

**THE UNITED NATIONS CONVENTION ON
THE INTERNATIONAL SALE OF GOODS:
WHAT ARE NEW ZEALAND TRADERS
MISSING OUT ON?**

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Introduction

Contracts for the international sale of goods have long been problematic. Issues such as conflict of laws, cultural difference, and wide-ranging divergences in judicial interpretation have made litigation arising out of contracts for the international sale of goods exceedingly complex. These difficulties have led to much uncertainty about what the outcome will be if something goes wrong and the contract ends up before the courts.¹

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was entered into in 1980 as a way of making international transactions more certain by providing a set of universal principles that harmonise the law on contracts for the sale of goods at an international level. The CISG has been heralded as one of the greatest legal achievements in international commercial law because of its ability to harmonise the law and reduce the uncertainties that existed in the laws on international sales contracts that existed prior to CISG.²

In many jurisdictions both lawyers and the courts are using the CISG to simplify international sales contracts and are therefore reaping the benefits that the convention has to offer.³ New Zealand, however, has been reluctant to follow this example and traders are rarely utilising the CISG in contracts for the international sale of goods. This has left

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¹ Koppenol-Laforce, M. (ed.) *International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law* (London: Sweet and Maxwell, 1996), 141.

² Butler, P. "Celebrating Anniversaries" (2005) 36 VUWLR 775, 775.

³ Schlechtriem, P. "Requirements of Application and Sphere of Applicability of the CISG" (2005) 36 VUWLR 781, 782.

many commentators asking why New Zealand traders are excluding the CISG from operation when *prima facie* it appears to offer significant benefits.

This paper will critically evaluate the approach of New Zealand traders to the CISG by answering the question: "Why are New Zealand traders failing to take advantage of the protection offered by the United Nations Convention on Contracts for the International Sale of Goods"? The paper will explore what could be done to improve the use of the CISG in New Zealand international sales contracts if New Zealand traders really are missing out.

A. History

As international trade increased throughout the 1900s it became increasingly clear that steps needed to be taken to introduce some type of uniform law on contracts for the sale of goods to deal with the complex issues of international trade and increase certainty in international sales contracts.⁴ In 1964 two conventions were enacted with the aim of creating uniformity, the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on Formation of Contracts for the International Sale of Goods (ULF). However, these agreements were largely unsuccessful, with each only receiving a small number of ratifications.⁵

The need for some type of uniformity continued until the 1980 Vienna Convention. The Convention provided a significant breakthrough in this area with United Nations countries agreeing on a collection of rules that would reform international law on the sale of goods and create a uniform set of principles to be used in the interpretation of such contracts.⁶ This agreement became known as the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The CISG came into force in 1988, and currently there are 71 state

⁴ Lutz, H. "The CISG and the Common Law Courts: Is There a Problem?" (2004) 35 VUWLR 711, 712-714.

⁵ Bridge, M. *The International Sale of Goods: Law and Practice* (Oxford: Oxford University Press, 1999), 38.

⁶ *Ibid* 40-42.

parties⁷, making it the most well received agreement of its kind.⁸ The purpose of the CISG is to reform previous international agreements, and to harmonise the law governing the international sale of goods. It aims to resolve issues that contracting parties have had in the past with determining which country's laws should apply to their contracts.⁹ The CISG is a significant development in international commercial law on contracts for the sale of goods because it ties together elements of both common and civil law, in a manner which makes it useful on an international scale. This has encouraged participation from a much wider range of countries than has been achieved in any previous attempts to create uniformity in contract law.¹⁰

Parties to the convention include Australia, Canada, and the United States. However, the United Kingdom has not yet ratified.¹¹ New Zealand ratified the CISG in 1992 and has incorporated it into domestic law by virtue of the Sale of Goods (United Nations Convention) Act 1994. Under section 5 of the Act the CISG is to be used as a code for determining issues arising out of contracts for the international sale of goods and:¹²

[S]hall, in relation to contracts to which it applies, have effect in place of any other law of New Zealand relating to contracts of sale of goods

This means that, provided the parties do not contract out of the CISG, New Zealand's domestic law on international sales will not be of application to contracts for the international sale of goods entered into in New Zealand.

