sup> S K Date-Bah, 'The Convention for the International Sale of Goods from the Perspective of the Developing Countries' in *Anonymous La Vendita Internazionale* (Milan 1981) 26–27.

<sup>446</sup> Chengwei Liu, 'Changed Contract Circumstances' (April 2005).

<<http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>> accessed 3 August 2013.

<sup>447</sup> Rabels Zeitschrift, Max-Planck-Institute for foreign and international Private Law. Ulrich Magnus and Lisa Haberfellner, 'General Principles of UN Sales Law.'

the fulfilment of their contractual obligations. As Professor Schmitthoff has stated, all national legal systems indeed recognise this paramount principle.

### **4.5.3 Acknowledgement of Party Autonomy and Balance of Interests Between Exporters and Importers**

The highest capacity of party autonomy has been written into the CISG. Therefore, parties to a contract of sales governed by the CISG may wish to modify or exclude most or certain articles of the CISG.<sup>448</sup> The CISG, however, places some restrictions. For example, particular formalities in the formation of a contract are being enforced.<sup>449</sup> Deviation from these required formalities results in the CISG overriding the contract. If the contract does not cover a certain necessary point, the CISG will fill the gap.<sup>450</sup> Moreover, this balanced approach towards the seller and the buyer is of great value particularly to smaller traders. The fact that the CISG does not favour any party strengthens the position of the weaker party by analogy with its normal position under domestic law.<sup>451</sup> This is particularly valuable for developing countries.

The application of the CISG leads to the reduction of bargaining power to a certain extent. However, it is not possible entirely to improve the bargaining power of the weaker party against the stronger party. The CISG tries to equalise the legal playing field by a balanced distribution of rights and obligations.<sup>452</sup> The basis of competition between parties is the same legal code that restricts imposition of any unfair terms on the weaker party.<sup>453</sup> This as a result strengthens competition. Therefore, this levelling of the playing field by application of the CISG creates a domino effect.

Parties may also remedy any inadequacy inherent in the CISG by contracting around those issues in their own private contract.<sup>454</sup> While it is true that this given freedom

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<<http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>> accessed 3 August 2013.

<sup>448</sup> Article 6 of the CISG.

<sup>449</sup> Part II of the CISG.

<sup>450</sup> Peter Winship, 'International Sales Contracts under the 1980 Vienna Convention' (1984) 17 *Uniform Commercial Code LJ* 58.

<sup>451</sup> Bianca and Bonell, *Commentary on the International Sales Law* (n 315) 15.

<sup>452</sup> Mendes, 'The UN Sales Convention & Canada Transactions' (n 389) 126; Winship, 'The New Legal Regime for International Sales Contracts' (n 389).

<sup>453</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 353.

<sup>454</sup> *ibid* 351.

could be exploited by stronger parties to exclude its entire application,<sup>455</sup> this principle of party autonomy is more beneficial than detrimental.<sup>456</sup>

#### **4.5.4 Summary: The Iranian Situation**

The arguments made in relation to the CISG's consistency with general principles of international commercial law and trade practices all come out in favour of its adoption. As far as Iran is concerned, Iranian traders are relatively familiar with Incoterms and apply them to their contracts with their international counterparts. Therefore, the incorporation of Incoterms, UCP and general trade usages and practices into the CISG should not be a problem for Iran. The purpose of these international trade usages and practices, which are widely and frequently used, is to facilitate trade with more ease and certainty. Hence, with or without adoption of the CISG, Iranian traders may find themselves in circumstances in which these international trade usages occur. The complicated and sophisticated world of commerce requires sophisticated traders. Therefore, the sooner Iranian traders familiarise themselves with these sets of international rules, the better it will be for them from a commercial standpoint. The fact that the CISG acknowledges these international trade usages is an added bonus for Iran, since they are all gathered into one body of law.

The principles of *pacta sunt servanda* and party autonomy, which are recognised by the CISG, are of particularly great value to a country like Iran. This is because, depending on the compatibility of articles of the CISG with the Iranian legal system, Iran can modify or exclude certain articles of the CISG to make it more adaptable to its own needs. Iranian traders can also make sure that faithful fulfilment of contractual obligations is recognised under the CISG, and the contract cannot easily be avoided in cases such as a simple change of circumstances or frustration of contract. Besides, the balanced and neutral approach of the CISG towards the rights and obligations of all parties provides a level playing field which strengthens the position of Iranian traders in international commercial dealings with stronger parties. All in all, the CISG's detailed

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<sup>455</sup> Lee, 'The UN Convention on Contracts for the International Sale of Goods' (n 433) 132.

<sup>456</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 351; See 'CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani' (n 26).

approach towards the legal aspects of contract assists Iranian traders during negotiations.

## **4.6 Adaptability to Future Changes**

### **4.6.1 Stability of the CISG**

Another argument that is put forward in favour of accession is stability. This is specifically true for countries whose legislative framework for doing business is still volatile and liable to frequent and peculiar changes. Therefore, business is more reassured if it relies on a convention that is fair and equitable as well as solid and long-lasting. Small and medium-sized enterprises benefit even more, as they can afford neither to spend much on legal fees nor to have their contracts drafted in much detail.<sup>457</sup>

### **4.6.2 Inability to Grow and Adapt**

All forms of legal code, regardless of whether they are national or international, have a tendency to come to a standstill and restrict the development of law.<sup>458</sup> No provisions in the CISG are designed for modification or alteration. The CISG embodies the most significant aspects of international trade contracts, which are greatly beneficial to all parties and countries involved. Like all other laws, the CISG was written against a background of specific socio-economic conditions at a specific time. Meeting the needs of the international trading community was the intention of its drafters, but such needs will change over time. This means that specific articles may become inappropriate and inessential, and may act as a hindrance to the development of sales law in a country. National laws are designed with the capacity to be altered if such legislation proves to be unsuitable for what it was drafted for. Given the number of

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<sup>457</sup> Rolf Knieper, 'Celebrating Success by Accession to CISG' (2005–06) 25 *Journal of Law and Commerce* 477.

<sup>458</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 272; Zwart, 'The New International Law of Sales' (n 365) 126–127; Lee, 'The UN Convention on Contracts for the International Sale of Goods' (n 433) 137; Evans, 'Uniform Law: A Bridge too Far?' (n 400) 151–152; Robert M Jarvis and Michael S Straubel, 'Litigation with a Foreign Flavour: A Comparison of the Warsaw Convention and the Hamburg Rules' (1994) 59 *Journal of Air Law and Commerce* 907.

countries that have ratified the CISG, altering its contents presents a problem.<sup>459</sup> This is because all contracting states have to agree on the proposed changes before any modification can take place. Non-unanimous agreement on the changes results in the code being static or different versions of the code being in place at the same time.<sup>460</sup> This would harm the goal of uniformity within international trade. However, the general and flexible terminology that was so strongly criticised guarantees ongoing development. Although such formulations result in a degree of uncertainty, they are vital as they allow for the vibrancy and adaptability of the code.<sup>461</sup> It is indeed the interpretation given to the CISG by courts and tribunals that provides for adaptability to the changing circumstances and not 'some supranational legislative agency.'<sup>462</sup> What individual courts decide does not have a legally binding effect on other courts in the world. At the time of formulation of the CISG, its drafters were of the opinion that courts and tribunals would in good faith go beyond national law and apply the CISG in the spirit in which it was drafted. They would also comply with the decisions of other tribunals and courts, although they are not obliged to do so. This is not naivety, but stems from the experience that a comparative approach is taken by modern courts to how other courts elsewhere have dealt with novel circumstances.<sup>463</sup> In other words, it is the essence of the CISG, though it is not dictated, that courts are aware of and consider other courts' decisions in order to maintain uniformity in their decisions. There is often a misconception in common law jurisdictions that where a principle of *stare decisis* does not exist, the civil law jurisdictions do not take into account other courts' judgements.<sup>464</sup> This is disproved, however, by established civil law systems such as those of Germany and the Netherlands, as it shows uniformity in court judgements and legal developments. To make sure that the CISG does not become frozen, it is up to the courts throughout the world to develop it consistently and uniformly. It is not yet clear from a study of the cases whether this has been achieved and whether the CISG has become a living code.<sup>465</sup>

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<sup>459</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 272; Audit, 'The Vienna Sales Convention and the Lex Mercatoria' (n 431) 187.

<sup>460</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 360.

<sup>461</sup> Audit, 'The Vienna Sales Convention and the Lex Mercatoria' (n 431) 187.

<sup>462</sup> Zwart, 'The New International Law of Sales' (n 365) 127; Audit, *ibid*; Evans, 'Uniform Law: A Bridge too Far?' (n 400) 152.

<sup>463</sup> Honnold, 'The Sales Convention in Action' (n 406) 208–209.

<sup>464</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 298.

<sup>465</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 360–361.

### **4.6.3 Summary: The Iranian Situation**

The main argument made in relation to the CISG's adaptability to future change is not in favour of its adoption. However, there is an argument that stability is valuable. The stability that the CISG offers is particularly relevant to Iranian traders, as they can rely on its fair and detailed provisions which liberate them from hefty legal expenses. With regard to the CISG's inability to develop and adapt to future changes, the writer is of the opinion that this is not a matter of concern for Iran. That is because the current position of Iran in the world economy is not very strong, and the priority for Iran at this specific time is to rely on a body of law that has the ability to cover most aspects of international trade and to be more beneficial to Iranian traders. This is clearly what the CISG is capable of, and what the Iranian legal system is incapable of. What the future may hold with regard to the CISG's adaptability to international changes is an issue to be confronted by all contracting states and not just Iran (in the event that Iran adopts the CISG). On top of that, as discussed above, the CISG is couched in general and flexible terms that safeguard its continuous development.

## **4.7 Ease of Assimilation into Domestic Law and Practice**

### **4.7.1 Compatibility of the CISG**

One of the arguments put forward to justify ratification of the CISG is its compatibility with national law. Taking the national civil legislation in post-Soviet countries as an example, the CISG and their national civil codes are indeed very compatible. In this regard, the text of the CISG was conferred when the civil codes of the Commonwealth of Independent States (CIS) were drafted. This obviously does not mean that there are no differences between the CISG and the civil codes of CIS countries. For example, the reliance of the code on forms contradicts CISG Article 11.<sup>466</sup> As soon as the offers reach the other party, the revocation of offers is not permitted. This means it deviates from CISG Articles 15<sup>467</sup> and 16.<sup>468</sup> Specific performance is always required, but restitution

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<sup>466</sup> Article 11 of the CISG states:

'A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.'

<sup>467</sup> Article 15 of the CISG states:

'(1) An offer becomes effective when it reaches the offeree.'

takes place before monetary compensation, meaning it is less stringent than CISG Article 28.<sup>469</sup> The examination of the goods and the giving of notification by the buyer to the seller before exercising their rights is not a must. This also makes it less stringent than CISG Articles 38<sup>470</sup> and 39.<sup>471</sup>

However, it is noteworthy that these differences between the CISG and national codes are not contradictory. They do not even count as insurmountable impediments, since contracting states can make a reservation of their applicability. Parties are also free to deviate from their national codes or the CISG. In practice, Georgia made its arguments for ratification on the basis of similarity between its national code and the CISG. This was not the case in Uzbekistan, however, as legislators held that, owing to transitional problems, more weight should be given to the civil code than to one Soviet system. Ratification was therefore justified as a practical option to eliminate such systems. The free-trade concept of the CISG was also an incentive behind the modernisation of the national Civil Code of Uzbekistan.<sup>472</sup> This example suggests that the CISG may be compatible with many other national laws, and, where differences exist between the two, states are free to make reservations.

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(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.'

<sup>468</sup> Article 16 of the CISG states:

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

<sup>469</sup> Article 28 of the CISG states:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

<sup>470</sup> Article 38(1) of the CISG (n 216).

<sup>471</sup> Article 39(1) of the CISG states:

'The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.'

<sup>472</sup> Knieper, 'Celebrating Success by Accession to CISG' (n 457).

### 4.7.2 Domesticity of the CISG

One of the benefits of accession to the CISG is that it becomes domestic law in signatory states. As a consequence, when disputes arise between parties to an international sales contract, they do not need to compete with a foreign law with which they are not familiar. This speeds up their dispute resolution, as they need not struggle with confusing foreign law. Besides, no matter where the case is heard, jurisdiction debates are prevented, as the same law will apply.<sup>473</sup> Unfortunately, in dealing with international sales contracts, there are still countries like Iran that need to understand and apply foreign law. If these countries accede to the CISG, the choice of law will be excluded from sales transactions involving signatory states. The courts will not waste time considering which law to apply to the dispute. Proving foreign law in court is no longer needed, and as argument proceeds the relevant information on the law will be introduced.<sup>474</sup>

### 4.7.3 Artificial Division Between National and International Transactions

Rosett argues that making a distinction between domestic and international transactions is not feasible, since parties choose to ignore international boundaries under new economic conditions.<sup>475</sup> In accordance with Article 1 of the CISG, the parties' place of business determines the sphere of application of the CSIG. Although it is artificial, this does not cause a problem in most transactions, as, when two legal systems come into play, the CISG clearly takes precedence. However, in some instances, the CISG may apply but the conflict rules would not,<sup>476</sup> so parties could choose to apply their own national law or prove that their intention was to apply national law. Although this formulation seems peculiar, application of the CISG in such manner results in certainty, which is respectful.<sup>477</sup>

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<sup>473</sup> Kabik, 'Through the Looking-Glass' (n 363) 409.

<sup>474</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>475</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 268; Bianca and Bonell, *Commentary on the International Sales Law* (n 315) 8.

<sup>476</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 277–279.

<sup>477</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 359.



#### **4.7.4 The Costs of Familiarisation**

Another reason put forward against adoption of the CISG in certain jurisdictions is the cost, time and effort required to become familiar with the Convention. Such costs, however, as Professor Flechtner argues, are 'start-up' costs, and are required as an initial investment.<sup>478</sup> As soon as such an investment is made in CISG knowledge, the CISG can be in use for a long time.<sup>479</sup>

#### **4.7.5 Lack of Manpower to Adopt the CISG**

Another reason given by some countries for not ratifying the CISG is the lack of manpower.<sup>480</sup> For example, Japan (though it is now a contracting party) was struggling with the impact of the bursting of the bubble economy in the early 1990s. Therefore, in an attempt to achieve economic recovery, its entire legislative agenda focused on insolvency laws, corporation laws, and laws on secured transactions. At the time, it was not possible for Japan to focus on adoption of the CISG.<sup>481</sup>

#### **4.7.6 Slow Process Towards the CISG**

The fact that many countries have not yet ratified the CISG does not always mean they are opposing it. Many countries have already taken steps towards its ratification but are at different stages. For example, in Azerbaijan the Ministry of Economic Development is still considering ratification, but they are certain that it will be adopted. In other words, 'procedures are slow but steady.' In Armenia (now a contracting state to the CISG), the constitutionality of the CISG was first approved by the Constitutional Court, and then, after the Ministry of Foreign Affairs approved it, the government sent the text to be adopted by parliament. In Kazakhstan too, the Ministry of Industry and Trade and the Ministry of Justice have approved it. It is then

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<sup>478</sup> Harry M Flechtner, 'Changing the Opt-Out Tradition in the United States' (2010) University of Pittsburgh Legal Studies Research Paper Series Working Paper No 2010-10. <<http://ssrn.com/abstract=1571281>> accessed 3 August 2013.

<sup>479</sup> Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)' (2009) *Vindobona Journal of International Commercial Law and Arbitration* 135, 140.

<sup>480</sup> Yoshihisa Nomi, 'The CISG from the Asian Perspective' in 'Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods' (2005) Singapore International Arbitration Centre 169.

<sup>481</sup> Sono, 'Japan's Accession to the CISG' (n 382).

up to the president, the Constitutional Council and ultimately the vote of parliament to conclude its adoption.<sup>482</sup>

#### **4.7.7 The CISG – More Neglected Than Resisted**

It is believed that ‘non-adherence to the CISG is not based on systemic or ideological resistance.’ This is a totally different reaction from what it is seen with regard to the Model Law on International Commercial Arbitration, which met with total resistance from judiciary, prosecutors and government officials in countries in transition. In some countries, commercial arbitration is regarded with suspicion and apprehension, so the CISG is neglected rather than resisted. For example, post-Soviet countries do not actively oppose and obstruct the CISG, nor do their legal systems or judges resist learning about or applying the CISG (bearing in mind that their national law has been recently and frequently changed). The reason for this may reflect the lack of a civil society, the absence of an independent chamber of commerce or other commerce-related organisations, and, more importantly, the scarcity of influential individuals or groups capable of showing willingness and lobbying for the CISG in parliament. Another reason could be the legacy of Soviet times, when all international business transactions were controlled from Moscow. It will require co-operation and legal assistance to surmount these hurdles originating from the old system.<sup>483</sup>

#### **4.7.8 Multiple Conventions or Codes Lead to Confusion**

Unifying efforts should facilitate the simplification of international trade rather than complicating this already complex field. The fact is that when there are diverse conventions trying to bring uniformity in the same field, determining which set of rules to apply will result in more confusion. This is very much true in the case of laws of the sea, with the Hague Rules, Hague–Visby Rules and Hamburg Rules in place. This does not apply, however, to international trade law, since the CISG’s forerunners’ (ULIS and ULF) are no longer in place.

Rosett criticises the fact that American businesses are now supposed to deal with more than one set of sales laws, while before acceptance they had only the Uniform

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<sup>482</sup> Knieper, ‘Celebrating Success by Accession to CISG’ (n 457).

<sup>483</sup> *ibid.*

Commercial Code (UCC), a nationally applicable law.<sup>484</sup> This argument is not entirely convincing, since before the CISG American traders were either in a stronger position to impose the UCC, or they were in a position in which the other party dictated which law should be applied. As a result, any foreign legal system could apply, or the applicable legal system was determined by normal conflict rules, which again could be either UCC or a foreign law. Acceptance of the CISG means that the possibility of different legal systems being applied to the contract is greatly decreased.<sup>485</sup> If both parties to the contract are signatory states, there will be no foreign national law connected if and when conflict arises. This is particularly beneficial for countries that have not yet ratified the CISG, as the CISG facilitates international trade. Therefore, the accusation of complicating international trade is not valid, as in many instances the CISG has succeeded in its simplification.<sup>486</sup> It is however true that the CISG has left certain aspects open, and this could result in complications.<sup>487</sup>

#### **4.7.9 Popularity of the CISG and the Extent of International Acceptance**

The fact that some of the world's major trading states have ratified the CISG shows its popularity in practice. Although popularity is not always translated into success, this widespread acceptance of the CISG makes it an influential convention for international trade transactions. Many developing countries enter into contracts of international trade with countries that have ratified the CISG, which therefore necessitates the paying of more attention to the Convention by non-contracting states in order to facilitate more efficient trade with contracting states. Ratification of the CISG may therefore promote improved relations with trading partners. Non-ratification may also have an adverse effect, though this obviously does not mean that general acceptance by the world justifies ratification.<sup>488</sup>

However, the Convention has been endorsed by many organisations, such as the American Association of Exporters and Importers, the National Trade Council, the American National Association of Manufacturers, and also the Canadian Manufacture

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<sup>484</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 273.

<sup>485</sup> Garro, 'Reconciliation of Legal Traditions' (n 152) 450–452.

<sup>486</sup> Kabik, 'Through the Looking-Glass' (n 363) 409.

<sup>487</sup> Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 281; Lavers, 'To Use, or Not to Use' (n 357) 10–11.

<sup>488</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

Association. Leading legal bodies such as the American and the Canadian Bar Associations also firmly support the CISG.<sup>489</sup> This widespread and diverse acceptance should be a sign of its dominance over the law of international trade. The hesitation that existed in the early 1990s over how the CISG would be applied no longer exists today.<sup>490</sup> The ever-growing body of case law reveals the extent to which the CISG is being used on a day-to-day basis in trade. Further interpretation of the Convention in the light of this increasing body of case law will be provided.<sup>491</sup>

It is also believed that the CISG as a recognised part of international trade has the capability to become the ultimate power governing international commerce.<sup>492</sup> The deliberate exclusion of the CISG from contracts of international trade could be a result of ignorance, prejudice and habit.<sup>493</sup> This is because the CISG is used more and more every day, and there is a growing knowledge about it, so trading practice is also influenced. The new generation of traders are more in favour of its application, which suggests that the CISG will become the norm in international trade and that its exclusion will be unusual.<sup>494</sup> This shift indeed justifies its ratification and incorporation into domestic law.

#### **4.7.10 CISG – The Great Rate of Opt-Outs**

As the CISG allows for the exclusion of its application, in its entirety or in part, it has been said that the CISG has been frequently 'opted out of'.<sup>495</sup> The CISG's goals of reduction of the cost of transactions and the facilitation of trade will not be achieved if it is not widely used by parties in international trade. The more parties opt out of the CISG, the more likely it will be for the CISG not to reach its objectives. The statistics taken from some jurisdictions show how frequently this exclusion takes place. For

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<sup>489</sup> *ibid* 346.

<sup>490</sup> Sono, 'Japan's Accession to the CISG' (n 382).

<sup>491</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 345–346.

<sup>492</sup> *ibid* 354.

<sup>493</sup> Lavers, 'To Use, or Not to Use' (n 357) 10.

<sup>494</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 355.

