

**SHOULD SOUTH AFRICA RATIFY THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE INTERNATIONAL
SALE OF GOODS?**

SUBMITTED BY:

CELIA MALAHLELA

IN ACCORDANCE WITH THE REQUIREMENTS OF THE DEGREE

MAGISTER LEGUM

AT THE

UNIVERSITY OF PRETORIA

SUPERVISOR: ADV. SALOME VILJOEN

2013

Disclaimer

I, Celia Malahlela, hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Magister Legum at the University of Pretoria. It has not been submitted before for any degree or examination at any other University.

Celia Malahlela

Table of contents

CHAPTER 1: BACKGROUND TO THE RESEARCH	1
1.1. Introduction	1
1.2. PURPOSE OF THE CISG	3
1.3. Application of the CISG	4
1.4. Exclusions of application of the CISG	5
1.5. Acceptance of the CISG by states	6
1.6. Structure of the CISG	7
1.7. Conclusion	7
CHAPTER 2: ACCEPTANCE AND REJECTION OF THE CISG GLOBALLY.....	10
2.1. Introduction	10
2.2. Abstinance	11
2.2.1 United Kingdom.....	11
2.2.2 New Zealand and Australia	14
2.2.3 Japan.....	14
2.2.4 Brazil	17
2.3. Adoption.....	18
2.3.1 Japan.....	18
2.3.2 New Zealand	19
2.3.3 Vietnam	21
2.4. Conclusion	22
CHAPTER 3: CASE FOR THE ADOPTION OF THE CISG IN SOUTH AFRICA	25
3.1. Introduction	25
3.2. Applicable law	25
3.3. CISG in South Africa	26
3.4. Suitable international trade rules	26
3.5. Certainty.....	27
3.6. Diverse legal systems.....	27
3.7. Uniform law	29

3.8.	Terms and conditions	29
3.9.	Accessibility.....	30
3.10.	Language	30
3.11.	Party autonomy	31
3.11.1	Altering provisions	31
3.11.2	Excluding the CISG	31
3.12.	Bargaining powers.....	32
3.13.	Simplicity	32
3.14.	International trade practices and usage	33
3.15.	Developing countries	33
3.16.	Success of the CISG	34
3.17.	African leader	34
3.18.	Conclusion	35
CHAPTER 4: CASE AGAINST THE ADOPTION OF THE CISG IN SOUTH AFRICA.....		36
4.1.	Introduction	36
4.2.	Acceptable compromise	36
4.3.	Foreign formulations.....	37
4.4.	Static and unchangeable monument	38
4.5.	Multitude of languages	39
4.6.	Legal certainty	40
4.7.	Irrelevance	41
4.8.	Developing countries.....	42
4.9.	Increased trade	42
4.10.	Utilisation.....	43
4.11.	Homeward trends	44
4.12.	Conclusion	45
CHAPTER 5: SHOULD SOUTH AFRICA RATIFY THE CISG?.....		46
5.1.	Introduction	46
5.2.	Vision of South Africa	46
5.3.	South African trade.....	47

5.4.	CISG in South Africa	48
5.5.	Suitable international trade rules	49
5.6.	Certainty.....	49
5.7.	Diverse legal systems.....	50
5.8.	Uniform law	50
5.9.	Accessibility.....	50
5.10.	Language	51
5.11.	Party autonomy	51
5.12.	Bargaining powers and simplicity	52
5.13.	Success of the CISG	53
5.14.	African leader	53
5.15.	Conclusion	54

CHAPTER 1: BACKGROUND TO THE RESEARCH

1.1. Introduction

The subject of this paper is whether South Africa should ratify the 1980 United Nations Convention on Contracts for the International Sale of Goods (the CISG).¹ The CISG was enacted in an attempt to create a unified body of law to regulate the international transactions on sale of goods. Due to globalization, countries are trading with each other on a daily basis, and the need for a unified body of contract law has developed.

In the early 1960s the International Institute for the Unification of Private Law (UNIDROIT) embarked on an exercise to create a unified body of law regulating international contracts on the sale of goods. As a result of these efforts the Uniform Law on the International Sale of Goods 1964 and the Uniform Law on the Formation of Contracts for the International Sale of Goods 1964 (ULIS and ULF)² were adopted in 1964.³ ULIS and ULF came into force in 1972, after ratification by five countries.⁴ These conventions were primarily effective in a few countries in western Europe; namely Belgium, the Federal Republic of Germany, Italy, and the Netherlands, who were amongst the first to ratify them.⁵ Other countries never quite warmed to these two Hague Conventions. At the most they had only a total of nine members; seven of which were European Countries.⁶

¹ The CISG is sometimes referred to as the Vienna Convention.

² ULIS and ULF are sometimes referred to as the Hague Conventions.

³ United Nations Commission on International Trade Law "United Nations Convention on contracts for the International Sale of Goods" 2010. *United Nations Publication*, 33.

⁴ Available at <http://www.unidroit.org/english/implement/i-main.htm>.

⁵ Honnold. (1988). "The Sales Convention: Background, Status, Application". *Journal of Law and Commerce*, 3.

⁶ Lehmann. (2006). "The United Nations Convention On Contracts For The International Sale Of Goods: Should South Africa Accede". *SA Mercantile Law Journal*, 318.

ULIS regulates the rights and obligations of parties under international contracts. On the other hand, ULF regulates the formation of the contract thereof. On the face of it, these conventions seem to be the best work which would have contributed towards the solution to dealing with myriad contract laws in international transactions. One would have expected the international community to have accepted them with open arms. The conventions are said to have failed to gain world acceptance due to the fact that the Asian countries and the developing nations did not partake in their formation.⁷ Therefore there was no worldwide participation. One of the major criticisms and reason for failure of these two CISG predecessors is that the Conventions were driven by the western European communities.⁸ The conventions contained legal traditions and economic realities of western Europe,⁹ and were seen as the product of the legal scholarship of western Europe.¹⁰

The CISG was drafted by the United Nations Commission on International Trade Law (UNCITRAL), and was adopted at the Diplomatic Conference in 1980.¹¹ The CISG came into force on the 1st of January 1988 after ratification by 11 countries on five continents.¹² The first countries to accede to the CISG were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia which represented, "... states from every geographical region, every stage of the economic development and every legal, social and economic system".¹³

UNCITRAL endeavoured to have the involvement and participation of as many states as possible to prevent the CISG from failing on the same basis as its predecessors (ULIS and

⁷ Booyesen Principles of international trade law as a monistic system (2003) *Interlegal* 580.

⁸ Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (CISG) in South Africa" 1999 *SALJ*, 353.

⁹ Lehmann (2006) *SA Merc LJ*, 318.

¹⁰ Lehmann (2006) *SA Merc LJ*, 318.

¹¹ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 33.

¹² McNamara "U.N. Sale of Goods Convention: Finally Coming of Age?" (2003) *Colorado Lawyer* 13.

¹³ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 34.

ULF). Most countries sent representatives and actively participated in the creation of the CISG. As a result of this adequate representation and consultation, the CISG did not face the same criticism as its predecessors.¹⁴

1.2. PURPOSE OF THE CISG

From the preamble of the CISG it is apparent that its main aim is to assist in the establishment of a new international economic order.¹⁵ The following is stated in the preamble:

*“Considering that development of international trade on the basis of equality and mutual benefit is an important element to friendly relations ...”*¹⁶

The preamble further states that,

“It was drafted on the premise that the adoption of the uniform rules which govern contracts for the international sale of goods that take into account the different social, economic and legal systems would contribute to the removal of legal barriers in the international trade and promote the development of international trade”.¹⁷

¹⁴ Eiselen (1999) *SALJ*, 353.

¹⁵ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 1.

¹⁶ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 1.

¹⁷ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 1.

In a nutshell, the principal goal of the CISG is to promote friendly relations between states by adopting a new set of uniform rules to govern contracts for the international sale of goods,¹⁸ and to introduce a global, uniform law of sale that will regulate international trade contracts.¹⁹

1.3. Application of the CISG

The CISG applies to contracts of goods between two contracting parties with places of business in two different states, where either (a) both states are members of the CISG, or (b) only one state is a member of the CISG, and the rules of private international law point to the application of the municipal laws of that member state.²⁰ The CISG expressly gives states the right to opt out of the condition concerning the rules of private international law.²¹ Article 95 states that,

“... any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1”. (The condition regarding the rules of private international law).

Article 1(3) of the CISG makes it clear that the nationality of the parties, and the civil or commercial character of the parties or of the contract, should not be taken into consideration when determining the applicability of the CISG. Therefore it does not matter whether the parties have the same nationality or not, as long as their places of business (connected to the contract) are in two different states. They can even be states or private individuals; their identity or character does not matter.

¹⁸ Whitlock & Abbey “Who Is Afraid Of The CISG?- Why North Carolina Practitioners Should Learn a Thing or Two About the 1980 United Nations Convention on Contracts for the International Sale Of Goods” (2008) *Campbell Law Review*, 278.

¹⁹ Lehmann (2006) *SA Merc LJ*, 317.

²⁰ United Nations Convention on Contracts for the International Sale of Goods (1980) Article 1.

²¹ Booysen, 581.

The CISG also embraces one of the important principles in international law namely, “Party Autonomy”.²² The parties have a choice to make the CISG applicable to them even in circumstances where it would naturally not apply according to the criteria set out in Article 1.²³ Furthermore, the parties have an option to exclude the application of the CISG altogether, or derogate from or alter the effects of some of its provisions where it would normally apply in accordance with the criteria set out in Article 1.²⁴

According to Article 4,²⁵ the CISG regulates only the formation of the contract of sale and rights and obligations of the trading partners arising from that contract.²⁶ It does not regulate the validity of the contract, its provisions or usage, nor the effect of a contract on the property of the goods.²⁷

1.4. Exclusions of application of the CISG

The CISG specifically excludes certain sales which are out of the scope of its application.²⁸ It does not apply to the sale of goods bought for personal use, ships, vessels, aircrafts, pure services without associated goods, or where the bulk of the contract is for services, electricity, goods bought on auction, on execution or otherwise by law, of stocks, shares, investment securities, negotiable instruments or money.²⁹

²² United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

²³ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

²⁴ CISG Article 6.

²⁵ CISG.

²⁶ CISG Article 4.

²⁷ CISG Article 4.

²⁸ CISG Article 2,3 and 4.

²⁹ CISG Article 2.

In my opinion, it is evident that the drafters of the CISG wanted to regulate the transactions on the sale of goods without encroaching on subjects that are heavily regulated by mandatory laws. The drafters stated that, “In many states some or all of such sales are governed by special rules reflecting their special nature.”³⁰ Furthermore, the drafters of the CISG have tried to stay away from introducing doctrines from certain legal systems or closely aligning the text with any legal system.³¹

1.5. Acceptance of the CISG by states

The CISG is generally recognised as one of the most successful instruments for the harmonisation and unification of the international trade law.³² As of 24 February 2012, UNCITRAL reported that 78 states have adopted the CISG, namely; Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Benin, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, South Korea, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Mauritania, Mexico, Moldova, Magnolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Romania, Russia Federation, Saint Vincent & Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Sweden, Switzerland, Syria, Turkey, Uganda, Ukraine, United States, Uruguay, Uzbekistan, and Zambia.³³

At the present moment, “... researchers have demonstrated the growing acceptance of the Convention, which can be justified by the legal certainty and stability that it provides”.³⁴ This

³⁰ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

³¹ Eiselen (1999) *SALJ*, 351.

³² Eiselen “The requirements for the inclusion of standard terms in international sales contracts” (2011) *PER*, 2.

