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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

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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

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I. INTRODUCTION

During the past few years, the world economy experienced its most severe recession since the Great Depression of the 1930s.[1] The crisis was felt significantly by most of the advanced economies, whose output fell by record levels.[2] One of these economies, considerably impacted by the crisis and its

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[1] *See* DICK K. NANTO, CONG. RESEARCH SERV. FOR CONG., RL 34742, THE GLOBAL FINANCIAL CRISIS: ANALYSIS AND POLICY IMPLICATIONS 10 (2009). For analysis of the crisis of the 1930s, see Keun Lee & Jin Son, *Financial Crisis & Asset Market Instability in the 1930s & in the 2000s: Flow of Funds Analysis* (Asia Pacific Econ. Bus. Conference, Paper, 2010).

[2] THE WORLD BANK, GLOBAL DEVELOPMENT FINANCE: CHARTING A GLOBAL RECOVERY I: REVIEW, ANALYSIS AND OUTLOOK (2009); *see also* Martin Weale, *Commentary: International Recession and Recovery*, 209 NAT'L INST. ECON. REV., no. 4, 2009, at xi.

consequences, is the United Kingdom.[3] The reasons for the strong impact on the UK's economy are often debated, but scholars suggest that the main causes include the high degree of reliance on the affected financial services sector as well as the elevated domestic indebtedness.[4]

In July 2010, the UK Secretary of State for Business, Innovation and Skills presented to the Parliament Green Paper Cm 7923: *Financing a Private Sector Recovery*, in which important observations were made regarding the status of the British economy in the few years after the start of the crisis:

> Over the last decade, economic growth in the United Kingdom has been driven by rising private and public sector debt. Businesses, households and the financial sector have become increasingly indebted. By 2008 the household saving ratio had fallen to the lowest level since the 1950s, with household debt reaching 100 per cent of GDP. Also, by 2008, despite the business sector continuing to be a net saver in the run up to the recession, corporate debt as a share of GDP had risen to over 110 per cent. Easy credit access and rapidly increasing asset prices meant that UK banks entered the recession with loans to the UK commercial property sector accounting for almost half of all the outstanding loans to UK businesses. Also, the accumulation of debt within the financial sector was even greater – between 2002 and 2007 there was a near tripling of UK bank balance sheets and the UK financial system had become one of the most leveraged in the world. [...] 850,000 people became unemployed between 2008 and 2010. Business investment fell sharply by more than 25 per cent from its peak.[5]

In the same Green Paper, both the Secretary of State for Business, Innovation and Skills, Vince Cable, and the Chancellor of the Exchequer, George Osborne, emphasized the need for recovery led by a sustained expansion in the private sector and a growth in business investment, seizing the opportunities presented by a recovering global economy.[6] Both specifically concentrated their attention on Small and Medium-Sized Enter-

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[3] Weale, *supra* note 2, at 4.

[4] John Kitching et al., *Have Small Businesses Beaten the Recession?* (Inst. for Small Bus. & Entrepreneurship Conference, Paper, 2009).

[5] DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, FINANCING A PRIVATE SECTOR RECOVERY, 2010, Cm. 7923, at 7 (U.K.).

[6] *Id*. at 3.

prises ("SMEs") and highlighted the fundamental importance of this sector for the economic recovery of the United Kingdom.[7]

This article, after further demonstrating and analysing the importance of the SMEs for the economy of the UK, will suggest that it is the right time for the Parliament to intervene in the recession by taking appropriate measures and making vital changes in the area of international trade law directly affecting small and growing businesses.

The main hypothesis of this article is that the Vienna Convention on the International Sale of Goods[8] has the potential to act as a catalyst for the economy of the UK on its way out of the recession and, therefore, should be ratified, as it will strongly affect the development of the SME sector. This hypothesis will be questioned and evaluated throughout the article.

In Part II of the article, the importance of the SMEs for the current economy of the UK will be assessed. Together with Part I, Part II will form the prism through which the remainder of the article will be viewed.

Parts III and onwards will analyze the hypothesis stated earlier in the Introduction. They will ask the questions: (1) Would the ratification of the CISG be beneficial for the UK SMEs?; and (2) Would the ratification of the CISG be beneficial for the economy of the UK?

The most relevant details[9] regarding the Convention will be discussed below, including its substance, historical account, the issues that have suspended its ratification in the UK for so long—with a particular emphasis on the English concerns regarding Article 7 of the Convention—as well as the experience of other countries that are already members of the Convention, which could prove to be a valuable guide for the UK Government on the way to ratification.

II. THE IMPORTANCE OF THE SME FOR THE UK

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[7] *Id*. at 14.

[8] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

[9] In order to analyse all the important details and arguments supporting the main hypothesis of this article, much more comprehensive work needs to be referenced. However, within the limited framework of this article, only a selected number of arguments and issues will be considered.

ECONOMY

In the 2010 Green Paper, a strong emphasis is placed on the significance of SMEs as a valuable mechanism having the potential to act as a catalyst for the recovery of the United Kingdom from the economic crisis and its consequential effects.[10] The Green Paper clearly stipulates that "a dynamic, growing SME sector has the potential to make a significant contribution to economic growth. SMEs are a vital part of the UK economy. There are around 4.8 million businesses in this category (99.9 per cent of all UK businesses), accounting for over half of private sector employment and turnover."[11]

A. Growing need for Stimulation of the Development of the SME Sector

The underlined importance of SMEs for the economy of the UK and the growing need for stimulation of the development of this sector has been reflected in a vast response by the media.

An article from the February 21, 2011 edition of the *Financial Times*, for example, concluded that private businesses have never been as important in helping to "solve the big issues of today."[12] The article quoted the new chair of the Confederation of British Industry's Small Business Council, Lucy Armstrong, in saying that "for the first time there is a recognition that private and family businesses will drive the economic recovery."[13] The article suggested that the British government has a lot to learn from small businesses in relation to Big Society[14] goals.[15] It also recommended, however, further planning to be considered on ways to support and stimulate the export of ideas from small businesses that are surrounded by various financial and administrative complications often created by high transaction

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[10] DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, *supra* note 5, at 14.

[11] *Id.*

[12] Jonathan Moules, *Big Society Needs Us, Says CBI*, FIN. TIMES (Feb. 21, 2011, 2:50 PM), http://www.ft.com/cms/s/0/ae31f596-3a86-11e0-9c65-00144feabdc0.html#axzz1HFrQm2Dt.

[13] *Id.*

[14] *See* Gabriel Chanan & Colin Miller, *The Big Society: How It Could Work: A Positive Idea At Risk From Caricature*, PACES, Spring 2010, at 2.

[15] *Id.*

risks and a lack of legal information and expertise.[16]

Another article from March 06, 2011 in the *BBC News* reflected on a speech made by the Prime Minister, David Cameron, at his party's spring conference in which he stated: "with no money left in the government coffers, the only strategy for growth is to get behind Britain's entrepreneurs."[17] He continued by saying: "there's only one strategy for growth we can have now and that is rolling up our sleeves and doing everything possible to make it easier for small businesses to grow, to invest, to export, to take people on. Back small firms, boost enterprise, be on the side of everyone in this country who wants to create jobs, and wealth and opportunity."

Yet another *BBC News* article, from March 18, 2011, emphasized the importance of SMEs for the British economy and reflected on the idea through its report of the Annual Conference of the Federation of Small Businesses in Liverpool.[18] It asserted that since the introduction of public spending cuts by the coalition government aiming to reduce the national deficit, the Prime Minister and his cabinet have constantly repeated, with growing emphasis, that they want to stimulate the advance of the SME sector.[19]

B. Growing need for Internationalization of the SMEs

Scholars and practitioners argue that a key feature for the survival and growth of SMEs is their ability to internationalize their services and methods of operation.[20] The globalization and internationalization of SMEs could be accomplished through a variety of activities, including international trade, investment, participation in alliances, partnerships, and other networking arrangements shaping the performance of those

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[16] For example, an increase of the Export Credits Guarantee Department was suggested in the article.

[17] Brian Wheeler, *David Cameron Says Enterprise Is Only Hope for Growth*, BBC NEWS (Mar. 6, 2011, 11:28 AM), http://www.bbc.co.uk/news/uk-politics-12657524.

[18] Will Smale, *Party Leaders Aim to Woo Small Firms*, BBC NEWS (Mar. 18, 2011, 2:31 PM), http://www.bbc.co.uk/news/business-12706616.

[19] *Id.*

[20] Terry Mughan & Stuart Wall, European SMEs and the Global Economy: Changes in Activity and Needs 2 (2009) (unpublished manuscript on file with Ashcroft International Busisness School at Anglia Ruskin University).

enterprises from developing their research and product ranges to distribution.[21]

A recent report by the European Commission: *Internationalisation of European SMEs*, published in July 2010, emphasises the need to promote internationalisation of SMEs.[22] The report observes that SMEs that are internationally active[23] are more innovative and demonstrate a better average performance in profitability when compared to other companies of the same size that only operate domestically.[24] The data from the report reveals that more than 50 percent of SMEs that invest abroad or are internationally active report increasing turnover, whereas the percentage of non-internationalised SMEs reporting such growth is only 35 percent.[25] Also, those SMEs that are involved in international trade generally report employment growth at levels 7 percent higher than the rate of domestic SMEs.[26]

The report, however, also reminds of the problem related to the lack of legal information available to this group of enterprises, which creates a barrier for the efficient performance of international business.[27] The report recommends that further action must be taken by the government to benefit the SMEs that suffer from lack of information and understanding of the functioning of international trade as well as to reduce the time, costs, and efforts the enterprises have to incur to understand

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[21] ORG. FOR ECON. CO-OPERATION & DEV., PROMOTING ENTREPRENEURSHIP AND INNOVATIVE SMES IN A GLOBAL ECONOMY: TOWARDS A MORE RESPONSIBLE AND INCLUSIVE GLOBALISATION: FACILITATING SMES ACCESS TO INTERNATIONAL MARKETS 21 (2004).

