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**APATHY VIS-À-VIS THE UN  
CONVENTION ON CONTRACTS  
FOR THE INTERNATIONAL SALE  
OF GOODS (CISG) IN THE UK  
AND TWO PROPOSED  
STRATEGIES FOR CISG'S  
INCORPORATION IN THE UK  
LEGAL ORDER**

**Katerina Georgiadou\***

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\* PhD Candidate, School of Law & Criminology, University of Derby. Katerina wishes to thank Dr. Antonios E. Platsas School of Law & Criminology, University of Derby for reviewing an early draft of this article, Shari

## I. INTRODUCTION

The 1980 UN Convention on Contracts for the International Sale of Goods (CISG or Convention) is said to have resulted out of a largely global scholarly *jurisconsultorium*,<sup>1</sup> as it was drawn up in cooperation between scholars from around the globe. In essence, this article will examine the lack of interest and reluctance on behalf of the United Kingdom (UK) to ratify the CISG by considering the initial reactions of the UK towards the CISG, the UK's isolationist attitude, the fact that CISG is not a legislative priority in the UK, and the objection to ratification based on unreasonable grounds. Furthermore, this article will offer two strategies as to how the UK could transform the CISG into the UK legal order.

A number of common law countries such as Canada, New Zealand and the United States have already successfully implemented the CISG.<sup>2</sup> In addition, leading civil law countries such as Germany and France have also ratified the CISG.<sup>3</sup> The main reason for CISG implementation in seventy-eight countries is that the CISG is a well drafted<sup>4</sup> convention balancing elements both from civil and common law systems.<sup>5</sup> There is reason to believe that, if applied by the UK, it will prove beneficial. From a political perspective, the UK has a negative image of being reluctant participants in international trade law

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Hochberg, Editor-in-Chief 2011-2012, Taylor Piscionere, Editor-in-Chief 2012-2013, and the peer reviewers for their most constructive comments.

<sup>1</sup> The term *jurisconsultorium* coined by Vikki Rogers and Albert Kritzer in their magnificent trade law thesaurus on terminology of international sales. Vikki M. Rogers & Albert H. Kritzer, *A Uniform International Sales Law Terminology*, in Festschrift für Peter Schlechtriem zum 70. Geburtstag 223, (Ingeborg Schwenzer & Günter Hager eds., 2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>. The term is used to emphasize the necessity for cross-border consultation in deciding issues of uniform law. *Id.*

<sup>2</sup> *CISG: Table of Contracting Countries*, PACE L. SCH. INST. INT'L COM. L. (Mar. 26, 2012), <http://cisgw3.law.pace.edu/cisg/countries/cntries.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Contra* Benjamin M. Zuffranieri, Jr. & Joshua I. Feinstein, *UN Sale of Goods Convention May be Trap for the Unwary*, LAW. WKLY., Dec. 12, 2003, available at <http://www.osgoode.yorku.ca/cisg/writings/zuff.htm>.

<sup>5</sup> Troy Keily, *How does the cookie crumble?*, PACE L. SCH. INST. INT'L COM. L. (Dec. 4, 2003), <http://www.cisg.law.pace.edu/cisg/biblio/keily2.html>.

initiatives. UK law does not have a special body of rules applicable to international sales; rather, it has a body of common rules which are not devised for international transactions. When dealing with private international law the UK is divided into three separate legal jurisdictions: English law in England and Wales, Northern Ireland law in Northern Ireland, Scots law in Scotland. Although there are some significant differences in procedure and law between the Republic of Ireland and the UK, Ireland's common law is similar to that of England, and to a certain degree originates from the same sources.<sup>6</sup> Furthermore, Ireland employs the same approach as the UK towards the CISG.<sup>7</sup> Consequently, it is the author's belief that if the UK decides to implement the Convention, then Ireland will also.

## II. INITIAL REACTIONS OF THE UK TOWARDS THE CISG

Some scholars argue that the original reason for the non-implementation of the CISG by the UK was pure lack of interest.<sup>8</sup> It is undeniable that the greeting originally accorded to the Convention by commercial and legal interests in the UK was at best mixed. Thus, it was not surprising that the British government failed to take any early steps towards ratification. A policy of wait and see was rational at the time.<sup>9</sup>

Attitudes in the UK toward CISG implementation soon be-

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<sup>6</sup> Kieran McEvoy & John Morison, *Beyond the "Constitutional Moment": Law, Transition and Peacemaking in Northern Ireland*, 26 FORDHAM INT'L L.J. 961, 988-92 (2002).

<sup>7</sup> See U.N. Secretary-General, *Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses*, U.N. Doc. A/CONF.97/9 (Feb. 21, 1980), available at <http://cisgw3.law.pace.edu/cisg/Fdraft.html>.

<sup>8</sup> See Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom*, PACE L. SCH. INST. INT'L COM. L. (Sept. 22, 2005), <http://www.cisg.law.pace.edu/cisg/biblio/forte.html>; Sally Moss, *Why the UK has not Ratified the CISG*, 25 J.L. & COM. 483, 483 (2005-2006), available at <http://www.uncitral.org/pdf/english/CISG25/Moss.pdf>.

