

WHY GHANA SHOULD IMPLEMENT CERTAIN INTERNATIONAL LEGAL INSTRUMENTS RELATING TO INTERNATIONAL SALE OF GOODS TRANSACTIONS

EMMANUEL LARYEA*

I. INTRODUCTION

This article argues that Ghana should implement¹ certain international legal instruments (ILIs) relating to international sale of goods transactions. The article submits that the recommended instruments, if adopted, would harmonise Ghana's laws with aspects of laws that govern international sale of goods globally and improve Ghana's legal environment for international sale transactions. It would also afford entities located in Ghana better facilitation and protection in their trade with foreign counterparts, enhance their competitiveness in international sale transactions and improve how Ghana is perceived by the international trading community.² The recommended actions hold advantages, have no material disadvantages, and are easy and inexpensive to implement.

In an era of increasing globalisation of the world's economies, countries and businesses operating within them are constantly competing for resources, investments, markets and profits. Countries have no choice but to take part in international trade,³ long recognised as an instrument for economic development.⁴ Further, laws and policies to strengthen a country's international sale and purchase

* LLB (Hons) LLM PhD, Senior Lecturer, Monash University Law School, Clayton, Victoria, Australia; Fellow, Tim Fischer Centre for Global Trade and Finance, Bond University, Australia.

1 For the sake of convenience, the term implement is used broadly in this article to cover otherwise technically different terms such as ratification, accession, succession, enactment and approval. Roy Goode uses the term implementation for the ratification of international conventions and the adoption, wholly or in part, of model laws. See R. Goode, *Insularity of Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law* 50 ICLQ (2001): 751, p. 752. The usage of implement in this article is similar.

2 While the discussions focus on the beneficial impact of the relevant international instruments on Ghana, the thrust of the argument may be applicable to other African countries in similar situations, albeit with differences.

3 I. F. Razafimahefa and S. Hamori, *International Competitiveness in Africa* Springer (2007), p. 1.

4 See, e.g., G. Bamodu, 'Transnational Law, Unification and Harmonisation of International Commercial Law in Africa' 38(2) *Journal of African Law* (1994): 125, 128; *UN General Assembly Resolution 1707 (XVI)*, 19 December 1961.

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2 Emmanuel Laryea

environment and competitiveness are crucial.⁵ It is therefore imperative that Ghana implements laws that enhance its competitive environment so as to afford entities located within its economy better facilitation and protection in their trade with foreign counterparts.⁶ This paper discusses how Ghana's legal regime for the international sale (and purchase) of goods transactions can be improved by the implementation of ILIs, and why that should be done.

Typically, an international sale of goods transaction would involve a number of interconnecting, but autonomous, contracts. There is usually a contract (or contracts) of sale of goods (often referred to as the underlying contract), a contract (or contracts) for the transportation of the goods from the exporting to the importing country (contract for the international carriage of goods) and contracts or arrangements for payment.⁷ The medium of communication (or transacting) by the parties may vary from traditional post of documents, fax and/or telephone or, in more recent times, electronic contracting (e-commerce), or a combination of the various media.⁸

The interconnecting contracts constituting an international sale transaction are the subject of widely adopted ILIs in the forms of conventions, model laws and legal guides. Some of the ILIs have been very successful, some have not. This article discusses some of these ILIs, particularly a few successful ones, arguing that there are advantages, and no material disadvantages, for Ghana to implement them. The article discusses ILIs relating to: (1) the underlying contract of sale; (2) international carriage of goods by sea;⁹ and (3) e-commerce.

For the underlying contract, the discussion focuses on the UN Convention on International Sale of Goods 1980 (CISG).¹⁰ For international carriage, the International Convention for the Unification Certain Rules Relating to Bills of

5 Razafimahefa and Hamori, *supra* note 3, p. 1.

6 Admittedly, the laws, policies, conditions and factors affecting a country's international competitiveness in its international trade are vast, the details of which are beyond the scope of this paper. The factors may include resources, productivity, physical and ICT infrastructure, business start-up costs, licensing regimes, labour market conditions, property rights and registration, access to credit, investor protection, taxes, enforcement of contracts, closing of business and cross-border trading (See The World Bank, *Doing Business in 2006: Creating Jobs*, The World Bank (2005), p. 6, available at <http://web.worldbank.org> (accessed 30 April 2010). See also The World Bank, *Doing Business in 2005: Removing Obstacles to Growth*, The World Bank (2004), available at <http://web.worldbank.org> (accessed 30 April 2010).

7 See E. Laryea, *Paperless Trade: Opportunities, Challenges and Solutions*, Kluwer Law International (2002), pp. 1–2 (hereafter, Laryea, *Paperless Trade*).

8 *Ibid.*

9 International carriage of goods could be by road, rail, air or sea, or a combination of these modes. While there are ILIs on all these modes of carriage, this paper confines its discussion to sea carriage, for two main reasons. First, most of the disadvantages identified in respect of the Ghanaian sea-carriage regime are not present with the other modes of carriage. Second, to the extent that any disadvantages in the non-sea-carriage instruments may exist, the arguments in respect of sea carriage may be a helpful template for their identification and rectification where appropriate.

10 See UNCITRAL, *United Nations Convention on International Sale of Goods 1980* (CISG), available at www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (accessed 30 April 2010).

Lading 1924 (Hague Rules), the Hague Rules as Amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 and/or SDR protocol (Hague-Visby Rules), the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules)¹¹ and the United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules)¹² are discussed. Instruments discussed for electronic contracting are the UNCITRAL Model Law on E-commerce 1996 (MLEC),¹³ the UNCITRAL Model Law on Electronic Signatures 2001 (MLES)¹⁴ and the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (CUECIC).¹⁵

This article is divided into six parts, including this introductory part. Part II briefly outlines the rationale for ILIs in the area of international commercial law, noting there are both supporters and detractors. Part III discusses ILIs relating to the underlying contract of sale, and examines Ghana's position regarding the relevant ILIs. It finds that Ghana has not implemented any ILIs on international sale, and recommends that Ghana should implement the CISG. Part IV discusses Ghana's position relating to ILIs on international carriage by sea. It observes that while Ghana has implemented an ILI in this area, it has adopted the Hague Rules, which is the least favourable of the available alternatives to Ghana. It argues that Ghana should have implemented the Hamburg Rules two decades ago. It goes on to suggest that Ghana has two choices: implement the Hamburg Rules now while monitoring progress on ratification of the new Rotterdam Rules; or simply ratify the Rotterdam Rules now in anticipation that they will become operational in the near future. Part V discusses the position of Ghana regarding ILIs on e-commerce in trade. It finds that Ghana has sought to implement a mixture of instruments in this area but has excluded the application of the relevant statute to important aspects of international trade transacting. It suggests that Ghana should rectify that anomaly. Part VI concludes the article with a summary of the arguments and submissions.

11 See UNCITRAL, *United Nations Convention on the Carriage of Goods by Sea 1978* (Hamburg Rules), available at www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf (accessed 30 April 2010).

12 See UNCITRAL, *United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008* (Rotterdam Rules), available at www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf (accessed 30 April 2010). The Rotterdam Rules, adopted by the UN General Assembly on 11 December 2008, and opened for signature at a signing ceremony in Rotterdam, the Netherlands, on 23 September 2009, is aimed at replacing the Hamburg Rules, Hague-Visby Rules and Hague Rules.

13 See UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996* (MLEC), United Nations (1999), available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 30 April 2010).

14 See UNCITRAL, *UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001* (MLES), available at www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf (accessed 30 April 2010).

15 See UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts 2005*, United Nations (2007), available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (accessed 30 April 2010).

II. REASONS FOR INTERNATIONAL LEGAL INSTRUMENTS

Harmonisation (and/or unification)¹⁶ of laws governing international commercial transactions has for a long time been considered to be important, and efforts have been made to achieve that goal. Institutions exist that aim to achieve the harmonisation uniformity of private international law.¹⁷ Some of the main reasons given for the pursuit of harmonisation and unification are that they contribute to the removal of cross-border legal barriers; increase stability and predictability of processes and results; lead to the avoidance of conflict of laws and reduction or simplification of litigation; reduce transaction costs and enhance efficiency; and promote the development of international trade.¹⁸ Not all in the legal fraternity (scholars, practitioners and judges) agree with the much-touted virtues of harmonisation of international commercial law. There are those who argue that harmonisation is neither attainable nor beneficial.¹⁹ However, there are many who hold the view, and to which this author adheres, that harmonisation is beneficial and should be supported.²⁰

Several legal instruments aimed at harmonising various aspects of international business transactions have been promulgated. These cover areas such as agency, contracts for the international sale of goods, limitation of action, conflict of laws,

16 Conceptually, harmonisation and unification may be differentiated. Harmonisation may be considered as the process of modifying domestic laws to enhance consistency and predictability in cross-border commercial transactions. Unification, on the other hand, is the adoption by States of a common legal standard governing particular aspects of domestic and international trade and commerce. See R. Bollen, 'Harmonisation of International Payment Law: A Survey of the UNCITRAL Model Law on Credit Transfers', 23(2) *Journal of International Banking Law and Regulation* (2008): 44. See also UNCITRAL, *What Does UNCITRAL Mean by the Harmonisation and Unification of the Law of International Trade?*, available at www.uncitral.org/uncitral/en/about/origin_faq.html (accessed 30 April 2010); P. J. Mazzacano, 'Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective', *Nordic Journal of Commercial Law* 1 (2008): 2, particularly text around footnote 10.

17 For example, UNCITRAL; the International Institute for the Unification of Private Law (UNIDROIT); the Comité Maritime International (CMI); and the International Maritime Organisation (IMO), among others.

18 See, e.g., J. Linarelli, 'The Economics of Uniform Laws and Uniform Law Making', 48(4) *Wayne Law Review* (2002): 1387–447; S. Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (The CISG) in South Africa', 116 *South African Law Journal* (1999): 323, 325–30; Goode, *supra* note 1, 752–4.

19 For examples of arguments against harmonisation, see P. B. Stephan, 'The Futility of Unification and Harmonisation in International Commercial Law', 39 *Virginia Journal of International Law* (1999): 743–98; M. Boodman, 'The Myth of Harmonisation of Laws', 39 *American Journal of Comparative Law* (1991): 699–724; and J. S. Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity', 106 *Law Quarterly Review* (1996): 530.

20 For examples of views favouring harmonisation, see S. Mancuso, 'Trends on the Harmonisation of Contract Law in Africa', 13 *Annual Survey of International & Comparative Law* (2007): 157; P. Myburgh, 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?' 31 *Victorian University of Wellington Law Review* (2000): 355–83; Mazzacano, *supra* note 16; Linarelli, *supra* note 18; Eiselen, *supra* note 18; Goode, *supra* note 1; E. Rabel, 'Draft of an International Law of Sales', 5 *University of Chicago Law Review* (1938): 543. This article does not get into, or add to, the debate on whether or not harmonisation of international commercial law is beneficial. It acknowledges that there are ILs relating to certain aspects of international commerce that are widely adopted, and argues that there are advantages in Ghana implementing those recommended for implementation.

international carriage of goods (by sea, air and land), international payment and credit transfer, dispute resolution and e-commerce. Some have been successful (in terms of their international acceptability), while some have failed. It is not the aim of this paper to consider all such instruments, nor is it practicable to do so. This paper considers instruments on international sale of goods, international carriage of goods by sea and electronic commerce. Even so, it is to be noted that most of the instruments under consideration have given rise to volumes of scholarly writings analysing either the entire instrument or some particular provisions of the instrument from a variety of perspectives. It is not intended in this article to engage in a similar exercise. This article simply observes whether or not an instrument under consideration has received acceptance internationally and has a considerably wide application in international commercial transactions. The focus is on examining Ghana's position regarding the selected instruments, and assessing whether Ghana should implement them and why. That is what the article now turns to.

III. INSTRUMENTS RELATING TO THE (UNDERLYING) CONTRACT FOR THE INTERNATIONAL SALE OF GOODS

While there have been a few attempts at formulating ILIs on the international sale of goods, resulting in a few such instruments, the CISG has been the most successful and dominant. Thus, in this article, the focus is on the CISG.

A. The CISG

As noted above, the most popular ILI in this area is the CISG. The object of the CISG was to provide a neutral, uniform, harmonised sales law around the world to reduce the uncertainty and costs of transacting across multiple jurisdictions.²¹ It was aimed at replacing 'the multitude of anachronistic, idiosyncratic localised sales laws around the world with one, relatively simple, pragmatic set of uniform laws designed specifically for international transactions'.²²

Efforts culminating in this instrument go back to the 1920s.²³ UNIDROIT drafted uniform laws on sales in the 1930s, but its efforts were interrupted by the Great Depression and World War II.²⁴ A diplomatic conference in 1964

21 L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', 10 *Melbourne Journal of International Law* (2009): 141, 145–6 (hereafter, Spagnolo, 'The Last Outpost').

22 *Ibid.*

23 Stephan, *supra* note 19, 773; Eiselen, *supra* note 18; J. A. Spanogle, 'The Arrival of International Private Law', 25 *George Washington Journal of International Law and Economics* (1991): 477; M. Ndulo, 'The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis', 38 *International and Comparative Law Quarterly* (1989): 1; P. Winship, 'Private International Law and the UN Sales Convention', 21 *Cornell International Law Journal* (1988): 489; J. Honnold, 'The United Nations Commission on International Trade: Mission and Methods', 27 *American Journal of Comparative Law* (1979): 201.