[22] EUROPEAN COMM'N, INTERNATIONALISATION OF EUROPEAN SMES 8 (2010) [hereinafter EUROPEAN COMM'N, INTERNATIONALISATION]. The conclusions of the report are based on a survey of 9,480 SMEs in thirty-three European countries. It follows two previous surveys commissioned by the European Commission on the internationalisation of the SMEs. EUROPEAN COMM'N, OBSERVATORY OF EUROPEAN SMES: INTERNATIONALISM OF SMES NO.4 (2003); EUROPEAN COMM'N, OBSERVATORY OF EUROPEAN SMES: ANALYTICAL REPORT (2007).

[23] Including exporting, importing, foreign direct investments, e-commerce, technological cooperation with enterprises abroad, etc.

[24] EUROPEAN COMM'N, INTERNATIONALISATION, *supra* note 22, at 41.

[25] *Id.* at 8.

[26] *Id.* at 55.

[27] *Id.* at 75.

foreign law and engage in foreign litigation.[28] These steps are essential for the efficient development of the SME sector because, in the age of globalization and global economies, enterprises are pressured by competition not only from within the borders of their countries, but from abroad as well.[29]

Such recommendations for reform are given by other reports as well as by notable scholars and practitioners. As noted by the Organisation for Economic Co-Operation and Development in its 2004 report: *Facilitating SMEs Access to International Markets*,

> the success and growth of international SMEs will be enhanced by a more internationalised infrastructure geared to the smooth growth of firms across borders. This applies to the infrastructure for financial markets, advisory services, information access, telecommunications, intellectual property rights, dispute resolution processes, etc. Governments need to collaborate more to set up monitoring systems to identify these impediments, understand their longer term impact and establish mechanisms for addressing them, at bilateral and multilateral levels.[30]

Therefore, as the needs of UK commerce change, this perspective must be reflected in the decisions made in the UK Parliament. English MPs are advised to realize that the advance of international trade around the world has stimulated the need for widespread harmonisation of the mechanisms that facilitate international trade, such as global fiscal instruments and rules allowing traders from different countries, cultures, and beliefs to conduct business under the same clear terms.[31] The potential harmonization of national laws reduce the uncertainties and possible excessive costs associated with conducting trade under unfamiliar laws.[32] The most appropriate harmonization instrument to be adopted in the UK at the moment to meet the

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[28] The increased cost of legal services is a result of the SMEs' need to acquire legal information, related to the jurisdiction of all of the parties involved in the contract in order to assess the effect of any choice of law clauses.

[29] Mughan & Wall, *supra* note 20, at 9.

[30] ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 21, at 26.

[31] Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, PACE L. SCH. INST. OF INT'L COM. L. (Nov. 5, 2002), http://cisgw3.law.pace.edu/cisg/biblio/williams.html.

[32] PROFESSOR SIR ROY GOODE, QC, COMMERCIAL LAW IN THE NEXT MILLENNIUM 32–46 (1998).

needs of the state and the economy is the UN Convention on the International Sale of Goods ("CISG").

Professor Luca G. Castellani, a legal officer at the United Nations Commission on International Trade Law ("UNCITRAL") Secretariat, illustrates the issue in the following way:

> As small and medium sized enterprises . . . have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of the CISG. Small and medium sized enterprises constitute the backbone of a modern and balanced economy. They support economic diversification and may therefore significantly contribute to achieving sustainable growth. In conclusion, they may play an important role in addressing those structural problems . . . . The CISG may be instrumental in making this role effective.[33]

III. GENERAL OVERVIEW OF THE DEVELOPMENT OF THE CISG

The Vienna Convention on the International Sale of Goods is often referred to as "one of [] history's most successful efforts at the unification of the law governing international transactions."[34] Commentators have defined it as a "quantum jump,"[35] a "legal lingua franca,"[36] a "milestone,"[37] a "triumph of comparative legal work,"[38] "monumental,"[39] and "arguably the

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[33] Luca G. Castellani, *Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 13 VINDOBONA J. INT'L COM. L. & ARB. 241, 246 (2009).

[34] Karen Halverson Cross, *Parol Evidence under the CISG, the "Homeward Trend" Reconsidered*, 68 OHIO ST. L J. 133, 137 n.19, 148 n.68 (2007); *see also* Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 5 (1996).

[35] Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 239 (1993).

[36] John O. Honnold, *Introduction to the Symposium*, 21 CORNELL INT'L L.J. 419, 420 (1988).

[37] LARRY A. DIMATTEO, LAW OF INTERNATIONAL CONTRACTING 22 (2d ed. 2009).

[38] Alejandro M. Garro, *Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 480 (1989).

greatest legislative achievement aimed at harmonizing private commercial law."[40] The CISG represents one of the central pillars of uniform international commercial law and is a key achievement of the UNCITRAL,[41] as is clearly evidenced by the numeric, geographic, and political distribution of its member states.

At the moment, just three decades after the Convention was signed on April 11, 1980, already seventy-eight countries have ratified it, seventy-six of which recognize it as having legal force, including the Dominican Republic (where the CISG entered into force in July 2011) and Turkey (where the CISG entered into force in August 2011).[42] Represented among this number are countries from all around the world, countries with various political economies, with different languages, cultures, legal structures, and from various stages of economic development.[43]

Moreover, since the Convention existed for the last thirty-one years, during which seventy-eight states adopted it, its adoption rate could be calculated as being around 2.45 adoptions per year. This rate makes it the second most adopted treaty in the field of international commercial law after the 1958 New York Convention,[44] which has an adoption rate of 2.74.[45] This success, efficiency, and wide acceptance has the effect of making the Convention commonly described as a "milestone in legal history."[46]

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[39] Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 266 (1984).

[40] Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 403 (1991); *see also* Harold S. Burman, *Building on the CISG: International Commercial Law Developments and Trends for the 2000's*, 17 J.L. & COM. 355, 357 (1998).

[41] Castellani, *supra* note 33.

[42] *CISG: Table of Contracting States*, PACE L. SCH. INST. OF INT'L COM. L. (Aug. 3, 2011), http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

[43] Van Alstine, *supra* note 34, at 6.

[44] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.S.T. 3.

[45] The New York Convention is adopted currently by 145 states, which makes the rate of adoption per year approximately 2.74, whereas the rate of the CISG is approximately 2.45.

[46] Van Alstine, *supra* note 34, at 7.

One of the most essential features of the Convention for the UK, however, is that currently twenty-one out of the twenty-five top UK export and import partners have already adopted the Convention, including the United States, Germany, France, China, Russia, Canada, Japan, Australia, and others.[47] Therefore, the ratification of the Convention by the UK will make it easier for the businesses to trade with their top export and import partners, which will have a direct effect on the UK economy. Ratification will also have a particularly strong influence on SMEs, as they will have the opportunity to perform international trade on already established grounds with already developed trade customs, but without the obstacles presented by the risk of having to deal with a different legal system, foreign litigation, increased costs, and lack of information.[48]

A. Sphere of Application

The sphere of application of the Convention is defined in Chapter 1, Article 1; the CISG applies to "contracts of sale of goods between parties whose places of business are in different States."[49] This provision provides the UN Convention with a wide potential to govern a vast range of commercial transactions—with the exception of some categories of sales specifically excluded from the application of the Convention, such as those outlined in Article 2: personal goods, goods acquired in an auction or by law, sales of stocks, shares, investment securities, negotiable instruments of money, ships, vessels, hovercraft, aircraft, and electricity.[50]

Also, in interpreting the Convention, "regard is to be had to its international character, and the need to promote uniformity in its application and the observance of good faith in in-

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[47] HM Revenue & Customs, *Overseas Trade Statistics: UK Exports General Trade: Top 25 Trading Partners*, UK TRADE INFO, https://www.uktradeinfo.com/index.cfm?task=topPartners (last visited Feb. 22, 2012).

[48] Those risks are listed, as they are the more popular and widespread ones. However, the list is not conclusive, as many other risks also exist in an international transaction that is not governed by the CISG.

[49] CISG, *supra* note 8, art. 1.

[50] Michael B. Lopez, *Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century*, 10 J. BUS. & SEC. L. 133, 141 (2010).

ternational trade."[51] These two provisions, as well as Articles 4 and 5, while defining the boundaries of the Convention and its interpretation, also imply the main objective of the CISG, clearly outlined in the Preamble, namely:

> 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 . . . [it is suggested 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.[52]

Here, a clear and direct parallel can be distinguished between the objectives of the CISG and the UK Government in relation to international trade. Both aim for the development and promotion of international trade. Whereas the UK Government needs practice, the application of which would lead to the desired aim, however, the CISG provides the means to achievement. The only element remaining is ensuring through ratification that the CISG and the UK Government can benefit from each other and accomplish their common goal.

