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Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa[*]

Sieg Eiselen [**]

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1. INTRODUCTION

The representatives at the Vienna Convention for the International Sale of Goods (CISG) [1] accepted the present text of the Convention on the 11 April 1980 after long and arduous debates on its content.[2] In the preamble to the CISG the aim of the Convention is described as follows:

"BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic order,

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

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

"HAVE AGREED as follows:"

At the time of the consideration of the CISG and its predecessors, South Africa had already been practically, if not officially, excluded from international organizations and processes because of its internal race [page 323] policies and therefore never took any active part in the creation of the CISG, although it sent observers to some events. The international measures spearheaded by the United Nations actively promoted the exclusion of South Africa from world trade by discouraging trade relationships with and encouraging boycotts against the country. All that has changed. Since 1994 South Africa has become a respected and welcome member of the international family of nations.

High expectations exist in the rest of the world, and especially in Africa, that South Africa, as the economically most advanced country south of the Sahara with a seemingly stable democracy in place, will play a leading role in the African renaissance.^[3] The promotion of democracy, the respect for human rights, and political stability in Africa, and more particularly southern Africa, is in no small way dependent on the healthy economic growth and development of the region. In this process there is no

place for exclusionary and overly nationalistic policies or tendencies. Freedom of trade, including the free movement of goods throughout the region, is of prime importance for the development of the region as a whole, as developments in the European Union have amply illustrated.

In the process of creating a new economic order, it is extremely important to remove any unnecessary bafflers impeding trade that might exist. Although most of the countries in southern Africa share a common legal background in regard to contract -- Roman-Dutch law -- there is no unified law of sale, and, as far as the rest of Africa is concerned, even a common legal heritage is lacking.

South African businesses trading internationally are potentially faced with as many applicable legal systems as they have trading partners, unless they are able to stipulate South African law as the applicable legal system. The requirements and quirks of a foreign legal system with which it is not familiar may harbour unexpected surprises for the unsuspecting business. This problem is not a uniquely South African or a new problem and was in fact one of the major stimuli in the pursuit of the unification of the law of international sales since the middle of the nineteenth century.[4]

The creation of a uniform law for international sales was aimed at eliminating this risk by the provision of legal rules which will be consistently applied whenever and wherever a dispute between international contracting parties may arise. Thus such uniform law of sale ought to remove one of the obstacles and a substantial area of uncertainty or disagreement from the international trading arena.

The following questions will be addressed in this article:

- (a) Is there a need for the unification of the law of international sales; [page 324]**
- (b) Are there compelling reasons for South Africa (and other southern African states[5]) to accede to the CISG; or**
- (c) Are there cogent reasons for retaining the status quo; and**
- (d) Has the CISC proved itself in the ten years since it has entered into force?**

In the course of answering these questions the need for the unification of the law of international sales as an incentive for the development of the CISG, and the background to the CISG, will be sketched briefly to give an overall perspective of the process leading up to the acceptance and the current standing of the Convention. Next, the arguments in favour of acceptance will be critically considered and compared with the arguments against acceptance. Finally, the success of the Convention will be discussed before concluding recommendations are made.

2. THE NEED FOR THE UNIFICATION OF INTERNATIONAL SALES LAW

2.1 The driving forces behind unification

The first issue that needs to be resolved is whether there really is or was a need for the unification of the law of international sales and, if so, why.[6] In the earlier continental European tradition it was widely believed that legal unification in general is something good and desirable and that it should be actively promoted.[7] Many of the attempts at unification have therefore been initiated by European academics or bodies, often without establishing what the extent of the problem really was.[8] After it became apparent that the total unification of private law and even the law of contract was far too ambitious, proponents of unification

restricted their [page 325] efforts to more realistic goals, aiming at the unification of specific areas of the law, like the law of sale, where a need for unification was perceived.[9] It was then decided to concentrate on international sales as the single most important type of contract in international trade relationships and one which was also limited enough in scope to actually achieve a result that might be acceptable. The development of the CISG is in no small way attributable to this desire by realistic proponents of legal unification such as Ernst Rabel.[10]

The experience of legal unification projects up to now has indeed shown that it is a very difficult, time-consuming and expensive task, and that the best chance of success has been in cases where specific needs force international co-operation and unification, as in the transport of goods and international payments. initially, peremptory statutory measures were regarded as the most suitable vehicle to attain these ends. Today, it is generally accepted that statutory instruments may not always be the most appropriate method of achieving greater conformity or unification in international commercial law.[11]

The need for a unified law of international sales arises in the first place from the fact that law is territorial in its nature. It only has the force of law within specified national boundaries, and in principle no other state is bound to acknowledge or apply it.[12] This is also the reason why choice-of-law or conflicts rules have developed in order that legal relationships that have ensued within one legal jurisdiction may be acknowledged and [page 326] enforced by the courts of another jurisdiction.[13] This invariably leads to the situation where at least one of the contracting parties is faced with the application of a foreign legal system of which it may have no knowledge, and it may even be uncertain which legal system will apply to the relationship of the parties because of uncertainties in the conflicts rules. The proper-

law approach is flexible but also notoriously unpredictable in determining the applicable legal system.[14]

The conflicts rules of some countries placed more emphasis on the law of the place of contracting *lex loci contractus*; others attached more importance to the law of the place of performance *lex loci solutionis* or of the characteristic performance to be rendered;[15] in others it was difficult to tell which approach was favoured; in yet others different parts of the contract were subject to different legal systems.[16] This fact, coupled with the possibility that each international contract of sale of a party was potentially subject to a different or more than one national legal system, caused a great deal of legal uncertainty and difficulty for the parties involved.[17] Although the uncertainty may often be avoided by a simple choice-of-law clause in the contract, it does not remove the predicament, first, that the applicable law will be foreign law for at least one of the parties and, secondly, that such clauses are often absent from international contracts of sale.[18] The unification of the law of international sales was seen as necessary to escape from the difficulties [page 327] caused by the choice of law in contract cases, where there was no unified approach.[19]

A further problem is that one or both of the parties may be unaware that another legal system will govern their relationship, rights and duties, or uncertain of which legal system will govern them. This may lead to a party's failing to comply with requirements of which it is unaware or does not understand, which may have dire consequences for it. Even if a party is aware of this conflict-of-laws problem, its negotiating strength may preclude it from ensuring that its own legal system is applied, with the same consequences. Businesses with a multitude of import or export partners are therefore faced with the application of a multitude of different legal systems to their legal

relationships. This increases the risks for such businesses as well as the attendant costs involved in such transactions. The provision of a unified law of sale was aimed at simplifying this situation by providing one applicable law for all international sales.[20]

Rabel stated:[21]

"To avoid these complications and to substitute a reasonably concise body of clear and simple written rules could not be a loss, and still less would it be a loss to have to consult only one law commented on by the courts and scholars of the world instead of innumerable different foreign legislations."

Rabel further indicated that the unification of the law of international sales was aided by the fact that the law of sale of most legal systems was codified in any case.[22] This not only provided excellent material for the comparison of the law of sale of a multitude of countries, but also showed that the law of sale could easily be excised as a separate body of law from the general law of obligations and contracts without compromising it.[23]

The existence of standard contracts and universally accepted usages in international sales was not seen as negating the necessity of a unified law of sale.[24] Although standard contracts and usages made national law of sale irrelevant in many ways, the standard contracts were developed [page 328] within certain sectors of international trade and in no way covered all of the law of international sales. These standard contracts also did not cover all the aspects of contract formation, the rights and duties of the parties, or the available remedies. The same held true for usages. A unified law of international sales would therefore be a valuable and practically useful instrument to close the gaps still left by the standard contracts and usages, by excluding national laws of sale. It would also form the basis for these standard contracts and

usages which in many respects drifted in a lawless void.[25]

From the beginning of this century, business also avoided the regular courts more and more and referred their disputes to arbitral tribunals for settlement, a practice which is very widespread today too.[26] These tribunals, frequently consisting of fellow traders and not jurists, very often rested their decisions on fairness and equity rather than law. A unified law of international sales was seen as a method of providing these tribunals with a set of 'universally accepted' rules that would be more difficult to ignore than the confusing national legal systems.
[27]

A third reason that was advanced for the need for a unified law of international sales was that national laws of sale were not always suitable for application to international sales, as they had been developed for internal trade only. Owing to the intricacies of sales across national boundaries, special concerns applied to international sales that required special rules.[28] A unified law of international sales could adequately take these issues into consideration. A unified code could also serve to improve on internal laws of sale, because it would be more modern and fashioned for the needs of the commercial markets of today, whereas many domestic rules of sale were antiquated and unsuitable for current conditions. Furthermore, such a code could purposely be based on well-known usages and practices that already prevailed in international commerce.[29]

A last consideration was the almost romanticized idea of the *lex mercatoria* as a law of international sales that was applied by market courts during the Middle Ages. Whether this idea is based on myth or fact is [page 329] arguable, but the yearning to attain to that ideal state certainly played an important psychological role in the efforts to shape a new *lex mercatoria*.
[30]

2.2 Opposition to unification

The validity of the belief that the law or certain parts of it need to be unified by legislative means for the purposes mentioned above has, however, come under fire from a number of sceptics and critics.^[31] There has been trenchant criticism to the effect that there is no need for the unification of law in general and that there was no need for such a process in regard to the law of international sales.^[32] The essence of the criticism is that international trade practice has developed sufficient and very successful practices and usages which make unified law in this field not only unnecessary but an unwarranted meddling that can only serve to undermine the existing position.^[33] Secondly, as a result of irresolvable differences between the various national legal and economic systems and political values represented at any conference for the unification of law, many of the contentious issues are simply sidestepped and not solved at all.^[34] Thirdly, the unification that results is more apparent than real because of underlying differences that will lead to conflicting interpretation and application by the various legal systems.^[35]

One of the early sceptics of the unification process, Grossman-Doerth, simply believed that any unified law had no chance of being accepted, as it would be rendered irrelevant by practice and exclusion clauses.^[36] He further stated that although the standard contracts and usages of the [page 330] traders suffered from many uncertainties and gaps, traders had sufficient trust in them, which would cause any unified law of sale to remain a dead letter. The arbitral tribunals would also very often not use this "foreign law", since they did not even consider domestic law in their decisions.^[37] Grossmann-Doerth also believed that a unified law would be inferior because it would be produced by lawyers and not the interested traders.^[38] Another critic, Hobhouse, supports this conclusion, contending that the process

of diplomatic and legal compromise does not take account adequately of the commercial need.[39]

A more guarded critique of the need for legal unification is found from Kötz,[40] who concludes that unification is a desirable and sometimes even necessary enterprise in certain instances, but that it is an expensive business where the cost sometimes exceeds the benefits.[41] Proponents of unification therefore need to weigh carefully the advantages, disadvantages, cost, and different ways in which unification may be achieved otherwise than through statutory instruments, before embarking on the process. He then postulates a number of valid considerations that need to be taken into account when unification is contemplated:

- (a) The law should not become too fragmented within a "sea of national law";**
- (b) Unification should not be undertaken where the participants in international trade and their organizations can achieve acceptable results;**
- (c) Unification must not be allowed to stagnate as a consequence of the results being dependent on political issues or incentives;**
- (d) When political issues come into play, model laws are a more suitable vehicle to achieve legal unity;**
- (e) Legislative unification is not always the only method whereby uniformity may be achieved, and other methods must be taking into account whenever unification is desired.**

These considerations must further be augmented by the following points mentioned by Mertens [42] and Hobhouse:[43]

- (f) The greatest degree of legal certainty possible must be**

aimed at;

(g) The solution must solve most of the problem areas tackled;

(h) The unified law must contain the capacity to be developed. [page 331]

It is important to note that Kötz, Mertens and Hobhouse,[44] in contrast to Rosett,[45] acknowledge that legislation in some instances may be an appropriate tool to achieve legal unification, provided that regard was had to the above considerations.

These considerations, as well as the criticisms, will be taken into account when the case for accepting the CISG is considered below. Despite these criticisms, some of which originated at the time and some of which were only raised later, the development of a unified law which resulted in the CISG carried on.

2.3 Conclusion

Although there is a great deal of validity in these arguments, one cannot judge all unification efforts on the same basis, for the circumstances under which they must operate vary significantly. [46] Owing to international practice, usage and private unification efforts, certain areas of international trading have already been unified or the conditions for unification have been created, as can be seen with the Incoterms (the International Rules for the Interpretation of Trade Terms, published by the International Chamber of Commerce) or the Uniform Customs and Practices of the International Chamber of Commerce (the UCP).[47]

The acceptance of the CISG, though, by such a large number of countries, representing about two thirds of the total amount of international trade,[48] certainly indicates that the time was ripe

for such a legislative unification. There is already a fairly substantial body of shared literature generated by the acceptance of the CISG and subsequent cases. Lastly, practice, usage and private unification such as the Incoterms are limited in the extent to which they can provide the legal foundation for the transaction as a whole to the extent that the CISG has achieved this.^[49] In the unification process it is therefore not a case of either of these methods or the CISG, but rather the codification in conjunction with all of these. This argument is substantiated by the way in which restatements or model laws like the UNIDROIT Principles of International Commercial Contracts are already beginning to influence practice and serve as an aid in the interpretation of the CISG.^[50] The different legislative and unifying techniques used in the European Union also indicate that a single [page 332] approach is not always effective and that sometimes unified legislation is the only way in which to achieve unification effectively.^[51]

The, unification of the law of international sales was therefore aimed at resolving these problems by introducing one generally applicable law of sale that would not involve choice-of-law problems, since the law would be the same wherever the unified law was applicable and since the law would not have to be proved, as is the case with foreign law in many legal systems. Courts or arbitral tribunals would simply be applying their own law, the unified law of sale. Parties would therefore only have to acquaint themselves with one additional law of sale and not a multitude of laws of sale. This would save on legal costs, avoid unnecessary disputes about the applicable law during negotiations, and therefore simplify international trade.