⁷ Institute of International Commercial Law, *CISG: Table of Contracting States* available online at <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last accessed 21 July 2008).

⁸ Lando, O. "CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law" (2005) 53 AM. J. Comp. L. 379, 381.

⁹ *Ibid.*, 380.

¹⁰ Carr, I. *International Trade Law (3rd ed.)* (London: Cavendish Publishing, 2005), 61.

¹¹ Institute of International Commercial Law, *CISG: Table of Contracting States* available online at <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last accessed 21 July 2008).

¹² Sale of Goods (United Nations Convention) Act 1994.

B. Scope and application of the CISG

The CISG will apply to contracts for the international sale of goods entered into after the date that country ratified.¹³ When it applies, and the parties have not contracted out, it will replace both the choice of laws rules and any domestic law on the international sale of goods.¹⁴ As explained in *Attorney General & NZ Rail Corporation v Dreux Holdings Ltd*, this means that because New Zealand has ratified effort should be made to interpret New Zealand law in a manner that is consistent with the convention:¹⁵

It should not go unnoticed that the United Nations Convention on Contracts for the International Sale of Goods, known as the Vienna Sales Convention, is now, by virtue of the Sale of Goods (United Nations Convention) Act 1994, part of New Zealand law... There is something to be said for the idea that New Zealand domestic law should be generally consistent with best international practice.

However, the CISG does not apply to all contracts between parties, but only to contracts for the sale of goods internationally.¹⁶ “Sale” and “goods” are not defined in the CISG.¹⁷ However, in most cases it will only apply to commercial sales of goods and not to “goods brought for personal, family, or household use”; contracts for services will also be excluded.¹⁸ There are also some other elements of contract law, such as validity of contract and consideration which CISG does not address and which must continue to be dealt with under domestic law.¹⁹ It is important to note, therefore, that the CISG will not be applicable to every international contract. It is to be determined on the facts of each case as to whether or not the CISG applies.

There are three important factors that must be present for the CISG to apply to a contract for the sale of goods. Firstly, under Article 1(1)(a) the parties to the contract must be based in different countries.

¹³ Mo, J. *International Commercial Law* (3rd ed.) (NSW: LexisNexis Butterworths, 2003), 78.

¹⁴ Bridge, above n 5, 37.

¹⁵ *Attorney General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA), 627.

¹⁶ Mo, above n 13, 78.

¹⁷ Bridge, above n 5, 45.

¹⁸ Schlechtriem, above n 3, 786.

¹⁹ Carr, above n 10, 67.

Secondly, the countries where the parties trade from must have ratified the CISG, and thirdly, the goods must be capable of fitting within the goods accepted by the CISG.²⁰ Article 6 provides an exception which allows people in member states to opt out of the CISG. It is also possible for parties in non-member states to opt in and agree that the CISG will apply to their contract.²¹

Where parties to an international sales contract choose to use Article 6 to opt out, they must expressly state their intention to exclude the CISG from operation. It will not be enough to say that the laws of New Zealand will apply to the contract. The CISG is part of New Zealand law and if express words are not used then CISG may be applicable despite the parties' intention that it is to be excluded.²²

C. Benefits of the CISG

One of the significant benefits that commentators argue New Zealand traders are missing out on by failing to use the CISG is the uniformity of law and judicial interpretation that the convention has to offer.²³ In its 1992 report into whether New Zealand should ratify CISG the New Zealand Law Commission summarised the benefits of the CISG as follows: ²⁴

When it applies, it avoids the often complex problems of first ascertaining the applicable law in accordance with conflict of law doctrines, and second determining what is required by the applicable foreign law once it has been ascertained.

Because of the many different countries that New Zealand traders do business with there are often conflicts between the laws of New Zealand and those of the other parties to international sales contracts. This can lead to complex disputes as to which states laws should apply. It is argued that the CISG helps to simplify contracts for the

²⁰ Mo, above n 13, 78.

²¹ Schlechtriem, above n 3, 784-785.