24 Stephan, *supra* note 19; Eiselen, *supra* note 18.

considered UNIDROIT's work and adopted two instruments, the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).²⁵ However, these instruments did not receive wide acceptance, partly due to a perception that they reflected European legal concepts that were not recognised elsewhere.²⁶ Only nine States contracted to the instruments.²⁷ UNCITRAL took over the task, and its efforts resulted in the promulgation of the CISG in 1980.²⁸

The CISG essentially merged civil and common law precepts in contract law through acceptable common denominators.²⁹ In doing so, it succeeded where ULIS and ULF failed. The CISG entered into force on 1 January 1988, after the required number of ten contracting States ratified it. As at 30 April 2010, 74 States had implemented the CISG.³⁰ The list of contracting States includes countries from every geographical region, every stage of economic development, and every major legal, social and economic system.

The CISG is divided into four main parts. Part one deals with the scope of application of the Convention and some general provisions. Part two contains rules governing the formation of international contracts of sale. Part three deals with the substantive rights and obligations of parties arising from contracts under the Convention, and part four contains final clauses concerning matters of enforcement, and reservations and declarations permissible under the instrument.³¹

Most in the international business community considers the CISG to be one of the most successful conventions in international commercial law, due to the

25 Ndulo, *supra* note 23. ULIS and ULF were promulgated on 1 July 1964.

26 C. P. Gillette and R. E. Scott, 'The Political Economy of International Sales Law', 25 *International Review of Law and Economics* (2005): 446, 449; M. P. Van Alstine, 'Dynamic Treaty Interpretation', 146 *University of Pennsylvania Law Review* (1998): 687, pp. 725–6; G. Eörsi, 'A Propos: The 1980 Vienna Convention on Contracts for the International Sale of Goods', 31 *American Journal of Comparative Law* (1983): 333, 335.

27 Namely, Belgium, The Gambia, Germany, Israel, Italy, Luxemburg, San Marino, the Netherlands, and the United Kingdom. See F. De Ly, 'Sources of International Sales Law: An Eclectic Model', 25(1) *Journal of Law and Commerce* (2005–6): 1, 2. (Also, note that the manner of implementation in the UK meant that the instruments were easily ignored and basically remained on paper only.)

28 J. O. Honnold, *United Nations Convention on Contracts for the International Sale of Goods (1980)*, 2nd edn, Kluwer Law Publishers (1991), pp. 4–5.

29 M. Bridge, *The International Sale of Goods: Law and Practice*, OUP (1999), p. 41; H. S. Burman, 'Building on the CISG: International Commercial Law Developments and Trends for the 2000's', 17 *Journal of Law and Commerce* (1998): 355; L. Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan', 36 *Victoria University of Wellington Law Review* (2005): 815.

30 See UNCITRAL's web page at www.uncitral.org for a full list of contracting States and details of their accession (when they acceded, date of entry into force, and any declaration or reservations that may have been made). The list is updated each time a new State accedes to the instrument.

31 For an analysis of the text of the CISG, see, e.g., J. Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) As Uniform Sales Law*, CUP (2007); P. Schlechtriem and I. Schwenzer (eds), *Commentary on the UN Convention on The International Sale of Goods (CISG)*, 2nd edn, OUP (2005).

extent to which it has been adopted internationally, the body of jurisprudence it has generated, and its contribution to trade in reducing both uncertainty and transaction cost.³² The CISG has been embraced by countries that constitute the great majority of the world's population, trade and economy. For instance, the top five world economies (USA, Japan, China, Germany and France)³³ are all parties to the CISG.³⁴ The major economies of the world that account for a considerably large proportion of international trade and global economic output have implemented the CISG.³⁵ The CISG has been widely applied in international sale transactions in the 20 years since its entry into force, and has generated a body of case law and abundant scholarly writing.³⁶

Implementation of the CISG affords parties to international sale transactions identifiable advantages.³⁷ First, the CISG gives a party the ability to standardise its preferred position on choice of law.³⁸ Second, as a neutral choice, the CISG might be more readily agreed upon by counterparties as a 'level playing field', giving neither side a home-ground advantage, which reduces negotiation costs

32 As noted earlier, the CISG has received the support and application of countries across every region of the globe, including major economic powers. The top five world economies (USA, Japan, China, Germany and France; see <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>), which together account for the great majority of international trade, are all parties to the CISG.

33 See IMF, *World Economic Outlook Database* (October 2009), available at <http://imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (accessed 30 April 2010); The World Bank, *The World Bank: World Development Indicators Database: Gross domestic product (2008)*, available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (accessed 30 April 2010).

34 See the list of contracting States at UNCITRAL, *Status: UN Convention on International Sale of Goods 1980 (CISG)*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 30 April 2010).

35 The notable major world economies that have not implemented the CISG are the UK and Brazil. For a discussion of the UK's position and arguments that the UK could benefit from implementing the CISG, and therefore should ratify, see, e.g., Linarelli, *supra* note 18, pp. 1426–42; Goode, *supra* note 1; A. E. Williams, 'Forecasting The Potential Impact of the Vienna Sales Convention on International Sales Law In The United Kingdom', in *Pace International Law Review* (ed.), *Review of the Convention on Contracts for International Sale of Goods (CISG)*, Kluwer Law International (2000–1), pp. 9–57; A. Gärtner, *Britain and the CISG: The Case for Ratification—A Comparative Analysis with Special Reference to German Law*, in *Pace International Law Review* (ed.), *Review of the Convention on Contracts for International Sale of Goods (CISG)*, Kluwer Law International (2000–1), pp. 59–81; R. Lee, 'The UN Convention on Contracts for International Sale of Goods: OK for the UK', *Journal of Business Law* (1993): 131. For a scholarly work recommending that Brazil implement the CISG, see E. Grebler, 'The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?', 25 *Journal of Law & Commerce* (2005–6): 467.

36 See UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT): UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods*, available at www.uncitral.org/uncitral/en/case_law/digests/cisg.html (accessed 30 April 2010). The Institute of International Commercial Law at Pace University maintains a current database on the CISG, which has a list of over 1,800 decisions and 5,000 case annotations, available at www.cisg.law.pace.edu/cisg/text/case-annotations.html, (accessed 30 April 2010). The site also lists a bibliography of over 1,000 scholarly writings on the CISG—see www.cisg.law.pace.edu/cisg/biblio.bib2.html (accessed 30 April 2010).

37 Spagnolo, 'The Last Outpost', *supra* note 21, pp. 149–59.

38 See Spagnolo, 'The Last Outpost', *supra* note 21, p. 149.

and delays.³⁹ Third, as neither side need familiarise themselves with foreign domestic sales and ancillary laws, conclusion of the contract may, at least in theory, be quicker, cheaper and, over time, yield further benefits in reduced compliance costs.⁴⁰ Fourth, the CISG may reduce, for parties and their lawyers, the risk of a forum seized of a dispute arising from the contract misapplying a foreign law and/or higher costs associated with proving a foreign law.⁴¹ Fifth, the simplicity and accessibility of the CISG (as the text is not only available in six official languages, but also simple to comprehend) holds advantage for all users.⁴² Materials on the CISG are easily accessible around the world on Internet sites dedicated to the dissemination of CISG cases and scholarship. This means lawyers, clients, courts and tribunals around the world are effectively ‘working from the same page’, compared with the problems faced by anyone wishing to access the intricacies of specific points of any foreign law.⁴³ Sixth, the CISG is designed specifically for international sales as opposed to most domestic sales laws that are internally focused, and may be ill-suited to international sales with their own special circumstances of distance, delays and interaction between different legal cultures.⁴⁴ Seventh, the CISG is increasingly viewed by the international business community as a key choice of law, which is neutral and can be expected to be uniformly applied anywhere in the world.⁴⁵ It must be noted, however, that, as there is no *stare decisis* in relation to the CISG, courts in different countries may adopt different interpretations despite the injunction in article 7 to adopt interpretations consistent with the purpose of the CISG.

Inevitably, the CISG is not perfect, and does not cover all conceivable issues that may flow from international sale of goods contracts. Like all international treaties, there were compromises made to ensure its passage, which left out certain issues and made some seemingly ambiguous provisions. It has been criticised for

39 For instance, Spagnolo alludes to a survey which found that 26 per cent of Swiss lawyers believed the CISG made negotiations easier because it was more readily agreeable than national law. Another survey stated that the CISG reduced costs by avoiding interminable discussions about legal details. See Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 149; C. Widmer and P. Hachem, ‘Switzerland’, in F. Ferrari (ed.), *The CISG and Its Impact on National Legal Systems*, Sellier (2008), pp. 281, 281–6.

40 Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 149.

41 Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 150.

42 Official texts of the CISG are in Arabic, Chinese, English, French, Russian and Spanish. See UNCITRAL, 1980—*United Nations Conventions on Contracts for the International Sale of Goods*, available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (accessed 30 April 2010). For further (non-official) translations, see Pace Law School, *CISG Database: Texts of the CISG*, available at <http://cisgw3.law.pace.edu/cisg/text/text.html> (accessed 30 April 2010).

43 Spagnolo, ‘The Last Outpost’, *supra* note 21, pp. 150–1.

44 Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 151. See also F. Ferrari, ‘Applicability and Applications of the Vienna Sales Convention (CISG)’, 4 *International Legal Forum: English Language Edition* (1998): 137, 139, where the author describes national laws in this area as ‘the merchants’ worst enemy’.

45 Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 151. For further discussion of the growing acceptance of the CISG, see A. E. Butler, ‘The International Contract: Knowing When, Why, and How to Opt Out of the United Nations Convention on Contracts for the International Sale of Goods’, 76 *Florida Bar Journal* (2002): 24, 26.

these shortcomings.⁴⁶ Examples are the issue of set-offs, which is not directly covered by the CISG, and the notion of ‘good faith’ in the CISG.⁴⁷ Another key omission, from a common law perspective, is the issue of transfer of property.

However, such criticisms, some more academic than practical, do not mean the CISG is not a good set of rules and principles for international sales. After all, no sale of goods law in any domestic jurisdiction is flawless.⁴⁸ A great deal of supporting material is now available. There are now numerous CISG cases to draw upon and plentiful scholarship. The bare bones of the CISG are now fleshed out by much in the way of guidance, although naturally there are still some areas of disagreement.⁴⁹ Further, the CISG allows parties to modify most of its rules.⁵⁰ Parties concerned about a certain issue can agree on the solution. The CISG also has an internal interpretive method that guides the resolution of ambiguities within it. For matters falling outside the CISG, the usual conflict rules determine the law applicable to the issue.⁵¹ Moreover, the content of the CISG is no worse than, and is in fact often very much better suited to, international sales than an outmoded sales law oriented toward domestic trade.⁵² In any case, the criticisms of the CISG have not dissuaded its increasing implementation by states and its application to international sale transactions.

B. Ghana and the CISG

Considering the breadth of acceptance of the CISG, and the perceived benefits of its implementation, it is the view of this author that Ghana’s implementation of the Convention would be beneficial for the country’s economy. Ghana should

46 Gillette and Scott, *supra* note 26, pp. 446–86; Stephan, *supra* note 19, pp. 774–6; J. S. Ziegel, ‘The Future of the International Sales Convention from a Common Law Perspective’, 6 *New Zealand Business Law Quarterly* (2000): 336, 345–6; P. Thieffry, ‘Sale of Goods Between French and US Merchants: Choice of Law Considerations under the United Nations Convention on Contracts for the International Sale of Goods’, 22 *International Lawyer* (1988): 1017, 1033; G. Cuniberti, ‘Is the CISG Benefiting Anybody?’ 39 *Vanderbilt Journal of Transnational Law* (2006): 1511, 1515–19.

47 See, e.g., P. Schlechtriem, ‘Sphere of Application and General Provisions: Sphere of Application: Arts 1–6’, in Schlechtriem and Schwenzler, *supra* note 31, pp. 15, 72; P. Schlechtriem, ‘Sphere of Application and General Provisions: General Provisions: Art 7’, in Schlechtriem and Schwenzler, *supra* note 31, pp. 93, 103; F. Ferrari, ‘Interpretation of the Convention and Gap-Filling: Article 7’, in F. Ferrari, H. M. Flechtner and R. A. Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, Sellier (2004), pp. 138, 167–8.

48 For an examination of the main critique of the CISG, and responses, see Mazzacano, *supra* note 16.

49 Spagnolo, ‘The Last Outpost’, *supra* note 21, pp. 152–4; Butler, *supra* note 45, p. 26 (arguing that the increasing number of decided cases around the world have reduced uncertainty).

50 CISG, article 6.

51 On the preliminary need to determine whether an issue falls within or outside the CISG, see L. Spagnolo, ‘Opening Pandora’s Box: Good Faith and Precontractual Liability in the CISG’, 21 *Temple International and Comparative Law Journal* (2007): 261, 308–9.

52 Spagnolo, ‘The Last Outpost’, *supra* note 21, p. 153. See also J. S. Ziegel, ‘Commentary on Party Autonomy and Statutory Regulation: Sale of Goods’, 6 *Journal of Contract Law* (1993): 123, 127–8 (where the author argues that the CISG is better than British sale of goods models in some respects, while being less preferable in others).

remain outside of the Convention only if its implementation would result in greater disadvantage than benefit to businesses operating within the country, and to the economy in general. Where there are conceivable benefits to Ghana, and no outweighing disadvantages, it makes sense for Ghana to implement the Convention.