B. History

It is believed that the unification of commercial transactions started in ancient times, when the first steps towards unification were systematized in the *lex mercatoria*[53] of medieval Europe.[54] It is believed that, at that time, international trade was governed by transnational commercial law, which allowed for a steady development of international commerce and the countries that participated in it.[55] Gesa Baron lists five

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[51] CISG, *supra* note 8, art. 7(1).

[52] *Id.* at pmbl.

[53] *Lex Mercatoria* refers to a body of law as well as trade practices, rules, and regulations that are used by the parties of an international commercial transaction to regulate their dealings. *See* Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, PACE L. SCH. INST. OF INT'L COM. L. (June 1998), http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b*.

[54] Lopez, *supra* note 50, at 135.

[55] Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155 (2001).

distinguishing characteristics of the *lex mercatoria* that separate it from any other law:

> Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered by professional judges but by merchants themselves… Fourthly, its procedures were speedy and informal and finally fifthly, as overriding principles, it emphasized freedom of contract and decision of cases *ex aequo et bono*.[56]

Professor Henry Mather adds that "in order to maintain the growth of international trade, merchants needed a new commercial law. It had to be fairly simple. It had to be a uniform commercial law, an international body of law that could protect merchants from the vicissitudes of local law."[57] The *lex mercatoria* satisfied all those requirements and provided an impartial unified set of legal rules that everyone could trust.

The medieval *lex mercatoria*, however, was later disintegrated in the modern ages when the commercial law became "nationalized."[58] With the emergence of more and more specific demands of various domestic jurisdictions on the law of commerce, *lex mercatoria* transformed as the locus for each transaction was influenced by the specific features of the state, such as religion, politics, history, economy, and law.[59]

It was in the early 20th century that the spirit of harmonization started to grow again, as evidenced by the foundation of the Rome International Institute for the Unification of Private Law ("UNIDROIT")[60] in 1926 as an auxiliary organ of the League of Nations.[61] Its purpose was to "study needs and methods for modernising, harmonizing and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments,

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[56] Baron, *supra* note 53; *see also* Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 FLA. ST. J. TRANSAT'L. L & POL'Y 217 (2001).

[57] Baron, *supra* note 53.

[58] *Id.*

[59] Lopez, *supra* note 50, at 136.

[60] UNIDROIT is an acronym, meaning the Institut International pour l'Unification du Droit Prive, the French name of the Institute.

[61] *UNIDROIT: An Overview*, UNIDROIT, http://www.unidroit.org/dynasite.cfm?dsmid=103284 (last visited Feb. 22, 2012).

principles and rules to achieve those objectives."[62]

At the same time, there were also other organizations focusing their work on unification and harmonization of laws in the fields of transportation, copyright, and conflicts of laws. None had an agenda as ambitious as that of the UNIDROIT.[63] In 1930, the UNIDROIT formed a committee of representatives from different countries who worked on formulating a new unified piece of law to govern international commercial transactions.[64] Their work materialized in 1935 in the first draft of a uniform sales law, which was not finalized due to the outbreak of World War II.[65]

The next attempt to harmonize international commercial law was in 1951 at a diplomatic conference held in The Hague, Netherlands.[66] At that point, after World War II was finished, the participating member states in the conference considered the possibility of taking the earlier drafts created by the UNIDROIT before the War and reached an agreement on them.[67] The conference generally approved the drafts of the UNIDROIT, but added various amendments that formed a new draft to be considered in the following years.[68]

A second diplomatic conference was held at The Hague, Netherlands in 1964, which resulted in the creation of two International Conventions: the Convention Relating to a Uniform Law on the International Sale of Goods ("ULIS"),[69] consisting of fifteen articles,[70] and the Convention Relating to a Uniform

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[62] *Id.*

[63] Thor Thingbø, *The United Nations Convention on Contracts for the International Sale of Goods (1980) and Norway's Ratification Process*, LEX MUNDI WORLD REPORTS 32 (Supp. 1993).

[64] Roberto Viano, *A General Approach to the International Sale of Goods: Creation of a Uniform Law,* THE CARDOZO ELECTRONIC L. BULL., http://www.jus.unitn.it/cardozo/obiter_dictum/Vian1in.htm (last visited Feb. 22, 2012).

[65] Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, 26 UNIFORM L. & REV. 229 (1996).

[66] Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 458 (2009).

[67] Thingbø, *supra* note 63.

[68] *Id.*

[69] Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107.

[70] *Id.*

Law on the Formation of Contracts for the International Sale of Goods ("ULFC"),[71] consisting of thirteen articles.[72]

These Conventions were considered the central pillars of a new international commercial system of law.[73] They had many imperfections, however, and were a compromise with which most countries were unsatisfied.[74] That is why only seven states ratified the 1964 Conventions, some also making additional reservations on their application. On this point, the UK was the only common law jurisdiction that adopted the Hague Conventions.[75] Even so, the UK limited its application by making a reservation under Article V of ULIS and Annex II, Article 1 of ULFC, according to which the Hague Conventions would only apply to contracts in which the parties adopted the Conventions themselves as the laws of their contract.[76]

In an endeavour to correct the mistakes made by the previous attempts of harmonization of international trade laws, in 1966, the United Nations established a new body with the mandate to "further the progressive harmonization and unification of the law of international trade:" The United Nations Commission on International Trade Law.[77]

The Commission, frequently criticised for its strong influence from Western Europe, materialized its work in 1978 when it published the Draft Convention on Contracts for the International Sale of Goods.[78] This Draft was considered and revised for the next two years until March 1980, when representatives from sixty-two states gathered in Vienna, Austria to

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[71] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

[72] *Id.*

[73] André Tunc, *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, PACE L. SCH. INST. OF INT'L COM. L. (Apr. 30, 1998), http://cisgw3.law.pace.edu/cisg/biblio/tunc.html.

[74] *Id.*

[75] Henning Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 VICT. U. WELLINGTON L. REV. 711 (2004).

[76] *Id.*

[77] *FAQ – Origin, Mandate, and Composition of UNCITRAL*, UNITED NATIONS COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited Feb. 22, 2012).

[78] THE UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL 7 (1986).

complete the final version of the Convention.[79] When the final version was finalized, the CISG was published on April 11, 1980 in six official languages: Arabic, Chinese, English, French, Russian, and Spanish.[80] Despite the fact that the United Kingdom helped with the formation and the finalization of the CISG, it did not ratify the Convention at that time and still has not done so.[81]

Looking back at the historical accounts, therefore, one can observe that each attempt, whether successful or not, of harmonizing international law throughout history has been provoked by some issue relevant to the particular period. It can be argued that the financial crisis of the late years of the first decade of the 21st century is what provokes the necessity for harmonization today. Moreover, the CISG has been revised in several conferences and has proven, in time, to work efficiently for the states that have ratified it. Through ratification, therefore, the CISG could contribute progressively to the UK's economic development as well.

C. Sources of Information on the CISG

Vast amounts of information about the CISG are available over the Internet. The main database regarding CISG is the one created by the Institute of International Commercial Law at Pace University School of Law.[82] It contains the text of the Convention in different languages, the texts of the diplomatic conference, over 2,500 cases on CISG, 10,000 annotations, a collection of prominent scholarly writings on the issues surrounding the Convention, and even the CISG Song.[83] The database has been referred to as "a promising source [for] persuasive authority from courts of other States party to the CISG" in the United States case: *MCC-Marble Ceramic Center v. Ceram-*

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[79] *Id.* at 19.

[80] *Id.* at 67.

[81] *Id*. at 37.

[82] *Albert H. Kritzer CISG Database*, PACE L. SCH. INST. OF INT'L COM. L., http://www.cisg.law.pace.edu/ (last visited Feb. 22, 2012).

[83] *The CISG and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool*, U. OF PITTSBURG (Nov. 2005), http://www.law.pitt.edu/academics/cile/cisgsongpage.

ica Nuova D'Agostina.[84]

Besides the Pace University Database, there are other databases constructed by member states to the Convention, often including the text of the CISG in their own languages as well as cases and scholarly writings on the topic.[85]

The unrestricted availability of sources of information on the CISG, including its text, case law, scholarly writings, and translations, encourages the unification of law significantly, but also serves as a useful guide on almost any debate or issue of uncertainty arising with respect to the UK's ratification of the Convention.

IV. THE RATIFICATION DEBATE SO FAR – FOR AND AGAINST

Since the entry into force of the CISG on January 1, 1988, legal scholars and practitioners have constantly been debating the reasons for and against ratification by the United Kingdom.[86]

Strongly arguing against the ratification of the Convention, Lord Justice Hobhouse, in the 1990 volume of the Law Quarterly Review, puts forward the claim that international conventions such as the CISG are "multi-cultural compromises between different schemes of law, which . . . introduce certainty where no uncertainty existed before" and which "lack coherence and consistency."[87] He further insists that "international commerce is best served not by imposing deficient legal schemes upon it, but by encouraging the development of the best

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[84] MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostina, S.P.A., 144 F.3d 1384, 1389 n.14 (11th Cir. 1998).

[85] *See Contents*, CISG – JAPAN DATABASE, http://www.juris.hokudai.ac.jp/~sono/cisg/eng_index.html (last visited Feb. 22, 2012); *UNCITRAL*, EASTLAW.NET, http://www.eastlaw.net/cominterlaw/international/transnational/transnationalindex.htm (last visited Feb. 22, 2012); *Danish Cases on the CISG*, CISG DENMARK, http://www.cisg.dk/eng-danish-cases.htm (last visited Feb. 22, 2012).