²² Ziegel, J. "The Future of an International Sales Convention from a Common Law Perspective" (2000) 6 NZBLQ 336, 339.

²³ Butler, above n 2, 776.

²⁴ Law Commission "The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance" (Wellington: New Zealand Law Commission, 1992), 10.

international sale of goods because it introduces one clear set of laws that are applicable to transactions between New Zealand and most of its major trading partners. This means that when disputes arise it is clear exactly what law will apply.²⁵ This is advantageous to the parties as it prevents them having to negotiate complex conflict of laws clauses when they enter into agreements for the international sale of goods. Therefore the application of the CISG would be likely to significantly reduce the costs for New Zealand traders as it would reduce the need to engage the help of experts, such as interpreters and paralegals.²⁶ It also has the potential to save time as it provides a compromise when parties cannot agree. Therefore, they should not have to spend so much time trying to reach an agreement as to whose laws should apply.²⁷ There should also be decreased legal costs as it is less likely that parties will have to pay lawyers to undertake research into different legal systems every time they want to enter into a contract.²⁸

Another argument in favour of the uniformity of principles that the CISG has to offer is that it makes judicial outcomes more certain if something goes wrong and the contract ends up before the courts.²⁹ Article 7 requires that all judges interpret the CISG in a way that provides for its international nature. This implies that domestic law should not be used to interpret unless there are gaps that the CISG itself does not cover; and that there should be a uniform interpretation in the courts of all member states.³⁰ The intention of this Article is to facilitate the development of an international body of CISG case law, which will in turn provide uniform precedents that can be applied to contracts for the sale of goods irrespective of which parties' courts decide the issue.³¹

Rajeev Sharma argues that because the CISG provides for uniformity of interpretation across the globe universal precedents will be developed on how each Article is to be interpreted.³² It is argued that

²⁵ Carr, above n 10, 57.

²⁶ Schlechtriem, above n 3, 794.

²⁷ Bridge, above n 5, 37-38.

²⁸ Schlechtriem, above n 3, 794.

²⁹ Sharma, R. "The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience" (2005) 36 VUWLR 847, 856.

³⁰ Koppenol-Laforce, above n 1, 196.

³¹ Bridge, see above n 5, 57-58.

³² Sharma, above n 29, 856-857.

this will help to make international transactions more certain as parties can be sure of what principles will be applied to the contract if something does go wrong and will know what the likely outcome will be if the issue ends up in the courts.³³ Because the CISG, and its body of resulting case law, do make potential outcomes clearer there will be less reason for parties to enter into litigious disputes over contracts for the international sale of goods as they will be able to predict the legal outcome.³⁴ However, as will be discussed in more detail in Part VI, uniform interpretation has been slow to emerge and has made lawyers in some CISG parties reluctant to apply it to contracts that they draft.

It has also been argued that one of the advantages of having the CISG apply is that it provides a neutral set of laws. This places both parties in an equal position and provides a more equitable situation for the parties as neither party will have a home advantage, but both parties should have equal access to information and legal advice.³⁵ In their 1992 report the Law Commission cited this as one of the potentially significant benefits to New Zealand traders. Prior to the CISG, the generally smaller size of New Zealand traders meant that they had significantly less bargaining power to be able to negotiate for New Zealand law to apply to international sales contracts.³⁶

Nottage argues that without the CISG New Zealand traders may be unable to avoid having to use a foreign set of laws to negotiate and litigate an international sales contract.³⁷ In many cases, large traders in countries like the USA will not enter into an agreement unless it is their law that applies.³⁸ This has often meant that New Zealand traders have had to work with unfamiliar legislation from overseas which is often not well suited to New Zealand trading conditions. It also means that New Zealand traders have experienced excessive costs in obtaining advice on the law of foreign states.³⁹ By providing a uniform set of laws that applies to both parties the CISG removes the advantages that

³³ *Ibid*, 856.

³⁴ Schlechtriem, above n 3, 794.

³⁵ Butler, above n 2, 777.

³⁶ Law Commission, above n 24, 56.