³³ Kritzer Table of Contracting States (2012).

³⁴ Booysen, 581.

success story is said to be attributed to a number of reasons which will be discussed in detail in the next chapters.

1.6. Structure of the CISG

The CISG is divided into four parts. Part I deals with the sphere of application, form of contract and general provisions, including guidelines around the interpretation of the convention and the contract usages. Part II contains the provisions on the formation of the contract. The provisions in Part II address the issues around offer and acceptance.

Part III is the biggest section of the text. This section contains the general rights and obligations of the traders under the contract of sale of goods. The CISG provides supplementary rules to be used in cases where the parties did not agree on how, when, and where a party should perform their obligations.³⁵ This section also contains provisions relating to the remedies of breach of contract, the passing of risk, suspension of performance, exemption from liability, and preservation of the goods.

Part IV contains the final clauses relating to the administration issues of the CISG. Article 91 in particular deals with the adoption of the CISG. The CISG remained open for signature until 30 September 1981. It can be ratified, accepted and approved by all the states that signed before 1981, and all other states that did not sign by the due date above can accede to it at any time.³⁶

1.7. Conclusion

From the background of the CISG and the content of the convention itself, it seems the drafters of the CISG realised that there was a need for uniform law. The aim seems to have been to

³⁵ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 38.

³⁶ CISG Article 91.

address the problem of the multitude of contract law and principles in the international markets. Firstly, the CISG is said to have been drafted as an attempt to promote friendly relations between states by the adopting uniform rules to govern contracts for the international sale of goods.³⁷

In summary, the CISG only applies to contracts of goods where contracting parties have their places of business in two different states, and where either or both states are members of the CISG, or where one of the states is a member state to the CISG and the rules of private international law point to the application of the laws of that member state.³⁸ States have an option to opt out of the provision relating to private international law.³⁹ Furthermore, the CISG embraces the principle of party autonomy. The CISG provides the traders with options to opt in or out in the sense that the parties to any type of contract not specifically excluded by the CISG provisions can also choose to have the CISG applicable to them, even though the CISG would not apply to those parties in terms of the provisions of Article 1. Traders further have an option to exclude the application of the CISG, or alter some provisions which would ordinarily be applicable to them.⁴⁰

The CISG regulates only the formation of contracts of sale, and the rights and obligations of the traders arising from a contract. As discussed above, the CISG specifically excludes certain sales which are out of the scope of its application. In my opinion the drafters of the CISG wanted to regulate the transactions on the sale of goods without encroaching on subjects that are heavily regulated by mandatory laws. In many states, some or all areas excluded from the scope of application of the CISG are governed by special rules reflecting their special nature.⁴¹

³⁷ Whitlock & Abbey (2008) *Campbell Law Review*, 278.

³⁸ CISG Article 1.

³⁹ CISG Article 95.

⁴⁰ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

⁴¹ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

The drafters of the CISG have tried to stay away from introducing doctrines from certain legal systems or closely aligning the text with any legal system.⁴²

Does the CISG fully achieve the objectives it set out to achieve? Does South Africa have good reason to have abstained this long, or has it been merely an issue of prioritising other matters over the accession of the Convention as seen in countries like Japan?

This study will ascertain whether it is essential for South Africa to become party to this Convention. What will we gain as a nation by acceding to this Convention? Will the accession positively contribute to the development of our legal system and economy?

⁴² Eiselen (1999) SALJ, 351.

CHAPTER 2: ACCEPTANCE AND REJECTION OF THE CISG GLOBALLY

2.1. Introduction

Initially it was not clear whether the use of the CISG would become prevalent.⁴³ There were also some uncertainties as to how the CISG would be applied in practice.⁴⁴ In some countries the adoption of the Convention is just not seen as a matter of importance, be it because of poverty, war, or just that there are other issues that are seen to be of more economic importance than the adoption of the CISG. With reference to the few articles that have been written since the coming into effect of the CISG, this chapter will outline some of the reasons put forward by the current member states of the CISG for ratification/accession, and the reasons for abstinence put forward by those that are not member states.

Adoption in countries without a self-executing system might require a drastic change of municipal laws to implement the Convention, and thus align municipal laws. The exercise would require funds and other resources which some countries are just not willing to spend. According to Lord Hobhouse, only conventions which are proven to be essential for the needs of commercial society and are demonstrated to be fit to be enacted as a part of the municipal law should be ratified, adopted and implemented.⁴⁵

⁴³ Sono “Japan’s Accession to the CISG: The Asian Factor” (2008) *Pace International Law Review*, 105.

⁴⁴ Sono (2008) *Pace International Law Review*, 105.

⁴⁵ Hobhouse “International conventions and commercial law: the pursuit of uniformity” (1990) *Law Quarterly Review*, 535.

2.2. Abstinance

2.2.1 *United Kingdom*

The United Kingdom has not yet ratified the CISG. Maniruzzaman concludes in his practical comparison of contract law between three legal regimes that the reason why the United Kingdom has not ratified the CISG could perhaps be its pride in its longstanding common law legal imperialism, or in its long-treasured notion of the superiority of English law to anything else that could even challenge it.⁴⁶ In many international commercial disputes concerning the sale of goods, England is often chosen as the seat of litigation or arbitration for the international commercial disputes, and English law is chosen as the applicable law.⁴⁷ There is a fear that joining the CISG may diminish this advantage.⁴⁸

According to Moss, the shorter answer is that municipal governmental ministers do not see the ratification of the Convention as a legislative priority.⁴⁹ Maniruzzaman further states that,

“With the anticipated acceleration of globalisation and liberalisation movements in the near future, there will be a greater demand for the global harmonisation of commercial law.

He finds the insular attitude of the United Kingdom to the harmonisation phenomenon, in fact, regrettable.⁵⁰ Even today, 24 years after the CISG came into force, the United Kingdom has not adopted the convention.

⁴⁶ Maniruzzaman “Formation of International Sales Contracts : A Comparative Perspective” (2001) *International Business Lawyer*, 489.

⁴⁷ Sono (2008) *Pace International Law Review*, 106.

⁴⁸ Sono (2008) *Pace International Law Review*, 108.

⁴⁹ Moss “Why the United Kingdom has not ratified the CISG” (2005) *Journal of Law and Commerce*, 483.

Not only does the United Kingdom have a rich commercial law that most nations prefer to utilise in their international transactions, but it also has well-established commercial institutions.⁵¹ The United Kingdom thus has frequent involvement in international contracts and dispute resolutions. Due to this active involvement in international trade, one would have expected the United Kingdom to have been amongst the first to ratify the CISG. Linarelli states that a reasonable suspicion exists that the actual reason for the rejection is the fear that the CISG would detrimentally affect the already established powerful interests groups in the United Kingdom, namely, legal London.⁵²

A few members of the judiciary in the United Kingdom have already shared their views regarding the CISG. Lord Hobhouse points out that due to the fact that the CISG does not deal with certain aspects of the international sale of goods and contractual relationships comprehensively, recourse to the municipal laws will still be necessary to fill the lacuna.⁵³ People already prefer choosing English law as governing law, and London as the forum for their disputes.⁵⁴ Lord Hobhouse further argues that what the commercial community needs is certainty, and not multi-cultural compromise.⁵⁵ He strongly believes that international conventions are a multicultural compromise of different bodies of law, “which introduce certainty where no certainty existed before and which lack coherence and consistency”.⁵⁶

⁵⁰ Maniruzzaman “Formation of International Sales Contracts : A Comparative Perspective” (2001) *International Business Lawyer*, 489.

⁵¹ Hobhouse “International conventions and commercial law: the pursuit of uniformity” (1990) *Law Quarterly Review*, 534.

⁵² Linarelli “The Economics of Uniform Laws and Uniform Law Making” (2003) *Wayne Law Review*, 29.

⁵³ Hobhouse “International conventions and commercial law: the pursuit of uniformity” (1990) *Law Quarterly Review*, 532.

⁵⁴ Barry “The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?” (1993). Available at <http://www.cisg.law.Pace.edu/cisg/biblio/nicholas3.html>.

⁵⁵ Hobhouse “International conventions and commercial law: the pursuit of uniformity” (1990) *Law Quarterly Review*, 533.

⁵⁶ Hobhouse “International conventions and commercial law: the pursuit of uniformity” (1990) *Law Quarterly Review*, 533.

According to Barry in his 1993 journal article (The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation), Lord Hobhouse further believes that English law should reign supreme to international law, or should rather be used as an international standard of commercial law.⁵⁷ Due to this comfort zone that the United Kingdom is in, no one is really making the ratification a priority.

In 1991 Lord Justice Steyn took a different view to that of Lord Hobhouse.⁵⁸ He notes that the CISG presents a satisfactory compromise between opposing principles found in different legal systems, considering that there will never be an international convention that can ever completely satisfy all states.⁵⁹ He further highlights that if the United Kingdom does not ratify the CISG, its businessmen will be detrimentally affected in their international trade dealings as the use of the CISG becomes prevalent.⁶⁰ He states that the CISG bears the badge of neutrality, and it will become more and more popular among businessmen globally.⁶¹ Lord Steyn further cautioned that if the United Kingdom did not ratify the CISG at that stage in 1991, when he urged it to, commercial realities would eventually compel ratification later.⁶²

Other reasons mentioned are, *inter alia*, that the English law (as provided for in the English Sale of Goods Act 1979 Chapter 54) is seen to be better suited to cater for commodity sales contracts than the CISG.⁶³ The English lawyers consider some provisions of the CISG to be vague.⁶⁴ In the early stages of the CISG, there were not a lot of reported English cases on the provisions of the CISG as opposed to the existing cases under the Sale of Goods Act.⁶⁵

⁵⁷ Barry (1993) <http://www.cisg.law.Pace.edu/cisg/biblio/nicholas3.html>.

⁵⁸ Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?" (1991) *The Denning Law Journal* 131.

⁵⁹ Steyn (1991) *The Denning Law Journal*, 135.

⁶⁰ Steyn (1991) *The Denning Law Journal*, 135.

⁶¹ Steyn (1991) *The Denning Law Journal*, 135.

⁶² Steyn (1991) *The Denning Law Journal*, 135.

⁶³ Hofmann (2010) *Pace International Law Review*, 141.

⁶⁴ Hofmann (2010) *Pace International Law Review*, 141.

⁶⁵ Hofmann (2010) *Pace International Law Review*, 141.

Consequently the English lawyers were cautious about favouring the CISG without knowing how the English courts would apply and interpret the provisions of the CISG.⁶⁶

The general feeling is that the United Kingdom has not acceded due to its fear that the importance of common law of contract would be lessened, if not diminished all together,⁶⁷ and furthermore, that it could consequently result in the reduction of the number of cases that are referred to the United Kingdom.⁶⁸ However, in my opinion, growth and success come from taking that step into the unknown new territory. Is it really wise to be wary of any law that is not English law? Does this justify the rejection of rules that could possibly present a solution to international traders, and make their lives easier?

2.2.2 New Zealand and Australia

New Zealand and Australia, now member states to the CISG, are said to have opposed the adoption for various reasons which include, *inter alia*, that the CISG provided a less appropriate regime than the common law principles regulating cost, insurance, and freight export sales that they had in their respective legal systems.⁶⁹ On the 1st of October 1995 the CISG became effective in New Zealand.⁷⁰ Perhaps New Zealand realised that the CISG is not less appropriate after all. The reasons given for its adoption are discussed below.

2.2.3 Japan

Although now a member, Japan also abstained for a number of years. There was never an official rejection of the CISG by Japan; “Japan sent a delegation to represent it at the

⁶⁶ Hofmann (2010) *Pace International Law Review*, 141.

