Arbitration of International Sale of Goods Disputes under the Vienna Convention

Hon Justice James Douglas[1]

Abstract

The CISG is a treaty applying to international sales transactions. Currently, unless excluded from operation, the convention governs many of Australia's international sales contracts but has not been litigated much locally. The paper provides an outline of the major articles of the convention with the aim of highlighting their potential application to arbitral disputes in Australia. The author notes the possibilities for arbitrators to help resolve disputes under the treaty locally or through the International Court of Arbitration and queries whether the British Government's possible ratification of it will increase awareness of its use.

Introduction

The *United Nations Convention on Contracts for the International Sale of Goods* is a treaty establishing a uniform international sales law that is accepted by countries that account for two-thirds of all world trade. It was signed in Vienna in 1980 and is often referred to as the Vienna Convention or the CISG. It came into force internationally on 1 January 1988 after being ratified by 10 countries and was adopted by the Australian jurisdictions by legislation passed in 1986 and 1987 that came into force on 1 April 1989.[2] It has been described as 'the uniform law convention with the greatest influence on the law of worldwide transborder commerce[3] and is now developing a critical mass of interpretative jurisprudence that is readily available through resources on the web at UNCITRAL and Pace University, New York.

1 Justice James Sholto Douglas was appointed as Justice of the Supreme Court of Queensland on 27 November 2003. He completed degrees in Arts and Law at the University of Queensland and was admitted to the Bar in 1973. After working in a solicitors' firm in London he commenced private practice at the Bar in Brisbane in 1977, became a QC in 1989 and was President of the Bar Association of Queensland from 1999 to 2001.

2 At a Commonwealth level, the Convention is a part of federal law by virtue of the *Trade Practices Act* 1974 (Cth) s 66A, under which the Convention prevails over the provisions of Pt V of that Act to the extent of any inconsistency. The Convention is a part of State and Territory law by virtue of the following Acts:(ACT) *Sale of Goods (Vienna Convention) Act* 1987, (NT) *Sale of Goods (Vienna Convention) Act* 1987, (NSW) *Sale of Goods (Vienna Convention) Act* 1986, (QLD) *Sale of Goods (Vienna Convention) Act* 1986, (SA) *Sale of Goods (Vienna Convention) Act* 1986, (TAS) *Sale of Goods (Vienna Convention) Act* 1987, (VIC) *Sale of Goods (Vienna Convention) Act* 1987, (WA) *Sale of Goods (Vienna Convention) Act* 1986.

3 Prof. Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG* [2005] 36 VUWLRev 781-794. In the same part of that journal Mr Luke Nottage provides references to some useful sources at 827. The convention's provisions and case abstracts can be found on the UNCITRAL website, along with a concise and authoritative introduction by the Secretariat. Its "Case Law on UNCITRAL Texts" (CLOUT) service provides abstracts of over 1000 cases applying CISG world-wide, supplemented since mid-2004 by an extremely helpful "Digest" of the cases for each article of the Convention. The Pace University website covers even more cases, reproducing many in full text and a growing number in full or partial translation, as well as important secondary literature and links to CISG websites maintained by other academics in over a dozen countries (including Australia and Japan). There are also several authoritative textbooks now readily available; e.g., John Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, The Hague, 1999); Peter Schlechtriem and Ingeborg Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods* (CISG) (2 ed, Clarendon Press; Oxford, New York, 2005); Larry A DiMatteo and ors, International Sales Law (CUP, 2005).

Many of our major trading partners including China, the USA, most major European Union countries, Canada, New Zealand, Singapore, the Russian Federation and many South American countries are contracting States; in fact all of the major trading countries are, with the notable exceptions of the United Kingdom and Japan. It is used frequently in legal practice in continental Europe but less so on a day to day level in the United States, Canada, New Zealand and Australia, at least so far as one can tell from the jurisprudence dealing with it, and even though they are all contracting States.

The United Kingdom intends to ratify the convention according to an answer given by Lord Sainsbury, the Under Secretary of State for the Department of Trade and Industry in the House of Lords on 7 February 2005. He said 'the United Kingdom intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a consultation document in the course of the next few months to examine the available options.'