<sup>9</sup> Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] (Mar. 1993) (Austria), available at <http://servizi.iit.cnr.it/~crdcs/crdcs/frames9.htm>.

gan to change. By 1988, a large number of countries had ratified the CISG; of particular significance from the British point of view, those countries included Australia, the United States, Canada and New Zealand, all common law countries. Furthermore, by this time most of the European Union states had joined the CISG,<sup>10</sup> and therefore it seemed natural that a British decision in regards to implementation was needed. Accordingly, the Department of Trade and Industry, the ministry principally concerned with CISG implementation, sent out a Consultation Paper in 1989 to interested bodies.<sup>11</sup> Interestingly, however, no official statement was made.<sup>12</sup> Although the reason for ministry's lack of official statement is unknown, legislation on issues of private law is not usually put before Parliament if it is noticeably controversial.<sup>13</sup>

### III. UK'S ISOLATIONIST ATTITUDE

There are a substantial number of both common and civil law systems that have successfully implemented the Convention.<sup>14</sup> Such a fact, in and of itself, illustrates that the rule of international law has changed since the CISG was first ratified. What more is required? Consequently, the UK should not wait until every other country ratifies the Convention. Rather, the UK should act now and revisit the CISG issue. Every time a change is made, someone has to take the first step. A country alone may make the first move and start the process, others may follow. "At first a trickle, then a stream, last a flood."<sup>15</sup>

Those who cite the superiority of UK law as reason for not implementing the CISG have attempted to focus the debate on issues of principle instead of substantive facts. In 1990, for in-

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<sup>10</sup> As of January 2012 there are 23 European Contracting States: Austria, Belgium, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovenia, Slovakia, Spain and Sweden. *CISG: Table of Contracting Countries*, *supra* note 2.

<sup>11</sup> Ahmad Azzouni, *The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom*, PACE L. SCH. INST. INT'L COM. L. (May 27, 2002), <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html#4>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *CISG: Table of Contracting Countries*, *supra* note 2.

<sup>15</sup> *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529, 556 (Eng.).

stance, Lord Hobhouse deemed international conventions desirable of as a means to achieve harmonization.<sup>16</sup> His comments were unquestionably aimed primarily at the CISG, which was at that time being measured for ratification following the 1989 Department of Trade and Industry report. Lord Hobhouse argued that such efforts were only aimed at producing uniformity, which was unachievable due to the fundamental distinctions in approaches among the different countries.<sup>17</sup>

Lord Hobhouse, however, failed to recognize that uniformity is only a single ambition that the decision makers are working towards. Yet academics like Professor Schmitthoff, who were very enthusiastic supporters of the CISG, did not view the Convention as the only means by which uniformity could be achieved.<sup>18</sup>

In particular, the CISG is only a part of the process of providing globally-recognized rules for international trade.<sup>19</sup> Lord Hobhouse seems to be ignoring the reality that this process has a substantial role to play in the global marketplace. On this issue, Lord Steyn said in the House of Lords in 1994:

The international marketplace for the sale of goods has changed. For every transaction in respect of which an English trader is able to insist on UK law as the applicable law, there will be one or more where the English trader has to concede the applicability of a foreign legal system. That is particularly the case with the great many foreign state trading corporations.<sup>20</sup>

Moreover, in 1995, UNICITRAL indicated that more than half of world trade is performed on CISG terms.<sup>21</sup> Since that statement, the number of ratifying countries has further in-

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<sup>16</sup> *Id.* at 532.

<sup>17</sup> *Id.*

<sup>18</sup> See generally Clive M. Schmitthoff, *The Codification of the Law of International Trade*, 1985 J. BUS. L. 34 (1985).

<sup>19</sup> See Harry M. Flechtner, *Another CISG Case in the US courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127, 138 (1995), available at <http://www.cisg.law.pace.edu/cisg/biblio/jlevol15.html>.

<sup>20</sup> Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, PACE L. SCH. INST. INT'L COM. L. (Nov. 5, 2002), <http://www.cisg.law.pace.edu/cisg/biblio/williams.html> (quoting 5 May 1993, PARL. DEB., H.L. (5th ser.) 1457-59 (U.K.) (Lord Steyn, Address to the House of Lords on the Sale of Goods (Amendment) Bill)).

<sup>21</sup> *Id.*

creased,<sup>22</sup> and due to the recent ratification by Japan, the CISG is now recognized by countries in all of the world's largest trading blocks. Based on these facts the UK surely has a powerful motivation to implement the CISG rather than stay outside on the grounds of principle. Even if the UK government decides to ratify the Convention, until time is found in the legislative schedule to address the CISG, hesitation can only be seen as yet another example of the British adopting an isolationist attitude based on what it seems to be lack of interest.<sup>23</sup> On the one hand, it can be seen as arrogant by some, but on the other hand it is also dangerous given the impact that international trade has on the political relationship between countries and the growing interdependence of the world's major markets.<sup>24</sup> Great Britain's introspection will increasingly come to damage its prospects abroad, and risk the nation being abandoned out in the cold.

#### IV. THE CISG IS NOT A LEGISLATIVE PRIORITY FOR THE UK

Why is it that the UK has not yet ratified the CISG? "The short answer is that Ministers do not see the ratification of the Convention as a legislative priority."<sup>25</sup> Ratification of the Convention requires legislation and the CISG must wait in the queue for its turn along with the UK government's many other legislative priorities. Some issues that may be covered by legislation instead of the CISG in a Parliamentary session include employment, company law, energy and civil partnerships; issues that UK politicians currently believe are of greater significance.<sup>26</sup>

Why then do UK politicians not consider the Convention a priority? First of all, it seems that there is not much interest to ratify the CISG as other issues have consistently had priority in recent Parliamentary sessions. For instance, every six

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<sup>22</sup> Michael P. Van Alstine, *Dynamic Treaty Interpretation* 146 U. PA. L. REV. 687, 689 (1998) (stating that the CISG has now been ratified by nations whose combined economies account for nearly two-thirds of all world trade).