⁶⁷ Eiselen (1999) *SALJ*, 348.

⁶⁸ Eiselen (1999) *SALJ*, 348.

⁶⁹ Whitlock & Abbey (2008) *Campbell Law Review*, 836.

⁷⁰ Available at <http://www.cisg.law.Pace.edu/cisg/countries/cntries-New.html>.

discussions and was actively involved in the process of finalising the convention at UNCITRAL”.⁷¹ During the early stages of the development of the CISG, several steps were taken to move toward ratification.⁷² In 1989, the director of the Civil Affairs Bureau of the Ministry of Justice answered to the Secretary General of the United Nations that he was placing top priority upon the ratification of CISG.⁷³ One could ask, what took Japan so many years to finally decide to ratify the convention? The delay has been attributed to several reasons, amongst which the issue of priority ranked high. The country had other important matters aimed towards economic recovery to concentrate on.⁷⁴

Furthermore, there was a lack of willpower from the legal community, and a lack of foreseeability as to how the CISG would be applied and interpreted.⁷⁵ It was also not clear whether the use of the CISG would become prevalent.⁷⁶ There was also uncertainty as to how the CISG would be applied in practice.⁷⁷ In a nutshell, there was fear of the unknown new set of rules, and a lack of understanding of the text itself and its application.⁷⁸ There were few reported CISG cases in the world.⁷⁹ Furthermore, there was a lack of legal resources to guide the interpretation of CISG.⁸⁰ It was still in the early years of the CISG, and most states still had not become party to the convention and Japan was just not sure about how the CISG would be applied in practice.⁸¹

⁷¹ Kashiwagi “ Accession by Japan to the Vienna Sales Convention (CISG)” (2008) *Journal of Japanese Law*, 207.

⁷² Kashiwagi (2008) *Journal of Japanese Law*, 207.

⁷³ Kashiwagi (2008) *Journal of Japanese Law*, 207.

⁷⁴ Sono (2008) *Pace International Law Review*, 107.

⁷⁵ Kashiwagi (2008) *Journal of Japanese Law*, 208.

⁷⁶ Sono (2008) *Pace International Law Review*, 107.

⁷⁷ Sono (2008) *Pace International Law Review*, 107.

⁷⁸ Sono (2008) *Pace International Law Review*, 107.

⁷⁹ Kashiwagi (2008) *Journal of Japanese Law*, 208.

⁸⁰ Kashiwagi (2008) *Journal of Japanese Law*, 208.

⁸¹ Sono (2008) *Pace International Law Review*, 107.

On the other hand, legal staff members of large corporations in Japan and practicing lawyers in large law firms dealing with international business transactions did not show much interest in the accession to CISG for various reasons.⁸² It is said to be due to that they were unfamiliar with the contents of CISG itself.⁸³ It is also believed that it could have been that they were influenced by American lawyers, who believe that the Uniform Commercial Code is better than CISG, and thus thought it was better for them to opt out, just like American lawyers.⁸⁴ Legal work concerning the international sale of goods was rare, or almost non-existent; therefore the international sales law was easily ignored.⁸⁵ What would normally be international disputes would end up being domestic matters due to large corporations having subsidiaries in the export countries.⁸⁶ Consequently, the large Japanese trading organisations in the early 1990s did not feel there was a need for the CISG, let alone the need to learn more about it.⁸⁷ They were reluctant to spend money and other resources on learning about rules that they felt they did not need.⁸⁸

Sono argues that, “In the early 1990’s, the Japanese economy was struggling with the aftermath of the burst of the bubble economy.”⁸⁹ Government resources were rather dedicated to other issues of more importance; in particular, economic recovery.⁹⁰ The Convention just kept getting pushed to the bottom of the pile.

⁸² Kashiwagi (2008) *Journal of Japanese Law*, 212.

⁸³ Kashiwagi (2008) *Journal of Japanese Law*, 212.

⁸⁴ Kashiwagi (2008) *Journal of Japanese Law*, 212.

⁸⁵ Kashiwagi (2008) *Journal of Japanese Law*, 213.

⁸⁶ Kashiwagi (2008) *Journal of Japanese Law*, 213.

⁸⁷ Kashiwagi (2008) *Journal of Japanese Law*, 213.

⁸⁸ Sono (2008) *Pace International Law Review*, 107.

⁸⁹ Sono (2008) *Pace International Law Review*, 107.

⁹⁰ Sono (2008) *Pace International Law Review*, 105.

2.2.4 Brazil

Just like Japan, Brazil's lack of inertia with regard to acceding to the CISG is speculated to be due to Brazil not setting the adoption of the CISG as a foreign policy priority.⁹¹ Brazil participated actively in the preparation of the CISG.⁹² A fair question to ask is, what happened, and why hasn't Brazil adopted the CISG?

Grebler is of the opinion that it would be to Brazil's benefit to adopt the CISG.⁹³ He states that there are no major inconsistencies between the Brazilian New Civil Code (Código Civil [C.C.] Law n. 10.406 (Braz.)) provisions and the CISG.⁹⁴ Since the CISG does not regulate domestic trade of goods, Brazilians would not have to revoke or replace their internal rules in order to accommodate international legal practices.⁹⁵ He argues that nothing in the CISG rules seems to offend fundamental principles of national contract law so as to incur the repeal by the Brazilian legal community.⁹⁶ Thus far, none of the Brazilian scholars have given any formal criticism on the CISG.⁹⁷

Neto *et al.* warn that,

⁹¹ Dolganova & Lorenzen "The Brazilian Adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods" (2008) 3.3.
<http://www.cisg.law.Pace.edu/cisg/biblio/dolganova-lorenzen.html>

⁹² Neto *et al.* "Brazil and the accession to the 1980 United Nations convention on contracts for the international sale of goods (CISG): advantages and disadvantages" (2011)
<http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html>.

⁹³ Grebler "The convention on international sale of goods and Brazilian law: are differences irreconcilable?" (2005) *Journal of Law and Commerce*, 467.

⁹⁴ Grebler (2005) *Journal of Law and Commerce*, 467.

⁹⁵ Grebler (2005) *Journal of Law and Commerce*, 475.

⁹⁶ Grebler (2005) *Journal of Law and Commerce*, 475.

⁹⁷ Grebler (2005) *Journal of Law and Commerce*, 475.

“Legal integration is a fundamental stage of economic and social integration.”⁹⁸ Otherwise, Brazil will remain the land of worried and anxious people, waiting for opportunity.”⁹⁹

They speculate that the Brazilian government may not consider the legal framework for international sales as a priority for Brazilian foreign policy.¹⁰⁰ Grebler also notes that the Brazilian community is starting to see the need and importance of conformity to international legal standards in foreign trade, and are gradually accepting it.¹⁰¹ Thus far, Brazilian scholars that have written about the CISG have given very positive remarks.¹⁰² Neto *et al.* believe that the move to adopt the CISG by Brazil will be an important step towards wider economic and legal integration.¹⁰³

2.3. Adoption

2.3.1 Japan

Over the years the CISG has become an international, well-known instrument and a success. The number of member states is increasing. Consequently case law and the accessibility to the CISG legal resources have increased. The legal and business community has become more comfortable and familiar with the CISG.¹⁰⁴ Currently the CISG has a number of databases/electronic libraries where one can easily access cases and other scholastic

⁹⁸ Neto *et al.* (2011) [Http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html](http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html).

⁹⁹ Neto *et al.* (2011) [Http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html](http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html).

¹⁰⁰ Grebler (2005) *Journal of Law and Commerce*, 476

¹⁰¹ Grebler (2005) *Journal of Law and Commerce*, 476.

¹⁰² Grebler (2005) *Journal of Law and Commerce*, 475.

¹⁰³ Neto *et al.* (2011) [Http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html](http://cisgw3.law.Pace.edu/cisg/biblio/neto-radael-lobes.html).

¹⁰⁴ Sono (2008) *Pace International Law Review*, 109.

material.¹⁰⁵ Taking a glance at the Pace website, many member countries are recording cases and more and more professors and lawyers have developed a keen interest in writing and publishing articles on CISG.¹⁰⁶ The CISG was gradually being absorbed and integrated into Japanese law, and had started influencing the interpretation of the Japanese Civil Code (89 of 1896). Fifteen years later, in 2007, the Japanese legislative agenda was finally uncluttered, and Japan became the 71st state to ratify the Convention.¹⁰⁷

Many foreign businessmen and lawyers are strongly opposed to accepting Japanese law as the governing law.¹⁰⁸ With the growing international trade, the traders prefer rules that they are familiar with and understand fully. Thus CISG has become an acceptable compromise as opposed to individual municipal laws.

2.3.2 New Zealand

In 1995 New Zealand became a new member state to the CISG.¹⁰⁹ Why did the country change its decision to adopt the CISG? The New Zealand Law Commission acknowledged that the unanimous support and acceptance of the CISG, including the widely representative diplomatic conference, highlighted that the CISG is indeed achieving the facilitation purpose for which it was enacted.¹¹⁰ The Commission went further to state that,

¹⁰⁵ Available at <http://www.cisg.law.Pace.edu/> , www.cisg-online.ch/ , see also http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

¹⁰⁶ Available at <http://www.cisg.law.Pace.edu/cisg/text/casedit.html>.

¹⁰⁷ Dolganova & Lorenzen (2008) <http://www.cisg.law.Pace.edu/cisg/biblio/dolganova-lorenzen.html>. 4.1.

¹⁰⁸ Kashiwagi (2008) *Journal of Japanese Law*, 210.

¹⁰⁹ Available at <http://www.cisg.law.Pace.edu/cisg/countries/cntries-New.html>.

¹¹⁰ New Zealand Law Commission “The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed acceptance” Report (1992). <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

*“The substantive rules are acceptable to and accepted by civil and common law jurisdictions, developed and developing countries, capitalist and socialist economies, and exporters and importers of agriculture , mineral primary products and manufacturing of goods”.*¹¹¹

The New Zealand Law Commission has further mentioned the following as its reasons for accession: “The Contractual remedies of the CISG are extended beyond those normally available under New Zealand law”.¹¹² “The CISG is clear, simple and practical”,¹¹³ “it is free of legal shorthand, free of complicated legal theory and easy for business people to understand”.¹¹⁴

The majority of New Zealand’s trade partners have already accepted the CISG. The CISG was already applicable to contracts of sale for New Zealanders, whenever the second ground for the application of Art 1 (1) (b) of the CISG become applicable. In that case the CISG will apply whenever the rules of private international law point to the law of a contracting state as the governing law of the contract.¹¹⁵

¹¹¹ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹² New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹³ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹⁴ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹⁵ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

The CISG “should also reduce the costs and uncertainties for New Zealand businesses engaged in international commerce”.¹¹⁶ And lastly, the CISG will afford bargaining powers to small New Zealand businesses when they trade with foreign businesses bigger than they are.¹¹⁷

In my opinion, New Zealand also clearly realised the importance of the CISG, the value that it brought to the states that were already members, and more importantly, the benefits that can derive from its application and adoption.