<sup>495</sup> Sonja A Krusinga, *(Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (New York: Intersentia, 2004) 9; Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *American Journal of Comparative Law* 97, 111.

example, in the US, the rate of opt-out is somewhere in the region of 55%–71%.<sup>496</sup> In Germany, 45% of lawyers ‘generally/predominantly’ opt out.<sup>497</sup> In Switzerland and Austria, the rates are around 41%<sup>498</sup> and 55%<sup>499</sup> respectively. Also in China the figure for lawyers who typically opt out of the CISG is around 37%.<sup>500</sup> Although the reason for exclusion might differ from jurisdiction to jurisdiction, the impact is pretty much the same, which is that the CISG is not able to achieve its objectives. On top of that, it could also have a knock-on-effect on the rate of adherence to the CISG by other countries.

The high rate of opt-outs could perhaps be explained by the somewhat indifferent attitude of large corporations and international business lawyers. It has been reported that they may be unwilling:

- i. Because of their unfamiliarity with the CISG’s contents. There has been no need so far to familiarise themselves with it and they basically do not like what they are not acquainted with.<sup>501</sup>
- ii. Because they are under American lawyers’ influence, concerning the superiority of the Uniform Commercial Code over the CISG.<sup>502</sup> They may thus be of the opinion

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<sup>496</sup> Peter L Fitzgerald, ‘The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation’s Convention on the International Sale Of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States’ (2008) 27 *Journal of Law and Commerce* 1, 67.

<<http://ssrn.com/abstract=1127382>> accessed 3 August 2013.

Martin F Koehler, ‘Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application’ (2006).

<<http://cisgw3.law.pace.edu/cisg/biblio/koehler.html>> accessed 3 August 2013.

G V Philippopoulos, ‘Awareness of the CISG Among American Attorneys’ (2008) 40 *Uniform Commercial Code Law Journal* 357, 361 and 363.

<sup>497</sup> Koehler, *ibid*; J Meyer, ‘The CISG in Attorney’s Every Day Work’ (English version, unpublished, 2009) 6, in Spagnolo, ‘A Glimpse through the Kaleidoscope’ (n 479) 136.

<sup>498</sup> Meyer, *ibid*; Corrine Widmer and Pascal Hachem, ‘Switzerland’ in Franco Ferrari (eds), *The CISG and its Impact on National Legal Systems* (Sellier, 2008) 281, 285–286.

<sup>499</sup> Meyer, *ibid* 6.

<sup>500</sup> M F Koehler and Y Guo, ‘The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems – An International Comparison of three Surveys on the Exclusion of the CISG’s Application Conducted in the United States, Germany and China’ (2008) 20 *Pace International Law Journal* 45; F Yang, ‘CISG in China and Beyond’ (2008) 40 *Uniform Commercial Code Law Journal* 373, 376; Albert H Kritzer, ‘Application and Interpretation of the CISG in the P.R. of China – Progress in the Rule of Law in China’ (2007) 40 *Uniform Commercial Code Law Journal* 261; Shiyuan Han, ‘China’ in Franco Ferrari (eds), *The CISG and its Impact on National Legal Systems* (Sellier, 2008) 71, 71.

<sup>501</sup> Filip De Ly, ‘Opting Out: Some observations on the occasion of the CISG’s 25th Anniversary’ in Franco Ferrari, *Quo Vadis CISG? Celebrating the 25<sup>th</sup> Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (Sellier, European Law Publishers 2005) 500.

that the CISG is ill drafted as a result of the compromise made between the civil and the common law jurisdictions.

- iii. Simply as a result of speculation. In some countries, large corporations and international law firms may not be involved in many international disputes arising from contracts of sale of goods. Although there may not be an empirical study on this, the statistics show that legal work in law firms and corporations involved in international transactions is mainly concerned with M&A, investment, joint ventures, large-scale finance, construction projects, legal issues under anti-trust, anti-dumping, issues of non-compliance or different legal disputes. There are rarely or hardly ever conflicts over the international sale of goods.<sup>503</sup>
- iv. Because many large corporations are in possession of branch offices or subsidiaries or joint venture companies in other countries where their raw materials and parts are being bought or in countries where they export their goods. Thus, if a dispute arises over the quality of the goods or time of delivery, the issues will be between original sellers or final buyers in that particular country and the branch offices or subsidiaries of those corporations in the same foreign country. In such circumstances, disputes over the international sale of goods are no longer international and will be treated domestically in that country. This may not, however, be the case for small companies that cannot afford to have subsidiaries or branches in other countries. Their disputes over international sales transactions are thus treated internationally. Having said that, in some countries, such as Japan, there are several large companies involved in a wide range of trading activities. Therefore, most small businesses rely on the expertise of these trading companies and their services. These trading companies are also in possession of subsidiaries and branch offices throughout the world. So, again, when a dispute arises regarding export and import business, it will become a domestic dispute in that particular country. This has thus been the main reason for their negativity towards the CISG.<sup>504</sup>

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<sup>502</sup> Ralph H Folsom, Michael W Gordon and John A Spanogle, *International Business Transactions* (6th edn, West Nutshell Series 2000) 51.

<sup>503</sup> Kashiwagi, 'Accession by Japan to the Vienna Sales Convention (CISG)' (n 375).

<sup>504</sup> *ibid.*

#### 4.7.11 Summary: The Iranian Situation

The arguments against the CISG's ease of assimilation into domestic law and practice outweigh the arguments in its favour. This should not, however, pose a threat for Iran. In chapter seven, it will be shown that the CISG and the Iranian Civil Code are compatible in many respects. Where differences exist between the two legal systems, it is possible to overcome them. In the event that Iran ratifies the CISG, it will become its domestic law as a signatory state. Hence the CISG will be the applicable law in international trade, which accelerates dispute resolution between parties. Although Iran will have to spend time on and pay the costs of becoming familiar with the CISG, this process, time-consuming and expensive as it is, is far more justifiable than the constant costs of becoming familiar with foreign laws. These foreign laws are likely to vary with different international transactions, and the cost of complying has to be borne by each individual Iranian trader.

The writer's fieldwork<sup>505</sup> in Iran shows that the CISG is more neglected than resisted there. The CISG has never met with resistance from Government officials in Iran, and no statement has ever been issued by them to disprove this point or reveal their position. The writer does not even believe that lack of manpower has been the reason behind the non-ratification of the CISG by Iran, as Iran has already ratified a number of other international conventions.<sup>506</sup>

Besides, if Iran adopts the CISG, the possibility of different legal systems being applied to contracts between Iranian traders and their international counterparts will considerably decrease, which will of course simplify international trade for Iran. Owing to the popularity of the CISG, it is important that Iran should consider adoption sooner rather than later, since Iran could conduct more efficient trade with the CISG's contracting states.

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<sup>505</sup> See generally ch 8, 8.2.

<sup>506</sup> See ch 6, 6.3.3.

## 4.8 Benefits to Domestic Law

### 4.8.1 Suitability of the CISG for Modern Sales Transactions – The CISG Might Even Lead to Domestic Reform

In order to meet the demands of domestic sales, countries have to improve their law of sales, but such a development may not fully and properly fit with international sales law. For example, South African sales law has been improved, but still has many obsolete rules that are not appropriate for modern international commerce.<sup>507</sup> This was also true for the Japanese Civil Code, which came into effect in 1898: despite several amendments, its basic provisions for the sale of goods remained unchanged.<sup>508</sup>

In the formulation of the CISG specific attention was given to contemporary international trade. This involved taking into account both domestic developments and different aspects of the law of sale from all over the world, and the result was the creation of a law of sale suitable for international commerce and sensitive to international economic usage and practice.<sup>509</sup> A further advantage of adoption of the CISG would be updating one's own domestic sales law,<sup>510</sup> since this might inspire national legislators to adopt the principles of the CISG when reforming their own contract law.<sup>511</sup>

### 4.8.2 Summary: The Iranian Situation

The benefits-to-domestic-law argument for adopting the CISG seems particularly relevant to Iran. The Iranian Civil Code, the main source of the law of contract, was first prepared in 1928 and then completed in 1935–36.<sup>512</sup> This code has remained untouched for nearly 80 years. During that time the volume, complexity and international character of commercial transactions have changed and the Iranian Civil Code is no longer suitable for modern international trade. The CISG, which is a more modern document developed in the light of the international character and complexity

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<sup>507</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 343.

<sup>508</sup> Kashiwagi, 'Accession by Japan to the Vienna Sales Convention (CISG)' (n 375).

<sup>509</sup> Mendes, 'The UN Sales Convention & Canada Transactions' (n 389) 118.

<sup>510</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43).

<sup>511</sup> Gary F Bell, 'Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG' (2005) *Singapore Journal of Legal Studies* 362.

<sup>512</sup> Text to n 610 in ch 6.



of current trade practices, responds better to international commerce. Besides, chapter seven will show that the CISG is compatible with the Iranian Civil Code in many ways; therefore, it could be used by Iran to embark on updating its own domestic law of sale.

## **4.9 Protection of National Sovereignty**

### **4.9.1 Flexibility of the CISG**

The flexibility of the CISG as reflected in Articles 92–96 offers a wide range of possibilities for contracting out of the Convention and restricting the application of parts of it, which might lead to higher rates of adherence. One might also argue, however, that this same flexibility harms uniformity and clarity and could result in higher transaction costs. The Soviet Union, for example, decided against the written and other forms of contract that are found in the CISG. Articles 11 and 29 were therefore declared not applicable in order to maintain this regime of formalities that was typical of Soviet law. As a result, the advantage of a swift and smooth conclusion of contract was lost. The Russian Federation has maintained this reservation. Georgia and Uzbekistan, on the other hand, have not followed this approach. This flexibility or the right to contract totally or partly out of the CISG is probably a realistic option for parties that are able to afford detailed drafting and prefer more suitable clauses. Governments may prefer to adhere to the CISG when they are aware that it is not *jus cogens* for their enterprises.<sup>513</sup>

### **4.9.2 The Inclusive and Participative Process of the Creation of the CISG**

As discussed earlier, considerable amounts of criticism were levelled at the CISG's precursors (ULIS and ULF). This criticism centred on their creation mainly by the developed, Western European and civil law states, and the exclusion of the developing, non-Western European, common law states. As a result, the social, political and economic position of non-capitalist developing states was not reflected.<sup>514</sup>

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<sup>513</sup> Knieper, 'Celebrating Success by Accession to CISG' (n 457).

<sup>514</sup> Mendes, 'The UN Sales Convention & Canada Transactions' (n 389) 121; Zwart, 'The New International Law of Sales' (n 365) 114–116.

This was no longer the case during the drafting of the CISG. Representatives from all over the world participated, including developing and common law states, and they aired their concerns during the drafting process. This was a truly participatory and representative process, and thus provides no hindrance to ratifying the CISG.<sup>515</sup>

### **4.9.3 Regional Integration**

#### **4.9.3.1 Leadership Role in the Region**

Some countries in the world are considered major absentees from the CISG, such as the United Kingdom, India and South Africa. The role that these countries play within a specific region or in the world may have a great impact on other states. For example, South Africa is the leading economic power in Southern Africa, which obliges it to run its domestic business and to interact with its neighbours in ways that improve national economies in the region. Many of these Southern African countries have weak and fragile economies, exacerbated by their inexperience and undercapitalisation in the international commercial arena. This opens the way for them to be exploited by stronger traders. A great number of developing countries enter into trading relationships with experienced developed countries,<sup>516</sup> which gives the stronger party the opportunity to determine which laws apply to contracts, and there is an excellent chance that this will be the law of a foreign state. This entails legal costs and requires a great deal of time for familiarisation with this foreign law.<sup>517</sup>

If the CISG were in place, the African states would be better served. The CISG applies to a contract if the other party is a signatory country and rules of private international law require it. This results in legal certainty and a reduction in money and time spent. The developing countries would be better served under a unified law applicable to international sales contracts, as this would remove the hurdles presented by foreign

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<sup>515</sup> Gichangi, 'The United Nations Convention' (n 351); See Eiselen, 'Adoption of the Vienna Convention' (n 43) 353–354.

<sup>516</sup> Eiselen, *ibid* 355.

<sup>517</sup> Muna Ndulo, 'The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area' (1987) 3(2) *Lesotho Law Journal* 127, 129–130.

law. If South Africa ratifies the CISG, it is believed that the flow of trade will take place more smoothly. African states' national economies will thus develop. The drafters made great efforts to reflect and protect the interests of developing countries but, despite their best efforts, the CISG has achieved a low rate of ratification in the developing world. There is a belief that it is internal efforts that result in economic growth in African states, and therefore all measures must be taken to reach this goal of sustainable economic growth. Ratification of the CISG is regarded as the right starting point. The economically stronger parties would not be able to take advantage of the weaker position of developing parties. Therefore, its acceptance by South Africa might well encourage neighbouring countries to take steps towards the ratification of the CISG.<sup>518</sup> This would safeguard even more trade practices for South Africa and Southern African countries, and suggests that the influential position and leadership role that a country has in a region gives rise to the acceptability of the CISG in the eyes of other countries in that region.

#### **4.9.3.2 CISG for the East African Community and a Common Market for East and Southern Africa**

The CISG can also serve as one harmonised sales law for regional integration. As a case in point, Kenya is a member of the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA). Both organisations aim to develop trade between the member states. Given that each member state has its own national law of sale, one harmonised law of sale is required in these two organisations. The CISG is fit for the purposes of EAC and COMESA as a unified law of sale providing the necessary legal framework for regional trade. At the time of writing, only two of the EAC states (Burundi and Uganda) have ratified the CISG, and of the COMESA states only four (Burundi, Egypt, Uganda and Zambia) have ratified it.<sup>519</sup>

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<sup>518</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 356.

<sup>519</sup> Gichangi, 'The United Nations Convention' (n 351).

#### 4.9.4 Imposing a Foreign Solution

Rosett believes that a foreign solution to well-known problems, such as that introduced by the CISG, had already been provided by the UCC.<sup>520</sup> Since these problems were well recognised, the trading parties were in a better position to deal with their own specific situations and come up with solutions.<sup>521</sup> Thus the CISG is unnecessary and complicates matters by introducing a new set of rules.

That the parties can establish their own solutions is correct: this has been recognised by the CISG in the principle of party autonomy, which ensures that parties are free to negotiate the terms of their contract. However, it is also true that parties often do not succeed in covering some or all of the aspects that are well covered by the CISG.

Besides, standard terms or Incoterms are not always used by all companies in international trade,<sup>522</sup> and, even if they are used, they may have deficiencies. This precipitates the need for a set of rules to apply if an issue is not adequately addressed by the contract. This is also true for American businesses to which the UCC is not applicable: the businesses do not need to deal with a large number of foreign legal systems.<sup>523</sup>

#### 4.9.5 CISG for Pan-Asian Law and Practice and Its Role in the Development of a Trade Law

It has been argued that courts, lawyers and law faculties in Asia focus almost exclusively on national law as expressed in local languages. This leaves few Asian lawyers capable of the regional and international exercise of law. Moreover, jurists in Asian law schools are not trained to practise law transnationally in foreign languages. Europe experienced the same problem until a few decades ago, but today, with the spread of the Europeanisation of law, this is no longer the case. A considerable amount of time is spent in European law schools on teaching non-national law that applies beyond national borders. Civil and common law are often connected by European law; this thus provides the basis for a comparative approach to teaching law

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<sup>520</sup> Rosett, 'The International Sales Convention' (n 422) 447; Rosett, 'Critical Reflections on the United Nations Convention' (n 14) 286 and 303–305.

<sup>521</sup> Patterson, 'United Nations Convention on contracts for the International Sale of Goods' (n 406) 276; Farnsworth, 'The Convention on Contracts for the International Sale of Goods' (n 430) 18.

<sup>522</sup> Franca Ciambella, 'Business Sector's Attitudes Towards the Vienna Convention' in Louis Perret and Nicole Lacasse (eds), *Actes du Colloque sur la Vente Internationale* (Montreal 1989) 292.

<sup>523</sup> Eiselen, 'Adoption of the Vienna Convention' (n 43) 365.

in law schools. It is sometimes accompanied by spending a year studying law in another European country, which enables lawyers to improve their abilities and aptitudes in comparative law as well as their language skills. As a result they are better prepared to practise law internationally. A similar approach is taken by top American law schools. International law is being progressively taught, and comparative law is an essential part of this.<sup>524</sup>

The number of American and European lawyers establishing a practice in Asia is increasing. Despite the limitations that Asian laws impose, the practice of international commercial law will not stop growing. Therefore, it is believed that foreign law firms ought to be less restricted and regulated by local practices, and instead that local practices should align themselves with the practice of law both internationally and transnationally. This would be more easily achieved by adoption of the CISG as a common sales law that is specifically designed for international sales and forms the basis for a pan-Asian practice of law.<sup>525</sup>

#### **4.9.6 Building a Comparative Law Expertise**

The comparative study of law now has an important role to play. Expertise in both common and civil law is no longer regarded as an exceptional phenomenon in Europe, owing to the fact that law is transnational. This is not the case in Asia, however, and that is because most law schools approach law as a national discipline. Adoption of the CISG would revolutionise this approach and foster a more comparative study of law, in particular contract and sales law. It is through a comparative study of common and civil law that one realises the compromises that have been made in the CISG. This was the case in Europe decades ago, when expertise in comparative law emerged from the harmonisation of law in Europe. This can happen today in Asia: if more Asian countries sign up to the CISG, the knowledge of comparative law will increase in the region, which will in turn enable lawyers to recommend the most suitable law of contract to their clients. International law firms require and demand this kind of ‘internationally

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<sup>524</sup> Bell, ‘Harmonisation of Contract Law in Asia’ (n 511).

<sup>525</sup> *ibid.*

savvy lawyer.’ Therefore, Asia should strive to build such a body of comparative law expertise through adoption of the CISG.<sup>526</sup>

#### **4.9.7 Influencing the Interpretation of the CISG**

The review of case law concerning the CISG shows that China is contributing significantly to its interpretation. This is being achieved through decisions made by courts and arbitral tribunals. Compared with the European contribution, China’s share seems very small. Even small countries in Europe such as Belgium, the Netherlands and Switzerland have a higher number of cases reported than China. This number obviously goes up a lot if larger European countries such as Germany, France and Russia are added to the analogy. There are some 2,900 cases reported on the CISG, of which fewer than 500 come from Asia.<sup>527</sup>

Therefore, it is certainly true to say that most of the interpretation of the CISG is being made in Europe and primarily by civil law countries (the UK of course being a major absentee from the CISG). Common law jurisdictions (the USA, Australia, Canada and New Zealand), on the other hand, have reported only a few cases. Asian common law jurisdictions, including Singapore, which is a signatory state, have made little contribution.<sup>528</sup> India, the most important common law jurisdiction in Asia, has not yet ratified the CISG, as is indeed true for other common law jurisdictions in Asia (apart from Singapore).

The reality is that the area of the international sale of goods governed by the CISG is being formed by European courts and tribunals. Therefore, if Asia wishes to contribute to the interpretation of the CISG and hence to the shaping of that law, the Convention should be adopted and applied by the Asian countries as soon as possible.<sup>529</sup>

#### **4.9.8 Promoting Law, Courts and Tribunals**

Asian courts and tribunals lack expertise on the CISG; this makes it more likely that CISG cases will be governed outside Asia or by arbitrators outside Asia. This will

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<sup>526</sup> Bell, ‘Harmonisation of Contract Law in Asia’ (n 511).

<sup>527</sup> See ‘CISG Database, Country Case Schedule’ (n 328).

<sup>528</sup> As of 25 July 2013, only one case has been reported by Singapore.

<sup>529</sup> Bell, ‘Harmonisation of Contract Law in Asia’ (n 511).

continue for as long as Asia lacks expertise on the CISG. To change this trend, more Asian countries need to adopt the CISG. For the time being, it seems that China is the only country in Asia that has developed expertise on the CISG.<sup>530</sup>

#### **4.9.9 Promoting Arbitration**

It is believed that the fact that the CISG is international by nature makes it perfect for international arbitration. That is because the CISG requires no expertise in any specific national law; in other words, it is supranational, and lawyers from different jurisdictions are able to use it. If two signatory countries (such as America and Singapore) enter into a contract and the CISG applies to their contract, lawyers from these two contracting states can apply the CISG in arbitration and there is no need to hire foreign lawyers. This however would not be the case if the CISG did not govern their contract and, for example, the law of New York without the CISG applied. In such a case, the country (in this case Singapore) whose law has not been applied would have to hire American lawyers or face being disadvantaged. Therefore, in order to increase the CISG arbitration business in Asia or any other part of the world, more countries have to adopt the CISG.<sup>531</sup>

#### **4.9.10 CISG – Reduction of Transaction Costs**

It is believed that contracting internationally is normally more expensive than contracting domestically. This is because coming from different legal backgrounds complicates the conclusion of a contract in the international field. Parties have to deal with the law that applies to their contract.<sup>532</sup> The application of the law of one party is generally agreed, and the other party consequently has to familiarise itself with the applicable legal regime, which obviously implies a process of learning.<sup>533</sup> With this in mind, it seems that an international sales law saves on the costs of transactions for two reasons: (i) that there would be no question mark over the applicable law, since the same law would apply to the whole contract and thus the costs of bargaining over the applicable law would be saved by the parties; and (ii) that the applicable law would

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<sup>530</sup> Bell, *ibid.*

<sup>531</sup> *ibid.*

<sup>532</sup> Michael Whincop and Mary Keyes, 'Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract' (1997) 21 Melbourne University Law Review 515, 531.