<sup>23</sup> Cf. TRADE AND INDUSTRY COMMITTEE, SECOND SPECIAL REPORT ON INDUSTRIAL AND TRADE RELATIONS WITH CENTRAL EUROPE, 1997-8, H.C. 893 (U.K.).

<sup>24</sup> See Williams, *supra* note 20.

<sup>25</sup> Moss, *supra* note 8, at 483.

<sup>26</sup> *Id.*

months a letter is sent to Parliament, asking why the UK has failed yet to ratify the CISG and when it is planning to do so.<sup>27</sup> The usual answer is that the UK will ratify the CISG if and when Parliamentary program allows.<sup>28</sup>

In addition, although formal consultations took place to decide whether the UK should ratify the CISG,<sup>29</sup> none of these consultations can be said to have revealed any strong desire for the UK to ratify. The first consultation was held in 1989. One thousand five hundred documents were issued to various individuals and entities but only fifty-five of those individuals and entities responded: twenty-eight in favor, twenty-seven opposed and ten neutral.<sup>30</sup> The second consultation was held in 1997. Four-hundred and fifty documents were issued, and to great disappointment only thirty-six individuals replied: twenty-six in favor, seven against and three neutral.<sup>31</sup> Clearly, the consultation process did not result in a ringing approval for accession.

Considering the technical, and rather uncontroversial, nature of the subject, the low level of responses should not have been a surprise. What was really unexpected from the few responses received, however, was that some large and influential organizations opposed ratification. In the 1989 consultation, this list included the Commercial Courts Committee, Shell, ICI, BP, and the CBI.<sup>32</sup> In the 1997 consultation, the organizations that opposed ratification included the Law Society of England and Wales, the Commercial Bar Association and BP.<sup>33</sup>

Conversely, the organizations that replied in favor included: British Airways, British Telecom, British Gas and the Law Commission of England and Wales.<sup>34</sup> Interestingly, some organizations that, in 1989, were in favor of accession had a change of mind by 1997. Hence, in light of all of the changes of mind, it is not surprising that the UK politicians do not see ratifying the CISG as their main priority.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Azzouni, *supra* note 11.

<sup>30</sup> Moss, *supra* note 8, at 483

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Another possible factor influencing the UK's decision not to ratify the Convention is that surprisingly very large and influential organizations have opposed ratification. Two examples of such organizations are the Commercial Bar Association and the Law Society of England and Wales.<sup>35</sup> If these two major organizations, both of which would be directly impacted if the CISG were implemented, fail to see the significance of the Convention, then any effort by the UK to join the CISG will likely be in vain.

Moreover, after the second consultation in 1997, a draft bill was drawn, but to the disappointment of many it failed to take effect.<sup>36</sup> The reason provided for not adopting this bill was that the Peer who was going to introduce it as a Private Member's Bill fell seriously ill.<sup>37</sup> Ever since, any other proceedings made involving accession of the CISG have been unsuccessful due to lack of interest.<sup>38</sup> Furthermore, in 2004 other methods for ratifying the Convention were explored.<sup>39</sup>

The alternative method for ratifying the Convention explored at this time was the use of a Regulatory Reform Order (RRO).<sup>40</sup> "For [the UK] to go down the RRO route a burden in legislation must always be either removed or reduced."<sup>41</sup> However, legal scholars felt that the alterations introduced by implementing the CISG would fail to qualify as removal of a burden or a reduction under the tests enclosed in the Regulatory Reform Act.<sup>42</sup> Moreover, a RRO would only take effect in England and Wales, which meant that the CISG would have to be implemented separately in Scotland and Northern Ireland.<sup>43</sup> Accordingly, the RRO route was rejected.<sup>44</sup>

So where is the UK to go from here? The author is convinced that the UK must demonstrate that it will successfully

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<sup>35</sup> *Id.* at 484.

<sup>36</sup> See TRADE AND INDUSTRY COMMITTEE, SECOND SPECIAL REPORT ON INDUSTRIAL AND TRADE RELATIONS WITH CENTRAL EUROPE, 1997-8, H.C. 893 (U.K.).

<sup>37</sup> See Moss, *supra* note 8, at 484

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



ratify the CISG, which will provide the UK with strong, quantifiable economic benefits. The UK must also ensure small businesses that they will not be negatively affected in the future and that the CISG will make international trading less complicated.