1. Possible disadvantages to Ghana's implementation of the CISG

There appears to be no material disadvantages to the Ghanaian economy if it implements the CISG. A conceivable disadvantage to Ghana's implementation may be that presented by Akaddaf,⁵³ who argues that the provisions of the CISG dealing with examination of goods (article 38), timely notification of lack of conformity (article 39) and sellers' knowledge of non-conformity (article 40) may work to the disadvantage of parties in developing countries who purchase advanced and sophisticated equipment from developed countries.⁵⁴ She argues that a developing-country purchaser of sophisticated machinery may lack the technological knowledge to be able to comprehensively examine the machinery, and to detect all faults within the time allowed by the Convention, which is two years.⁵⁵ Article 39(2) imposes a maximum period of two years from the date of delivery within which a purchaser must notify the seller of lack of conformity. The buyer loses the right to rely on a lack of conformity of the goods if it does not give the seller notice of default within two years. Akaddaf argues that it 'may take more than two years before a [latent] defect in sophisticated machinery can be discovered',⁵⁶ as in developing countries, inspecting and discovering defects in sophisticated goods generally involves difficult and often expensive tasks for qualified experts, sometimes from industrialised countries.⁵⁷

Indeed, this argument is not new. It was canvassed by delegates of developing countries at the drafting stages of the provisions of the CISG.⁵⁸ There was spirited discussion over the articles at the Diplomatic Conference, since many developing countries considered that the two-year period was too short.⁵⁹ 'The Ghanaian delegation to the Diplomatic Conference deprecated the drastic consequence of failure to give the required notice under article 39(1), which is loss of the right to rely on the non-conformity'.⁶⁰ However, it was noted that the two-year period was

53 F. Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?', 13 *Pace International Law Review* (2001): 1.

54 *Ibid.*, pp. 11–12. By definition, Ghana is a developing country; thus, Akaddaf's arguments are applicable to Ghana to the extent of their validity.

55 *See* CISG, article 39(2).

56 Akaddaf, *supra* note 53, p. 13.

57 Akaddaf, *supra* note 53, p. 13.

58 S. K. Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selected Commentary', 11 *Review of Ghana Law* (1979): 50, 66 (hereafter, Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods', 1980).

59 Date-Bah, *ibid.*, p. 66.

60 Date-Bah, *ibid.*

much longer than pertains in many (domestic) jurisdictions.⁶¹ To that extent, the period adopted was thought to be a reasonable compromise. A further compromise was procured by developing countries to insert article 44, which allows the buyer to reduce the price in accordance with article 50 or claim damages, except for loss of profit, if the buyer has reasonable excuse for its failure to give the required notice.⁶²

It might also be contended, in addition to the above compromises, that either the likelihood of the above disadvantage materialising is small or steps can be taken to eliminate it altogether. The likelihood of the disadvantage materialising is small because, in the first place, a Ghana-located purchaser of sophisticated equipment is likely to have reasonable sophistication or be able to afford sophisticated examiners to detect defects within two years of the equipment being delivered. This is because sophisticated equipment is likely to be acquired and used in reasonably sophisticated environments. Second, if the equipment is deployed, it is likely that latent defects would become apparent within two years.

The disadvantage may be eliminated by two means. First, the two-year time-limit prescribed in article 39(2) does not apply where it 'is inconsistent with a contractual period of guarantee'.⁶³ Thus, purchasers of complex equipment may be able to obtain extended periods of supplier's guarantee beyond the two years. The second means is by exercising the option granted in article 6 to opt out of the application of the CISG altogether, although the parties' places of business are located in contracting States. So, if Ghana implements the CISG, a Ghanaian-located party who perceives the Convention to be disadvantageous in a particular case may explore the possibility of opting out of its application. Admittedly, an entity located in Ghana may lack the bargaining power to push for extended supplier's guarantee or opt out of the Convention if the supplier is reluctant. Nonetheless, the options discussed remain possible avenues for ameliorating the perceived disadvantage presented by articles 38–40. In any case, many developing countries to which this disadvantage applies have implemented the CISG. Moreover, the Ghanaian delegate that had an input into the final instrument recommended that Ghana implement the instrument.⁶⁴

2. Benefits of the CISG to Ghana

Beyond the above unlikely pitfall posed by the CISG to entities located in Ghana, there are, arguably, many advantages in Ghana's adoption of the instrument. First, accessibility of the CISG affords Ghanaian businesses and their foreign counterparts reduced transaction costs and enhanced efficiency. Ghanaian laws are

61 Date-Bah, *ibid.*

62 Date-Bah, *ibid.* See also the text of article 44 of the CISG.

63 See CISG, article 39(2).

64 Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods', 1980, *supra* note 58.

not very obvious or easily accessible to overseas parties seeking to do business with Ghana. A party seeking to familiarise itself with Ghanaian laws relating to the international sale of goods may have to employ the services of lawyers at substantial cost and time. Such costs may hamper the transaction or, if the transaction proceeds, are likely to be passed on and manifest in terms of higher domestic prices of goods. Those costs may be obviated if Ghana implements the CISG, as the implementation would be published, making Ghana's position readily available to prospective traders with Ghanaian counterparts.

Second, Ghana's implementation of the CISG may eliminate costs relating to negotiation of governing law of the contract of sale if a foreign counterpart transacting with a Ghanaian-located entity is located in another contracting State. Negotiation of governing law can be time-consuming and costly, particularly where the laws of the respective parties are perceived to be different or confer peculiar advantages to one party.⁶⁵ Where the parties are negotiating at arm's length, the issue could be protracted. Where there is inequality of bargaining power or negotiation ability, the preference of the stronger party or the party with the better negotiation ability is likely to prevail. In a transaction between a party in Ghana and counterparty in a developed economy, it is likely that the Ghanaian party would be the economically weaker party or the party with the lesser negotiation skills, and therefore the one who will suffer an imposition of the stronger party's preference. Ghana's implementation of the CISG may eliminate such a disadvantage to the Ghanaian party.

Third, when a dispute has arisen, a Ghana-located party may find its contract with an international counterpart governed by the CISG if that counterpart is located in a contracting State in which article 1(1)(b) of the CISG applies and the rules of conflict of laws lead, probably fortuitously, to the laws of that jurisdiction. This is because under article 1(1)(b) of the CISG, the Convention applies 'when the rules of private international law [of the forum] lead to the application of the law of a contracting State'. This means of application is often described as 'indirect'.⁶⁶ Although, article 95 permits a contracting State to declare it is not bound by this indirect means of application, most contracting States have not made such a declaration.⁶⁷ So there is a likelihood that Ghanaian-located parties and their lawyers may be caught by indirect application of the CISG. If that happens, the parties and their lawyers may find themselves unfamiliar with, and deficient

⁶⁵ Linarelli, *supra* note 18.

⁶⁶ See, e.g., Spagnolo, 'The Last Outpost', *supra* note 21, p. 143. The direct application provision is found in article 1(1)(a), which provides that the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are contracting States.

⁶⁷ Only 7 (namely, China, Czech Republic, Germany, Singapore, Saint Vincent and the Grenadines, Slovakia and the USA) out of the 74 contracting States have made reservation under article 95 to exclude or limit the application of article 1(1)(b). See the list of contracting States and details of their implementation at *Status: UN Convention on International Sale of Goods 1980 (CISG)*, available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 30 April 2010).

in, the necessary understanding and application of the CISG, which could have consequences for the administration of justice.

Fourth, non-implementation of the CISG means the deprivation of the possible reductions in transactional costs already alluded to. In a world of increased globalisation, higher transactional (time and financial) costs will reduce the competitiveness of doing business with Ghana-located entities. All things being equal, a foreign buyer who has alternative sources of supply will choose the country with lesser costs. Conversely, a foreign seller may demand higher prices from a country with which transactional costs are higher. These, then, disadvantage Ghana-located businesses.

Fifth, implementing the CISG will enhance how Ghana is perceived within the international business community, as it announces the country's intentions to operate by internationally accepted laws and standards. This may help assuage the often-existing perceptions, rightly or wrongly, that doing business with sub-Saharan Africa, and Ghana for that matter, is risky due, in part, to unpredictable laws and dubious standards.

Sixth, the CISG is substantially the same as Ghanaian domestic law of contract and sale of goods law. Much of the CISG is in line with the common law principles of contracts for the sale of goods. One major departure from the common law, in favour of civil law systems, is that consideration is not required under the CISG. Thus, under the CISG, a promise to keep an offer open for a specified period may be binding although the offeree has given no consideration for that promise.⁶⁸ Similarly, the difficulties posed by the existing legal duty principles at common law would not arise under the CISG.⁶⁹ While the position under the CISG introduces a shift from most common law jurisdictions that have ratified the Convention (such as the USA, Australia, Canada, New Zealand and Singapore) on the issue of consideration, it rather aligns perfectly with Ghanaian law. Aspects of the common law doctrine of consideration regarding open offers and existing legal duty were reformed by the Contracts Act 1960, Ghana (Act 25), ss. 8 and 9, respectively.⁷⁰ Other departures from the general law of Ghana are minor, commercially realistic and of little legal significance. It must be noted, too, that major common law jurisdictions (such as Australia, Canada, Singapore and the USA) whose laws are slightly more divergent from the CISG have implemented the instrument.

Considering the above enumerated potential benefits of the CISG to Ghana, why has Ghana not implemented the CISG; are there any particular reasons why Ghana has not yet implemented it?

⁶⁸ CISG, article 16.

⁶⁹ The existing legal duty (or pre-existing obligation) rule is to the effect that, at common law, a promise to perform, or the performance of, an existing duty is not sufficient consideration. See, e.g., J. Paterson, A. Robertson and P. Heffey, *Principles of Contract Law*, 2nd edn, Lawbook Co. (2005), pp. 91–3.

⁷⁰ Contracts Act 1960, Ghana (Act 25). For a discussion of the reform in Ghana, see C. Dowuona-Hammond, 'The Reform of Consideration by the Contracts Act, 1960 (Act 25): Implications for The Law of Contract in Ghana', *University of Ghana Law Journal* (1993–5): 1–31.

3. *Why has Ghana not implemented the CISG?*

This is a question that has been asked of other non-contracting States to the CISG.⁷¹ In the case of Ghana, it is particularly poignant because Ghana was one of only five countries that signed the instrument on the day it opened for signature on 11 April 1980.⁷² Ghana is the only remaining country of those initial five signatories that has not yet ratified the Convention.⁷³ Meanwhile several non-signatory countries have since acceded to the instrument.

More perplexing is the fact that Ghana was also among the initial 14 countries represented in UNCITRAL's Working Group charged with the development of the CISG, as an instrument to be acceptable 'by countries of different legal, social and economic systems'.⁷⁴ Ghana was represented throughout the development and promulgation of the instrument, to which it made contributions.⁷⁵ Furthermore, a Ghanaian representative⁷⁶ to the Plenipotentiary Conference on CISG that adopted the Convention recommended the CISG for Ghana's ratification shortly after the instrument was adopted.⁷⁷ Indeed the representative hoped that not only Ghana would ratify, but 'that the convention will be ratified by ECOWAS member-states so that sales transactions between Francophone and Anglophone members of ECOWAS may be facilitated'.⁷⁸ Other scholars have argued forcefully that

71 For instance, in the case of the UK, *see* Goode, *supra* note 1, pp. 756–8; Linarelli, *supra* note 18; Williams, *supra* note 35; Gärtner, *supra* note 35; Lee, *supra* note 35. For Brazil, *see* Grebler, *supra* note 35. For Japan, before it implemented the instrument, *see* Nottage, *supra* note 29. For South Africa, *see* Eiselen, *supra* note 18.

72 The other four were Austria, Chile, Hungary and Singapore, all of which have since ratified the instrument. *See* UNCITRAL, 'Status: UN Convention on International Sale of Goods 1980 (CISG)', available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 30 April 2010).

73 The only other signatory, though not in the initial five, that has not yet ratified the CISG is Venezuela, which signed on 28 September 1981. *See* 'Status: UN Convention on International Sale of Goods 1980 (CISG)', available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 30 April 2010).

74 *See* UNCITRAL, *Report of the Working Group on International Sale of Goods, First Session, 5–10 January 1970*, Yearbook of the United Nations Commission on International Trade Law (1970), Vol. 1, p. 176, 177 (extracted at <http://daccessdds.un.org/doc/UNDOC/GEN/NL7/001/02/PDF/NL700102.pdf?OpenElement>, (accessed 28 February 2009) (hereafter, UNCITRAL, *Report 1970*). The initial 14 countries were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the USSR, the United Kingdom and the USA, to which four other countries – Austria, the then Czechoslovakia, the Philippines and Sierra Leone – were added later; *see* M. C. Bianca and J. M. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè (1987), p. 3.

75 Not only was Ghana represented at the first meeting (by K. K. Dei-Anang, then a Lecturer in Commercial Law at the University of Ghana), Ghana's Emmanuel Sam was also elected at the same meeting as the Rapporteur to the meeting (*see* UNCITRAL, *Report 1970*).