2.3.3 Vietnam

Vietnam is not yet a member state to the CISG. Professor Sono of Hokkaido University in Japan attests that it will be in the interests of Vietnam to become a member state to the CISG.¹¹⁸ He states that the accession of Vietnam will be beneficial for enterprises in Vietnam,¹¹⁹ as local businesses will benefit immensely. He further argues that it would reduce the number and complication of sale of goods disputes with foreign partners. It would help them reduce the legal risks as most of them only consult a lawyer once a dispute arises. It would also reduce the cost of doing business and consequently give them an added advantage that they would not otherwise have had when using any other legal system. He further states that in addition, Vietnam’s participation in CISG will reduce costs and time needed to negotiate contracts, and reduce the difficulty of negotiating aspects that fall within the scope of the CISG.¹²⁰

¹¹⁶ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹⁷ New Zealand Law Commission Report (1992) Available at <http://www.cisg.law.Pace.edu/cisg/wais/db/articles/newz2.html>.

¹¹⁸ Available at <http://wtocenter.vn/vien-convention/vietnam-advised-join-international-trade-convention>.

¹¹⁹ Available at <http://wtocenter.vn/vien-convention/vietnam-advised-join-international-trade-convention>.

¹²⁰ Available at <http://wtocenter.vn/vien-convention/vietnam-advised-join-international-trade-convention>.

2.4. Conclusion

From the analysis above, it appears that states have different reasons for not adopting the CISG. Some countries believe that their domestic legal system is better suited to regulate international trade than the CISG. These states are unwilling to compromise on their long standing legal principles/rules. There is a fear that joining the CISG may diminish the advantage they have as the forum and legal system of choice. The CISG only regulates certain aspects of a contract, leaving other aspects to domestic law. In the beginning, before the CISG gained momentum, there was a lack of legal resources for the CISG and most people were not only unsure of what to expect in the future but also how to apply it in practice.

Some states are merely just preoccupied with other issues that are regarded as more important than international sales law, while some just lack the willpower to start the adoption process. Negative influences from other states that have not adopted the CISG are also stated as a contributing factor. Some are just not familiar with the contents of CISG itself. Certain countries are reluctant to spend money and other resources on learning about rules that they feel they do not need. For some that have taken the time to look at the CISG, they perceive some provisions of the CISG as vague, uncertain, and ill-equipped to regulate trade.

Some countries never really objected to the CISG. Most of them just never got around to focusing on the adoption. Some countries just prefer the legal principles that they know and have spent a few years using. On the other hand, other states seem to adopt it for various reasons, depending on the needs of their economic society. Over the years the CISG has become a success and a well-known instrument internationally. More and more states saw the need to join, and the number of member states kept increasing. Consequently, case law and the accessibility to the CISG legal resources increased. The legal and business community

became more comfortable and familiar with the CISG.¹²¹ The legislative agenda thus becomes uncluttered.

More and more domestic contract laws were rejected by foreign businesses. With the growing international trade, traders prefer legal principles that they are familiar with and understand fully. CISG has become an acceptable compromise. The unanimous support and acceptance of the CISG motivated more states to adopt the CISG. The substantive rules are acceptable to, and accepted by, all different jurisdictions, economies and industries.

The CISG is already applicable to contracts of sale of nationals, through application of Art 1 (1) (b) of the CISG. It reduces the costs, time and uncertainties for businesses engaged in international commerce. It would help them reduce the overall legal risks that the businesses are exposed to when engaging in international trade. The CISG also levels the contractual playing field; it affords smaller businesses bargaining powers that they would otherwise not have.

Arguably, unlike most municipal legal systems, the CISG was drafted to be fair to all parties in a contract. Neither the interests of buyer nor those of the seller have been privileged.¹²²

“It is well known that some courts have parochial tendencies when it comes to the application of their own legal regime.”¹²³

Choosing the CISG should even out the playing field, consequently fostering the growth of trade, and fairness. The importance of the CISG is seen by more and more people.

¹²¹ Sono (2008) *Pace International Law Review*, 109.

¹²² Dolganova & Lorenzen “The Brazilian Adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods” (2008) 5.1.1.

¹²³ Laver “To Use, Or Not To Use” (1993) *International Business Lawyer*, 13.

*“This is not a case of uniformity for the sake of uniformity; rather the world trading community has made the practical judgment that this uniform law will facilitate international trade.”*¹²⁴

It is “...sometimes ignorance, sometimes fear, sometimes a reluctance to change existing patterns and be it for lack of time and resources to concentrate on something new”¹²⁵ that in most situations leads to the exclusion of the CISG. Thus far, I am yet to read about a state that has given sound reasons for its abstinence. Countries such as New Zealand, Japan and Vietnam, along with other member states, have clearly realised the benefits that they could derive by joining the road to uniformity.

¹²⁴ Lehmann (2006) *SA Merc LJ*, 319.

¹²⁵ Brödermann, “The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)” (2007) 3.

CHAPTER 3: CASE FOR THE ADOPTION OF THE CISG IN SOUTH AFRICA

3.1. Introduction

With reference to the few articles that have been written since the coming into effect of the CISG, this chapter will critically analyse the arguments that have been put forward in support of the adoption of the CISG by South Africa. Professor Sieg Eiselen has made a significant contribution to the CISG legal research. In particular, he has written articles relating to the ratification of the CISG by South Africa, the compatibility of South African sales law with the CISG, and the impact of CISG in South Africa. In this chapter I will only focus on a few of the reasons he has put forward as the basis for South Africa to accede to the CISG.

3.2. Applicable law

Eiselen avers that by acceding to the CISG, the number of foreign laws that South African law has to contend with in the international market will significantly be reduced,¹²⁶ specifically when the CISG applies the conflict rules that would normally come into operation in international contracts are excluded.¹²⁷ In cases where the CISG is not applicable in terms of Art (1)(a), and there is no choice of law clause by the parties, the applicable law will be determined in terms of rules of private international law/conflict of law rules.¹²⁸ I am of the opinion that acceding to the CISG will indeed reduce the number of legal systems that South African law will have to compete with as the applicable law of the contract.

¹²⁶ Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (CISG) In South Africa” (1999) *SALJ*, 342.

¹²⁷ Eiselen (1999) *SALJ*, 341.

¹²⁸ Booysen, 574.

3.3. CISG in South Africa

Art 1 (1) (b) will be applicable in instances where conflict of law rules point to the application of a contracting state.¹²⁹ Should the parties have failed to select the applicable legal system, the rules of private international law will apply to determine the applicable legal system. The CISG will accordingly be applicable should the rules of private international law point to the law of one of the contracting states as the applicable legal system.¹³⁰

This means that South African cross-border transactions are already exposed to the application of the CISG. South African traders should accordingly already be *au fait* with the CISG.¹³¹ According to Eiselen, this fact is ignored, and he avers that the introduction of the CISG in South Africa will improve knowledge and awareness on the CISG.¹³² We currently have 78 states as signatories to the CISG. This membership of 78 does not only include the most active states in international trade but also the majority of South Africa's biggest trade partners.¹³³ This means Eiselen is correct in saying that South Africa is already exposed to the CISG. The CISG is already being applied to our international transactions, and we should therefore be acquainted with it.

3.4. Suitable international trade rules

The principles of contract law in South African law are rooted in Roman Dutch law. These principles evolved over time as they are interpreted and applied to cases in practice. However, the South African Law of Contract as it stands today is not tailor-made for international trade.

¹²⁹ CISG Article 1 (1) (b).

¹³⁰ CISG Article 1 (1) (b).

¹³¹ Eiselen (1999) SALJ, 343.

¹³² Eiselen (1999) SALJ, 343.

¹³³ Available at http://en.wikipedia.org/wiki/Foreign_trade_of_South_Africa.

CISG is modern and has been drafted by people with experience, not only in international trade law but also in different laws of sale.

Different sales laws were studied and the best appropriate principles for international trade were therefore taken into the CISG.¹³⁴ This makes the CISG more suited to regulate international trade than South African sales law.

3.5. Certainty

Eiselen argues that acceding to the CISG will provide greater certainty in international trade and relations.¹³⁵ The codified nature of the rules, the simplicity of their formulation, the exclusion of foreign law, and the availability of sources will no doubt increase legal certainty.¹³⁶ Currently Africa is seen as the “Dark Continent”. Most of the time people from other continents do not necessarily accept our systems or believe in the adequacy thereof. Incorporating the CISG into our law of sales will definitely boost certainty in our international trade and relations.

3.6. Diverse legal systems

The difference in legal systems is seen to be one of the major restrictions limiting involvement in international trade.¹³⁷ International businessmen are exposed to different legal systems with each border they cross to transact. In the absence of uniform law, they will have to be *au fait* with each and every one of those legal systems.¹³⁸ Not only will it be time consuming and costly,¹³⁹ but it will also not be practical. According to Eiselen, the acceptance of the CISG as

¹³⁴ Eiselen (1999) *SALJ*, 343.

¹³⁵ Eiselen (1999) *SALJ*, 344.

¹³⁶ Eiselen (1999) *SALJ*, 344.

¹³⁷ Eiselen (1999) *SALJ*, 348.

¹³⁸ Eiselen (1999) *SALJ*, 349.

¹³⁹ Eiselen (1999) *SALJ*, 349.

the legal foundation for all international contracts of sale will improve legal certainty, and reduce transaction cost.¹⁴⁰

I do agree that it will be time consuming and costly to try to acquaint oneself with each and every legal system. One can only imagine how many contracts a multinational trading company concludes in a day. Having a unified law will not only make it easier to conclude international contracts, but will shorten the time for negotiations, which will in turn shorten lead times on items bought, and overall, improve international trade. By adopting the CISG, South Africa will be reducing the number of instances that South African traders need to deal with different foreign contract law.¹⁴¹

The field of international trade requires a sophisticated set of rules due to its nature and complexity. Having numerous legal systems only adds to the multitude of issues that traders need to deal with.¹⁴² According to Eiselen, the CISG is an answer to this problem. He states that the CISG is drafted in a fairly simple form, but yet is complex enough to comprehensively regulate international trade.¹⁴³ Eliminating the headache of dealing with myriad legal systems will surely boost the international trade environment. The CISG is drafted with an international trade businessman in mind; simple but yet comprehensive enough on all issues that it covers. Part II of the CISG deals with issues relating to the formation of the contract,¹⁴⁴ and Part III deals with most issues relating to the sale of the goods; from the rights and obligations of each party to their remedies.¹⁴⁵

¹⁴⁰ Eiselen (1999) *SALJ*, 349.

¹⁴¹ Eiselen (1999) *SALJ*, 349.

¹⁴² Eiselen (1999) *SALJ*, 339.

¹⁴³ Eiselen (1999) *SALJ*, 340.

¹⁴⁴ CISG Article 14-24.

¹⁴⁵ CISG Article 25-88.

3.7. Uniform law

Due to globalisation and the liberalisation of South African markets, South Africans have started trading with parties all over the world.¹⁴⁶ Eiselen sees the instability, or rather non-existence, of international sales law as a non-tariff barrier to trade in states that are not part of any unified law.¹⁴⁷ He argues that this non-tariff barrier presents a problem for South Africans when engaging with others in the international market.¹⁴⁸ Does the absence of unified law really prevent or hinder trade *per se*? Due to the fact that the parties are still able to trade with each other, the lack of unified law should not be seen as a barrier, but rather as a hurdle. Unified law just makes it easier to trade. It makes it less cumbersome.

3.8. Terms and conditions

Traders can draft/redraft their standard terms and conditions to make provision for their requirements in line with the CISG.¹⁴⁹ Eiselen states that using the CISG as a framework for standard terms and conditions will provide traders with a certain degree of certainty/peace of mind, knowing their contractual terms and conditions will fit in with the applicable legal system.¹⁵⁰ It is very difficult to try and speculate about all the possibilities in order to cater for all eventualities.¹⁵¹

Part III of the CISG sets out not all, but most, issues that are inherent in an international sales contract. The CISG could also be used as a checklist of issues that parties need to cover in an

¹⁴⁶ Eiselen (1999) *SALJ*, 346.

