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## Uniformity and Diversity in the Law of International Sale

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# UNIFORMITY AND DIVERSITY IN THE LAW OF INTERNATIONAL SALE

Michael G. Bridge\*

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In an article written for a festschrift some years ago, I referred to the “bifocal” world of international sales law.<sup>1</sup> This was meant to signify the application of two bodies of law of different character to international sales transactions of different types. More exactly, it represented the effort demanded of a sales law exponent in focusing on both the broad principles laid down in the UN Sales Convention 1980<sup>2</sup> (usually known as the CISG) and the finely detailed provision of English sales law in the matter of commodity sales. The metaphor had a certain autobiographical poignancy: its origins lay in a recent visit to an optometrist.

Uniform law represents a part of that phenomenon that we call globalization; a word that means so many different things to so many different people and ought on that account be used sparingly, perhaps with a modest financial forfeit that upon sufficient accumulation would be paid over to charitable causes. Those of us participating in one or more of the incremental efforts to bring about uniform law are, fortunately, sufficiently obscure to be spared the attentions of anti-globalization protestors. The United Nations Commission on International Trade

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<sup>1</sup> See Michael G. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in *MAKING COMMERCIAL LAW* 277, 277-96 (R. Cranston ed., 1997).

<sup>2</sup> See United Nations Conventions of Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 reprinted in [1980] XI UNCITRAL YEARBOOK 149, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty17.asp> [hereinafter CISG].

Law (UNCITRAL)<sup>3</sup> is dedicated to the pursuit of uniform law. Its mission is revealed in stark clarity by the preamble to the CISG, which, in addition to stating that uniformity will reduce barriers to international trade, provides that "the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States."

A cynic might wonder how such a sentiment adds nobility to the mundane detail of the rights and duties of buyers and sellers under the CISG and might also recall that, in the European wars of the 1660s, the Dutch were selling arms to the French forces invading their country. But if that sentiment is to be criticized, it is for overstatement rather than inaccuracy. International collaboration in the cause of uniformity assists mutual understanding and encourages neighborliness.

The CISG in its short life<sup>4</sup> has already proved itself to be a wonderfully effective instrument. It should not, however, be thought that all international sales are alike and that one single uniform sales law should be provided on a "one size fits all" basis. One of my purposes today is to lay emphasis upon the variety of international sales transactions and to make out a case for the continuing availability of governing laws of different character to suit this variety. As much as I admire the accomplishments of the international uniformity movement, there is a case to be made for national legal systems to continue to play a vigorous part in the world of international sales. I shall deal by way of example with the character of English law as the governing law of choice in commodities transactions — an act of some temerity in this of all cities — and lay stress on the speculative character of the world of forward delivery trading that English law serves.<sup>5</sup> I shall then turn to the CISG, as part of the ambitious efforts currently in train to develop a world legal

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<sup>3</sup> See United Nations Commission on International Trade Law (UNCITRAL) Y.B. VIII, 48-49, paras. 323-30, 336-40, A/CN.9/SER.A/1977.

<sup>4</sup> The Convention came into force in 1988 when it acquired the requisite number of ratifications. The number of Contracting States has now reached sixty-one.

<sup>5</sup> For the view that a principle of good faith and fair dealing has no part to play in commodity sales, see Michael G. Bridge, *Good Faith in Commercial Contracts*, in *GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT* 139, 139-64 (Roger Brownsword et al. eds., 1999).

order, to explore the character of uniform law, and in that connection, I shall also deal with an instrument that is similar in tone but quite different in type, the UNIDROIT Principles of International Commercial Contracts 1994.<sup>6</sup> In promoting the cause of uniform law in international sale, the Pace Law School is in the vanguard. Pace's on-line achievements in marshalling case reports, translations and secondary literature, and in promoting the cause of uniform law, command the highest respect.<sup>7</sup> These efforts have earned the gratitude of scholars, practicing lawyers, judges, and arbitrators across the world. I have found the achievements of this law school invaluable in my own work.

The word "uniformity" in connection with transnational substantive law commands a certain understanding, though what constitutes true uniformity in the law of international sale, when States maintain non-uniform bodies of private law and procedural law upon which that uniform law sits, is a different matter. In the case of English law and commodities sales, it may seem odd to speak of uniformity — since I am making a case for diversity — but I shall demonstrate, by reference to the structure of multiple sales transactions in this field, that the word is not out of place in describing the character of English sales law. In demonstrating a case for the continuing existence of English law as the law of choice in commodities sales, sitting alongside a uniform law informed by the CISG and other instruments, I hope to show that this is not a blemish on the uniformity movement but rather a recognition of the compelling need for diversity. Sales transactions cannot be assumed to be homogeneous in character. There is a grain of truth in the old story about the large quantity of tins of sardines sold on CIF (cost, insurance and freight) terms. The end buyer complains to its seller about the inedible character of the sardines, only to be told that they were not eating sardines at all but buying-and-selling sardines. It should not be a cause for reproach that bulk oil sold on CIF Rotterdam terms is governed by a body of law quite different in character from the law that applies to the sale

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<sup>6</sup> International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994), available at <http://www.unidroit.org/english/principles/chapter-1.htm> [hereinafter UNIDROIT Principles]. These are not contained in a treaty and are designed for multiple purposes, including a model law.

<sup>7</sup> See <http://www.cisg.law.pace.edu>.

of clothing items by an Italian fashion house to a German retail store.

### I. COMMODITY SALES AND ENGLISH LAW

For various reasons, some of them historical, English law plays a leading role as the governing law of international commodities sales.<sup>8</sup> The great majority of reported cases involve transactions and parties that have no physical connection at all with the United Kingdom. The leading role played by English law and by the rules and by-laws of the Liverpool Cotton Trading Association has been noted by Professor Bernstein in her study on cotton sales,<sup>9</sup> though cotton sales do not feature in the reported case law, which instead is concentrated heavily on grain and feedstuffs, with oil playing an increasing role in recent years.<sup>10</sup> A quite typical example of a transaction unconnected with England would be a sale, by an Argentinean seller to a Swiss buyer, of soya bean meal in bulk to be loaded in a Gulf of Mexico port on CIF Antwerp terms and paid for in cash against documents in U.S. dollars. The law reports will not declare the flag of the ship, but one can expect it to be one of the usual flags of convenience. The economics of shipping favor bulk cargoes destined for the handful of North European ports that are large enough to accommodate the bulk carriers (the so-called ARA ports of Amsterdam, Rotterdam and Antwerp), where cargoes can be broken up for transshipment to other destinations.<sup>11</sup> The concentration of cargo destinations favors the phenomenon of string trading, where multiple parties deal suc-

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<sup>8</sup> The major English commodities traders were long ago absorbed by multinational traders. Judging by the parties' names in cases reported in Lloyd's Law reports, the leading source of reported cases in this area, it will be very rare for a case to involve an English party.

<sup>9</sup> See generally Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*, in John M. Olin *Law & Economics Working Paper No 133* 2d Series 1-2 (The Law School, The University of Chicago), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_126-150/133.lb.cotton.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/133.lb.cotton.pdf), citing e-mail from Linda Mawdsley, Membership Manager, Liverpool Cotton Exchange, to author (Oct. 27, 1997).

<sup>10</sup> See generally MICHAEL G. BRIDGE, *THE INTERNATIONAL SALE OF GOODS* Chs. 4-5 (1999).

<sup>11</sup> Cargo quantities may be multiples of the carrying capacity of barges on the River Rhine. See *Andre & Cie. S.A. v. Tradax Export S.A.*, [1981] 2 Lloyd's Rep. 352, 354.

cessively with the same cargo, the success of which is dependent on uniformity of a sort.<sup>12</sup>

String trading is a product of speculative activity in that only the shipper and the end buyer have physical dealings with the goods. Intermediate parties deal only with documents and then only in the absence of a truncated delivery of the documents, where delivery is made directly to the end buyer and the documents are not handled at intervals in the string. Furthermore, intermediate contracts may be closed out for one or more reasons, so as to become financial differences contracts. In the world of stable oil prices that preceded the Arab-Israeli War of 1973, oil was commonly sold on spot terms in major centers such as Rotterdam. The conditions of shortage and price volatility that followed the war encouraged the development of forward trading and string contracts, which in the oil trade go under the name of daisy chains. Oil companies are keen to retain strategic freedom for as long as possible when determining the ultimate destination of oil cargoes, hence the practice of consigning cargoes to Gibraltar or other ports to await further orders,<sup>13</sup> and the practice of selling bulk cargoes on CIF "basis Rotterdam" terms, the expectation being that the vessel may be later ordered to discharge in a refinery away from Rotterdam.<sup>14</sup> Conditions in the oil trade are different from those in the dry commodities trade: cargoes are not dispatched to just a few destinations to be broken up for transshipment to other destinations. The use of "basis Rotterdam" clauses, however, concentrates the trade and encourages string trading activity.

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<sup>12</sup> It is often said of string contracts that they are identical save as to price (though it is also possible for the quantities to be different, as might occur where a trader splits a larger purchase contract to fulfill two resale contracts).