[86] John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387 (2003).

[87] J. S. Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L. Q. R. 530, 533 (1990). *See also* Linarelli, *supra* note 86, at 1428; Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, PACE L. SCH. INST. OF INT'L COM. L. (Mar. 1993), http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html.

schemes in a climate of free competition and choice."[88]

Other British critics are sceptical of law unification, as they are apprehensive of the conflict between common and civil law traditions. They argue that English contract law, characterized by its strictness and focus on certainty, is more suitable for international sales than the Convention, which values equitable solutions over certainty.[89]

Further arguments against ratification include a possible "reduction in the number of international arbitrations coming in the UK"[90] due to a potential weakening or "diminishing"[91] of the role of English law in the settlement of international trading affairs, and the limitation of the Convention due to the exclusion of questions of validity and the passing of property.[92]

Many critics also speculate on the difficulties of each of the Articles of the Convention, arguing that it will never be able to harmonize with English principles, as the conflict between the Sale of Goods Act and the CISG and between general English legal doctrines and principles implied in the provisions of the CISG are too vast to be overcome.[93] One of the Articles to which critics devote much time and energy in their scholarly writings is Article 7, which focuses on the statutory interpretation of the provisions of the Convention and the principle of good will, as discussed above.

On the other hand, arguments in favor of ratification of the CISG are also in many cases strongly defended by scholars and

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[88] Hobhouse, supra note 87.

[89] Hiroo Sono, *Japan's Accession to the CISG: The Asia Factor*, 20 PACE INT'L L. REV. 105, 114 (2008).

[90] Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom*, 26 U. BALT. L. REV. 51, 57 (1997) (quoting comments made by the Law Reform Committee Report in reply to the Department of Trade and Industry's 1980 Inquiry).

[91] Ahmad Azzouni, *The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom*, PACE L. SCH. INST. OF INT'L COM. L. (May 7, 2002), http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html.

[92] *See* Nicholas, *supra* note 87. Therefore, many issues will still have to be covered by the national law which conflicts the idea of uniformity already. The last two comments were first published on March 27, 1990 in a short article in *The Times* by Derek Wheatley QC—who was at that time a leading member of the English Bar—as main arguments in opposition of the ratification of the Convention. *Id.*

[93] *See* Azzouni, *supra* note 91.

practitioners. The main and founding argument for the adoption of the Convention is identified in its own Preamble, which states 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.[94]

Two main strengths of the Convention can be identified as rarely disputable and widely present in academic writings and opinions: first, the Convention provides a set of neutral rules applicable to international contracts for the sale of goods; and second, the Convention's provisions offer a compromise between common law and civil law trade principles. In the latter respect, the Convention excludes some issues, such as the passing of property where the gap between the legal traditions is too vast to be bridged.[95]

One of the first positive reflections was given in 1991 in a lecture at Oxford University by Lord Justice Steyn.[96] In the lecture, he notes that even though international conventions are rarely apprehended well by all countries, the CISG represents a "satisfactory compromise" between opposite views.[97] He emphasizes the observation that should the Convention not be ratified, UK businessmen will be placed in a disadvantageous position in international commerce.[98] Lord Justice Steyn also adds that "if the United Kingdom does not ratify the convention now, commercial realities will compel ratification later."[99]

In addition, one of the biggest supporters of ratification of the Vienna Convention in the UK currently, and one of the few

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[94] CISG, *supra* note 8, at pmbl.

[95] Sir Roy Goode, *Reflections on the Harmonization of Commercial Law*, *in* COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS (Ross Cranston & Roy Good eds., 1993); *see also* Forte, *supra* note 90, at 52.

[96] Hon. Mr. Justice Steyn, Law Lecture at the Royal Bank of Scotland: The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy? (1991).

[97] *Id.*

[98] *Id.*

[99] *Id.*

distinguished legal scholars and practitioners of commercial law in the world,[100] Sir Roy Goode, describes the matter as one of "utmost gravity."[101] He argues that many of the rules in the Vienna Convention are better and more suitable for international trade than the rules in the UK Sale of Goods Act, most of which still date from the promulgation of the Act in 1893 and are not reflective of the issues and realities of today's international commerce.[102] Professor Goode cites as an example of this argument the rule relating to the passage of risk of loss of goods, which passes under the CISG with control or possession (unlike under the SoGA, which passes with ownership or title and, thus, allows for the allocation of risk to the least cost insurer).[103]

The British Government, on the other hand, implied a desire to ratify the CISG for the first time in a Consultative Document issued in 1989 by the UK Department of Trade and Industry, asking for the views of the public on the desirability of accession of the Convention by the United Kingdom.[104] In the Consultative Document, three advantages of ratification were outlined.[105] The first argument supported uniformity in international trade law and suggested that the provisions of the CISG would constitute a "common ground" for international

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[100] *See* Linarelli, *supra* note 86, at 1438.

[101] Sir Roy Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law*, 50 INT'L & COMP. L.Q. 751 (2001).

[102] *Id.* at 762.

[103] *Id.*; *see also* Shivbir Grewal, *Risk of Loss in Goods Sold During Transit: A Comparative Study of the U.N. Convention on Contracts for the International Sale of Goods, the UCC, and the British Sale of Goods Act*, 14 LOY. L.A. INT'L & COMP. L. REV. 93 (1991) (discussing the risk of loss in goods sold in transit).

[104] U.K. DEP'T. OF TRADE & INDUST., UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A CONSULTATIVE DOCUMENT (1989). *See also* INDIRA CARR, INTERNATIONAL TRADE LAW 57–95 (3rd ed. 2005); Azzouni, *supra* note 91. The Consultative Document was issued just one year after the Convention went into force as a multilateral treaty. During this consultation 1,500 documents were issued which received fifty-five responses—twenty-eight in favour, seventeen against, and ten neutral. Sally Moss, *Why the United Kingdom Has Not Ratified the CISG*, 25 J.L. & COM. 483, 483 (2005).

[105] U.K. DEP'T. OF TRADE & INDUST., *supra* note 104. *See also* CARR, *supra* note 103, at 57–95; Azzouni, *supra* note 91; Forte, *supra* note 90, at 63.

business transactions.[106] The second argument suggested that unification of the law in this area would reduce the inefficiency of the time-consuming and costly litigation necessary to establish, at the least, what the proper law of contract to be applied to the transaction is.[107] The third argument advanced recommended that ratification would give the courts and arbitrators the opportunity to resolve disputes under the UN Convention and thus to participate in the development of its jurisprudence.[108]

The idea of ratification was supported at that time by both the Law Commissions, the Law Society of Scotland, as well as by the Commercial Law Sub-Committee of the City of London Law Society.[109] The UK Government, however, did not respond to the initiative started by the issuance of the Consultative Document and remained silent for ten years until 1997, when it demonstrated its desire to ratify in a second consultation document published again by the UK Department of Trade and Industry. [110] This time, it was clearly argued in the 1997 Consultation Document that ratification would protect the interests of the UK traders:

> This evidence suggests 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 a 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

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[106] U.K. DEP'T. OF TRADE & INDUST., *supra* note 104, ¶ 31; *see also* Forte, *supra* note 90, at 63–64.

[107] U.K. DEP'T. OF TRADE & INDUST., *supra* note 104, ¶ 32. 31; *see also* Forte, *supra* note 90, at 64.

[108] U.K. DEP'T. OF TRADE & INDUST., *supra* note 104, ¶ 33. 31; *see also* Forte, *supra* note 90, at 64.

[109] U.K. DEP'T. OF TRADE & INDUST., *supra* note 104, ¶ 33. 31; *see also* Forte, *supra* note 90, at 64.

[110] *See* GREAT BRITAIN DEPT. OF TRADE & INDUS., UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (THE VIENNA SALES CONVENTION): A CONSULTATION DOCUMENT (1997) (during the consultation 450 documents were issued, which triggered thirty-six replies—twenty-six in favor, seven against, and three neutral).

at the moment without our participation.[111]

Since then, however, besides favouring ratification, the Government has not taken any substantial parliamentary action to ratify the Convention. According to Sally Moss, the main reason for such an outcome is due to the relatively little interest in the UK to ratify the Convention; Ministers do not consider the ratification as a legislative priority.[112] She argues, as of 2005, that there are many legislative priorities with greater importance than the ratification of the Convention, such as employment, civil partnerships, energy, and company law.[113] In 2012, one could hypothetically argue that due to the current economic climate,[114] there are even more urgent issues "in the queue"[115] at Parliament that could outweigh the importance of the ratification of CISG. This article, however, contends that the importance of the ratification of the CISG for the UK economy is not at all small and tangential, as further explored in the next sections.

V. THE ARTICLE 7 CONCERN

One of the most commonly advanced criticisms put forward by scholars and practitioners supporting the reluctance of the UK to adopt the Convention is the vagueness of some of the CISG's provisions, like Article 7, which refers to the principles of statutory interpretation and good faith as well as the "gap filling" technique.

A proper analysis of the provision and its merit reveals that these criticisms are mostly based on unfounded speculations and, as such, create an unsubstantiated obstacle to the ratification of the CISG in the UK that impedes the development of the international trade and thereby obstructs economic

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[111] *Id.* ¶ 23.

[112] Moss, *supra* note 104, at 483.