¹⁴⁷ Eiselen (1999) *SALJ*, 346.

¹⁴⁸ Eiselen (1999) *SALJ*, 346.

¹⁴⁹ Eiselen (1999) *SALJ*, 349.

¹⁵⁰ Eiselen (1999) *SALJ*, 349.

¹⁵¹ Eiselen (1999) *SALJ*, 349.

international trade contract negotiation.¹⁵² It is tailor-made to address legal international trade issues.

3.9. Accessibility

At this stage most countries do not have a centralised legal resource hub on the applicable contract law principles with case law, opinions and other relevant material easily accessible. Eiselen argues that an international trader will have to conduct thorough research of the law to find the applicable provisions.¹⁵³ The text of the CISG, and all legal material relating to it, is easily accessible online. All applicable provisions can easily be found in one location. It is usually very difficult for a foreign trader to access and understand foreign legal systems, and thus foreign traders are more likely to accept the CISG as the applicable law rather than municipal law of the other party.

3.10. Language

The text of the CISG is available in more than 20 different languages, six of which are official texts (Arabic, English, Spanish, Russian, Chinese and French).¹⁵⁴ The six official texts are equally authoritative and used to translate text into other languages.¹⁵⁵ It could be said that people from different cultural backgrounds and with different languages have a common understanding of what their rights and obligations under the CISG fully entail.¹⁵⁶ Most countries rarely have the law written in more than two languages. South Africa only has the law written in English and Afrikaans. This is an advantage that one would not have if the contract is subject to any other domestic legal system. In most cross-border transactions at least one of the parties

¹⁵² Eiselen (1999) *SALJ*, 351.

¹⁵³ Eiselen (1999) *SALJ*, 349.

¹⁵⁴ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

¹⁵⁵ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

¹⁵⁶ Eiselen (1999) *SALJ*, 351.

would be a foreigner, exposed to foreign law that he does not fully understand, or even worse, is unable to read the language in which the law is written.

3.11. Party autonomy

3.11.1 Altering provisions

Furthermore, Eiselen mentions that due to the principle of party autonomy embraced by the CISG, parties can choose which provisions will be applicable to their transactions and they can also modify provisions as they wish.¹⁵⁷ They can supplement their agreements to cater for all known shortcomings of the CISG.¹⁵⁸ CISG could be used as a base, and then they can modify the provisions accordingly to suit their specific needs.¹⁵⁹ The CISG can also be used as a fall-back provision to fill the gaps in areas where parties failed to provide.¹⁶⁰ In actual fact, the CISG seems to be an instrument to lighten the burden on the trader's shoulders, and give them support in cases where they might fail.

3.11.2 Excluding the CISG

As part of the concept of party autonomy, the parties are afforded the freedom of excluding the CISG altogether should they wish not to have it applicable to their transaction.¹⁶¹ However, thus far, the CISG has been excluded purely because of ignorance rather than the good basis Eiselen argues.¹⁶² It is apparent from this provision that parties are given leeway to design their

¹⁵⁷ Eiselen (1999) *SALJ*, 350.

¹⁵⁸ Eiselen (1999) *SALJ*, 351.

¹⁵⁹ Eiselen (1999) *SALJ*, 350.

¹⁶⁰ Eiselen (1999) *SALJ*, 350.

¹⁶¹ Eiselen (1999) *SALJ*, 351.

¹⁶² Eiselen (1999) *SALJ*, 351.

contracts as they wish. Even when the state has accepted the CISG, the traders are still given a chance to opt out completely, or from just some of the provisions. Therefore, by accepting the CISG, states are rather giving traders more options than deciding for them.

3.12. Bargaining powers

CISG provides a good basis for weaker parties to negotiate. The CISG is well known to be a neutral instrument.¹⁶³ It provides a legal basis for a neutral and well balanced transaction.¹⁶⁴ Therefore a weaker and/or inexperienced party could use the CISG as a benchmark for fairness.¹⁶⁵ It is a good starting point for fair and neutral negotiations. It is also often an acceptable solution in difficult negotiations due to the fact that it is considered neutral to both parties.¹⁶⁶ South Africa is an emerging economy, with the majority of its traders being substantially inexperienced with regard to international markets. Having the CISG at their disposal will surely help South African traders to a great degree.

3.13. Simplicity

According to Eiselen, the CISG is framed in a non-technical manner with businessmen in mind.¹⁶⁷ The normal day-to-day businessmen are not lawyers. Therefore they need a document that could be easily understood; something written in layman's terms, and a document that is free from doctrine and national characteristics. International traders need a document which can be easily understood by the businessmen without having to refer it to a lawyer for clarification. The CISG is more of a business document than a purely legal

¹⁶³ Eiselen (1999) *SALJ*, 350.

¹⁶⁴ Eiselen (1999) *SALJ*, 350.

¹⁶⁵ Eiselen (1999) *SALJ*, 350.

¹⁶⁶ Eiselen (1999) *SALJ*, 350.

¹⁶⁷ Eiselen (1999) *SALJ*, 351.

document; it is not based on any particular national principles or practice.¹⁶⁸ It is tailored to be user-friendly for non-legal traders. Unlike most domestic legal systems, the CISG does not include much legal jargon; it is straight forward and not a lengthy document like most legal texts.

3.14. International trade practices and usage

The CISG is drafted to complement and accommodate international trade practices and usage.¹⁶⁹ To this end the CISG has been accepted by different organisations in trade and industry.¹⁷⁰ Most established international traders conduct their daily business in accordance with established international trade practices and usage. Having the applicable law that complements these principles would no doubt be an added advantage for these traders. There is no guarantee that applicable domestic legal systems will be consistent with international trade and usage. The CISG supports and complements the current trade practices and usages to complete the transactional picture.¹⁷¹ In my opinion, trade practice and usage are the cornerstones of international trade. Having applicable rules that complement these trade practices and customs would no doubt make a significant difference.

3.15. Developing countries

Developing and developed countries were both well represented.¹⁷² Eiselen notes that South Africa itself did not participate in the work of the United Nations at that stage due to the phase that the country was going through at that time.¹⁷³ He argues that there is little doubt that we

¹⁶⁸ Eiselen (1999) *SALJ*, 351.

¹⁶⁹ Eiselen (1999) *SALJ*, 352.

¹⁷⁰ Eiselen (1999) *SALJ*, 352.

¹⁷¹ Eiselen (1999) *SALJ*, 352.

¹⁷² Eiselen (1999) *SALJ*, 354.

¹⁷³ Eiselen (1999) *SALJ*, 354.

would have participated if that were not the case at the time.¹⁷⁴ Even some countries closer to home in Africa (Lesotho and Zambia) participated and represented developing countries.¹⁷⁵ Therefore South Africa can rest assured that the concerns of emerging world markets that trade internationally have been addressed. Eiselen calls for the support of United Nations initiatives that are worthwhile, such as the CISG. He urges the country to evaluate such projects and endeavour, in the light of its internal policies, to support them accordingly.¹⁷⁶

3.16. Success of the CISG

A significant number of countries have acceded to the CISG worldwide, and the membership keeps growing.¹⁷⁷ The fact that many countries are becoming members should, of course, not be the sole reason for South Africa to follow suit.¹⁷⁸ I personally do not believe that economic giants such as the United State, China and others would sign a document that did not make sense nor make a significant contribution to the industry. There must be some merit in their decision. Be that as it may, South Africa should indeed still make its own policy decisions based on the country's needs and vision.

3.17. African leader

South Africa is considered one of the economic powerhouses of Africa.¹⁷⁹ That in a way gives it a responsibility within the region.¹⁸⁰ We should not expect the African solution to come from the

¹⁷⁴ Eiselen (1999) *SALJ*, 323.

¹⁷⁵ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 34.

¹⁷⁶ Eiselen (1999) *SALJ*, 354.

¹⁷⁷ Eiselen (1999) *SALJ*, 354.

¹⁷⁸ Eiselen (1999) *SALJ*, 354.

¹⁷⁹ Eiselen (1999) *SALJ*, 355.

¹⁸⁰ Eiselen (1999) *SALJ*, 324.

outside.¹⁸¹ In my opinion Africa needs to stop waiting for the knight from the west to come and rescue it; we need an African leader to lead African states. With the two CISG predecessors, most countries waited for the US to lead them, which is pretty much what is suspected to be the case in Africa with regard to the CISG. African countries are waiting for South African to take that step.

3.18. Conclusion

The CISG seems to be the answer to each and every international trader's daily problems. Drafting terms and conditions and hoping they fit in with the legal system applicable can be very frustrating. One will never be assured that the contract is watertight. This is a situation no businessman would like to see himself in. The reality is, without uniform law, this is the true state of affairs.

Furthermore, the CISG addresses one of the significant international trade problems that most African states are currently facing. The continent is currently viewed as a "Dark Continent". Africa is seen as a jungle where no real laws exist; inexperienced and underdeveloped. Practically speaking, looking at all the advantages above, it makes no sense for an African state not to become part of the CISG. African states would most likely transact with big developed strong parties who would most likely try to dictate conditions to them. With the CISG as their basis, they would at least have something to fall back on and negotiate their terms accordingly. Eiselen makes a strong case for adoption; however, the disadvantages of ratifying the convention must also be taken into consideration.

¹⁸¹ Eiselen (1999) *SALJ*, 324.

CHAPTER 4: CASE AGAINST THE ADOPTION OF THE CISG IN SOUTH AFRICA

4.1. Introduction

Since the coming into effect of the CISG, few scholars have researched and commented on the case against the adoption of the CISG. As mentioned in Chapter 3, Professor Sieg Eiselen has made a significant contribution to the CISG legal research and resources. In particular, he has written articles relating to the ratification of the CISG by South Africa, the compatibility of South African sales law with the CISG, and the impact of the CISG in South Africa. Karin Lehman has also made her mark on the subject. Contrary to Eiselen's arguments supporting the adoption of the CISG, Lehman has argued against the adoption of the CISG. In this chapter I will critically analyse why her arguments in this regard should be rejected.

4.2. Acceptable compromise

Eiselen summaries the criticism against the adoption of the CISG as follows.¹⁸² The drafters of the CISG attempted to cater for all participants, rather than dealing with the main issues that divide the different legal systems, and adopts principles that are more suited for international sales law.¹⁸³ Most believe the CISG is rather an acceptable compromise than a sound body of law.¹⁸⁴ Due to this attempt to satisfy all parties around the table, the CISG appears more unifying than it actually is.¹⁸⁵ Authur Rosette argues that the CISG has no underlying principles; the drafters simply imported different rules from different legal systems which were at the time

¹⁸² Eiselen (1999 *SALJ*, 357.

¹⁸³ Eiselen (1999 *SALJ*, 357.

¹⁸⁴ Eiselen (1999 *SALJ*, 357.

¹⁸⁵ Eiselen (1999 *SALJ*, 357.

acceptable to them.¹⁸⁶ This resulted in a conflicting, non-coherent text.¹⁸⁷ In short, he avers that it does not address the differences, and where there was disagreement the compromise was achieved by finding a new rule that is politically acceptable to everyone around the table without necessarily ascertaining or understanding the meaning of the new term.¹⁸⁸ Was it really a pure uncalculated compromise without substance or reason? Marlene Wethmar-Lemmer agrees that the CISG represents a compromise between different legal systems; however she further states that that it would have been rather difficult, if not impossible, to strike a balance between achieving complete uniformity and getting everyone to agree on all legal principles concerning contracts for the international sale of goods.¹⁸⁹

4.3. Foreign formulations

It has been argued firstly, that the CISG uses foreign language and therefore has no clearly defined meaning, and secondly, that it is too wide and inexact and therefore leads to legal uncertainty.¹⁹⁰ Lavers argues that the CISG is drafted in a form that fosters a fair balance between certainty and flexibility.¹⁹¹ The CISG is aligned with international trade practices, rather than municipal law *per se*.¹⁹²

¹⁸⁶ Rosette “Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods” (1984) *Ohio State Law Journal*, 270.