76 In the person of S. K. Date-Bah. *See* S. K. Date-Bah, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa', 2 *Uniform Law Review* (2004): 269.

77 Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods', 1980, *supra* note 58. The text of the publication suggests it was published after the CISG was adopted and opened for signature on 11 April 1980, though the publication appeared in a 1979 issue of the journal. This is likely to be due to the relevant issue of the journal being published late.

78 Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods', 1980, *supra* note 58, p. 67. ECOWAS is the Economic Community of West African States, a regional group of 15 West African countries, founded on 28 May 1975.

implementation of the CISG is beneficial to African economies.⁷⁹ Yet, to date, only two out of the fifteen ECOWAS member countries are parties to the CISG (and only nine from Africa as a whole).⁸⁰ This is despite a general recognition by academics and governments of African states that harmonisation of business laws within the continent and with the outside world is vital, and some measures have been initiated towards that end;⁸¹ for example, an Organization for the Harmonization of Commercial Law in Africa (OHADA) was formed in 1993 to pursue uniform commercial laws across member countries.⁸²

The idea behind OHADA is laudable, and it has made good progress towards its aims.⁸³ However, an ILI such as the CISG (and the UNIDROIT Principles), which has clearly influenced OHADA's work,⁸⁴ could have been adopted by member countries in addition to the organisation's drafting efforts. Implementation of the CISG by OHADA member countries (and, possibly, non-member countries as well) would not only harmonise international sales laws between member countries, it would also harmonise their laws with the wider CISG contracting States elsewhere.⁸⁵ A similar argument, that the CISG be implemented as the harmonising law for the international sale of goods, has been proposed for Asia.⁸⁶ Indeed, there is interest in Asia moving in that direction, particularly with Japan's accession to the CISG.⁸⁷ The European Union (EU) has adopted a similar approach.⁸⁸ The three member states of the North Atlantic Free Trade Area (NAFTA) have already incorporated the CISG as uniform law for their

79 See Eiselen, *supra* note 18, pp. 339–56.

80 The two ECOWAS countries are Guinea and Liberia. The additional seven African countries are Burundi, Egypt, Gabon, Lesotho, Mauritania, Uganda and Zambia.

81 Mancuso, *supra* note 20; Eiselen, *supra* note 18; Bamodu, *supra* note 4, p. 125; M. Ndulo, 'Harmonisation of Trade Laws in the African Economic Community', 42 *International and Comparative Law Quarterly* (1993): 101; A. Allott, 'Towards the Unification of Laws in Africa', 14(2) *International and Comparative Law Quarterly* (1965): 366, 378; A. Allott, 'The Unification of Laws in Africa', 16 *American Journal of Comparative Law* (1968): 51.

82 OHADA has 16 African member countries, namely Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. For discussions of the OHADA treaty and work, see N. Enonchong, 'The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem', 51(1) *Journal of African Law* (2007): 95–116; 8 *Uniform Law Review* (2008), an issue dedicated to the work of the organisation.

83 Mancuso, *supra* note 20, pp. 168–71.

84 *Ibid.*

85 It is to be noted that none of the member States of OHADA is a party to the CISG.

86 See G. F. Bell, 'Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG' *Singapore Journal of Legal Studies* (2005): 362, 366–72, where the author argues that Asian countries should implement the CISG instead of attempting their own harmonisation of their laws of sales.

87 See Spagnolo, 'The Last Outpost', *supra* note 21, p. 146; UNCITRAL Secretariat, *Technical Co-operation and Assistance*, UN Doc A/CN.9/627 (18 April 2007) [8]–[9].

88 Most of the EU member states are parties to the CISG, but that has not stopped the EU taking steps to further harmonise their contract laws, particularly laws outside of sale of goods. For a discussion of the interaction between the CISG and European contract law, see U. G. Schroeter, 'Global Uniform Sales Law – With a European Twist? CISG Interaction With EU Law' 13 *Vindobona Journal* (2009): 179–96.

cross-border transactions.⁸⁹ In any case, as Ghana is not, as yet at least, a member of OHADA, it would not have been affected even if OHADA had gone down the CISG path as has been argued.⁹⁰

So, coming back to the particular issue under consideration, why has Ghana abstained from ratifying the CISG?⁹¹ There are no known official reasons why Ghana has so far abstained from ratifying the CISG. It is the same for most countries that have not implemented the instrument.⁹² Those that attempt to give official reasons tend to be unconvincing.⁹³ That leaves the reasons open to conjecture. Two factors may come to mind: (1) political interruptions or instability; and (2) lack of appreciation of the benefits of implementing the CISG on the part of government, business and the legal community.

(a) Political interruption or instability

Ghana signed the CISG under the government of the People's National Party (PNP) in the Third Republic, which governed for only 27 months, from September 1979 to December 1981.⁹⁴ The government may have intended to ratify the Convention, but was ousted by the Provisional National Defence Council (PNDC) in 1981, before it probably had an opportunity to ratify and, in any case, well before the CISG entered into force in 1988.

The PNDC, which ruled for the next ten years (from 31 December 1981 to 7 January 1992), and therefore had a lengthy stable period, took no steps to ratify the CISG during its time. Neither did the National Democratic Congress (NDC) that succeeded the PNDC for another eight years, with similar personnel as the PNDC.⁹⁵ It may be argued that the PNDC had more difficult and mundane issues to grapple with at the beginning, and the CISG was itself not yet in force. However, the PNDC commenced active promotion of engagement in international trade, particularly the promotion of Ghanaian exports, in the mid 1980s, and also sought to attract foreign investments to Ghana in that period. These policies were continued by its successor, the NDC. Ratification of the CISG, particularly after

89 F. Hinestrosa, 'Harmonisation of Sales Law in the Americas and Regional Economic Integration: A Cautious Appraisal' 8 *Uniform Law Review* (2003): 211, 213.

90 Except that an en-masse implementation of the CISG by OHADA member countries may raise fresh interest in the instrument in Ghana.

91 Discussion of reasons why other African countries have not ratified the CISG is beyond the scope of this article.

92 For instance, there is no official reason for Brazil's refusal to implement the CISG; see Grebler, *supra* note 35, p. 467.

93 For instance, the official reason given to explain why the UK has not yet implemented the CISG is lack of Parliamentary time (see Goode, *supra* note 1, p. 757). Japan also cited lack of Parliamentary time for a long time before implementing the instrument, eventually, in 2008 (see Nottage, *supra* note 29, p. 840).

94 For a chronology of the political history of Ghana, see J. G. Amamoo, *Ghana: 50 Years of Independence*, Jafint Ent. (2007).

95 The PNDC ruled from 31 December 1981 to 7 January 1993 when it was succeeded by the NDC, which governed till it was succeeded by the NPP from January 2001 to the end of 2008. The NDC regained power in January 2009, following elections in December 2008. See Amamoo, *ibid.*, for political history of Ghana up to 2007.

the instrument entered into force in 1988, should have been seriously considered as part of the export promotion and facilitation initiatives.

The immediate past government, the National Patriotic Party (NPP),⁹⁶ also ignored the CISG in its eight years at the helm. This is despite the government's claim of implementing, as a matter of priority, policies to create a 'Golden Age of Business' on its assumption of office in 2001.⁹⁷ The 'Golden Age of Business' was supposed to indicate the then government's commitment to assisting the private sector in spearheading Ghana's economic development process, and to attract foreign direct investment, boost exports and overcome the problem of underdevelopment and unemployment in Ghana. The government embarked on some legal reforms, including on aspects of Ghanaian commercial and mining laws. Again, ratification of the CISG should have been considered.

There is no indication that the NDC, which returned to power in January 2009, is taking steps to implement the CISG. It would appear that the possible benefits of implementing the CISG has not been appreciated by successive governments in Ghana. It is submitted that the Ghanaian government should take steps to ratify the CISG, as it offers benefits, with no obvious disadvantages to the country.

(b) Lack of appreciation of the benefits of implementing the CISG

It would appear also that the possible benefits of adopting the CISG have not been appreciated by the business and the Ghanaian legal community, including judges and academics. There is no visible pressure from business or debate from the legal community for government to implement the CISG. The reasons are unclear. It may be that members of the Ghanaian legal community are comfortable with the status quo and do not want a change or they simply have not alerted their minds to the potential benefits of Ghana's implementation of the instrument. It is hoped that this article will contribute to initiating debate towards consideration of the implementation of the CISG.

IV. CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

Over 80 per cent of international cargo is carried solely or partly by sea.⁹⁸ This is of particular importance to Ghana as a coastal nation. Due to the transnational character of seaborne carriage, international uniformity of maritime law has for long been regarded as vital. While uniformity of the broad aspects of maritime law is important, this paper focuses on cargo liability regimes relating to sea-carriage of goods. At present, there are three international regimes

⁹⁶ As mentioned in note 95 *supra*, Ghana had a change of government (from the NPP to the NDC) in January 2009.

⁹⁷ P. Arthur, 'The State, Private Sector Development, and Ghana's Golden Age of Business' 49(1) *African Studies Review* (2006): 31.

⁹⁸ UNCTAD, *Review of Maritime Transport 2008*, UNCTAD (2008) p. 8, available at www.unctad.org/en/docs/rmt2008ch1_en.pdf (accessed 30 April 2010).

in operation (namely the Hague Rules,⁹⁹ Hague-Visby Rules¹⁰⁰ and Hamburg Rules¹⁰¹) and a fourth, and most recent that is yet to enter into force, the Rotterdam Rules.¹⁰²

A. ILLs on carriage of goods by sea

1. *Hague Rules*

The Hague Rules was the first major successful instrument on the subject, standardising the rights, obligations and liabilities of cargo and carrier interests.¹⁰³ The rules impose some minimum liability regime on carriers. They were a compromise instrument between the use of exculpatory clauses by carriers to immunise themselves from cargo liability, on the one hand, and action by governments of cargo-owning countries to not only proscribe the practice but also impose certain obligations and liabilities on carriers, on the other.¹⁰⁴ The reaction started with the enactment of the Harter Act 1893 by the US government, followed with similar legislation by New Zealand,¹⁰⁵ Australia¹⁰⁶ and Canada.¹⁰⁷ Other European and Asian countries either followed suit or were reportedly on the verge of doing so by the early 1920s.¹⁰⁸ The Hague Rules imposed some minimum liability regime on carriers, while acknowledging circumstances in which carriers may be exempted. The Rules were well received in the Anglo-common law world, and were ratified by the UK,¹⁰⁹ Australia,¹¹⁰ Canada,¹¹¹ New Zealand,¹¹² the USA¹¹³ and other countries.

99 *International Convention for the Unification Certain Rules Relating to Bills of Lading 1924* (Hague Rules), available at www.admiraltylawguide.com/conven/haguerules1924.html (accessed 30 April 2010).

100 *International Convention for the Unification Certain Rules Relating to Bills of Lading 1924* (Hague Rules), as amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 and/or SDR Protocol* (Hague-Visby Rules), available at www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/landscape.pdf (accessed 30 April 2010).

101 See the *United Nations Convention on the Carriage of Goods by Sea 1978* (Hamburg Rules), available at www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf (accessed 30 April 2010).

102 See, UNCITRAL, *United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008*, available at www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf (accessed 30 April 2010).

103 Myburgh, *supra* note 20; F. Hannah, 'Carriage of Goods by Sea', in M. White (ed.), *Australian Maritime Law*, 2nd edn, The Federation Press (2000), p. 62, 64.

104 Hannah, *ibid*.

105 Shipping and Seamen Act 1903, 1908, 1911 (NZ).

106 Sea-Carriage of Goods Act 1904 (Cth).

107 Water-Carriage of Goods Act 1910 (Canada) .

108 Myburgh, *supra* note 20, p. 359.

109 Carriage of Goods by Sea Act 1924 (UK).

110 Sea-Carriage of Goods Act 1924 (Cth).

111 Water Carriage of Goods Act 1936 (Canada).

112 Sea-Carriage of Goods Act 1940 (NZ).

113 Carriage of Goods by Sea Act 1936 (46 USC 1300–13).

2. *Hague-Visby Rules*

Despite the initial positive view of the Hague Rules, deficiencies within the regime emerged over time, for which amendments to the instrument were thought necessary. Difficulties emerged, among other things, in respect of package limitation, scope of application of the Rules, the evidential effect of bills of lading and effect of time bar.¹¹⁴ A protocol that amended several provisions of the Hague Rules, including increasing the minimum liability of carriers to a higher amount, was signed in Visby, Sweden, in 1963, and adopted in Brussels in 1968.¹¹⁵ However, the protocol did not attract the requisite number of ratifications until 1977.

The amended Hague Rules are commonly known as the Hague-Visby Rules.¹¹⁶ There was a further technical amendment in 1979, by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1979, the main purpose of which was to change the unit of currency to the Special Drawing Rights (SDR), compiled by the International Monetary Fund (IMF).¹¹⁷

Many countries implemented the amended Hague Rules (Hague-Visby Rules), while a few, such as Ghana and the USA, retained the unamended Hague Rules. Thus two regimes – Hague Rules and Hague-Visby Rules – became operational in different countries around the world.