[113] *Id.*

[114] HM TREASURY, BUDGET 2011, 2011, H.C. 836, at 7 (U.K.) ("Indeed, it has been estimated that [after the crisis] the UK became the most indebted country in the world") (citing MCKINSEY GLOBAL INST., DEBT AND DELEVERAGING: THE GLOBAL CREDIT BUBBLE AND ITS ECONOMIC CONSEQUENCES (2010)).

[115] Moss, *supra* note 104, at 483 ("CISG must take its place in the queue with the Government's many other legislative priorities.").

progress, which the country so needs in the current climate.

Article 7(1) of the CISG states that "[in] the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[116] Article 7(2) continues by stating that:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[117]

A. Statutory Interpretation

The main concern for sceptical legal scholars and practitioners in the UK regarding Article 7(1) of the UN Convention is that the provision may create confusion or complication for UK judges by suggesting a different approach to interpretation than the approaches traditionally used in the UK courts.

It is widely stated that in order for the efficient unification and harmonization of international law, such as the CISG, to exist, it is essential that courts in different states and legal systems apply similar methods to interpret the provisions of that law to avoid conflicting or simply differing results.[118] The traditional method for statutory interpretation in the United Kingdom, however, is very distinctive and diverse from the methods used in the civil law jurisdictions[119] and English lawyers are concerned that with the lack of English case law on the CISG and the large number of precedents under the Sale of Goods Act, as the choice of CISG as the governing law of an international contract for sale may confuse the judges in their interpretative duty and not be beneficial the English contracting

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[116] CISG, *supra* note 8, art. 7(1).

[117] *Id.* art. 7(2).

[118] Kurt Haertel & Dieter Stauder, *Zur Auslegung Von Internationalem Ein- heitsrecht* [*On the Interpretation of International Uniform Law*], 2 GRUR INT'L 85, 86 (1982).

[119] 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,* 22 PACE INT'L L. REV. 145, 153 (2010).

parties.[120]

As Nathalie Hofmann suggests in her recent paper on the interpretation of the Convention, particularly with reference to Article 7, however, due to some developments in English jurisprudence in the last decade, such a concern should be considered minimal.[121] Whereas, in the past, UK courts have used three rules of statutory interpretation—namely the literal,[122] golden,[123] and mischief[124] rules—today, the attitude of the courts is considered more relaxed.[125]

The purposive approach, on the other hand, a slightly different rule developed during the last century, is considered favourable by the courts in the UK today. As Lord Scarman said in a lecture in 1980: "In London no one would now dare to choose the literal rather than a purposive construction of a statute."[126] Different reasons for such a change in approaches in statutory interpretation can be argued, including the adoption of the practice of usage of modern textbook as a source of interpretation as well as the use of parliamentary materials pursuant to the House of Lords decision of *Pepper v. Hart.*[127]

Moreover, since the decisions of two key cases on the interpretation of international conventions—respectively, *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.* in 1978,[128] concerning the 1956 Convention on the Contract for the International Carriage of Goods by Road, and

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[120] *Id.* at 152. However, it must be noted that there is a growing number of cases on the interpretation of the CISG by courts in other common law countries such as United States, Australia, and New Zealand.

[121] *Id.* at 171.

[122] *Id.* at 154–55 ("According to the literal rule, words must be given their ordinary and natural meaning.").

[123] *See id.* at 155 ("The golden rule allows a departure from the ordinary meaning only if there is ambiguity or an absurd result.").

[124] *Id.* ("[T]he mischief rule looks at the mischief the statute was supposed to cure in order to interpret the statute.").

[125] *Id.*

[126] Lord Scarman, *Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century – Happy Marriage or Irretrievable Breakdown?*, 7 MONASH U. L. REV. 1, 6 (1980).

[127] *See, e.g.*, Pepper (Her Majesty's Inspector of Taxes) v. Hart [1992] A.C. 593 (H.L.) (U.K.).

[128] James Buchanan & Co. v. Babco Forwarding & Shipping, Ltd., [1978] 1 Lloyd's Rep. 119 (U.K.).

Fothergill v. Monarch Airlines Ltd. in 1980,[129] concerning the 1929 Warsaw Convention on International Carriage by Air—it has been generally accepted that English courts tend to interpret the provisions in consideration with the aim of the Convention.[130] As Lord Wilberforce observed in *James Buchanan & Co. Ltd*:

> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted … unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.[131]

He continued by stating that:

> [t]he assumed and often repeated generalisation that English methods are narrow, technical and literal, whereas continental methods are broad, generous and sensible, seems to me insecure at least as regards interpretation of international conventions.[132]

In the same case, Lord Denning MR also pointed out that:

> This art. 23, para 4, is an agreed clause in an international convention. 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. . . . We must, therefore, put on one side our traditional rules of interpretation. . . . We ought, in interpreting this convention, to adopt the European method.[133]

On the other hand, in *Fothergill*, not only was a purposive approach applied to the interpretation by the House of Lords, but Lord Wilberforce also unprecedentedly suggested a reference should be made to the legislative history of the conven-

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[129] Fothergill v. Monarch Airlines, Ltd., [1980] All E.R. 696 (U.K.).

[130] Hofmann, *supra* note 119, at 156.

[131] Fothergill, [1980] All E.R. 696, at 706. *See also*, H. v. H. (Child Abduction: Acquiescence) [1998] A.C. 72 (H.L.) (U.K.); R. v. Secretary of State for the Home Department, [2000] 2 A.C. 477 (H.L.) (U.K.) (opinion of Steyn, L.J.).

[132] James Buchanan & Co., [1978] 1 Lloyd's Rep. 119, 123.

[133] James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping, Ltd. [1977] Q.B. 208, 209 (U.K.).

tion. He said:

> In the Federal Republics of Germany, France, Italy, Luxembourg, The Netherlands and Belgium both 'administrative' and other courts have recourse in varying degrees, but generally with prudence and caution, to preparatory work of the laws of the legislature . . . and there may be cases where such travaux preparatoires can profitably be used.[134]

A significant illustration of this attitude exhibited by a variety of judges across the UK, and the world, is the recent decision of the English Court of Appeals' in the 2006 case: *ProForce Recruit Ltd. v. The Rugby Group Ltd.*[135] In this case, Lady Justice Arden, in *obiter dictum*, disapproved of some of the outdated rules on contract interpretation used in the UK "and suggested a possible change in the approach."[136] She referred to the UNIDROIT Principles of International Commercial Contracts as well as the CISG.[137]

In the decisions of *James Buchanan & Co. Ltd.*, *Fothergill*, and *ProForce Recruit Ltd.*, therefore, an idea very similar to what is recommended in Article 7 of the CISG on the interpretation of its provisions was well illustrated. All of these decisions illustrate that common law judges are increasingly striving towards uniform interpretation of the provisions of the international conventions and are willing to adopt different interpretative methods to cure discrepancies.[138] It is arguable, then, that any suggestion that Article 7 of the Vienna Convention on the International Sale of Goods might create confusion or complication for the interpretation of the provisions of the Convention for the UK courts is simply based on outdated speculation and has no basis for creating an obstacle for the ratification of the Convention by the UK.

B. The Principle of Good Faith

The second immediate problem that sceptical English law-

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[134] Fothergill v Monarch Airlines Ltd., [1981] A.C. 251, 277–79 (U.K.).

[135] ProForce Recruit Ltd. v. Rugby Group Ltd., [2006] EWCA (Civ) 69 (U.K.).

[136] Michael Joachim Bonell, *The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts*, 19 PACE INT'L L. REV. 9, 10 (2007).

[137] *ProForce Recruit Ltd.*, [2006] EWCA (Civ) 69, ¶ 57.

[138] Lutz, *supra* note 75.

yers spot when reading Article 7 of the CISG is the use of the term "good faith" as a suggestion of a positive legal requirement in an international contractual relationship. The conflict here appears from the fact that, in English law, there is no general positive duty of good faith imposed on the parties to a contract.[139] Vanessa Sims illustrates the issue vividly in her paper, *Good Faith in Contract Law: of Triggers and Concentric Circles*:

> Hugh Mills once observed that "nothing unites the English like war. Nothing divides them like Picasso." In the context of contract law, it could be said that "nothing unites English lawyers like the belief in the unique nature of the common law. Nothing divides them like the issue of good faith."[140]

On one hand, it cannot be argued that English jurisprudence is unfamiliar with "good faith" ideology, as the principle was first established in legal contractual relationships under English law in the 18th century in the 1766 case of *Carter v. Boehm*,[141] Lord Mansfield stated in the decision that the "governing principle of good faith is applicable to *all contracts and dealings*." He went further to define "good faith" by explicitly underlying its importance in contract law:

> Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. . . . The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.[142]

Later, at the beginning of the 20th century, the concept of "good faith" was still supported by the English courts, as is evident in the 1904 case of *Boulton v. Houlder Bros. & Co.*,[143]

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[139] R. Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16 (1956).

[140] Vanessa Sims, *Good Faith in Contract Law: of Triggers and Concentric Circles*, 16 KING'S C. L.J. 293 (2005).

[141] Carter v. Boehm [1766] 97 E.R. 1162 (U.K.); *see also* Peter Schwartz, *Non-Disclosure Under the Utmost Good Faith Doctrine in English Law: Alive and Kicking or Being Dumbed Down?*, DECLARATIONS, Winter 2002–2003, at 31 (summarizing the facts and analyzing the decision of *Carter v. Boehm*).

[142] Carter [1766] 97 E.R. 1162, 1164–65.