³⁷ Nottage, L. "Whose Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View From Australia and Japan" (2005) 36 VUWLR 815, 836.

³⁸ *Ibid*, 836.

³⁹ Law Commission, above n 24, 56.

larger trading partners have had over New Zealand traders, at least with respect to negotiating conflict of laws clauses. New Zealand traders are in a position where they have much more bargaining power than they would without the CISG.⁴⁰

One of the other significant advantages for traders in particular, is that the CISG is drafted in a relatively simple manner which is well suited to the nature of international trading agreements. Therefore it makes these types of transactions easier to understand for the parties involved.⁴¹ Luke Nottage argues that because the structure of the CISG is “logical, coherent, and comprehensive” and describes complex legal issues in a manner that is understandable to people with little knowledge of international sales law. Thus, it can be more useful to traders than domestic contract law which uses language unfamiliar to many people without a legal background.⁴² The simple drafting of the CISG is helpful for traders as it means that they are able to understand the provisions themselves without having to get extensive legal advice.⁴³ If they wish, parties can easily look up the provisions of the CISG themselves to clarify advice given to them or to learn about what the implications will be if they take certain actions.⁴⁴

One of the final benefits of the CISG is that it is modelled on common business practices of international traders.⁴⁵ It is therefore more suitable for contracts for the international sale of goods than domestic law is, as domestic contract law is made to apply to a wide range of contracts; whereas the CISG is specific to international sales contracts. Using CISG should simplify issues by keeping reference to domestic law to a minimum.⁴⁶

D. New Zealand's approach to the CISG

In many member states the CISG has been warmly embraced. Traders and lawyers alike are “as familiar with the convention as they are with

⁴⁰ Ibid, 56.

⁴¹ Nottage, above n 37, 827.

⁴² Ibid.

⁴³ Ziegel, above n 22, 339.

⁴⁴ Nottage, above n 37, 827.

⁴⁵ Butler, above n 2, 779.

⁴⁶ Law Commission, above n 24, 38.

their domestic law.”⁴⁷ However, in many common law countries, including New Zealand, traders have not been so quick to utilise the CISG in contracts for the international sale of goods.⁴⁸ There has been a notable lack of use in New Zealand with few cases even citing CISG. This has led to the CISG being described as the “sleeping beauty of New Zealand’s statute book.”⁴⁹

The New Zealand Law Commission was initially enthusiastic about how the CISG would be received in New Zealand.⁵⁰ However, despite the significant benefits that the CISG appears to offer New Zealand traders, many New Zealand traders are choosing to use Article 6 to opt out of the application of the CISG.⁵¹ In 2005, Petra Butler pointed out that CISG is excluded from standard form contracts in most law firms and has appeared before the courts on even fewer instances.⁵² Only nine New Zealand cases mentioning the CISG appearing on the Pace University CISG case law database.⁵³ This lack of use raises questions about why New Zealand traders are failing to use the CISG in international contracts when *prima facie* there appear to be significant advantages if the CISG is applied.⁵⁴

Some argue that the lack of case law does not necessarily mean that the CISG is not being used, but may suggest that its use is resulting in successful contracts and therefore very little litigation.⁵⁵ However, the more popular view amongst commentators is that the CISG is being excluded from contracts because traders and their legal advisers are either ignorant of, or unfamiliar with, the CISG and therefore are reluctant to use it.⁵⁶

⁴⁷ Schlechtriem, above n 3, 782.

⁴⁸ Ziegel, above n 22, 337.

⁴⁹ Butler, above n 2, 776.

⁵⁰ Law Commission, above n 24, 10.

⁵¹ Butler, above n 2, 776.

⁵² *Ibid.*

⁵³ As at 27 July 2008. For an up to date list of New Zealand CISG cases see

<http://cisgw3.law.pace.edu/cisg/text/caselit.html#newzealand>.

⁵⁴ Nottage, above n 37, 817.

⁵⁵ Lewis, M. “Comments on Luke Nottage’s Paper” 36 VUWLR 859, 861.

⁵⁶ Lutz, above n 4, 731; Murray, J. “The Neglect of CISG: A Workable Solution” (1998) 17 JLC 365 372-373.