<sup>13</sup> In such a case, the seller (more accurately in string sales the head seller or shipper) will also be the charterer of the ship and therefore in a position to order the ship to a named port. For examples of the destination port being determined in mid-voyage, see generally *Mallozzi v. Carapelli S.A.*, [1976] 1 Lloyd's Rep. 407; *Gatol International Inc. v. Tradax Petroleum Ltd. (The Rio Sun)*, [1985] 1 Lloyd's Rep. 350.

<sup>14</sup> Oil contracts on CIF terms are focused on the arrival of the goods at the discharge port in a way that dry goods contracts are not, a distinction that would seem to be due to the lesser degree of flexibility in accommodating the discharge of oil cargoes, which dictates a need to know when the tanker will in fact present itself for unloading. For an example of the difficulty in calculating arrival times under "basis Rotterdam" contracts, see generally *P & O Oil Trading Ltd. v. Scanoil AB*, [1985] 1 Lloyd's Rep. 389.

Now, if string trading is regarded as beneficial and is to be encouraged, then it requires a uniform product. Grain and similar products do not roll out of nature's granary with the reliable quality of a BMW assembly line. They are dependent on conditions of sun, rain and soil. This means that a method must be found to classify them in a standard way. In the case of Canadian grain exports, this is done by the Canadian Grain Commission,<sup>15</sup> a department of the federal government. Canadian western red spring wheat, to take just one example, comes in three quality grades, the properties of each being described meticulously in an official guide.<sup>16</sup> There must also be a reliable source of supply, which means that forward trading in North American grain is much more likely than similar trading in Ukrainian grain (though that may change as the Ukraine rediscovers the market). In the oil market, Brent crude from the North Sea is a favored product for forward trading activity since it is produced in reliable quantities,<sup>17</sup> in a climate that is not too harsh, and in conditions of political stability.

String trading also requires a reliable standard form that can be used at all stages in the string. North American grain and soya is commonly dealt with on the standard forms issued by trading associations based in London, namely, Grain and Feed Trade Association (GAFTA) and Federation of Oil Seeds and Fats Associations (FOSFA). The standard forms have a lengthy pedigree and are constantly refined in the light of experience. Perhaps the most famous of these, the GAFTA 100 contract (bulk feeding stuffs *tailor made* on CIF terms), dates back more than 100 years.<sup>18</sup> The value of legal certainty in the shape

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<sup>15</sup> See generally Canada Grain Act, available at <http://www.cgc.ca>. Under the Canada Grain Act, R.S.C. 2000, the "Commission shall, in the interests of the grain producers, establish and maintain standards of quality for Canadian grain . . . to ensure a dependable commodity for domestic and export markets." Canada Grain Act § 13. To that end, it "shall, in furtherance of its objects, (a) recommend and establish grain grades and standards for those grades and implement a system of grading and inspection for Canadian grain to reflect adequately the quality of that grain and meet the need for efficient marketing in and outside Canada . . . ." *Id.*

<sup>16</sup> See Official Grain Grading Guide 4-26, § 14(1)(a) (Aug. 1, 2001), available at <http://www.cgc.ca/pubs/ggg/2001/04-wheat-e-2000.pdf>.

<sup>17</sup> See the account of the expert's report as discussed in Voest Alpine Intertrading GmbH v. Chevron International Oil Co Ltd., [1987] 2 Lloyd's Rep. 547.

<sup>18</sup> It used to be Form No. 1 of the Liverpool Corn Trading Association.

of a consistent line of decisions is obvious; likewise, the elevation of the standard form so that it performs a function not dissimilar to private legislation in a designated field of economic activity. Legal certainty is also enhanced by the rule that matters of interpretation are treated as raising issues of law so that the finding of a trial judge or an arbitrator may be overturned by an appellate court.<sup>19</sup> This is far removed from the attitude in some civilian jurisdictions that interpretation is a matter for the trial court's sovereign powers of assessment.<sup>20</sup>

Besides being more recent, string trading in crude oil – taking Brent Crude as an example (another important benchmark crude is West Texas Intermediate) — has been dominated by the forms published by the oil majors, BP and Shell. In the parallel futures market, the International Petroleum Exchange makes available a Brent Crude contract that serves as a hedging instrument and trading mechanism, and is designed to sit well with forward trading in the physical market.<sup>21</sup> It contemplates physical delivery but gives an option to settle in cash against the published settlement price on the day following the last trading day for the futures contract.<sup>22</sup> Given the market-driven activity of those dealing with physical commodities, and the latter's connection to the futures market, it is no small wonder that contractual discipline and certainty are the typifying features of English case law arising out of the sale of commodities, whether these are wet (oil) or dry (grain and soya).

Just as string trading needs a uniform physical product and a uniform standard form contract, so too it needs uniformity in choice of jurisdiction and choice of law. The standard

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<sup>19</sup> See *Andre & Cie. S.A. v. Tradax Export S.A.*, [1981] 2 Lloyd's Rep. 352, 354.

<sup>20</sup> For example, see the commentary to Article 1156 Code Civil (Dalloz) (intention of the parties a matter for the "juges du fond").

<sup>21</sup> Referring to the Brent Crude futures contract,

[i]t is tailored specifically to meet the oil industry's need for an international crude oil futures contract and is an integral part of the Brent pricing complex, which also includes spot and forward markets. The Brent pricing complex is used to price over 65% of the world's traded crude oil. The IPE Brent Crude futures contract is a deliverable contract based on EFP (exchange of futures for physical) delivery with an option to cash settle.

International Petroleum Exchange of London, Ltd., available at [http://www.ipe.uk.com/contracts/bcf\\_index.asp](http://www.ipe.uk.com/contracts/bcf_index.asp).

<sup>22</sup> See *id.*



GAFTA and FOSFA forms, for example, are firm in the selection of England and English law. According to the so-called domicile clause in GAFTA 100:

Buyers and Sellers agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there . . . and the Courts of England or Arbitrators appointed in England . . . shall . . . have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become . . . .<sup>23</sup>

The fiction of place of formation and domicile of parties is designed, however, implausible that fiction may be, to make the choice of English law binding despite the absence of any material connection of parties or contract to England.<sup>24</sup> In so doing, it is consistent with modern developments in choice of law and, in particular, with the Rome Convention on the Law Applicable to Contractual Obligations 1980,<sup>25</sup> to which the United Kingdom is a party. We are therefore left with identical contracts in string in which the only differentiating elements are the price and (sometimes) the quantity, the latter being dealt with in standard amounts that can be broken up into standard units for multiple buyers.

How then does the string come into being? Imagine first a multiplicity of bilateral contracts entered into at different times for a stated quantity of soya bean meal, shipment in a Gulf of Mexico port of the seller's choice in August on CIF Antwerp terms.<sup>26</sup> There will be many more contracts than there are available cargoes. A study some years ago found about nine

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<sup>23</sup> *Contract for Shipment of Feedingstuffs in Bulk No.100*, cl. 31 (THE GRAIN AND FEED TRADE ASS'N) (Effective Oct. 1, 1995) [hereinafter GAFTA 100].

<sup>24</sup> Prior to the Rome Convention on the Law Applicable to Contractual Obligations, which came into force in the UK with the Contracts (Law Applicable) Act 1990, English Law permitted a free choice of applicable law (as indeed does the Rome Convention, subject to certain limitations), but required that choice to be "bona fide and legal." See *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277.

<sup>25</sup> Rome Convention on the Law Applicable to Contractual Obligations 1980, June 19, 1980 O.J. (L266), available at <http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/> [hereinafter Rome Convention].

<sup>26</sup> The order in which the contracts are concluded by no means dictates the order in which they come in the string.

contracts for each cargo in the Brent market for FOB crude oil.<sup>27</sup> At first, nothing connects these different contracts but they can be fitted to the number of available physical cargoes by the notice of appropriation process, which permits traders to match their buying and selling commitments. Basically, a seller with a broad selling obligation of the type just stated gives a notice of appropriation, which identifies a particular cargo by reference to a bill of lading and thus locks the contract onto that cargo.<sup>28</sup> This notice is a pre-tender operation in that the tender of the shipping documents themselves occurs at a later date in line with the contents of the notice of appropriation.<sup>29</sup> This action is repeated by the buyer in turn in its character of seller to another party until a contractual sequence is created between the original shipper and the last buyer in string.

The string trading system generally functions well. It permits closing out arrangements in defined circumstances, which include the insolvency of an intermediate party in the string,<sup>30</sup> but it can occasionally come to grief, as it did when the United States Department of Commerce, as a result of flooding in the upper Mississippi Valley in spring 1973, issued a partial prohibition of export with certain exceptions.<sup>31</sup> The effect of this act of governmental intervention was to reduce shipments and prevent strings being formed by notices of appropriation. The result was described by an English judge as a "man-made disaster," with over fifty reported cases and one thousand arbitrations, all contributing to the invisible exports of the City of London.<sup>32</sup>

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<sup>27</sup> See generally *Voest Alpine Intertrading GmbH v. Chevron International Oil Co. Ltd.*, [1987] 2 Lloyd's Rep. 547.