3. *Hamburg Rules*

The Hamburg Rules resulted from the work of UNCITRAL, due to developing countries' agitation for a more fundamental reform (beyond the Visby amendments) to the international sea-carriage of goods regime. Developing countries considered the Hague and Hague-Visby Rules to be 'biased in favour of carrier interests from the industrialised nations and a contributory cause of unnecessarily high insurance and transport costs'.¹¹⁸ The Hamburg Rules were signed in 1978, but did not come into force until November 1993 when the necessary ratifications were achieved. The Hamburg Rules were viewed as an improvement over the Hague and Hague-Visby Rules since they extended the scope of a carrier's liability for loss of or damage to cargo to the entire period that the goods are in the charge of the carrier rather than just for the time that the goods are physically aboard the vessel. They also established liability of the carrier when economic loss occurs due to delay in delivery and place the onus on the carrier to prove that all reasonable measures were taken to avoid damage or loss, rather than requiring the claimant to prove the carrier's negligence. Further, they increased the carrier's limit of liability.

¹¹⁴ See Myburgh, *supra* note 20, p. 360.

¹¹⁵ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 23 February 1968.

¹¹⁶ A. Diamond, 'The Hague Visby-Rules', *Lloyd's Maritime and Commercial Law Quarterly* (1978): 225.

¹¹⁷ Myburgh, *supra* note 20, p. 360.

¹¹⁸ Myburgh, *supra* note 20, p. 361.

Having been adopted by the United Nations with the participation of traditional maritime nations and developing countries, the Hamburg Rules were expected to have a broader political base than the Hague and Hague-Visby regimes. However, they were considered to favour shipper-dominated economies.¹¹⁹ As such, no major maritime jurisdictions have implemented them to date. The majority of countries that have adopted the Hamburg Rules remain developing cargo-owning countries.¹²⁰ There was only one developed country (Austria) out of 34 contracting parties to the Hamburg Rules as at 30 April 2010.¹²¹

Implementation of the Hamburg Rules by the 34 countries means three international regimes became operational (Hague, Hague-Visby and Hamburg Rules) in different countries around the world, which remains the case today.¹²² Despite the perceived advantages of the Hamburg Rules to shipper-dominated developing countries, Ghana did not, and has not, implemented the instrument.¹²³

4. *Rotterdam Rules*

As the Hamburg Rules lacked the support of developed countries, interest in another cargo-liability treaty that would be more widely accepted by most, if not all, countries was soon generated. Several states and international non-governmental organisations felt it was time to find a solution to the lack of uniformity and create a modern, technologically up-to-date convention. This eventually led to the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), which was opened for signature on 23 September 2009.

The Rotterdam Rules have a very broad scope, and apply to door-to-door cargo movements provided there is an international sea leg. They accommodate the use of electronic transport documents (in Chapters 3 and 8), and reflect more modern practices in international carriage. They also address issues such as the seaworthiness of the vessel, transfer of rights and many other aspects of the relationship between carriers and cargo owners, set out in nearly 100 articles. At the same time, they introduce contractual freedom, allowing carriers and cargo owners to agree to contract out of some provisions.

Sixteen States, including Ghana, signed the instrument at the ceremony at which it was opened for signature, 'making it the most successful of the conventions developed by the United Nations Commission on International Trade

119 C. C. Nicoll, 'Do the Hamburg Rules Suit a Shipper-Dominated Economy?' 24(1) *Journal of Maritime Law and Commerce* (1993): 151.

120 D. Frederick, 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules', 22 *Journal of Maritime Law and Commerce* (1991): 81.

121 See UNCTRAL, *Status: 1978–United Nations Convention on the Carriage of Goods by Sea—the Hamburg Rules*, available at www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (accessed 30 April 2010).

122 Of course these three regimes are in addition to a few countries that are not parties or have not implemented any of the three regimes. Those countries often have purely domestic regimes.

123 Ghana's position regarding Hamburg Rules, and the other sea-carriage instruments, are discussed in more details later below, under Section B of this part.

Law (UNCITRAL) so far in terms of signatures obtained on opening day'.¹²⁴ Five more have since signed,¹²⁵ bringing the total number of contracting States over the threshold of 20 States required to bring the Rotterdam Rules into force at the international level.¹²⁶ However, none of the signatories has ratified the instrument as yet. Signing a convention only signifies an in-principle expression by the signatory State to become a party to the instrument; it usually does not oblige the State to ratify or implement it.¹²⁷ Thus, achieving the 20 implementations to bring the Rotterdam Rules into operation may still be far off. Further, it is one thing for the instrument to garner the 20 implementations necessary to bring it into operation, and it is another thing for it to be widely adopted so as to attain its aim of achieving an international uniform cargo liability regime. Only the future will tell whether the Rotterdam Rules will enter into force, and the extent to which international carriage of goods will be subjected to the instruments, but the initial signs are promising. Developed and developing countries as well as industry seem to favour its implementation.

B. Ghana and the carriage of goods by sea regimes

1. Implications of the different regimes to Ghana

Of the three currently operational regimes, Ghana has implemented the Hague Rules, enacted into its domestic laws in 1961.¹²⁸ The Hague Rules were the sole operative regime on the subject existing at the time of Ghana's implementation in 1961. The Visby protocol was adopted later, in 1968, and the Hamburg Rules another decade after, in 1978. Being a country that exports mainly commodities, imports lots of physical goods, and is not a ship-owing country, one would have expected Ghana to have implemented the Hamburg Rules when they entered into force in 1992. Somehow, Ghana has taken no steps to improve its international carriage of goods by sea regime since 1961, despite major developments in this area internationally.

Ghana's continuous adherence to the Hague Rules, particularly in the light of all the changes in international carriage and movement by many countries to the

124 See UNCITRAL, 'Rotterdam Rules Gain Momentum as 20th State Signs' (press release, 23 October 2009), available at www.unis.unvienna.org/unis/pressrels/2009/unis1133.html (accessed 30 April 2010). The initial signatories were: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the USA.

125 Namely, Armenia, Cameroon, Madagascar, Mali and Niger. The 21 signatories represent a mix of developing and developed countries, including several major trading and maritime nations. The Arab League, representing some 21 countries in the Middle East, has recommended a joint signing to its member states in a declaration, the Alexandria Declaration 2010 (3 February 2010), to sign the Rotterdam Rules. See the declaration available at www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf (accessed 30 April 2010).

126 Rotterdam Rules, article 94.

127 For instance, as already noted *supra*, Ghana signed the CISG when it opened for signatures in 1980, but it is yet to ratify the instrument; and there are many State signatories to the Hamburg Rules that have not ratified the instrument.

128 Bills of Lading Act 1961 (Act 42), Ghana.

later regimes, disadvantages cargo owners and shippers from Ghana. The Hague Rules afford Ghanaian-located parties less protection and compensation for their cargo than is available under the Hague-Visby or Hamburg Rules. The scale of difference between the protections and compensation available under the Hague Rules, on the one hand, and the Hague-Visby and Hamburg Rules, on the other, may be illustrated through the following cases: (1) *JCB Sales Ltd, Caterpillar Inc & Land Rover Exports Ltd v Wallenius Lines (Wallenius Lines North America Inc) & Others*;¹²⁹ (2) *Ferrostaal Inc v M/V 'Sea Phoenix', Interway Shipping Co Ltd & Others*;¹³⁰ (3) *John Holt Shipping Services v Edward Nassar & Co Ltd*;¹³¹ (4) *Fan Milk Ltd v State Shipping Corporation*;¹³² and (5) *The 'River Gurara'* case.¹³³

In *JCB Sales Ltd*,¹³⁴ the second plaintiff-appellant (Caterpillar Inc.) delivered 15 items of construction equipment to a vessel (*M/V Seijin*) of the carrier (Wallenius Lines) at Antwerp, Belgium, for carriage to Baltimore. The vessel then journeyed to Southampton, England, where it loaded on-board 24 additional items of construction equipment to Baltimore under a contract of carriage with Caterpillar. At Southampton, the vessel also took on a further 81 pieces of construction equipment from JCB to be transported to Baltimore. The vessel delivered the bulk of the cargo at Baltimore seriously damaged, and the plaintiffs sued for compensation. The defendant carriers argued that the basis of their liability was the Hague Rules, as applied in the USA.¹³⁵ If this argument had been upheld, the carrier's liability would have been limited to USD500 per package, leading to a total liability of USD18,061.84 to JCB and USD5,094.06 to Caterpillar. The plaintiffs argued that the defendants' liability was determined by the Hague-Visby Rules, as applied in the two jurisdictions of shipment,

129 124 F.3d 132; 1997 US. The USA provides unique avenue for illustration because its law compulsorily applies the US carriage of goods by sea regime to both outgoing and incoming cargo (see Carriage of Goods by Sea Act 1936 (46 USC 1300–15)), whereas most jurisdictions compulsorily apply their regimes to outgoing cargo while remaining silent or deferring to the law of the jurisdiction of shipment for incoming cargo (see the Ghanaian Bills of Lading Act 1961 (Act 42), section 1, which applies the Hague Rules to only outbound cargo, remaining silent on inbound cargo; and the Australian Carriage of Goods by Sea Act 1991 (Cth), schedule 1A, article 10, which applies compulsorily to outbound cargo and applies to inbound only if none of the three regimes applies by virtue of the country of shipment). Thus, US courts have sometimes been called upon to determine whether other regimes are applicable to cargo entering the USA, particularly where the jurisdiction of shipment compulsorily applies the Hague-Visby or Hamburg Rules, either of which affords the cargo owner higher protection and compensation in the event of damage or loss. It is not difficult to anticipate which party will argue for the application of which regime: the carrier argues for the application of the Hague Rules (which imposes the lowest liability), while the cargo owner argues for the other (which imposes a higher liability on the carrier, and affords higher compensation for the cargo owner). The cases discussed below illustrate the point. Belgium seems to be the only other country applying its regime similarly to the USA, to both outbound and inbound.

130 477 F.3d 212; 2006 US App.

131 [1971] 1 GLR 205.

132 [1972] 2 GLR 1.

133 [1996] 2 Lloyd's Rep. 53.

134 124 F.3d 132; 1997 US.

135 Carriage of Goods by Sea Act (COGSA), 46 USC App. 1300 (1936).

Belgium and the UK. Under those rules the carrier's liability to JCB was to be USD648,662.35 (instead of USD18,061.84) and USD128,141.36 to Caterpillar (instead of USD5,094.06). Both the district and appellate courts held that the Hague-Visby Rules applied, and the plaintiffs received the higher amounts. The main reason given for the decision was that the sea-carriage document issued, Data Freight Receipt (DFR), in respect of the shipments was construed not to be a bill of lading within the meaning in the US COSGA, and so the limitation in the relevant section did not apply.¹³⁶

In *Ferrostaal Inc v M/V 'Sea Phoenix' & Others*,¹³⁷ Ferrostaal, the plaintiffs, were consignee owners of 402 coil steel, weighing a total of 3,628,480 kg, shipped on board the carrier's vessel from Tunisia to the USA. Part of the cargo was damaged in transit, the estimated cost being USD507,892.00. Ferrostaal argued that the Hamburg Rules applied in Tunisia, the country of shipment, and so the defendant's liability should be determined under those rules, which would have entitled them to the full amount of the loss. The defendant carriers argued that the Hague Rules, as applied in the USA, were the basis of liability and that limited the amount to USD140,000.00. The courts held that the Hague Rules as applicable under US law applied, for the reason that the plaintiffs were unable to prove to the satisfaction of the courts that the Hamburg Rules had been properly incorporated into Tunisian law.

The difference in the recoverable amounts of compensation under the Hague Rules on the one hand, and the Hague-Visby and Hamburg Rules on the other, as illustrated in the above cases, may even be wider under the Hague Rules as they apply in Ghana. This is because the US COGSA specifies a limit of USD500, while the Ghanaian Bills of Lading Act 1961 (Act 42), article 4(5) imposes a limit of '£200 Ghanaian pounds' (the equivalent of GBP100 at the time of enacting the Ghanaian statute).¹³⁸ The differences in the recoverable amounts under the

136 The Court of Appeal also took the opportunity to overrule the fair opportunity doctrine, a much-criticised doctrine which some courts had used in previous cases to side-step the application of the liability limitations under the USA COSGA, section 4(5). For a discussion of the fair opportunity doctrine, see A. J. Marcopoulos, '*Ferrostaal Inc v M/V Sea Phoenix*: The Third Circuit's Sinking of the Fair Opportunity Doctrine (Case note)' 31(2) *Tulane Maritime Law Journal* (2007): 679–88; A. A. Helman, 'Limitation of liability under COGSA: in the wake of the fair opportunity doctrine' 25(1) *Tulane Maritime Law Journal* (2000): 299–326; M. Sturley, 'The Fair Opportunity Requirement Under COSGA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act—Part I', 19(1) *Journal of Maritime Law and Commerce* (1988): 1–35; M. Sturley, 'The Fair Opportunity Requirement Under COSGA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act—Part II', 19(1) *Journal of Maritime Law and Commerce* (1988): 157–206.

137 477 F.3d 212; 2006 US App.

138 It must be noted, however, that the relevant provision of the Hague Rules (article IV, rule 5, combined with article IX) have been interpreted in several cases in different jurisdictions, to refer to the gold value of the pound sterling, not its nominal or paper value: see, e.g. *The Rosa S* [1988] 2 Lloyds Rep 574, 581, per Hobhouse J. In *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co*, Yeldham J decided that the limitation confining recovery to £100 per unit in article IV, rule 5 was, in the light of article IX, to be calculated by reference to the quantity of gold which was the equivalent of £100 sterling in 1924, and his decision was upheld by the Court of Appeal of New South Wales: (1989) 93 ALR 171, 172, 175, 188, 192.

different regimes could be the difference between the survival and insolvency of a small Ghanaian business.