<sup>533</sup> Gillette and Scott, 'The Political Economy of International Sales Law' (n 57).

be part of their domestic law. Therefore, no parties would be unfamiliar with it and as a result there would be no need to learn it.<sup>534</sup>

However, in the end it is the parties' degree of legal sophistication that determines how international sales law affects the costs of a transaction.<sup>535</sup> If international sellers and buyers are unsophisticated parties, they could benefit from the CISG *ex post*. These parties are not worried about the law applicable to their contract *ex ante*. They do not even investigate whether their contract will be enforceable. In the event that a problem arises, they may question which law governs their contract and at this stage seek legal advice. If the issue is better and more easily resolved by the CISG, it could then be advantageous. As a result, their rights under this legal regime could be determined with greater ease and a higher degree of certainty, which would have a positive impact on their negotiation and litigation. The CISG, by way of explanation, increases legal certainty and reduces the costs of litigation and pre-litigation.<sup>536</sup>

If international sellers and buyers are sophisticated parties, they bear higher transaction costs when concluding a contract in an international context. Therefore, the harmonisation of international sales law would in effect avoid the need to negotiate over the applicable legal regime and learn the content of the foreign law governing the contract, and would thus reduce the cost of the transaction.<sup>537</sup> In sum, the harmonisation of the applicable law would have the same impact on both groups, namely saving the costs of determining the governing legal regime and learning it.

#### **4.9.11 Building an International Law Expertise**

It is believed that understanding the CISG requires lawyers to have a good grounding in public international law. The ever-growing application of the CISG establishes a need for lawyers in private commercial practice to stay familiar with the basic principles of

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<sup>534</sup> Gilles Cuniberti, 'Is the CISG benefiting anybody?' (2006) 39 Vanderbilt Journal of Transnational Law 1. <<http://ssrn.com/abstract=1045121>> accessed 3 August 2013.

<sup>535</sup> *ibid.*

<sup>536</sup> *ibid.*

<sup>537</sup> *ibid.*



public international law. This is of great importance to them, as the number of commercial matters being governed by international treaties is growing.<sup>538</sup>

#### **4.9.12 Summary: The Iranian Situation**

The arguments put forward in relation to the CISG's protection of national sovereignty are overwhelmingly in favour of its adoption. This issue is of great importance for Iran. The flexibility that the CISG offers enables Iran to contract out of it or limit application of parts of it. It is however noteworthy that no provision of the CISG allows reservations concerning Article 78 in respect of the duty to pay interest. This will be discussed in more depth in chapter seven, but suffice it to say that Article 78 of the CISG does not contradict the principles and fundamental values of Iranian law and Islam.<sup>539</sup>

As discussed in chapters two and three, the CISG was finally adopted following a series of participative processes, and representatives from developed and developing nations had their say during the drafting process. Although Iran did not participate during the drafting of the CISG, some developing and Muslim countries did reflect their views and concerns, and therefore Iran was able to make sure that its concerns were taken on board. Besides, the CISG has now achieved a high rate of acceptance throughout the world. This may foster friendlier relations between Iranian traders and their trading partners. In the event that Iran adopts the CISG, owing to its religious ties with Muslim states other countries in the region may be encouraged to adopt the CISG because they will realise that the CISG does not pose a threat to the principles and fundamental values of Islam. If this happens, Iran, along with other countries in the region, can contribute to the interpretation of the CISG, which for the time being is non-existent. Besides, if the CISG were adopted, more comparative study of contract and sales law would take place in Iran's law schools and law firms, which would ultimately lead to promotion of the CISG within the courts and tribunals of Iran. Iran can gain the expertise needed on the CISG, which may be useful for the promotion of arbitration in the region or in Iran itself. Eventually, if Iran decides to reform its domestic law in this field, this will take place more maturely and effectively.

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<sup>538</sup> Bell, 'Harmonisation of Contract Law in Asia' (n 511).

<sup>539</sup> Text to n(s) 651 and 652 in ch 7.

## 4.10 Conclusion

This chapter has aimed to analyse the reasons for and against adoption of the CISG primarily by developing countries, with particular attention to the situation in Iran. The study shows that the case for ratification dominates the case against ratification. As a commentator once stated:<sup>540</sup>

in this age of global commerce seemingly routine transactions are subject to the CISG. The general practitioner must be aware of the CISG and the significant changes it brings to sales law.

Ignoring the CISG is no longer an option for Iran and other developing countries. Iran should pay careful attention to the positive global movement towards the CISG. The fear that the CISG may result in uncertainty is outweighed by the greater uncertainty that arises from the application of foreign law. The fact that certain terms are not yet well defined does not justify non-ratification. Definitions are being developed, and this process requires all-embracing contribution.

The CISG has met with widespread acceptance from both developed and developing countries. This includes commercial communities that apply its provisions in their trading contracts. As well as international unification, ratification of the CISG would in certain instances bring regional harmonisation. This would be of great value to Iran, since it might encourage other countries in the region to ratify the CISG and would thus establish a unified body of law that would form the basis for smoother trade among the member states of the region as well as around the globe. While the Incoterms are recognised in Iran, it is important that Iran adopts the CISG to complete the unifying effort. The benefits of ratifying the CISG far outweigh the drawbacks. Therefore, it is true to say that the case for adopting the CISG in Iran remains strong. Owing to the fact that UK is the major trading state, which has resisted ratification, it will thus be useful to investigate the reasons put forward by the UK in order to determine whether or not Iran should hold back on account of those reasons.

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<sup>540</sup> Harry M Flechtner, 'Another CISG Case in the US Courts: Pitfalls for the Practitioner and the Potential For Regionalised Interpretations' (1995) 15 *Journal of Law and Commerce* 127, 138.

## Chapter Five

### Comparative Study: The United Kingdom and the CISG: Should Iran Hold Back on Account of Reasons Put Forward by the UK?

#### 5.1 Introduction

For the purposes of this paper it is useful to consider the position of the UK with regard to the CISG. The debate in the UK is worth following because it has considered the CISG carefully, and yet has failed to ratify it. By contrast, other non-ratifying states have not examined the CISG as closely. This study also matters because legal developments in the UK might be followed by other specific jurisdictions, in such a way that the UK's position regarding the CISG may prevent these countries from adopting the Convention (see appendix A).<sup>541</sup> It is therefore worth asking if any of the arguments made regarding the ratification of the CISG by the UK would apply to Iran. It will be argued that even if the UK's failure to ratify the CISG can be justified, the same justification would not apply to Iran. It should be noted from the outset that although there are economic justifications for the UK's non-ratification, Iran is not in a comparable position. There are no economic advantages for Iran in maintaining its domestic law for international matters. It should also be taken into account that the UK intends to ratify the CISG when legislative priority allows.<sup>542</sup> Although a decision has been made to ratify it, there is still considerable confusion in the UK, as it seems that the reasons given for non-ratification are strongly supported in spite of the government's decision to go ahead.

In this chapter, the author will first examine the debate on the UK's position on and approach towards the CISG, and then demonstrate how the arguments made by the UK against the CISG would not apply to Iran.

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<sup>541</sup> In July 2011, the writer sought Professor Castellani's (UNCITRAL Legal Officer) opinion on the question of why developing nations have been much more reluctant to ratify the CISG than the developed nations. His response to this inquiry reveals that it is partly due to the fact that '... certain jurisdictions might closely follow legal developments in England and therefore be prevented from adopting the CISG by the position of the United Kingdom with respect to that text.'

Email from Luca Castellani to author (5 July 2011).

<sup>542</sup> Moss, 'Why the United Kingdom Has Not Ratified the CISG' (n 22).

## 5.2 The United Kingdom's Approach to and Decision on Non-Ratification of the CISG

Non-ratification of the CISG by the United Kingdom seems to be just 'another case of splendid isolation.'<sup>543</sup> However, ratification of the CISG in its entirety has been finally decided.<sup>544</sup> The author will therefore consider the reasons for and against its adoption in more depth.

### 5.2.1 The Reasons Against Adoption

There are a number of arguments being put forward against ratification of the CISG and its incorporation into English law. First of all, it is held that the UK is unfamiliar with many rights and legal principles being introduced in the CISG. This includes the right to cure after the fixed time for performance, the right to reduce the price when the goods delivered are not in conformity, and also the notion of fundamental breach. Secondly, the popularity of the English Sale of Goods Act 1979 is said to be another reason. Many contracts choose English law as the applicable law even when the contracting parties are not from the UK.<sup>545</sup> English commercial law has achieved world renown. The statistics show that, in at least 50% of cases brought before the English Commercial Court, one party is non-British, and in 30% of cases neither party is British.<sup>546</sup> Therefore, by adopting the CISG, the UK may witness a 'reduction in the number of international arbitrations coming into the UK'<sup>547</sup> because of the likelihood of the diminishing or weakening of the role of English law<sup>548</sup> in settling disputes in international commerce. Thirdly, it was held the fact that the CISG may be interpreted and applied differently by different courts would result in non-uniformity of application. Fourthly, it was stated that the fact that the CISG allows commercial traders to opt out of its application could have an adverse effect on its efficiency. Fifthly, since issues such as contractual validity and the passing of property fall outside

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<sup>543</sup> Nicholas, 'The United Kingdom and the Vienna Sales Convention' (n 35).

<sup>544</sup> Department of Trade and Industry, 'Report to the House of Commons' (House of Commons Library, Great Britain). The CISG is yet to be ratified.

<sup>545</sup> Nicholas, 'The United Kingdom and the Vienna Sales Convention' (n 35).

<sup>546</sup> Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention' (n 2).

<sup>547</sup> Forte, 'Reason or Unreason in the United Kingdom' (n 37) 57.

<sup>548</sup> Ahmad Azzouni, 'The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom' (2002) PACE Law School Institute of International Commercial Law.

the scope of the CISG, the Convention is thus a non-comprehensive code.<sup>549</sup> Sixthly, international conventions such as the CISG are ‘multi-cultural compromises between different schemes of law, which . . . introduce uncertainty where no uncertainty existed before’ and also ‘lack coherence and consistency.’<sup>550</sup>

Such was the reasoning put forward to oppose adoption of the CISG. However, the UK has been criticised for its reluctance to ratify the CISG. In addition to these arguments, two central principles of the CISG are put forward against ratification: (i) in the event of breach of contract, the CISG tries to continue with the contract if possible; (ii) when there are gaps in law, the CISG tries to fill in such gaps in order to assist the progress of trade. These two principles should be taken into account when other differences between English law and the CISG are considered. Moreover, The CISG was drafted on a different basis,<sup>551</sup> and fails to meet ‘English standards of precision and drafting.’ The general rules that the CISG offers are required to meet the needs of all parties participating, whereas English law approaches it differently and provides ‘concrete solutions to specific problems.’ Such a drafting style, aiming at general principles, allows for a more subjective approach when it comes to the interpretation of contracts. But the English courts have a different view, as they tend to be in favour of a more objective interpretation. A subjective interpretation is provided through Article 8(3) of the CISG, but this is allowed only when Article 8(1) does not succeed in providing a solution.<sup>552</sup> Therefore, in any interpretation of the intention of parties, the written agreement will be very influential.

Documentary sales are also another source of difference. Article 9 of the CISG takes into account two conditions:

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

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<sup>549</sup> Nicholas, ‘The United Kingdom and the Vienna Sales Convention’ (n 35); Williams, ‘Forecasting the Potential Impact of the Vienna Sales Convention’ (n 2).

<sup>550</sup> Hobhouse, ‘International Conventions and Commercial Law’ (n 27) 533; See John Linarelli, ‘The Economics of Uniform Laws and Uniform Lawmaking’ (2003) 48 WAYNE Law Review 1387.

<sup>551</sup> Williams, ‘Forecasting the Potential Impact of the Vienna Sales Convention’ (n 2).

<sup>552</sup> Article 8(1) of the CISG states (n 17).

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

It is argued that the CISG is not well designed for documentary sales, since there is no allusion to them and the significance given to non-conforming documents is not as important as the common law.<sup>553</sup> It is also said that standard forms of documentary sales are not sufficiently protected by the CISG and standard business terms are not protected either in Article 9. One could however argue that the CISG is not designed to deal with all types of contract or goods, and that its focus is to detect the intention of the parties in their agreement by including common terms of trading.

It was also claimed that the CISG is not as suitable as the English Sale of Goods Act when it comes to commodity sales. That is because, under the CISG, avoidance is not easily permitted in the case of non-conforming goods and documents.<sup>554</sup> Under the CISG, it is a fundamental breach, which gives way to avoidance of contract, whereas under the English Sale of Goods Act non-conformity gives way to termination of the contract, as it is considered a breach of condition.<sup>555</sup>

Another source of difference was how to interpret the CISG.<sup>556</sup> In accordance with Article 7(1), in interpretation of the provisions of the CISG, regard has to be given to its international character and to the promotion of uniformity in its application. It also requires observance of good faith in the interpretation of international trade.<sup>557</sup> This does not, however, apply to the performance of the contract.<sup>558</sup> It is also expected that

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<sup>553</sup> Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention' (n 2).

<sup>554</sup> Michael Bridge, 'A Law for International Sales' (2007) 37 Hong Kong Law Journal 17, 35; Alastair Mullis, 'Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention' (2007) 71 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 35; Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG' (n 35).

<sup>555</sup> Hofmann, *ibid*.

<sup>556</sup> *ibid*.

<sup>557</sup> Article 7 of the CISG.

<sup>558</sup> There have been number of cases that have applied the principle of good faith to the performance of the contract.

*SARL Bri Production 'Bonaventure' v Société Pan African*

courts have an understanding of and take into account the decisions submitted by other foreign courts.<sup>559</sup> English courts might be able to accustom themselves to such methods of interpretation. In *Fothergill v Monarch Airlines Ltd*, the House of Lords held that the traditional 'plain meaning' approach in interpretation must accept the more flexible approach adopted by other parties to the Convention.<sup>560</sup>

In October 1997, a consultation document was published by the Department of Trade and Industry (DTI) in favour of adoption of the CISG. The document identified that the CISG was now more widely accepted. It stated that:<sup>561</sup>

. . . the UK is becoming increasingly isolated within the international trading community in not having ratified the convention. We judge the time is right therefore to consider again whether our international traders are at a disadvantage because the UK is not party to the convention and therefore does not have access to a law which was drafted specifically for international sales in the modern world. Ratification would also enable our courts to contribute towards the interpretation and development of the convention, which is taking place at the moment without our participation.

The document asked for views on whether the CISG should be adopted; however, the responses received were underwhelming.<sup>562</sup> They revealed a considerable lack of interest. The Law Reform Committee of the Law Society of England and Wales expressed a negative vision and suggested non-ratification.<sup>563</sup> The Committee decided

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France 22 February 1995 Appellate Court Grenoble.

< <http://cisgw3.law.pace.edu/cases/950222f1.html>> accessed 5 August 2013;

*Mushrooms case*

Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124.

< <http://cisgw3.law.pace.edu/cases/951117h1.html>> accessed 5 August 2013;

*Rolled metal sheets case*

Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318.

< <http://cisgw3.law.pace.edu/cases/940615a4.html>> accessed 5 August 2013;

*Renard Constructions v Minister for Public Works*

Australia 12 March 1992, Appellate Court New South Wales.

< <http://cisgw3.law.pace.edu/cases/920312a2.html>> accessed 5 August 2013.

<sup>559</sup> Flechtner, 'Another CISG Case in the US Courts' (n 540).

<sup>560</sup> [1980] 3 WLR 209 (HL).

<sup>561</sup> Department of Trade and Industry, 'United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention): A Consultation Document' (1997). <<http://www.dti.gov.uk>>

<sup>562</sup> Moss, 'Why the United Kingdom Has Not Ratified the CISG' (n 22).

<sup>563</sup> The Law Reform Committee firstly held that:

that, in the event of the UK deciding to ratify the CISG, it should make reservations under Articles 94 and 95.<sup>564</sup> Under Article 94, the CISG would not be applicable to contracts being made between a party whose place of business is in the UK and a party whose place of business is either in another contracting state or in a non-contracting state, considering both states have the same or similar rules to those found in the Convention. Under Article 95 of the CISG, the application of the CISG under its Article 1(1)(b) is not permitted. The responses and recommendations were poor and mainly negative; therefore, it is expected that the UK will ratify the CISG only if 'parliamentary time allows.'<sup>565</sup> The UK's failure to ratify the CISG does not seem to harm its national economy, so ratification is not seen as a high priority. Nonetheless, the UK apparently intends to ratify the CISG, depending on legislative priority.<sup>566</sup>

Adoption of the CISG in the UK is still pending, awaiting the availability of parliamentary time. Other trading states, on the other hand, are applying the CISG and contributing to its interpretation. It is noteworthy that most of the European states along with major world trading nations such as the United States of America, China and Japan are now contracting states to the CISG. It does not however stop here, as the CISG may be applied and interpreted by English courts if parties to a contract have

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On the merits of the revised uniform law adopted in the 1980 Convention, we do not wish to exaggerate the differences from the provisions of UK law (the Sale of Goods Act). There are, however, certain differences which are not altogether insignificant and we think they are not such as to make the uniform law more attractive to traders than the existing UK law. Moreover they have the inherent disadvantage that even slight changes of wording from that in the Sale of Goods Act result in losing the benefit of the certainty conferred by long established case law on the interpretation of the Act.

Law Reform Committee Report, para 4.

The Law Reform Committee secondly stated that:

If the Convention were ratified by the UK and . . . came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country.

Law Reform Committee Report, para 8.

<sup>564</sup> Law Reform Committee Report, para 10.

<sup>565</sup> Moss, 'Why the United Kingdom Has Not Ratified the CISG' (n 22).

<sup>566</sup> Department of Trade and Industry, 'United Nations Convention on Contracts for the International Sale of Goods' (n 561).

The UK has decided to ratify the CISG in its entirety without making a declaration like the USA to limit the application of the CISG to other contracting States. Fifteen out of the thirty-five replies to the DTI Consultation Paper in 1997 suggested that the UK model the USA. However, such an approach would indicate that that the UK is not committed to objectives of the CISG. Legal organisations such as the Law Society and the Commercial Bar Association opposed ratification. They agreed however that if the UK did ratify the Convention that no declaration should be made to limit the application of the CISG to contracts with other States, because the act of ratification would make the CISG a part of English law anyway.



decided to apply it, or if it is applied because the rule of private international law demands application of the law of a party from a contracting state.

### 5.2.2 The Reasons in Favour of Adoption

The UK has modified its position with regard to ratification of the CISG. The CISG is no longer seen as an ill-drafted code with minor benefits; rather, it is seen as an instrument designed to have an impact on the law of international trade.<sup>567</sup> It is believed that the CISG has the capacity to make English law and English courts more profitable and popular. The English Commercial Court is reputed throughout the world for its realistic and efficient approach to and understanding of business issues. English judges are highly experienced and competent.<sup>568</sup> Therefore, it is only upon ratification that the knowledge and reputation of English lawyers and the English Commercial Court can have an effect on the interpretation and application of the CISG.<sup>569</sup>

The main argument put forward for ratification is that ratification will have a positive influence on the number of parties that choose London for the resolution of their dispute.<sup>570</sup> It is further suggested that, owing to ever-growing competition in the arbitration sector, it is necessary for London to present the full range of legal services offered in other places.

The second argument in favour states that English law and the CISG are similar in many ways.<sup>571</sup> There *are* difficulties, but they are surmountable. When the UK ratifies the CISG, parties should be able to apply the CISG with the choice of English law and English courts as the centre for resolving their dispute, as long as they are not prevented by legal costs. Moreover, it is argued that if English law works in conjunction with the CISG in such a way that it fills in the aspects that the CISG does not cover and English courts are elected as the centre for reaching resolution, the principle of certainty will continue to be maintained by English courts.<sup>572</sup> Under such

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<sup>567</sup> Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention' (n 2).

<sup>568</sup> Derek Wheatley, 'Why I Oppose the Wind of Change' (1990) *The Times* (UK) 31.

<sup>569</sup> Nicholas, 'The United Kingdom and the Vienna Sales Convention' (n 35).

<sup>570</sup> The Law Society, '1980 Convention of Contracts for the International Sale of Goods, Comments by the Council's Law Reform Committee' (April 1981).

<sup>571</sup> Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention' (n 2).

<sup>572</sup> *ibid.*

circumstances, Commercial Court judges can make sure that established trade terms such as 'fob' and 'cif' are operative when it comes to conflicting provisions of the CISG. Another point in favour of ratification is that, after ratification of the CISG, the English courts would be able to contribute to its development and to provide authority that other states can rely on.<sup>573</sup> On top of that, ratification of the CISG would be beneficial to traders and in particular to small traders, who suffer from insufficient bargaining power to apply their own choice of law, in this case English law. The problems and high costs that exist under a foreign legal system would be avoided by application of the CISG. The CISG as a neutral set of codes would open up more potential markets to UK traders, which might be of especial significance for small traders, who cannot afford to have subsidiaries in foreign countries and need more global opportunities. In addition, as Professor Castellani has stated, ' . . . 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, [so] they would take advantage correspondingly from the application of the CISG.'<sup>574</sup>

A consultative document<sup>575</sup> that was issued by the Department of Trade and Industry in 1989 enumerated the likely benefits that adherence to the CISG might bring: (i) it might achieve uniformity in international trade law, and the neutral rules of the CISG would be the bedrock for creating contracts<sup>576</sup>; (ii) the need to determine the proper law of a contract, which is often expensive and time-consuming, might be reduced by the application of this uniform law;<sup>577</sup> and (iii) resolving disputes that have arisen under the CISG may be beneficial to the UK's court arbitrators and the CISG's jurisprudence could be developed by their participation.<sup>578</sup> Some of these points have been stated earlier. Ratification of the CISG was, interestingly, supported by both Law

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<sup>573</sup> Williams, *ibid.*

<sup>574</sup> Castellani, 'Promoting the Adoption of the United Nations Convention' (n 41) 246; Silvia 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) 3 *Pace International Law Review Online Companion* 69.