3. DEVELOPMENT OF THE CISG

3.1 Early unifying efforts

Whether the idea that the *lex mercatoria* of the Middle Ages formed a uniform sales code that was universally and consistently applied throughout Europe at the various fairs and markets is historically well founded is arguable.[52] This notion did, however, serve as one of the stimuli towards renewed attempts to introduce a uniform commercial law during the middle of the nineteenth century.[53] As the end of the eighteenth century marked important renewal and changes in international trade which formed the basis for international trade relations as we know them today, there was also a desire for a less complicated legal regime.[54]

This was the time, too, that a number of European codes were compiled. During the latter half of the nineteenth century the so-called internationalist movement was founded in the belief, based on the national codifications, that a new uniform *ius commune* could be established in Europe. At first it was thought that the French Code de Commerce would establish itself as the model in this development, but it soon became apparent that the aims of the internationalist movement were far too ambitious and unrealistic.[55]

The internationalist movement did, however, lead to the foundation of the Institut de Droit International and the International Law Association, both organizations with much more realistic objectives. The Institut had the study of international legal problems to achieve practical results as its main goal, whereas the Association strove to attain the reform and codification of law. At various conferences of the Association the idea of [page 333] a uniform law of international sales was mooted but never seriously pursued. Such pursuits were also inhibited by the large measure of success that the newly created Incoterms enjoyed at that time.[56]

3.2 The ULIS and ULF[57]

The most important step, though, was the foundation in 1926 by the League of Nations of UNIDROIT, a body that exists to this day. At the first meeting, the proposal of Ernst Rabel that a limited project to produce a uniform law of sale, rather than a unified commercial law, should be launched was accepted. UNIDROIT accepted the principle that a uniform law of international sales should be based on the basic principles of private law which could be arrived at through the comparison of national laws rather than commercial practice. Although commercial practice was taken into account, this principle remained the foundation on which the work of UNIDROIT was built.[58]

In 1935 the first draft was tabled by Rabel, who had been assigned with the responsibility of preparing such a draft. A second draft was tabled and accepted by the council of UNIDROIT in 1939, but the Second World War prevented any immediate developments. In 1951 this second draft was tabled at the international Hague Conference on the Unification of Sales Law. A special commission appointed by the Conference prepared a third draft, which was presented in 1956. A rework of this draft, published in 1958, formed the basis for a draft which was published in 1963 after comments on the reworked draft had been received. This draft was the text that was finally discussed at the Hague Conference of 1964. On 25 April 1964, this conference finally adopted two conventions, the Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[59]

Although there were twenty-eight states in attendance at the conference, the Conventions entered into force only in 1972. In the end merely nine states ratified the Conventions, of which only two were not European. [60] The other seven all belonged to the

then European Economic [page 334] Community.[61] The ratifications of the United Kingdom (enacted by the Uniform Laws on International Sales Act 1967, which came into force on 18 August 1972) and The Gambia were more a form of gesture than a real commitment to the aims of the conventions, because both these countries accepted the reservation that the conventions would only apply in instances where the parties made express declarations to this effect, thereby rendering the application of the conventions in these jurisdictions very limited.

Shortly after the acceptance of the conventions, the United Nations, perturbed by the lack of ratifications of them, conducted a survey to establish whether nations would accede and, if not, what the reasons were.[62] Feedback was received from a number of countries and was submitted to UNCITRAL, the United Nations Commission for International Trade Law.[63] It seems that the resistance was due to two main factors: the lack of participation by non-European countries in the process of creating ULIS and ULF, and a number of serious deficiencies in the material stipulations of the conventions.[64] Developing countries and socialist-bloc countries did not trust the result of conventions that were drafted by mainly industrialized countries.[65] An important factor was also that the United States failed to ratify the conventions through its lack of participation and some serious material shortcomings in them.[66]

The material shortcomings lay in the inattention to overseas shipments, the imbalance between the rights of buyers and sellers, the insensitivity to commercial practice, and the scope of their application.[67] It was said that the conventions were too complex, too abstract, artificial and vague in many instances and, lastly, aimed at regional unification rather than global [page 335] unification.[68] The fact that the United Nations established the UNCITRAL in 1966 (to become operative at the start of 1968)

also deterred some countries from acceding.[69]

3.3 The evolution of the CISG

From the outset, UNCITRAL saw the unification of the law of international sales, despite the existence of ULIS and ULF, as a very high priority in its programme of work.[70] In contrast to the mainly European forces that shaped ULIS and ULF, UNCITRAL from the outset comprised a small number of members representing all political, legal and economic groupings that finally facilitated the acceptance by a much broader scope of nations of the CISG. The more prominent participation of the United States also played a pivotal role in its acceptance of the convention.

UNCITRAL did not entirely abandon ULIS and ULF but rather used these conventions as a point of departure for the forging of the CISG.[71] By debating the shortcomings of these conventions against the background of the needs, concerns and aims of the different groupings, UNCITRAL was able to table a final draft for acceptance at the Vienna Conference of 1980.

Despite the small number of accessions to ULIS and ULF, these conventions can by no means be termed failures.[72] They failed in their inability to gain worldwide acceptance, but in the countries where they were implemented they functioned well for a number of years. Valuable experience was gained from their application in practice and in a number of disputes.[73] This body of law and experience served as an important source in the unification work of UNCITRAL and other national law reforms. [74] [page 336]

The failure of ULIS and ULF to gain wider international acceptance led to an almost immediate reaction by the United Nations in founding UNCITRAL.[75] From the outset, this body

has had a wider frame of reference than just producing a unified law of international sales, but the latter task was one of the first items on its programme of work. This fact also had a significant influence on the decision of many countries not to ratify ULIS and ULF. From 1970 onwards, the yearly meetings of UNCITRAL discussed drafts produced by working groups appointed by it. These working groups used ULIS and ULF as their point of departure, taking into account the comments and criticisms made about those conventions. Initially, the commission worked on two draft conventions, one for the formation of contracts and the other for the rights and duties flowing from the contract and breach of contract. In 1978 these two drafts were moulded into one as the New York draft. This draft was presented to all UN members for comment. The draft, plus the comments received, formed the basis for the Vienna Conference of 1980.[76]

The success of UNCITRAL was in no small measure due to the composition of the body.[77] Although it was composed of members of all the major economic, political and legal groupings in the world, its membership was limited to first twenty-nine and later thirty-six states. Most of the representatives had a great deal of experience in international trade law.[78] There were also quite a few representatives who had been involved in the authoring of ULIS and ULF, which provided continuity and experience in the unification process.[79]

The present text of the Convention was accepted at the Vienna Conference by a majority of forty-two of the sixty-two states that participated in the proceedings. In terms of art. 99 of the Convention, the CISG came into effect on 1 January 1988, one year after the tenth state ratified the Convention on 22 December 1986.[80] The final acceptance of the CISG was delayed because many states waited for the United States to ratify before

committing themselves. The United States finally acceded, together with China and Italy, on 11 December 1986. This gave the necessary impetus to the CISG that was lacking for ULIS and ULF. Ten years after the entry into force of the CISG, it has been accepted by fifty-one countries, representing all continents and all major political, economic and legal groupings. [page 337]

4. OTHER METHODS TO ACHIEVE LEGAL UNIFICATION OR SOLVE PROBLEMS OF INTERNATIONAL SALES

A number of authors have indicated that unification by legislative means is not necessarily always the best or most effective way to bring about legal unification; it can be achieved in other ways, such as unifying the applicable private international law or creating model laws such as the UNIDROIT model contract law contained in the UNIDROIT Principles of International Commercial Contracts, or restatements of the law such as the Uniform Commercial Code.[81]

The unification of the private international law rules applicable to contracts of sale was represented as an important alternative route to legal unification that would solve the problems at hand. [82] It was thought that the unification of these rules would be much less complicated than the unification of the law of international sales. Attempts and unification of the conflicts rules soon proved to be more complicated than initially thought. The process of creating the European Contracts Convention,[83] which would only be applicable between members of the then European Economic Community, bears testimony to this.[84]

The unification of conflicts rules, however, does not solve the basic problems encountered in international sales of different legal systems applicable to each and every contract. A unified conflicts law ensures that the same legal system will be applied to a particular contract wherever the dispute is adjudicated and will

therefore inhibit forum shopping, but it does not remove the problem of businesses having to deal with foreign legal systems. Providing unified conflicts rules is not a substitute for a unified law of international sales, but an additional measure which will improve international trade law.[85] The fact that the Rome Convention unified the private international law rules applicable to contracts of the European Union countries has not precluded the majority of them from also accepting the CISG.

Rosett argues that harmonization is driven not by legislative means but by a shared commercial culture and a shared legal literature and education.[86] [page 338] He then suggests that efforts should rather be directed at removing the underlying differences in economic, cultural and political settings and cultures within which these rules operate before the legal rules are unified. Unless this is done, these differences will always result in the different application of the unified rules.[87] This theme is further developed in a later contribution in which the emphasis is placed on a flexible multi-layered approach to unification.[88] As with the unification of private international rules applicable to contracts, the solution lies not in one domain exclusively, but rather requires that the different instruments be used in unison to achieve the desired legal unification. This is increasingly happening with the symbiosis that is developing between the CISG, the UNIDROIT principles and Incoterms.[89]

5. THE CASE FOR ADOPTION

5.1 Legal reasons

(a) Simplification, reasonableness and equity

One of the most important aims of any legal system is to create an environment wherein the participants can operate with the maximum of security and the minimum of friction.[90] It must

supply the rules of the game and the sanctions if those rules are not adhered to. In order to be effective, the rules must be simple enough for the participants to understand, equitable and fair to all participants, and certain and consistent. These three principles, simplicity, fairness, and certainty and consistency, often lead to conflicting results. If rules are very simple, they will often not be fair in all circumstances and may not be certain. If they are flexible, they may be fairer, but there will be a great deal of uncertainty about their application. If they try to provide a fair result for every situation, they are bound to be very complex and difficult to comply with. The art of any legislation is to strike a balance between these three considerations.

There is no doubt that the international trade field is a fairly complex environment and therefore needs refined rules to deal with such complexity.[91] The situation without the CISG is that there may be any number of applicable playing rules according to the whims of private international law and/or the bargaining strength of the parties.[92] With the acceptance of the CISG, the playing field is levelled a little bit in that there will only be one set of rules that will be applicable. Furthermore, these [page 339] rules have been specifically developed with international trade and its usages and practices in mind, unlike many domestic law of sale.[93]

The drafters of the CISG have also succeeded in creating a set of rules which is fairly simple, yet complex enough to deal adequately with the intricacies of international trade.[94] The CISG does, though, at first glance seem simpler than it really is. [95] With so many interest groups represented, it was ensured that the structuring of the rights and duties of parties favoured neither seller nor buyer, leading to a code which is as well balanced as any code of sale. This balance ensures a fair distribution of rights, duties and risks in general. The present

formulation and structure is also much simpler than ULIS and ULF, avoiding the criticism that was levelled at those conventions of being unnecessarily complex and obscure.[96]

(b) Unified interpretation and application

From the outset, it was clearly stated by all concerned that the success of the CISG would first of all turn not on its balanced nature or its fairness but on the consistency of interpretation and application by the courts and tribunals in different countries. There was a great deal of apprehension that the style of legislation (a code in the civil-law style, with more generalized rules, and not as explicitly formulated as Anglo-American-style legislation), and the different interpretational methodology in civil law and in Anglo-American law, might lead to widely diverging interpretations of the Convention.[97] Such a result would, of course, ring the death knell for this Convention, because it would destroy the unification which is its chief aim.

With the exception of a number of sceptics, most commentators believed that courts and other tribunals would rise to the task of interpreting, [page 340] applying and developing the Convention in a consistent manner.[98] Fortunately for the CISG, the growing number of reported cases has borne out this optimism. [99] Although there are already conflicting judgments, they remain the exception rather than the rule. Lack of uniformity in legal decisions is nothing exceptional and in the present context should not be a source of concern unless it becomes too widespread and no pattern emerges that supports the general trend towards unification. In most legal systems there are aberrant decisions from time to time and the same was to be expected with the CISG. Despite the absence of a "higher authority" for the Convention that can correct wrong decisions, the weight of opinion found in other cases and comment on such decisions will certainly override them in time.

The unified approach to the CISG has been aided to a large extent by the interpretational tools and principles provided in the Convention itself [100] and by the rules of interpretation of conventions in general.[101] Most of the cases decided in the common-law countries prove that the task of interpreting general rules, interpreting by analogy, and relying on general principles and applying them to specific facts is certainly not beyond the capabilities of the courts. Nor has the fact that civil-law countries do not adhere to the *stare decisis* principle prevented them from giving adequate consideration to cases that have already been decided.[102]

The unified interpretation of the CISG has further been aided by the number of excellent commentaries that are available in an ever-increasing number of languages.[103] The availability of the documentation leading [page 341] up to the Convention *travaux préparatoires* and the collections of court decisions also ensure that courts and tribunals are in a position to inform themselves readily of all the necessary material to attain the goal of unification.[104]

(c) One internal law to contend with

As the CISG becomes internal (municipal) law after accession by a country, parties and their legal representatives do not have to contend with foreign law when the CISG applies.[105] Through South Africa's accepting the CISG, the number of foreign laws that must potentially be contended with will be drastically cut down owing to the extent of the acceptance of the Convention by South Africa's trading partners. Although the CISG is special in that it requires interpretation and application that may be different from those governing other statutes, it is internal law nevertheless. This difference should not represent any obstacle to the proper application of the CISG in South African courts. In most courts, especially when they are dealing with international

commercial law, it is nothing strange to hear comparative arguments based on foreign law. Certainly in South African decisions there is no lack of examples illustrating this point.

When the CISG applies, the conflicts rules that would normally come into operation in transborder transactions are excluded. The court or tribunal simply applies the *lex fori* -- the CISG. This means that there is no need for proof of foreign law. Counsel can introduce any relevant material on the law during argument. The court is furthermore compelled to take judicial notice of the law and may in that process take into account any relevant material it chooses.[106] The court is not bound by the constraints contained in s 1 of the Law of Evidence Amendment Act 1988, [107] which allows courts to take judicial notice under certain circumstances when applying foreign law.

(d) The CISG already applicable in many cases

A very important reason for adopting the CISG is that it may already be applicable to many contracts involving South African traders in the [page 342] international arena.[108] Article 1(1)(b) of the Convention, read with art. 6, stipulates that where the normal conflicts rules point to the application of the law of a CISG state, then the CISG will be applicable unless it has been specifically excluded by the parties. Thus, if a South African importer concludes a contract with an Australian exporter, and the proper law of the contract is Australia, the CISG will be applicable. South African traders must as a result already contend with the CISG in their negotiations and standard contracts. There is, however, a great deal of ignorance about this fact. The introduction of the CISG in South Africa will enhance the awareness about the CISG and its consequences.

(e) Improved law of sale

The South African law of sale, like the law of sale in many other countries, has largely developed to meet the needs and complexities of domestic sales and is not specifically tailored to meet those of international sales.[109] In certain respects there is also some uncertainty, and a number of the rules are downright antiquated and not suitable for modern commercial practice. The CISG, on the other hand, is of a fairly recent origin, and in its development the authors drew from the experience of a multitude of different laws of sale in constructing a very up-to-date sales law specifically aimed at international sales. In this process, commercial practice and usage were taken into account as well. [110]

The criticism that the CISG is largely a cut-and-paste job [111] and is in many instances a regressive step is contradicted by the fact that it has been used as the basis for the modernization of the law of sale in a number of [page 343] instances.[112] In the Scandinavian countries, for example, the CISG provided the model for the revision of the law of sale. This clearly indicates that the CISG is regarded as a sales code abreast of the times, which underscores the argument that its adoption is a desirable step in updating the South African law, even if it is only in international transactions. It is quite possible that the CISG may have a beneficial influence on the domestic law of sale once it has been accepted.

Despite the use of some unknown concepts and the introduction of new rights and obligations, the CISG does not contain any stipulations that are entirely foreign or repugnant in any way to South African law.[113] In that sense, the fact that South African law of contract has been influenced by English law and therefore cannot be said to be pure Roman-Dutch law ensures that a South African jurist should feel quite comfortable in studying and analysing the CISG.