E. Why are New Zealand traders not embracing the CISG?

There are two main arguments as to why New Zealand traders are not embracing the CISG, both related to the types of legal advice they are receiving from their lawyers. Firstly, it has been argued that many lawyers in New Zealand are ignorant about what the CISG is, and the potential benefits it has. Therefore they are not advising their clients of its uses either because they do not know it exists or because they feel more secure using domestic laws which are more familiar.⁵⁷ Secondly, some argue that lawyers are advising clients against using the CISG because lack of uniform interpretation has led to uncertainty in how it will be interpreted in the courts.⁵⁸ These arguments are discussed in detail below.

1. Ignorance?

Arguably one of the main reasons the CISG is not being used in New Zealand is that New Zealand lawyers do not know enough about the CISG to advise their clients as to its use and application.⁵⁹ Lawyers may be clinging to the common law rules of contract because it is familiar to them.⁶⁰ Some lawyers therefore choose to draft contracts for the international sale of goods in accordance with domestic law because they think that it is likely to provide a more desirable outcome for their clients.⁶¹

One of the reasons for this is that CISG is rarely addressed as part of the New Zealand legal education, especially at undergraduate level. Consequently, few lawyers have been exposed to the CISG during their education.⁶² It is possible that one of the reasons the CISG is being excluded is because New Zealand lawyers do not know it exists.

Australia has had a similar experience with lack of knowledge about the CISG. The lack of knowledge in Australia was illustrated in the case of *Perry Engineering v Bernold* where neither party's lawyers knew that the

⁵⁷ Lutz, above n 4, 731.

⁵⁸ Murray, above n 56, 372.

⁵⁹ Lutz, above n 4, 732.

⁶⁰ Nottage, above n 37, 830.

⁶¹ Murray, above n 56, 372-373.

⁶² Ziegel, above n 22, 344.

CISG applied to their client's contracts, or even existed.⁶³ There has been no New Zealand case law to date which suggests similar incidents. However, the lack of CISG case law in New Zealand could be used to infer a similar lack of understanding in this country.⁶⁴

2. Risk?

One of the arguments put forward as to why lawyers are reluctant to advise clients to use the CISG is that there is too much uncertainty as to how issues will be resolved in the courts, due to a general lack of understanding of CISG issues by judges and lawyers.⁶⁵ This lack of understanding about how the CISG should be interpreted and its gaps filled has meant that there has not been uniform interpretation of the CISG in the courts. This leads to serious concerns for legal advisers as to whether there will be an effective remedy for their clients if the relationship between the parties deteriorates.⁶⁶

(a) Is the risk argument justified?

Given that one of the main goals of the CISG was to increase certainty in contracts for the international sale of goods, it is essential to evaluate whether the arguments that lack of certainty under the CISG in causing lawyers to avoid applying CISG when drafting international sales contracts are justified.

(i) Gaps

One of the major reasons lawyers fear that the CISG will not provide the best outcomes for their clients is that there are many gaps in the CISG where important questions are left unanswered. This means that domestic law will still need to be referred to and conflicts of laws will still need to be negotiated. Therefore it may be easier for lawyers to draft contracts in accordance with one set of laws rather than having to jump back and forwards between the CISG and domestic legislation.⁶⁷ In other situations, it is argued, that while the CISG deals with certain

⁶³ *Perry Engineering v Bernold* [2001] SASC 15.

⁶⁴ Butler, above n 2, 776.

⁶⁵ Nottage, above n 37, 776.

⁶⁶ Murray, above n 56, 372-373.

⁶⁷ Schlechtriem, above n 3, 784.

issues, they are dealt with inadequately and so do not provide appropriate remedies for the client. For example, under Article 78 a successful party may claim interest on judgment. However, the CISG does not state at what rate the interest is to be calculated.⁶⁸ Article 78 is one of the most heavily litigated sections of the Convention.⁶⁹ This shows that there is significant uncertainty at least in some provisions of CISG.