Finally, if the UK business community truly wishes the UK to ratify the Convention, such a desire should be made clear to the government. One might say that now is the most appropriate time for the business community to take actions towards accession given current economic difficulties. When the Department of Trade and Industry informal meeting for the business community was held in 2004, the British economy was relatively healthy, and thus, there was nothing to fix.<sup>45</sup> Following October 2008, however, the financial crisis hit the UK, and currently, the UK economy is in need of a “fix.” Consequently, it seems unlikely that the British can forever remain aloof towards that implementation of the Convention, especially as the number of signatories grows. So, if the UK business community is interested in joining the CISG, the onus is on the business community. As Lord Justice Steyn predicted in an Oxford lecture in 1991, “[i]f the United Kingdom does not ratify the convention now, commercial realities will compel ratification later.”<sup>46</sup>

#### V. CURRENT STATE OF CISG IMPLEMENTATION IN THE UK: FREEDOM OF CONTRACT

The CISG does not directly affect contracts governed by British law, for the UK has not yet implemented the UN Convention. Nonetheless, it may be employed in contracts concerning UK traders where conflict of rules call for the application of a contracting state instead of the law of England.<sup>47</sup> One of the greatest virtues of the CISG is that it offers modern and flexible rules and always allows for adjustment and/or exclusion. Thus, the CISG values and encourages the principle of

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<sup>45</sup> *Id.*

<sup>46</sup> Nicholas, *supra* note 9, (quoting The Hon. Justice Steyn, The Royal Bank of Scotland Law Lecture, The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?, 1991).

<sup>47</sup> See United Nations Convention on Contracts for the International Sale of Goods, art. 1.1(b), *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 [hereinafter CISG].

freedom of contract, as it allows parties to opt in and out of its standards or even choose the application of an utterly diverse body of law.<sup>48</sup> At the moment UK traders wishing to go into a contract under the UN Convention may do so due to freedom of contract.

The notion of freedom of contract is of great significance for the trader as it enables the trader to choose the law which is more cost effective and less time consuming for each transaction. This principle is mainly rooted from the laissez faire doctrine, a doctrine which has been created and established by one of the greatest classical economists, Adam Smith. Under laissez faire doctrine, “[g]overnment activity is natural enough and therefore good when it promotes the general welfare, and it is an interference with nature and therefore, bad when it injures the general interests of society.”<sup>49</sup> This was Adam Smith’s idea of the government’s role in a society of perfect liberty. Smith was a firm believer, as all classical economists, of a system of laissez-faire and freedom of contract.

What we currently have in the UK falls under the second area of Smith’s laissez-faire, where all traders are free to engage in their own commercial transactions in a free market.<sup>50</sup> Under this model, private property rights and freedom of contract alone provide the structure for affairs between consumers and firms. The current situation in the UK may appropriately be named the “free trade approach,” since it is directly linked to Adam Smith’s theory of free trade. Specifically, the “free trade approach” closely follows Smith’s theory that traders should be free to proceed as they consider right when it comes to their trade transactions.<sup>51</sup>

One might say that commerce and trade are obstructed from prospering if liberally made agreements are not normally carried out.<sup>52</sup> Under the CISG, contracts in general should be

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<sup>48</sup> See CISG, art. 6. (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

<sup>49</sup> K.B. SMELLIE, A HUNDRED YEARS OF ENGLISH GOVERNMENT 9 (1937) (quoting ADAM SMITH, THE WEALTH OF NATIONS (1776)).

<sup>50</sup> See Tahany Naggar, *Adam Smith's Laissez Faire*, 21 THE AM. ECONOMIST 35, 35-36 (1977).

<sup>51</sup> See *id.* at 36.

<sup>52</sup> See generally, John Charvet, *Liberalism: New Dictionary of the History of Ideas*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/topic/liberalism>.

considered as a course of action by which traders negotiating with one another can assure that their pledges will last longer than their unsettled states of mind. The advantage of freedom of contract is that it allows private individuals, to a certain degree, to stabilize and predict the process of their business transactions.<sup>53</sup>

The CISG embraces the freedom of contract principle as it includes an express recognition that protects this right in the international sale of goods arena.<sup>54</sup> Specifically, Article 6 establishes one of the fundamental principles of the Convention, contractual freedom. It provides that contracting parties "may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."<sup>55</sup> The CISG believes that party autonomy is essential, and therefore it emphasizes institutional egalitarianism between traders of different Contracting States in its text.<sup>56</sup> However, absolute contractual freedom does not exist, and sometimes, it is quite difficult to classify the exact limitations of the freedom of contract within the Convention. Moreover, even though UK importers and exporters are allowed to create contracts under CISG terms, they often unfortunately choose to opt out mostly because they prefer to employ the old and familiar Sale of Goods Act of 1979.<sup>57</sup>

According to Chief Justice Erle, "[e]very man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties."<sup>58</sup> Support for this principle is found in the CISG. Nevertheless, notions of contractual freedom inherent in the CISG may present UK policymakers with a complex, arguably paradoxical, situation as implementation of the CISG may be seen as a choice between heavy-handed government control and individual autonomy.

Ever since the UK introduced legislation that implicates

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aspx (last visited Jun. 17, 2011).

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

<sup>54</sup> *See* CISG, art. 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 PACE INT'L L. REV. 145, 169 (2010), available at <http://www.cisg.law.pace.edu/cisg/biblio/hofmann.html>.

<sup>58</sup> *Clarke v. Wilson* [1865] 144 Eng. Rep. 450.

individual autonomy in such a manner, the principle of freedom of contract has been under a critical gaze.<sup>59</sup> There are several examples of legislative interference with the freedom of contract, and a wide range of legislation has been passed that altered U.K. contract law in terms of how it incorporates the freedom of contract. Two examples of such legislation are the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977.<sup>60</sup>

Currently, the situation in the UK in regards to the CISG is similar to the “bottom-up approach” in that the practitioners and traders are playing the leading role rather than the country’s policymakers.<sup>61</sup> These practitioners draft, construe and put into practice rules according to their knowledge in the field. Initially, these rules are informal, but they eventually can blossom into law. The opposite of the “bottom-up approach,” “the top-down approach,” involves the implementation of rules that control the practices and performance of those who are subject to such rules.<sup>62</sup> Taking into consideration that the UK has yet to adopt the CISG, perhaps the “bottom-up approach” does not work towards a more up-to-date international practice; perhaps it is time to consider the “top-down approach.”