<sup>28</sup> See GAFTA 100, *supra* note 23, at cl. 10.

<sup>29</sup> In effect, a notice of appropriation amounts to an offer to tender a particular cargo in fulfillment of the seller's more generic contractual obligation. See *Borrowman, Phillips and Co. v. Free & Hollis*, [1878-79] 2R4 Q.B.D. 500.

<sup>30</sup> See GAFTA 100, *supra* note 23, at cl. 30, "the contract shall be closed out at the market price ruling on the business day following the giving of the [insolvency] notice." *Id.* The insolvent party may, according to the market, profit from the contract.

<sup>31</sup> See generally Michael G. Bridge, *The 1973 Mississippi Floods: 'Force Majeure' and Prohibition of Export*, in *FORCE MAJEURE AND FRUSTRATION OF CONTRACT* 287, 287-303 (Ewan McKendrick ed., 2d. ed. 1995).

<sup>32</sup> *Tradax Export S.A. v. André & Cie. S.A.*, [1975] 2 Lloyd's Rep. 516, 526.

The commodities market is a highly speculative market and is dominated by major corporations able to withstand what are sometimes extreme movements in the market. Physical trading is unregulated. Rules that exist on derivatives and futures exchanges in relation to abusive behavior, such as market manipulation, and in relation to margin deposits<sup>33</sup> and mark-to-market calculations,<sup>34</sup> have no part to play in the forward (or physical) market. Nevertheless, a case can be made that the application of strict contractual standards, by way of both the general law and the standard trading terms themselves, perform a disciplinary function. This can be seen in the strict time protocols governing the passing on of notices of appropriation to constitute the sales string.<sup>35</sup> These must be done promptly (on the same day, but with some measure of latitude) in order to avoid manipulative behavior in the market as traders might otherwise delay passing on notices in order to secure the best possible match of purchase and resale commitments.<sup>36</sup> In addition, though each sale is a bilateral affair, the systemic integrity of the string as a whole is recognized by the burden placed on all traders, not only to pass on notices in time but also to guarantee that all prior parties too have passed on their notices in a timely fashion.<sup>37</sup> This is but one example of a contractual apparatus that is at times expressed in multilateral as well as bilateral terms.<sup>38</sup>

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<sup>33</sup> This is the security that has to be deposited in a margin account in the case of short sales and purchases on margin. In the former case, the seller will not yet have purchased what it is selling, and so will be vulnerable to a later upturn in the market; in the latter case, the purchaser has not yet paid for the investment, and so is vulnerable to a downturn in the market.

<sup>34</sup> Mark-to-market may be defined as the process of recording the price or value of an investment on a daily basis, in order to calculate profits and losses or to confirm that percentage margin requirements are being met.

<sup>35</sup> See generally *Société Italo-Belge v. Palm and Vegetable Oils Sdn. Bhd.* (The Post Chaser), [1981] 2 Lloyd's Rep. 695.

<sup>36</sup> See BRIDGE, *supra* note 10, paras. 5.36-37.

<sup>37</sup> See generally *Tradax Export S.A. v. André & Cie. S.A.*, [1977] 1 Lloyd's Rep. 484.

<sup>38</sup> An example of this is the so-called circle clause that applies if the same party appears more than once in the string brought about by the transmission of notices of appropriation. Instead of that party performing in the character of seller, only to receive performance as buyer at an interval later in the string, the intervening contracts are circled out prior to the date of performance and the parties to those contracts enter into bilateral settlements, treating their contracts purely as market difference contracts. A standard circle clause will require all

The strict approach of the general law is borne out by a few examples that show a disinclination on the part of English courts to question the motives behind the exercise of technical rights of contractual termination.<sup>39</sup> To that extent, the case law is hard to reconcile with general standards of good faith and fair conduct of the sort espoused in the Restatement Second of Contracts<sup>40</sup> and in the UNIDROIT Principles of International Contracts.<sup>41</sup> Also, it is not easy to reconcile such a strict approach with the general tendency in English law to infuse rules of law with substantial measures of judicial discretion,<sup>42</sup> a movement that is also plainly evident in the United States. Therefore, it is tempting to see international commodities sales law as distinctive in character from remaining sales and contract law.

Extensive rights of termination are based on the principle that important terms of the contract are promissory conditions<sup>43</sup> — an English usage that Samuel Williston rightly deplored<sup>44</sup> — such that any breach however slight gives rise to termination rights. They are most likely to be seen in the timely performance of obligations and in the tender of conforming documents under a CIF contract.<sup>45</sup> So, in one case, where the FOB buyer was four days late in giving the required 15 days' notice of readiness to load the ship, and the seller then terminated the contract, the crystal clear question facing the House of Lords was whether the seller had the right to do so, even though, on the facts, the buyer's breach did not generate

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parties to the succession of string contracts to cooperate with all other parties in identifying the existence of a circle. *See, e.g.*, GAFTA 100, *supra* note 23, at cl. 29. "[a]ll Sellers and Buyers shall give every assistance to ascertain the circle and when a circle shall have been ascertained in accordance with this clause same shall be binding on all parties to the circle . . ." *Id.*

<sup>39</sup> *See, e.g.*, *Cargill UK Ltd. v. Continental UK Ltd.*, [1989] 1 Lloyd's Rep. 193, affirmed [1989] 2 Lloyd's Rep. 290; *Richco International Ltd. v Bunge & Co Ltd.* (The "New Prosper"), [1991] 2 Lloyd's Rep. 93.

<sup>40</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

<sup>41</sup> UNIDROIT Principles, art. 1.7.

<sup>42</sup> *See* P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1249-50 (1980).

<sup>43</sup> The Sale of Goods Act 1979 exemplifies this approach. *See* Sale of Goods Act 1979, §§ 11-15.

<sup>44</sup> As the draftsman of the Uniform Sales Act 1906, he made sure that this usage was not ported into the United States. The 1906 Act avoids this terminology.

<sup>45</sup> *See* the failed attempt by the seller to contract out of this strict liability in *S.I.A.T. di Dal Ferro v. Tradax Overseas S.A.*, [1980] 1 Lloyd's Rep. 53.

serious factual consequences.<sup>46</sup> The court upheld the seller's right of termination and was keen to lay emphasis upon the systemic virtues of a law that laid down clearly the existence of termination rights.<sup>47</sup> The buyer and seller would know exactly where they stood in the event of breach and would not be faced with difficult issues of fact. They would not have to anticipate how a court or arbitrator might handle the matter, perhaps some years down the road and with the gift of hindsight. Lengthy trials and difficult issues of damages assessment could be avoided. Moreover, this strict approach in the commodities market could not be criticized as unduly pro-buyer or pro-seller. Traders in this market are both buyers and sellers, and indeed will have both capacities in relation to a particular cargo in string trading conditions. Clear-cut termination rights would also assist in the handling by traders of their multiple contractual commitments. One might add, too, that, if it is well known that a particular term of a standard form contract yields termination rights in all cases of breach, it reduces legal costs in a commercial milieu where the presence of lawyers is confined to a minimum.<sup>48</sup>

In the case of documentary performance under a CIF contract, deviations from the prescribed standard are not tolerated. The buyer is not expected to buy into litigation and cannot be called upon to accept documents that are commercially unsaleable to sub-buyers or unacceptable to banks providing letter of credit financing. This is the reason for the so-called clean documents rule. A famous English judge, in a case<sup>49</sup> where the bill of lading did not evidence liability on the part of the designated carrier for the whole of a voyage from a minor Norwegian port to Yokohama via Hamburg, said that the buyer was entitled to expect documents that were "fit to pass current in commerce."<sup>50</sup> It would not matter that the goods have arrived at the dis-

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<sup>46</sup> See generally *Bunge Corp. v. Tradax Export S.A.*, [1981] 2 Lloyd's Rep. 1.

<sup>47</sup> See *id.*

<sup>48</sup> Charterparty contracts and international sale agreements, even for large quantities, are not entered into with legal assistance. When major law firms specialize in these areas, it is within their litigation departments.

<sup>49</sup> See generally *Hansson v. Hamel & Horley Ltd.*, [1922] 2 A.C. 36 (Lord Sumner).