Lawyers in common law jurisdictions may rightfully be nervous about accepting the CISG as, in trying to take a route which is useful for both common law and civil jurisdictions, it has failed to include some of the most important elements of common law contract law.⁷⁰ For example, consideration⁷¹, passing of property, and validity of contract are all-important concepts to common law contracts.⁷² While these gaps are able to be filled by reference to domestic law, and may be considered necessary so that the CISG can have universal application,⁷³ it means that lawyers may be correct to conclude that the outcomes may be all too risky if something goes wrong. In the 1992 Law Commission Report Sir Kenneth Keith identified the risks of potentially having to fill the gaps in the CISG with unfamiliar foreign law.⁷⁴

The uncertainties and potential costs associated with transacting business under unfamiliar laws increase the risks of international commerce and are likely to reduce [CISG's] efficiency.

However, as discussed in Part IV it is arguable that there will be more uncertainty if the CISG were not applied and New Zealand traders are required to negotiate and litigate an entire contract under a foreign set of laws.⁷⁵ In addition, to state that uniform law does not exist is not entirely true as, as courts are becoming more familiar with the CISG, a uniform set of principles is beginning to emerge.⁷⁶

⁶⁸ Ziegel, above n 22, 346.

⁶⁹ Bridge, above n 5, 61.

⁷⁰ Lutz, above n 4, 718.

⁷¹ *Ibid*, 721.

⁷² Carr, above n 10, 61.

⁷³ Whittington, N. "Comment on Professor Schwenzer's Paper" (2005) 36 VUWLR 809, 809.

⁷⁴ Law Commission, above n 24, 13.

⁷⁵ Carr, above n 10, 57.

⁷⁶ Butler, above n 2, 780.

Others argue that definitional gaps in the CISG also make its application confusing. While the CISG states that it “applies to contracts of sale of goods, the CISG defines neither ‘sale’ nor goods’ nor ‘contract of sale of goods’.”⁷⁷ However, Indira Carr suggests that this argument is unfounded as what is included in these definitions becomes clear on reading the articles of the convention dealing with the obligations of buyers and sellers.⁷⁸ For example, under Article 30 of the CISG a seller “must deliver the goods, hand over any documents relating to them and transfer the property in the goods.”⁷⁹ Under Article 53 a buyer is required to “pay the price for the goods and take delivery of them.”⁸⁰ In my view, any person who is involved in the international sale of goods or in the drafting of contracts for the international sale of goods is unlikely to be in any doubt as to what these words mean and the obligations that they place on a contract party.

Because the gaps in the CISG make its interpretation uncertain, there appears to be some justification for the reluctance by many lawyers to use the CISG. However, it is arguable that the gaps in the CISG do not make it any more uncertain than domestic regimes as there are often gaps in domestic law which need to be filled by common law principles. This suggests, perhaps, that lawyers are not doing enough to weigh up the costs and benefits between the two alternatives but are rather clinging to the principles that they are familiar with.⁸¹

(ii) Lack of uniformity

One of the arguments made by those who chose to exclude the CISG is that it has not resulted in a uniform interpretation and therefore does not provide the certainty which those who argue in favour of CISG cite as being its major success. Uniform application is more difficult to achieve than the CISG suggests as there are vastly different methods of interpretation between different jurisdictions and also between civil and common law countries. This has led to a lack of uniform interpretation

⁷⁷ Bridge, above n 5, 45.

⁷⁸ Carr, above n 10, 62.

⁷⁹ United Nations Convention on the International Sale of Goods 1980.

⁸⁰ *Ibid.*

⁸¹ Nottage, above n 37, 830.

and has introduced uncertainties into how the CISG will be applied.⁸²

While Article 7 provides that courts in member states must interpret the CISG in a uniform manner; the CISG has not provided any mechanisms to ensure this occurs.⁸³ There is no superior court to ensure that a uniform body of case law develops.⁸⁴ Because there is no real guidance as to how uniformity will be achieved, most domestic courts, reluctant to move away from their own principles of contract law, have interpreted CISG principles with reference to domestic law rather than considering the principles of the CISG on its own as required in Article 7.⁸⁵ This has led to the development of a body of contradictory case law whereby different judges, reluctant to refer to the decisions of other jurisdictions, have interpreted articles in vastly different manners.⁸⁶ Opponents argue that this reason alone provides justification for excluding the CISG as it lacks certainty. Therefore, it is preferable to apply domestic law because domestic laws usually provide a developed set of principles to guide parties as to what outcomes will be. It has been suggested, by Ziegel, that rather than having to negotiate all of the inadequacies of the CISG many lawyers will find it preferable to choose a country's domestic law to govern the contract. The reasoning for such a decision is that it is likely to create greater certainty.⁸⁷