In *John Holt Shipping Services v Edward Nassar & Co Ltd*,¹³⁹ the appellants were the agents for the carriers of the respondents' goods imported into Ghana. The goods arrived safely and were unloaded and stored in a warehouse. However, the goods could not be found when the respondents sought to take delivery. The respondents sued for loss of the cargo. The trial judge held that the Hague Rules applied, and awarded the respondents GH£1,050 in damages for the appellants' failure to deliver the goods. The appellants appealed on the ground that the Hague Rules ceased to apply after the goods were unloaded, and that the trial judge erred by not giving full effect to an exemption clause in the bill of lading that, *inter alia*, exempted the carrier and its agents from any liability after the goods were unloaded at their port of destination. It was held that (1) the Hague Rules only applied during the actual carriage of goods on a ship and ceased to apply when the goods were discharged; and (2) although at common law the shipowner's liability does not cease on the landing of the cargo, the appellants were exempted from liability by reason of the express provisions in the exemption clause contained in the bill of lading.¹⁴⁰

The Court of Appeal's ruling in this case was based on the reasoning that the minimum liability imposed on the carrier under the Hague Rules, which the carrier cannot contract out of, is from 'tackle to tackle'. That is, the period from loading (on board a vessel) to the time of discharge (that is, unloading from the vessel) at the port of destination.¹⁴¹ On that basis, the Court of Appeal's decision was sound.

The question, though, is whether the provisions in the other regimes (the Hague-Visby Rules and the Hamburg Rules) would have yielded a different result. The result would have been similar under the Hague-Visby Rules, as they contain the same 'tackle to tackle' provision,¹⁴² but different under the Hamburg Rules. Article 4(1) of the Hamburg Rules provides that the period of responsibility 'covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge'. Article 4(2) goes on to explain that the carrier is deemed to be in charge of the goods from the time it takes over the goods from the shipper until the time it delivers the goods to the

139 [1971] 1 GLR 205.

140 The exemption clause provided in clause 13 of the bill of lading that: 'Goods in the custody of the carrier or his sub-contractors or agents before loading on the ship and after discharge therefrom shall be deemed to be in such custody as agents only for and at the entire risk of the shipper and/or consignee, and the carrier and his sub-contractors shall not be responsible for any act, neglect or omission on the part of his or their servants or agents in relation to the goods while in such custody.'

141 *John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, 208.

142 See Hague-Visby Rules, article III, rule 2. The Visby Protocol that amended the Hague Rules dealt mainly with the financial limits of liability under the Hague Rules; it did not alter the basic regime of the Hague Rules or the allocation of risks effected by the rules. See, e.g., *Explanatory Notes to the United Nations Convention on the Carriage of Goods by Sea, 1978*, attached to the Hamburg Rules (pp. 22–9) (hereafter, *Hamburg Rules: Explanatory Notes*, p. 22, para. 6). The Hamburg Rules are available at www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf (accessed 30 April 2010).

consignee (or some other authorised person or entity). As it was found in this case that ‘the goods were still in the custody of the appellants who were, until delivery had been completed, still the agents of their principals [the carrier]’,¹⁴³ delivery did not occur within the meaning of the Hamburg Rules. The appellants would therefore have been liable, and the respondents would have succeeded. Thus, the Hamburg Rules would have yielded the opposite result, in favour of the cargo owner.¹⁴⁴

It is instructive to note that the kind of outcome in the *John Holt Shipping Services v Edward Nassar & Co Ltd* case was one of the major reasons for the change of the period of responsibility in the Hamburg Rules.¹⁴⁵ The Rotterdam Rules retain a similar provision in article 12. Thus, as they operate in a mainly cargo-owning (as opposed to ship-owning) country, Ghanaian businesses would have better protection under the Hamburg and Rotterdam Rules.

In *Fan Milk Ltd v State Shipping Corporation*,¹⁴⁶ the plaintiffs shipped their goods on the vessel of the defendants. The contract of carriage was contained in a bill of lading made subject to the Hague Rules.¹⁴⁷ The goods, which were shipped in apparent ‘good order and condition’, were delivered damaged. In an action by the plaintiffs for damages, the defendants denied liability, among other arguments, on the grounds that it was protected by clauses contained in the bill of lading. It was held that a carrier cannot be protected beyond the limits provided by the Hague Rules. Therefore, the protection (exemption) clauses in the bill of lading, which were wider than those allowed by the Bills of Lading Act 1961 (Act 42), were void. The defendants were therefore liable for the amount claimed (GHS4081.74).¹⁴⁸

In *The ‘River Gurara’* case,¹⁴⁹ the defendant’s vessel, *River Gurara*, which was carrying the plaintiffs’ cargo from West African ports (including the Port of Tema, Ghana) to Europe, suffered an engine breakdown, broke up and sank off the Portuguese coast. Much of the cargo was containerised. Most of the goods were shipped under bills of lading in the West Africa Line form, which, typically of liner bills of lading used around the globe, provides that the bill of lading shall have effect subject to any national law making the Hague Rules, Hague-Visby Rules or Hamburg Rules compulsorily applicable.¹⁵⁰ The defendant admitted

143 *John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, 210.

144 One must concede that the Hamburg Rules were not in existence at the time of the *John Holt Shipping Services* case and, therefore, the Hamburg Rules could not have assisted the respondents in this case.

145 See *Hamburg Rules: Explanatory Notes*, p. 23, paras 14 & 15.

146 [1972] 2 GLR 1.

147 *Carriage of Goods by Sea Act 1924* (14 & 15 Geo 5, c. 22) (UK).

148 There are not sufficient details on the facts in this case about the cargo and the extent of damage caused to it to enable calculation of the possible difference in the monetary claim awarded with reference to the other regimes. Nor did the case raise an issue regarding the applicability of other sea-carriage regimes, as sometimes happens in the USA.

149 [1996] 2 Lloyd’s Rep. 53.

150 See, e.g., clause 2, Paramount Clause, of the EuroAfrica Shipping Lines, West Africa Services Bill of Lading form, available at www.euroafrica.com.pl/img/konosamenty/Konosament_Afryka_str_1.pdf (accessed 30 April 2010).

liability, and argued that the Hague Rules applied by virtue of the laws of the ports of shipment. The issue was whether, as argued by the defendant, the container was to be treated as the package or unit or, as argued by the plaintiffs, the separate packages within the containers were the packages or units for the purposes of the limitation of liability provisions of the Hague Rules. For instance, whether ‘one bill of lading evidencing shipment of a container from Tema stated . . . to contain eight pallets said to contain 1855 bundles of veneer’¹⁵¹ constituted one (container) unit or 1855 separate units. It was held that the latter (1855 units) applied; a decision that was affirmed on appeal.¹⁵²

The ‘River Gurara’ case has two import points for our purpose. First, for the cargo shipped from Tema, the quantum of compensation was calculated based on a limit set in 1961 instead of the higher amount available under the amended Hague-Visby provisions. Second, the central issue raised by the case was one that has long been recognised and ameliorated by the Visby amendments. Here Colman J laments:

The problem was recognised by those who framed the protocol known as the Hague-Visby Rules at Brussels in 1968 . . . However, there are still many States which have not incorporated the Hague-Visby Rules into their domestic legislation and there are consequently many movements of cargo which even today are still governed by the Hague Rules in their original form.¹⁵³

If Ghana had implemented the Hague-Visby Rules, not only would the plaintiffs have received a higher amount of compensation, the litigation and its associated costs and time wasted, at least in respect of the cargo (including the 1855 bundles of veneer) shipped from Tema, would have been avoided.¹⁵⁴ Parties are afforded the level of protections their governments have chosen to accord them from the available alternatives. It is imperative that Ghana accord businesses located within it the higher protections available.

2. *Why has Ghana not implemented the Hague-Visby or Hamburg Rules?*

Considering that the Hague Rules are the least favourable to Ghanaian businesses, why has Ghana failed to update its laws to either the Hague-Visby Rules or,

151 *The River Gurara* [1996] 2 Lloyd’s Rep. 53, 55.

152 *See The River Gurara* [1998] 1 Lloyd’s Rep. 225.

153 *The River Gurara* [1996] 2 Lloyd’s Rep. 53, 55.

154 The cases discussed here are a fraction of the volume of transactions and cases affected by the Hague Rules as they apply in Ghana. It has been observed, in the Ghanaian context, that ‘[a]ctions involving the application of the Hague Rules are very rare and cannot be found in the available law reports’ (*see John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, 212, per Archer JA). But this does not necessarily mean damage to, or loss of, cargo rarely occurs. Liabilities are often settled out of court based on the liability regime outlined in the applicable rules (e.g., the Hague Rules as enacted in the *Bills of Lading Act* 1961 (Act 42), Ghana). Parties work out their liabilities and entitlements with reference to the applicable regime, which makes it unnecessary to litigate. This, indeed, is an aim of the carriage by sea conventions – to standardise the liability regime and reduce transaction costs.

preferably, the Hamburg Rules? Ghana was one of 14 (out of 78 represented) jurisdictions that signed the Hamburg Rules when they were opened for signature on 31 March 1978.¹⁵⁵ More than three decades on, Ghana has still not ratified the instrument. As observed in respect of the CISG, again, there appears to be no official or documented reasons for Ghana's failure to ratify the Hamburg Rules. So, again, one has to infer the reasons. The two possible reasons discussed in respect of the CISG, namely political instability and lack of appreciation by government and business come to mind, and remain the only plausible reasons.

Ghana should have taken steps to ratify the Hamburg Rules to improve its regime for carriage of goods by sea for the benefit of business. In the context of Ghana, the Hamburg Rules had advantages over the Hague-Visby Rules. First, the sea-carriage documents that trigger the application of the Hague-Visby Rules are much narrower than under the Hamburg Rules.¹⁵⁶ The Hague-Visby Rules, as they exist in most jurisdictions, apply to contracts of carriage evidenced by a bill of lading 'or any similar document of title'.¹⁵⁷ 'However, receipt as a document of title will not be sufficient to trigger the Hague-Visby Rules unless it has the character of a bill of lading'.¹⁵⁸ In contrast, the Hamburg Rules apply to sea carriage regulated by 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another'.¹⁵⁹ There is no mention of document of title, and that simplifies the often contentious question as to the qualification of the documents relating to a pending dispute under the Hague-Visby regime.¹⁶⁰ It also removes the unnecessary disadvantage that

155 The other thirteen were: Brazil, Chile, Ecuador, Egypt, Germany, Holy See, Madagascar, Mexico, Panama, Portugal, Senegal, Singapore and Venezuela. See *Status: United Nations Convention on the Carriage of Goods by Sea—the Hamburg Rules 1978*, available at www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (accessed 30 April 2010).

156 Scholarly literature abounds that engages in detailed comparative analysis of the various instruments of carriage of goods by sea. It is not intended to engage in any detailed analysis here; only a few core provisions are mentioned. For some of the comparative literature, see S. Ping-Fat, *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules*, Kluwer Law International (2002); C. Luddeke and A. Johnson, *The Hamburg Rules: From Hague to Hamburg via Visby*, 2nd edn, Lloyd's of London Press (1995); S. R. Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COSGA, Visby and Hamburg Conventions' 23 *Transport Law Journal* (1996): 471; R. Force, 'A Comparison of the Hague, Hague Visby, and Hamburg Rules: Much Ado About (?)' 70 *Tulane Law Review* (1996): 2051–89; G. F. Chandler III, 'A Comparison of COSGA, the Hague-Visby Rules and the Hamburg Rules', *Journal of Maritime Law and Commerce* (1984): 233–91; R.G. Baur, 'Conflicting Liability Regimes: Hague-Visby v Hamburg Rules—A Case by Case Analysis', 24 *Journal of Maritime Law and Commerce* (1993): 53.

157 See, e.g., article 1 of the Hague-Visby Rules as contained in Schedule 1—The amended Hague Rules (unmodified text) of the Australian Carriage of Goods by Sea Act 1991 (Cth). Australia has now broadened the application of its regime to apply to sea-carriage documents other than the bill of lading or documents of title. See Schedule 1A, which came into effect in 1998 and replaces Schedule 1.

158 S. Thompson, 'The Hamburg Rules: Should They Be Implemented in Australia and New Zealand?', 4 *Bond Law Review* (1992): 168, 172. See also *JCB Sales Ltd, Caterpillar Inc & Land Rover Exports Ltd v Wallenius Lines (Wallenius Lines North America Inc) & Others* 124 F.3d 132; 1997 US; and *Hugh Mack & Co Ltd v Burns & Laird Lines Ltd* (1944) 11 L Rep. 377.