¹⁸⁷ Rosette (1984) *Ohio State Law Journal*, 270.

¹⁸⁸ Rosette (1984) *Ohio State Law Journal*, 270.

¹⁸⁹ Wethmar-Lemmer “The Vienna Sales Convention And Gap-Filling” (2012) *Tydskrif vir die Suid Afrikaanse Regs/ Journal of South African Law* (TSAR) 274-5.

¹⁹⁰ Eiselen (1999) *SALJ*, 359.

¹⁹¹ Lavers “CISG: To use, or not to use?” (1993) *International Business Lawyer*, 14.

¹⁹² Eiselen (1999) *SALJ*, 352.

4.4. Static and unchangeable monument

Rosette states that the CISG does not provide for change, amendment or modification of its provisions.¹⁹³ He states that due to this problem, the CISG is ill-equipped to deal with new challenges that might arise in the future.¹⁹⁴ The CISG is drafted to complement and accommodate international trade practices and usage.¹⁹⁵ In this way the interpretation and the application of the CISG will undoubtedly keep evolving as international trade practices and usages keep changing.

Furthermore, according to Wethmar-Lemmer, the drafters of the CISG realised that international trade is a growing industry; therefore the rules regulating it need to be able to evolve accordingly.¹⁹⁶ Article 7(2), a “gap-filling provision”, makes a provision for the adjustment of the CISG to cater for new developments not foreseen by its drafters.¹⁹⁷ According to Schlechtriem as quoted in Wethmar-Lemmer (*The Vienna Sales Convention And Gap-Filling*), the CISG is based on the knowledge and experience that the drafters had in 1980.¹⁹⁸ The drafters could not have foreseen the new technical and economic developments that we have today.¹⁹⁹ However, Wethmar-Lemmer argues that Article 7(2) becomes the instrument of adjustment for the CISG to address the new developments.²⁰⁰

¹⁹³ Rosette (1984) *Ohio State Law Journal*, 294.

¹⁹⁴ Rosette (1984) *Ohio State Law Journal*, 294.

¹⁹⁵ Eiselen (1999) *SALJ*, 352.

¹⁹⁶ Wethmar-Lemmer (2012) *TSAR*, 275.

¹⁹⁷ Wethmar-Lemmer (2012) *TSAR*, 274-275.

¹⁹⁸ Wethmar-Lemmer (2012) *TSAR*, 274-275.

¹⁹⁹ Wethmar-Lemmer (2012) *TSAR*, 274-275.

²⁰⁰ Wethmar-Lemmer (2012) *TSAR*, 274-275.

4.5. Multitude of languages

The text of the CISG itself is available in six different languages which are predominantly used in the biggest trade blocks in the world. All six versions are equally authentic, and any of these texts can be used for translation into any other language.²⁰¹ According to John O Honnold, as quoted by Rosette, the integrity of the CISG is endangered by a multitude of languages and interpretational approaches.²⁰²

Eiselen adds that the success of the CISG has always been seen to be highly dependent on the uniform interpretation and application of the text.²⁰³ Article 7 of the CISG states that in the interpretation of the CISG, its international character must be taken into consideration in the endeavour to promote uniformity. I concur; practically it will be difficult to interpret and apply the CISG uniformly throughout the world. However, if its purpose and object is respected and interpreted to promote uniformity, a certain degree of uniformity will indeed be achieved. It is important that we take into consideration that the CISG will be applied in an international trade globally. We have different nations, with different languages participating in international trade. The rules that will be the closest to effectively regulating international trade have to be able to be understood by as many traders as possible.

There is a huge concern that with these versions of the CISG in different languages, the lack of clear definitions and the vagueness of many terms, it would be very difficult for courts with very different interpretational styles and cultures to interpret and develop the CISG uniformly.²⁰⁴ In the beginning when the success of the CISG was still in doubt, this argument could perhaps hold water. There have been numerous easily accessible cases, journal articles and other

²⁰¹ Article 101 (2) CISG.

²⁰² Rosette (1984) *Ohio State Law Journal*, 302, footnote 128.

²⁰³ Eiselen (1999) *SALJ*, 361.

²⁰⁴ Eiselen (1999) *SALJ*, 361.

scholarly materials written in different languages ever since.²⁰⁵ Furthermore, most international trade disputes are usually settled through arbitration, which does not apply strict rules of law on interpretation. I am of the opinion that it is surely far better to have the same text in different languages than to have none at all. It is common knowledge that international trade is conducted in a diverse community. If there are ever rules that come close to catering for the whole international community, they have to be in different languages catering for the diverse community.

4.6. Legal certainty

Other criticisms of the CISG are that the terms are new, unique, too vague, and wide, and as a result the CISG is complicated and requires clarity.²⁰⁶ The flexible formulation leads to legal indeterminacy, which makes it difficult to predict the outcomes of pending disputes.²⁰⁷ As flexible as the CISG is, the courts and arbitral tribunals are urged to observe the international character of the CISG, and accordingly strive to promote uniformity in its application and interpretation.²⁰⁸

In 1996 the Del Duca brothers reviewed a few reported cases on the CISG and they found no significant conflicts between interpretations of the CISG in different forums.²⁰⁹ The courts in different states seemed to indeed strive to apply and interpret the CISG in a consistent manner.²¹⁰ As time goes by there will be few conflicting interpretations here and there in different states. However, Eiselen argues that the lack of uniformity in CISG decided cases

²⁰⁵ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

²⁰⁶ Eiselen (1999) *SALJ*, 362.

²⁰⁷ Eiselen (1999) *SALJ*, 362.

²⁰⁸ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 36.

²⁰⁹ Del Duca & Del Duca "Practice under the convention on the international sale of goods (CISG). A primer for attorneys and international traders part II." (1996) *Uniform code LF*, 158.

²¹⁰ Del Duca & Del Duca (1996) *Uniform code LF*, 158.

should not be a source of concern unless it becomes so widespread that no pattern that supports the general trend toward unification can be determined.²¹¹

4.7. Irrelevance

Lord Goff, as quoted by Eiselen in 1999, expressed much scepticism about the necessity of unification measures such as the CISG.²¹² The CISG covers the subject matter that is already mostly regulated by standard terms, and those terms were more appropriate for international trade.²¹³ Traders in these fields would be more reluctant to give up the terms they are familiar with for the CISG which is new and untested.²¹⁴ However, the CISG was not drafted to replace or do away with the already established/standardised trade terms. Usages agreed to by the parties, or those used in that particular industry, are still binding on the parties.²¹⁵

The CISG supports and complements the current trade practices and usages to complete the transactional picture.²¹⁶ The CISG should be interpreted in harmony with the already established trade practices and usages. The CISG is drafted to complement and accommodate international trade practices and usage.²¹⁷ Furthermore, according to Article 7(2) general principles, practices or usages of the industry can be used to settle matters that are not expressly settled by the CISG itself.²¹⁸ According to Article 7(1) of the CISG, when interpreting the CISG, regard must be had to the observance of good faith in international trade.

²¹¹ Eiselen (1999) *SALJ*, 341.

²¹² Eiselen (1999) *SALJ*, 363.

²¹³ Eiselen (1999) *SALJ*, 363.

²¹⁴ Eiselen (1999) *SALJ*, 363.

²¹⁵ CISG Explanatory notes 36.

²¹⁶ Eiselen (1999) *SALJ*, 352.

²¹⁷ Eiselen (1999) *SALJ*, 352.

²¹⁸ Wethmar-Lemmer (2012) *TSAR*, 274.

Schlechtriem states that the observance of good faith has to be analysed by taking into account trade practices and standard forms.²¹⁹

4.8. Developing countries

The overwhelming majority of developing countries are not members of the CISG.²²⁰ Could this be due to the fact that the majority of the African countries and other developing countries worldwide have far more pressing issues to focus their resources on? Developing countries have core policy issues to deal with, and the little funds that they have are rather used for their survival. The truth of the matter is that emerging markets are desperate for exports to first world markets; as a result they end up accepting whatever legal terms the other party is proposing. In my opinion these states have vulnerable emerging markets, and therefore need some sort of legal protection.

4.9. Increased trade

The CISG does not provide the developing countries with the means and capacity to produce additional goods with which to trade.²²¹ The CISG does not assist developing countries to develop/grow their markets.²²² Perhaps we should go back to the basics to address this concern; what is the purpose of the CISG? The CISG is created to provide a body of unified rules that would contribute to the removal of legal barriers in international trade and thus promote the development of international trade.²²³ The CISG provides a solution to make international trade less cumbersome. For me it is a means to simplify the very same

²¹⁹ Schlechtriem "Requirements of Application and Sphere of Applicability of the CISG". (2005) *Victoria University of Wellington Law Review*, 790.

²²⁰ Lehmann (2006) *SA Merc LJ*, 320.

²²¹ Lehmann (2006) *SA Merc LJ*, 323.

²²² Lehmann (2006) *SA Merc LJ*, 323.

²²³ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 1.

transactions that traders would have concluded. The CISG provides an effective, efficient solution to concluding those transactions. It provides rules that clarify the parties' rights and obligations.

After analysing the trade statistics of various countries, Lehmann concludes that it is apparent that the CISG has not increased the degree of trade of contracting countries or impacted significantly on the direction of trade.²²⁴ In Lehmann's opinion the CISG's potential to promote trade is exaggerated.²²⁵ One of the stated purposes of the CISG is the removal of legal barriers to trade.²²⁶ In my understanding the removal of legal barriers would not necessarily result in increased levels of trade/transactions. It rather means that it will result in a better understanding of the terms, less disputes, and less time spent on negotiations etc.; those are the elements that we should be measuring to ascertain the potential or rather at this stage effectiveness of the CISG.

4.10. Utilisation

Lehmann estimated in 2006 that since 1988 the CISG has been referred to or applied in 2 400 estimated reported and unreported cases.²²⁷ She states that this lack of usage suggests that it was not necessary to introduce it, and it has not proven to be as useful as its advocates believed it would be.²²⁸ I will use Lehmann's very own words to address this concern. She states that, "... under most contracts parties receive substantially what was promised; these default rules need never be resorted to".²²⁹ This could be the very reason why there are so few

²²⁴ Lehmann (2006) *SA Merc LJ*, 323.

²²⁵ Lehmann (2006) *SA Merc LJ*, 323.

²²⁶ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 1.

²²⁷ Lehmann (2006) *SA Merc LJ*, 323.

²²⁸ Lehmann (2006) *SA Merc LJ*, 324.

²²⁹ Lehmann (2006) *SA Merc LJ*, 325.

cases on the CISG. In addition to this, there might be other reasons; such as out of courts settlements or there could even be more unreported cases than the estimate above.

Lehmann further draws a distinction between the CISG and other uniform rules introduced to date; viz. the Uniform Customs and Practice for Documentary Credit (UCP) and the International Chamber of Commerce's International Trade Terms (INCOTERMS).²³⁰ She states that on the contrary the UCP and the INCOTERMS regulate the actual performance, whereas the CISG provides default rules in case something goes wrong. In the words of Lehmann, "... assuming that under most contracts parties receive substantially what was promised, these default rules need never be resorted to".²³¹ That being true, I strongly believe that it would be a huge mistake to ignore the fact that disputes do arise and contracts are drafted for the very instances when transactions fail. The CISG provides rules that are clear enough to assist in determining what the parties actually agreed to in case there is a dispute in that regard.