<sup>50</sup> *Id.* at 46.

charge port or have even been discharged in perfectly satisfactory condition.<sup>51</sup>

Occasionally, a decision will be handed down that looks quite shocking. One notorious example involves an FOB buyer of a quantity of Australian barley required to nominate a ship that could comply with all loading restrictions in all ports of the States of Victoria and South Australia.<sup>52</sup> The buyer nominated a ship that the seller rejected because it could not enter all ports.<sup>53</sup> Now, the seller had taken a short position in the market, which had unexpectedly risen and was looking for a technical escape from the contract.<sup>54</sup> When the buyer approached the shipper (the Australian Barley Board) directly, and was told that a cargo could be made available for the buyer's ship, the seller remained unmoved and was vindicated in subsequent proceedings.<sup>55</sup> FOB buyers conventionally choose the loading port. The difficulty in the present case arose because the Australian Barley Board was a monopoly exporter that wished to retain the strategic freedom to choose the loading port.<sup>56</sup> Consequently, the choice of port was given to the seller in the present contract.<sup>57</sup> The problem could have been dealt with by an amendment to the usual standard form but this had not yet happened. To the extent that the decision can be defended, it has to be in terms of the compelling merits of certainty, the ability of powerful operators in the market to exercise their own private sanctions in the face of egregious behavior, and the solution of problems of this kind by an amendment for the future of the standard form.

If one takes stock of English sales law, it is useful to start with the reasons that led some national governments to adopt the CISG. They saw the CISG as an instrument superior to their national sales laws for dealing with international sales transactions. Whatever one may think about the United Kingdom's curious failure to adopt the CISG – which I shall return

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<sup>51</sup> See generally *Orient Co. Ltd. v. Brekke & Howlid*, [1913] 1 K.B. 531.

<sup>52</sup> See generally *Richco International Ltd. v. Bunge & Co. Ltd.*, (*The "New Prosper"*) [1991] 2 Lloyd's Rep. 93.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

to later – it would be difficult to criticize English sales law on the ground of its unsuitability for handling international sales transactions. This is because in some respects it functions as a system that was designed for commodity sales, albeit sales that were much smaller in scale than those we are accustomed to seeing today. Furthermore, a number of statutory changes since our law was first codified have been made so as not to impinge upon the distinctive character of the commodity sales regime.<sup>58</sup>

The best example of English sales law as one designed for commodity sales comes in the rules dealing with damages assessment in the event of non-delivery by the seller (or non-acceptance by the buyer). In contrast with the rules in UCC Article 2 and in the CISG, which base assessment upon cover and resale transactions when these occur,<sup>59</sup> English law stays with a rule of damages assessment based upon the market prevailing at the due date of delivery and in principle ignores such transactions.<sup>60</sup> Suppose a seller fails to deliver on the agreed date of July 1 and the buyer terminates the contract on July 4. Apart from unusual cases, damages will be assessed according to the market on July 1, regardless of whether it was reasonable for the buyer to delay termination and regardless of the time it might take a buyer to make a substitute purchase. Indeed, the buyer is not required to enter into a substitute purchase at all and can treat the contract as one for the payment of financial differences. The approach to damages is an abstract one, based on a notional or fictitious substitute transaction that could have been entered into on the due date of performance, or on the steps the buyer could have taken in advance to hedge the transaction so as to protect itself against the consequences of the seller's breach.

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<sup>58</sup> See, e.g., Sale of Goods Act 1979, §15A (as added by the Sale and Supply of Goods Act 1994), which, in introducing restrictions on the rights to reject goods where a breach of condition has only slight consequences, does not apply these restrictions to cases of late performance and documentary discrepancies, which are the very areas in international sales where the assertion of technical rights is most manifest.

<sup>59</sup> See U.C.C. arts 2-706(1), 712(1); CISG art 75.

<sup>60</sup> See *Shearson Lehman Hutton Inc. v. MacLaine Watson & Co Ltd.* (No. 2), [1990] 3 All ER 723, 730.

The need to make separate provision for commodity sales despite changes in English sales law, influenced at least in part by the consumerist movement, is evidenced by the limitations placed upon a recent statutory incursion into the buyer's right to terminate for breach of a promissory condition.<sup>61</sup> In the case of conditions that concern the description, quality and fitness of goods, termination by the buyer in a commercial sale is now disallowed if the breach is so slight that it would be unreasonable to terminate. For the most part, matters of description, fitness, and quality are dealt with in commodity sales so that the buyer is bound to take the goods anyway but with a price rebate. The statutory reform stops short, however, of dealing with time and documentary obligations, which are precisely those obligations where decisions to terminate are made for strategic or opportunistic reasons. Commodity sales are thus ring-fenced from statutory change.

A consideration of the CISG reveals a contractual philosophy that is at odds with the commodity sales world I have portrayed. The avoidance of contracts for fundamental breach — a test both demanding and indeterminate — is a world away from opportunistic termination for breach of a promissory condition. The entitlement of sellers to cure defective performance exhibits a philosophy of contractual continuance as well as the avoidance of waste that might otherwise be caused by easily acquired rights of avoidance. There is, admittedly, an entitlement to serve notices on a defaulting party, making time of the essence of the contract, but this is far from the hair trigger rights of termination for late delivery in a commodity sale governed by English law. The instruction to tribunals to interpret the rules of the CISG in accordance with good faith contains latent scope for locking the parties even further into the contract. There is also displayed, in the rules concerning the incidence of risk, an almost total lack of understanding of the realities of bulk shipment and marine insurance.

In light of these considerations, it is no small wonder that every commodities sales form and oil company's standard terms that I have seen expressly excludes the operation of the CISG, which the CISG on its own terms permits contracting parties to

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<sup>61</sup> See Sale of Goods Act 1979, §15A.



do. From the point of view of commodities traders, additional virtues of the existing English system include the certainty, the system and the consistency that over a century of experience provides. One of the drawbacks of any new law is the uncertainty of its application and its tendency to feed litigation. There is no reason to suppose that commodities traders do not know what they really want and that, if they gave the CISG time to bed down, they would appreciate its merits in due time. That would be arrogant and unjustifiable.

A part of the success of the CISG lies in its adoption by (at the last count) sixty-three States. The CISG has also been transposed into Norwegian law as part of a fused instrument applicable to both domestic and international sales.<sup>62</sup> Adopting States include the major trading nations with the exception of Japan and the United Kingdom. The attitude of the United Kingdom is difficult to explain. The country took a leading role in the development of the CISG, and in its predecessor, the Uniform Law on International Sales (ULIS).<sup>63</sup> The CISG does not adversely affect the interests of commodity traders, since they are permitted to exclude it and have done so for a number of years.<sup>64</sup> To that extent, the CISG poses no threat to the provision of legal services in the City of London as parties opt for ICC arbitration in Paris instead. There is no reason to suppose that English law is any better than the CISG in handling those international sales that do not concern commodities. My own view, based on a close comparison of the two bodies of law, is that the CISG would better suit the small-scale importer or exporter, or the buyer and seller of manufactured goods.

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<sup>62</sup> See Norwegian Sale of Goods Act 1988, § 5(1) and ch. XV, available at <http://www.jus.uio.no/lm/norway.sog.act.1988/doc.html>.

<sup>63</sup> Convention Relating to a Uniform Law on International Sale of Goods, July 1, 1964, available at <http://www.unidroit.org/english/conventions/c-ulis.htm> [hereinafter ULIS]. The ULIS was incorporated in English law by the Uniform Laws on International Sales Act 1967.

<sup>64</sup> The following example is to be found in GAFTA 100, *supra* note 23, at cl. 33: "International Conventions[:] The following shall not apply to this contract: — (a) the Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967; (b) the United Nations Convention on Contracts for the International Sale of Goods of 1980; and (c) the United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and the amending Protocol of 1980."

Like so many other aspects of law reform in England, it comes down to priorities in the matter of legislative time and a lack of political will. To depart for the moment from sales law, there is some reason to suppose that current support by the Department of Trade and Industry for a radical reform of the law of company charges, along the lines of the Article 9 system of notice filing, is inspired by fears that the current law may offend that part of the European Convention on Human Rights dealing with the protection of property rights.<sup>65</sup> It is hard for a rational lawyer to see anything in this, but it is indicative of the sorts of capricious currents and movements that tip the balance in governmental decision-making. A story is told of an unnamed senior civil servant that, if exporters and importers were to stage a demonstration in Whitehall in favor of the CISG, the government would take the matter seriously. That conjures up strange visions of chanting demonstrators — “What do we want? We want the CISG. When do we want it? We want it now.”

What the government, of course, does not recognize is that United Kingdom merchants are already exposed to the CISG for reasons I shall bring out in a moment. What the government might fail to appreciate is that elements of the CISG are already being inserted into the fabric of English sales law indirectly by way of European directives dealing with consumer sales law.<sup>66</sup> What government might fail to foresee is that the recent announcement by the European Commission of a Communication on European Contract Law,<sup>67</sup> one of whose possible outcomes is a Pan-European contract code, may lead to a body of law inspired by the CISG supplanting altogether English contract and sales law. If this were to happen, commodity traders would not have a sort of “legacy English law” to turn to when

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<sup>65</sup> This concern has emerged in the consultation process.

<sup>66</sup> The EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees contains provisions “requiring” certain acts by the seller, and provisions on price reduction that are features of civilian systems and also found in the CISG. See Article 3 of the EC Directive, *available at* [http://www.dti.gov.uk/cacp/ca/constitution/sle\\_of\\_goods.htm](http://www.dti.gov.uk/cacp/ca/constitution/sle_of_goods.htm).