<sup>575</sup> Department of Trade Industry, 'United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document' (1989) Part 1. <<http://www.dti.gov.uk>>

<sup>576</sup> *ibid* para 31.

<sup>577</sup> *ibid* para 32.

<sup>578</sup> *ibid* para 33.

Societies along with the Commercial Law Sub-Committee of the City of London Law Society.<sup>579</sup>

It seems that economic and political reasons are the driving forces encouraging the ratification of the CISG, but, having said that, the remedial differences that exist between the CISG and English law require more scrutiny.

### **5.3 Should Iran Hold Back on Account of Reasons Put Forward by the UK?**

Iran and the United Kingdom are similar in that both countries are bound to be concerned by the extent of the transformation in law. That, however, is where the similarity ends. It appears that the changes and transitions in Iran would not be so significant that they would hinder adoption of the CISG. The practical objections are very different in Iran. By adopting the CISG, Iran would gain business rather than losing business. The argument that economic factors justify the UK's non-ratification by no means applies to Iran. Iran is not a highly-sought-after dispute resolution forum. Besides, the fact that the popularity of the English Sale of Goods Act 1979 may result in its use as the applicable law when the contracting parties are not from the UK has never been the case in Iran. Indeed, Iranian law is hardly known in the world. The CISG has been thoroughly studied by the UK to decide what advantages and disadvantages it can offer. The UK has held two formal consultations on whether it should ratify the Convention. This has never been the case in Iran. The Iranian Government has never published any statement to show its official position, nor have the provisions of the CISG been thoroughly examined in Iran. There are only a few PhD theses that have done a comparative study of aspects of the CISG and Iranian law.<sup>580</sup>

There are a number of reasons for Iran to be apprehensive about adopting the CISG, such as the duty to pay interest,<sup>581</sup> as recognised by the CISG, but none seem to be related to the arguments made by the UK against its adoption.

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<sup>579</sup> A body representing the constituency most likely to be affected by accession.

<sup>580</sup> Text to n(s) 621, 622 and 623 in ch 7.

<sup>581</sup> See generally ch 7, 7.2.2.

As detailed in chapter four, Iran would obtain many benefits if it adopted the CISG. Therefore, Iran should not hold back on the grounds cited by the UK, as the two countries are not in an equal economic position.

## **5.4 Conclusion**

Despite the efforts made and scholarly writings published by its supporters, it seems that the CISG is still very unpopular in all sectors in the UK. Although other European countries are benefiting from the application of the CISG in trade, it appears that this is not necessarily convincing the English communities. This position might have an impact on certain jurisdictions that follow legal developments in this country. Although the UK has not yet ratified the CISG, it has promised to adopt it. A comparative study of the provisions of the CISG and those of English law shows that there are no major legal barriers in the way of its adoption. The fear that the CISG would have a negative impact on domestic law is baseless, as English law would apply to domestic matters and the CISG only to international sales. The main reason for non-ratification seems to be lack of interest in the CISG. The economic reasons might also justify non-ratification, since the UK, as a primary forum for dispute resolution in international trade, is not willing to lose its edge. The UK seems to believe that ratification would jeopardise its exceptional position, but this is not necessarily convincing, seeing that, after ratification, parties would seek the English courts' expertise. This means, therefore, that English judges would contribute to the further interpretation of the Convention. But this is not the case in developing countries such as Iran. In reality, developing countries are not known as the world's foremost dispute resolution forums. While the United Kingdom may arguably be privileged enough to maintain its domestic law in international trade, this cannot be a source of pride for developing countries.

Iran need not hold back on account of the reasons put forward by the UK. This is because the two countries are not in a comparable position economically, and Iran lacks a well-established domestic sales law. Instead, Iran should follow the German model and further consider whether domestic law should be reformed to reflect the CISG. While chapter seven will provide a comparative study of the Iranian law of sale

and the CISG, it is necessary that a brief overview of the economy and the legal environment of Iran should precede this.

## **Chapter Six**

### **The Commercial Law of Iran**

#### **6.1 Introduction**

A further aspect of the debate on ratification in Iran concentrates on the legal situation in Iran itself. This builds on one of the points made in the previous chapter, as the burden of making the transition to the CISG seems to be a factor that discourages ratification in the UK. If, in Iran, the legal profession and traders come to the view that the cost of transition is very high, this may be a strong argument against ratification; in effect, it would not be the case that the content of the CISG is regarded as undesirable, but simply that the differences from the current law are too great to allow a smooth transition. This chapter and the next therefore examine this question in some depth.

The purpose of this study is to provide a brief review of the economy and the legal environment of Iran, with the aim of creating a basis for an understanding of the relationship between Iranian law and the CISG. It should be noted that there are some differences between Iranian law and the CISG, but none that would make transition to the CISG so difficult that it should be rejected.

This chapter will take a closer look at Iran's economy, with the aim of providing general information on Iran's position in the world economy, its volume of international trade, and its trading partners. It then considers the legal environment in Iran in order to ascertain the sources of law in Iran, in particular the law on the sale of goods, and will finally look at the status of international conventions under the Iranian legal system.

## 6.2 Iran's Economy

### 6.2.1 General Information

As of July 2013, Iran is an upper-middle-income country.<sup>582</sup> According to the World Bank's income classification of 2012, countries with GNI per capita of between US\$4,086 and US\$12,615 are classified as upper-middle-income countries.<sup>583</sup> The Budget Act 1390 (2011–2012) provides for state revenues of US\$ 131.2 billion in the Persian calendar year lasting from March 2011 to March 2012.<sup>584</sup> Iran's economy is mainly reliant on the oil sector, which provides most of the Government's revenues. Iran is classified as the second largest oil producer in the Organization of the Petroleum Exporting Countries (OPEC), and its oil and gas reserves are among the largest in the world.<sup>585</sup>

In the early 1970s Iran's economy was relatively balanced and had commenced full-scale industrialisation. Iran's economic growth rates during the 1960s and 1970s were around 10%, which was one of the highest in the world.<sup>586</sup> This dynamic move to modernise the economy and social structure of the country started during the reign of Muhammad Reza Pahlavi. It was seen as feasible because of the availability of manpower (ten million at the time) and because Iran's oil wealth could accommodate such industrial growth. However, this rapid modernisation was never fully completed because of the revolution in 1979, which changed its modern economic history. The industrial and commercial units that existed in Iran up to the 1979 revolution were classified in two categories:

- (a) The public sector units under the complete control of Government and Government agencies. This included airlines, shipping lines, radio, television, telecommunication and like industries. Other state industries were either in close

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<sup>582</sup> 'The World Bank, Country and Lending Groups.' <[http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Upper\\_middle\\_income](http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Upper_middle_income)> accessed 4 July 2013.

<sup>583</sup> 'The World Bank, How we Classify Countries.' <<http://data.worldbank.org/about/country-classifications>> accessed 4 July 2013.

<sup>584</sup> 'Central Intelligence Agency, The World Factbook, Iran.' <<https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>> accessed 4 July 2013.

<sup>585</sup> Shayerah Ilias, 'Iran's Economy' (22 August 2008) CRS Report for Congress. <<http://fpc.state.gov/documents/organization/110402.pdf>> accessed 4 July 2013.

<sup>586</sup> *ibid.*

correlation with the national interests of Iran (such as the defence trade and arms production) or had a significant impact on the national economy (such as the oil, oil-related, petrochemical, copper and steel industries);

(b) The private sector units which existed in all areas of business and functioned on the principles of a 'free market.'<sup>587</sup>

The 1979 revolution, which transformed Iran into an Islamic state with a public-sector-dominated economy,<sup>588</sup> adversely affected the Iranian economy and in particular the industrial sector. This was followed by the Iran–Iraq war, lasting from September 1980 to August 1988. According to the Central Bank of Iran's official figures, Iran's GNP fell by 6%, 3.5% and over 10% in 1978–79, 1979–1980 and 1980–1981 respectively.<sup>589</sup> During the 1990s, Iran's economy needed to recover from the war and growing international isolation, but a severe economic downturn occurred in the late 1990s owing to a drop in international oil prices.<sup>590</sup> However, by the 2000s Iran's economy had recovered and was experiencing growth, albeit below the average level of economic growth in the Middle East and Central Asia and oil-exporting countries in general.<sup>591</sup> It is worth examining the different sectors of the economy, to understand the role of international trade in the Iranian economy, and in particular how measures to ease the barriers to trade (such as the adoption of the CISG) might affect the economy. The following sections carry out this examination.

## 6.2.2 International Trade

The vast natural resources of Iran and its population of some 78 million make it an important partner for trading nations. The total imports for 2011, as reported by the Central Intelligence Agency,<sup>592</sup> were estimated at US\$76.1 billion, compared with US\$70.0 billion for 2010.<sup>593</sup> Iran's economy has benefited significantly from international trade and has witnessed a dramatic increase over the past few years.

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<sup>587</sup> Sayed Hassan Amin, *Commercial Law of Iran* (Vahid Publications 1988) 9–10.

<sup>588</sup> Ilias, 'Iran's Economy' (n 585).

<sup>589</sup> As stated in Amin, *Commercial Law of Iran* (n 587) 10.

<sup>590</sup> Abdelali Jbili, Vitali Kramarenko and José Bailén, 'Islamic Republic of Iran: Managing the Transition to a Market Economy' (2007) IMF 1–5.

<sup>591</sup> IMF, 'Regional Economic Outlook: Middle East and Central Asia' (May 2008) World Economic and Financial Surveys 44.

<sup>592</sup> The writer relies on CIA figures, as there are no reliable figures from Iran.

<sup>593</sup> 'Central Intelligence Agency, The World Factbook, Iran' (n 584).



During the period from 2004 to 2007, the total trade in goods (exports plus imports) in Iran almost doubled and reached around \$147 billion in 2007. Iran has enjoyed a growing and positive trade balance in goods, benefiting from high international oil prices. In 2007, exports levelled at about \$97 billion, while imports were about \$56 billion. However, in 2008 and 2009 Iran witnessed a drop in its trade surplus from \$32 billion to \$17 billion, which was due to the decrease in global oil prices.<sup>594</sup> (Please see Table One below.)

**Table One: Iran's Merchandise Trade, 2006–2008**

(Millions of US dollars)

Merchandise	2006	2007	2008 <sup>a</sup>	2009 <sup>b</sup>
<b>Exports</b>	<b>76,055</b>	<b>97,401</b>	<b>100,572</b>	<b>77,408</b>
<b>Oil and Gas</b>	<b>62,011</b>	<b>81,764</b>	<b>81,855</b>	<b>59,240</b>
<b>Non-oil and Gas</b>	<b>14,044</b>	<b>15,637</b>	<b>18,717</b>	<b>18,168</b>
<b>Imports</b>	<b>50,020</b>	<b>56,582</b>	<b>68,533</b>	<b>60,327</b>
<b>Trade Balance</b>	<b>26,035</b>	<b>40,819</b>	<b>32,039</b>	<b>17,081</b>
<b>Total Trade</b>	<b>126,075</b>	<b>153,983</b>	<b>169,105</b>	<b>137,735</b>

**Sources:** IMF, 'Islamic Republic of Iran: 2008 Article IV Consultation' (August 2008) IMF Country Report No 08/284; IMF, 'Islamic Republic of Iran: 2006 Article IV Consultation' (March 2007) IMF Country Report No 07/100

Notes: a. Data for 2008 are estimated

b. Data for 2009 are projected

Iran's other major export commodities include petrochemicals, carpets and fresh and dried fruits. Iran's non-oil exports, such as liquid natural gas, are exported to the United Arab Emirates (UAE), Iraq, China, Japan and India. Iran's major imports are gasoline and other refined petroleum products, industrial raw materials and intermediate goods used as manufacturing inputs, capital goods, food products, and other consumer goods.<sup>595</sup> Many of the contracts that govern these transactions are standard contracts used in international trade. Hence it is likely to be the case that many transactions are already governed by foreign law, and the transition to the CISG

<sup>594</sup> Shayerah Ilias, 'Iran's Economic Conditions: U.S. Policy Issues' (22 April 2010) CRS Report for Congress.

<<http://www.fas.org/sgp/crs/mideast/RL34525.pdf>> accessed 4 July 2013.

<sup>595</sup> Ilias, 'Iran's Economic Conditions: U.S. Policy Issues' (n 594).

could provide a means for ensuring that the law applicable to contracts would be better understood in Iran.

### 6.2.3 Major Trading Partners

In 2007, China was the top trading partner for Iran. Its next largest trading partners were Japan, Italy, South Korea and Germany respectively. Iran's most important export markets are China, Japan, Turkey and Italy. Germany, China, the UAE and South Korea are Iran's major merchandise suppliers. (Please see Table Two below.)

**Table Two: Major Export Markets and Sources of Imports for Iran, FY 2007**  
(Millions of US dollars)

Country	Total Trade	Exports	Imports	Trade Balance	CISG Ratified	Effective Date of CISG
China	20,135	12,188	8,017	4,101	Yes	1 Jan 1988
Japan	13,064	11,599	1,465	10,134	Yes	1 Aug 2009
South Korea	8,421	5,139	3,282	1,857	Yes	1 Mar 2005
Italy	8,039	5,215	2,824	2,391	Yes	1 Jan 1988
Turkey	7,539	6,013	1,526	4,487	Yes	1 Aug 2011
Germany	6,066	621	5,445	-4,824	Yes	1 Jan 1991
UAE	5,915	747	5,168	-4,421	No	-
France	5,334	3,069	2,265	804	Yes	1 Jan 1988
Russia	3,272	282	2,990	-2,708	Yes	1 Sept 1991

Sources: IMF, Direction of Trade Statistics; and CISG: Table of Contracting States

International concern about Iran's nuclear programme has affected its trading relations. The trade ties between Iran and Germany have historically been very strong, but Germany and other European countries have reduced their trade with Iran over recent years. As a result Iran's trade has witnessed a shift from the developed to the developing world. Asian countries, in particular China and Japan, Russia and other Central Asian countries and the Middle East have become Iran's increasingly important trading partners.<sup>596</sup>

As shown above, with the exception of UAE, Iran's other trading partners in the table are all CISG signatories. The question, however, is whether these contracting states apply the CISG when the other party's country is not a signatory. As indicated in the introduction to the thesis, in accordance with Article 1(1) of the CISG, the CISG applies to a contract of sale of goods between parties (i) who are located in different Convention states, or (ii) where the rules of private international law governing the contract lead to the application of the law of a Convention state. Iran is not a contracting state, and therefore prerequisite (i) does not apply to a contract of sale of goods between Iran and a contracting state. However, there are circumstances in which the rules of private international law result in the application of the law of a contracting state which *has* ratified the CISG (prerequisite (ii)), and thus the CISG applies. Therefore, CISG Article 1(1)(b) expands the scope of application of the CISG where the parties are not located in different CISG states or one of them is not located in a CISG state.<sup>597</sup> One could argue that the impact of Article 95<sup>598</sup> of the CISG is to limit the scope of application. However, a study of the Convention's contracting states shows that only a limited number of countries have made reservations under Article 95.<sup>599</sup> Nevertheless, in a hypothetical example, where a contracting state (eg China) has made an Article 95 declaration, and parties to the contract (Iran and China) have

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<sup>596</sup> Ilias, 'Iran's Economy' (n 585).

<sup>597</sup> Jacob Ziegel, 'The Scope of the Convention: Reaching Out to Article One and Beyond' (2005–06) 25 *Journal of Law and Commerce* 59.

<sup>598</sup> Article 95 of the CISG states:

'Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.'

<sup>599</sup> China (PRC), Singapore, St Vincent & Grenadines, the United States, the Czech Republic and Slovakia declared that they would not be bound by Article 1(1)(b).

'CISG: Table of Contracting States' (n 1).

accepted a choice-of-law clause indicating China's law as the law of the contract, should it be interpreted to say that they intended that the CISG should govern their relationship in spite of China's reservation under Article 95 to exclude the CISG? The answer could be that, in the case of *Asante Technologies*,<sup>600</sup> the federal court in California decided that the dispute between parties was determined by the application of the CISG. The court held that the CISG was part of the law of the State of California and the buyer adopted Californian law as the choice-of-law clause. Therefore, the CISG applied. By way of analogy, it could be concluded that the CISG may govern the relationship between Iran and China in this hypothetical example.

It should also be noted that Iran's own trading partners would apply the CISG, since they have acceded to it. This signifies the importance of accession to the CISG by Iran. If Iran decides to adopt the CISG, it will benefit from the many advantages of adherence to the Convention that were discussed in chapter four, such as accepting a legal regime that already is applied by the majority of Iran's trading partners. This could be far more beneficial to Iran than regional trade, since regional trade is likely to be with countries that have not adopted the CISG, but adoption of the CISG facilitates more trade with OECD countries that are already signatories.

#### **6.2.4 Summary**

Iran is the eighteenth largest economy in the world.<sup>601</sup> It is an important partner for trading nations owing to its vast natural resources and considerable population. Oil and gas are easily the most important exports, and finished and refined goods are the most important imports for Iran. Even where there is a domestic manufacturing industry, it is not strong enough to meet domestic demand and Iran is an importer. In effect, the types of goods that dominate its patterns of international trade have not changed significantly since the 1970s: like most developing countries of that period, it is an exporter of commodities and an importer of manufactured goods. Thus some of the concerns of developing countries that were valid during the drafting of the CISG in

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<sup>600</sup> *Asante Technologies v PMC-Sierra*

United States 27 July 2001 Federal District Court [California].

< <http://www.cisg.law.pace.edu/cases/010727u1.html> > accessed 5 August 2013.

<sup>601</sup> 'Central Intelligence Agency, The World Factbook, Country Comparison: GDP (2012).'

< <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> > accessed 4 July 2013.

the 1970s still apply to Iran.<sup>602</sup> This has already been established that the CISG reflects the concerns of the developing nations and is therefore suitable for developing countries.

### **6.3 The Legal Environment in Iran**

This section will provide a general description of the Iranian legal environment, which will be useful in determining the level of compatibility of Iranian law and the CISG. To that end, it begins with a brief introduction to the Iranian legal system and the source of law in Iran. It then takes a closer look at the Iranian Civil Code as the main source of Iranian law on the sale of goods. Lastly, it will consider the status of international conventions under the Iranian legal system.

#### **6.3.1 The Iranian Legal System**

Until 1906, for some 2,500 years Iran was ruled by an absolute monarchy. In that year, the Constitutional Revolution (Monarchy) came into effect. This was replaced by the 1979 Republican Constitution following the revolution which resulted in the Islamic Republic of Iran.

#### **Source of Law**

Under the Islamic Republic of Iran, the major sources of law are as follows:

##### **6.3.1.1 Islamic Law**

Under the Iranian Constitution of 1979, Islamic law is the major source of law in Iran.

The Constitution in its Article 4 states that:

All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha of the Guardian Council are judges in this matter.

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<sup>602</sup> Text to n 199 in ch 3.

This provision emphasises the supremacy of Islamic law in all matters relating to constitutional and municipal laws and customary and conventional international law. To clarify the matter further, reference can be made to statements made by the leader of the Iranian delegation to the United Nations Human Rights Committee (Geneva) in July 1982. In those years, reports of mass murder and torture in Iran were under investigation. In response to the questions being posed by the members of the Committee, the Iranian chief delegate stated that what is accepted in Iran is the 'supremacy of Islamic laws, which are universal.'<sup>603</sup> This signifies that in the event that the provisions of the 1966 Covenant on Human Rights should come into conflict with Islamic law, the latter would prevail in Iran.

This principle formed the basis of the invalidation of many secular laws and legal precedents dating from pre-revolutionary days. Therefore, in accordance with Articles 4 and 170<sup>604</sup> of the 1979 Constitution, secular legislation could not be accepted as the 'law of the land.'

It is said that Article 4 of the 1979 Constitution is 'an unequivocal statement of the absolute supremacy or predominance of Islamic law over all other systems of law. It also precludes the existence of arbitrariness, prerogative, even discretionary authority on the part of any branch of the State whether it be the executive or legislature.'<sup>605</sup> The supremacy of Islamic law therefore requires society to adapt to its provisions and prerequisites, and establishes that Islamic law is not to be changed to suit the socio-economic climate.<sup>606</sup> As a case in point, there is a mandatory rule in Islamic law that prohibits payment of interest, which the author will be returning to later in chapter seven<sup>607</sup> and chapter eight.<sup>608</sup>

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<sup>603</sup> As stated in Amin, *Commercial Law of Iran* (n 587) 31.

<sup>604</sup> Article 170 of the 1979 Constitution states:

Judges of courts are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws or the norms of Islam, or lie outside the competence of the executive power. Everyone has the right to demand the annulment of any such regulation from the Court of Administrative Justice.