[143] Boulton v. Houlder Bros. & Co., [1904] 1 K.B. 784 (C.A.) (U.K.).

where Mathew LJ stated that:

> The case is important because it appears to be necessary, as one would hardly expect it to be, to reiterate the statement of a well-established rule of law. It is an essential condition of a policy of insurance that the underwriters shall be treated with *good faith*, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract.[144]

It has been only in the past century that such a divergence in the opinions on the principle of "good faith" has developed in the UK. A belief has emerged that it is a duty of the parties to look after themselves and, as Professor Goode refers to it, "stay on their own feet."[145]

Even though English law does not acknowledge the general principle of good faith today, however, there are other considerations that are applied to various situations to substitute the principle as such.[146] These include the principles of fairness, reasonableness, and principles based on equity, such as promissory estoppel or equitable remedies like specific performance.[147]

Moreover, during the period of the Decline of Freedom of Contract, as named by Professor Atiyah for the years 1870-1980,[148] English law started to develop even more doctrines and classifications, such as pre-contractual duties between the parties and fiduciary relationships, which, under civil law, would be considered to fall under the "good faith" principle.[149] Examples of this development are family and professional-client contractual relationships that impose a duty of good faith and full disclosure as well as other contractual relationships imposing a duty of care between the parties, as in cases where

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[144] *Id*. at 791–92 (emphasis added).

[145] ROY GOODE & EWAN MCKENDRICK, GOODE ON COMMERCIAL LAW 386 (4th ed. 2010).

[146] *See* JOSEPH CHITTY & H.G. BEALE, CHITTY ON CONTRACTS 1291 (29th ed. Supp. 2007); *see also* Hofmann, *supra* note 119, at 164.

[147] CHITTY & BEALE, *supra* note 145, at 1291.

[148] PATRICK S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 15 (5th ed. 1995).

[149] Alberto M. Musy, *The Good Faith Principle in Contract Law and the Pre-Contractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures* 7 (Int'l Ctr. for Econ. Research, Working Paper No. 19/00, 2000).

the English courts find "implied terms" very similarly to how civil law courts would decide the principle of good faith.[150]

As Jane Stapleton argues, therefore, "even if English lawyers do not utilize the principle of "good faith" as such, they believe in the need for legal doctrines that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound."[151] In many cases, English lawyers reach the same outcomes by way of detailed rules and duties established by precedent as a continental lawyer would reach using the principle of good faith.

In addition, it is further suggested by Professor Musy that such absence of a general doctrine of good faith could even be described as an illustration of the English jurisprudential attitude to separate law as an autonomous and self-standing establishment, distinct from other areas such as business and politics.[152] This attitude, however, as is it more theoretically supported than practically, should not serve as an obstacle to the ratification of the CISG in the UK or hamper the development of the country's economy.

C. The Gap-Filling Analysis

More interpretative problems for some legal critics arise from the second provision of Article 7, which allows for a gap filling technique, or the creation of a *lacunae iuris*, to be applied to certain specific issues that should formally fall under the CISG, but did not at the time of the drafting because no uniform rule could be concluded to satisfy all the parties.[153] This problem arises from uncertainty regarding the source from which a solution to an issue can be identified. Article 7(2)

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[150] *Id.*

[151] Jane Stapleton, *Good Faith in Private Law*, 52 CURRENT LEGAL PROBS. 27 (1999).

[152] Musy, *supra* note 149.

[153] *See, e.g.*, Honnold, *supra* note 36. One of the most debated of such issues is the passing of property. John Honnold explains that "in some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time, such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point, nor was it regarded necessary to do so, since rules are provided by this Convention for several questions linked, at least in certain legal systems, to the passing of property." *Id.* at 407.

permits recourse to the applicable domestic law according to the rules of private international law when no other general principles of the CISG can solve the matter.[154]

The main criticism respecting this provision is that while the CISG rejects the application of domestic law, it still uses domestic law when it cannot find a better solution to an issue.[155] Critics have gone so far as to call Article 7(2) a "strange arrangement," "an awkward compromise," "a rather peculiar provision," and a "statesmanlike compromise."[156]

On the other hand, however, it is strongly argued that Article 7(2) provides a useful guide for judges who would otherwise be more confused as to the sources of argumentation they are supposed to accept, as the provision gives clear directions on how to reach a solution on matters not expressly settled, but governed by the Convention. Furthermore, the Article provides equal treatment to the means of gap-filling and, thus, is justified, as the *ratio legis* of Article 7(2) is to preserve uniformity as much as possible.

The second section of Article 7, therefore, cannot in practice lead to confusion and complication of the application of the Convention in UK courts. As such, it cannot be used as an argument for further postponement of the ratification of the CISG in the UK.

D. Evaluation

Article 7 of the CISG assumes that, in interpreting the provisions of the Convention, there shall be regard for promoting "the observance of good faith in international trade" and a technique through which the *lacunae iuris* of the CISG application can be filled. Even though the immediate reaction to Arti-

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[154] Evelien Visser, *Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in the Light of the General Principles of the CISG,* PACE LAW SCH. INST. OF INT'L COMMERCIAL LAW, http://www.cisg.law.pace.edu/cisg/biblio/visser.html (last updated Sept. 24, 1998).

[155] THOMÁS VÁZQUEZ LEPINETTE, THE INTERPRETATION OF THE 1980 VIENNA CONVENTION ON INTERNATIONAL SALES 377, 394 (1995).

[156] Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TULANE J. INT'L & COMP. L. 47, 55 (1995); Visser, *supra* note 154 (citing Farnsworth).

cle 7 by English scholars or practitioners might be sceptical, detailed analysis of this issue shows that the provision is completely compatible with English law and does not create complication or confusion in the judicial system by introducing new and unknown principles. On the contrary, upon the ratification of the CISG by the United Kingdom, English courts will be able to significantly contribute to the jurisprudential development of this area of law, which would influence the understanding of international trade law all over the world. This development could only be positive for the UK as a leading common law jurisdiction and economic power on its way to recovery from the recession.

VI. THE IMPACT OF CISG ON OTHER JURISDICTIONS

When arguing for or against the ratification of the Convention in the United Kingdom, it is very important to consider the impact of the Convention on the States that have already adopted it, particularly similar common law jurisdictions such as the United States, Australia, and New Zealand.

A. Australia

In Australia, the CISG was ratified on April 1, 1989.[157] To date, Australian judges and legal scholars have vastly contributed to the jurisprudence concerning the legal question of the application of Article 7 of the Convention and, more specifically, of the "good faith" principle. As Marcus Jacobs QC, Professor Katrin Cutbush-Sabine, and Philip Bambagiotti observe, the questions of the principle of good faith and its interaction with free-market commerce are of great interest to Australian law.[158] This is so due to the fact that the implication of the term of good faith is one of the most debated topics in Australi-

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[157] Bruno Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, PACE L. SCH. INST. OF INT'L COM. L. (May 2003), http://www.cisg.law.pace.edu/cisg/biblio/4corners.html.

[158] Marcus S. Jacobs, Katrin Cutbush-Sabine & Philip Bambagiotti, Remarks at the 75th Anniversary Congress of the Union Internationale des Avocats: The CISG in Australia-to-date: An Illusive Quest for Global Harmonisation? (Oct. 27–31, 2002), *reprinted in* 17 MEALEY'S INT'L ARB. REP. 24 (2002).

an domestic jurisprudence.[159]

With reference to the Convention, however, in the Federal Court of Australia, Finn J. stated in *South Sydney District Rugby League Football Club Ltd. v News Ltd. & Ors*:

> Australian law has not yet committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement[160]. . . . Such a duty has been accepted as an implied legal incident of particular classes of contract[161] . . . and particularly contracts of a commercial character[162] . . . notwithstanding the supposed uncertainty in defining the concept of "good faith and fair dealing[163] . . . . I would note in passing that the supposed uncertainty with "good faith" terminology has not deterred every State and Territory legislature in this country from enacting into domestic law the provisions of Article 7(1)[164] of the United Nations Convention on Contracts for the International Sale of Goods.[165]

As observed in the above citation, in Australia, there is a growing debate on the topic of the implication of Article 7 and, more specifically, on the concept of "good faith." Hence, certain similarities can be drawn between the domestic views of the good faith doctrine in both the UK and Australia. It can be concluded, therefore, that since Australia has found a way to integrate Article 7 into its jurisprudence and has established a way to interpret it in accordance with its domestic law, the UK can use Australia's experience when considering the issue of Article 7 and the good faith principle.

B. New Zealand

New Zealand, another common law jurisdiction, ratified

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[159] *Id.*

[160] *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[161] *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Hughes Bros. v Trs. of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91.

[162] *Garry Rogers Motors (Aust.) Pty Ltd. v Subaru (Aust.) Pty Ltd.* [1999] FCA 903.

[163] *Aiton Aust. Pty Ltd. v Transfield Pty Ltd.* [1999] NSWSC 996.

[164] *E.g., Sale of Goods (Vienna Convention) Act 1986* (NSW).

[165] *S. Sydney Dist. Rugby League Football Club Ltd. v News Ltd. & Ors* [2000] FCA 1541.

the UN Convention on October 1, 1995.[166] As a common law jurisdiction, it also considers the topic of the implication of the principle of good faith in its law to be a question of interest.[167]

In 2001, the Court of Appeal of Wellington analysed the principle of good faith and its development in common law with reference to Article 7 of the UN Convention in the case of *Bobux Marketing v Raynor Marketing*.[168] The ruling Judge Thomas established that the principle of good faith is to be understood as "a loyalty to a promise" and that it should be perceived as an obligation at least in long-term contracts.[169] This case presents yet another viewpoint on the issue of implementation of Article 7 of the CISG for the UK to consider.