159 The Hamburg Rules, article 1(6). The Rotterdam Rules retains a similar provision in article 1(1).

160 Thompson, *supra* note 158, p. 172.

occurs when goods are carried under other widely used documents such as sea waybills.¹⁶¹

Second, while the Hague-Visby Rules are excluded from applying to carriage of live animals and deck cargo,¹⁶² the Hamburg Rules are more flexible. The definition of goods capable of being subject to the Hamburg Rules does not exclude live animals.¹⁶³ The carrier may carry goods on deck if 'such carriage is in accordance with an agreement with the shipper or with the usage of particular trade or is required by statutory rules or regulations'.¹⁶⁴

Third, as has been alluded to already, the Hague-Visby Rules apply from 'tackle to tackle', (that is, the rules apply from the time the goods are physically aboard the carrier's vessel to when they are unloaded.¹⁶⁵ The Hamburg Rules, on the other hand, extend the liability of the carrier to the entire period the carrier is in charge of the goods.¹⁶⁶ The carrier is liable from the time it receives the goods from the shipper or responsible third party until the goods are delivered to the consignee or responsible third party. This ameliorates problems presented by the Hague-Visby rules in situations where goods are damaged during transshipment from one vessel to another or when at the dock or in a warehouse, as happened in the *John Holt* case discussed above. The Hamburg Rules may have continuous application.¹⁶⁷ The carrier, if unable to deliver the goods to the consignee, is allowed to 'place them at the disposal of the consignee in accordance with the contract, or with the law, or with the usage of the particular trade applicable at the port of discharge',¹⁶⁸ after which its liability discharges.

Fourth, the Hamburg Rules impose on the carrier extended duty of care over the cargo. The carrier has a duty to exercise due diligence in respect of the cargo at all times while the cargo is in the charge of the carrier.¹⁶⁹ The carrier is required to provide a seaworthy vessel during the entirety of the voyage. Article 3 of the Hague-Visby Rules, on the other hand, imposes a on the carrier to provide seaworthy vessel only at the beginning of the voyage.

Fifth, the basis of liability under the Hamburg Rules, which are outlined in a single test in article 5, is arguably simpler, clearer and fairer.¹⁷⁰ The 'list' of

161 It is possible, though, to enact the Hague-Visby Rules as to make them applicable to documents other than the bills of lading. Australia, for instance, has amended its carriage of goods by sea laws to extend its Hague-Visby regime non-bills of lading (*see* the Australian Carriage of Goods by Sea Act 1991 (Cth), schedule 1A), but the hybrid approach has been severely criticised as constituting a source of confusion rather than harmonising with adopted regimes internationally (*see* Myburgh *supra* note 20, pp. 365–79).

162 *See* Hague-Visby Rules, article 1.

163 Hamburg Rules, article 1.5, defines goods to include live animals. That the carriage of live animals may be governed by the Hamburg Rules is not of much significance to Ghana, as Ghana is not a major livestock trader.

164 Hamburg Rules, article 9.1.

165 Hague-Visby Rules, article 1.

166 Hamburg Rules, article 4.1.

167 Hamburg Rules, article 4.2(b)(ii).

168 Hamburg Rules, article 4.2(b)(ii).

169 Hamburg Rules, article 5.1.

170 J. Honnold, 'Ocean Carriers and Cargo: Clarity and Fairness—Hague or Hamburg?', 24 *Journal of Maritime Law and Commerce* (1993): 75; Thompson, *supra* note 158, p. 174.

defences available to the carrier under article 4(2) of the Hague-Visby Rules, which includes defences of negligent navigation or negligent management of the ship, is discarded in the Hamburg Rules. Some of these defences are archaic, found in no other law of transport.¹⁷¹ The basis of liability under the Hamburg Rules is in line with the evolving trend established in other transport conventions towards carrier liability based on negligence. The burden of proof rests with the carrier to establish that it took all reasonable care to avoid the loss or that the loss resulted from circumstances beyond the carrier's control.¹⁷²

Sixth, the Hamburg Rules set a minimum liability of the carrier in the event of a loss at a level that is slightly higher than under the Hague-Visby Rules. Adopting SDR as the unit of account,¹⁷³ the limits for damage or loss of cargo under the Hamburg Rules are an amount equivalent to SDR835 per package or other shipping unit or SDR2.5 per kilogram, whichever is higher.¹⁷⁴ The liability limit for delay in delivery is two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage.¹⁷⁵ While the limits in the Hamburg Rules for damage or loss are still low,¹⁷⁶ representing only a 25 per cent increase over those set by the Hague-Visby Rules,¹⁷⁷ it is the better of the two regimes. In any case, it is much better than the current Ghanaian provision contained in the Hague-Rules provided way back in 1961.

With the Rotterdam Rules now promulgated, and signed by Ghana, two questions arise. First, are the Rotterdam Rules better for Ghana than the Hamburg Rules? Second, should Ghana implement the Hamburg Rules while it monitors progress on the ratification of the Rotterdam Rules or should it simply proceed to implement the Rotterdam Rules and hope a sufficient number of countries implement them to bring them into operation?

Briefly stated, the Rotterdam Rules combine aspects of the Hague-Visby and Hamburg Rules, as well as introducing new aspects to reflect modern methods and modes of international carriage of goods including the application of new technologies. The Rotterdam Rules better clarify the rights, obligations and responsibilities of the parties, while allowing for the parties' freedom to contract out of the instrument within certain limits. The scope of application of the limits of liability has been widened in the Rotterdam Rules to cover generally breaches of

171 Thompson, *supra* note 158, p. 175.

172 Thompson, *supra* note 158, p. 175.

173 The SDR became the unit of account of the Hague-Visby regime in countries that adopted the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (21 December 1979) (commonly referred to as The SDR Protocol of 1979).

174 Hamburg Rules, article 6.1(a).

175 Hamburg Rules, article 6.1(b). Thus, where the delivery of an entire cargo in shipment is delayed, the shipper would receive not more than the freight paid under this provision.

176 Particularly when compared with other limits in the world of transportation. For instance, article 23 of the CMR provides for SDR8.33 per kilogram, plus the costs of carriage.

177 Under the Hague-Visby Rules, the limits are SDR666.67 per package or SDR2 per kilogram, whichever is higher.

the carrier's obligations under the Rules.¹⁷⁸ The minimum liability is higher under the Rotterdam Rules, at SDR875 per package or unit and SDR3 per kilogram, compared with SDR835 and SDR2.5, respectively, under the Hamburg Rules, and SDR666.67 per package or unit and SDR2 per kilogram under the Hague-Visby Rules as amended by the SDR Protocol.¹⁷⁹

It is submitted that Ghana should implement the Rotterdam Rules. However, while one may anticipate that the Rotterdam Rules would probably attract wider international implementation than the Hamburg Rules, and become more successful, past experience suggests that would take several years. Ghana may therefore consider immediate ratification of the Hamburg Rules in the meantime, to benefit its international traders. After all, countries are still acceding to the Hamburg Rules. Kazakhstan, for example, only recently acceded to the Hamburg Rules, where the instrument entered into force on 1 July 2009, after the Rotterdam Rules had been adopted by the UN in 2008.¹⁸⁰

A question that may be raised is whether Ghana's implementation of the Hamburg or Rotterdam Rules would lead to higher freight charges for cargo shipped from or to Ghana. This issue, sometimes referred to as the 'insurance argument'¹⁸¹ has been a long-standing debate between shipping interests and cargo-owning interests.¹⁸² On the one hand, shipping interests argue that an increase in their liability would lead to higher insurance costs, which would be offloaded onto shippers in the form of higher freight. On the other hand, there is the argument that higher carrier liability limits provide an incentive for loss avoidance, lower insurance and other costs for both parties.¹⁸³ It is not intended in this article to go into the details of the 'insurance argument', much of which has 'been characterised by a surfeit of legal discourse, voodoo economics and generalised speculation, and an almost total lack of detailed empirical economic

178 Rotterdam Rules, article 59.

179 For a detailed analysis of the Rotterdam Rules and its comparison with the Hamburg and Hague-Visby Rules, see, e.g., M. F. Sturley, T. Fujita and G. van Der Ziel, *The Rotterdam Rules: The UN Convention on Contracts for The International Carriage of Goods Wholly or Partly by Sea*, Sweet & Maxwell (2010); F. Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, The Hamburg Rules and The Rotterdam Rules, (A Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009)', available at www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (accessed 30 April 2010).

180 See UNCITRAL, Status: United Nations Convention on the Carriage of Goods by Sea—the Hamburg Rules, available at www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (accessed 30 April 2010).

181 M. Sturley, 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence', 24 *Journal of Maritime Law and Commerce* (1993): 119, 120 (hereafter, Sturley, 'Changing Liability Rules and Marine Insurance').

182 *Ibid.*

183 For a detailed discussion of the arguments, see Sturley, 'Changing Liability Rules and Marine Insurance', *ibid.*; E. Selvig, 'The Hamburg Rules, the Hague Rules and Marine Insurance Practices', 12 *Journal of Maritime Law and Commerce* (1981): 299; C. W. H. Goldie, 'Effect of the Hamburg Rules on Shipowners' Liability Insurance', 24 *Journal of Maritime Law and Commerce* (1993): 111.

research'.¹⁸⁴ Suffice it to observe that there is little evidence that the different regimes influence freight charges.¹⁸⁵ Ghana should therefore not be swayed by arguments of possible increased costs in its consideration of implementing the Hamburg or Rotterdam Rules for the benefits of its traders.

As Ghana was one of the initial 16 countries to sign the Rotterdam Rules at the open-for-signature ceremony, it might be argued that Ghana would implement the instrument. As has been discussed already, however, it is to be noted that Ghana signed both the Hamburg Rules and CISG at their open-for-signature ceremonies, in 1978 and in 1980, respectively, but has failed to ratify them. Discussing the merits for implementation is thus important.

V. ELECTRONIC COMMERCE (E-COMMERCE)

Undoubtedly, advancements in information and communications technology (ICT) have revolutionised the ways in which business is currently conducted. Electronic methods of contracting afford several efficiencies including speedy transacting, automation (which may reduce preparation, sorting and filing time, and eliminates data re-entry and associated potential errors), cheaper record keeping, and more efficient data collection and analysis.¹⁸⁶ E-commerce is also considered to widen market access to small and medium-sized enterprises (SMEs) at the regional and international level.¹⁸⁷ The benefits of business to business (B2B) e-commerce are particularly distinct in international trade.¹⁸⁸

A potential barrier to the development, use and reliance on e-commerce is lack of an e-commerce-friendly legal framework to provide recourse for users, resulting in legal uncertainty.¹⁸⁹ Thus, more than two decades ago, the UN called on governments and international organisations to put in place new laws as well as to revise existing legal rules and other texts to facilitate electronic transacting.¹⁹⁰ For this reason, the international business community, including UN organs and other vital international organisations, has been working hard to facilitate the utilisation of ICT in international (and domestic) trade transactions.¹⁹¹ UNCITRAL in particular has been especially active in this

184 E. S. Lee, 'Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance', 4 *ILSA Journal of International and Comparative Law* (1997): 153–72; Myburgh, *supra* note 20, p. 365.

185 See Sturley, 'Changing Liability Rules and Marine Insurance', *supra* note 181; Selvig, *supra* note 183.

186 E. Laryea, 'Facilitating Paperless International Trade: A Survey of Law and Policy in Asia', 19(2) *International Review of Law, Computers & Technology* (2005): 121, 121–2 (hereafter, Laryea, 'Facilitating Paperless International Trade').

187 UNCTAD, *Information Economy Report 2007–2008*, UNCTAD (2008), p. 321, available at www.unctad.org/en/docs/sdteecb20071ch8_en.pdf (accessed 30 April 2010).

188 Laryea, 'Paperless Trade', *supra* note 7, p. 1.

189 See, e.g., Laryea, 'Facilitating Paperless International Trade', *supra* note 186, pp. 122–7; APEC, *Paperless Trading: Benefits to APEC*, APEC (2001), p. 18, available at www.dfat.gov.au/publications/paperless/index.html (accessed 30 April 2010).

190 See UN General Assembly, UNCITRAL Recommendation on the Legal Value of Computer Records (1985), UN GAOR, 40th Sess., Supp. No. 17, at 360, U.N. Doc. A/40/17, 1985.

191 Laryea, 'Facilitating Paperless International Trade', *supra* note 186.

area, having promulgated three e-commerce-related instruments: (1) MLEC;¹⁹² (2) MLES;¹⁹³ and (3) CUECIC.¹⁹⁴ These instruments, and Ghana's position regarding them, are briefly now considered.

A. The ILIs on e-commerce

1. MLEC

The MLEC was published by the UN in 1996 for adoption by governments into domestic law. The instrument was intended to facilitate the use of modern means of communications and information storage. It is based on the establishment of functional equivalence in electronic media for paper-based concepts such as 'writing', 'signature' and 'original'.¹⁹⁵ It was expected that, by providing standards by which the legal value of electronic messages can be assessed, the MLEC would play a significant role in enhancing the use of paperless communication in modern business transactions.

Many countries around the world have enacted laws based on or influenced by the provisions of the MLEC in order to facilitate e-commerce.¹⁹⁶ Ghana has incorporated a significant part of MLEC in its Electronic Transactions Act 2008 (Act 772). However, as will be noted under Section B below, section 4 of the statute excludes its application to negotiable instruments and bills of lading, which affect international sale transactions. As argued below, these exclusions should be reversed.

2. MLES

In addition to the generic e-commerce law, as provided in the MLEC, it is considered that electronic signatures, an electronic means of authenticating documents, pose particular challenges and deserve specific treatment.¹⁹⁷ An e-signature may be described, generically, as data in an electronic form in, affixed

192 UNCITRAL, *UNCITRAL Model Law on Electronic Commerce (1996)*, UN GAOR 51st Sess., 85th plenary mtg., UN Doc. A/51/162 (1996).