<sup>605</sup> Amin, *Commercial Law of Iran* (n 587) 32.

<sup>606</sup> Y Noori, *Islamic Government and Revolution in Iran* (Glasgow: Royston Ltd 1985) 11–74.

<sup>607</sup> See generally ch 7, 7.2.2.

<sup>608</sup> See generally ch 8, 8.2.2, sect II.

### 6.3.1.2 The Constitutional Law

The second primary source of law in Iran after Islamic law is the country's constitution. The first Iranian constitution dates from 1906, and was followed by a supplement in 1907. The very nature of these constitutional instruments was liberal, as they followed the pattern of the French and Belgian constitutions, but at the same time embodied provisions appropriate to Iran such as the state religion (*Shia* Islam). Following the Constitution of 1906–07, the European continental theory of law was added to the Islamic norms and as a result the secular Iranian legal system emerged.

After the revolution in 1979, however, the Constitution of the Islamic Republic of Iran replaced the Constitution of 1906–07. The 1979 Constitution has its basis in religious sovereignty in line with the doctrine of 'the governance of Islamic jurists.' Therefore, 'the post-revolution constitutional law is limited in its effect by its subjection to the religious law and Islamic principles.'<sup>609</sup>

### 6.3.1.3 Legislation

Legislation is the third primary source of law in Iran. This includes a law which is declared by Parliament (the *Majlis*). Iranian law conforms to a number of important codes as well as to thousands of acts of parliament proposed by the *Majlis*. In interpreting and analysing cases, the judges refer to the laws established by the legislature such as the Civil Code, Commercial Code, Criminal Code, Civil Procedure Code and etc. Article 166 of the Constitution sets out that:

The verdicts of courts must be well reasoned out and documented with reference to the articles and principles of the law in accordance with which they are delivered.

In accordance with Articles 71 and 72 of the Iranian Constitution, 'The Islamic Consultative Assembly [*Majlis*] can establish laws on all matters, within the limits of its competence as laid down in the Constitution,' and ' . . . cannot enact laws contrary to the official religion of the country or to the Constitution . . . '

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<sup>609</sup> Amin, *Commercial Law of Iran* (n 587) 33.

## 6.3.2 Iranian Law on the Sale of Goods

The main source of Iranian law on the sale of goods is the Iranian Civil Code. There are other codes that contain a few articles on the sale of goods. These will be discussed further below.

### 6.3.2.1 The Iranian Civil Code

Under the Iranian legal system, the main source of the law of contract is the Iranian Civil Code. The Code contains 1,335 articles, and consists of three volumes: Volume I concerning 'Property' was first prepared in 1928; Volume II concerning 'Nationality' and Volume III on 'Evidence in Substantiation of Claims' were drafted in 1935–36.<sup>610</sup> The committee in charge of drafting the Civil Code consisted of both Muslim jurists and secular jurists educated in Europe. They considered Islamic law as well as the *Code Napoleon*. Other European civil codes such as those of France, Switzerland and Belgium were taken into account. In the end, the Iranian Civil Code was a codification of Islamic law for the most part (including the law of contract, property and family) but in the format and structure of European civil codes.<sup>611</sup>

### 6.3.2.2 Other Statutory Sources on Sale

The Iranian Commercial Code 1932 differentiates between commercial sales and civil sales. It specifies that a sale is regarded as commercial if it is for the purpose of resale or hire (Article 2(1)) or is made by a person engaged in commercial activities (Article 3). Nonetheless, the same law is applicable to these two types of sale. The Commercial Code contains no provisions with regard to commercial sales; therefore, the Iranian Civil Code governs both commercial sales and non-commercial sales. There are provisions concerning 'contract of carriage'<sup>612</sup> in the Iranian Commercial Code, and provisions concerning 'carriage of goods by sea'<sup>613</sup> in the Iranian Maritime Code 1964.

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<sup>610</sup> Hamid Bahrami-Ahmadi, 'A Historical Overview on the Development of Civil Code.' (Available in Persian.)

<[http://www.isu.ac.ir/publication/research-quarterly/research-quarterly\\_24/Research-Quarterly\\_2402.htm](http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_24/Research-Quarterly_2402.htm)> accessed 4 July 2013.

<sup>611</sup> Amin, *Commercial Law of Iran* (n 587) 36.

<sup>612</sup> Chapter Eight on 'Contract of Carriage,' Articles 377 to 394 of Iranian Commercial Code. (Available in Persian.)

<sup>613</sup> Chapter Four on 'Carriage of Goods by Sea,' Article 52 to 68 of Iranian Maritime Code. (Available in Persian.)



These provisions however mainly deal with the relationships between the sellers and the carriers rather than those of the sellers and buyers. It is thus fair to say that the only source of Iranian law on the sale of goods is the Iranian Civil Code.

### **6.3.3 The Status of International Conventions Under the Iranian Legal System**

Under Article 9 of the Iranian Civil Code, 'treaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other government[s], shall have the force of law.' The Iranian Constitution lays down that international treaties must be approved by the legislature<sup>614</sup> and the Council of Guardians must determine its compatibility with Islamic law,<sup>615</sup> and finally the president signs the treaty.<sup>616</sup> This suggests that when the provisions of an international convention are incompatible with the principles of either Islam or the Constitution, it is unlikely that the Council of Guardians would approve the convention. In such a case, a possible solution is the exercise of the right to reservation to those particular articles, as long as the convention allows for the making of reservations to those articles.<sup>617</sup> The significance of this point, in relation to the CISG, is discussed below.

There are a number of international conventions that the Iranian Government has acceded to without making any reservations. These include the International Convention on Maritime Search and Rescue 1979 (ratified in June 1994), the International Convention for Safety of Life at Sea 1984 (ratified in July 1994), and the International Convention on Salvage 1989 (ratified in May 1994).

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<sup>614</sup> Article 77 of the Iranian Constitution states:  
'International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly.'

<sup>615</sup> Article 96 of the Iranian Constitution states:  
The determination of compatibility of the legislation passed by the Islamic Consultative Assembly with the laws of Islam rests with the majority vote of the religious men on the Guardian Council; and the determination of its compatibility with the Constitution rests with the majority of all the members of the Guardian Council.

<sup>616</sup> Article 125 of the Iranian Constitution states:  
The President or his legal representative has the authority to sign treaties, protocols, contracts, and agreements concluded by the Iranian government with other governments, as well as agreements pertaining to international organizations, after obtaining the approval of the Islamic Consultative Assembly.

<sup>617</sup> Text to n 646 in ch 7.

However, in September 1994 Iran ratified the International Convention on a Unified System of Description and Codification of Goods, and has made reservations to its Article 4. This article is in conflict with Article 139 of the Iranian Constitution, which requires the approval of the *Majlis* in cases where one party to the dispute is a foreigner.

In 2001, Iran also signed up to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

## 6.4 Conclusion

Iran's vast natural resources and considerable population make it an important partner for other trading countries. Its pattern of international commerce as an exporter of oil, gas and commodities and an importer of manufactured goods reflects developing countries' concerns in the 1970s and during the drafting process of the CISG. Bearing in mind that the CISG addresses the concerns of developing nations and that many, if not all, trading partners of Iran are signatory states to it, there is no justification for Iran not to adopt the CISG.

The status of international conventions under the Iranian legal system means that Iran has already acceded to a number of them. With this in mind, in order to establish the reason why Iran has not adopted the CISG, one can use the New York Convention as a 'litmus test.'<sup>618</sup> Professor Castellani suggests, ' . . . Those factors preventing . . . adoption of the CISG in developing countries impede the adoption of other trade law texts as well.'<sup>619</sup> (See appendix A.) As we have seen, Iran has adopted the New York Convention, which suggests that there is no legal reason for it not to ratify the CISG.

In chapter seven, Iranian law will be compared with the articles of the CISG to determine the degree of harmony between the two legal systems. As explained in the introduction to this chapter, the degree of harmony can have a significant influence on the level of support for ratification.

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<sup>618</sup> Email from Luca Castellani to author (n 541).

<sup>619</sup> *ibid.*

## Chapter Seven

# An Investigation into the Compatibility of the CISG with Iranian Law

### 7.1 Introduction

The first step in determining whether or not to ratify the Convention is to examine whether the CISG is compatible with Iranian law. The rights, duties and remedies accommodated in the CISG will be compared with those provided for in the Iranian Civil Code. Where the CISG is different from the Iranian Civil Code, the author will make a critical examination to decide whether such a discrepancy can be overcome and, if so, how. This should help to determine whether the adoption of the CISG would represent a radical break with Iranian law and hence whether the cost of adapting to a new law would make the change undesirable. The extent to which the provisions of a uniform law require changes in legal and commercial practice can be a factor in determining support for ratification. Hence, for Iran, it is necessary to review the similarities to and differences from existing law.

It is again worth mentioning the flexible nature of the CISG, and in particular Article 6, which allows the parties to exclude the application of the Convention from their contract or, subject to Article 12, to derogate from or vary the effect of any of its provisions.<sup>620</sup> Therefore, parties may alter or exclude any or all duties, rights and remedies. Hence an Iranian party to the contract could seek to derogate from or modify the applicability of CISG provisions that are inconsistent with Iranian law. In effect, the differences from Iranian law, and the cost and effort of adapting to the CISG, are partly under the control of the parties.

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<sup>620</sup> Article 12 of the CISG states:

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

There are as yet very few analyses of the compatibility of the CISG with Iranian law. The main ones are the doctoral theses undertaken by Mirghasem Jafarzadeh,<sup>621</sup> Hamid Reza Oloumi-Yazdi<sup>622</sup> and Ali Moghaddam Abrishami.<sup>623</sup> Therefore, there is a dearth of writing on this subject. This chapter will emphasise the important points made by Iranian authors, and additional analysis will be made on the basis of the writer's own fieldwork in Iran.<sup>624</sup> To illustrate the key points of difference and similarity between the CISG and Iranian law, in this chapter the author will consider both general principles and specific provisions on some selective points as a case study. Part A will examine the general principles, including taking a closer look at the duties to pay damages and interest. This area in particular is of great importance, as there is a good deal of controversy over the compatibility of the two legal systems. In Part B, the chapter will turn to a case-study analysis of the rights and remedies available to parties. This is important, since, where certain rights and remedies provided for in the CISG do not have a counterpart under Iranian law, it is necessary to ensure that they do not pose a threat to legal stability in Iran. The CISG will be examined first and then the position under Iranian law will be considered in order to reach a conclusion on the compatibility of the two systems.

## **Part A**

### **7.2 General Principles**

The drafters of the Convention studied different legal systems and took into account their rules and solutions. As a result, they proposed and drafted provisions and principles that are compatible with many of the rules applicable in different countries and legal systems. Below the author will concentrate on some of the more important

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<sup>621</sup> Mirghasem Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law' (2001).

This publication has its origin in Jafarzadeh's 1998 PhD thesis at the University of Sheffield.

<sup>622</sup> Hamid Reza Oloumi-Yazdi, 'Delivery in International Sales of Goods – An Analytical Study of Iranian Law and the Vienna Sale Convention' (PhD thesis, University of Exeter 1998).

<sup>623</sup> Ali Moghaddam Abrishami, 'How to Modernise Formation of Contract Rules in Iranian Law? Proposals for Reform of Iranian Civil Code from Comparative Perspective of English and Uniform Law' (PhD thesis, Queen Mary, University of London 2007).

<sup>624</sup> See generally ch 8, 8.2.

concepts and principles contained in both Iranian law and the Convention as illustrations of the extent of this compatibility.

### 7.2.1 Duty to Pay Damages

All legal systems recognise the duty to pay damages to an aggrieved party; however, what can be obtained from claiming damages under one legal system may not be the same under another system of law. For example, whether indirect as well as direct loss is included in damages and whether consequential damages can be recovered or not will affect the concept of damages under different legal systems.<sup>625</sup>

The Convention is based on a general principle that the party in breach of contract has to pay damages to the aggrieved party unless he is exempt from liability in accordance with Article 79<sup>626</sup> of the Convention. This principle is set out in Article 45(1)(b),<sup>627</sup> Article 61(1)(b)<sup>628</sup> and Article 74<sup>629</sup> of the Convention. Under the CISG, damage is 'a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of breach' (Article 74). The liability of the breaching party is limited to

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<sup>625</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>626</sup> Article 79 (2)(a) of the CISG states:

' . . . (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph . . . '

<sup>627</sup> Article 45 of CISG states:

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
  - (a) exercise the rights provided in articles 46 to 52;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

<sup>628</sup> Article 61 of the CISG states:

- (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
  - (a) exercise the rights provided in articles 62 to 65;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

<sup>629</sup> Article 74 of the CISG states:

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

the foreseeable loss suffered by the aggrieved party as a result of the breach. The Convention also states that 'the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract' is the foreseeability test for recovery of damages.<sup>630</sup> Therefore, where such damages were foreseeable to the seller, the seller is liable and damages can be awarded under the Convention.<sup>631</sup> It is said that Article 74 of the Convention is important with regard to the indirect consequences of breach.<sup>632</sup> As regards whether the liability extends to losses by indirect causality, there is no explicit answer in the Convention. To answer this question, the criterion of foreseeability should apply. Therefore, the liability of the breaching party extends to the loss indirectly caused to the other party provided that the party in breach could foresee this loss at the time of the conclusion of the contract.<sup>633</sup> Under the Convention, the only method of recovery from losses is monetary compensation, as stated in Article 74, and it does not permit restitution. This may cause problems, as 'the injured party will sometimes not be placed in his original economic position.'<sup>634</sup>

Under Iranian law, the aggrieved party is also entitled to claim damages when the other party has breached the contract and this has caused loss or loss of profit. The breach of contractual obligation, however, does not have any legal impact when it does not cause any damage to the aggrieved party. When it is ascertained that the aggrieved party would have obtained profit had the defaulting party fulfilled his obligations, loss of profit can be compensated for. It is argued that such a level of assurance of obtaining profit may be ascertained by a relevant custom and usage.<sup>635</sup> When non-performance of contractual obligations causes loss of profit, it is easier to ascertain such a degree of certainty so as to entitle the innocent party to damages for

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<sup>630</sup> Jacob S Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Galston and Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender 1984) ch 9, 9–1; Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in J Herbots (eds)/ R Blanpain general (eds), *International Encyclopaedia of Laws – Contracts* (29th Supp, 2000).

<sup>631</sup> Schlechtriem, *Uniform Sales Law* (n 169).

<sup>632</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630).

<sup>633</sup> Victor Knapp, 'Article 74' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffrè: Milan, 1987) 538.

<sup>634</sup> *ibid.*

<sup>635</sup> N Katouzian, *Huquq-i Madani (Civil Law, General Principles of Contracts)* vol 4, 231–232. (Available in Persian.)

the lost profit. However, it is unlikely that Iranian law would compensate for the loss of profit when it involves a possible profit of resale or any future transaction with regard to the object of sale.<sup>636</sup>

Unlike the Convention, the Iranian Civil Procedure Code specifies that the aggrieved party cannot be compensated for any loss that is not directly caused by the failure of the party in breach. Therefore, determination of direct loss and indirect loss does not seem to be an easy task. According to Dr Katouzian, a contemporary Iranian jurist, direct loss is a loss that is directly and inevitably caused by the failure of the breaching party. In other words, the breach of contract is the cause of direct loss, and other factors, if any, should not have an impact on the loss to a degree that can break the logical relationship between cause and effect.<sup>637</sup>

For the breach of obligations caused by the defaulting party, the extent of his responsibility is for a foreseeable loss (the Convention and Iranian law are similar in this regard). Article 221 of the Iranian Civil Code contains this principle, and provides that:

If any party undertakes to perform or to abstain from any act, he is responsible to pay compensation to the other party in the event of his not carrying out his undertaking provided the compensation for such losses is specified in the contract or is understood in the contract according to customary law or provided such compensation is by law regarded as guaranteed.

Therefore, the limit of responsibility of a party in breach is those situations that are determined in the contract. In the event that recoverable damages are not foreseen in the contract, the gap may be filled with custom and usage, and the party in breach will be accountable for direct and ordinary loss caused by his breach of contract. However, parties may agree on extending the liability of the party in breach to the instances that

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<sup>636</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

This is in line with the decision of court of appeal in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* which held that claimant only had to be compensated for ordinary and not extraordinary loss of profit. See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

<sup>637</sup> Katouzian, *Huquq-i Madani* (n 635) 248.

cover indirect and unusual loss arising from the breach.<sup>638</sup> It should be noted that, according to a general principle of Islamic law with regard to liability for damages, there is no liability for unforeseeable and uncommon loss. Therefore, it is not the type of breach that has to be foreseen; it is rather the consequences of that breach with regard to the interests and status of other party that have to be foreseen.<sup>639</sup>

With regard to methods of compensation, Iranian law is silent. Thus damages can be recovered by either monetary compensation or compensation by restitution. However, where the damage can be compensated for by restitution, the aggrieved party cannot be compensated by a certain amount of money.<sup>640</sup>

One can therefore see that damages, under both Iranian law and the Convention, cover loss including the loss of profit. The loss that is the consequence of a breach of contract has to be foreseeable by the party in breach. Iranian law requires that the loss or loss of profit be caused directly by the party in breach, while the Convention has no such requirement. Therefore, under the CISG, the indirect consequences of breach may be recoverable provided that the requirements of the Convention are met. An examination of the duty to pay damages under the two legal systems thus shows that there are no fundamental differences between them. Therefore, there should be no significant adjustments, at least in relation to these points, for Iranian lawyers and traders if the CISG were adopted.

### **7.2.2 Duty to Pay Interest**

As for the payment of interest as a general principle, there is a point of divergence between the CISG and Iranian law. The Convention specifies provisions with regard to interest that seem to be incompatible with Islamic law and Iranian law. The proposal at the conference,<sup>641</sup> at the time of drafting the CISG, reflected different views, divergent

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<sup>638</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>639</sup> Katouzian, *Huquq-i Madani* (n 635) 250–261.

<sup>640</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>641</sup> 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Report of the First Committee.' <<http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries78,84.html>> accessed 25 July 2013.



theoretical approaches and conflicting practical requirements with regard to the duty to pay interest. It was also opposed for religious reasons.<sup>642</sup>

Article 74 of the Convention sets out a general rule that damages caused as a consequence of breach of contract should be recovered. It then provides in Article 78 that 'if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.' It is understood that, under the obligation to pay interest, the debtor is responsible for paying interest even if his failure was the consequence of an impediment beyond his control, and thus, according to Article 79, he is not liable for damages.<sup>643</sup> It is also laid down in Article 84 (1) of the Convention that, in the event that the seller is bound to refund the price, he must pay interest on it from the date the price was paid.

It is argued that:

. . . a general obligation for the breaching party to pay interest may well preclude the argument that an award of interest under Article 78 might be declared invalid under the applicable domestic law, [and] such an award would surely be unenforceable in those fora where the applicable domestic law prohibits interest payments.<sup>644</sup>

However, whether or not such a conflict over the payment of interest would act as much of a deterrent against adoption of the Convention by Iran requires more in-depth examination.

With regard to Iranian law, there is a mandatory rule in Islamic law that prohibits *riba*. *Riba* or interest includes any unwarranted increase in capital which is free from

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<sup>642</sup> Egyptian Delegate proposed 'it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner.'

'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 34<sup>th</sup> meeting.'

<<http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting34.html>> accessed 25 July 2013.

<sup>643</sup> Schlechtriem, *Uniform Sales Law* (n 169).

<sup>644</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630).

compensation.<sup>645</sup> Therefore, acceptance of the payment of interest on an unpaid price or any amount when the time of its payment has elapsed contradicts the principle of prohibition of *riba* under Islamic law.

One might argue that this conflict could easily be avoided by making a reservation to Article 78 of the Convention. But this could easily be refuted by closer analysis of the Final Provisions of the Convention, embodied in Articles 89–101. There is no provision of the Convention that allows reservation to Article 78.<sup>646</sup> Article 98 provides that ‘no reservations are permitted except those expressly authorized in this Convention.’ Having said that, by virtue of Article 6, parties may derogate from or vary any or all provisions of the Convention.<sup>647</sup> Therefore, if a contracting party does not accept paying interest, he can choose to deviate from Article 78. Article 78 of the Convention, like its other provisions, is applied when parties have not stipulated otherwise, and by their silence have expressed their consent that the Convention be applied.<sup>648</sup> This interpretation therefore clarifies that the provisions of the Convention do not contradict the principles of Islamic law.

Besides that, it is stated that most schools of Islamic law are of the opinion that when the debtor voluntarily returns more than what he owes, then it is lawful.<sup>649</sup> The Council of Guardians, which according to the Iranian Constitution has the duty to examine the compatibility of rules and legislation with Islamic law, has authorised a clause to be stipulated in the contract which necessitates the debtor to pay 12% of the unpaid amount of a loan to the bank when he delays making the repayment of this loan.<sup>650</sup> It should be noted that Iranian law recognises late payment compensation as contained in Articles 515(2) and 522 of the Iranian Civil Procedure Code 1379 (2000). Late

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<sup>645</sup> Nabil A Saleh, *Unlawful Gain and Legitimate Profits in Islamic Law* (Cambridge University Press 1986) 13–15.

<sup>646</sup> T S Twibell, ‘Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari’a Law: will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?’ (1997) 9 *International Legal Perspective* 25; Oloumi-Yazdi, ‘Delivery in International Sales of Goods’ (n 622).