(f) Legal certainty and availability of sources

The adoption of the CISG will also lead to greater legal certainty in international trade relations and negotiations. The codified nature of the rules, the simplicity of their formulation, the exclusion of conflicts intricacies and foreign law, and the availability of sources, all help to create greater legal certainty for importers and exporters.^[114] Where there is greater legal certainty, there is less chance of disputes, and where disputes do arise, the inquiry can concentrate on the factual basis of the dispute rather than the legal intricacies. Schlechtriem indicates that in German practice there has been little difficulty in handling the CISG.^[115]

The use of indefinite terms in the Convention such as "unless the circumstances indicate otherwise" (art. 18(2)), "as substantially to deprive him of what he is entitled to expect" (art. 25), and "a reasonable time after the conclusion of the contract" (art. 33(c)) is bound to give rise to some disputes, but it would be impossible to draw up rules for a law of sale that is to be fair and flexible without these kinds of uncertainties. This is, in any case, not a feature which is unique to the CISG. The law of sale of [page 344] most countries contains rules of this type, where the application will differ from situation to situation. The Convention is characterized by a good balance between precision and flexibility. This feature can therefore not be judged as endangering the legal certainty that should be created by it.^[116]

Besides the text of the CISG, which is available in English and five other languages, there is a host of other sources and commentaries available in languages that are accessible to South African lawyers.^[117] In addition, the cases, which at the end of 1997 already exceeded more than 270 globally, are easily accessible in the original language and English abstracts from UNCITRAL and in UNILEX.^[118] Lastly, the Law School of

Pace University hosts an Internet page which contains references to all kinds of material published on the CISG and even some full-text articles.[119] Thus there is much up-to-date information that is readily available on the interpretation and application of the Convention.

(g) Success of the CISG

Despite some serious criticisms and initial fears about the future of the Convention, the CISG has been a great success in practice. [120] Magnus describes it as follows:[121]

"The UN Sales Law justifies, also in view of its spread and applicability -- in contrast to the Hague Sales Law -- the conclusion that it is one of the most important private law conventions."

The number of ratifications, fifty-one at this stage, including the majority of the most influential trading nations, bears witness to the worldwide acceptance of the CISG as the best available legal basis for international trade. The growing number of cases does not so much indicate a poorly drafted Convention as the fact that it is a living Convention which is in use in everyday trading life. These cases are steadily developing a body of law supporting the Convention and providing [page 345] guidance for the interpretation of some of the more indefinite rules referred to above.[122]

In one of the few empirical studies done on the awareness of the CISG by trade and industry, and its acceptability by them, Ciambella did a survey in 1987 of fifty top Canadian companies and seven banks prior to the introduction of the CISG in that country.[123] There was a great deal of ignorance about the Convention, but amongst the companies and banks that were aware of it, the vast majority (77 per cent) supported the

acceptance of the Convention from trade and industry. This fact is endorsed by the unqualified support given to the Convention in the United States by trade organizations such as the American Association of Exporters and Importers, the National Foreign Trade Council and the American National Association of Manufactures, and in Canada by the Canadian Manufacturers Association, and in the two countries by the leading legal professional bodies, the American Bar Association and the Canadian Bar Association.[\[124\]](#)

5.2 Business or trade related reasons

There are a number of very sound arguments from a business point of view for the adoption of the CISG.

(a) Renewed importance of international trade

Since the democratization process in South Africa started, most of the trade barriers and boycotts that existed prior to 1990 have fallen away and South Africa now is a respected participant in the international business arena. The fact that some restrictive trade practices still exist in dealing with certain markets is a universal problem being addressed by the GATT Conferences, and is not a uniquely South African problem as the trade boycotts used to be. The unsettled state of international commercial law in countries where unified law does not apply, though, has been described as a non-tariff barrier.[\[125\]](#)

In the following table an indication is given of the distribution of trade between South Africa and CISG and non-CISG countries.
[\[126\]](#) [page 346]

[The table and graph that follow are not presented.]

As the table and the graph adequately show, the CISG is already operative in a significant number of countries with which South

Africa is trading regularly, and certainly in the greater number of its most important trading partners. The notable exceptions here are, of course, the United Kingdom, Japan, Taiwan, Korea, and the African countries. The call by Ndulo for the African countries to accede has been largely unheeded except by his own country, Lesotho.[127] The reason why the United Kingdom has failed to accede is ascribed to its fear that the importance of the common law of contract in international trade will be eroded if it should accede.[128] This fear has surely been significantly reduced by the accession of an important number of common-law countries such as the United States, Canada and Australia.

(b) Simplification, reduction of costs and legal uncertainty; easy access to the law

It is generally acknowledged that the fewer the impediments to free trade are, the more competitive and efficient markets become.[129] A significant impediment to becoming involved in international trade, especially for less experienced businesses, is the foreign legal environment [page 348] which is entered.[130] This creates uncertainty and risks which are difficult for such businesses to evaluate. If an importer or exporter must acquaint itself with the foreign legal system or systems which may be applicable to its contracts of sale, it involves cost and energy which may be expended more profitably.[131]

The acceptance of the CISG as the legal foundation for all international contracts of sale can significantly reduce the legal uncertainty and cost involved in such contracts.[132] Frequently, the CISG may already be the applicable law if the other party is resident within a CISG country. For instance, if a South African importer contracts with a German exporter, the CISG will apply if German law is the applicable law indicated by the conflicts rules of the *lex fori*. [133] In many cases, therefore, South African traders already ought to be acquainted with the CISG as the

applicable law. By acceding to the CISG, the number of instances in which South African businesses need to deal with foreign law is significantly reduced.[134]

When the CISG applies, businesses can also redraft their standard terms and conditions to make provision for the requirements and stipulations of the Convention, knowing that they will fit in with the applicable legal system. Where it does not apply, it becomes very difficult to provide for all the possibilities that may emerge, unless the business is in a position to enforce its own legal system on the transaction.[135]

The CISG also provides much easier access to the law for the traders themselves.[136] Unlike the law of sale in many countries, such as South Africa, where there is no codification, the CISG provides an easily accessible text which contains most of the rules that will be applicable to the transaction, unless excluded or modified by the parties. It has been written more in the language of traders than in typical statutory [page 349] language.[137] This is further supported by the collection of all available case law on the Convention by UNCITRAL and in publications such as UNILEX.[138]

It is a valid criticism and important shortcoming of the CISG that it was unable to create a totally unified sales law, and that certain significant issues have been left out for a compromise to be reached. The most notable exclusions are the rules relating to the validity of the formation of the agreement and specific performance.[139] Disputes on mistake, capacity, duress, undue influence, liability for precontractual misstatements and conduct *culpa in contrahendo*, the validity of standard terms and conditions, and specific performance are in fact all referred to the applicable national law and are therefore not unified. The difficulties associated with conflicts rules and the proof of foreign law are therefore not fully excluded as far as these issues are

concerned. However, according to a leading English judge, Lord Goff, issues of validity play a fairly insignificant role in trade litigation, the majority of disputes between parties arising from breach of contract and the available remedies, and from the interpretation of the contract.^[140] And these issues have been fully dealt with in the CISG. Therefore, despite these shortcomings, on balance acceptance of the CISG should definitely be favoured.

(c) Acknowledgement of party autonomy

An important feature of the CISG is that it is based on the principle of party autonomy in that most of its provisions may be modified or excluded to suit the needs of the parties. This provides a great deal of flexibility to the parties, who can accept, change or reject the provisions of the Convention to suit their needs.^[141] The only exception is found in the provisions relating to formalities.^[142] In a case where there is a variance between the CISG and the terms of the contract, the latter will receive priority. This leaves parties with the freedom to shape the contract according to their specific requirements. The CISG is then only used to fill those gaps for which the parties made no provision.^[143]

Where there is a difference in the bargaining positions of the parties, the CISG provides a good basis for the weaker party to establish a more neutral arrangement for the contractual relationships in that the CISG is neutral and does not give precedence to either buyer or seller.^[144] [page 350]

Any shortcomings in the CISG or legal uncertainties may be addressed in the contract concerned. The shortcomings are well known and parties can therefore provide for those issues in their standard contracts or during the negotiating process.

In a certain sense, this principle is at the same time one of the strengths and one of the weaknesses of the CISG. The international acceptance by the business community has been much slower due to the fact that many businesses tended to exclude the application of the Convention.[145] At the same time, it has provided the required flexibility to allow for the catering for individual needs and the preservation of trade customs and usages. This accords with the aims of the Convention to provide the legal basis or framework for sales where needed without unnecessarily imposing itself.

(d) Common language and checklist for international negotiations

The CISG can aid international negotiations between parties who do not share a common legal culture and especially do not share a common language, in two significant ways. First, because the Convention is available in six major official languages, all with equal authority,[146] it provides a common understanding of the transaction and the rights and duties of the parties.[147] From the negotiations that led to the Convention, it is clear that the authors tried to steer clear of formulations that were too closely aligned with any legal system and also to avoid introducing specific doctrines from certain legal systems, as far as that was possible. The language itself therefore carries very little national baggage with it.

Secondly, the CISG forms a very useful checklist of issues that need to be addressed by the parties during negotiations, as it has been drafted with international trade in mind.[148] It is especially important for parties who are inexperienced in international trade. A feature of the CISG is that it has been framed in fairly non-technical language which is largely free from doctrine and national characteristics and which may be easily understood by trading parties themselves. The structure of the Convention also makes it far easier to read and understand

than was the case with [page 351] ULIS and ULF.[149] As a codified piece of legislation, all the rules may be easily found in one place, unlike the position in many legal systems, such as that of South Africa, where there is no code and where it is difficult for lay persons to find and interpret the law.

(e) Acknowledgement of international trade usage and practice

Important factors conducing to the acceptability of the CISG have been the much more careful consideration of, and the much greater according of significance to, international trade practice and usage in its formulation than were the case with preceding Conventions.[150] The CISG does not detract from the effect of the Incoterms or the Uniform Customs and Practices of the International Chamber of Commerce (UCP), but rather supports and combines with these trade practices and usages to complete the transactional picture.[151] The role of trade practice and usage was one of the contentious issues between the developing and developed countries during the discussions that led to the Convention.[152] Suspicions that so-called accepted trade usages and practices could be used to entrap unsuspecting inexperienced traders from developing countries, on the one hand, and fears that the erosion of the importance of trade practices and usages in many fields would be disruptive of trade, on the other hand, led to the current formulation in the CISG of the role of such usages and practices.[153] This compromise demonstrates the way in which the authors of the Convention were able to produce solutions for very tricky situations and very real concerns which are eminently acceptable and create a more balanced situation for international trade relations. Testimony to this is found in the acceptance of the CISG by important organizations within trade and industry in the United States and Canada.[154]

(f) Focus on the commercial aspect of transaction

That the CISG will in any event govern the transaction may assist the parties in avoiding unnecessary conflict about peripheral issues such as choice-of-law clauses. The CISG creates a legal basis for the transaction which is neutral and well balanced and therefore does not favour either the seller or the buyer.[155] It is a good starting point for any negotiations because it points to what would be fair and reasonable in general, and it [page 352] can often provide an acceptable solution in difficult negotiations.[156] Unless there are specific reasons or circumstances flowing from the particular relationship necessitating changes in this balance, parties may rely on the CISG to provide equal protection to both parties. This may also help to prevent or curtail the so-called battle of forms, where parties try to gain the upper hand by firing the last shot in the negotiations. Very often this leads to unnecessary friction about non-essential aspects of the transaction.

In the attainment of the simplification and encouragement of international trade it is important to remove any unnecessary obstacles in the way of parties reaching an acceptable result.[157] If the parties can concentrate on the main issues on hand -- price, quality, delivery times, guarantees and so forth -- and not waste time on bickering about choice of law, then the CISG has already served an important purpose.

(g) Improved competition

The CISG provides the basis for better competition in international markets. If parties are all contracting on the same legal basis, it makes it easier for them to make an evaluation of the different options available in the market in as much as the risks, rights and duties will be similar. This improves the conditions for stronger competition.[158]

5.3 Policy reasons

(a) The inclusive and participative process in the creation of the CISG

One of the major criticisms of ULIS and IJLF was that these conventions represented the result of an almost exclusively Western European endeavour, which did not adequately take into account the interests and concerns of other political, economic and legal groupings. It was suspected of overly emphasizing the interests of industrialized, capitalist and civil-law countries, which would be detrimental to developing or socialist nations.[159]

South Africa did not take part in the proceedings in UNCITRAL, and although it remained a member of the United Nations, it was at that time not a very welcome member at international gatherings owing to its internal race policies. There is little doubt that if it had not been for this factor, South Africa, as an important economic force in Africa, would have played a role in UNCITRAL and its work.

As a result of the adequate representation of all groupings in UNCITRAL and its working parties, and the consultative process that took place throughout the development of the CISG, this important stumbling [page 353] block fell away.[160] The concerns of particularly the developing countries were much more adequately addressed in this process. The CISG is generally viewed as a very well balanced set of rules which does not favour either the buyer or the seller.[161] There is thus no reason on this account that should prevent South Africa from acceding. As a developing nation, its interests and concerns have been adequately addressed in the Convention by representatives of other developing countries.

(b) The extent of international acceptance

A further incentive for South Africa to accede to the CISG is that a significant number of countries have already done so.[162] Since the political changes have taken place in South Africa and almost all boycotts against the country have been dropped, international trade has become a much more important part of the South African economy. Although its traditional trading partners such as the United Kingdom, Germany, Taiwan and the United States still remain very important, external trade has become much more diversified. South Africa today has trading relationships with most countries, and certainly with all of the CISG nations.

That so many other countries have accepted the CISG is, of course, in itself not enough reason to do the same. Still, the extent of international acceptance, not only by most of the major trading nations but also by all the different interest groups, shows that there is every chance that this Convention is likely to succeed and become the norm for international trade in future, very much like the Incoterms or the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce. This argument is further supported by the considerations that the CISG is becoming better known and is applied more regularly, and that the growing body of literature and case law is allaying the fear that a uniform approach to the interpretation of the Convention would be difficult or impossible to achieve.[163] Although there have been minor aberrations in the decisions, by and large the courts and arbitral bodies have succeeded in implementing the Convention in the spirit in which it was conceived. Wide international acceptance has therefore not been a hollow gesture; it has achieved real and substantial results.

The adherence of so many countries to the CISG, which seems to be working for them, is surely a strong reason for South Africa to

join this venture and aid in its further success. That at this stage many enterprises still exclude the applicability of the CISG in their standard contracts may be attributed in part to ignorance, in part to unjustified prejudice, and [page 354] only to a limited extent to really well-founded objections to the CISG within a particular transaction.[164] As new generations of lawyers emerge who are acquainted with the CISG through their studies, as more and more commentaries and writings in more and more languages emerge, and as more and more cases prove that the CISG is a valuable and workable alternative which creates more certainty and facilitates international trade, fewer enterprises will be inclined to exclude the CISG.