In addition, the incorporation of absolute contractual freedom into modern UK law is unrealistic. It has been theorized by economists that absolute freedom of contract would in due course result in market failure.<sup>63</sup> The premise behind this proposition is that the abolition of any sort of limitation or regulation on contractual freedom would only work in a perfectly efficient market. Such a flawlessly efficient market can only exist when, for instance, the seller and the buyer achieve equal benefits from a trade transaction.<sup>64</sup>

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<sup>59</sup> See Thomas Wilhelmsson, *Various Approaches to Unfair Terms and Their Background Philosophies*, 14 JURIDICA INT'L 51, 52 (2008), available at <http://www.juridicainternational.eu/index.php?id=12728>.

<sup>60</sup> See *id.* at 53.

<sup>61</sup> See Janet Koven Levit, *A Bottom-Up Approach to International Law-making: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

<sup>62</sup> See Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19. HARV. INT'L L.J., 221, 225 (1978) (discussing the history and development of *lex mercatoria*).

<sup>63</sup> See HUGH COLLINS, *THE LAW OF CONTRACT* 25-26 (2003).

<sup>64</sup> *E.g.*, ROBERT HAGIN, *MODERN PORTFOLIO THEORY* 11-13 (1979).

This article proposes two strategies by which the CISG could be incorporated into the UK legal order through the “top-down approach” while simultaneously and substantially incorporating the principle of contractual freedom. Through these strategies, the trader will play the role of the decision maker. Additionally, the trader’s contractual freedom would be fairly regulated by the government, which would have the role of the policymaker during the consultation and drafting of legislation that would transform the CISG’s standing in the UK.

## VI. STRATEGIES FOR INCORPORATING THE CISG IN THE UK

This article proposes that the CISG may be incorporated in the UK legal order through two different strategies: the à la carte strategy and the parallel strategy.

The CISG is an à la carte convention; it enables the parties involved to select the provisions they prefer in the same way they would choose a meal from a restaurant menu. There is no obligation to comply with all CISG provisions.<sup>65</sup> In other words, the UK, as a contracting member, may choose to ratify only some of the Convention articles.

Under the à la carte strategy, the UK would, in its legislation implementing the CISG, choose only to incorporate those articles of the CISG that are appropriate for the UK legal order, and disregard the rest that may be non-suitable or non-comprehensible. However, some Sales of Goods Act 1979 provisions are mandatory,<sup>66</sup> and therefore, cannot be overlooked or replaced by CISG articles.

Through the parallel strategy the CISG may exist parallel to the Sales of Goods Act 1979. In other words, implementation of the CISG via the parallel strategy would allow parties to create a contract either on CISG terms or under the Sales of Goods Act 1979. This strategy may be less complicated to put in practice compared to the complete abolition of the Sale of Goods Act 1979, as that course of action is highly improbable.<sup>67</sup>

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<sup>65</sup> CISG, art. 6; CISG, art. 12.

<sup>66</sup> *E.g.*, Sale of Goods Act, 1979, c. 54, §§ 12-15 (U.K.). Due to a statutory restriction in the Unfair Contract Terms Act, section 6, the implied terms provided in the Sales of Goods Act 1979 are rendered mandatory.

<sup>67</sup> See Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom*,

Thus, the parallel strategy will please both the traders who wish to employ up to date law especially created for international contracts, as well as the traditional traders who prefer to employ the old and familiar Sale of Goods Act 1979.

The à la carte strategy is a realistic proposal created for the purpose of providing order and clarity in the law without sacrificing the fundamental characteristics of the UK legal order. For instance, the à la carte strategy is based on the fact that the UK is unlikely in the near future to completely abolish the Sale of Goods Act 1979. Consequently, the mandatory provisions of the Sale of Goods Act 1979 will have to be maintained in order to keep a balance between the old and familiar Sale of Goods Act 1979, and the comparatively new Convention. In other words, the Sale of Goods Act 1979 will be given a certain priority; its mandatory provisions will be maintained. Accordingly, the remaining Sale of Goods Act 1979 provisions along with the CISG articles the UK ultimately adopts would help shape the new UK legal order.

Likewise, the parallel strategy is also based in practicality. Rather than criticizing traders for their unwillingness to depart from their old and familiar, the parallel strategy utilizes a more rational approach of adopting one of the most brilliant merits of the CISG, freedom of contract, without alienating traditionalists. Freedom of contract endows the parties drafting the contract the right to decide whether to employ the CISG or the Sale of Goods Act 1979.<sup>68</sup>

#### A. *À La Carte Strategy*

As already mentioned, a number of provisions of the Sales of Goods Act 1979 are compulsory, which means that they cannot be superseded by the CISG.<sup>69</sup> Consequently, the à la carte strategy would not amend in any way the core of the Sale of Goods Act 1979. Implementation of the CISG through this strategy would result in the ratified portions of the CISG be-

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PACE L. SCH. INST. INT'L COM. L. (Sept. 22, 2005), <http://www.cisg.law.pace.edu/cisg/biblio/forte.html>.