Some opponents of the CISG have argued that where the parties to an international trading arrangement wish to have the terms of their agreement governed by a uniform set of rules it is preferable to use the United Kingdom Sale of Goods Act.⁸⁸ This is because the United Kingdom statute already has a developed body of case law and a much more comprehensive set of principles. Therefore, it will be more likely to provide certainty of outcomes for the parties. It is also argued that the parties will not have to experience the excess costs of having to be the first to litigate an issue under the CISG. However, others argue that

⁸² Ferrari, F. "Uniform Interpretation of the 1980 Uniform Sales Law" (1994-95) 24 *Georgia Journal of International and Comparative Law* 183, 204-208.

⁸³ Kilian, M. "CISG and the Problem with Common Law Jurisdictions" (2001) 10 *Journal of Transitional Law and Policy* 217, 227.

⁸⁴ Butler, above n 2, 780.

⁸⁵ Whittington, above n 73, 811.

⁸⁶ *Ibid*, 810.

⁸⁷ Ziegel, above n 22, 346.

⁸⁸ Carr, above n 10, 58.

using the United Kingdom Act as an alternative to CISG does not provide any significant advantages. It is suggested that even the United Kingdom Sale of Goods Act does not provide a comprehensive code. It requires that principles are adapted into agreements, from the common law, in order to cover issues that are excluded from the statute.⁸⁹ Nottage argues that even a long established set of principles, such as is found in the United Kingdom law, is only helpful to those who have an understanding of that law. He is skeptical as to whether this argument is justification for excluding the CISG as the benefits will only be received by those who have knowledge of the United Kingdom Act. Those who do not will still have exactly the same difficulty of having to research the law as those who choose to use the CISG.⁹⁰ Therefore it is arguable that using the United Kingdom Sale of Goods Act provides little or no benefits above the CISG.

While there may be some advantages in applying the United Kingdom law because it is already established, I am of the view that overall CISG is better suited to contracts for the international sale of goods because it is designed for universal application and with the needs of international traders in mind. It is, therefore, more likely to meet the needs of people trading on an international level.

3. Costs?

One of the reasons that have been put forward as to why the CISG will benefit New Zealand traders is the decreases in costs that will be experienced with having a uniform law.⁹¹ Critics of the CISG, however, argue that there can still be significant costs arising out of negotiation and litigation surrounding the CISG. Bridge points out that because there has been a lack of interpretation of many of the Articles of the CISG parties may face being the first to litigate on a particular section. This will lead to significant costs for litigants as it is necessary to conduct extensive research in order to prove that the interpretation a party wishes to take is the correct interpretation.⁹² This may be one of the reasons why there is a lack of CISG jurisprudence as parties are unwilling to be the first to litigate an issue, not only because of the

⁸⁹ Nottage, above n 37, 829.

⁹⁰ Ibid.

⁹¹ Law Commission, above n 24, 56.

⁹² Bridge, above n 5, 38.

uncertainties but also because of the significant cost.⁹³

In addition, Bridge argues that decreased costs as a result of reduced levels of negotiation on conflict of laws is a fallacy and cannot be included as one of the advantages of the CISG. Bridge argues that there remains a need for the parties to negotiate about whose domestic law should be used to cover gaps in the CISG. In many instances it will also be necessary for the parties to negotiate as to whether or not the CISG should be applied to their contract.⁹⁴