<sup>647</sup> Article 6 of the Convention states:

‘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.’

<sup>648</sup> Oloumi-Yazdi, ‘Delivery in International Sales of Goods’ (n 622).

<sup>649</sup> Saleh, *Unlawful Gain and Legitimate Profits in Islamic Law* (n 645) 36.

<sup>650</sup> The letter No 7742 of the Council of Guardians, in *The Iranian Official Gazette*, No 11301 on 11 Esfand 1361 (2<sup>nd</sup> March 1983). (Available in Persian.)

payment compensation is very similar to the notion of interest.<sup>651</sup> Therefore, it could be concluded that under Iranian law it is lawful to pay interest on compensation of damages caused by late payment.

On top of that, on 4 October 1987 the Council of Guardians in Iran held that it is permissible to receive interest from those foreign trading partners that do not regard interest as illegal.<sup>652</sup> Therefore, one can argue that the interest referred to in Articles 84 and 78 of the Convention is not the type that is illegal under the Islamic law of Iran, and as a result adoption of these provisions of the Convention is justifiable and compatible with Iranian law.

One can conclude that the Convention in no way contradicts the principles and fundamental values of Iranian law and Islam. Iran can therefore adopt the CISG without departing from the principles and values that have been so important to it. Iran's accession to the Convention would appear to have benefits for Iran at an international level, as it would most likely promote Iran's international trade and be beneficial for its economic growth and development. Iran's trading partners would be able to predict the governing law of the contract. This governing law, which is familiar to them and derived from international customs and trade usages, would enable them to enter into contracts with Iran with a higher degree of certainty, which would promote stronger trade relations.

It is also worth mentioning that accession to the CISG does not mean that our own national law will be neglected or abandoned. Since the Convention governs only international sales contracts between parties whose places of business are in two different countries, the Iranian Civil Code would still govern contracts of sales made within Iran.

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<sup>651</sup> H Safai, M Adel, M Kazemi, and A Mirzanejad, *The Law of International Sale of Goods – A Comparative Study* (2nd edn, University of Tehran Press 2008) 446. (Available in Persian.)

<sup>652</sup> *ibid.* Sayed Hassan Amin, 'Banking and Finance Based On Islamic Principles – Law and Practice in Modern Iran' (1989) 9 *Islamic and Comparative Law Quarterly* 1.

## Part B

### 7.3 Case Study

#### 7.3.1 Place of Delivery

In accordance with Article 31 of the Convention, when the contract does not refer to a particular location for handing over the goods, the place of delivery is determined by whether the sale involves carriage of goods or not. The Convention sets out that when the contract of sale involves carriage of goods, the seller hands over the goods to the first carrier for transmission to the buyer. When the contract is related to specific goods or goods to be manufactured or produced or goods to be drawn from stock at a particular place, the goods will be placed at the buyer's disposal at that place; in other cases, it will be placed at the seller's place of business.<sup>653</sup> If it is contractually agreed, the seller is bound to deliver 'at any other particular place.'

Under Iranian law, the statutory regulation regarding place of delivery is different from the Convention. Under Iranian civil law, the seller has to place the goods at the buyer's disposal at the place of conclusion of the contract, unless stated otherwise.<sup>654</sup> As an Iranian scholar<sup>655</sup> has argued, this could result in confusion and ambiguity on the following grounds: (i) there is no express provision with regard to the place of conclusion of a contract in the Iranian Civil Code. Therefore, it is argued that delivery should not be linked to the place of conclusion of the contract, since it is the place of performance of the contract which is more important and practical; (ii) it is impossible to establish the place and time of conclusion of the contract when the contract involves international sales; and (iii) when the contracting parties fail to take into account an issue such as place of delivery, it is the conductive rules of law of contracts that is meant to fill the gaps. Therefore, it should be either the intention of the parties or common usages which fill the gap. In this case, the place of delivery should be what

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<sup>653</sup> Article 31 of the CISG.

<sup>654</sup> Article 375 of the Iranian Civil Code states:

'Delivery should be made at the place where the contract was concluded, unless another place is required by common usage or unless by a provision in the contract of sale a special place has been fixed for the delivery.'

<sup>655</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

the parties would have agreed on, had it been decided by them. The place of conclusion of the contract is not fit for this purpose, as parties often do not know where the contract is concluded.<sup>656</sup>

It has also been argued that Article 375 of the Iranian Civil Code is based only on old customs and usage and has no strong origin in religion. In addition, Article 375 is not a compulsory rule, and the will of parties or customs and trade usages will supersede this article.<sup>657</sup> Therefore, adoption of the provisions of the Convention, which is based on modern trade usages and customs, does not contradict Iranian law, and Iran can easily adopt the Convention.

### 7.3.2 Passing of Risk

According to Articles 67 and 69 of the Convention, the passing of risk takes place upon physical acts of transfer of possession. Article 67 must be read in conjunction with Article 69, since the circumstances not covered by Article 67 fall automatically into Article 69.<sup>658</sup> Apart from special circumstances that come under Article 68, the two Articles (67 and 69) together accommodate comprehensive rules for the passing of risk in all cases.<sup>659</sup>

When the carriage of goods is involved in the contract, the passing of risk is subject to the handing over of the goods to the first carrier (Article 67(1)). Article 67(1) embodies the traditional solution for the passing of risk, and the provision does not differentiate between carriage by sea, road or air or by multimodal transport.<sup>660</sup> In cases of combined modes of transport, it does not divide the risk.<sup>661</sup> The passing of risk is marked by the transfer of goods to the carrier (Article 67(1)). In most cases of carriage, therefore, the passing of risk to the buyer takes place at this point, and practical considerations correspond with this general CISG rule that the buyer will be in a better position to inspect goods damaged by transit-related risks and to make claims against

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<sup>656</sup> *ibid.*

<sup>657</sup> Safai, Adel, Kazemi, and Mirzanejad, *The Law of International Sale of Goods* (n 651) 446.

<sup>658</sup> Honnold, *Uniform Law for International Sales* (n 241); Barry Nicholas, 'Article 67' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffr : Milan 1987) 487.

<sup>659</sup> Nicholas, *ibid.*

<sup>660</sup> Schlechtriem, *Uniform Sales Law* (n 169).

<sup>661</sup> *ibid.*

the carrier or insurer concerned.<sup>662</sup> The passage of risk is not influenced by the fact that the seller holds the documents of transport (Article 67(1)). Therefore, maintaining the documents to secure payment and the reciprocal right to control the disposition of the goods does not prevent the passing of the risk to the buyer. This provision implies that the passing of risk is not dependent upon the transfer of title.<sup>663</sup>

When no carriage of goods is involved, the transfer of risk takes place when the buyer takes over the goods or the goods are placed at his disposal (Article 69(1)). If the buyer is bound to take over the goods at a place other than the seller's place of business, the risk passes under Article 69(2) when the goods are delivered and the buyer knows that the goods are placed at his disposal at that place. Passing of risk, therefore, has taken place when the buyer is in control of the goods or his control over the goods is better than the seller's. If the buyer fails to take over the goods on time at the seller's place of business, the risk passes to him at the point at which he breaches this commitment.<sup>664</sup> However, when the provision of the contract specifies that the buyer can collect the goods within a given period, the passing of risk does not take place until the given period has elapsed, regardless of the goods being held available during the given period.<sup>665</sup> But when the contract permits the buyer to collect the goods within a given period at a place other than the seller's place of business, and the goods are available, the risk will pass before the period has expired; in this case, the seller is in no better position to protect against the loss.<sup>666</sup> In spite of all this discussed above, the scope of application of Article 69 is limited in practice, as most international contracts of sale involve the carriage of goods.<sup>667</sup>

When goods are in transit, the first sentence of Article 68 lays down the primary rule that the buyer bears the risk from the moment the contract is made. In order to protect buyers in developing countries, the opponents included this rule (Article

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<sup>662</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630).

<sup>663</sup> Schlechtriem, *Uniform Sales Law* (n 169).

<sup>664</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630).

<sup>665</sup> *ibid.*

<sup>666</sup> *ibid.*

<sup>667</sup> *ibid.*

68(1)), whereby the risk passes at the time of contracting.<sup>668</sup> The second sentence of Article 68, whereby the risk passes retroactively at the time the goods were handed over to the carrier, was more acceptable to Western experts, as they believed it is difficult in most cases to determine when damage during transport has taken place.<sup>669</sup> One can argue that, when the contract is concluded, the buyer does not physically possess the goods. However, he may acquire constructive possession of the goods through shipping documents or he may examine the goods and claim damages when he receives them, as he is in a better position than the seller. Furthermore, when there is doubt over the possession of the goods, the effects of law would be to give the possession to the person with the legal title to the goods. In this case, the buyer is seen as the person who has the possession of the goods. Having said that, according to Article 6 of the Convention, parties can agree on the time of passing of risk. Parties are at absolute liberty to agree on the time of passing of risk, which can even be prior to the transfer of property.

Under Iranian law, the risk passes on delivery. This principle has its origin in Islamic law. It would be difficult to justify passing of risk under Iranian law when there are other legal systems in which risk passes at the time of conclusion of the contract. Those legal systems believe that, once ownership is transferred, the risk, accidental damages and loss should also be borne by the owner.<sup>670</sup>

Passing of risk on delivery puts the party in control of the goods at risk of loss or damage. It is argued that, since transfer of risk by delivery derives from the intention of the parties, they may agree on the passing of risk to the buyer at a time prior to the transfer of property or at the time of contract. This means that the buyer acknowledges accepting defective goods and waives any rights he may have had when the goods delivered turn out to be defective or non-conforming. If it later becomes

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<sup>668</sup> Argentina, Egypt, Pakistan, Republic of Korea, Turkey; Document A/CONF.97/L.15 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, M Proposals and Amendments Submitted to the Plenary Conference.'

<<http://www.cisg.law.pace.edu/cisg/mproposal.html>> accessed 3 August 2013.

See Text to n 286 in ch 3.

<sup>669</sup> Drafting Committee; Document A/CONF.97/L.23

'Legislative History 1980 Vienna Diplomatic Conference' (n 668).

See Text to n 290 in ch 3.

<sup>670</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

evident that the goods were defective before the contract was made, the buyer is not under obligation to make the payment in spite of having agreed on transfer of risk prior to the contract, as the contract is invalid.<sup>671</sup>

The Convention and Iranian law have taken different approaches to the matter of the passing of risk. But they are similar in that they both link the passing of risk to the control of the goods. In both legal systems, parties are at liberty to agree on the time in which the risk passes. Therefore, when it comes to the passing of risk, there is no impediment in the way of Iran ratifying the Convention.

### **7.3.3 The Right to Withhold**

The Convention in its Article 71(1) provides that the aggrieved party (seller or buyer) has a right to suspend the performance of his obligations when 'it becomes apparent that the other party will not perform a substantial part of his obligation.' Therefore, any failure to carry out a substantial part of the obligation may entitle the aggrieved party to suspend the contract. Although there is no precise measurement for these terms, an analysis of the provisions contained in Article 72<sup>672</sup> reveals that under the Convention it is easier to suspend than to avoid.<sup>673</sup> The wording of the two articles shows that failure to perform a 'substantial part' of obligations implies something less than a 'fundamental breach,' and an 'apparent' non-performance is intended to show a lesser degree of certainty than that which is 'clear.'<sup>674</sup>

Therefore, as long as the seller is in possession of the goods, suspension of the contract frees him from both delivery and taking any further step such as manufacturing the goods as provided in the contract. The fact that the first sentence

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<sup>671</sup> *ibid.*

<sup>672</sup> Article 72 of the CISG states:

- (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
- (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
- (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

<sup>673</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630); See Text to n 277 in ch 3.

<sup>674</sup> Lookofsky, *ibid.*; see generally ch 3, 3.3.2.



of Article 71 grants the seller or buyer the right to suspend the contract, when it becomes apparent that the other party is unable to fulfil a substantial part of that contract, means that there is no need for actual occurrence of breach. To prevent abuse of the exercise of this right, the grounds on which the Convention gives permission to suspend the contract are set out in Article 71(1):

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

Although the provisions of Article 71 are not limited to cases of insolvency,<sup>675</sup> if the buyer becomes insolvent it is considered to show a serious deficiency in his creditworthiness, and as a result the seller is given the right to suspend the contract. Article 71 of the Convention in its third paragraph continues that it is required that the party that intends to suspend the contract give notice to the other party.<sup>676</sup> This is because the other party must have a chance to provide adequate assurance of his performance. If and when adequate assurance is given, the suspending party must continue to fulfil his obligations.

Iranian law recognises the right of lien for the aggrieved party when the defaulting party does not fulfil his obligations. The reciprocity between payment and delivery gives the seller the right not to deliver when the buyer does not pay the price, and the same right is given to the buyer when the seller does not deliver the goods.<sup>677</sup> Therefore, in accordance with Article 377<sup>678</sup> of the Iranian Civil Code, both parties may refuse to fulfil their obligations until the other party delivers or pays. The aggrieved party may waive this right when a partial delivery takes place. Insolvency of the buyer before delivery gives rise to non-delivery by the seller. As long as the seller is in

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<sup>675</sup> Bennett, 'Article 71' (n 253) 513.

<sup>676</sup> Article 71 (3) of the CISG states:

'(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.'

<sup>677</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>678</sup> Article 377 of the Iranian Civil Code states:

Either the seller or the buyer can retain the goods sold or their consideration until the other party is prepared to deliver his part, unless either the object of sale or the consideration thereof is agreed to be delivered at a subsequent date in which case either the object of sale or consideration which has become mature should be surrendered.

possession of the goods, he can exercise this right.<sup>679</sup> Article 378<sup>680</sup> of the Iranian Civil Code provides that the seller will be deprived of his right to withhold only when he intentionally delivers the goods before receiving the price.

The right to suspend the contract prior to delivery as set out in the Convention may seem identical to the right to lien in Iranian law; however, the right to suspend has a wider scope and is not limited to non-delivery or non-payment. Having said that, the provisions of the Convention with regard to the right to suspend the contract *are* compatible with Iranian law. Under both legal systems, both the buyer and the seller may exercise their right to withhold delivery or payment when the other party does not fulfil or is not able to fulfil his obligations. Buyer insolvency under Iranian law, which is partly equal to a serious deficiency in his creditworthiness under the Convention, gives rise to termination of the contract by the seller. Under the Convention, however, a serious deficiency in one of the parties' ability to perform entitles the other party to suspend the contract. Iranian law, which has taken a more rigid and strict approach, can accept the remedy of suspension of contract, which takes a more lenient approach. Both Iranian and Islamic law accept the Convention, which was developed as a result of the close relationship between the obligations of both parties. Therefore, as far as the right to withhold performance is concerned, Iran can adopt the Convention.

#### **7.3.4 Delivery of Non-Conforming Goods**

The Convention recognises the remedy of the buyer's right to withhold performance where the seller fails to deliver conforming goods.<sup>681</sup> The Convention identifies this remedy on the basis of the theory of *interdependence* of the delivery and payment obligations (CISG Articles 58<sup>682</sup> and 71<sup>683</sup>). Iranian civil law recognises this remedy on

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<sup>679</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>680</sup> Article 378 of Iranian Civil Code states:

'The seller who has voluntarily delivered the object of sale before receiving the price thereof, cannot reclaim the object of sale, except in the case of the cancellation of the transaction assuming that he has the option to do so.'

<sup>681</sup> CISG Advisory Council Opinion No 5, 'The buyer's right to avoid the contract in case of non-conforming goods or documents' (2005). Rapporteur: Professor Dr Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel.

<sup>682</sup> Article 58 of the CISG states:

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in

the basis of the theory of *sharte-e-demni* (implied agreement)<sup>684</sup> or the theory of mutuality,<sup>685</sup> which is similar to the analysis of the Convention. This is to say that both Iranian law and the Convention justify the remedy on the basis of the theory of dependency.<sup>686</sup>

The similarity ends, however, when the seller fulfils his obligation to deliver the goods, but there is a lack of conformity with the terms of the contract. The Convention does not refer to the buyer's right to withhold performance in Articles 45 to 52 (remedial provisions); however, closer examination of the provisions of the Convention shows that this right to withhold performance of the obligations exists for the buyer.

Professor Schlechtriem argues that 'pursuant to Article 7(2) CISG, such a right [right of withholding] can be developed as a gap-filler.'<sup>687</sup> A justified refusal to take delivery signifies that the buyer is not in breach of the contract, as he has the right to withhold his performance.<sup>688</sup> It is however not clear whether lack of conformity will permit the right to refuse to accept and take delivery of goods under the Convention; however, it is clear that there is no need to show that non-conformity corresponds to a 'fundamental breach' as stated in Article 25. The breach need be fundamental only in order to give rise to termination and delivery of substitute goods (Articles 46(2),

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accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

<sup>683</sup> Article 71(2) of the CISG states:

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

<sup>684</sup> This means that at the time of concluding the contract, beside the fact that the contracting parties expressly commit themselves on a duty to do something in return of the other party's commitment, they also impliedly agree to perform their obligations simultaneously in exchange of the other party's performance.

<sup>685</sup> There is also this school of thought that the right to withhold performance is justified on the theory of mutuality of obligations. It is indeed the nature of mutual contracts which gives rise to the right of refusal. The reciprocal character of transaction supports the simultaneous performance of counter-obligations.

<sup>686</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 622).

<sup>687</sup> Peter Schlechtriem, 'Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods' (2006) 18 Pace International Law Review 83.

<sup>688</sup> *ibid.*

49(1)(a), 51, 72 and 73). The Convention does not, however, give rise to the right to refuse to accept the goods for any non-conformity. Articles 46(2) and (3) and Article 71(1) of the Convention emphasise that the buyer is not entitled to the right to reject the goods for minor non-conformity.

Under the Iranian Civil Code, the buyer's right to withhold performance where the seller delivers the non-conforming goods is recognised, and the buyer is given this right to reject. However, the circumstances that give rise to the buyer's right to reject goods in non-conformity are not clear: is he entitled to reject any non-conforming delivery, or is there some restriction on the exercise of this right?<sup>689</sup> If one applies the theory of implied agreement or the theory of mutuality to the case of non-conforming delivery, where the former is applied one may argue that it was the mutual intention of both parties to the contract that any non-conformity should permit the right to reject. If the basis of this right is the theory of mutuality, it is not easy to say that, under a reciprocal contract, any party should have the right to refuse to accept the performance of other party for any non-conformity. This serves as a basis for restricting the right to reject to circumstances in which the non-conformity is not minor.

If the second doctrine accords with Iranian civil law, it would then be very similar to the analysis made by the Convention. In any event, the court should consider the impact of breach on the position of the buyer in order to establish whether the buyer was entitled to reject the seller's delivery.<sup>690</sup>

The Iranian Civil Code recognises that the buyer has this right to withhold performance of obligation if the seller fails to deliver the subject matter of the contract. But would adopting the CISG require a change in practice? It appears that there is no substantial difference between the Convention and Iranian law on this. Under Iranian law, it is rather confusing to establish the circumstances in which the buyer would be entitled to exercise this right, and the doctrine which justifies the exercise of this right. Having said that, there is no evidence to suggest that the CISG contradicts Iranian law. Adoption of the Convention would put Iranian commercial traders in a better position,

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<sup>689</sup> *ibid.*

<sup>690</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 621).

as its provisions remove any confusion and allow for a higher degree of certainty in establishing the exercise of this right.

### 7.3.5 Tender of Non-Conforming Documents

Where the seller does not fulfil his obligation to obtain and deliver documents that represent the goods according to the requirements provided by the documentary sale contracts, certain problems may occur: (i) should the buyer have the right to reject non-conforming documents?; and (ii) if the right to reject documents is granted, how is this exercised?<sup>691</sup> This is of great importance in international trade, as many transactions (especially those involving payment by documentary credits) depend on conformity of documents for their completion.

The Convention refers to the seller's duty to deliver both goods and documents in accordance with the terms of the contract (Articles 30<sup>692</sup> and 34<sup>693</sup>); however, it has failed to properly answer the questions above. According to Articles 30 and 34 of the CISG, the seller must deliver documents that conform to the contract. The second and third sentences of Article 34 discuss the cure of non-conforming documents.<sup>694</sup> It must be noted that the buyer still has the right to damages resulting from the seller's exercise of the right to cure non-conformity in the documents (Article 34 sentence three). Although it seems to be unquestionable that the seller could cure non-conformity before the agreed date for handing over the documents,<sup>695</sup> it is unclear what remedy is available to the buyer for the non-conformity of documents after the agreed time. Article 48<sup>696</sup> of the Convention deals with the seller's right to cure where

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<sup>691</sup> Jafarzadeh, *ibid.*

<sup>692</sup> Article 30 of the CISG states:

'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.'

<sup>693</sup> Article 34 of the CISG states:

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

<sup>694</sup> Fritz Enderlein, 'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1996) ch 5, 133.