(c) South Africa's leadership role in the region

South Africa is undoubtedly the economic powerhouse of the southern African region and it needs to fulfil this role with a responsibility not only to itself but also to the region as a whole and to the wider international community. The call for an African renaissance is based on a realization that nobody is going to rescue Africa from outside: it needs to be done by Africans for themselves. The facilitation of international trade in the region is an important step in the development and regeneration of the economies in the region. The unified sales law can play an important part in making it easier for businesses in the region, which are often inexperienced and undercapitalized, to get involved in international trade. The removal of unnecessary trade barriers, such as the intricacy and cost of dealing with potentially different applicable legal systems, is of prime importance.[165]

South Africa also has a moral obligation to support the work and efforts of the United Nations and its agencies, as these bodies played such an important role in bringing about the changes leading to democratization in South Africa.[166] This is not a call

for a blind participation and blanket endorsement of anything the United Nations does, but rather a call for a qualified endorsement and support for United Nations projects which are worthwhile and also in the interest of the region. South Africa should always evaluate such projects and endeavours in the light of its own interests, but where the evaluation is positive there should be a readiness to embrace those projects and endeavours.

It is significant, although somewhat perplexing, that up to date so few African countries have ratified the CISG despite the broad participation and representation of African interests and the endorsement of the Convention by an important regional organization like the Asian-African Consultative Committee.

[167] Practically speaking, it makes little sense for African countries not to endorse the CISG. Very often African traders will be dealing with parties who are either stronger and can therefore dictate [page 355] choice-of-law clauses, or with parties who are resident within CISG countries. This will invariably mean that foreign law will be applicable to these contracts. [168] But if the CISG is ratified, the applicable law will no longer be foreign law should the other party be resident within a CISG country. The law is easier to find, to understand, to comply with and to apply than would otherwise be the case.

In the process of introducing the CISG into African trade, South Africa may very well have to play the same role as the United States did in the initial acceptance of the CISG internationally.

[169] After the reluctance of many states to commit themselves to ULIS and ULF, there was a widespread reluctance to accept the CISG unless the United States was going to do so. The number of states that acceded to the Convention after the United States had done so amply proves this fact. If South Africa, as the most important economic entity in the southern African subregion, accepts the CISG, its chief African trading partners will follow

suit, which may lead to a second avalanche of acceptances.

Furthermore, latecomers will play no role in the further development of the CISG in its application and interpretation.

[170] Already the majority of the cases reported are of European origin.[171] From the perspective of developing countries, it is important that they also make their contribution to this ongoing process.

It is thus clear from a purely political point of view that there are overwhelming arguments in favour of acceptance. None of the political considerations which plagued ULIS and ULF and eventually led to their demise exist as far as the CISG is concerned. The Convention is a balanced one, neither favouring nor discriminating against buyer or seller, or developed or developing country. It would create an equitable situation which at the moment does not exist. While standard contracts are often used to tilt the scales in favour of the stronger contracting parties of developed nations, at least the CISG offers the opportunity of a fairer, less oppressive, legal environment.

6. THE CASE AGAINST ADOPTION

Although there has been some criticism in general of legal unification by legislative means, as discussed above, direct opposition to the introduction of the CISG has been relatively scarce.[172] The arguments raised by opponents will be dealt with under the same headings as above. There [page 356] may also be unspoken reasons for not accepting the CISG, as in the case of the United Kingdom. [173]

6.1 Legal reasons

***(a) Compromise character compromises unification* [174]**

It has been argued that the compromise character of the CISG

forced the drafters to place emphasis on formulations that were acceptable to everyone rather than confronting issues that still divide legal regimes, this resulting in the appearance of unification rather than substantially achieving it.[175] This criticism is valid as far as a few provisions are concerned, such as art. 28 on specific performance; art. 4 on the validity of the contract; art. 5 excluding the liability of the seller for death or personal injury caused by the goods; art. 7 on good faith; and art. 9 on custom and usage -- where there may be differences of interpretation on these issues.[176] Furthermore, there is no mention of procedural issues such as the burden of proof.[177]

On the majority of issues, however, and especially on the most important ones such as breach of contract and the remedies available (except, of course, specific performance), substantial harmonization was achieved.[178] The emphasis on issues of validity by commentaries, especially on international trade, is often exaggerated when compared with the frequency that such issues occur in practice.[179] The majority of disputes arise from breach of contract by the parties and the related remedies, and the interpretation of the contract. As far as the remedies are concerned, in most cases reliance on specific performance is the exception rather than the rule in international trade, even in civil -- law countries.

(b) No underlying principles

Rosett also claims that the compromise character of the CISG has resulted in a code with no underlying principles.[180] It is accordingly [page 357] "largely a cut-and-paste job" where grand principles and transcendent values are largely a pretence.[181] Wool [182] supports this criticism in arguing that there is an unacceptable tension between a diplomatic effort and commercial objectives which are reliant upon comparative methodology to achieve their aims. Accordingly, the unification

process is driven without clear-cut principles underlying the eventual outcome.

The role of good faith is a prime example, being one of the problem areas of the Convention. Although it is a principle which is recognized in most legal systems, it was excluded as an independent requirement because of Anglo-American fears that the *culpa in contrahendo* rules would be introduced into international transactions in this manner. It was then introduced via the back door by making it an interpretative principle of the Convention, about which there remains controversy. Civil-law commentators accord a much more important role on the use of the principle in the Convention than Anglo-American commentators, who are generally apprehensive about affording it too much importance.[183]

When the Convention is analysed through a less jaundiced perspective, though, it soon becomes apparent that these criticisms are largely invalid. Although compromises between developing and non-developing countries, capitalist and socialist countries, and civil- and common-law legal systems were reached, these relate to specific instances, which do not diminish the structural unity and balance of interest between seller and buyer achieved. The contention that there are no underlying principles has also been adequately disproved by the enumeration and analysis of principles found in the Convention by a number of leading commentators.[184] The following are some of the underlying principles that can clearly be found and which are consistently applied throughout the Convention:[185] party autonomy, *pacta sunt servanda*, protection of reliance, freedom from formalities, and *favor contractus*.[186]

(c) Foreign formulations

The CISG has been criticized for using language which, first of

all, is foreign in regard to the law of contract and therefore has no clearly defined meaning and, secondly, is too wide and inexact and therefore [page 358] leads to legal uncertainty.[187]

Farnsworth mentions a sense of unease one experiences when first encountering the language in the Convention.[188] The term "avoidance" of the contract is perhaps the best example of such a new term. The reason for this characteristic of the CISG can be found in the desire of the drafters to fashion a code which would be largely free from terminology that was grounded in a particular legal system and would therefore carry theoretical, conceptual or political baggage with it. That this would lead to some legal uncertainty initially was accepted by the drafters.[189] Despite the initial fear, this aspect of the Convention has not led to insurmountable obstacles. In some instances terms like "good faith" have tended to seduce commentators into importing national legal ideas and interpretations,[190] a consequence which is not in accordance with the aim of unification.[191]

(d) Artificial division between national and international transactions

Rosett is of the opinion that it is impossible to distinguish between local and international transactions because of modern economic conditions and the diminishing importance of international borders.[192] Article 1 determines the sphere of application of the Convention by using the places of business of the parties as the deciding factor. This certainly is artificial, but in the majority of cases it provides absolutely no problem, as it applies clearly to cases where the application of different legal systems would come into play. There are a number of circumstances where the Convention may apply where conflicts rules would not necessarily do so.[193] These curious results, however, are a small price to pay for the amount of certainty which the current formulation achieves. In any event, the parties

in such case would be free to choose domestic law or prove that they tacitly agreed to the application of domestic law.

(e) Static and unchangeable monument

An important problem with legislation, and especially with conventions, is that they tend to lead to the petrification of the law.[194] The CISG is an international code of sale that contains no provisions for change or [page 359] modification. Although UNCITRAL may be instrumental in setting in motion a conference for a change of the Convention, the sheer number of countries that have acceded to it makes it a daunting task.[195] Unless the CISG countries unanimously accept such changes, the law remains unaltered or splinters into a number of different versions, a result which destroys the unity the Convention set out to achieve. Even national codes are difficult to change and are only modified with great circumspection.[196] Because of this characteristic, it is argued that the law becomes static, unable to conquer new challenges and problems.[197]

This is a real concern, but there are factors which militate against such fossilization of the law. The CISG was consciously drafted in the style of civil-law codes, with fairly general and flexible formulations. Although this leads to some legal uncertainty, it is necessary to enable the code to remain vibrant and adaptable. [198] The long-term durability of the CISG is not dependent on some supranational legislative agency with the authority to change it, but rather on the interpretation and development of the code by courts and arbitral tribunals around the world.[199]

The decisions of individual courts are not binding on any other courts elsewhere in the world. The drafters of the Convention seems to have had a great deal of trust that courts and tribunals would in good faith and in a competent manner rise above national law and apply the Convention in the spirit in which it

was drafted and agreed on, and that they would in that same spirit -- accord the necessary importance and respect to the decisions of other courts and tribunals although they are in no way bound to do so. This is not simply a blind faith but results from the experience that modern courts often take comparative note of what courts elsewhere decide when they are faced with novel situations.[200]

There exists a popular misconception among common-law jurists that, in the absence of a principle of *stare decisis*, the courts in civil-law countries do not follow the decisions of other courts. [201] Investigation into civil-law systems such as the German and Dutch soon reveals an astonishing unity of decision between courts and that these courts have contributed much in developing the legal systems of these countries in a coherent and systematic manner. One may be cautiously optimistic that the same will prove true for the CISG. If the Convention is not to remain a static monument, petrified in time, it will have to be developed and augmented by the unified interpretation and application of courts and [page 360] tribunals. Thus far the evidence in the decisions does not either confirm or refute this expectation.[202]

(f) Integrity endangered by multitude of languages and interpretational approaches

From the outset it has been emphasized that the success of the CISG would be dependent on its uniform interpretation and application. Some commentators expressed grave fears that, owing to the different languages, the lack of clear definitions and the vagueness of many terms, it would be very difficult for courts with very different interpretational styles and cultures to interpret and develop the CISG uniformly.[203] The problem seems to be directed mainly at the difference between the traditional interpretational style of English courts, in which no notice is taken of *travaux préparatoires* and statutory texts are

usually interpreted strictly according to the language used, on the one hand, and the freer more teleological style of civil-law courts, in which *travaux préparatoires* are freely used, on the other hand.

[204]

It seems, however, that when it comes to the interpretation of international conventions this divergence has largely fallen away due to Anglo-American courts accepting the civil-law-orientated approach when dealing with conventions.[205] This fact is best illustrated by the judgment of Lord Denning MR in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*, [206] in which he makes the following statements:[207]

"This art. 23, para 4, is an agreed clause in all international conventions. As such it should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We must, therefore, put on one side our traditional rules of interpretation. . . . We ought, in interpreting this convention, to adopt the European method. . . [page 361]

"We are told that there have been no decisions so far in other countries on this article of the convention. . . . So where we lead, others may follow. But I would like to assure them that if it had come first before them, we would be only to glad to follow them."

This passage and several similar passages in Anglo-American cases show clearly that courts are adequately aware of the responsibility to strive towards the uniform interpretation of conventions and their ability to adopt different interpretational

methods.[208] The biggest fear is not really the difference in style of interpretation but rather whether courts will be able to rise above their national laws and resist the temptation to refer to the familiar concepts and doctrines of their national law in cases of uncertainty.[209]

(g) Legal uncertainty

Novelty, indefinite terms, new terms, wide terms, and avoidance of issues lead to legal uncertainty for the parties, which does not fulfil the claims of simplification and the requirement of clarity.

[210] Although the flexible style of formulation makes the Convention more adaptable to different situations and affords the courts greater freedom to arrive at a just result and a uniform interpretation of the Convention, it leads to legal indeterminacy, which presents parties and their legal representatives with the difficulty of predicting the result of any pending dispute.[211]

As indicated above, a certain amount of uncertainty is inevitable when dealing with a civil-law-style code such as the CISG.[212] The question is whether the extent of the uncertainty remains within acceptable boundaries and is in balance with the flexibility won by it. The apparent uncertainty of the CISG was rendered less severe by the fact that it was preceded by ULIS and ULF. The application of its stipulations and principles was therefore not totally new and had been subjected to the practice in the countries where these conventions were in force. A number of decisions were reported and even a few commentaries on the conventions were published. Valuable lessons were learned from this which were taken into account in the drafting of the CISG. [213] [page 362]

6.1 Business or trade-related reasons

(a) Irrelevance because of trade practices and standard contracts

From a business point of view, Lord Goff expressed a great deal of scepticism about the necessity of unification measures such as the CISG.^[214] In his opinion, most branches of international trade used standardized trade terms which covered most, if not all, of the field being covered in the CISG, and these methods were more appropriate for international trade law. Traders in these fields would be very reluctant to give up these well-known and widely used standard terms for an unknown and untested legal regime. Once again, this criticism is a truism which is not really opposed to the introduction of the CISG but fails to deal with the many situations where no standard form or terms are used, or where they are deficient.

The fear that the standard terms and practices would render the CISG irrelevant has to some extent proved correct in that many traders have excluded the CISG from their standard contracts.^[215] But the Convention often covers a much broader field than most trade practices and standard terms. There is also a significant enough number of transactions which are covered by neither. In this respect, the CISG, trade practices and standard contracts play complementary roles rather than opposing roles. The CISG covers those aspects that are not covered by the individual contract, the accepted trade practice or the standard contract used, rather than leaving this auxiliary role to national law.

Legal unification is further viewed by some as unnecessary on the ground that international traders themselves will eventually make the reforms that are necessary, as in the case of the Incoterms and the UCP.^[216] It is, however, clear that it is unlikely that organizations such as the International Commission of Jurists will undertake a broader unification of the total law of international sales; their efforts have thus far been restricted to

distinct parts of the international transaction, as they do not have the necessary legislative powers to introduce such reforms. The support for the acceptance of the CISG by important trade organizations also tends to refute this argument.[217]

(b) Unnecessary complication of international trade law

Unification may in some instances lead to the law becoming more complicated rather than simpler. This may be the case where the existence of possibly competing instruments makes it hard to determine which set of unified legal rules will apply. This is the unfortunate situation as far as the law of the sea is concerned with the existence of the Hague [page 363] Rules, the Hague-Visby Rules and the Hamburg Rules. In the case of the CISG, though, there are no competing conventions, since ULIS and ULF are no longer of any practical consequence.