C. United States of America

The United States, yet another common law country, accepted the UN Convention on January 1, 1988[170] despite very similar conflicts between national law, the Uniform Commercial Code ("UCC"), and the international harmonized law, the CISG. As in the UK with the conflict between the Sale of Goods Act and the UN Convention, scholars and practitioners in the US are divided and offer conflicting views on the necessity and efficiency of the CISG.

Whereas the opinions in the UK are completely hypothetical and speculative, however, the Convention has already been ratified in the US, so there are cases to prove scholarly assumptions right or wrong. Alison E. Williams has observed that in many cases in the US, the criticisms of the Convention prove to be wrong and based on false premises.[171] She argues that, in the United States, the CISG is considered as an area of

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[166] Petra Butler, *Celebrating Anniversaries*, 36 VICTORIA U. OF WELLINGTON L. REV. 775, 775 n.1 (2005).

[167] N.Z. LAW COMM'N, REPORT NO 23: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: NEW ZEALAND'S PROPOSED ACCEPTANCE (1992).

[168] *Bobux Mktg. Ltd. v Raynor Mktg. Ltd* (2002) 1 NZLR 506 (CA).

[169] Hofmann, *supra* note 119, at 162.

[170] Burt A. Leete, *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 TEMPLE INT'L & COMP. L.J. 193, 194 (1992).

[171] Williams, *supra* note 31, at 35.

law that all practitioners must be aware of and must understand, as the wide comprehension of the topic in the commentaries refers to the issue in the context of a *lex mercatoria*, or the rules of a new law merchant. As Harry M Fletcher put it: "[i]n 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."[172]

Moreover, since the ratification of the CISG in the United States, 147 cases have been decided on issues related to the Convention, 17 in the Circuit Court of Appeal, 108 in the District Courts, and the rest in other federal courts.[173] Some recent key US cases on the CISG include[174]: *Travelers Property Causualty Company of America v. Saint-Gobain Technical Fabrics Limited*,[175] *American Biophysics Corporation v. Dubois Marine Specialists*,[176] *American Mint LCC v. GOSoftware, Inc.*,[177] *Multi-Juice, S.A. v. Snapple Beverage Corporation*,[178] *Prime Start Limited v. Maher Forest Products Limited*,[179] *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*,[180] *TeeV-*

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[172] Harry M. Flechtner, *Another CISG Case in the US Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127, 137 (1995).

[173] *United States Cases on the CISG*, PACE L. SCH. INST. OF INT'L COM. L., http://www.cisg.law.pace.edu/cisg/text/casecit.html#us (last visited Feb. 22, 2012).

[174] For a detailed analysis of each case, see Barton S. Selden, *Update on United Nations Court Decisions Concerning the CISG (cases decided in 2006 and 2007)* (Int'l Bar Ass'n Annual Meeting (Singapore), 2007).

[175] Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Canada Ltd., 474 F. Supp. 2d 1075 (D. Minn. 2007) (identifying the issue of 'opting out' of the CISG and the use of choice of law clause under Article 6).

[176] Am. Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61 (D.R.I. 2006) (identifying the issue of 'opting out' of the CISG).

[177] Am. Mint LLC v. GOSoftware, Inc., 2006 U.S. Dist. LEXIS 1569 (M.D. Pa. June 1, 2006) (explaining the application of Article 1(1)(a) of CISG).

[178] Multi-Juice, S.A. v. Snapple Bev. Corp., 2006 U.S. Dist. LEXIS 35928 (S.D.N.Y. Sept. 1, 2006) (explaining Article 1(1)(a) "contracts of sale of goods.").

[179] Prime Start Ltd. v. Maher Forest Prods. Ltd., 442 F. Supp. 2d 1113 (W.D. Wash. 2006) (identifying the application of Article 1(1)(b))..

[180] Treibacher Industrie, A.G. v. Allegheny Techs. Inc., 464 F.3d 1235 (11th Cir. 2006) (interpreting the contract terms under the CISG and the incorporation of an implied term under Article 9(2)).

ee Toons, Inc. v. Gerhard Schubert GmbH,[181] and *Miami Valley Paper, LLC v. Lebbing Engingeering and Consulting*.[182] Another more recent case, a key decision concerning Article 19, is the 2009 decision of *Belcher-Robinson, LCC v. Linamar Corporation*.[183]

D. Japan

Japan ratified the CISG on August 1, 2009. It is one of the most recent member states of the Convention, only three countries having ratified the CISG after it: Lebanon (December 1, 2009), Armenia (January 1, 2010), and Albania (June 1, 2010).

One of the main arguments for Japan's late acceptance of the Convention was the same as that suggested by Sally Moss[184] as a main argument for the UK suspension: a relatively small legislative priority in the Parliament.[185] In the early 1990s, the Japanese economy was recovering from the burst of the bubble economy, which filled the legislative agenda with pressing legislation.[186] The quick and widespread acceptance of the Convention around the world[187] and the "phenomenal success of the CISG," however, overturned all the negative predictions made earlier by Japanese critics and were decisive arguments for Japan to decide on ratification.[188] Another positive argument taken into consideration by Japan was the emergence of the considerable collection of court and arbitral decisions as well as the selection of thousands of scholarly writings on each and every aspect of the Convention.[189]

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[181] TeeVee Toons, Inc. v. Gerhard Schubert GmbH, 2006 U.S. Dist. LEXIS 59455 (S.D.N.Y. Aug. 22, 2006) (interpreting contract terms)

[182] Miami Valley Paper, LLC v. Lebbing Eng'r & Consulting, 2006 U.S. Dist. LEXIS 49590 (S.D. Ohio Mar. 26, 2006) (identifying matters not governed by the CISG).

[183] Belcher-Robinson, LLC v. Linamar Corp., 699 F. Supp. 2d 1329 (M.D. Ala. 2010).

[184] Moss, *supra* note 104.

[185] Sono, *supra* note 89, at 106.

[186] *Id.*

[187] In the early 1990s, there were only around thirty member states. In the first few years of the 2000s, the number rose to sixty member states and continued growing in the following years.

[188] Sono, *supra* note 89, at 107.

[189] *Id.*

These arguments were instrumental in Japan even though the state also had conflicting areas of law that had to be harmonized or assimilated to work efficiently in accordance with the provisions of the CISG. The concept of "fundamental breach,"[190] for example, was a brand new and unfamiliar concept that had to be implemented and interpreted with reference to the existing Japanese Civil Code.[191]

The benefits of ratification, however, have already been noticed in Japan. During the Annual Moot Alumni Association Peter Schlechtriem CISG Conference: *Towards Uniformity*, which took place in Hong Kong on March 13, 2010, it was suggested that the SMEs had become the largest beneficiaries of the CISG in Japan. This suggestion should be heavily emphasized when considering the ratification of the Convention by the UK.

E. Continental Europe

Germany, the member state that has produced the most case law on the CISG database, ratified the CISG in early 1991.[192] At the beginning of the application of the CISG, it was noticed that SMEs were benefiting the most, as they did not have the bargaining power to demand the application of their own law before this time.[193] Furthermore, today, the country has been so well affected by the ratification of the CISG that it is planning to reform its Law of Obligations under the BurgerlichesGesetzbuch (BGB)[194] so that the domestic law will closely reflect some of the provisions and principles of the Convention.[195]

Similar plans for domestic law reforms are also considered in the Scandinavian states and in Holland.[196] In the words of

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[190] CISG, *supra* note 8, art. 49 (1)(a); *id.* art. 64(1)(a).

[191] Noboru Kashiwagi, *Accession by Japan to the Vienna Sales Convention (CISG)*, 4 U. TOKYO J.L. & POL. 92, 92–98 (2007).

[192] *Germany*, PACE L. SCH. INST. OF INT'L COM. L., http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html (last updated Jan. 22, 1998).

[193] Williams, *supra* note 31, at 33.

[194] *See* BURGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 195 (Ger.).

[195] Werner Lorenz, *Reform of the German Law of Breach of Contract*, 1 EDINBURGH L. REV. 317, 327 (1995); *see also* Williams, *supra* note 31, at 33.

[196] Williams, *supra* note 31, at 36. *See also* Jan Hellner, *The Vienna Con-*

the Danish Ministry of Justice on the Bill on the International Sale of Goods:

> One of the purposes of the Nordic legislative co-operation and the consequent uniformity of law is to facilitate trade between the Nordic countries. Uniform legislation regulating sales reduces the need for a buyer in a Nordic country to make himself familiar with the rules regulating sales in countries other than his own. This is particularly important, as small businesses often do their first international trade in the Nordic market. A small business has generally no access to the expertise required when its contracts are subject to foreign law.[197]

F. Evaluation

The experience of the countries that have already ratified the Vienna Convention can serve as a useful guide throughout the process of evaluation and ratification of the CISG in the UK. As is seen in the analysis above, each country shares a similar issue of concern with the UK. In Australia and New Zealand, for example, two common law jurisdictions, the principle of "good faith" was as uncommon to the domestic legal doctrine as it is argued to be in the United Kingdom. Also, in the United States, similarly to the UK, the confidence and strong belief in domestic law, the Uniform Commercial Code, made practitioners and scholars sceptical about viewing any law other than the domestic as a better or more efficient. Furthermore, in Japan, the same lack of legislative priority that suspended ratification serves the leading explanation for the CISG not being discussed and voted on in the UK Parliament.