<sup>68</sup> See CISG, art. 6; CISG, art. 12.

<sup>69</sup> See, e.g., Sale of Goods Act, 1979, c. 54, §§ 12-15 (U.K.). Due to a statutory restriction in the Unfair Contract Terms Act, section 6, the implied terms provided in the Sales of Goods Act 1979 are rendered mandatory.

coming effectively an add-on to the Sale of Goods Act 1979. Implementation of the CISG through this strategy means the UK would ratify only the articles that can be implemented in the UK legal order as currently comprised. Note that not all CISG articles reconcile with the UK business transactions requirements, and moreover, not all CISG articles are easy for UK traders and practitioners to comprehend and in turn put in practice. Furthermore, this strategy emerged from the fact that no sales statute can settle equally and without any difficulty the variety of transactions and goods.<sup>70</sup> Neither the Sale of Goods Act 1979 nor the CISG is sufficiently adjustable to entirely accommodate the conflicting values of different sales environments.

The so-called mandatory rules, however, control the parties' freedom of contract. There are some provisions from both the CISG and Sale of Goods Act 1979 which are mandatory and must be maintained in the hypothetical act created by the *à la carte* strategy. A rule is mandatory when parties cannot contract out from it when drafting a contract.<sup>71</sup> The distinction between mandatory and non-mandatory rules is well recognized in the civil law countries. To the contrary, this distinction was traditionally unknown in the common law. It has become known in the UK, however, with the introduction of the Unfair Contract Terms Act 1977. Furthermore, if the question whether a statutory provision is mandatory is not established by the statute, then it is up to the courts to decide the matter.<sup>72</sup>

Because of a statutory restriction in the Unfair Contract Terms Act 1977 that restricts parties' right to exclude certain implied contractual terms,<sup>73</sup> the implied terms provided in the Sales of Goods Act 1979 are mandatory. Hence, this author suggests policymakers pay close attention when drafting the CISG *à la carte* based legislation to the wording of the Sale of Goods Act 1979 sections. There are several occasions where the phrase "unless otherwise agreed" is used.<sup>74</sup> Moreover, it is

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<sup>70</sup> See Michael Bridge, *A Law for International Sales*, PACE L. SCH. INST. INT'L COM. L. (Nov. 28, 2007), <http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html#7>.

<sup>71</sup> OLE LANDO, PRINCIPLES OF EUROPEAN CONTRACT LAW 101 (1999).

<sup>72</sup> *Id.*

<sup>73</sup> Unfair Contract Terms Act, 1977, c. 50, § 6 (U.K.).

<sup>74</sup> *E.g.*, Sale of Goods Act, 1979, c. 54, § 32(2)-(3) (U.K.).

strongly advisable to bear in mind that the somewhat outmoded nature of certain sections of the Sale of Goods Act 1979 may not be appropriate for the modern commercial context.

The passing of the Unfair Contract Terms Act 1977 represented a very clear restriction on the freedom of contract in the UK.<sup>75</sup> Principally, the Unfair Contract Terms Act 1977 covers terms relating to quality, sample, title and description. Generally speaking, it distinguishes between the consumer dealings and non-consumer dealings, and it prevents vendors from having the option to exclude or restrict liability for breach of the implied terms as to title. Furthermore, the Unfair Contract Terms Act 1977 makes it impossible for a trader to limit or exclude the other implied terms just referred to.<sup>76</sup>

Pursuant to the Unfair Contract Terms Act 1977, contracting out of the implied terms in sections twelve through fifteen of the Sale of Goods Act is not feasible,<sup>77</sup> and thus those sections are mandatory. In this respect, sections twelve through fifteen will be incorporated in the *à la carte* act exactly as they exist under the Sale of Goods Act 1979.

Nevertheless, the CISG contains an express recognition of freedom of contract in the international sale of goods.<sup>78</sup> The philosophy of the Convention embraces party autonomy and emphasizes the institutional equality between buyers and sellers of different contracting states. The exact boundaries of this principle are, however, complex and difficult to define. In fact, during the drafting of the Convention not many states vetoed the CISG's incorporation of the party autonomy principle.<sup>79</sup> Their concern was that an economically stronger party could abuse the principle by imposing their own national law or contractual terms, which may be less balanced than those offered by the Convention.<sup>80</sup>

Article 6 of the UN Convention provides that “[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provi-

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<sup>75</sup> See Unfair Contract Terms Act, 1977, c. 50, § 6 (U.K.).

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> Michael Joachim Bonell, *Article 6*, PACE L. SCH. INST. INT'L COM. L. (Jan. 10, 2005), <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb6.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*



sions.”<sup>81</sup> Article 6 establishes Article 12 of the CISG as the only provision in the Convention that parties are not permitted to derogate from. Consequently, Article 12 is the sole provision under the CISG which is clearly mandatory.

Taking into consideration the fact that not all matters relating to international sales are settled by the Convention, mandatory rules of national, supranational and international law are to be employed whenever a matter is outside the CISG's scope. Thus, following the *à la carte* strategy would result in legislation that would have to contain Article 12, the only compulsory provision of the Convention, and all the provisions from the Sale of Goods Act 1979 that are related to international sales contracts but are not within the CISG's capacity.