A further criticism from Rosett is that American businesses now have to cope with more than one set of laws of sale, whereas in the past they only had to cope with the Uniform Commercial Code (UCC), which was the nationally applicable law.[218] This argument is not entirely valid. Before acceptance of the CISG, American businesses were either in a position to dictate American law, in which event the UCC would apply, or they were in a position where the other party dictated the applicable law, in which event any number of foreign legal systems could come into play, or the normal conflicts rules dictated the applicable legal system, which could be either the UCC or foreign law. The acceptance of the CISG has resulted in the number of possibly applicable legal systems being drastically reduced.[219] The same would hold true in the South African situation. The CISG can therefore not be accused of complicating the international trade arena. If anything, it simplifies it in many instances.[220] It is, however, true that, with a number of issues having been left open, the failure to effect total unification causes complications.[221]

6.3 Political reasons

(a) Foreign solutions to well-known problems

Rosett argued, prior to the introduction of the Convention in the United States, that the CISG represents a foreign solution to well-known problems that were adequately addressed in the Uniform Commercial Code.^[222] The CISG was therefore unnecessary and would lead to complications by introducing a new set of rules with which American businesses would have to contend. As these problems were well known, the CISG was also unnecessary, for the trading parties themselves are in the best position to control the process and devise solutions for their specific situation.^[223]

It is true that parties can devise their own solutions, and the CISG acknowledges this by retaining the principle of party autonomy, but often parties fail to make provision for some or all of the issues covered by the CISG. Not all companies in international trade use standard terms or employ Incoterms,^[224] and even if they do, there may be shortcomings. There is a need for fall-back rules that will apply if the contract does not cover an issue adequately. The fact that the UCC covers these situations [page 364] adequately and is well known to American business, is of no avail if the UCC is not applicable, businesses then having to deal with any number of foreign legal systems.^[225]

(b) Inefficiency of uniform law

Rosett's opposition to the CISG stems from a fundamental opposition to legal unification in general.^[226] His view is based on the belief that it is a mistake to try to unify substantive rules of the law unless one is also prepared to co-ordinate the judicial and social contexts within which those rules must be applied.^[227] If the judicial and social contexts are not co-ordinated, the

substantive rules will not be applied in the same way and will lead to different results. Accordingly, efforts should be aimed at this type of co-ordination first.[228] This is a highly theoretical argument that does not take into account the successes that unifying conventions and usages have attained in international trade, such as the Incoterms, the Uniform Customs and Practice for Documentary Credits, the Hague-Visby Rules and the Warsaw Convention.[229] These examples and the success that the CISG has achieved prove adequately that legal unification in different legal and social contexts is an attainable and desirable goal.

A similar scepticism on the efficiency of legal unification endeavours is voiced by Kötz, who points to the selective and fragmentary nature of the results that have been achieved thus far, which sometimes seem to overshadow the effort, time and resources that went into producing them.[230] Furthermore, the ultimate goal of simplification is seriously jeopardized if the following statement should be true:[231]

"If one takes a closer view, it appears justified to ask whether legal unification, inasmuch as it has legal simplification as a goal, does not find itself in the same position as Heracles, who cuts off the one snakehead of the Hydra, only to be confronted by three others in its place."

The first criticism, which questions the wisdom and economy of these endeavours, can easily be dealt with, as it is aimed at the future and not so much at what has already been produced. The CISG is in existence; the fact that it took a long and expensive process to produce it does not change that fact.

Magnus also quite correctly indicates that it is in the nature of legal unification that it will be fragmentary and selective and that should not necessarily be evaluated entirely negatively.[232] A realistic endeavour to create unity within a specified sphere

where there is a fair amount of diversity or uncertainty has the best chance of achieving success and being useful. The less diversity there exists, the easier it becomes to create unification, but it may not be as useful as in the first instance. But if the [page 365] differences are too great, whether in reality or in perception, then the chance of achieving unification is slim.[233]

The second question that warrants more attention is whether the CISG achieves simplification and unification or whether it produces more problems than it solves. Although some important issues that may arise in the context of the law of international sales have not been covered,[233] sufficient important issues have been unified and simplified.[235] The CISG has thus achieved this balance of finding agreement on a number of issues where there was a fair amount of diversity.[236] It is also true that it failed to find a compromise for a number of other issues, but this does not cut to the core of the Convention, as Rosett claims.[237] The experience with the Convention thus far has also proved that this is so.

7. EXPERIENCE WITH THE CISG THUS FAR

The growing number of ratifications of the CISG has meant that the Convention has been applied in many more cases.[238] One can fairly safely assume that for each of the disputes resolved in the cases reported, there are many more disputes which were resolved in another manner or which have not been reported. And there must be an enormous number of other international transactions that fell within the sweep of the CISG in which no dispute arose at all. Therefore, despite fears that the CISG would be a dead letter because it would not be accepted or, where accepted, it would be excluded by most traders, it appears that the CISG is growing in importance acceptance in practice.[239] Even if the Convention is still excluded by the majority of enterprises, it nevertheless plays an important part in providing a

common legal basis for those transactions where it has not been excluded or where standard contracts contain gaps or do not provide for a specific situation.

The anxiety that a varying interpretation of the Convention would seriously endanger the unification process has also not clearly manifested itself in the decisions thus far, but has also not been disproved either.[240] A disconcerting feature of the latest cases is that despite their growing number there has been very little reference in them to other cases especially any from a jurisdiction not that of the forum.

Also embarrassing is the fact that in certain jurisdictions within which the CISG has been applicable for a number of years it does not seem to [page 366] have made itself generally felt or known in practice or literature, whereas in other jurisdictions there is a much greater general awareness of it.[241] In Germany, for instance, where the Convention has been in force since 1991, besides there being a number of commentaries available,[242] textbooks on private international law and on general commercial law contain copious references to and discussions of the Convention.[243] In Australia, on the other hand, one leading textbook on the conflict of laws contains no reference to the CISG.[244] Several prominent books on commercial law in that country also omit the Convention entirely, even though they discuss the law of sale at length.[245] One would have expected that textbooks aimed at commercial lawyers and business persons would at least give some attention to this subject, which is relevant to Australian importers and exporters. What it does indicate is that the level of awareness of the CISG and its import does not seem to be very high in Australia.

In conclusion, it can be said that the CISG has been a successful venture judged by its international acceptance and the body of law that is developing under it. More than 270 cases worldwide in

which it has been applied have been reported. Although there are a number of criticisms of the formulations used, gaps that were not filled or issues that were sidestepped, the overall evaluation of the content and viability of the Convention has been positive.

[246]

8. CONCLUSION

Hobhouse makes the following statement about English law, which applies equally to South African law:[247]

"Only conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of this country."

It seems that in certain fields there is greater need for some kind of unification to take place than in others. It is clear from the history leading up to the formation of the CISG and also the wide interest and participation in the drafting that this is one of those areas.[248] From the arguments advanced and the experience with the CISG thus far, the main advantages to be gained by adopting the CISG, and therefore the main reasons for adopting it, are the following:

A simplification of the legal environment within which international sales operate by having available one set of domestic rules which is internationally accepted;

A global uniform approach to international sales, independent of the intricacies of private international law;

A reduction in the number of foreign legal systems that may potentially apply to the international contracts of sale of South African traders;

The opportunity to unify the law of sale applicable in the southern African region;

Saving of legal expenses;

The removal of unnecessary trade barriers, supporting the growth of international trade;

The acceptance of a legal regime which is already applicable in many instances;

The initial uncertainty ascribed to the CISG has largely been eliminated by the available case law and commentaries on the Convention;

Accepting a legal regime which already is applied by the majority of South Africa's trade partners;

Acceptance of a modern sales code which was specifically fashioned for international trade and takes sufficient notice of international trade practice and usages as well as the needs of South Africa as a developing country;

No competing conventions which complicate rather than simplify the law and endanger the unification sought;

The fact that the Convention embraces the basic principles on which the South African law of contract and law of sale are based, such as party autonomy, freedom of contract, freedom of form, the sanctity of the contract, and foreseeability. The Convention improves, modernizes and simplifies, without revolutionizing.

The main disadvantages of the CISG and therefore the main reasons for rejecting adoption are the following:

The legal uncertainty caused by introducing a new set of

rules of sale;

The legal uncertainty caused by broadly formulated rules containing many undefined and new terms which have to be developed in the international arena by courts and arbitral tribunals without any hierarchy and no principle of *stare decisis*; [page 368]

The introduction of foreign solutions to well-known problems;

The general irrelevance of the Convention due to the fact that in most instances it is excluded by the parties in practice;

The compromise character of the Convention, which blunts the solutions and evades many of the real issues;

The absence of certain underlying principles;

Legislative measures are not the most suitable means to create legal unification or solve the problems created by diverse laws and conflicts issues;

The law is robbed of its flexibility and is fossilized in a code which is almost impossible to change;

The integrity of the Convention is threatened by diverse interpretational approaches and traditions.

Some of the hoped-for advantages, such as simplification and true unification, have been harder to achieve in practice than the original optimism predicted. The change from different national legal regimes being applicable under a traditional conflict-of-laws approach to one domestic regime in which conflict-of-laws issues are largely excluded has, however, achieved a significant simplification for businesses and their legal advisers alike. The

flood of literature containing many excellent commentaries in a number of different languages has made an enormous contribution to the development and unified interpretation and application of the Convention. The success of the Convention measured in the number of ratifications has unfortunately been diminished by the exclusion of its application by many businesses in practice. With newer generations of lawyers who are more familiar with and less suspicious of the Convention coming into practice, this may well change. The large number of decisions on the Convention have by and large confirmed the optimism about its uniform interpretation and application. They have also made a substantial contribution to the greater acceptability of the Convention and the confidence in its future.

In the process of unification of international commercial law, it is important to realize that unification will not be successfully introduced if one relies on a single instrument only.[249] The fact that the Incoterms and UCP are recognized in South African law is important, but to complete the picture the CISG, supported by the UNIDROIT Principles, needs to be added.

In conclusion, it is clear that the advantages of adopting the Convention far outweigh the disadvantages. I would therefore recommend that South Africa take the necessary steps to accede to the Convention as soon as possible. It is also important that, prior to accession, steps be taken to convince other southern African states to accept the Convention at the same time, so that application and unification are not limited to South [page 369] Africa, Lesotho and Zambia, but pervade the whole of the subregion.[250] This will create the necessary legal framework within which international trade in the region can be developed and promoted by removing an unnecessary obstacle in a region where many businesses are either newcomers in international trade or would like to become participants. This step alone will,

of course, not trigger the African renaissance hoped for, but will be an important building block in the process of creating the conditions within which it can take place and flourish. [page 370]

FOOTNOTES

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**** Professor of Private Law; Potchefstroom University for Christian Higher Education. B Juris LLB LLD (PU for CHE) Certificate in Tax Law (Unisa), Advocate.**

1. The Vienna Convention will be referred to generally in this article as "the CISG".

2. See the following texts, which are referred to extensively in shortened form in the rest of the article: C M Bianca & M J Bonell *Commentary on the International Sales Law--The 1980 Vienna Sales Convention* (1987) 6-7; Peter Schlechtriem in *Von Caemmerer/Schlechtriem Kommentar zum Einheitlichen UN-Kaufrecht* (1995) 25-7 (this source is now also available in English as Peter Schlechtriem *Commentary on the UN Convention for the International Sale of Goods* (1998)--references to paragraph numbers and margin numbers are applicable to both sources); Muna Ndulo 'The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964; A Comparative Analysis' (1989) 38 *International and Comparative LQ* 1 at 2-4; S K Date-Bah 'United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary' 1979 *Ghana LR* 50-2. The Convention is to be found in (1980) 19 *International Legal*

Materials 668-99.

3. This term is used in political circles to indicate the revival of the economies of African states by their own means and efforts.

4. G G Oly *Algemene Beschouwingen over de Eenvormige Wet op de Internationale Koop van Goederen in Historisch Perspektief* (1982) 29-33.

5. With the exception, of course, of Lesotho and Zambia, which have already acceded to the CISG.

6. Roy Goode 'Harmonization, Unification and Internationalization' in Ross Cranston & Roy Goode (eds) *Commercial and Consumer Law-National and International Dimensions* (1993) 1 at 5-6. Hein Kötz 'Rechtsvereinheitlichung-Nutzen, Kosten, Methode, Ziele' (1986) 50 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1 at 5 refers to Kegel's suspicion that sometimes legal unification is promoted more because of a certain body's having to produce results than because there is a pressing need.

7. Kötz op cit note 6 at 1. See, for instance, F Enderlein, D Maskow & H Strohbach *Internationales Kaufrecht* (1991) 23; J S Hobhouse 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 *LQR* 531; Malcolm D Evans 'Uniform Law: A Bridge too Far?' (1994) 3 *Tulane Journal of International & Comparative Law* 146; Jeffrey Wool 'Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Preliminary Proposal for the Development of a Policy-based Unification Model' (1997) 1 *Uniform LR* 46; Jan Hellner 'The UN Convention on International Sale of Goods--An Outsider's View' in E Jayme, G Kegel & M Luther (eds) *Jus Inter Nationes: Festschrift für Riesenfeld* (1983) 73.

8. Goode op cit note 6 at 6; Hans-Joachim Mertens

'Rechtsvereinheitlichung Rechtspolitisch Betrachtet' in M Lutter (ed) *Recht und Wirtschaft in Geschichte und Gegenwart: Festschrift für Johannes Bärman* (1975) 659.

9. Ernst Rabel in H G Leser (ed) *Ernst Rabel Gesammelte Aufsätze* Band III (1967) 490, 499-501; Ernst Rabel *Das Recht des Warenkaufs* 1. Band (1936) 27, 35; Kötz op cit note 6 at 1-2; Goode op cit note 6 at 11-13; Mertens op cit note 8 at 659, 662.

10. Schlechtriem op cit note 2, at Einl I; Peter Schlechtriem *Internationales UN-Kaufrecht* (1996) 1; Mertens op cit note 8 at n 653. See Ernst Rabel 'Draft of an International Law of Sales' (1938) 5 *Univ of Chicago LR* 543-6; Ernst Rabel 'Der Entwurf eines einheitlichen Kaufgesetzes' (1935) 9 *Zeitschrift für ausländisches und internationales Privatrecht* 1-4; Bianca & Bonell op cit note 2 at 3.

11. Enderlein, Maskow & Strohbach op cit note 7 at 23; Kötz op cit note 6 at 1ff; Arthur Rosett 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *American Journal of Comparative Law* 683 at 683-4; Goode op cit note 6 at 6-9; Hobhouse op cit note 7 at 531ff; Mertens op cit note 8 at n 657; Arthur Rosett 'UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven' 1997 *Uniform LR* 441-50; Michael Joachim Bonell 'The UNIDROIT Principles in Practice: The Experience of the First Two Years' 1997 *Uniform LR* 34-45; Evans op cit note 7 at 158.

12. J Kropholler *Internationales Privatrecht* 3 ed (1997) 2-3, 24; Gerhard Kegel *Internationales Privatrecht* 7 ed (1995) 4-5; G C Cheshire & P M North *Private International Law* 12 ed (1992) by P M North & J J Fawcett 3-5; John Honnold 'The New Uniform Law for International Sales and the UCC: A Comparison' (1984) 18 *International Lawyer* 21 at 22; Ernst von Caemmerer

'Internationale Vereinheitlichung des Kaufrechts' (1981) 77 *Schweizerische Juristen Zeitung* 259; Goode op cit note 6 at 3; Francis A Gabor 'Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective' (1988) 8 *Northwestern Journal of International Law & Business* 538 at 540-1; Ndulo op cit note 2 at 24-5.