To say there have been delays in ratifying the convention in the United Kingdom is an understatement. There has been significant opposition to it. Much of the English resistance to ratification related to scepticism about the practical effectiveness of the buyer's remedies provided under the convention compared to the remedies under English law. Both practitioners and academics working in the field in England have expressed hostility to it.[4] One of their concerns was that ratification of the convention in the United Kingdom might lead to a reduction in the number of international arbitrations coming to England. I am not sure that this conclusion is likely but I think the possibility should make the ears of commercial arbitrators here prick up a little. In other words, will an increase in the uniformity of the rules of international trade law increase the opportunities for arbitration of international trade disputes in forums outside traditional centres such as the City of London?

When the United Kingdom Department of Trade and Industry published a consultative document on this issue in 1989, it identified three advantages for British accession to the convention: uniformity in international sales law was desirable and the convention's rules would constitute "common ground" on which business might be transacted; secondly, a uniform law might reduce expensive litigation of preliminary issues as to the proper law of a contract; and, thirdly, accession would allow courts and arbitrators in the United Kingdom to have a market share in the resolution of disputes under the convention and to participate in the evolution of its jurisprudence.

It is notable that common lawyers with a background in English common law have not yet contributed significantly to the evolution of the jurisprudence under the convention. It also seems significant to me that, in Australia at least, we share some of the English advantages of experience and impartiality of judges and arbitrators and their efficiency in the resolution of commercial disputes. All of that is really a long way of saying that there seems to be an opportunity for Australian arbitrators to promote themselves as capable of assisting in the resolution of such disputes, either when Australian companies are parties to contracts for the international sale of goods, or when there is a need for an

4 See *Benjamin's Sale of Goods* (6th ed., 2002) at 12-081 but for a Scottish take on the issue see Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom* (1997) 26 University of Baltimore Law Review 51-66.

independent arbitrator to resolve disputes between parties to such contracts who themselves come from jurisdictions other than Australia but who are bound by the convention.

In spite of its potential application to many contracts involving Australian companies engaging in international trade there is little local jurisprudence dealing with the convention. There is also a degree of continuing ignorance of its potential application, except, perhaps, among recent graduates who have participated in the Willem C. Vis moots dealing with international trade disputes held annually in Vienna. That ignorance was reflected in a local case that went to the Court of Appeal in Queensland where the applicability of the convention had not been pleaded and one party was not alerted to the need to deal with its potential application until submissions in the trial.[5] Similarly in South Australia in proceedings against an overseas defendant which had failed to appear, it was held that the Court could not assess damages for breach of contract where the *Sale of Goods (Vienna Convention) Act* 1986 (SA) had not been pleaded.[6] That apparent ignorance of the effects of the convention was one reason why I thought a paper reminding the profession of its potential significance and arbitrators of the possibility of arbitrating disputes under it may be useful.

Professor Michael Pryles, one of the leading international commercial arbitrators in Australia, has also expressed the view to me privately that the lack of significant judicial or arbitral activity in Australia dealing with disputes under this convention may reflect a more general tendency to exclude its operation in the drafting of contracts for the international sale of goods. Mr Luke Nottage has published a similar comment in a particularly useful article that also deals with the Japanese attitude to the convention.[7] If that is the case, and I welcome any comments in respect of that issue, it may not be idle to speculate that, if the United Kingdom and Japan do ratify the treaty, then more common lawyers influenced by English commercial practice may be willing to draft contracts which assume the operation of the convention.

An alternative view, which I canvass later, is that the convention is particularly unsuited to CIF contracts for the sale of commodities and the need for speedy, certain remedies for buyers under such contracts. Much of Australia's overseas export trade is, of course, in bulk commodities and this may explain the infrequent litigation involving the convention here.

There has been little jurisprudence in New Zealand either. American lawyers also have been less willing to rely upon the convention in the past although there is a developing body of jurisprudence there and considerable academic interest. Although their Uniform Commercial Code itself contains provisions that are departures from the common law and closer to the civil law tradition and are reflected in the convention's drafting,[8] the preference for the familiar still applies there on the whole. In Canada there is said to have been a gradual evolution in the use of the convention.[9]

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5 *Downs Investments Pty Ltd (in liq) v Perwaja Steel* [2002] 2 Qd R 462.

6 *Perry Engineering Pty Ltd v Bernold* [2001] SASC 15 at [16].

7 *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan* [2005] 36 VUWLRev 815, 817. He said: "In Australia – as apparently in New Zealand, according to this conference's organisers – some businesses or their legal advisers may also be excluding its operation (as permitted by article 6) when drafting cross-border sales contracts. This may account for quite limited case law applying CISG from those jurisdictions. This paper will reconsider the pros and cons of such a strategy, and conclude that it is generally problematic." That article was written for a symposium whose papers are published in that journal and may be found at http://www.austlii.edu.au/nz/journals/VUWLRev/2005/index.html.