<sup>67</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law, Doc No 10996/01(July 2001), *available at* <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldselect/lddeucom/72/7202.htm>.

selecting a governing law via the choice of law process.<sup>68</sup> English law would cease to exist.

## II. THE CISG AND UNIFORM LAW

Commodities traders whose contracts are governed by English law have opted for a system of sales law resting upon a bedrock of private law. English sales law, in the same way as Article 2 of the UCC, permits an easy reference to this body of law at the outer limits of sales law.<sup>69</sup> This process of course is not available in the case of international uniform law, especially when the process begins with the special law of sale rather than the general law of contract. It is tempting to imagine the CISG as an autarkic body of uniform law, floating free in some sort of international ether. I shall attempt later to dispel this vision, though it has to be confessed that the CISG is less "rooted" than Article 2.<sup>70</sup> Before dealing with the efforts of lawyers and tribunals to deal with the relative rootlessness of the CISG, we should explore its development and its principal features.

The 1980 Diplomatic Conference in Vienna that produced the CISG was the outcome of twelve years of preparation, which took as the starting point the previous failed Hague Conventions of 1964 on sales formation (ULF) and sales substantive law (ULIS). These in turn were the outcome of efforts, interrupted by the Second World War that stemmed from the pioneering work of the great German jurist, Rabel.<sup>71</sup> The Hague Conventions failed — not because of internal deficiencies, though there were some — but because of a lack of involvement on the part of the developing world, the socialist economies of eastern Europe, and the United States. It is an exercise in futil-

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<sup>68</sup> The better view is that the Rome Convention, implemented in English law by the Contracts (Applicable Law) Act 1990, ch. 36, permits the application of only a living system of law. By that account, a choice of Roman law by the parties would be unacceptable. The Rome Convention and the Contracts (Applicable Law) Act 1990, ch. 36 are both available at [http://www.legislation.hms.gov.uk/acts/acts1990/Ukpga\\_19900036\\_en\\_1.htm#end](http://www.legislation.hms.gov.uk/acts/acts1990/Ukpga_19900036_en_1.htm#end).

<sup>69</sup> See Sale of Goods Act 1979, § 62(2) (permits supplementary references to the rules of the common law so far as these are not inconsistent with the provisions of the Act).

<sup>70</sup> See, e.g., U.C.C. art. 1-103 (which permits a reference to supplementary principles of law and equity).

<sup>71</sup> See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1980 (CISG) 1 (1998).

ity to sell uniform law to a non-participating world. States must be active participants in the uniformity process, delegates must absorb the spirit of collegiality, and States and their delegates must feel a sense of ownership of the product. All of these requirements were met in full by the CISG.<sup>72</sup>

There are broadly two ways in which a uniform sales instrument might be seen to have an autarkic character. First, its application might depend upon criteria that do not involve a reference to the forum State's rules of private international law. Secondly, its provisions might be self-contained and involve no reference to any other body of law playing a supplementary role. It is my contention that, in both of these respects, the CISG lacks the character of an autarkic instrument.

Taking first the circumstances in which the CISG applies, these were settled only during the committee proceedings held during the Diplomatic Conference in 1980 and as a result of combining proposed Italian and Bulgarian amendments.<sup>73</sup> The ULIS had based its own application on the cross-border dispersal of contract formation or contract performance.<sup>74</sup> In consequence, this so-called "universalist" law could be applied regardless of the residence or nationality of the parties. It might even be applied if the parties had selected a particular governing law, were it not for the parties being free in whole or in part to opt out of ULIS,<sup>75</sup> as indeed they are free to do under the CISG.<sup>76</sup> ULIS could therefore apply "accidentally" by virtue of a matter being litigated in the courts of a Contracting State and to the surprise of the contracting parties. A further characteristic of ULIS was its rigorous eschewal of private international law for the purposes of its own application.<sup>77</sup>

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<sup>72</sup> Representatives of sixty-two states and eight international organizations assembled in Vienna in 1980 on the occasion of the diplomatic conference.

<sup>73</sup> The various proceedings leading up to the signing of the CISG are to be found in JOHN HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* 476, 679 (1989). They were compiled from the relevant volumes of the UNCITRAL Yearbooks and the Official Records of the 1980 Diplomatic Conference in Vienna. The proceedings are also available at <http://www.cisg.law.pace.edu/cisg/conference.html>.

<sup>74</sup> See ULIS art. 1(1).

<sup>75</sup> See ULIS art. 3.

<sup>76</sup> See CISG art. 6.

<sup>77</sup> See ULIS art. 2.

In contrast with ULIS, the CISG applies without any reference to cross-border formation or performance. The parties must either be resident in different Contracting States (route 1);<sup>78</sup> or else they must be resident in different States with the rules of private international law leading to the law of a Contracting State (route 2).<sup>79</sup> It is under route 2 that parties before an English court might find themselves "bound" in their contractual dealings by the CISG. This might occur, not as a matter of treaty obligation but pursuant to the normal choice of law process in an English court, as where English choice of law rules lead to the law of a State whose courts would apply the CISG under route 1.<sup>80</sup> The rules of private international law referred to in route 2 can only be those of the forum State and the CISG itself. The rules, when applicable by this second route, would seem to be part of the law of the Contracting State, to the extent of its supplanting that State's domestic law of sale and its private international law rules. An alternative view, which has some attractions, would treat the forum State's duty to apply the CISG as supplanting the forum State's choice of law process, so that the CISG is applied as part of the *lex fori*. Be that as it may, a few States, including the United States, have made a declaration<sup>81</sup> that they will not apply the CISG

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<sup>78</sup> See CISG art. 1(1)(a).

<sup>79</sup> See *id.* art. 1(1)(b).

<sup>80</sup> Suppose that English choice of law rules, taken from the Rome Convention, lead to French law in a case where the seller is resident in France and the buyer in Germany. France and Germany have both adopted the CISG. The question that arises is, What do we mean by "French law"? The Rome Convention forbids recourse to the doctrine of *renvoi* (art. 15) but, it is submitted, the application of the CISG as French law would not involve *renvoi*. The reason is that the CISG has been absorbed within French law, where it operates to deal with international sales contracts as defined by the CISG, where it works in parallel with the rules of the Code civil, which apply only to all other sales contracts. The CISG in French law therefore supersedes such French domestic law and private international rules as had previously occupied the same space. Suppose, however, that the English court's choice of law rules lead it to French law in a case where the seller is French but the buyer is resident in Portugal (Portugal not being a Contracting State). Suppose further that the French courts would also apply French law as the applicable law of the sales contract (this should be the case since France is a party to the Rome Convention). If the English courts then applied the CISG, on the ground that a French court in those circumstances would apply the CISG (pursuant to route 2 as opposed to route 1), it is submitted that the English courts would be invoking the doctrine of *renvoi* in a way that offends Article 15 of the Rome Convention.

<sup>81</sup> As they are permitted to do by Article 95 of the CISG.

where it can only be applied by way of route 2.<sup>82</sup> This declaration apart, private international law plays a considerable part - though a diminishing part with the increasing adherence of Contracting States - in the application of the CISG.

The second way in which an instrument like the CISG might be autarkic concerns its relationship to other bodies of rules or legal systems. This matter breaks down into two parts. The more obvious concerns the body of private law, including contract, on which the CISG "sits." Less obvious is the body of law that might be drawn upon to fill gaps in the sales provisions of the uniform instrument. Unlike, say, the UK Sale of Goods Act 1979,<sup>83</sup> the CISG cannot draw upon a pre-codification body of case law to fill gaps, though the presence of gaps obviously diminishes over time with the build-up of reported cases and arbitral decisions. Akin to the filling of gaps is the process of interpreting the CISG,<sup>84</sup> which lacks the sort of legal culture that absorbs new legislation in domestic systems. It is instructive to look first at the processes of interpretation and gap-filling, starting first with interpretation.

There is of course no international commercial court charged with the settlement of private parties' disputes under uniform law and no realistic possibility of such a court being created. UNCITRAL does not provide a supra-national judicial authority to which national courts are by treaty-bound to defer. For the international community at large, there is nothing corresponding to the role played by the European Court of Justice (ECJ) in matters of uniform law within the European Union.<sup>85</sup>

It is worth noting, however, the range of possibilities between the binding decisions of a supranational court and unfettered interpretation by national courts and arbitral tribunals. Let us take as an example the Brussels on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

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<sup>82</sup> The other States are China, the Czech Republic, and Slovakia. Germany has declared that it will respect the Article 95 declarations of these States.

<sup>83</sup> See generally Sale of Goods Act 1979.

<sup>84</sup> The filling of gaps is dealt with by Article 7(2) of the CISG and interpretation by Article 7(1).

<sup>85</sup> See, e.g., Treaty on European Union art. 234, 1992 O.J. (C 191) (regarding the reference procedure).