In each of these countries, nonetheless, ratification of the CISG has influenced positively the economy and businesses in one way or another and has contributed to the development of international trade, in most cases impacting strongly the small and medium-sized enterprises, an effect that is fundamentally needed in the UK, which is on its way to recovery from the fi-

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vention and Standard Form Contracts, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 335 (Petar Šarčević & Paul Volken eds, 1986); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (3d ed. 1999).

[197] LOVFORSLAG NR. 35 [BILL NO. 35], Dec. 7, 1988, 1 FOLKETINGSTIDENDE 1988–89 tillæg A, sp. 869–1100 [1 OFFICIAL REPORT OF PARLIAMENTARY PROCEEDINGS 1988–89, App. A, col. 869–1100].

nancial crisis and the recession that followed.

VII. LEGAL DIVERSITY VERSUS ONE SET OF UNIFIED RULES

The normative question discussed in this section is whether unified rules would be more efficient than diverse rules in ensuring the UK's stable economic development by supporting UK businesses that are currently trading internationally. As illustrated by Professor John Linarelli in his paper, *The Economics of Uniform Laws and Uniform Lawmaking*, the answer to this question is: "they can be."[198] He argues that legal diversity in this context may result in a net welfare loss, both within the borders of the country and internationally.[199] In support, Chief Justice Roger J. Traynor stated in 1959 that

> in conflicts of law, the wilderness grows wilder and faster than the axes of discriminating men can keep it under control. The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage. He has a better chance to arrive at the least erroneous answer if the scholars have laboured in advance to break ground for new paths.[200]

On the other hand, however, one of the most commonly advanced arguments opposing the idea of unification of laws is that it would harm the freedom of choice of the contractual parties who should be encouraged by legal diversity and by the competition among legal systems.[201] Supporters of this view often argue that the contractual parties in an international transaction benefit from the freedom of choice of the proper law of the contract from a list of competing legal systems.[202] In a famous quotation, for example, Professor Paul B. Stephan advocates:

> We ought to spend less time drafting rules to govern the substantive rights and duties of persons engaged in a transaction, and more on devising ways to encourage states to facilitate contractual choices made by parties in the course of transactions and in

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[198] Linarelli, *supra* note 86, at 1392.
[199] *Id*. at 1394.
[200] ALBERT A. EHRENZWEIG, CONFLICT OF LAWS 8 (1959).
[201] *Id* at 20.
[202] *Id* at 28.

> encouraging states to reveal how they propose to deal with private disputes arising out of international commerce.[203]

Professor Linarelli, however, suggests that a contractual choice of law approach has negative consequences from the standpoint of both efficiency and distribution.[204]

A strong argument in support of this statement is that legal diversity often shifts the costs to the weaker party in an international contract for the sale of goods.[205] The London Investment Banking Association, for example, observes that, in Europe, firms have complained about rules on legal diversity, claiming that contractual parties must cover the costs of local regulation, which increases the total cost immensely and deprives the parties of chance to offer competitive services and exchange opportunities with their customers, which, it is argued, affects most severely SMEs.[206]

As mentioned above, one of the significant problems with the development of prosperous internationally trading SMEs in the UK is directly associated with costs. Transaction costs include costs related to the legal system, including costs imposed by the provisions reflecting the rules, rights, and duties laid down in the contracts as well as the costs reflecting informal arrangements.[207] In his article, *The Economics of Uniform Laws and Uniform Law Making*, Professor Linarelli argues that international default rules "decrease transaction costs and facilitate exchange."[208] In his view, it is preferable to have a single set of international default terms to regulate international contracting for many reasons. He argues that when a conflict arises between the parties, even if they

> could predict that a particular local law applied to them, and could predict the content of that law, learning and complying with an unfamiliar rule of law increases the costs associated with reaching agreement. This is true even if the governing law turns

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[203] Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 746 (1999).

[204] Linarelli, *supra* note 86, at 1404.

[205] *Id.* at 1409.

[206] LONDON INV. BANKING ASS'N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL – A MORE COHERENT EUROPEAN CONTRACT LAW: AN ACTION PLAN (COM(2001)/398 FINAL) (2001).

[207] Linarelli, *supra* note 86, at 1400–01.

[208] *Id.* at 1401.

> out to work well for the particular transaction. These additional costs may include increased lawyer fees and opportunity costs associated with time and effort.[209]

He continues by stating that when it comes to mandatory rules,[210] on the other hand, "the costs of legal diversity in international transactions are exposed dramatically."[211] Mandatory rules that differ across jurisdictions, in this vein, can complicate the structuring of a transaction to the point where it is impossible for it to go forward.[212] The same transaction, which could be easily realized under one law, may be confusing, difficult, extremely expensive, or unduly complicated under another legal regime.[213]

Another argument suggesting that unified law is a better alternative to legal diversity in international commercial transactions is that Scotland, as part of the United Kingdom, would largely benefit from such a change. Being a small jurisdiction, Scotland is disadvantaged at the moment because its laws,[214] judicial system, and legal professionals are unfamiliar to many foreign businesses.[215] These reasons are commonly cited as providing a basis not to choose the law of the country as the regulating law of contracts for the international sale of goods.[216] This logic deprives Scotland of large amounts of litigation, which affects the business of law in the country. It also makes it very difficult for SMEs to progress and internationalize their services. There are increased legal costs, higher risks, higher uncertainty, and the possibility of foreign litigation.

In a report published in 1993 by the Scottish Law Commission, *Report on Formation of Contract: Scottish Law and the*

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[209] *Id.* at 1401–02.

[210] Mandatory rules regulate contract formation and performance.

[211] Linarelli, *supra* note 86, at 1403.

[212] *Id.*; *see also* Matthias E. Storme, *Freedom of Contract*: *Mandatory and Non-Mandatory Rules in European Contract Law* 33–44 (Tartu Conference, Paper, 2006).

[213] *See id.* at 10.

[214] *See* J.M. Thomson, *Scots Law, National Identity and the European Union*, SCOTTISH AFF., no. 10, Winter 1995, at 2. Scots law is commonly thought of as a mixed system of law in the sense that certain doctrines are derived from Common Law, whereas others are more reflecting of some Civil Law traditions. *See id.*

[215] Forte, *supra* note 90, at 52.

[216] *Id.* at 62.

United Nations Convention on Contracts for the International Sale of Goods, the following conclusion was made on the potential impact of the CISG on Scotland and its law:

> The Convention offers a modern, internationally agreed set of rules on the formation of certain contracts. These rules now apply very widely in international trade. Given that Scots law has a tradition of being receptive to the best international legal developments, given the obvious advantages for Scottish traders, lawyers and arbiters in having our internal law the same as the law which is now widely applied throughout the world in relation to contracts for the international sale of goods, and given the sensible tradition in Scotland of not having different rules for the formation of contracts of different types, it seemed to us that it would be worth considering whether the more general rules of contract formation in the Vienna Convention could be adopted as part of the general law of Scotland on the formation of contracts. We reached the [...] conclusion that they would form a very satisfactory basis for the internal law of Scotland in this area.[217]

VIII. CONCLUSION

To conclude, this article highly recommends that the CISG be ratified by the UK, as a harmonized law will be much more efficient and beneficial for the businesses in the United Kingdom than a choice of law clause in an international contract for the sale of goods. Legal diversity, as illustrated above, brings negative consequences from the standpoint of both efficiency and distribution to every UK business, but especially to SMEs. Even Resolution 2102 of the General Assembly of the United Nations states that "conflicts and divergences arising from the law of different states in matters relating to international trade constitute an obstacle to the development of trade."[218]

After detailed consideration of the arguments and facts stated above, this article recommends that the UK Government should place weight on the legislative priority of the ratification of the Vienna Convention on the International Sale of

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[217] SCOTTISH LAW COMMISSION, REPORT ON FORMATION OF CONTRACT: SCOTTISH LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 1993, Scot Law Com No. 144 (Scot).

[218] G.A. Res. 2102 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 20, 1965).

Goods in the UK Parliament, as ratification will promote the internationalization of SMEs in the UK, will increase the profitability levels of these enterprises, and thus will positively affect the development of the UK economy, which is on its way out of the recession following the financial crisis of 2008.

In a response to the question: why the United Kingdom has not ratified the CISG?, Sally Moss gave as a main reason the low profile of the Convention and the fact that the UK Ministers had not received a truly representative view on the impact the CISG would have on the UK and its economy.[219] She recommended that what had to be demonstrated was that "implementation [of the Convention would] bring strong, quantifiable economic benefits to the UK . . . that small businesses [would] not be adversely affected in the long term[,] and that the Convention [would] make international trading simpler."[220] This paper examines all these points.

In 2011, the Parliament advocated more than ever that an emphasis must be placed on the development of business in the UK, especially the SME. It is important to look at the features that impede the progress of SMEs, therefore, and serve as an obstacle on the way to the effective internationalization of the services of businesses. As these features are identified, proper action must be taken to suppress their negative impact. In this article, it is suggested that if the Vienna Convention on the International Sale of Goods is ratified by the United Kingdom, the impact of the outlined negative features will be abolished and business in the UK will be able to grow and expand faster, which will stimulate a quick and efficient recovery from the economic recession with which the country has been struggling for the past few years.

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[219] Moss, *supra* note 104, at 484.
[220] *Id.* at 485.