8 See Forte, op. cit. 59-60.

The local ignorance of and, perhaps, unwillingness to use the convention encourages me to say a little about its coverage and some of its features which have attracted praise and criticism, particularly in the United Kingdom. The outline that I shall give you is not meant to be comprehensive. You can supplement it very usefully by reading the recent series of articles in the Victoria University of Wellington's Law Review.[10]

Outline of the CISG's provisions

The convention can be, and has been, described as a compromise, producing the worst of both worlds between the main civil and common law systems and influenced to some extent by the former socialist legal systems. On a more positive note it is said to offer:

> *[A] logical, coherent and comprehensive framework for working through quite complex legal issues that can develop in negotiating and implementing cross-border sales. One key advantage is therefore the accessibility of the Convention. Recent empirical research in Australia suggests considerable benefits, even for people with some legal training active in common law jurisdictions, from succinct statements of contract law through codification techniques, rather than the verbose case law (and accretions of statute law) that commentators try endlessly to summarise, rationalise or criticise. The layout of CISG is also logical, generally tracking the issues as they arise in actual commercial transactions.*[11]

If one were to generalise one might say that the convention is designed to operate in accordance with the intentions of the parties. In that context the parties may exclude the application of all or part of the convention and it is not subject to requirements of form; see articles 6 and 11. The convention is also designed to operate to reward co-operation between the parties, for example, by the requirement of reasonable notice in respect of lack of conformity of the goods in article 39. It is also designed to encourage contracts to proceed rather than to be terminated, as a fundamental breach is required before a party can declare a contact avoided under articles 49, 64 and 72. Finally the damages provisions in articles 74 to 77 are designed to compensate, not to punish.

The convention contains 101 articles which detail the rights and obligations of seller and buyer, the time when risk in goods passes from seller to buyer, the obligations on parties to preserve the goods, conditions, and remedies for breach of contract as well as preliminary questions of formation of the contract. It does not deal with questions of validity of the contract or the effect which the contract may have on the property in the goods sold; see article 4. In article 79 it provides a remedy wider than the common law doctrine of frustration. That provision may require careful additional drafting of contracts. The overall structure is, however, logical and reasonably easy to follow.

The convention applies to contracts of sale of goods in two situations. The first is when the contract is between parties whose places of business are in different countries when those countries are contracting states; article 1(1)(a). The second is when the rules of private international law lead to the

9 Rajeev Sharma, *The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience* [2005] 36 VUWLRev 40.

10 See at http://www.austlii.edu.au/nz/journals/VUWLRev/2005/index.html vol. 36 no. 3.

11 Nottage, *op. cit.* at 827

application of the law of the contracting state; article 1(1)(b). China and the USA have each, however, entered a reservation under article 95 against the application of article 1(1)(b), to the effect that, if their private international law rules lead to the application of Chinese law or American law respectively, the convention is not activated and their domestic sales law applies.

In our context, if the proper law of the contract led to the conclusion that the law of Queensland governed the contract, and it related to the sale of goods between parties whose places of business were in different countries, then the convention would apply. In its focus on the international character of the parties to the contracts, however, the convention may create anomalies. An international transfer of goods is not needed. The convention can be attracted, for example, if an Australian company makes a sale to an American company for resale in Australia.[14] The fact that the parties have their places of business in different countries is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract; see article 1(2).

The convention does not apply to consumer sales, sales by auction, sales of shares, ships, vessels, hovercraft, aircraft or electricity. Nor does it apply to contracts where the party ordering the goods undertakes to supply a substantial part of the material necessary for their manufacture or production nor where the preponderant part of the obligation to the party who furnishes the goods consists in the supply of labour or other services; see articles 2 and 3. Nor does it apply to the liability of a seller for death or personal injury caused by the goods to any person; in other words product liability is out; see article 5.