1968.<sup>86</sup> As the 1971 Protocol to the Convention makes plain, and as implementing UK legislation (the Civil Jurisdiction and Judgments Act 1982) confirms, questions of interpretation may, like any other matter of European Community law, be referred directly by the national court to the ECJ under the now familiar procedure.<sup>87</sup> In addition, there is a requirement that such questions be determined by national courts according to principles laid down in relevant decisions of the ECJ.<sup>88</sup> Furthermore, judicial notice must be taken of relevant decisions or even expressions of opinions by the ECJ.<sup>89</sup> The same system has been created for choice of law under the Rome Convention on the Law Applicable to Contractual Obligations,<sup>90</sup> though it has not yet come into force.

The Lugano Convention 1988<sup>91</sup> extended the scheme of the Brussels Convention to European Free Trade Association (EFTA) States minus the paramount position of the ECJ. In Protocol No. 2 to the Lugano Convention, there is no treaty obligation to defer to the case law of the ECJ, still less to refer questions of interpretation to it.<sup>92</sup> But there is an obligation on national courts to "pay due account to the principles laid down by any relevant provision delivered by courts of the other Contracting States."<sup>93</sup> In addition, there is a treaty obligation to deliver details of certain judgments to a central body for the purpose of classification by that body and dissemination of the information to national authorities and to the European Commission.<sup>94</sup> The judgments in question include decisions of the ECJ and of national courts of last instance as well as final judgments of particular importance.

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<sup>86</sup> EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968, *available at* <http://www.jus.uio.no/lm/ec.jurisdiction.enforcement.judgements.civil.commercial.matters.convention.brussels.1968/doc.html>.

<sup>87</sup> See Treaty on European Union, art. 234.

<sup>88</sup> See Civil Jurisdiction and Judgments Act 1982, § 3(1).

<sup>89</sup> See *id.* § 3(2).

<sup>90</sup> See, e.g., Contracts (Applicable Law) Act 1990, §§ 1 and 3 and the Brussels Protocol 1988.

<sup>91</sup> It is scheduled to the Civil Jurisdiction and Judgments Act 1982 by a later amendment. See Civil Jurisdiction and Judgments Act 1982, Schedule 3C.

<sup>92</sup> See Lugano Convention 1988, Protocol no.2, *available at* <http://www.ius.no/lm/ec.efta.jurisdiction.enforcement.judgments>.

<sup>93</sup> Lugano Convention 1988, Protocol no.2, art. 1.

<sup>94</sup> See Lugano Convention 1988, Protocol no.2, art. 2.

The Lugano approach cannot guarantee the same uniformity of interpretation by national courts as that provided under the Brussels Convention. It does, however, go somewhat beyond typical international uniform legislation. Taking the CISG as an example, there is nothing corresponding to the Lugano Protocol no. 2. But outside the CISG itself, UNCITRAL deals with national correspondents who send in details of significant national decisions. These are published in an abbreviated and cross-referenced form and published under the label of CLOUT (Case Law on UNCITRAL Texts). So far, the service has focused mainly on the CISG with some additional cases on the Model Arbitration Law and the Hamburg Rules 1978 (dealing with carriers' liability). It is available on the internet<sup>95</sup> and is a most useful service, but it is a long way from the compulsion that promotes the uniform interpretation of the Brussels Convention in EU courts. It is, however, better than nothing. More useful still is the exercise, in which Queen Mary College of London University and Pace University Law School play a prominent role, namely, the translation of the full reports of cases and arbitral tribunals into English, which has become the *lingua franca* of the uniform law movement.<sup>96</sup> Nevertheless, until certain national courts assume a responsibility for introducing rhetorical persuasion and pedagogy into their decisions, those decisions may, like poor wine, travel badly across national frontiers.<sup>97</sup> Moreover, to date, there has been a noticeable unwillingness for national courts to cite decisions on the CISG handed down by courts and tribunals in other countries. This all adds up to a failure to come to terms with the obligation of courts in Article 7(1) of the CISG: "In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application . . . ." The impact of the recent work done by the translation service has yet to be felt but there is cause to hope that it will have a significant effect over time.

It is not only case law that has a part to play in the uniform international interpretation of the CISG. Academic literature

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<sup>95</sup> See <http://www.uncitral.org>.

<sup>96</sup> See <http://www.cisg.law.pace.edu>.

<sup>97</sup> See generally C Witz, *Droit uniforme de la vente internationale des marchandises* D.1998.Somm.307.



may not amount to a formal source of law, and indeed is not referred to explicitly in Article 7(1), but it is certainly influential and will continue to be so. The literature on the CISG is already voluminous — the number of books must run to dozens by now and there are many hundreds of articles on the subject.<sup>98</sup> The cause of the international uniform integrity of the CISG has been taken up in a major way in the academic literature. Academic writings have a part to play in building up the legal culture surrounding the CISG if only because academics have more time to reflect than practitioners engaged in the rush of litigation. Academic lawyers therefore have a particular responsibility to promote the uniform application of the CISG.

It is immensely difficult to coin international uniform law that is free from national bias. Indeed, since the process of uniformity often entails selecting the best from a range of competing ideas and solutions — new legal ideas are very rare — it is impossible to efface national experience. The skill lies in being able to stand outside one's national legal culture when applying the CISG. The architects of the CISG were keen to emancipate it as far as they could from national legal culture. One method was to invent new terminology. For example, one of the key concepts of a sales law — delivery — is deliberately downplayed in the CISG, giving way at certain points to the inelegant expression “hand over.”<sup>99</sup> (A difficulty that cropped up with the CISG's predecessor — ULIS — concerned the domestic connotations in French law of the translation of “delivery,” namely “*délivrance*.”) But judges are only human. A review of German cases, dealing with the requirement in Article 39 that a buyer give notice to the seller of any defect in the goods, shows that the German judiciary has imported from German domestic law the strict attributes of notice.<sup>100</sup> Again, the concept of fitness for purpose lies at the heart of Article 35, which deals with the quality of the goods that the seller is bound to supply. There is a danger that English judges, who have a very extensive experi-

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<sup>98</sup> See the extensive list at <http://www.cisg.law.pace.edu>.

<sup>99</sup> See the way that the language of the CISG shifts between the two in Articles 30-34.

<sup>100</sup> The Case Law on UNCITRAL Texts (CLOUT) service now, helpfully, gathers cases according to both country and the particular Article that is the subject of the litigation.

ence of the concept (going back to at least 1829),<sup>101</sup> would, if the UK adopted the Convention, simply apply that experience without considering the Convention as a whole and the role that fitness for purpose plays in it. Similarly, Article 35 requires the seller to supply goods of the contractual description. One hopes that English courts would not be beguiled by the technicalities of description in English law and would recognize its distorted character in English law as founded upon an idiosyncratic national experience.<sup>102</sup>

Article 7(1) of the CISG goes on to require courts and tribunals when interpreting the CISG to have regard to the observance of good faith in international trade. Like Sherlock Holmes' dog that did not bark in the night,<sup>103</sup> this provision is above all noteworthy for what it does *not* say. It does not impose a general duty of good faith and fair dealing in the formation and performance of contracts, which was objected to by some representatives in the course of the 1980 Vienna Diplomatic Conference.<sup>104</sup> Rather, it is a compromise between the rejectionists and those who wanted to see some mention of good faith in the Convention. How any court is meant to read this provision is a mystery. It might be argued that there is no difference between a duty of good faith resting on the parties and a rule that their rights and duties should be interpreted according to the standard of good faith. According to this proposition, parties derive their contractual rights and duties ultimately from the Convention so that, if the Convention has to be interpreted in accordance with good faith, this means that the parties' rights and duties take their character from this good faith interpretation of the Convention.<sup>105</sup>

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<sup>101</sup> See generally *Jones v. Bright*, [1829] 5 Bing 533. See generally MICHAEL G. BRIDGE, *THE SALE OF GOODS* ch. 7 (1997).

<sup>102</sup> See generally BRIDGE, *supra* note 11, at ch. 7.

<sup>103</sup> See generally Sir Arthur Conan Doyle, *Silver Blaze*, at [http://www.obtuse.com/juniper-docs/misc/silver\\_blaze.html](http://www.obtuse.com/juniper-docs/misc/silver_blaze.html).

<sup>104</sup> See, e.g., the Summary Records of the Meetings of the First Committee (5th meeting, Mar. 13, 1980), available at <http://www.cisg.law.pace.edu>.

<sup>105</sup> Schlechtriem asserts that art. 7(1) is not confined to the interpretation of the CISG's express rules. See SCHLECHTRIEM, *supra* note 71, at 63. This may seem a debatable proposition, but note the way the Convention lays duties on the parties to abide by the terms of the contract (see, among other provisions, Articles 30 and 53), thus incorporating those contractual duties by reference into the Convention. Taking now the case of a right expressly laid down by the Convention, a seller has

It is predictable that some national courts will interpret this provision, which raises difficult issues of interpretation, more expansively than others. Nevertheless, given that an explicit standard of good faith and fair dealing was rejected by the conference delegates, does this mean that the standard itself was rejected as a general principle or only that express mention of the standard was rejected? It may be possible to bring good faith into the CISG by means of the gap-filling provision in Article 7(2) as a general principle upon which the Convention is based.<sup>106</sup>

Perhaps the most difficult matter arising out of the incorporation of uniform law in a national system of law is knowing how to fill out the gaps in its provisions. In the case of national legislation, there is a developed tradition of case law, doctrinal writing, similar legislation, and shared understandings to which resort can be had. But uniform law has no hinterland. What is a court to do when filling gaps? The danger is that the uniform law will be overwhelmed by national culture in national courts.<sup>107</sup> It is for this reason that uniform laws contain interpretation rules, which are amongst the most important of their provisions. According to Article 7(2) of the CISG:

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.