13. Although there are a number of theories on why courts should and do acknowledge and apply foreign law, it is an accepted practice in most jurisdictions, which leads to legal certainty in general and fairness inter parties. For an overview of the different theories, see Cheshire & North op cit note 12 at chapter 2; P Nygh *Conflict of Laws in Australia* 6 ed (1995) 21-30; Kropholler op cit note 12 at 24-5; Kegel op cit note 12 at 142-63. For the purposes of this paper it is not necessary to take a stand on these different theories.

14. Within the European Union some of the uncertainty has been evaded by the introduction of the EEC Convention on the Law Applicable to Contractual Obligations 1980 of Rome. Although it makes use of the proper law as the basic rule, a number of presumptions provide a greater measure of certainty. See Cheshire & North op cit note 12 at 457-9; D Martiny in C Reithmann & D Martiny *Internationales Vertragsrecht* 5 ed (1996) Rn 2-25; Kegel op cit note 12 at 477-9.

15. Section 4(2) of the Rome Convention. See Martiny op cit note 14 at Rn 102-6; Cheshire & North op cit note 12 at 487-92.

16. Rabel op cit in Leser note 9 at 617; Rabel *Warenkaufs* op cit note 9 at 36.

17. Date-Bah op cit note 2 at 51; Bianca & Bonell op cit note 2 at 3; Hellner op cit note 7 at 73; Kurt Zweigert & Ulrich Drobnig 'Einheitliches Kaufgesetz und internationales Privatrecht' (1965)

29 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 146ff; Kegel op cit note 12 at 477-9.

18. Kegel op cit note 12 at 483-9; Martiny op cit note 14 at Rn 101-1-2; Arthur Rosett 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 *Ohio State LJ* 265 at 269.

19. Enderlein, Maskow & Strohbach op cit note 7 at 23; Errol P Mendes 'The UN Sales Convention & Canada Transactions: Enticing the World's Largest Trading Block to Do Business Under a Global Sales Law' (1988) 8 *Journal of Law & Commerce* 114; G A Barton 'The United Nations Convention on Contracts for the International Sale of Goods' (1985) 18 *CILSA* 22; Date-Bah op cit note 2 at 51; Goode op cit note 6 at 25; Hellner op cit note 7 at 73; Muna Ndulo 'The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area' (1987) 3 (2) *Lesotho LJ* 127 at 130.

20. Hans Dölle (ed) *Kommentar zum Einheitlichen Kaufrecht* (1976) XXXII; Rosett op cit note 18 at 269; Mendes op cit note 19 at 113-14; John Honnold (1959) 107 *Univ of Pennsylvania LR* 299-300; Bernard Audit 'The Vienna Sales Convention and the Lex Mercatoria' in T E Carbonneau (ed) *Lex Mercatoria and Arbitration--A Discussion of the New Law Merchant* rev ed (1998) 173-4.

21. (1938) 5 *Univ of Chicago LR* op cit note 10 at 546.

22. Although this Eurocentric statement may be challenged when looking at all the legal systems of the world, it certainly was true for the legal systems subject to the discussions at the time. See also Robert Goff 'Force Majeure and Frustration' in Anonymous *La Vendita Internazionale* (Milan 1981) 314 on the Anglo-

American legal systems.

23. Warenkaufs op cit note 9 at 27. Cf Rosett op cit note 18 at 268-9.

24. Dölle op cit note 20 at XXXI.

25. Rabel *Warenkaufs* op cit note 9 at 44-5.

26. G J Meijer 'International commercial arbitration' in M Koppenol-Laforce (ed) *International Contracts* (1996) 85-94; A Redfern & M Hunter *Law and Practice of International Commercial Arbitration* 2 ed (London 1991) 1-7; Klaus Peter Berger 'The *lex mercatoria* doctrine and the UNIDROIT principles of international commercial contracts' (1997) 28 *Law & Policy in International Business* 979-84; Joseph Lookofsky *Transnational Litigation and Commercial Arbitrations--A Comparative Analysis of American, European and International Law* (1992) 559ff.

27. Rabel *Warenkaufs* op cit note 9 at 47-8. See also Berger op cit note 26 at 943ff on the similar role to be played by the UNIDROIT principles.

28. Enderlein, Maskow & Strohbach op cit note 7 at 23.

29. Rabel (1938) 5 *Univ of Chicago LR* op cit note 10 at 546. See also Mendes op cit note 19 at 118; Bianca & Bonell op cit note 2 at 9-13; Hellner op cit note 7 at 74-5; Ndulo op cit note 2 at 25; Audit op cit note 20 at 173.

30. Mendes op cit note 19 at 110-14; Oly op cit note 4 at 34-5; Rosett 'UNIDROIT' op cit note 11 at 446; Gabor op cit note 12 at 538-9.

31. Hans Grossmann-Doerth *Das Recht der Überseekauf* (1930)

- 65. See Kötz op cit note 6 at 1ff; Hein Kötz 'Europäische Juristenausbildung' (1993) 1 *Zeitschrift für Europäisches Privatrecht* 268ff; Hans-Joachim Mertens 'Nichtlegislatorische Rechtsvereinheitlichung durtch transnationales Wirtschaftsrecht und Rechtsbegriff' (1992) 56 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 219ff; Arhtur Rosett 'The International Sales Convention: A Dissenting View' (1984) 18 *International Lawyer* 445-9; Rosett op cit note 18 at 265ff.**
- 32. See Arthur Rosett 'CISG Laid Bare: A Lucid Guide to a Muddy Code' (1988) 21 *Cornell International LJ* 585; Rosett op cit note 18 at 269; Richard E. Speidel 'Symposium Reflections on the International Unification of Sales Law' (1988) 8 *Northwest Journal of International Law & Business* 535 note 10; Hobhouse op cit note 7 at 531ff.**
- 33. Grossmann-Doerth op cit note 31 at 67-8; Rosett op cit note 32 at 585-6; Goff op cit note 22 at 322-3; Hobhouse op cit note 7 at 534.**
- 34. Rosett op cit note 32 at 578-80; Rosett op cit note 31 at 447.**
- 35. Elisabeth Hayes Patterson 'United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination' (1986) 22 *Stanford Journal of International Law* 278-9; Rosett op cit note 18 at 272; Rosett op cit note 32 at 586; Lisa M. Ryan 'The Convention on Contracts for the International Sale of Goods: Divergent Interpretations' (1995) 4 *Tulane Journal of International & Comparative Law* 101-2; Goff op cit note 22 at 314-16; Hobhouse op cit note 7 at 533; Ulrich Magnus 'Die allgemeine Grundsätze im UN-Kaufrecht' (1995) 59 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 473.**
- 36. Grossman-Doerth op cit note 31 at 67. See also Goff op cit**

note 22 at 314; Hobhouse op cit note 7 at 532.

37. This prediction has been proved totally wrong in international arbitrational practice, where more and more arbitrators are using the CISG and the UNIDROIT principles as a generally applicable *lex mercatoria*. On arbitral practice, see Berger op cit note 26 at 943ff; Alejandro M Garro 'The contribution of the UNIDROIT principles to the advancement of international commercial arbitration' (1994) 3 *Tulane Journal of International & Comparative Law* 93ff; Audit op cit note 20 at 173ff.

38. Grossmann-Doerth op cit note 31 at 67-9.

39. Hobhouse op cit note 7 at 533.

40. Op cit note 6 at 1-17.

41. See also along similar lines Hobhouse op cit note 7 at 531ff.

42. Mertens op cit note 8 at n 662ff.

43. Hobhouse op cit note 7 at 532.

44. Hobhouse op cit note 7 at 531; Kötz op cit note 6 at 12-13; Mertens op cit note 8 at n 662ff.

45. His plea 'Please do not do it again' op cit note 32 at 589 clearly indicating his opposition to unified statutes. He is, however, not opposed to unification as such, but prefers other tools to achieve this. See Rosett op cit note 32 at 575-6; and Rosett 'UNIDROIT' op cit note 11 at 443-7 for a useful overview of the different instruments.

46. Ulrich Magnus 'Aktuelle Fragen des UN-Kaufrechts' (1993) 1 *Zeitschrift für europäisches Privatrecht* 80; Hobhouse op cit note 7 at 534.

- 47. Andreas W Renck *Der Einflu der INCOTERMS 1990 auf das UN-Kaufrecht* (1995); 4, 11-15.**
- 48. H Bernstein & J Lookofsky *Understanding the CISG in Europe* (1997) 1.**
- 49. Goode op cit note 6 at 8-9.**
- 50. Bonell op cit note 11 at 34-5. On UNIDROIT, see § 3.2 and § 4 below.**
- 51. See also Goode op cit note 6 at 3-4.**
- 52. See Michael Joachim Bonell *An International Restatement of Contract Law-The UNIDROIT Principles of International Commercial Contracts* (1994) 3; Oly op cit note 4 at 34-5; Mendes op cit note 19 at 88, 110-13; Barton op cit note 19 at 22-3.**
- 53. Bonell op cit note 52 at 3.**
- 54. Hans-Joachim Mertens & Eckard Rehbinder *Internationales Kaufrecht-Kommentar zum den Einheitlichen Kaufgesetzen* (1975) 113.**
- 55. Oly op cit note 4 at 29-31.**
- 56. Ulrich Magnus 'Erfahrungen mit dem Haager Waren-Kaufrecht, Erwartungen von der UNCITRAL-Konvention' in Hans Hoyer & Willibald Posch *Das Einheitliche Wiener Kaufrecht* (1992) 1 at 5-6.**
- 57. Convention for the Uniform Law of International Sales (ULIS) and Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).**
- 58. Dölle op cit note 20 at XXXI; Enderlein, Maskow & Strohbach op cit note 7 at 23; Kurt Siehr in Heinrich Honsell (ed)**

***Kommentar zum UN-Kaufrecht 1997)* 37; P Winship 'Private International Law and the UN Sales Convention' (1988) 21 *Cornell International LJ* 489; Ndulo op cit note 2 at 2-4.**

59. Mertens & Rehbinder op cit note 54 at 82-3; Schlechtriem op cit note 2 at Einl I; Enderlein, Maskow & Strohbach op cit note 7 at 23-4; Siehr op cit note 58 at 37; Winship op cit note 58 at 490.

60. Schlechtriem op cit note 2 at Einl I; Schlechtriem op cit note 10 at 2; Ndulo op cit note 2 at 2-3.

61. Siehr op cit note 58 at 37-8.

62. 1968 *UN Monthly Chronicle* March 35; 1968 *UN Yearbook* 838; John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (1982) 9; M L Zionitz 'A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?' (1980) 2 *Northwest Journal of International Law & Business* 146-7; Ulrich Magnus 'Weiner UN-Kaufrecht (CISG)' in Heinrich Honsell (ed) *Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetze* 13 ed (1994) Einl Rn 20-1; Winship op cit note 58 at 490.

63. 1969 *UN Yearbook* 775. On UNCITRAL, see immediately below.

64. Von Caemmerer op cit note 12 at 258-9.

65. Paul Lansing 'The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL' (1980) 18 *American Business LJ* 274; Date-Bah op cit note 2 at 50; Peter Winship 'International Sales Contracts under the 1980 Vienna Convention' (1984) 17 *Uniform Commercial Code LJ* 58.

66. Von Caemmerer op cit note 12 at 258-9; Robert G Lee 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?' (1993) *Journal of Business Law* 131; Dölle op cit note 20 at XXXVII; Enderlein, Maskow & Strohbach op cit note 7 at 24; Kenneth C Sutton 'The Draft Convention on International Sale of Goods (Part I)' (1976) *23 Business LR* 269.

67. Zionitz op cit note 62 at 137-44; Sutton op cit note 66 at 269; Winship op cit note 65 at 58.

68. Sutton op cit note 66 at 269; Winship op cit note 58 at 501; S K Date-Bah 'The Convention for the International Sale of Goods from the Perspective of the Developing Countries' in Anonymous *La Vendita Internazionale* (Milan 1981) 23; Dietrich Maskow 'The Convention on Contracts for the International Sale of Goods from the Perspective of the Socialist Countries' in Anonymous *La Vendita Internazionale* (Milan 1981) 41; Ndulo op cit note 2 at 3-4; Patterson op cit note 35 at 268; Bianca & Bonell op cit note 2 at 17.

69. Magnus op cit note 62 at Einl Rn 20-1; Zionitz op cit note 62 at 146 note 116; Dölle op cit note 20 at XXXVII.

70. *1968 UN Monthly Chronicle* March 35; Honnold op cit note 62 at 8; Sutton op cit note 66 at 269; Winship op cit note 58 at 502-3.

71. *1970 UN Monthly Chronicle* May 41; Honnold op cit note 62 at 9; Schlechtriem op cit note 10 at 2-3; Sutton op cit note 66 at 270; Winship op cit note 58 at 502-3.

72. Schlechtriem op cit note 2 at Einl I; Magnus op cit note 46 at 80; Magnus op cit note 62 at Einl Rn 21-30; R I V F Bertrams & F Ferrari *Enige Aspecten van het Weens Koopverdrag--Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing--Preadviezen Uitgebracht voor de Vereniging voor Burgerlijk Recht* (1995) 3; Mendes op cit note 19 at 124.

73. Schlechtriem op cit note 10 at 2.

74. Magnus op cit note 62 at Einl Rn 21, 24; Peter Schlechtriem 'Uniform Sales Law--The Experience with the Uniforms Sales Laws in the Federal Republic of Germany' 1991 *Juridisk Tidskrif vid Stockholm Universitet* 2.

75. Schlechtriem op cit note 2 at Einl I; Enderlein, Maskow & Strohbach op cit note 7 at 24-5; Siehr op cit note 58 at 38; Sutton op cit note 66 at 269-70; Ndulo op cit note 2 at 2-3.

76. Enderlein, Maskow & Strohbach op cit note 7 at 24-5; Ndulo op cit note 2 at 4.

77. Schlechtriem op cit note 2 at Einl I.

78. Schlechtriem op cit note 2 at Einl I.

79. Siehr op cit note 58 at 38-40; Sarah G Zwart 'The New International Law of Sales: A Marriage Between Socialist, Third World, Common Law and Civil Law Principles' (1988) 13 *North Carolina International Law & Commerce Register* 109ff.

80. Siehr op cit note 58 at 40.

81. Goode op cit note 6 at 6-9; Rosett op cit note 11 at 683-97; Bonell op cit note 52 at 1-6; Michael Joachim Bonell 'The UNIDROIT Principles of International Commercial Contracts and CISG--Alternatives or Complimentary Instruments?' 1996 *Uniform LR* 29; Hans-Joachim Mertens in (1992) 56 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 8ff; René David *International Encyclopaedia of Comparative Law* volume II: *The Legal Systems of the World: Their Comparison and Unification* ch 5; Kötz op cit note 6, at 1ff; Hobhouse op cit note 7 at 531; Mertens op cit note 8 at n 657; Rosett 'UNIDROIT' op cit note 11 at 441ff; Evans op cit note 7 at 158.