The interpretation of the convention is based on three principles: its international character, the need to promote uniformity in its application and the observance of good faith in international trade; see article 7. The first of these requirements is consistent with a purposive approach to the construction of the document and should encourage a comparative approach to the materials relied on for interpretation "but experience shows that practitioners and scholars tend to understand words and concepts of the Convention according to their familiar domestic law."[15] The second principle, uniformity in application, is pure common sense but may be difficult to achieve in practice with the variety of jurisdictions and languages in which disputes may arise and the privacy normal in arbitrations. The need to interpret the convention with reference to the observance of good faith in international trade is a concept with which common lawyers in the English tradition are not overly familiar. There is case law developing slowly here dealing with the importation of obligations of good faith into contracts which will probably require a decision of the High Court to determine whether those concepts fit into our commercial law and how they might affect it.[16] American lawyers are much

12 See *The Laws of Australia* 24.3 at [8].

13 Nottage, *op. cit.* at 826 fn 66.

14 *The Laws of Australia* ch. 24.3[9].

15 Schlechtriem, *op. cit.*, 790; Paul van Reesch, Judicial Consistency and Article 25 of the Convention on the International Sale of Goods (2003) 77 ALJ 436, 442.

16 *Royal Botanic Gardens and the Main Trust v The South Sydney City Council* (2002) 76 ALJR 436 at 445 [40], 452 [86]-[87], 462 [146] and 463 [156]; Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151, 188-198 and, in this particular context, see Mr Bruno Zeller, *Good Faith – Is it a Contractual Obligation?* (2003) 15 BLR 204-227.

more familiar with an explicit duty of good faith under their general law and under the UCC, a feature that has led to speculation that the convention's attenuated form of the obligation, limited to its interpretation, has discouraged its more frequent use in the USA.[17]

Generally speaking the objective theory of contract familiar to common lawyers seems to apply although the waters are muddied somewhat as 'statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was'; see article 8. Parties are also 'bound by any usage to which they have agreed and by any practices which they have established between themselves' and 'are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved' in that particular trade; article 9. Again proof of custom and usage is a topic familiar to common lawyers.

There are no formalities required by the convention for the conclusion of contracts; article 11. Jurisdictions that expect such formalities may make a declaration preserving that regime; articles 12 and 96.

There are some differences from the common law in the articles dealing with the formation of the contract. A proposal for concluding a contract addressed to one or more people constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. It is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price; article 14. Article 55 adds to the ability to make a price certain by deeming the parties to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned; more simply perhaps, the market price. There is, however, a tension between those two articles which I need not discuss further here.[18]

Under the common law an irrevocable offer would need to be supported by consideration to bind the offeror but under article 16 an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable or, if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance on the offer. Otherwise it may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. Silence or inactivity does not in itself amount to acceptance; article 18(1). An acceptance of an offer becomes effective when the assent reaches the offeror; article 18(2).

There is another difference from the common law in article 19 which states our conventional view initially in saying that a reply to an offer which purports to be an acceptance, but contains additions, limitations or other modifications, is a rejection of the offer and constitutes a counter offer. It goes on, however, in article 19(2) to provide that a reply to an offer which purports to be an acceptance which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror without undue delay objects orally to the discrepancy or dispatches a notice to that effect. Additional or different terms relating to the price, payment, quality and quantity

17 Meredith Kolsky Lewis, Comments on Luke Nottage's Paper [2005] 36 VUWLRev 859-860.

18 See *United Technologies International Inc. Pratt and Whitney Commercial Engine Business v Magyar Légi Közlekedési Vállalat (Málev Hungarian Airlines)* (1993) 13 Journal of Law and Commerce 31-47.

of the goods, place and time of delivery, the extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. In Australia, under the common law, there must be unequivocal acceptance of the terms proposed by the offer.[19] I suspect that this slight variation from the common law would be unlikely to have much practical effect on normal commercial dealing.

The general provisions dealing with the sale of goods include, in article 25, a provision that a breach of contract is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. The idea of fundamental breach resurfaces in articles 49, 64 and 72(1) dealing with a party's power to declare a contract avoided if the other party to the contract fails to perform his obligations in circumstances amounting to a fundamental breach or, in the case of article 72, where it is apparent there will be an anticipatory breach amounting to a fundamental breach.