On the other hand, Article 4 of the CISG, which is occasionally interpreted to be a mandatory provision,<sup>82</sup> will probably give rise to uncertainty. Article 4 of the CISG provides:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.<sup>83</sup>

The consequence of the exclusion clause is that if an issue relating to the contract's substantive validity or that of its individual clauses and usages is not governed by the Convention, it has to be settled by the appropriate domestic law. Nonetheless, the question of which national law is more appropriate to apply is established by the conflict of laws rules of the country with jurisdiction, in our case the UK. Apparently, Article 4 leaves a lot of room for the application of compulsory provisions that deal with issues of validity.<sup>84</sup> Since the CISG does not classify and therefore limit the term "validity," the *à la carte* model

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<sup>81</sup> CISG, art. 6.

<sup>82</sup> See Oberster Gerichtshof [OGH] [Supreme Court] Sept. 7, 2000, docket No. 8 Ob 22/00v, at <http://cisgw3.law.pace.edu/cases/000907a3.html>, (Austria); Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 201 F. Supp. 2d 236, 281-284 (S.D.N.Y. 2002), rev'd on other grounds, 386 F.3d 485 (2d Cir. 2004).

<sup>83</sup> CISG, art. 4.

<sup>84</sup> See Ulrich Drobnig, *Substantive Validity*, PACE L. SCH. INST. INT'L COM. L. (Jun. 6, 2006), <http://www.cisg.law.pace.edu/cisg/biblio/drobnig2.html>.

would leave it to the Sale of Goods Act 1979 to define when a cause of invalidity takes place as well as its consequences.

### *B. Parallel Strategy*

Parallelism is a word used on nearly a daily basis in almost every aspect of society. People use it to refer to the hypothetical set of multiple possible universes, “parallel universe,” to give directions, “parallel road,” or even to describe a forbidden affair, “parallel relationship.” However, the expression “parallel” is very old. In fact, it can accurately be described as ancient since it was established by the Greek mathematician Euclid, whom many consider the “Father of Geometry.”<sup>85</sup> Euclid had an exceptional interest in parallel lines and he discovered that systems of parallel lines were great tools in proving abstract geometrical truths.<sup>86</sup>

The parallel strategy suggests that two systems are better than one, and it gives great validity to optionality. Optionality is of great importance in the commercial transaction world. A simple example of optionality manifesting itself in the principles of contract law occurs via how a contract is formed; offer, acceptance, agreement.<sup>87</sup> In other words, one party is presented with the option to accept the offer made by the counterparty. Optionality is vital to the parallel strategy. The need for optionality is supported by the fact that the CISG is a legal mechanism where the trader plays a fundamental role. UK traders will have improved business dealings if they are presented with the option of selecting the legal sales statute that is more suitable and advantageous for their transactions. In addition, in a two-option parallel system, if one legal mechanism was to fail, the second one could continue to function, and therefore optionality may also act as a safety net.

Nowadays a number of individual rights and freedoms exist in the UK. But, is it not fundamental to all of such rights and freedoms that one is able to first of all make up his or her own mind before being told how to think? What kind of free-

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<sup>85</sup> Charlene Douglass, *Euclid*, MATH OPEN REFERENCE (2007), <http://www.mathopenref.com/euclid.html>.

<sup>86</sup> See *The Euclidean model for space*, CALTECH PARTICLE THEORY GROUP, <http://www.theory.caltech.edu/people/patricia/sptmb.html> (last visited Feb. 2, 2012).

<sup>87</sup>EWAN MCKENDRICK, CONTRACT LAW 22 (2011).

dom and competition can be created by using monopoly force, like arguably that of government, to enforce the legal system?<sup>88</sup> Yet, the notion of optionality inherent in the parallel strategy rejects such legal constructions.

### C. CISG advantages: A Brief Exposition

Pursuant to the parallel strategy, the UK and traders are exposed to both the advantages and disadvantages of the Convention. Consequently, traders will form their own opinion as to whether it is advantageous to apply the CISG.

One of the CISG's aims is to promote a set of uniform rules that would administer certain aspects of drafting and performing every day trade-related contracts for the sale of goods.<sup>89</sup> The Convention's stated objective is to "adopt[] . . . uniform rules which govern contracts for the international sale of goods . . . [that] would contribute to the removal of legal barriers in international trade and promote the development of international trade."<sup>90</sup>

It is this author's belief that the implementation of this globally-accepted international convention can only advance British law and the British Courts abroad. The reason is that if British law is chosen to regulate those parts of the contract that are not governed by the CISG, and if the British courts are preferred as the forum for any disputes, the British courts will likely continue promoting the fundamental principle of certainty.<sup>91</sup>

In general, this author believes that the CISG has reached its goals as it is a well-drafted law that mirrors what the parties anticipate from an international business transaction. What is more important is that practitioners around the world construe the Convention as a good law that does not discriminate, neither surreptitiously nor openly, against either side of a contract. Therefore, one might say that it promotes good and just solutions. The Convention's good and just solutions are a

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<sup>88</sup> *Measuring Freedom*, OPTIONALITY MAGAZINE, <http://www.optionality.net/mag/feb96a.html> (last visited Feb. 5, 2012).

<sup>89</sup> John P. McMahon, *When the UN Convention on Sales Applies and Why It Matters to You and Your Clients*, PACE L. SCH. INST. INT'L COM. L. (Feb. 6, 1998), <http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>.

<sup>90</sup> CISG, Preamble.