4.11. Homeward trends

In order to be successful in the unification of law, the law/rules created must be interpreted and applied consistently.²³² In Lehmann's view it would be almost impossible to avoid the emergence of national or regional interpretation, and furthermore she fears that given the number of jurisdictions and number of languages involved, only the decisions of the primary jurisdictions that apply and interpret the CISG on a regular basis and those that are linguistically more accessible, will be observed.²³³ This is a valid concern. It is human nature to stick to the familiar way of doing things. There will be divergence here and there in the interpretation and application of the CISG.

²³⁰ Lehmann (2006) *SA Merc LJ*, 325.

²³¹ Lehmann (2006) *SA Merc LJ*, 325.

²³² Lehmann (2006) *SA Merc LJ*, 325.

²³³ Lehmann (2006) *SA Merc LJ*, 326.

4.12. Conclusion

The CISG is an international instrument. It would have indeed been very difficult to strike a balance between achieving complete uniformity and getting the support of all the participants. However, all matters observed, the CISG is said to be drafted in a form that fosters a fair balance between certainty and flexibility.

The fact that the CISG is drafted in a number of languages which are equally authoritative should rather be seen as a benefit than a disadvantage. Taking the nature of the international trade arena into consideration, I would say rules that are available in different languages are definitely a bonus for international traders.

International trade practices and customs are the cornerstone of international trade. A set of trade rules that complement and support these trade practices and customs will no doubt be beneficial to the development of the industry. The CISG should not be seen as a trade increasing instrument; it should rather be seen as a set of rules that will assist the traders in better understanding their contractual rights and obligations to avoid disputes. In cases where disputes do arise, these rules will surely help in the resolution thereof.

The CISG, similar to any other body of law, has shortcomings. However, the shortcomings should not be viewed in isolation. We should rather try to get a better understanding of the text, its purpose, and the intentions of UNCITRAL first, before we misjudge or discard it all together.

CHAPTER 5: SHOULD SOUTH AFRICA RATIFY THE CISG?

5.1. Introduction

Having discussed different views on the adoption of the CISG globally, in this chapter I will give my personal opinion on whether I believe that the country will benefit from becoming a signatory to the CISG. Based on the research made, I will give a systematic and comprehensive conclusion as to whether South Africa should go ahead and ratify the CISG.

5.2. Vision of South Africa

Soon after the beginning of the South African democracy it became apparent that the country wished to be a role player in the global markets. We did not only join the global/world organisations, but we also started playing a visible role in the leadership of the African continent.

According to the 2011-2014 medium-term strategy report, South Africa has a vision to build “A dynamic industrial and globally competitive South African economy”²³⁴ The plan is to achieve this through building mutually beneficial regional and global relations.²³⁵ This plan should advance South Africa’s trade, industrial policy and economic development objectives.²³⁶ The aim is to raise South Africa’s competitiveness, net exports, and its trade as a share of world trade.²³⁷ The goal is to build an equitable global trading system that facilitates development by

²³⁴ South African Department of Trade and Industry: SA 2011-2014 Medium strategy report, 11.

²³⁵ SA 2011-2014 Medium strategy report, 11.

²³⁶ SA 2011-2014 Medium strategy report, 11.

²³⁷ SA 2011-2014 Medium strategy report, 11.

strengthening trade and investment links with key economies and by fostering African development.²³⁸

In order to achieve the ultimate goal, South Africa needs to consider the relevant national legislative and regulatory frameworks as well as the process and rules of multilateral institutions that have competence over trade-related issues.²³⁹

5.3. South African trade

The ratio of South African trade in goods and services to Gross Domestic Product has risen from below 40% in 1993 to 60% in 2006.²⁴⁰ All exports have grown significantly since 1994, with R585.57 billion imports and R595.92 billion exports in 2010.²⁴¹ South Africa is the second largest producer of mineral resources such as gold, chrome, magnesium, platinum, vanadium etc.²⁴²

Looking at the import and export figures above, South Africa has indeed become a role player in the international markets. We surely should not be operating under the old national trade rules and regulations that we were comfortable operating under when the amount of international trade was minimal and mainly local. Due to the effect that globalisation and modernisation has on international trade, it is of paramount importance that this area of trade be regulated by rules flexible enough to evolve accordingly. The South African Department of Trade and Industry states that in South Africa efforts to restructure the industrial economy in order to better deal

²³⁸ SA 2011-2014 Medium strategy report, 11.

²³⁹ South African Department of Trade and Industry: The DTI “A South African Trade Policy and Strategy Framework” 2010 May, 46.

²⁴⁰ The DTI “A South African Trade Policy and Strategy Framework” (2010) May, 25.

²⁴¹ The DTI South African investor hand book 2011/12 86.

²⁴² Available at http://en.m.wikipedia.org/wiki/Foreign_trade_of_South_Africa.

with the increased international trade and competition have generally been insufficient to induce the necessary structural change in the economy.²⁴³

If the CISG is as great as it is said to be, it will surely foster the country's economic strategy and help it realise its vision. However, by the same token, if the CISG could not foster the above goal directly or indirectly, the country should not waste its resources on its ratification and implementation. Those resources should rather be invested elsewhere. Should we adopt the CISG?

5.4. CISG in South Africa

As stated in Chapter 1 of this paper, the CISG applies to contracts of sale of goods between two parties with places of business in two different states, or where only one state is a member of the CISG and the rules of private international law point to the application of the municipal laws of the member state.²⁴⁴ Individual traders can also, of their own accord, choose to apply the CISG to their contracts, even in instances where the CISG would not be applicable under Article 1, as discussed in this paragraph.²⁴⁵ The latter option is rarely exercised by South African traders. In my opinion, it is due to lack of knowledge of the existence of the CISG and the content thereof.

Due to the nature of the scope of application of the CISG through rules of private international law, unsuspecting South Africans are already exposed to the CISG. The CISG could be already applicable to most of our international transactions, and we should therefore be acquainted with it. Ignoring this fact, or the existence of the CISG, is not a solution; we will only be exposing most South Africans to unnecessary legal risk.

²⁴³ The DTI "A South African Trade Policy and Strategy Framework" (2010) May, 25.

²⁴⁴ CISG Article 1.

²⁴⁵ United Nations Commission on International Trade Law (2010) *United Nations Publication*, 35.

5.5. Suitable international trade rules

In order to fulfil our vision of building an equitable global trading system that facilitates development, by strengthening trade and investment links with key economies and fostering African development²⁴⁶, South Africa will need suitable trade rules that were created with international trade in mind.

CISG has been drafted by people with commercial experience not only in international trade law but also in fields of sale. During the drafting of the CISG different sales laws were studied and the best appropriate principles for international trade were therefore taken into the CISG.²⁴⁷ Unlike the CISG, the South African law of contracts was not drafted with international trade in mind. This makes the CISG better suited to regulate international trade than South African sales law.

5.6. Certainty

South Africa does not have a codified legal system.²⁴⁸ The codified nature of the CISG, its simplicity, exclusion of foreign law, and availability of sources will no doubt increase legal certainty.²⁴⁹ Utilizing internationally acceptable rules will not only make South African contracts and rules acceptable to the world but it will give South Africans the certainty that comes with being familiar with the terms and conditions used. Furthermore, by using the CISG as a framework for standard terms and conditions, it will no doubt give traders a certain degree of certainty/ peace of mind knowing their contractual terms and conditions are in line with the international trade practices.

²⁴⁶ SA 2011-2014 Medium strategy report, at page, 11.

²⁴⁷ Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (CISG) In South Africa” (1999) *SALJ*, 343.

²⁴⁸ Thomas “The application of Roman law in modern South African law” *TSDP* (2010) 2.

²⁴⁹ Eiselen (1999) *SALJ*, 344.

5.7. Diverse legal systems

By adopting the CISG, South Africa will surely be affording its traders the benefit of eliminating the headache of dealing with a lot of confusing rules from different legal systems. Even though the CISG does not cover all aspects of contract, it deals comprehensively with most issues relating to the formation of the contract and issues relating to the sale of the goods, including rights and obligations of each party and their remedies.²⁵⁰

5.8. Uniform law

The ratio of South African trade in goods and services to Gross Domestic Product has risen from below 40% in 1993 to 60% in 2006.²⁵¹ All exports have grown significantly since 1994. This means that South Africans have started trading with parties all over the world.²⁵² Adopting a uniform law such as the CISG will make it less cumbersome for South African traders when concluding international transactions. Traders will spend less time researching and reviewing applicable trade rules. The CISG has been successfully used as harmonised international trade rules independent from national legal systems.²⁵³

5.9. Accessibility

As stated above, South African cross border trade has increased significantly. This means that we also have a lot of newcomers into the market. Some of the newcomers are traders with less experience and knowledge. This group of traders surely needs to acquaint themselves with the

²⁵⁰ Article 14-88 CISG.

²⁵¹ The DTI “A South African Trade Policy and Strategy Framework” (2010) May, 25.

²⁵² Eiselen (1999) *SALJ*, 346.

²⁵³ Wandrag “Unification of Southern African Contract Law (2011) *European Journal of Law Reform*, 457.

utilised trade rules as it is difficult to digest the trade rules applicable to one transaction. Wouldn't it be great if these traders were to only worry about one set of rules that they could easily access? The text of the CISG and related materials are easily accessible on line.²⁵⁴ Should the CISG be adopted it will most probably also be accessible on trade-related websites such as the DTI website and others. This will mean that most South Africans will have easy access to the rules should they wish to get hold of the CISG or related material.

5.10. Language

With South Africans doing business with various different foreign nationals, they are bound to transact with traders that cannot even speak a word of English. The text of the CISG is available in more than 20 different languages, six of which are official texts (Arabic, English, Spanish, Russian Chinese and French)²⁵⁵. The six official texts are equally authoritative and used to translate the CISG into other languages.²⁵⁶ At this stage I am not aware of any other similar trade rules text written in six languages. It could be said that people from different cultural backgrounds and with different languages will have a common understanding of what their rights and obligations under the CISG fully entail.²⁵⁷ Most countries rarely have the law/rules written in more than two languages. South Africa only has the law written in English and Afrikaans. This is an added advantage that the CISG will present to South African traders.

5.11. Party autonomy

As discussed in Chapter 3, the CISG embraces the principle of party autonomy.²⁵⁸ South African traders will have the option to chop and change the provisions of the CISG to fit their

²⁵⁴ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

²⁵⁵ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

²⁵⁶ Available at <http://www.cisg.law.Pace.edu/cisg/text/text.html>.

²⁵⁷ Eiselen (1999) *SALJ*, 351.

²⁵⁸ CISG Article 6.

own needs. They can even add extra provisions where they feel that the CISG is lacking. The great thing about the CISG is that it can be excluded altogether.²⁵⁹ This means that even after South Africa has adopted the CISG, the individual traders will still have an option to opt out. Therefore by accepting the CISG, South Africa will merely just be giving South African traders more options, rather than deciding for them. In my opinion, this is what every democratic society should be doing. A democratic state should allow its people to have as many economic liberating options as legally possible.

5.12. Bargaining powers and simplicity

South Africa has a young emerging economy, with a lot of newcomers in international trade. The CISG will provide these traders with a good basis to bargain from. It will provide them with a foundation for a neutral and well balanced transaction.²⁶⁰ The CISG has also been framed in a non-technical manner. This attribute caters for the type of traders (i.e. non-technical,) we have in our economy.