In my opinion this argument is not entirely justified. An array of CISG precedents are starting to emerge as evidenced by the ever expanding number of cases recorded internationally.⁹⁵ Therefore traders that use the CISG are no longer likely to be faced with being the first to litigate on a particular article. In any case, as discussed earlier, it is likely that greater costs would arise if parties need to resolve a conflict of laws dispute. Therefore CISG is likely to make conflicts over sale of goods less costly for parties that utilise it.⁹⁶

F. What changes could be made to further the use of the CISG?

As discussed, one of the major reasons that the CISG is not being used is a lack of knowledge by lawyers as to its existence and usage. One of the ways that knowledge could be improved is by including a segment on the CISG as part of the New Zealand legal education. Evidence suggests that the CISG is rarely discussed in New Zealand law schools at undergraduate level and in many cases only gets a brief mention even at postgraduate level. In contrast, in countries where the CISG is being more widely used it has been covered in courses at law school.⁹⁷ It has also been suggested that continuing education seminars conducted by the New Zealand Law Society, to educate existing practitioners on how the CISG can be used. This would further increase understanding of the CISG and incentivise its use in contracts for the international sale of goods.⁹⁸

⁹³ Ibid.

⁹⁴ Ibid, 38.

⁹⁵ Butler, above n 2, 780.

⁹⁶ Schlechtriem, above n 3, 794.

⁹⁷ Nottage, above n 37, 842-843.

⁹⁸ Ibid, 830.

Another possible way to increase the use of the CISG in New Zealand would be to make its application to contracts for the international sale of goods compulsory. Kilian argues that allowing parties to contract out of the CISG reduces its effectiveness and leads to uncertainties, which the CISG was meant to prevent.⁹⁹ By making the CISG a compulsory consideration its effectiveness would be likely to be increased and many of the identified issues surrounding its lack of use reduced.¹⁰⁰ However, freedom to contract is one of the foundational principles of the CISG, and contract law in general.¹⁰¹ Forcing parties to a contract use the CISG would go against the long established principle of freedom of contract. Thus, this suggested reform is unlikely to gain any widespread acceptance.

The issue of lack of uniform interpretation must also be dealt with to help make the outcomes of decisions under the CISG more certain. Nicholas Whittington has argued that one way that this could be achieved would be to encourage judges to refer to precedents from other countries when applying CISG to contracts.¹⁰² However, as Whittington points out, language barriers can present a problem with relying on overseas precedents.¹⁰³ Education of judges could play an important role in this respect. However, in my opinion, what is required first and foremost is the development of an international law reporting system for CISG cases. Such a database would need to be translated into a variety of different languages so that CISG parties would be able to use precedents set in other countries. I am of the view that by making CISG jurisprudence more readily accessible international precedents are more likely to emerge.

Conclusion

The United Nations Convention on Contracts for the International Sale of Goods has the potential to be a highly useful instrument in contracts between New Zealand and international traders. However, New Zealand traders have been reluctant to embrace the CISG in contracts

⁹⁹ Kilian, above n 83, 226-227.

¹⁰⁰ Ibid, 225.

¹⁰¹ Lando, above n 8, 387-388.

¹⁰² Whittington, above n 73, 812.

¹⁰³ Ibid.

for the international sale of goods.

Prima facie the lack of use by New Zealand traders appears strange given the range of benefits often attributed to CISG; including uniformity of law, decreased transaction costs, and increased bargaining power. However, it can be seen from a deeper analysis of the issues that the CISG is not the all encompassing regime that had been expected. To certain degree the effectiveness of the CISG has suffered as a result.

In New Zealand, and some of the other common law countries, the lack of certainty and uniformity that has become apparent has resulted in lawyers advising their clients against using the CISG. In many cases this is why traders are excluding the CISG from their contracts. Whether this position is justified is highly debated. Yet, while the CISG does have concerns that may need to be addressed, there remain significant advantages to its use that New Zealand traders are currently missing out on. These advantages appear to outweigh the reasons, given by critics of CISG, as to why the Convention should be excluded. These advantages indicate that there is a need in New Zealand for knowledge of the CISG to be expanded within the legal profession, so that lawyers and traders are able to embrace the CISG and make use of its principles in contracts for the international sale of goods.