In a common law system like English law, courts have not always been too concerned to clarify whether they are working within the text of a statute like the Sale of Goods Act or within

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a right to make time of the essence of the contract so that the buyer's failure to pay within the reasonable time spelt out in the seller's notice entitles the seller to avoid the contract even in the absence of a fundamental breach of contract (see Articles 63 and 64(1)(b)). Suppose now that the seller's motive is to escape from a contract that has now become disadvantageous because of a rising market. What does it mean to say that Articles 63 and 64(1)(b) are to be interpreted in accordance with good faith? That the seller's exercise of its Convention right to make time of the essence should not be corrupted by an impure motive?

<sup>106</sup> See SCHLECHTRIEM, *supra* note 71, at 65.

<sup>107</sup> If such were to happen, then fresh impetus would be given to the choice of law process as there might arise a choice between different national "brands" of the same uniform law.

the body of uncoded common law.<sup>108</sup> Such a lack of concern is impossible in the case of the CISG. There is no authoritative international commercial common law, despite attempts by jurists to conjure up a new *lex mercatoria*. Moreover, the comparative brevity of the time scale leading to the diplomatic conference at which the Convention was signed dictated a number of omissions from the text of the final act. The CISG excludes issues of contractual validity<sup>109</sup> and there are gaps in its coverage of certain issues. For example, it deals fully with issues of damages<sup>110</sup> but does not specifically mention penalty and liquidated damages clauses. It permits the award of interest on late payment<sup>111</sup> but gives no practical guidance on its calculation.<sup>112</sup> It deals with fundamental breach<sup>113</sup> but in less detail than one might have wanted.<sup>114</sup>

The reference in Article 7(2) to the general principles on which the CISG is based has a stronger resonance for civil lawyers than for common lawyers. In the case of a comprehensive code, the answer to problems will always be found within the code even if no text explicitly speaks to the problem. Common lawyers, whilst conceding that statutes are supreme as a source of law, nevertheless still regard them as in derogation from the common law, which in principle is comprehensive, and so interpret them in a restrictive way.<sup>115</sup>

To find the general principles in a code requires its various provisions to be subjected to an inductive process that sees them as examples of a more general principle. It is a creative and necessarily subjective process. This general principle can then be applied to deal with the novel case not explicitly dealt

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<sup>108</sup> This is because there will be a statutory outlet to compatible common law which, in any case, will often be forged along the same lines as the statutory text: see section 62(2) of the UK Sale of Goods Act 1979 and *Young; Marten Ltd. v. McManus Childs Ltd.*, [1969] 1 A.C. 454.

<sup>109</sup> See CISG art. 4(a).

<sup>110</sup> See CISG arts. 74-77.

<sup>111</sup> See CISG art. 78.

<sup>112</sup> It does not mention the rate or the starting date or whether it is simple or compound.

<sup>113</sup> See CISG art. 25.

<sup>114</sup> Consider the added detail in the UNIDROIT Principles, art. 7.3.1 (fundamental non-performance).

<sup>115</sup> For a particularly strong version of this, see *Minet v. Leman*, [1855] 20 Beav. 269, 278 (Romilly MR), cited in *National Assistance Board v. Wilkinson*, [1952] 2 Q.B. 648, 659.

with in the code. The very subjectivity of this process lends itself to dissonance and to the compromising of that uniformity, which is expressed in the CISG. Nevertheless, it is preferable to the alternative, which almost as a counsel of despair invokes the governing law found by means of the choice of law process to deal with sales matters that are not expressly resolved in the CISG.<sup>116</sup> If courts and tribunals are to be criticized for their accomplishments to date, it is above all on the ground that they have been too willing to invoke private international law<sup>117</sup> and insufficiently creative in discovering general principles in the text of the CISG.

In Article 7(2), there is of course no reference to the UNIDROIT Principles of International Commercial Contracts. Work on them did not start until the conclusion of the 1980 Diplomatic Conference that produced the CISG. The UNIDROIT Principles have the great merit that they can assist in correcting one of the major deficiencies of the CISG, that it can be changed only through the medium of a diplomatic conference and has no equivalent to the constant editorial work provided for the American Uniform Commercial Code. The UNIDROIT Principles are capable of editorial alteration from time to time because, to the extent that they serve as a contract law, they are only a model law. Moreover, they serve other purposes as well. The format of the Principles is akin to that of the Uniform Commercial Code, with hypothetical illustrations and comment attached to each article, which for many represents the preferred medium for international or regional uniformity, superior to the restricted and enclosed world of the code. A reference to the Principles can be a useful guide in the search for immanent general principles in the CISG, so long as the Principles do not conflict with the provisions of the CISG. The Principles might also be invoked to assist in the international interpretation of the CISG under Article 7(1).

It is to repair the deficiency of an underlying common law that the UNIDROIT Principles could prove most useful. But a difficult issue concerns the legitimacy of these Principles under the CISG, since they were adopted by a rigorous process that

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<sup>116</sup> See CISG art. 7(2).

<sup>117</sup> This is particularly evident in the case of judgments and awards applying Article 78 (see cases cited in the CLOUT service).

looked to the merits rather than the cross-border popularity of individual rules.<sup>118</sup> This prevents them from being applied in their totality as usage under Article 9(2); indeed, some rules, such as those dealing with methods of payment,<sup>119</sup> are more suitably treated as matters of usage than others, such as those dealing with the definition of fundamental non-performance. The system of qualitative choice that went into the drafting of the Principles makes it impossible to see them as extant but uncodified at the time the CISG was concluded and so forming the basis of the CISG. They are nevertheless useful as complements to the CISG, and nice points of legitimacy and chronology are unlikely to stand in their way if it is expedient for a court or arbitrator to invoke them.<sup>120</sup> The UNIDROIT Principles were not expressly designed to be incorporated as legislation in national legal systems. Rather, they were designed to assist arbitrators and courts empowered or competent to settle disputes *ex aequo et bono* or in accordance with general principles, the *lex mercatoria* or some other formula of this type.<sup>121</sup>

This leads on to the question whether astute contracting parties might select them as the governing contract law to supplement the CISG in those cases where the CISG is applicable. (The same question arises in connection with the CISG itself in those cases where it would not be applicable according to its own terms.) This is very much a matter for national legal systems. Taking English law as an example, it is plain that such clauses are permissible in arbitration agreements. Under our Arbitration Act 1996, an arbitrator may decide a dispute either “in accordance with the law chosen by the parties as applicable to the substance of the dispute” or (emphasis added) “in accordance with such other considerations as are agreed by them or determined by the tribunal.”<sup>122</sup> In one pre-1996 case, a senior

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<sup>118</sup> See Introduction by the UNIDROIT Governing Council to the published version, *Principles of International Commercial Contracts* (Rome 1994), vii: “Since . . . the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they . . . embody what are perceived to be the best solutions, even if still not generally adopted.”

<sup>119</sup> See UNIDROIT Principles, arts 6.1.7 - 10.

<sup>120</sup> For example, they have been cited in the following CISG cases: ICC Arbitrations Cases No 9117 (March 1998) and 9333 (October 1998); Austrian Arbitral Tribunal SCH-4318(Vienna) (15 June 1994).

<sup>121</sup> See UNIDROIT Principles, pmbl.

<sup>122</sup> Arbitration Act 1996 §46(1).

judge, Donaldson MR, upheld an arbitral award conducted on the basis of "internationally accepted principles of law governing contractual relations."<sup>123</sup> The arbitration had been conducted according to the ICC Rules, which in Article 13(3) enable parties to "determine the law to be applied by the arbitrator."<sup>124</sup> In the absence of such choice, the arbitrator was to "apply the law . . . by the rule of conflict which he deems appropriate."<sup>125</sup> This reasoning should support the applicability of the UNIDROIT Principles as the chosen applicable law of the contract.

Where there is no arbitration agreement, the position is not so clear. The Rome Convention 1980, which does not apply to arbitration agreements,<sup>126</sup> allows the parties to choose "the law" to govern the contract<sup>127</sup> and goes on to refer to the parties having chosen "a foreign law."<sup>128</sup> It then makes provision for the law that is applicable in the absence of such choice.<sup>129</sup> Must it be a territorially-based law that is chosen? One argument is that, if the Arbitration Act had to spell out the possibility of a non-territorial system, the absence of a similar formula from the Rome Convention is fatal. The Inter-American Convention of 1994 (Mexico City) has a provision similar to Article 3.1 of Rome<sup>130</sup> but also calls for the application of customs of international law in accordance with the dictates of justice.<sup>131</sup> This formula could open the door to a sympathetic court to apply a

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<sup>123</sup> *Deutsche Schachtbau v. Ras Al Khaimah National Oil Co.*, [1987] 2 Lloyd's Rep. 246, 251.