<sup>91</sup> See Williams, *supra* note 20.

result of its rational drafting exemplified by the fact that the CISG contains elements from both civil and common law systems and from economic systems of all different stages of development around the world.<sup>92</sup> The CISG's success is evidenced by the fact that major and powerful trading countries, such as the North American nations including the United States, and a large part of Europe are signatory parties to the Convention.<sup>93</sup>

Ratifying the CISG offers signatory parties the benefit of a widely accepted and understood text. The CISG does not aim to deprive parties of the freedom of contract; rather, its provisions simply act as a gap filler, governing the parties' rights and obligations where the contract is silent on these matters.<sup>94</sup> There are certainly substantial differences between the contract law of individual states and, as a result, a common solution has to be found. Nonetheless, a genuine effort is made by the Convention to reduce obstacles to cross-border contracts.

#### *D. Disadvantages of the CISG: A Brief Exposition*

Scholars analyzing the CISG have in the past said that if the UK implements the CISG, it may lead to uncertainty.<sup>95</sup> Furthermore, the Convention may be required to employ domestic law rules in order to resolve issues dealing with the passing of property and the validity of a contract.<sup>96</sup> It is also said that the Sale of Goods Act 1979 provisions may be more certain than the analogous provisions of the CISG when employed.<sup>97</sup> More importantly, the way the CISG deals with contracts is different than the common forms of international sale contracts, such as CIF (Cost, Insurance, and Freight) and FOB (Free on Board).<sup>98</sup> The purpose of CIF and FOB is to clarify and organize the rights of seller and the buyer in regards to the implementation of the sale contract.<sup>99</sup>

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<sup>92</sup> See Keily, *supra* note 5.

<sup>93</sup> See *CISG: Table of Contracting Countries*, *supra* note 2.

<sup>94</sup> See CISG, art 7(2).

<sup>95</sup> See Williams, *supra* note 20.

<sup>96</sup> See Drobnig, *supra* note 84.

<sup>97</sup> See Williams, *supra* note 20.

<sup>98</sup> ROBERT BRADGATE, *COMMERCIAL LAW* 792-93 (2000).

<sup>99</sup> *Id.*

## VII. CONCLUSION

In synopsis, this article's objective was to present the reader a study on the current situation in the UK with regards to ratification of the CISG and to provide two strategies by which the Convention could be transformed efficiently into the UK legal order. A genuine effort was made to analyze the current and the proposed situation, taking into account the following factors: the lack of interest on behalf of the UK to implement the CISG, the response of large and influential organizations, the freedom of contract, the mandatory rules, parallelism, optionality and the advantages and disadvantages of the UK ratifying the Convention. It seems that the non-ratification of the CISG by the UK so far is due to pure lack of interest. Current attitudes in the UK to the Convention vary. A number of British observers follow fully the "no surrender" attitude typified by criticism of the CISG as "a further erosion of our own excellent municipal law."<sup>100</sup> Others accord it only reluctant acceptance, believing that the Convention is "probably as good as can be expected."<sup>101</sup> On the other hand, however, are those who support implementation of the CISG, like the Department of Trade and Industry, and, "most eloquently, the Scottish Law Commission, to which may be added the voice of Professor Roy Goode."<sup>102</sup>

The author is in favor of accession as well. The Convention is likely able to accommodate the rather different features of the UK legal system.<sup>103</sup> Furthermore, if the UK is very careful when drafting the legislation incorporating the CISG, then it has the potential to apply the CISG without major practical difficulties.<sup>104</sup>

However, it would appear to be the case that the lethal blend of antipathy and apathy has ensured that the government of the UK will do nothing until the British legal commu-

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<sup>100</sup> Forte, *supra* note 67 (quoting Derek Wheatley, *Why I Oppose the Winds of Change*, THE TIMES, Mar. 27, 1990).

<sup>101</sup> *Id.* (quoting J.D. Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. BUS. L. 346 (1981)).

<sup>102</sup> *Id.*

<sup>103</sup> Antonios Platsas, *The Potential Impact of the CISG on the Common Laws of England and the Republic of Ireland: A Legal Anactataxis or a Trivial Matter of Implementation? The Lessons of Comparative Law*, 17 DENNING L. J. 43, 62 (2004-2005).

<sup>104</sup> *See id.*

nity dynamically presses for change. The rather isolationist approach of the UK towards the harmonization phenomenon is quite disappointing. The reformation that the UK legal order should carry out in a prospective case of implementation of the Convention should not be the excuse that holds the UK legal system back from incorporating the CISG.

Accepting the significance of international law does not mean that national law will be marginalized. As a matter of fact, under both the proposed strategies, national law is given great validity. This is apparent from the fact that all the important and mandatory rules of the Sale of Goods Act 1979 and the Unfair Contract Terms 1977 will be preserved in legislation if implementation occurs via the *à la carte* strategy, and under the parallel strategy, a party will be given the autonomy to select between the Sale of Goods Act 1979 and the CISG. The “legal transformation” making its way through the proposed strategies does not replace national law with international law, where the second suffers the defect of a democratic deficit.<sup>105</sup> International law offers an opportunity to develop both the relevance and effectiveness of domestic law by ensuring that all people in society fully understand, and put in practice, the autonomy that they benefit from within their polity.

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<sup>105</sup> H.M. Kindred, *The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach*, in O. E. FITZGERALD, *THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW* 130, 135 (2006).