- 82. David op cit note 81 at ch 5; Winship op cit note 58 at 487; Bianca & Bonell op cit note 2 at 12; Audit op cit note 20 at 174.**
- 83. The European Economic Community Convention on the Law Applicable to Contractual Obligations, Rome 1980. Also known as the Rome Convention. See Cheshire & North op cit note 12 at 459-60; M. Koppenol-Laforce *International Contracts* (1996) 142.**
- 84. See Cheshire & North op cit note 12 at 459-60; Martiny op cit note 14 at Rn 2; Evans op cit note 7 at 148; Audit op cit note 20 at 174.**
- 85. Winship op cit note 58 at 488; Von Caemmerer op cit note 12 at 260; Magnus op cit note 62 at 23-4.**
- 86. Rosett (1992) 40 *AJCL* op cit note 11 at 693-7.**
- 87. Rosett (1992) 40 *AJCL* op cit note 11 at 687-8**
- 88. Rosett 'UNIDROIT' op cit note 11 at 443-5.**
- 89. Bonell op cit note 11 at 34-45; Renck op cit note 47 at S 255; Rosett 'UNIDROIT' op cit note 11 at 443-5.**
- 90. Goode op cit note 6 at 15-16.**
- 91. For an overview of the complexities, see C Graf von Bernstorff *Vertragsgestaltung im Auslandsgeschäft* 2 ed (1991); R I V F Bertrams & F J A van der Velden *Overeenkomsten in het Internationaal Privaatrecht en het Weens Koopverdrag* (1994) 3, 133.**
- 92. Mendes op cit note 19 at 114; John Honnold op cit note 20 at 299-300, 316; Winship op cit note 65 at 56.**
- 93. Kenneth C Sutton "The Draft Convention on International Sale of Goods (Part II)' (1977) 24 *Business LR* 119ff; Audit op cit**

note 20 at 174ff.

94. Kazuaki Sono 'UNCITRAL and the Vienna Sales Convention' (1984) 18 *International Lawyer* 7 at 13; Magnus op cit note 62 at 5-6; Bianca & Bonell op cit note 2 at 12; Von Caemmerer op cit note 12 at 260.

95. Hellner op cit note 7 at 101.

96. Schlechtriem op cit note 10 at 4-5; Mendes op cit note 19 at 121; Peter Winship 'The New Legal Regime for International Sales Contracts' (1988) 2 *Review of International Business Law* 108.

97. John O Honnold 'The Sales Convention in Action - Uniform International Words: Uniform Application?' (1988) 8 *Journal of Law & Commerce* 207; Sutton op cit note 93 at 119; Ryan op cit note 35 at 101-2; V Susanne Cook 'The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods' 1988 *Univ of Pittsburg LR* 217; J Clark Kelso 'The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and Battle of Forms' (1983) 21 *Columbia Journal of Transnational Law* 556; Bianca & Bonell op cit note 2 at 12, 18 E Allan Farnsworth 'The Convention on Contracts for the International Sale of Goods from the Perspective of the Common Law Countries' in Anonymous *La Vendita Internazionale* (Milan 1981) 21; English Law Society as reported by Robert G Lee 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?' 1993 *Journal of Business Law*, 132; Dennis J Rhodes 'The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law' (1992) 5 *Transnational Lawyer* 388-9. For a graphic exposition, see Goff op cit note 22 at 314-16.

- 98. Honnold op cit note 97 at 208ff; Michael Joachim Bonell (ed) *UNILEX International Case Law & Bibliography on the United Nations Convention on Contracts for the International Sale of Goods* loose-leaf ed (June 1997), also available as an electronic publication (update June 1998). See also the Internet site kept by the Pace University Law School at <http://cisgw3.law.pace.edu>**
- 99. Louis F Del Duca & Patrick Del Duca 'Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders Part I' (1995) 27 *Convention on International Sale of Goods (CISG): A primer for Attorneys and International Traders Part II* (1996) 29 *Uniform Commercial Code LF* 99-158; Ulrich Magnus 'Das UN-Kaufrecht: Fragen und Probleme seiner praktische Bewährung' (1997) 5 *Zeitschrift für europäisches Privatrecht* 826; Heinrich Honsell *Kommentar zum UN Kaufrecht* (1997) 88-9. Ryan op cit note 35 at 100 mentions divergent interpretations, but gives no examples or references, and this has certainly not been borne out by the case law so far. See Bianca & Bonell op cit note 2, at 12, 20.**
- 100. Section 7. See generally Schlechtriem op cit note 10 at 29-35; Magnus op cit note 62 at 114ff; Michael Joachim Bonell & Fabio Liguori 'The UN Convention on the International Sale of Goods: A Critical Analysis of Current Interpretational Case Law (Part I)' 1996 *Uniform LR* 147-63; Franco Ferrari 'Uniform Interpretation of the 1990 Uniform Sales Law' (1994) 24 *Georgia Journal of International & Comparative Law* 183ff; Ernst A Kramer 'Uniforme Interpretation von Einheitsprivatrecht--mit besonderer Berücksichtigung von Art 7 UNKR' 1996 *Juristische Blätter* 137ff.**
- 101. Magnus op cit note 35 at 470ff; Winship op cit note 65 at 67.**
- 102. Honnold op cit note 97 at 211; Kramer op cit note 100 at 141-2; Patterson op cit note 35 at 282.**

103. Honnold op cit note 97 at 208ff; Kramer op cit note 100 at 138; Patterson op cit note 35 at 278-9.

104. Honnold op cit note 97 at 209; Bonell & Liguori op cit note 100 (Part II) 359 at 374-5; Bonell op cit note 98 at D1ff, E1ff.

105. Magnus op cit note 56 at 28; Magnus op cit note 62 at 5; Goode op cit note 6 at 25; Lyon L Brinsmade (ed) 'American Bar Association Report to the House of Delegates' (1984) 18 *International Lawyer* 40; Von Caemmerer op cit note 12 at 260; Michael Kabik 'Through the Looking-Glass; International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods' (1992) 9 *International Tax & Business Lawyer* 409; Bertrams & Van der Velden op cit note 91 at 4.

106. C F Forsyth *Private International Law* 3 ed (Cape Town 1996) 90-3; Von Caemmerer op cit note 12 at 260.

107. Act 45 of 1988.

108. See Duncan Webb 'A New Set of Rules for International Sale' (1995) 71 *New Zealand LF* 87; Evans op cit note 7 at 149 similarly for English law; Jacob S Ziegel 'The International Sales Convention: Some Considerations' in Louis Perret & Nicole Lacasse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 56; J A Manwaring 'Reforming Domestic Sales Law: Lessons to Be Learned From the International Convention on the Sale of Goods' in Louis Perret & Nicole Lacasse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 141.

109. For instance, some rules on the formation of contract such as the post-box rule and the mirror-image rule, and the rules relating to the transfer of risk. See, for example, R H Christie *The Law of Contract in South Africa* 3 ed (1996) 66, 75-85 and AJ

Kerr 'Sale' in W A Joubert (ed) *The Law of South Africa* vol 24 (1986) paras 1-78; Generally see Bianca & Bonell op cit note 2 at 12-13 and Winship op cit note 96 at 108 for international evaluation. For similar and surprising reasoning in regard to French law, see Patrick Thieffry 'Sale of Goods Between French and US Merchants: Choice of Law Considerations under the UN Convention on Contracts for the International Sale of Goods' (1988) 22 *International Lawyer* 1023, who considers that French law is detrimental to the seller and should under no circumstances be chosen as the applicable law!

110. Mendes op cit note 19 at 118; Ziegel op cit note 108 at 74; Bianca & Bonell op cit note 2 at 9, 12-13; Evans op cit note 7 at 148; Von Caemmerer op cit note 12 at 260, 267; Hellner op cit note 7 at 74-5; 80; Audit op cit note 20 at 173; Ndulo op cit note 2 at 25.

111. Rosett op cit note 32 at 589.

112. Jan Hellner 'The United Nations Convention on Contracts for the International Sale of Goods: Its Influence on National Sales and Contract Law' in Ross Cranston & Roy Goods (eds) *Commercial and Consumer Law-National and International Dimensions* (1993) 45-51; Magnus op cit note 62 at Vorwort; Magnus op cit note 46 at 81. Even in the United States it is being utilized in the new draft of the UCC; Rosett 'UNIDROIT' op cit note 11 at 443.

113. Clement Ng'ong'ola 'The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of the Contract of Sale' (1992) 4 *African Journal of International & Comparative Law (RADIC)* 853.

114. Barton op cit note 19 at 23; Winship op cit note 96 at 108; Bertrams & Ferrari op cit note 72 at 4; Von Caemmerer op cit

note 12 at 260; Zwart op cit note 79 at 112; American Bar Association op cit note 105 at 40; Magnus op cit note 62 at 5; R M Lavers 'To Use, or Not to Use' 1993 *International Business Lawyer* 10; Yvan Feltham 'The Vienna Convention of 1980 and Canada' in Louis Perret & Nicole Lacasse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 18; Audit op cit note 20 at 173ff. Rosett op cit note 18 at 270, however, argues that, despite uniform texts, a great deal of uncertainty may persist. The experience with the CISG thus far has largely denuded this argument. See § 6 below.

115. Schlechtriem op cit note 2 at Einl II.

116. Lavers op cit note 114 at 10-11.

117. Winship op cit note 96 at 111; Honsell op cit note 99 at 88.

118. Bonell op cit note 98; Del Duca & Del Duca (1996) op cit note 99 at 102; Magnus op cit note 99 at 827.

119. <http://cisgw3.law.pace.edu> See also the following websites: Law School of the University of Tromsø (International Trade Law Project) <http://itl.irv.uit.no/tradelaw/> ; the ICC at <http://www.iccwbo.org/>; UNCITRAL at <http://www.un.or.at/uncitral/>; and UNIDROIT at <http://www.unidroit.org>

120. Schlechtriem op cit note 2 at Einl I; Del Duca & Del Duca (1995) op cit note 99 at 332-3; Mendes op cit note 19 at 119; Franco Ferrari 'General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions' 1997 *Uniform LR* 451-2; Frank Diedrich 'Lückenfüllung im internationalen Einheitsrecht' 1995 *Recht der internationalen Wirtschaft* 353; Bonell op cit note 52 at 26; Bertrams & Ferrari op cit note 72 at 1, 3-4; M R Will *CISG United Nations Convention on Contracts*

for the International Sale of Goods International Bibliography 1980-1995: The First 150 or So Decisions (1995) 1ff; Ulrich Magnus 'Stand und Entwicklung des UN-Kaufrechts' (1995) 3 *Zeitschrift für europäisches Privatrecht* 202-3.

121. Magnus op cit note 62 at 4: 'Das UN-Kaufrecht rechtfertigt aber auch in Hinblick auf sein Verbreitung und seinen Geltungsanspruch--anders als das Haager Kaufrecht--seine Einordnung als eine der wichtigsten privatrechtlichen Konventionen.

122. See Bonell op cit note 98 at C1ff and D1 for an up-to-date list of cases. Also Magnus op cit note 120 at 202-3; Will op cit note 120 at 12-14.

123. Franca Ciambella 'Business Sector's Attitudes Towards the Vienna Convention' in Louis Perret & Nicole Lacasse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 285ff.

124. See John D Gregory 'The Vienna Sales Convention--Ontario's Perspective' in Louis Perret & Nicole La casse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 185-7; Ciambella op cit note 123 at 291; Patterson op cit note 35 at 274; American Bar Association op cit note 105 at 39ff.

125. Gabor op cit note 12 at 541.

126. Based on the 1997 trade figures provided by the South Revenue Services. Statistically, the figures are slightly misleading because the South African trade figures include not only the South African figures but trade with the whole customs-union bloc, which includes Botswana, Swaziland, Namibia and Lesotho.

127. Ndulo op cit note 19 at 130.

128. This fact was also clearly indicated by its cautious

acceptance of ULIS and ULF, which in practical terms was no acceptance at all. See § 3.2 above.

129. See Gabor op cit note 12 at 541.

130. Ndulo op cit note 19 at 129-31; Bianca & Bonell op cit note 2 at 3; Gabor op cit note 12 at 541; Patterson op cit note 35 at 266.

131. Rosett op cit note 18 at 269; Honnold op cit note 20 at 299-300; Mendes op cit note 19 at 114; Winship op cit note 96 at 108; Bianca & Bonell op cit note 2 at 3; Magnus op cit note 62 at 5; American Bar Association op cit note 105 at 40; Von Caemmerer op cit note 12 at 260; Kabik op cit note 105 at 409.

132. Zwart op cit note 79 at 114.

133. There are, of course, certain exceptions to this, for instance where the parties have expressly excluded the application of the CISG or, in the case of the United States, where it has made use of the art 95 exclusion. This exclusion provides that the CISG will not be applied where both parties are not resident in CISG contracting states and United States law is indicated by conflict rules in the specific case. In that case, the Uniform Commercial Code will apply. Generally see Bernstein & Lookofsky op cit note 48 at 11-13; Magnus op cit note 62 at 45-6, 697-8.

134. Mendes op cit note 19 at 121; Magnus op cit note 62 at 5; Kabik op cit note 105 at 409; Manwaring op cit note 108 at 142-3; Ndulo op cit note 2 at 24.

135. See Magnus op cit note 62 at 5.

136. Schlechtriem op cit note 2 at Einl II; Audit op cit note 20 at 179; Mendes op cit note 19 at 121; Sono op cit note 94 at 13.

137. Zwart op cit note 79 at 115. See, however, Hellner op cit note

7 at 101, who argues quite correctly that the simplicity of the language and the structure may be misleading as to the legal complexities contained in the text. But the situation is still much easier to comprehend for the trader than it would be were there no CISG.

138. Bonell op cit note 98 at C1ff, D1ff.

139. Rosett op cit note 18 at 281ff.

140. Goff op cit note 22 at 312-13.

141. Barton op cit note 19 at 29; Date-Bah op cit note 2 at 54; Winship op cit note 65 at 57; Audit op cit note 20 at 175-6.

142. See arts. 11, 12 and 96.

143. Winship op cit note 65 at 64-5.

144. Magnus op cit note 62 at 5-6; Bianca & Bonell op cit note 2 at 15.

145. See the advice given by, for instance, Ziegel op cit note 108 at 59-60 and 91-8; Zwart op cit note 79 at 127-8; Goff op cit note 22 at 324-5; English Law Society in Lee op cit note 97 at 132. See, however, the refreshing voice of Lavers op cit note 114 at 10 and 14, who encourages the choice. For a discussion of the phenomenon see Bertrams & Ferrari op cit note 72 at 78-9; Del Duca & Del Duca (1996) op cit note 99 at 157; Schlechtriem op cit note 74 at 2, 4.

146. And even in cases where the Convention has been translated into non-Convention languages such as German, great care was taken to effect translations which were as close as possible to the original languages. See Magnus op cit note 62 at 120-1; A Herber in Peter Schlechtriem (ed) *Von Caemmerer/Schlechtriem*

Kommentar zum Einheitlichen UN Kaufrecht (1995) § 7 Rn 19-27.

147. Magnus op cit note 62 at Einl Rn 24; Winship op cit note 96 at 107; Bianca & Bonell op cit note 2 at 15; Bonell op cit note 11 at 38; Lee op cit note 97 at 136.