<sup>695</sup> *ibid.*

<sup>696</sup> Article 48 of the CISG states:

he has failed to perform his obligations after delivery; therefore, the same rule is applicable to defective and non-conforming documents.<sup>697</sup> That is because a breach of obligation to transfer conforming documents is approached in exactly the same way as delivery of non-conforming goods.<sup>698</sup>

Article 48(1) refers to the phrase 'subject to Article 49.' According to Article 49, the buyer may avoid the contract: (a) when a failure by the seller to perform 'any of his obligations' amounts to a 'fundamental breach of contract'; and (b) 'in case of non-delivery, if the seller does not deliver the goods' within an additional period of time fixed by a *Nachfrist* notice under Article 47. However, it seems to be agreed that, in most cases, the seller should be given this right to cure even serious defects in accordance with Article 48(1). This includes situations where lack of conformity might seem to fall within the scope of the fundamental breach rule in Article 49.<sup>699</sup>

In the *Cobalt Sulphate Case*,<sup>700</sup> the Dutch plaintiff (seller) sold four quantities of cobalt sulphate to the German defendant (buyer). They had agreed on the British origin of the goods and that the plaintiff had to represent the certificates of origin and quality. Upon receipt of the documents, the buyer avoided the contract, as the cobalt sulphate was of South African origin and the certificate of origin was thus wrong. The German Supreme Court decided, however, that there were no grounds to declare the contract avoided and the plaintiff was thus not guilty. The Court held that the plaintiff had delivered the goods, and non-conformity of the goods with the contract because of

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(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

<sup>697</sup> Ole Lando, 'Article 34' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffr : Milan 1987) 265; Schlechtriem, *Uniform Sales Law* (n 169); Honnold, *Uniform Law for International Sales* (n 241) 249–250.

<sup>698</sup> Schlechtriem, *ibid.*

<sup>699</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630).

<sup>700</sup> Germany 3 April 1996 Supreme Court.

<<http://cisgw3.1aw.pace.edu/cases/960403g1.html>> accessed 5 August 2013.

either their lesser quantity or their different origin did not constitute non-delivery. Although the exercise of the buyer's right to avoid the contract is not straightforward under the tender of non-conforming documents, it is clear that such a remedy exists for the buyer when the circumstances warrant.

In contrast, Iranian civil law appears very inadequate in this regard. There are no proper rules regulating the obligations of the seller to deliver conforming documents, and no proper remedies for the buyer when the seller does not perform his duties to deliver documents in conformity with the requirements of the contract. The right to reject non-conforming documents is non-existent under Iranian civil law. Under that law, the obligation of the seller to prepare and deliver documents for the purchased goods has to be analysed on the grounds of the theory of *shart-e-fel*.<sup>701 702</sup> Therefore, if the seller does not deliver documents in conformity with the terms of the contract, the right to refuse to accept should be granted to the buyer. This is because a documentary sale transaction obliges the seller to prepare certain documents and deliver them to the buyer in accordance with the terms of the contract. As a result, the buyer is under obligation to accept and pay for the performance. Therefore, if the seller does not deliver such a performance, the buyer has no obligation to accept and pay for them. It is agreed that, under such contracts, the right to withhold performance is justified on the grounds of *shart-e-demni* (implied stipulation) and therefore would be applied to the case.<sup>703</sup> That the seller should offer and show documents in full conformity with the terms of contract is a well-established rule. Any lack of conformity gives rise to the buyer's (or his bank's, in the case of making the payment through letter of credit) right to reject and pay for them.<sup>704</sup> Therefore, it is concluded that it is impliedly agreed between parties to a documentary sale contract that the conforming documents should be tendered and any non-conformity should give rise to the right to reject them. It is argued that, under a documentary sale contract, the buyer should have the right to reject documents for defects on their face, whether these defects are related to the goods, the documents, or even both.

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<sup>701</sup> *Shart-e-fel* is an expression which describes terms signifying a promise to do or refrain to do something.

<sup>702</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 621).

<sup>703</sup> *ibid*.

<sup>704</sup> See Uniform Customs and Practices for Documentary Credits 2007, UCP 600.

However, there is a lack of clarity on whether the right should be granted to the buyer to reject the goods on arrival for deficiency in the goods if the buyer has already accepted the documents. It could however be suggested that, if the deficiency were not apparent on the face of the documents, the right should be given to the buyer to reject. The reasoning behind this is that, at the time of termination of the contract, the buyer will not be given this right if he was or ought to have been aware of non-conformity which gives rise to the right to terminate. However, if the deficiency was evident on the face of the documents or could have been discovered by an examination, the buyer has accepted the goods in non-conformity on the basis of the doctrine of *isqat* (waiver) or the doctrine of *iqdam*<sup>705</sup> (action against himself).<sup>706</sup>

This suggests that, although this issue is not covered under the Iranian Civil Code, there is no evidence that the two legal systems are incompatible. Iranian commercial traders would be even better off with the CISG, and that is because the Convention makes provisions with regard to the tender of conforming documents by the seller, and failure to do so gives rise to the buyer's right to avoid the contract when circumstances allow. This *per se* increases traders' confidence, as they would be aware of their rights and obligations in similar circumstances.

### 7.3.6 Partial Non-Conforming Delivery

The CISG contains certain provisions that deal with circumstances in which the seller either delivers the wrong quantity of goods, or delivers the right quantity but in partial non-conformity with the terms of the contract. Article 51(1)<sup>707</sup> of the Convention expressly entitles the buyer to exercise his remedies under Articles 46–50 with regard to non-conformity; therefore, it is arguable that the same logic applicable to full non-conformity of goods could apply to partial non-conformity.<sup>708</sup> The UNCITRAL Digest on the CISG states that 'the general rule is that apart from damages, all remedies of the

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<sup>705</sup> In accordance with this principle, a right given to a person will be lost where he himself, knowing of the right, acts to his own detriment.

<sup>706</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 621).

<sup>707</sup> Article 51(1) of the CISG states:

'If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.'

<sup>708</sup> 'UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods.'

[A/CN.9/SER.C/DIGEST/CISG/51](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/553/20/PDF/V0455320.pdf?OpenElement)

[<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/553/20/PDF/V0455320.pdf?OpenElement>](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/553/20/PDF/V0455320.pdf?OpenElement)

accessed 25 July 2013.



buyer refer only to that part of the contract which is not performed. The rest of the contract remains unimpaired.<sup>709</sup> Paragraph 1 of Article 51 follows the general approach of the Convention, which is to safeguard as much of the contract as possible.<sup>710</sup> That is why the remedies contained in the contract shall not be available to the buyer when only part of the performance is in non-conformity. Therefore, it is true to say that Articles 46–50 are applicable only to the non-conforming or missing part.<sup>711</sup> The rest of the contract generally cannot be declared avoided.<sup>712</sup>

It is understood from paragraph 1 of Article 51 that it is possible to divide the performance of the seller into conforming and non-conforming parts. Where the missing or non-conforming part can be divided, Articles 46 to 50 apply to that part.<sup>713</sup> The UNCITRAL Digest on the CISG also states that Article 51 requires that the goods delivered embody severable parts.<sup>714</sup>

Under Iranian civil law, there are no conflicting views on whether the buyer should be entitled to reject goods for partial non-conformity. However, partial rejection is not covered under the Iranian Civil Code as a remedy. It does however state that the buyer, on the basis of option of defect, has the right to terminate the contract partially where the seller of the specific goods delivers goods that are partially in non-conformity with the contract quality. These conflicting views on the acceptance of the right to partial termination arise because there is no clear distinction between severable and non-severable contracts. In a non-severable contract, it is agreed that breach of *shart-e-sefat* or *shart-e-sehhat* with regard to some part of the goods should be seen as a breach of the whole contract, and therefore this allows for rejection of the contract. In a severable contract, however, partial non-conformity entitles the buyer to keep the conforming part and reject the rest.<sup>715</sup> Therefore, those who support the buyer's right to partial rejection seem to refer to this situation.<sup>716</sup>

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<sup>709</sup> *ibid.*

<sup>710</sup> Michael Will, 'Article 51' in Bianca and Bonell (eds), *Commentary on the International Sales Law* (Giuffr : Milan 1987) 377.

<sup>711</sup> *ibid.*

<sup>712</sup> CLOUT case No 302 [Arbitration International Chamber of Commerce No 7660 1994].

<sup>713</sup> Will, 'Article 51' (n 710).

<sup>714</sup> 'UNCITRAL Digest of Case Law' (n 708).

<sup>715</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 621).

<sup>716</sup> *ibid.*

Therefore, in Iranian civil law as well as in the Convention, the right to partial rejection depends on the severability or non-severability of the contract. If the contract is separable, each severable part will be seen as a separate subsidiary contract under the main contract and the buyer has the same right with regard to separable parts as with regard to a non-severable contract. Therefore, adoption of the Convention does not require a change in practice, as they are compatible in this regard.

### **7.3.7 Delivery of Wrong Quantity**

In accordance with the terms of the contract, the seller is under an obligation to deliver the exact quantity of goods stipulated in the contract. If the quantity of goods delivered does not amount to what was agreed (in either shortfall or excess), it is then considered as a breach of contract, and gives rise to certain remedies for the buyer. The Convention and Iranian law both contain provisions for this, so the author will consider them in turn.

#### **7.3.7.1 Shortfall in Delivery**

Under the Convention, it is unclear whether a shortfall in delivery entitles the buyer to refuse to take delivery of the goods. If it is allowed, it is not clear what degree of shortcoming grants the buyer the right to rejection. On the one hand, Article 37<sup>717</sup> of the Convention specifies that a shortfall on delivery can be cured by the seller either by delivering the missing part or by making up any deficiency in the quantity of the goods delivered, provided that the delivery is made before the date specified in the contract. Although according to Article 37 the buyer retains any right to claim damages provided by the Convention, the scope of application of this article is limited to circumstances in which the delivery takes place before the date fixed by the contract. On the other hand, in accordance with Article 51(2)<sup>718</sup> of the Convention, termination

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<sup>717</sup> Article 37 of the CISG states:

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

<sup>718</sup> Article 51(2) of the CISG states:

'The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.'

of the contract under certain circumstances is granted to the buyer in full; therefore, the buyer is entitled to refuse to perform until the seller offers delivery of conforming goods in accordance with the contract.<sup>719</sup> It is however unclear whether the buyer can refuse to fulfil his obligations if parts of the goods are missing. Article 51(1) sets out that, in the event of a shortfall in delivery or non-conforming delivery, Articles 46 to 50 apply in respect of missing or non-conforming parts. Therefore, following a shortfall in delivery, the buyer: (i) according to Article 46(1)<sup>720</sup> may require performance by the seller of his obligation (in this case refusing the delivered quantity and requesting a perfect delivery), or (ii) in accordance with Article 46(3)<sup>721</sup> request repair (in this case accepting the quantity delivered and asking for the missing part).<sup>722</sup> A shortfall in delivery does not entitle the aggrieved party to avoid the contract, as it does not have the same effect as fundamental breach. That is because the defaulting party can cure any deficiency in the quantity of goods delivered.

The question that might provoke controversy is, if the buyer accepts the quantity delivered to him and does not ask for delivery of the missing part, will he be able to reduce the price in accordance with Article 50?<sup>723</sup> Most commentators have so far failed to make a recommendation on whether price reduction should be available as a remedy for the buyer where the seller delivers the wrong quantity.<sup>724</sup> Only one commentary has considered insufficient quantity to qualify as a form of non-performance, and consequently regarded price reduction as an available remedy for the buyer when there is deficiency in quantity and quality of goods delivered.<sup>725</sup>

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<sup>719</sup> Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract' (n 621).

<sup>720</sup> Article 46(1) of the CISG states:

'The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.'

<sup>721</sup> Article 46(3) of the CISG states:

If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

<sup>722</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>723</sup> Article 50 of the CISG (n 242).

<sup>724</sup> See Bianca and Bonell, *Commentary on the International Sales Law* (n 315); John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd edn, 1991).

They have failed to discuss whether or not price reduction is available to the buyer as a remedy where the seller delivers the wrong quantity.

<sup>725</sup> Bergsten and Miller, 'The Remedy of Reduction of Price' (n 242).

Flechtner, however, has argued that the phrase in Article 50 that says ‘if the goods do not conform with the contract’ covers only circumstances in which the goods do not meet the quality requirement of the contract.<sup>726</sup> Article 35(1)<sup>727</sup> does not explicitly mention that deficiency in the quantity of delivered goods amounts to non-conformity. Article 35(2)<sup>728</sup> also clearly expresses that goods do not conform to the contract unless they meet quality specifications. In addition, it seems that the provisions of Article 37 make a distinction between a deficiency in quantity of goods and non-conformity.<sup>729</sup> All in all, a shortfall in delivery may not be regarded as non-conformity under the Convention, and therefore reduction of price will not be available under its provisions. The decision of a US federal court in *S V Braun Inc v Alitalia-Linee Aeree Italiane S p A*<sup>730</sup> endorses this point that the Convention may authorise a price reduction for non-conforming goods, but in this case the goods delivered did conform although the delivery was short on quantity.

Under Iranian law, a shortfall in delivery leaves the aggrieved party with two options: he can accept the goods and pay for the amount delivered at the contract rate, or he can avoid the contract (Article 384<sup>731</sup> of the Iranian Civil Code). When the item being sold is not divisible, such as a carpet, the only available remedy is to cancel the contract (Article 385<sup>732</sup> of the Iranian Civil Code). These articles attract criticism, as

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<sup>726</sup> Harry M Flechtner, ‘More US Decisions on the UN Sales Convention: Scope, Parol Evidence, “Validity” And Reduction of Price Under Article 50’ (1995) 14 *Journal of Law and Commerce* 153.

<sup>727</sup> Article 35(1) of the CISG states:

‘The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.’

<sup>728</sup> Article 35(2) of the CISG states:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

<sup>729</sup> Flechtner, ‘More US Decisions on the UN Sales Convention’ (n 726).

<sup>730</sup> United States 6 April 1994 Federal District Court [New York].

<<http://cisgw3.law.pace.edu/cases/940406u1.html>> accessed 5 August 2013.

<sup>731</sup> Article 384 of the Iranian Civil Code states:

If under a contract the object sold is fixed in quantity and if on delivery less than this quantity is handed over, the buyer will have the choice of cancelling the contract or of taking the quantity available on payment of the right proportion of the price. If the object sold exceeds in quantity the amount fixed in the contract, the excess belongs to the seller.

<sup>732</sup> Article 385 of Iranian Civil Code states:

they do not introduce the possibility of a request for delivery of the quantity contracted.<sup>733</sup> It could however be argued that the main concern of Articles 384 and 385 of the Iranian Civil Code is with the sale of ascertained goods, and, under a contract for sale of unascertained goods, shortfall in delivery is bound to the general principles of Iranian law regarding the fulfilment of obligations.<sup>734</sup> In other words, in such a case, the buyer may request delivery of the contractual quantity, and the court may force the seller to deliver that quantity. If the seller refuses to deliver the quantity stipulated by the contract, the buyer may cancel the contract.<sup>735</sup>

### 7.3.7.2 Excess in Delivery

The Convention, in the event of an excess delivery, has given the right to the buyer either to accept the excess amount and pay at the rate of contract, or to accept the contractual quantity and reject the excess amount (Article 52(2)).<sup>736 737</sup> There are circumstances in which delivery of excess goods can comprise a fundamental breach, and give rise to the buyer's right to avoid the contract. An example of this is when the seller renders a bill of lading that covers both the contractual quantity and the excess amount and states that delivery of goods is subject to payment for all goods (including the excess goods).<sup>738</sup>

Under Iranian law, Articles 384 and 385 of the Iranian Civil Code suggest that, in cases of delivery of excess quantities, the buyer has no rights over the excess amount. Where the object of sale is separable, the excess amount belongs to the seller,<sup>739</sup> and where the object of sale is not separable, the seller can cancel the contract.<sup>740</sup> As discussed earlier, it appears that the two articles are mainly connected with the sale of

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'If an object sold is one that cannot be divided without damage, such as a house or a carpet, and if it is sold as being of a fixed size but on delivery it is smaller or larger in size, then the buyer in the former case and the seller in the latter can cancel the contract.'

<sup>733</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

<sup>734</sup> *ibid.*

<sup>735</sup> *ibid.*

<sup>736</sup> Article 52 of the CISG states:

'If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.'

<sup>737</sup> Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (n 630); Will, 'Article 51' (n 710).

<sup>738</sup> Honnold, *Uniform Law for International Sales* (n 241); Schlechtriem, *Uniform Sales Law* (n 169).

<sup>739</sup> Article 384 of Iranian Civil Code.

<sup>740</sup> Article 385 of Iranian Civil Code.

ascertained goods. Therefore, if the buyer so chooses, he can accept the quantity as defined under the contract and reject the excess amount.<sup>741</sup>

### **7.3.7.3 Summary**

Iranian law does not adequately cover the problems of shortfall or excess in delivery. The CISG however has a more remedial approach in this area. The remedies provided under the Convention appear to be compatible with Iranian law. For example, in the case of excess delivery, there is no provision in Iranian law that contradicts the buyer's right to accept the delivered goods and pay for the excess amount at the contract rate. The remedy of specific performance in the case of shortfall in delivery that the Convention offers to the aggrieved party is also available as an alternative under Iranian law. When the excess or shortfall in delivery corresponds to a fundamental breach, the Convention may entitle the injured party to avoid the contract. This approach is similar to the right that Iranian law gives to the injured party to cancel the contract when the enforced performance of contract becomes impossible and impractical.

## **7.4 Conclusion**

The above comparison demonstrates that similarity exists between the duties, rights and remedies contained within the CISG and those in the Iranian law of sale. There is similarity in the seller's duty to deliver goods that conform in nature to the requirements of the contract, and the buyer's duty to take delivery of the goods. The CISG largely mirrors Iranian law with respect to the duties, and the corresponding rights, of the buyer and the seller.

A number of remedies contained in the CISG are not strictly catered for in Iranian law. For example, the duty to pay interest does not seem to be compatible with Iranian law as it is forbidden under Islamic law. However, closer examination of Iranian law shows that late payment compensation is very similar to the notion of interest and *is* permitted under the Iranian Civil Procedure Code. Moreover, it is permissible to

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<sup>741</sup> Oloumi-Yazdi, 'Delivery in International Sales of Goods' (n 622).

receive interest from those foreign trading partners that do not regard interest as illegal. The duty to pay interest is therefore not unknown in Iranian law.

Other remedies under the CISG, however, do match those in Iranian law. The remedy of the right to withhold, enabling the innocent party to suspend the contract, is accepted under both legal systems. Both systems provide for the suspension of a breached contract; the only difference being that suspension under the CISG has a wider scope, while the right to lien under Iranian law is limited to non-delivery and non-payment. Under both concepts, parties can exercise their right to withhold delivery or payment when the other party cannot fulfil or is not able to fulfil his obligations.

The duties, rights and remedies stipulated by the CISG largely resemble those catered for under Iranian law. Where discrepancies do exist, they can be overcome by utilising sufficiently similar principles that are well known under Iranian law to produce the equivalent results. The duties, rights and remedies contained in the CISG do not therefore pose an impediment to ratification.

## Chapter Eight

### Concluding Remarks

#### 8.1 The Road Ahead

This research constitutes an attempt to demonstrate the suitability of the CISG for advancing international commerce with an Iranian buyer or seller. The opening chapter set out the issues that would need to be addressed, to determine both whether the ratification of the CISG would be advantageous for Iran and whether (and how) it would be feasible to implement it. As the chapter (and subsequent ones) explained, the questions of desirability and feasibility are not merely technical legal questions. The broader historical and political contexts are important, as is the current status of knowledge and opinion in Iran regarding the CISG. Hence, the thesis sought to determine the level of compatibility between the CISG and Iranian sales law. The historical development of the CISG shows that its drafters intended to create a unified code that would harmonise international trade law. The CISG was also intended to contribute to the achievement of NIEO. The Preamble refers to the NIEO and the importance of developing trade 'on the basis of equality and mutual benefit.' These objectives reflected the desire to create a structure for international trade that would be fairer to developing nations. Many states have recognised the potential of the CISG to achieve its objectives, as ratification promotes a harmonised sales law that will bring great future benefits to contracting states in the area of both domestic and international sales.

It must be noted, however, that the desirability of ratification depends on local conditions. The United Kingdom is a prime example of a state that has not yet ratified the CISG, though it has promised to do so in the future. A comparative analysis of the provisions of the CISG and those of English law reveals that no major legal impediment exists to ratification.<sup>742</sup> The fear that the CISG would have a negative impact on domestic law is unjustified because English law would remain applicable to domestic matters and the CISG would apply only to international sales. The writer believes that

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<sup>742</sup> See generally ch 5, 5.2.2.



the primary reason behind the UK's failure to ratify is lack of interest in the CISG. There are economic justifications for the UK not ratifying the CISG: the UK is currently the leading forum for dispute resolution in matters relating to international trade, and there is a degree of apprehension that ratification would dissipate the UK's economic benefits and harm its prominent position.<sup>743</sup> This may not necessarily be the case, however, as ratification of the CISG might benefit the UK given that parties often seek the experience of English courts. The experience gained by the English courts in international trade matters will not be sidelined by the CISG; in fact, the experience of English judges will be invaluable in the interpretation of this Convention.<sup>744</sup>

Iran is not in a comparable position. Although there are similarities between the two countries (Iran and the UK), for example in that they are both bound to be concerned by the extent of the required transformation in law, in Iran it seems that the changes would not be so significant that the CISG could not be adopted. One has to bear in mind that the practical objections are different in Iran. Iran is not a highly sought-after dispute resolution forum and Iranian law is not well known in the world. Ratifying the CISG could very well lead to more legal business coming to Iran, rather than to its losing business. Although the UK can justifiably claim that it might obtain economic advantage from maintaining English domestic law for international matters, Iran cannot claim the same.