Once the CISG was adopted in Japan, using the CISG to supplement the governing law made it much easier for Japanese companies to draft their own terms and conditions and forms of contract.²⁶¹ Similarly, the adoption of the CISG by South Africa will assist South African companies and traders to formulate terms and conditions that they can use with almost any company or individual across the globe.

²⁵⁹ CISG Article 6.

²⁶⁰ Eiselen (1999) *SALJ*, 350.

²⁶¹ Kashiwagi "Accession by Japan to the Vienna Sales Convention (CISG)" *ZJAPAN/J.JAPAN.L* (2008) 211.

5.13. Success of the CISG

A significant number of states have acceded to the CISG worldwide, and the membership keeps growing.²⁶² Wethmar-Lemmer states that though South Africa is currently not a CISG member state, the CISG is of great significance for this country and its merchants, since most of South Africa's largest trading partners are CISG contracting states.²⁶³ South Africa's largest trade partners are China, Germany, United States, Japan, United Kingdom and Spain.²⁶⁴ China, Germany, United States and Japan have already adopted the CISG.²⁶⁵ The fact that many countries are becoming members should, of course, not be the sole reason for South Africa to follow suit.²⁶⁶ I personally believe that economic giants such as the United States, China and others will not sign a document that did not make economic sense. There must be some merit in their decision. Due to the fact that most of our biggest trading partners are already members to the CISG, we are exposed to the application of the CISG through application of the rules of private international law.²⁶⁷ Thus far the CISG has been one of the greatest UNCITRAL success stories, and its membership keeps growing year by year.

5.14. African leader

Africa has 54 countries on the UN membership roster,²⁶⁸ with only nine registered as members of the CISG.²⁶⁹ South African corporates are the investment drivers in Africa. Since 1994 the

²⁶² Eiselen (1999) *SALJ*, 354.

²⁶³ Wethmar-Lemmer "The Vienna Sales Convention and gap-filling" *TSAR*, (2012) 2, 274.

²⁶⁴ Available at http://en.m.wikipedia.org/wiki/Foreign_trade_of_South_Africa.

²⁶⁵ Kritzer A H: CISG: Table of Contracting States. Available at <http://www.cisg.law.Pace.edu/cisg/countries/cntries.html>.

²⁶⁶ Eiselen (1999) *SALJ*, 354.

²⁶⁷ CISG Article 1 (2).

²⁶⁸ Available at http://en.m.wikipedia.org/wiki/List_of_sovereign_states_and_dependent_territories_in_Africa.

government has placed emphasis on building trade and investment relations with countries across the African continent.²⁷⁰ One of South Africa's goals going forward is to play an active role in strengthening continental processes, build effective regional markets and promote cross border infrastructure development.²⁷¹ South Africa is considered one of the economic powerhouses in Africa.²⁷² That in a way gives South Africa a huge responsibility within the region.²⁷³ African countries are waiting for South African to take that step. Date-Bah, as quoted in Castellani, states that the process of harmonization and modernization of international trade law in Africa should be led by African businesses and governments.²⁷⁴ Firm support and commitment of African states to this harmonization process is of paramount importance.²⁷⁵

5.15. Conclusion

The CISG seems to be an answer to one of the significant international trade problems that South Africa is currently facing. Africa as a whole is currently viewed as a dark continent, jungle where no real laws exists, inexperienced and underdeveloped. Most African countries have started realising the importance and the need to become part of the global economy.²⁷⁶ They have since started partaking in global initiatives to liberalise their economies.²⁷⁷ Practically

²⁶⁹ Wandrag "Unification of Southern African Contract Law page (2011) *European Journal of Law Reform*, 457.

²⁷⁰ SA 2011-2014 Medium strategy report at page 34.

²⁷¹ SA 2011-2014 Medium strategy report at page 25.

²⁷² Eiselen (1999) *SALJ*, 355.

²⁷³ Eiselen (1999) *SALJ*, 324.

²⁷⁴ Castellani' "Future of international sales law in Africa International Trade Law Reform in Africa: A Call for Action" (2011) *European Journal of Law Reform*, 487.

²⁷⁵ Castellani (2011) *European Journal of Law Reform*, 487.

²⁷⁶ The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States S.K. Date-Bah' (2011) *European Journal of Law Reform*, 367. Onguglo *et al*, "Preparing African Countries to benefit from continuous International Trade Negotiations and Complex Agreements" (2007) UNCTAD 3: <http://repositpry.uneca.org/handle/10855/3061>.

²⁷⁷ Date-Bah' (2011) *European Journal of Law Reform*, 367. Onguglo *et al*, (2007) UNCTAD 3: <http://repositpry.uneca.org/handle/10855/3061>.

speaking looking at all the advantages above, it makes no sense for an African State not to become part of the CISG. African countries would most likely transact with big developed strong parties who would most likely try to dictate terms of contract to them. With the CISG as their basis, they would at least have something to fall back on and negotiate their terms accordingly.

Furthermore the rest of the world is now penetrating Africa in order to get their hands on our mineral resources. As stated throughout the paper, South Africa and Africa as a whole is already exposed to the CISG due to the nature of the applicability of the CISG through private international law. I quote R.J. David's words "Let jurists continue in their routine opposition to international unification of law; nevertheless, that unification will occur without and despite them, just as the *ius gentium* developed in Rome without the pontiffs, and as equity developed in England without the common-law lawyers. Today the problem is not whether international unification of law will be achieved; it is how it can be achieved."²⁷⁸

In my opinion if we continue to resist or ignore the CISG, it will eventually be to our detriment. We should rather adopt it, educate the nation and let them decide if they wish to have it applicable to their transactions or not. The advantages outlined throughout the paper surely outweigh all disadvantages listed herein.

There are different legal systems in the world. Therefore one can never really enact uniform rules that are similar or aligned to all legal systems. As an attempt to unify the rules, all one can do is to try to find a compromise that can possibly be acceptable to most countries. One of the main functions of the CISG is to harmonize common law and civil law legal principles.²⁷⁹ " The compromise between civil and common law states, accompanied by a body of law that is uniform, creates an environment in which parties from different states feel comfortable engaging

²⁷⁸ Wandrag (2011) *European Journal of Law Reform*, 457; David R.J. "The Methods of Unification" 1968 *American Journal of Comparative Law*, 13 and 27.

²⁷⁹ Eiselen (1999) 353.

in commercial transactions.”²⁸⁰ The positive response to the CISG could be seen as an indication that it is often used in practice.²⁸¹

I strongly recommend that South Africa adopt the CISG as soon as possible and launch an educational campaign on the CISG to South African businesses. At the same time we should inform South Africans about their right to exclude the CISG out of their contracts. In this way South Africans will know fully well what they are getting themselves into or opting out of.

²⁸⁰ Eiselen (1999) 279.

²⁸¹ Dely “The Relevance of the Vienna Convention for the International Sale Contracts-Should We Stop Contracting it out” (2003) *IBA*, 241.

BIBLIOGRAPHY

Barry, N. (1993). The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation? .Saggi, Conference Seminari 9. *Reproduced Pace Law School Institute of International Commercial Law* with permission of Centro di studi e ricerche di diritto comparato e straniero, diretto da M.J. Bonell.

Booyesen, H. (2003). *Principles of International Trade Law as a monistic system*. 1st edition. Pretoria: Interlegal.

Brödermann, E. (2007). The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change) *Modern Law for Global Commerce*, 1-4. Available at <http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf> (Accessed 01 May 2012).

Castellani, L. (2011). Future of international sales law in Africa International Trade Law Reform in Africa ; A Call for Action , *European Journal of Law Reform*, 3-4.

Date-Bah, S.K. (2011). The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States. *European Journal of Law Reform*, 360-369.

Del Duca, L.F. & Del Duca, P. (1996). Practice under the convention on the international sale of goods (CISG). A primer for attorneys and international traders part II *Uniform Code LF*, 331-370

Dely, F. (2003). The relevance of the Vienna Convention for the international sale contracts-should we stop contracting it out." *International Bar Association*, 241-249.

Dolganova, I. & Lorenzen, B.M. (2008). *The Brazilian Adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods*. Reproduced Pace Law School

Institute of International Commercial Law. Available at <http://www.cisg.law.pace.edu/cisg/biblio/dolganova-lorenzen.html>. (Accessed 26 November 2011).

Eiselen, S. (1999). Adoption of the Vienna Convention for the International Sale of Goods (CISG) In South Africa. *SALJ*, 323-370.

Eiselen, S. (2011). The requirements for the inclusion of standard terms in international sales contracts. *PER*, 1-31.

Grebler, E. (2005). The convention on international sale of goods and Brazilian law: are differences irreconcilable?" *Journal of law and commerce*, 467-476. Available at <http://www.uncitral.org/pdf/english/cisg25/grebler.pdf> .

Hobhouse, J.S. (1990). International conventions and commercial law: the pursuit of uniformity. *Law Quarterly Review*, 530-535.

Hofmann, N. (2010). Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe. *Pace International Law Review*, 145-181.

Honnold, J. (1998). The sales convention: background, status, application. *Journal of law and commerce*, 1-10. Available at <http://www.cisg.law.pace.edu/cisg/biblio/honnond-background.html>.

Kashiwagi, N. (2008). Accession by Japan to the Vienna Sales Convention (CISG). *Japanese Law*, 207-214.

Laver, R.M. (1993). To Use, Or Not To Use. *International Business Lawyer*, 10-14.

- Lehmann, K. (2006). Article on The United Nations Convention On Contracts For The International Sale Of Goods: Should South Africa Accede. *SA Merc LJ*. 18.
- Linarelli, J. (2003). The Economics of Uniform Laws and Uniform Law Making. *Wayne Law Review*, 1-41.
- Maniruzzaman, M. (2001). Formation of International Sales Contracts: a Comparative Perspective. *International Business Lawyer*, 483-489.
- McNamara, T. (2003). *U.N. Sale of Goods Convention: Finally Coming of Age?* Colorado Lawyer 11-22. Available at <http://www.cisg.law.pace.edu/cisg/biblio/mcnamara.html>.
- Moss, S. (2005). Why the United Kingdom has not ratified the CISG. *Journal of Law and Commerce*, 483-485.
- Neto, A., Radael, G., Cal, L. & Lopes, E. (2011). *Brazil and the accession to the 1980 United Nations convention on contracts for the international sale of goods (CSIG): advantages and disadvantages*. Reproduced Pace Law School Institute of International Commercial Law. Available at <http://cisgw3.law.pace.edu/cisg/biblio/neto-radael-lopes.html>.
- Rosette, A. (1984). Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods. *Ohio State Law Journal*, 265-305.
- Schlechtriem, H. (2005). Requirements of Application and Sphere of Applicability of the CISG. *Victoria University of Wellington Law Review*, 781-794.
- Sono, H. (2008). Japan's Accession to the CISG: The Asian Factor. *Pace International Law Review*, 105-115.

Steyn, J. (1991). The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy? *The Denning Law Journal*, 131.

Wandrag, R. (2011). Unification of Southern African Contract Law. *European Journal of Law Reform*, 451-461.

Wethmar-Lemmer, M. (2012). The Vienna sales convention and gap-filling. *TSAR*, 274-300.

Whitlock, A.J. & Abbey, B.S. (2008). Who is afraid of the CISG?- Why North Carolina practitioners should learn a thing or two about the 1980 United Nations Convention on the contracts for the international sale of goods. *Campbell Law Review*, 275-295.