148. See Bonell op cit note 11 at 38 on the way the UNIDROIT principles are being used more and more by arbitrators; Audit op cit note 20 at 173ff.

149. That it may still be fairly complicated for lay persons is argued by Hellner op cit note 7 at 101. Cf Magnus op cit note 62 at Einl Rn 5-6.

150. Lee op cit note 97 at 136; Manwaring op cit note 108 at 141.

151. Audit op cit note 20 at 174.

152. Bianca & Bonell op cit note 2 at 9, 13; Date-Bah op cit note 68 at 26-7; Maskow op cit note 68 at 58; Zwart op cit note 79 at 118-20.

153. Zwart op cit note 79 at 118-20; Date-Bah op cit note 68 at 26-7; Audit op cit note 20 at 175-7.

154. See Gregory op cit note 124 at 185-7; Patterson op cit note 35 at 274.

155. Mendes op cit note 19 at 126; Honnold op cit note 62 at 69; Winship op cit note 96 at 108; American Bar Association op cit note 105 at 40; Magnus op cit note 62 at 5-6.

156. Hellner op cit note 7 at 76.

157. Bianca & Bonell op cit note 2 at 3; Magnus op cit note 62 at 5.

158. Magnus op cit note 62 at 5.

159. See § 3.2 above. Also Mendes op cit note 19 at 121; Sutton op cit note 66 at 269; Zwart op cit note 79 at 114-16; Ndulo op cit note 2 at 3-4; Ndulo op cit note 19 at 129.

160. Zwart op cit note 79 at 114-116; Mendes op cit note 19 at 121; Date-Bah op cit note 2 at 50; Date-Bah op cit note 68 at 25.

161. Zwart op cit note 79 at 115; Magnus op cit note 62 at 6; Date-Bah op cit note 68 at 25.

162. See the Table above as well as Bonell op cit note 98 at B1ff or <http://cisgw3.law.pace.edu> for the latest list of countries. Ziegel op cit note 108 at 56 used the same argument for the accession of Canada to the CISG.

163. See § 5.1(f) above.

164. See Lavers op cit note 114 at 10; also § 5.2(c) above and §6.2 (a) below.

165. See generally Ndulo op cit note 19 at 129-30, 151.

166. See similarly for Canada, Ziegel op cit note 108 at 57; Rüdiger Krieger 'The United Nations Convention on Contracts for the International Sale of Goods: An Assessment of Its Impact on International Transactions' (1989) 106 *SALJ* 184 at 190.

167. Sono op cit note 94 at 13-14. See also Date-Bah op cit note 2 at 67; Date-Bah op cit note 68 at 26, 37.

168. Bianca & Bonell op cit note 2 at 3; Date-Bah op cit note 68 at 27-8.

169. For the role played by the USA, see Sono op cit note 94 at 14; Eric Bergsten 'The Future of the United Nations Convention

on Contracts for the International Sale of Goods from the Perspective of UNCITRAL' in Louis Perret & Nicole Lacasse (eds) *Actes du Colloque sur la Vente Internationale* (Montréal 1989) 203-4; and American Bar Association op cit note 105 at 40.

170. Evans op cit note 7 at 149.

171. See Bonell op cit note 98 at C1ff.

172. See Zwart op cit note 79 at 123.

173. See Goode op cit note 6 at 26 on the so-called NIMBY (not in my backyard) resistance to change.

174. Generally see Alejandro M. Garro 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' (1989) 23 *International Lawyer* 450; Gyula Eörsi 'A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 *American Journal of Comparative Law* 333 at 345-52; Zwart op cit note 79 at 116-23; Patterson op cit note 35 at 263ff.

175. Rosett op cit note 18 at 270; Ryan op cit note 35 at 101-8; Hobhouse op cit note 7 at 533; Evans op cit note 7 at 147.

176. Rosett op cit note 18 at 280-1; Del Duca & Del Duca (1995) op cit note 99 at 336-7.

177. Rosett op cit note 18 at 281. But this issue has been fully discussed in the various commentaries and there are also two dissertations which explore it, besides a number of articles in journals. See R Jung *Die Beweislastverteilung im UN-Kaufrecht* (1996); B Reimers-Zucher *Beweislastverteilung im Haager und Wiener UN-Kaufrecht* (1995); and Magnus op cit note 120 at 207 for further references.

178. Rosett op cit note 18 at 270-1; also Zwart op cit note 79 at 125-6.

179. Goff op cit note 22 at 312-13.

180. Rosett op cit note 18 at 289-92, 299. See also Eörsi op cit note 174 at 348-9.

181. Rosett op cit note 32 at 589. The overriding principle underlying the Convention, according to him, was to find a text that everybody would accept and nobody would reject.

182. Wool op cit note 7 at 48.

183. Rosett op cit note 18 at 289-90; E Allan Farnsworth 'Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws' 1994 *Tulane Journal of International & Comparative Law* 47ff; Ferrari op cit note 100 at 210-14; Honnold op cit note 97 at 210; Herber op cit note 146 at § 7 Rn 15-17.

184. See Ulrich Magnus 'General Principles of UN-Sales Law' 1997 *International Trade & Business Law Annual* 41ff; Cook op cit note 97 at 203-18; Farnsworth op cit note 183 at 47-63; Ferrari op cit note 100 at 219ff; Kramer op cit note 100 at 148-9.

185. See Magnus op cit note 62 at § 7 Rn 41-57; Magnus op cit note 184 at 41ff; Melis in H Honsell (ed) *Kommentar zum UN-Kaufrecht* (Berlin 1997) 91.

186. See Del Duca & Del Duca (1995) op cit note 99 at 357ff and (1996) 158; Audit op cit note 20 at 181-7; Magnus op cit note 184 at 33ff.

187. Rosett op cit note 18 at 274-6; Patterson op cit note 35 at 276; Ryan op cit note 35 at 101; Cook op cit note 97 at 217; Kelso

op cit note 97 at 556; Evans op cit note 7 at 147. A sense of realism is brought into this part of the debate by Goode op cit note 6 at 25, who writes about the difficulties of producing draft conventions and legislation. See also Thieffrey op cit note 109 at 1021 and Hellner op cit note 7 at 79.

188. Farnsworth op cit note 97 at 8.

189. Audit op cit note 20 at 179-80; Hellner op cit note 7 at 79.

190. See, for instance, Herber op cit note 146 at § 7 Rn 15-17.

191. Hellner op cit note 7 at 79.

192. Rosett op cit note 18 at 268, 270-1; Bianca & Bonell op cit note 2 at 8.

193. See Rosett op cit note 18 at 277-9 for practical examples.

194. See Rosett op cit note 18 at 272; Zwart op cit note 79 at 126-7; Lee op cit note 97 at 137. Referring to the Warsaw Convention as an example of a convention being outdated and difficult to change, see Robert M Jarvis & Michael S Straubel 'Litigation with a Foreign Flavour: A Comparison of the Warsaw Convention and the Hamburg Rules' (1994) 59 *Journal of Air Law & Commerce* 907ff; Evans op cit note 7 at 151-2.

195. Rosett op cit note 18 at 272; Audit op cit note 20 at 187.

196. See, for instance, the history of the introduction of the Nieuw Burgerlijk Wetboek in the Netherlands: E O H P Florijn *Ontstaan en Ontwikkeling van het NBW* (1995); E H Hondius & C C Van Dam, *Het Nieuw Burgerlijk Wetboek in Perspektief* (1990).

197. Rosett op cit note 18 at 294-5.

198. Audit op cit note 20 at 187.

- 199. Kramer op cit note 100 at 138; Zwart op cit note 79 at 127; Evans op cit note 7 at 152; Audit op cit note 20 at 187.**
- 200. Kramer op cit note 100 at 138; Honnold op cit note 97 at 208-9.**
- 201. Rosett op cit note 18 at 298.**
- 202. Magnus op cit note 99 at 823-4.**
- 203. See Kramer op cit note 100 at 141; John O Honnold in Peter Schlechtriem (ed) *Einheitliches Kaufrecht und Nationales Obligationenrecht* (1987) 83ff; Honnold op cit note 97 at 207; Rosett op cit note 18 at 272; Kötz op cit note 6 at 8; Evans op cit note 7 at 150; Patterson op cit note 35 at 278-9.**
- 204. For the changes in English law see *Pepper v Hart* [1993] AL 593 (HL), [1993] 1 All ER 42 (HL); Scott C Styles 'The Rule of Parliament: Statutory Interpretation After *Pepper v Hart*' (1994) 14 *Oxford Journal of Legal Studies* 151ff; and Francis Bennion *Statutory Interpretation* 3 ed (1997) 466-522. For American case law, see Cook op cit note 97 at 203-4, 218-19.**
- 205. Rosett op cit note 32 at 586; Kramer op cit note 100 at 141; Frank Diederich *Autonome Auslegung von internationalem Einheitsrecht* (1994) 93ff; Bennion op cit note 204 at 523-30; Patterson op cit note 35 at 278-80; Mendes op cit note 19 at 125.**
- 206. [1977] 1 All ER 518 (CA) at 522, 524, [1977] 2 WLR 107 (CA) at 112, 113-14. This decision was further reinforced by the decision in *Fothergill v Monarch Airlines* [1981] AC 251 (HL), [1980] 2 All ER 696 (HL). See also *Air France v Saks* 470 US 392 (1985) in the USA.**
- 207. See also in the same case Roskill LJ at All ER 524, 528-9, WLR 114, 118-19 and Lawton LJ at All ER 529, WLR 120. See**

also Lord Wilberforce in *James Buchanan & Co Ltd v. Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) at 152, [1977] 3 All ER 1048 (HL) at 1052 and Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) at 281-2, [1980] 2 All ER 696 (HL) at 706 and Lord Scarman at AC 290-1, 294, All ER 712-13, 715.

208. Kramer op cit note 100 at 140.

209. Kramer op cit note 100 at 142; Honnold op cit note 97 at 208, 211; Thieffrey op cit note 109 at 1021. Whether this has been the case thus far has not yet been fully analysed in any commentary on or discussion of the Convention. The analysis of about fifty prominent cases in problem areas of the Convention does not convey any such tendency.

210. See Michael Stonberg 'Drafting Considerations Under the Convention on Contracts for the International Sale of Goods' (1988) 3 *Florida International LJ* 262; Wool op cit note 7 at 46-7; Lee op cit note 97 at 137; Bianca & Bonell op cit note 2 at 10-11; Hobhouse op cit note 7 at 533; Evans op cit note 7 at 147; Lavers op cit note 114 at 10-11.

211. Farnsworth op cit note 97 at 8.

212. Farnsworth op cit note 97 at 11-12; Lee op cit note 97 at 137.

213. Magnus op cit note 62 at Einl Rn 9-10, Einl Rn 23-4; Lavers op cit note 114 at 11; Lee op cit note 97 at 137.

214. Goff op cit note 22 at 312-13.

215. See Lavers op cit note 114 at 10-11; Goff op cit note 22 at 324-5; Ziegel op cit note 108 at 59-60.

216. Wool op cit note 7 at 47; Rosett (1992) 40 *AJCL* op cit note

11 at 685.

217. See 5.2(c) above.

218. Rosett op cit note 18 at 273. Cf Kabik op cit note 105 at 409-10; Magnus op cit note 62 at 5.

219. See Garro op cit note 174 at 450-2.

220. See 5.1(a) above; Kabik op cit note 105 at 409.

221. Rosett op cit note 18 at 281; Lavers op cit note 114 at 10-11. See also § 5.2(b) above.

222. Rosett op cit note 31 at 447; Rosett op cit note 18 at 286, 303-5.

223. Patterson op cit note 35 at 276. Similarly for France, see Thieffry op cit note 109 at 1025. Cf Farnsworth op cit note 97 at 18.

224. See the survey by Ciambella op cit note 123 at 292.

225. See § 3.2 above.

226. Rosett op cit note 32 at 576.

227. Rosett (1992) 40 *AJCL* op cit note 11 at 687-8.

228. Rosett op cit note 32 at 575.

229. For a criticism of the Warsaw Convention, see Jarvis & Straubel op cit note 194 at 907ff.

230. Kötz op cit note 6 at 3.

231. Kötz op cit note 6 at 12-20.

232. Magnus op cit note 35 at 471.

233. Magnus op cit note 35 at 471.

234. Zwart op cit note 79 at 115. See also §5.2(b) above.

235. See 6.1(a) above.

236. For instance, on notice of deficiencies; usage and custom; the mirror-image rule; the determination of price. See further Magnus op cit note 62 at Vorwort; Date-Bah op cit note 68 at 26-35.

237. Rosett op cit note 31 at 446-7.

238. In the electronic version of UNILEX the number of cases at the end of 1997 is given as 272. M R Will *International Sales Law: The First 284 or So Decisions* seems (the book was not available to me at the time of writing this article) already to have reported 284 cases in 1996. See also Magnus op cit note 120 at 202-3.

239. Del Duca & Del Duca (1996) op cit note 99 at 157.

240. Magnus op cit note 99 at 826; Del Duca & Del Duca (1995) op cit note 99 at 333 and (1996) at 157.

241. See Will op cit note 120 at 241, making this point and referring to I. Marasinghe *Contract of Sale in International Trade Law* (1992), who does not even mention the Convention!

242. See UNILEX F1-2 for a representative list of commentaries, including eleven German commentaries. Other German sources of general private law, sales law, commercial law and private international law all include either long discussions or copious references to other relevant materials.

243. See for instance, P Bassenge et al (eds) *Palandt Bürgerliches*

***Gesetzbuch* 57 ed (1998) 2289-90; H J Mertens *Soergel BGB Band 3 Schuldrecht II* (1991) 2231-43; Kropholler op cit note 12 at 421-7; Kegel op cit note 12 at 519-21.**

244. E I Sykes & M C Pryles *Australian Private International Law* 3 ed (1991). Nygh op cit note 13 does, however, have a short section at 313-14, but refers only to one source other than the Australian statutes.

245. For instance R B Vermeesch & K E Lindgren *Business Law of Australia* 8 ed (1995); P Latimer *Australian Business Law* (1995); P Gillies *Business Law* 6 ed (1994). Several other works do, however, have short discussions on the Convention. See C Turner *Australian Commercial Law* 20 ed (1995); K C T Sutton *Sales and Consumer Law* 4 ed (1995); E J Wright (ed) *Doing Business in Australia* (1992); B Pentony, S Stivastava & S Graw *Commercial Transactions Cases and Materials* (1991); J Carvan & J Gooley *Essential Commercial Legislation New South Wales* (1996). All in all, though, the Australian literature on the subject is rather meagre.

246. See Bertrans & Ferrari op cit note 72 at 88-90.

247. Hobhouse op cit note 7 at 535.

248. Magnus op cit note 62 at 6; Ndulo op cit note 19 at 151; Zwart op cit note 79 at 115; Audit op cit note 20 at 193-9; Hellner op cit note 7 at 101-2.

249. Rosett 'UNIDROIT' op cit note 11 at 449; Bonell op cit note 81 at 26-7.

250. See also Ndulo op cit note 19 at 151; Ng'ong ola op cit note 113 at 853.

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