In the event that Iran ratifies the CISG, it will have to decide whether domestic law reforms should be made to bring domestic law into line with the Convention. Germany is a major example of a ratifying state which has embraced the CISG. In addition to ratifying it, Germany has undertaken domestic law reforms to align German law with the Convention. From our investigation into the compatibility of the CISG with Iranian law it is clear that the two legal systems are similar. Where differences exist, the gaps can be filled by finding fairly similar Iranian principles. Therefore, ratifying the CISG does not mean that Iran will have to give up parts of its domestic law. This is not to say that Iran has to pursue the German model, but it can maintain domestic law for domestic sales and apply the CISG to international sales.

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<sup>743</sup> See generally ch 5.

<sup>744</sup> See generally ch 5.

In chapter four, it was shown that the arguments in support of ratification seem to outweigh those against. The focus of this study has been on substantive legal provisions, which show similarity between the CISG and Iranian law. The rights and duties contained in the CISG to some extent match those in Iranian law. Iran cannot disregard the CISG. The argument that the CISG may result in uncertainty is outweighed by the greater uncertainty that arises already from the application of foreign law, given that the CISG has some degree of similarity to Iranian law. One could argue that a simple choice-of-law clause would avoid such uncertainty, but it would not fully eradicate the difficulty, since the applicable law would be foreign law for at least one of the parties to the contract. Therefore, a unified body of law, in this case the CISG, is seen as necessary to escape from such predicaments. In addition, the CISG is constantly being subjected to interpretation and clarification, and Iran could contribute to this process. The provisions of the CISG show similarity with Iranian law, and therefore there should be no reason to believe that impractical definitions will be developed.

The CISG has obtained worldwide acceptance because it appeals to both developed and developing nations. Commercial entities have also happily accepted the CISG, as its provisions govern their trade contracts. The CISG has been a success in Europe. The majority of states have ratified it and now apply the CISG to their trade disputes. This is to a great extent because the European Union fosters trade among its member states. European states have gone a step further and even used the CISG as a model for the harmonisation of other areas of European contract law. This is in contrast with the developing nations. Although the CISG has been better received by the developing world than its precursors were, the rate of accession to the CISG has not been as high. Therefore, it is fair to say that many developing countries have not ratified it and have made no substantial contribution to literature and case law on CISG. This would not have been expected from their high level of participation during the CISG's drafting process.

If Iran decided to ratify the CISG, it would be positioning itself within the international community as well as with the OECD states, many of which have already acceded to

the Convention. It might also lead to ratification of the CISG by Iran's neighbouring countries, which could facilitate trade among them on the basis of a unified set of laws.

The CISG poses few risks to traders and may facilitate international trade through a unified body of law, which can govern their contracts or may be adjusted according to the wills of the parties. Therefore, the CISG maintains party autonomy, and signatories are at liberty to form their contracts in accordance with their particular legal needs. It is a pity that few Iranian academics have embarked on a thorough examination of the CISG. It is essential that businesses, legal professionals, academics and private individuals educate themselves on the substance and application of this Convention. The CISG can no longer be avoided in the international market, and Iran will have to face it more and more in international trade.

The CISG is not trying to replace domestic law or govern trade through its own legal principles alone. There are certain aspects of sales contracts to which the CISG needs to be applied in domestic law, and it approves the use of existing trade usages and customs. The CISG supports a framework that encourages a unified international trade law irrespective of the political, social and economic conditions of contracting states. Every individual signatory state will benefit from this international Convention, provided that they all support and participate in the project. There is a great likelihood that the CISG will become law for the trading nations which was made by them. It is up to Iran to decide whether to join this global project, which has already gathered such momentum.

This study recommends that Iran become a signatory state to the CISG and complete the ratification process.

## **8.2 Summary of Fieldwork in Iran**

In 2011/2012, the writer conducted a survey in Iran to measure the level of familiarity with CISG, the knowledge of the CISG and the attitude of Iranian academics/lawyers, the business community and Government officials to the CISG. The purpose of this

study was to gain a better sense of the practical difficulties that may arise in implementing the CISG in Iran (see appendix B).

### **8.2.1 Method**

The aim of the fieldwork was to conduct unstructured interviews with leading figures in business, law and Government in Iran with regard to the area of international trade. The goal was to determine: (i) whether they are familiar with the CISG; (ii) whether they support/oppose its introduction, with reasons why; and (iii) whether there are any other insights/observations on the potential difficulties of implementation. To that end, contact was made through an initial questionnaire, sent by post and then followed up by telephone or written contact if no reply was received.

The writer issued 60 documents and received only nine responses: five responses came in the form of questionnaires only, two responses included both questionnaire and a face-to-face interview, and two responses were obtained only from interviews (one was a face-to-face interview and one was a telephone interview). The small number of responses means it is important to be cautious in interpreting results. However, three tentative conclusions can be drawn:

#### **I. Lack of Awareness**

Although it is arguable that the low level of response might reflect the technical nature of the subject, the lack of awareness of and familiarity with the CISG could be considered as one of the major factors potentially hindering accession. The implications of this lack of awareness are discussed below.

This is supported by interviews/questionnaires. One example is the 'Mega Motor Company,' whose managing director admitted his unfamiliarity with the CISG. It is worth mentioning that, with the exception of three that came from academia or the legal community, other endorsements for accession came from organisations whose level of familiarity with the CISG was either low or non-existent. In other words, despite unfamiliarity, they were not opposing accession to the CISG.

## II. Direct Opposition

With the exception of one vote against, the majority were in favour of adoption. However, the opposition is significant because, although it did not focus on trade issues, for instance on the fact that it is not yet evident whether the CISG would promote trade or reduce legal business (as in the UK), it focused instead on the secular nature of the CISG. A highly influential organisation that was against ratification was the Trade Promotion Organisation of Iran, which is a subset of the Iran Chamber of Commerce, Industries and Mines. Their main objection was the incompatibility of the CISG with Islamic jurisprudence.

From this point of view it is not incorrect to oppose adoption of the CISG, on the grounds that the Convention specifies provisions with regard to interest that seem to be incompatible with Islamic and Iranian law.<sup>745</sup> For example, Article 84 of the CISG states that in the event that the seller is bound to refund the price, he must pay interest on it from the date the price was paid. Also, under CISG Article 78, it is clear that interest must be paid to the aggrieved party.

But this does not in fact introduce a radical change, since Iranian law recognises late payment compensation (Articles 515(2) and 522 of the Iranian Civil Procedure Code 1379 (2000)), which is very similar to the notion of interest.<sup>746</sup> Moreover, when an action is brought outside Iran, Iranian authorities do request interest in their dealings and litigation arbitration proceedings with foreign corporations.<sup>747</sup>

Hence it could be very difficult politically to promote access to the CISG in Iran. Those who prefer secular law may feel that it is unwise to promote the Convention, as it may invite closer scrutiny of the Civil Code. It is only speculation, but it may explain the low rate of return of the questionnaires.

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<sup>745</sup> Text to n(s) 641 and 642 in ch 7.

<sup>746</sup> Text to n 651 in ch 7.

<sup>747</sup> Text to n 652 in ch 7.

### **III. There Is Some Support for the CISG**

Several respondents stated their willingness to adhere to the CISG, but one went a step further and explained that Iran's accession to the New York Convention (1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) on 15 October 2001<sup>748</sup> implies that accession to the CISG is feasible. Those respondents who were very familiar with the CISG and in favour of accession put forward their arguments as follows:

1. Iran's accession to the Convention would appear to have benefits for Iran at an international level. It is believed that it would promote Iran's international trade and be beneficial for its economic growth and development. Iran's trading partners would be able to predict the governing law of the contract. This governing law, which is familiar to them and derived from international customs and trade usages, would enable them to enter into contracts with Iran with a higher degree of certainty, which would in turn lead to the building of stronger relations.
2. Accession to the Convention would not mean that our own national law would be neglected or abandoned. Since the Convention governs only international sales contracts between parties whose places of business are in two different countries, the Iranian Civil Code would still govern contracts of sales made nationally.
3. A comparative study of the CISG and the Iranian Civil Code does not suggest any radical departure from our Civil Code.

#### **8.2.2 Future Action**

The three points made above suggest the following areas of action:

##### **I. Awareness**

There is clearly a great need for further awareness. The outcome of this survey shows that there is a lack of familiarity with and awareness of the CISG within the business community in particular. The problems this brings include not only a lack of support for the CISG but also the likelihood that the transition to the CISG would be more difficult. Although this thesis shows that the CISG is preferable in many ways to the Civil Code,

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<sup>748</sup> The New York Convention came into force on 13 January 2002.

and that there are not that many incompatibilities between the two legal systems, many of the benefits would not be obtained if the legal and business community lacked the knowledge to take advantage of the CISG. Moreover, there is a risk that their lack of knowledge might increase the cost of doing business rather than reduce it, as the CISG is intended to do.

The CISG allows contracting parties to opt out of its provisions and choose the application of a different body of law. The source of this autonomy is contained in Article 6 of the Convention, which permits signatories to 'opt out' of the Convention in its entirety or to derogate from or vary the effect of any of its principles. The reasoning behind this was that parties could always opt out of the provisions they wanted to avoid, and this is very useful, in particular for persuading sceptics to adopt the CISG. For example, in Iran those contracting parties that did not wish to apply the provisions on interest could declare that such provisions did not apply to their contract. However, in taking advantage of Article 6, the legal profession should apply the CISG in cases where it could be very useful. But the question is, why do the lawyers opt out of the CISG? But, though the answer to this could be much extended, one of the main reasons is, again, lack of awareness and knowledge of the CISG.

So how does one compensate for this lack of awareness? It seems that the most important resources through which one can raise awareness are law schools and the publication of scholarly writings, commentaries and court decisions in specialised and general law reviews. Time, cost and effort are indeed required at the start to become familiar with the CISG, but, given the position of Iran in the international community, such expenditure would seem to be of vital importance. It is then up to the legal and business communities to make their desire to ratify the CISG clear to the Government. There is also an issue with the transition from the Civil Code to the CISG, but this should not create serious difficulties, as education would focus on ensuring that lawyers and professionals were comfortable with the CISG and could see its advantages. The writer acknowledges that there are some valid objections to the CISG that are related not to its usefulness but to its compatibility with Islamic principles. Therefore, this issue will need to be addressed separately.

## II. Concern Over Anti-Islamic Elements

The one vote against ratification registered during the writer's fieldwork came from the Trade Promotion Organisation of Iran. This Governmental organisation appears to reflect the Government's view. However, the Government of Iran has never published any statement to express its direct and/or indirect opposition to ratification of the CISG.

The prohibition of interest by the *Qur'an*, which seems to be an impediment to accession to the CISG for Islamic countries, has to a certain extent been avoided by interpretation. Taking Egypt as an example, Article 226 of the Egyptian Civil Code awards interest.<sup>749</sup> More importantly, as noted above, Articles 515(2) and 522 of the Iranian Civil Procedure Code 1379 (2000) introduce compensation for late payment, which is similar to the notion of interest.

Such interpretations perhaps explain why those Islamic countries that are party to the CISG<sup>750</sup> have not made reservations on Article 78, which deals with interest. One could however argue that the reason these countries can apply interest is that the Western legal structure has had a great impact on their legal systems, and the same approach may not apply to other Islamic countries. Although this is true, there is still Article 6 of the CISG, which formulates safety for Islamic countries, should they decide to avoid application of Article 78 of the CISG. Article 6 of the CISG, which provides that 'the parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions,' exemplifies the fundamental principle of freedom of contracts given to the parties.

## III. The Community That Would Probably Overcome (I) and (II)

It is the duty of this group – the community that is aware and in support of accession – to further facilitate accession to the CISG. It could be achieved by raising greater awareness and knowledge of the CISG through the use of the CISG database. The

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<sup>749</sup> Article 226 of Egyptian Civil Code reads:

'When the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest . . . '

<sup>750</sup> Egypt, Iraq, Syria and Mauritania are parties to the CISG.



database accommodates over 2,900 cases and 1,500 full texts of commentaries. Besides, one of the main functions of the CISG Advisory Council, where a jurisdiction has not ratified it, is to encourage and help them to adopt and implement it. More in-depth analysis and comparative study of the two legal systems (the CISG and Iranian law) would also enable Iran to overcome any apprehension over the anti-Islamic element of the CISG. An investigation into the compatibility of the CISG with Iranian law has shown that the two legal systems are by and large similar, and, where there are differences, sufficient principles can be found within Iranian law to bridge the gap.

## **Appendix A**

### **Author's Correspondence with Mr Castellani**

Date: 4 July 2011

Dear Mr Castellani,

I am a PhD student at Durham Law School, University of Durham. I am doing my research on the United Nations Convention on Contract for the International Sale of Goods (CISG) under supervision of Professor Thomas Allen. The focus of my research is on the adoption of the CISG with specific interest in its impact on developing countries.

I have read the report of your interview regarding Brazil and the CISG, at <http://cisgw3.1aw.pace.edu/cisg/biblio/castellani2.html> , which I found very interesting. I would like to know if you would be able to answer a question that I have about developing countries and the CISG.

The UNCITRAL web pages, at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) , show that many developing countries, especially in Africa and Asia, have not ratified the CISG. Therefore, I would like to ask you why, from your perspective in UNCITRAL, developing nations have been much more reluctant to ratify the CISG than the developed nations, given that the preamble to CISG refers to the development of a New International Economic Order and importance of developing trade on the basis of equality and mutual benefit.

Your answer is very much appreciated. You can contact me at [mona.ahadi@durham.ac.uk](mailto:mona.ahadi@durham.ac.uk) and/ or the address below.

I look forward to hearing from you and many thanks in advance for your time and consideration.

Yours sincerely,

Mona Ahadi  
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Durham University  
29/30 Old Elvet  
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### **Email from Mr Castellani to Author Dated 5 July 2011**

Dear Mona Ahadi,

Thank you very much for your kind and interesting e-mail.

I am glad to reply to your query, though on a personal basis only. In other words, "the views expressed herein are those of the author and do not necessarily reflect the

views of the United Nations or those of UNCITRAL.”

Your observation about the low rate of adoption of the CISG in developing countries is correct. Indeed, there seems to be a correlation between economic development and the adoption of the CISG: for instance, while the vast majority of the 20 richest economies of the world are parties to the CISG, the vast majority of the 20 poorest are not.

However, that relation is not universal. Thus, for example, the CISG enjoys greater support in Central and Latin America than in Gulf countries, despite the fact that the average income in many States in the latter group is higher than that of those in the former. Other sub-regions that are seeing quick economic growth, such as South East Asia, also have limited CISG participation.

The question comes thus to whether the cause for such trends rests in the CISG or is more in general related to participation in international trade law reform. To that end, it might be possible to use as a litmus test the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). The pattern of adoption of that treaty is somehow similar to that of the CISG, taking into account the difference in the number of State parties (the New York Convention has 145 State parties while the CISG has 76).

Indeed, certain aspects might be specific to the CISG: for instance, certain jurisdictions might follow closely legal developments in England and therefore be prevented from adopting the CISG by the position of the United Kingdom with respect to that text. However, my conclusion is that those factors preventing broader adoption of the CISG in developing countries impede the adoption of other trade law texts as well. Such factors may include lack of capacity and expertise, given that trade law is a highly technical topic. Moreover, trade law reform is seldom perceived as a priority on the legislative reform agenda. Legislative capacity is often directed to other, more visible sectors such as environmental law or human rights, often endowed with significant resources in terms of implementation of treaty obligations. Trade law reform remains thus marginal in the technical assistance to international law reform arena.

Finally, the fracture between the public and the private aspects of international trade law may also be a contributing factor. At the global level, the WTO is not promoting trade law reform in the field of private commercial relations. Where such support was available, eg in the case of ICSID indirect support to the promotion of the adoption of the New York Convention, the results seem evident. At the regional level, certain regional economic integration organisations do not always coordinate their law-making activities with global standards, thus introducing a further element of fracture. The above analysis should be complemented with the consideration of factors relevant at the regional and sub-regional level. For the sake of illustration of such factors, I am attaching a short note on trade law reform in Africa. (See attached file: 547–563 Castellani.pdf)

I hope the above is of interest for your research and I remain at your disposal for any further need.

Kind regards,

Luca Castellani

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## Appendix B

### Questionnaire ADOPTION OF THE CISG IN IRAN

1. How familiar are you with the CISG?  
a. Not Familiar At All      b. Slightly Familiar      c. Fairly Familiar  
d. Quite Familiar      e. Very Familiar
2. How important are international sales transactions to your company?  
a. Not At All      b. Slightly      c. Moderately  
d. Very      d. Extremely      e. Not Applicable
3. In the event that Iran decides to ratify the CISG, would you oppose or support its ratification?  
a. Strongly Oppose      b. Inclined to Oppose      c. Neither  
c. Inclined to Support      d. Strongly Support

If you oppose, would you please elaborate on your reasons?

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4. Are you available for interview?  
a. Yes      b. No

#### **List of Academics/ Lawyers, Business Community and Government Officials Contacted With Regard to the CISG Inside Iran in Author's Fieldwork**

##### Academics/ Lawyers

<b>Key Person</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Hossein Safai	03 Dec 2011	No	Yes/Face to Face
Morteza Adel	03 Dec 2011	Yes	No
Rabia Eskini	03 Dec 2011	Yes	Yes/Face to Face

##### Government Officials

<b>Name of Organisation</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Iran Chamber of Commerce, Industries and Mines	03 Dec 2011	No	Directed me to TPOI
Ministry of Commerce	03 Dec 2011	No	No
Trade Promotion Organisation of Iran (TPOI)	03 Dec 2011	No	Yes/Phone

##### Business Community

<b>Name of Company</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Ahwaz Pipe Mills	03 Dec 2011	No	No
Alborz Investment	03 Dec 2011	No	No

<b>Name of Company</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Almahdi Aluminium Company	03 Dec 2011	No	No
Amirkabir Petrochemical Company	03 Dec 2011	No	No
Arak Petrochemical Company	03 Dec 2011	No	No
Bahman Group	03 Dec 2011	No	No
Bandar Imam Petrochemical Company	03 Dec 2011	No	No
Behpakhsh Company	03 Dec 2011	No	No
Behran Oil Company	03 Dec 2011	No	No
Borzouyeh Petrochemical Company	03 Dec 2011	No	No
Chadormalu Mining and industrial Company	03 Dec 2011	No	No
Darou Pakhsh	03 Dec 2011	Yes	No
Esfahan Steel Company	03 Dec 2011	No	No
Fars and Khuzestan Cement Company	03 Dec 2011	No	No
Gole-e-Gohar Iron Ore Company	03 Dec 2011	No	No
Heavy Equipment Production Company	03 Dec 2011	No	No
Iran/Aluminium Company	03 Dec 2011	No	No
Iran Dairy Industries Company	03 Dec 2011	No	No
Iranian Offshore Engineering and Construction Company	03 Dec 2011	No	No
Iran Khodro Company	03 Dec 2011	No	No
Iran Khodro Diesel	03 Dec 2011	No	No
Iran Khodro Investment Development	03 Dec 2011	No	No
Iran Khodro Khorasan Company	03 Dec 2011	Yes	No
Iran Power Plant Projects Management Company	03 Dec 2011	No	No
Iran Tractor Manufacturing Company	03 Dec 2011	No	No
Islamic Republic of Iran, Shipping Lines Company	03 Dec 2011	No	No
Khark Petrochemical Company	03 Dec 2011	No	No

<b>Name of Company</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Khorasan Steel Complex	03 Dec 2011	No	No
Khouzestan Steel Company	03 Dec 2011	No	No
Marun Petrochemical Complex	03 Dec 2011	No	No
Mega Motor Company	03 Dec 2011	Yes	Yes/Face to Face
Mehrcam Pars Company	03 Dec 2011	No	No
Mobarakeh Steel Company	03 Dec 2011	No	No
National Iranian Copper Industries Company	03 Dec 2011	No	No
National Iranian Oil Company	03 Dec 2011	No	No
National Petrochemical Company	03 Dec 2011	No	No
Pakhshe Razi Company	03 Dec 2011	No	No
Pars Khodro	03 Dec 2011	No	No
Pars Petrochemical Company	03 Dec 2011	No	No
Pasargad Oil Company	03 Dec 2011	No	No
Petrochemical Industries Investment Company	03 Dec 2011	Yes	No
Sadid Industrial Group	03 Dec 2011	No	No
Saipa	03 Dec 2011	No	No
Saipa Diesel	03 Dec 2011	No	No
Sapco	03 Dec 2011	No	No
Shahid Bahonar Copper Industries Company	03 Dec 2011	No	No
Shahid Tondgooyan Petrochemical Company	03 Dec 2011	Yes	No
Tabriz Petrochemical Company	03 Dec 2011	No	No
Tidewater Company Middle East	03 Dec 2011	No	No
Marin Services Plc			
Zagros Petrochemical Company	03 Dec 2011	No	No
Zamyad Company	03 Dec 2011	No	No

**List of Business Communities Contacted With Regard to the CISG Outside Iran in  
Author's Fieldwork**

<b>Name of Company</b>	<b>Date of Sending Q</b>	<b>Replied to Q</b>	<b>Interviewed</b>
Behpakhsh Europe Office in Germany	14 Dec 2011	No	No
Iranian Trade Association in San Diego, USA	14 Dec 2011	No	No
Petrochemical Commercial Company International Ltd in England	14 Dec 2011	No	No



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