<sup>124</sup> I.C.C. Rule 13(3).

<sup>125</sup> *Id.*

<sup>126</sup> Rome Convention, art. 1.2(d).

<sup>127</sup> Rome Convention, art.3.1: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

<sup>128</sup> *Id.* art. 3.3.

<sup>129</sup> *See id.* art. 4.

<sup>130</sup> Inter-American Convention on the Law Applicable to International Contracts, art. 7: "The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same."

<sup>131</sup> *Id.* art. 10: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as com-

non-national body of law like the UNIDROIT Principles. As for English case law, one very senior English judge, Lord Diplock, whilst not explicitly rejecting a chosen non-territorial law, was insistent that the parties' freedom of choice extended to *systems* of law.<sup>132</sup> That would prevent the application of the UNIDROIT Principles, and the CISG itself, solely because the parties have selected them as the governing law of the contract. Yet, the express incorporation of such an instrument by the contracting parties might be treated as the shorthand incorporation of their individual rules into the text of the contract,<sup>133</sup> in which case the difficulty concerning their status largely falls away.

I now come back to the remaining aspect of autarky and the CISG, which concerns the body of private law — contract, tort, and property — on which the CISG sits. Taking contract first, we have seen that the UNIDROIT Principles might be invoked to fill gaps in the coverage of the CISG. It is, however, rather difficult to define what is a gap. First of all, it may be flagged up by the CISG itself, as occurs with the barebones statement of an entitlement to interest in Article 78, without any guidance as to the type, rate or starting-date of interest. More difficult is the silent gap, the identification of which depends upon where one draws the line between the general law of contract and the special law of sale. Do penalty clauses belong to contract law or to sale? Opinions might well differ. I should not have classified interest as a matter of sale, since my domestic bias tells me that it falls under the head of civil procedure. Closer attention to the matter, however, persuades me that interest may be seen as compensation for being kept out of one's money,<sup>134</sup> in which

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mercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."

<sup>132</sup> See *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*, [1984] A.C. 50, 60, 65.

<sup>133</sup> Since so much of the contract law of a given country is dispositive, it should follow that the selection of the UNIDROIT Principles as governing law could be seen, on a rule-by-rule basis, as displacing inconsistent rules of the otherwise applicable law.

<sup>134</sup> This assumes that I am demanding interest not in the capacity as a creditor, but as someone who has suffered loss arising out of the non-payment of money. That loss, compensable in interest damages, may take the form of interest that I have to pay a creditor for the loan advance taken in substitution for the money I should have been paid, or it may be the interest I could have earned by advancing moneys received to a borrower.



case it is entirely understandable that it should fall within Article 78 of the CISG.

In the case of penalty clauses, there is the added difficulty that some legal systems may regard them as a matter of contractual validity (though the UNIDROIT Principles do not),<sup>135</sup> and therefore the subject of the validity "carve out" in Article 4 of the CISG. What price uniformity in cases of this sort? If forced to generalize in the interest of uniformity, and taking account of the exclusion of property matters from the CISG,<sup>136</sup> I should say that, apart from validity, special contract should be treated as at least co-extensive with general contract but expressed in the particular context of sale. To a large extent, this would compensate for the absence of an international uniform law of general contract.

When a Contracting State "beds down" the CISG in its legal system, this gives rise to possible distortions created by incompatible elements. I shall take two examples to illustrate the point. My first concerns a rule present in some common law systems that, in the event of a misrepresentation inducing the contract, the victim is entitled to rescind the contract *ab initio* if the misrepresentation, at least in part, induces entry into the contract.<sup>137</sup> Rescission is not technically contractual termination, or avoidance under the CISG, but like them, it is an escape from the contract. It is much more readily available than avoidance for fundamental breach. Since many breaches of contract can also be viewed as inducing misrepresentations,<sup>138</sup> a common law system that suffers its misrepresentation rules to apply unchecked in international sales governed by the CISG undermines the remedies structure of the CISG and challenges the CISG's essential value of contractual continuance. Now, a common law court might say that misrepresentation, which sits alongside mistake, is a matter of contractual validity standing outside the CISG. I believe that would be a mistake. In the cause of the internationally uniform application of the CISG under Article 7(1), a common law court should interpret validity

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<sup>135</sup> It deals with Penalties in Article 7.4.13, contained in Chapter 7 ("Non-Performance") and not in Chapter 3 ("Validity").

<sup>136</sup> CISG art. 4(b).

<sup>137</sup> See generally *Redgrave v. Hurd*, [1881] 20 Ch. D. 1.

<sup>138</sup> In English law, see § 1(a) of the Misrepresentation Act 1967. See generally *Esso Petroleum Co. Ltd. v. Mardon*, [1976] Q.B. 801.

in a way that is consistent with the integrity of the CISG, and should treat inducing misrepresentation as a gap in the coverage of the CISG to be dealt with by a general principle of contractual continuance that would place limits upon rescission akin to the limits on avoidance.

A discordant body of tort law presents a different challenge since we are not dealing with gaps in the CISG. Suppose goods are sold and contain a hidden fault that gives rise to extensive consequential loss, consequential damages may be recovered under the CISG<sup>139</sup> and the seller's liability should be treated as strict<sup>140</sup> and as not falling within the exemption provision of the CISG.<sup>141</sup> Suppose, however, that the applicable tort law classifies a seller's strict liability for defective goods causing damage as a matter of tort and gives producers the benefit of immunity from liability in tort if they are able to invoke a state of the art defense. The question is, how should we deal with this conflict? Does the answer depend upon whether the applicable law treats the matter as sounding exclusively in tort or permits a defense to strict tortious liability only where the seller sues in tort? It is enough to note the problem without trying at this stage to resolve it. The extension of the CISG damages rules to physical proprietary loss has been regretted by some, on the ground that it gives rise to conflict with domestic tort law. Be that as it may, there is no reason why the scope of the CISG in a legal system should be determined by the scope of that system's tort law. Uniform law is uniform law and international obligations are international obligations. To the extent of the CISG's coverage, the Contracting State has committed itself to uniform application. There is no provision in the CISG for a state of the art defense.

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<sup>139</sup> See CISG art. 74.

<sup>140</sup> See CISG art. 35 (which is not expressed in terms of the seller's fault).

<sup>141</sup> See CISG art. 79 (which refers to a party's "failure to perform any of his obligations" and calls for proof that "the failure was due to an impediment beyond his control". The view that this does not readily excuse non-negligent intermediate sellers of defective goods is probably more acceptable to a common lawyer than to a German civilian.). See also PETER SCHLECHTRIEM, COMMENTARY ON THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1980 (CISG) 606 (1998) ("a reasonable person in the promisee's position could not have been aware of . . . [the] non-conforming state [of the goods]").

## III. CONCLUSION

Different legal systems treat consumer and commercial in different ways. I have sought to show that it is an oversimplification to treat all commercial sales alike. Commodity sales are unlike the sale of goods for commercial consumption and therefore, there is every reason to keep alive a special body of law attuned to their particular character. I have laid stress on the experience and extensive scope of English law suitable for the governing of such contracts and as expressive of the parties' choice, though I am not making a case to the effect that a special international uniform law could not be devised for them (but this hardly seems an urgent matter). In my view, the CISG is not apt to deal with the problems they raise, though in this setting I have not been able to demonstrate this by means of a close textual analysis of the CISG. My view, incidentally, is not based upon the absence from the CISG of mention of bills of lading and trade terms such as CIF and FOB. These expressions are not to be found in the contractual provisions of the UK Sale of Goods Act. Within English sales law, the somewhat isolated character of international commodities sales law lends further support to the availability of a body of law outside the CISG. I am not on this occasion making an argument for the need for competition amongst different laws and the need for contracting parties to have a genuine choice, though I believe that the otherwise monolithic character of uniform law is broken down by the opportunity for parties to opt out and select a law, or a portion of law, of their own choice.

Turning now to uniform law as expressed in the CISG, the temptation to state Lao Tse's maxim that a journey of 1,000 miles starts with the first step is irresistible. The CISG is a remarkable instrument whose influence has been felt at many levels of the international and regional uniformity movement. There is a challenge afoot to prevent it from being domesticated by different legal systems, and that challenge may ultimately fail. But as long as it remains the subject of intense scrutiny in its day-to-day application, and to the extent that it receives support from other instruments, the dangers of domestication are diminished. It may be that voices will be raised that uniform law is exterminating national legal culture, in much the same way that the onward march of the English language is extermin-

nating minority languages across the globe. It may be that my own plea for differentiation can be seen as expressing premature nostalgia for the disappearance of my own national law.