193 UNCITRAL *Model Law on Electronic Signatures (2001)*, *supra* note 14.

194 UNCITRAL, *UN Convention on the Use of Electronic Communications in International Contracting* (2005), UN Doc. A/60/515 (23 November 2005).

195 The Model Law was expanded in 1998 to cover rules for electronic commerce in specific areas, such as carriage of goods, by the addition of article 5 *bis*. See UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with additional article 5 bis as adopted in 1998*, available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 30 April 2010).

196 See UNCITRAL, *Status: UNCITRAL Model Law on Electronic Commerce*, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (accessed 30 April 2010), for a list of countries that have implemented laws based on influenced by the MLEC.

197 See UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods* (2007), available at www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf (accessed 30 April 2010); A. Lincoln, 'Electronic Signature Laws and the Need for Uniformity in the Global Market', 8 *The Journal of Small & Emerging Business Law* (2004): 71.

to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of information contained in the data message.¹⁹⁸ There are different types of e-signatures providing different levels of security, including biometric records, scanned manuscript signatures, typing a name on electronic documents and digital signatures.¹⁹⁹

UNCITRAL has worked on this aspect of e-commerce to produce its MLES in 2001. MLES builds upon the signature provisions in the MLEC to provide (1) greater legal certainty about the use of certain types of electronic signatures; (2) conduct rules for various parties dealing with electronic signatures; and (3) basic standards for the recognition of electronic signatures from other jurisdictions.

MLES has struggled to attract uniform implementation.²⁰⁰ Many countries around the world have adopted differing approaches to electronic signature legislations to support electronic transacting.²⁰¹ Ghana, too, has incorporated digital signature provisions in its Electronic Transactions Act 2008 (Act 772) (Ghana). However, here again, the exclusion of negotiable instruments and bills of lading from the application of the statute undermines the Act's facilitative potential for international sale transactions, which needs to be corrected.

3. CUECIC

The aim of CUECIC was to eliminate legal obstacles to the use of modern means of communication in contract formation.²⁰² The provisions of CUECIC are based on the CISG and the MLEC.²⁰³ The Convention establishes a

198 See UNCITRAL, *The Model Law on Electronic Signatures 2001*, *supra* note 14; M. Wang, 'Do the Regulations on Electronic Signatures Facilitate International Electronic Commerce? A Critical Review', 23 *Computer Law & Security Report* (2007): 32.

199 Wang, *ibid.*

200 As at 30 April 2010, only ten jurisdictions—Cape Verde, China, Costa Rica, Guatemala, India, Jamaica, Mexico, the United Arab Emirates, Thailand and Vietnam—had enacted laws based on or influenced by the *Model Law on Electronic Signatures*. See UNCITRAL, *Status: UNCITRAL Model Law on Electronic Signatures 2001*, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html (last accessed 30 April 2010).

201 See Wang, *supra* note 198, p. 33; L. Brazell, *Electronic Signatures Law and Regulation*, Sweet & Maxwell (2004), p. 2; D. Campbell (ed.), *E-Commerce and the Law of Digital Signatures*, Oceana Publications (2005).

202 C. H. Martin, 'The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law', 16 *Tulane Journal of International & Comparative Law* (2008): 467, 471 (hereafter, Martin, 'The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law'); C. H. Martin, 'The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?', 17 *Pace International Law Review* (2005): 261, 264 (hereafter, Martin, 'The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?').

203 The MLEC focused on flexible principles that would facilitate its adoption within the laws of the member countries in order to achieve uniformity in the laws of international trade, see A. Brooke Overby, 'UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce', 7 *Tulane Journal of International & Comparative Law* (1999): 219, 225; Martin, 'The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?', *ibid.*, p. 263.

treaty-based framework of rules to legitimise contract formation and performance through electronic communications by commercial parties whose contract places of business are in different nations, unless the parties effectively choose an alternative applicable law.²⁰⁴ Additionally, CUECIC validates the use of electronic communications for notice, filing and other procedures prescribed by international treaties that were drafted prior to the advent of modern electronic communications.²⁰⁵ CUECIC is thus intended to clarify or adapt the traditional rules on contract formation to accommodate the realities of electronic contracting in an internationally uniform manner. Unfortunately, while the instrument has attracted 18 signatures so far (at 30 April 2010), it has not obtained the three implementations necessary to bring it into force.²⁰⁶

B. Ghana and the ILIs on e-commerce

Ghana recognises ICT as an important tool in its socio-economic development, as do an increasing number of developing countries who 'are adapting their legislation to e-commerce to remove barriers to online services and provide legal certainty to business and citizens'.²⁰⁷ In mid 2003, the Ghanaian government published its official policy on communications and national development, The Ghana ICT for Accelerated Development (ICT4AD) Policy.²⁰⁸ The aim was 'to transform Ghana into information-rich knowledge-based society and economy through the development, deployment and exploitation of ICTs within the economy and society'.²⁰⁹

In 2008, the then NPP government enacted a suite of four Acts for the national ICT environment. These included the Electronic Transactions Act 2008 (Act 772) (Ghana) (hereafter, ETA), the National Information Technology Agency Act 2008 (Act 769) (Ghana), the Electronic Communications Act 2008 (Act 775) (Ghana) (subsequently amended by the Electronic Communications Amendment Act 2009 (Act 786) (Ghana)) and the National Information Technology Agency Act 2008 (Act 771) (Ghana).

For the purposes of this article, the most important of these Acts is the ETA. The ETA is an ambitious Act designed as a comprehensive statute to

204 Martin, 'The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law', *supra* note 202.

205 Martin, 'The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law', *supra* note 202.

206 See UNCITRAL, *Status: United Nations Convention on the Use of Electronic Communications in International Contracts 2005*, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (accessed 30 April 2010).

207 UNCTAD, *Information Economy Report 2007–2008*, UNCTAD (2008), p. 321, available at www.unctad.org/en/docs/sdteecb20071_en.pdf (accessed 30 April 2010).

208 Government of Ghana, *The Ghana ICT for Accelerated Development (ICT4AD) Policy* June 2003, available at http://img.modernghana.com/images/content/report_content/ICTAD.pdf (accessed 30 April 2010) (hereafter, *ICT4AD*); A. Alhassan, *Development Communication Policy and Economic Fundamentalism in Ghana* (2004), (a dissertation submitted to the Tampere University, 2004), available at <http://acta.uta.fi/pdf/951-44-6023-5.pdf> (accessed 30 April 2010).

209 *ICT4AD, ibid.*, p. 1.

cover most aspects of e-commerce, from providing for functional equivalence of electronic documents, to evidence, digital signatures, retention of records, regulation of domain names, spam and cyber crime. Somewhat perplexingly, however, section 4(a)&(f) of the ETA expressly excludes the application of the statute to negotiable instruments and bills of lading, respectively. The reasons for the exemptions are not immediately clear. One reason may be the generally recognised difficulty of replicating the concept of 'negotiability' when using electronic documents.²¹⁰ However, electronic trade documentation, including paperless bills of lading and negotiable instruments, are a major goal of the international business community.²¹¹ MLEC and CUECIC do not make such exemptions, and most jurisdictions, including Australia, that have implemented electronic transactions law do not make such exemptions.²¹² The Rotterdam Rules anticipate, and provide for, electronic transport documents. And Ghana's customs clearance procedures have now been modernised to use electronic processes.²¹³ The exemptions in the Ghanaian ETA are, therefore, unnecessary and a major flaw that must be rectified to facilitate electronic documents in international trade transacting.

It must be acknowledged that legislation is not the only means by which electronic transacting, and attendant documentation, may be facilitated legally.²¹⁴ There other sources of law by which legal barriers to electronic transacting may be removed and facilitation achieved, including private contracting and custom and judicial adaptation of existing (general) laws to suit new methods of transacting.²¹⁵ Private contracting may be used in the absence of or in conjunction with legislation to overcome the legal problems with electronic transacting.²¹⁶ The general law may also adapt to recognise electronic transactions in the absence of legislation or private contract. As the then Justice Bingham once put it, the common law 'has in the hands of judges the same facility [as the law merchant] for adapting itself to the changing needs of the general public; principles do not alter,

210 See M. Goldby, 'Electronic Bills of Lading and Central Registries: What is Holding Back Progress?', 17 *Information and Communications Technology Law* (2008): 125; M. Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral', 23 *Arizona Journal of International and Comparative Law* (2006): 437; Laryea, 'Paperless Trade', *supra* note 7; E. T. Laryea, 'Paperless Shipping Documents: An Australian Perspective', 25(1) *Tulane Maritime Law Journal* (2000): 255.

211 For discussions of efforts and systems on paperless trade documentation, see Goldby, *ibid.*; Dubovec, *ibid.*; Laryea, 'Facilitating Paperless International Trade', *supra* note 186; Laryea, 'Paperless Trade', *supra* note 7; Laryea, 'Paperless Shipping Documents: An Australian Perspective', *ibid.*

212 See, e.g., the Australian Electronic Transactions Act 1999 (Cth), available at www.austlii.edu.au/au/legis/cth/consol_act/eta1999256/ (accessed 30 April 2010).

213 See L. De Wulf, 'Ghana', in L. De Wulf and J. B. Sokol (eds), *Customs Modernization Initiatives: Case Studies*, The World Bank (2004), pp. 19–32.

214 See Martin, 'The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law', *supra* note 209.

215 Laryea, 'Facilitating Paperless International Trade', *supra* note 186, p. 127.

216 For instance, the parties may enter into a contract detailing the legal status of transactions concluded with each other electronically and undertaking not to challenge its validity. See Laryea, 'Facilitating Paperless International Trade', *supra* note 184, p. 127.

but old rules of applying them change, and new rules spring into existence'.²¹⁷ There have already been various instances where courts have adapted old rules to suit new methods. For instance, it has been recognised that signatures are only identification marks for authentication, so that the method (manual signing on paper) is not necessary, and a PIN is valid. However, the general law does not change swiftly to adapt itself to accommodate all the complex issues raised by the use of new technologies in international trade.

Of the above methods of removing legal uncertainty to electronic transacting, legislation is preferable because while private contracting may work in some situations, its effectiveness may be limited by statutory requirements in certain situations.²¹⁸ Custom and judicial adaptation could be slow to develop, inconsistent and possibly exacerbate the problems. That is the reason for the efforts to develop the model laws and convention discussed above, aimed at forging international harmonisation in this area. Ghana's ETA, though belated, is a good step, but the exclusion of negotiable instruments and bills of lading from its application is an anomaly that should be rectified.

VI. CONCLUSION

In an increasingly globalised world economy, countries and businesses operating within them are constantly competing for resources, investments, markets and profits. Ghana must, and does, participate in international trade, and laws that facilitate and improve Ghana's international sale regime are important. While the laws, conditions and factors affecting a country's international competitiveness in its international trade are vast, and complete reforms would require major work, time and costs, there are some simple and inexpensive improvements that can be accomplished quickly.

This paper has discussed one such step. That is, how Ghana's legal regime for the international sale (and purchase) of goods transactions can be improved by the implementation of certain ILIs. It has demonstrated how and why Ghana's implementation of certain ILIs relating to contracts for the international sale of goods (CISG), international carriage of goods (Hamburg Rules or Rotterdam Rules), and alignment of Ghana's electronic transactions legislation with MLEC and CUECIC would be beneficial to Ghana and businesses located within it. Implementation of the recommended instruments would afford Ghana, its businesses and their foreign counterparts the benefits of reduced transaction costs, enhanced efficiencies, increased competitiveness and improved perception of the country by the international business community. Failure to implement the instruments unnecessarily disadvantages businesses operating within, and with, Ghana.

²¹⁷ See *Edelstein v Schuler & Co* [1902] 2 KB 144, 155.

²¹⁸ Private contracting sometimes needs to be used in conjunction with statutes, such as to outline systems specifications, security measures to be taken by all parties, responsibilities and consequences of breach. See, e.g., Laryea, 'Facilitating Paperless International Trade', *supra* note 186, p. 127.

Serious consideration, therefore, should be given to implementing the relevant ILLs. It must be acknowledged that similar calls have been made in the past unsuccessfully, in respect of Ghana and other jurisdictions.²¹⁹ That such recommendations are sometimes ignored is no reason to not raise the issue. A fresh initiative to raise awareness and discussion is important. It is hoped that this article will at least influence considerations and debate for an improved legal regime for international sale transactions in Ghana. The discussions in this paper have focused on laws relating to the international sale and carriage of goods, and in the context of Ghana. However, the presented arguments may be applicable to other areas of law, and to other countries in similar situations, albeit varyingly. It is hoped that this article has that effect.

219 See, e.g., Date-Bah, 'The United Nations Convention on Contracts for the International Sale of Goods, 1980', *supra* note 58, recommending, some three decades ago, that Ghana should implement the CISG. For jurisdictions such as the UK, see Goode, *supra* note 1, pp. 756–8; Linarelli, *supra* note 18; Williams, *supra* note 35; Gärtner, *supra* note 35; Lee, *supra* note 35. For Brazil, see Grebler, *supra* note 35. For South Africa, see Eiselen, *supra* note 18.