Williams JA in the Queensland Court of Appeal has expressed the view that the convention has adopted to some extent the common law concept of repudiation for fundamental breach.[20] Another view is, however, that the concept of fundamental breach in the convention is inherently different from the concept as developed at common law. According to Mr Paul van Reesch:[21]

> *The concept of fundamental breach was developed by the common law as a method of allowing an aggrieved buyer to escape contractual limitations denying it rights, whereas the concept developed in the Convention is crucial to the right of a party to declare a contract avoided.*

Article 25 has also been criticised as being likely to lead to uncertainty when compared with the common law test whether a term is essential or fundamental. That test was expressed by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* to be whether the promise 'is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise … and that this ought to have been apparent from the start to the promisor'.[22]

The articles of the convention are focused rather upon the detriment suffered by the innocent party as a result of the guilty party's breach of the term rather than the nature of the term itself and have been criticised as "open textured" making it hard to predict just when a breach will be regarded as fundamental. Where breach involves failure to deliver goods by a prescribed date the right to declare the contract avoided arises only in cases of "fundamental breach" and has been said to be much less favourable to the buyer than the automatic right of rejection given to him or her under the common law[23].

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19 *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1; for a useful discussion of the competing issues here see E H Hondius and Ch Mahé, The Battle of Forms (1998) 12 JCL 268.

20 *Downs Investment Pty Ltd v Perwaja Steel* at 481 [35].

21 Paul van Reesch, op. cit. at 438.

22 (1938) 38 SR (NSW) 632, 641.

23 *Benjamin's Sale of Goods* at 18-232 fn 61 citing Bowes v Shand (1877) 2 App Cas 455. As to the question of uncertainty compared with the common law, see also Paul van Reesch, op. cit. at 443-445.

Article 28 says that a court is not bound to enter a judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the convention. So the reluctance of the common law courts to decree specific performance, instead of awarding damages in the context of a sale of goods contract, is capable of being reflected in the operation of the convention.

The obligations of the seller are expressed in terms familiar to common lawyers and I do not propose to say anything more about them here.

It is in the area of the remedies for breach of contract by the seller, however, that the main differences between English common law practice and practice under this convention appear. Under article 46, if the goods do not conform with the contract, the buyer may require delivery of substitute goods 'only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made' pursuant to a notice given within a reasonable time under article 39. Article 39 is one of the most litigated sections of the convention. Under it the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In practice the requirement for a reasonable time has been read narrowly and inspections of the goods should be made in a very timely fashion. The buyer may also fix an additional period of time of reasonable length for performance under article 47 but, unless he has received notice from the seller that he will not perform within the period so fixed, he may not resort to any remedy for breach of contract during that period, although he is not deprived of a right to claim damages for delay in performance; article 47(2). Then, under article 48, subject to article 49, the seller may, even after the date of delivery, remedy at his own expense any failure to perform his obligations if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

Article 49 provides that the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations amounts to a fundamental breach of contract or, in the case of non delivery, if the seller does not deliver the goods within the additional period of time fixed under article 47(1) or declares that he will not deliver within the period so fixed. Further the buyer may declare the contract avoided in its entirety only if the failure to make delivery completely, or in conformity with the contract, amounts to a fundamental breach of the contract; article 51. In this context there is criticism in England of the definition of fundamental breach to which I referred earlier as making it hard to predict just when a breach will be regarded as fundamental.

These articles are thought to make it harder to determine a contract than is the situation in England where a buyer can immediately terminate for breach of a condition. This is said to be particularly detrimental in the case of contracts for the sale of commodities.[24]

Commodities are normally sold on CIF or FOB terms. The cost insurance freight contract is a type of contract where, although physical delivery is contemplated, the contract is performed by the delivery of the documents. Because of the short time within which the documents must be considered

24 See Alastair CL Mullis, Termination for Breach of Contract in C.I.F Contracts under the Vienna Convention and English Law; is there a substantial difference? in Lomnicka and Morse eds, Contemporary Issues in Commercial Law, (Sweet & Maxwell, London, 1997) at 137-160 reproduced at http://www.cisg.law.pace.edu/cisg/biblio/mullis.html.

and passed on it is important that a buyer should be able to determine his rights immediately he becomes aware of any discrepancy in the documents. Mr Alastair Mullis has expressed the view that, in this category of contract, this important commercial decision, whether to refuse the tender, 'should not be complicated' by asking the buyer to consider what the likely effect of any loss will be.[25]

Use of the CISG locally

That is one of the practical problems which may well have inhibited use of the convention locally. Many of our export sales contracts are for the sale of bulk commodities. In that context, however, Mr Luke Nottage has said:[26]

> *"Another more practical consideration that might justify exclusion of CISG also seems to make much less sense at least for Australia and New Zealand. One reason given quite frequently in England for not even adopting the Convention is that it provides a less appropriate regime than the common law in respect of cost, insurance and freight (CIF) export sales, especially of commodities. A primary concern is to ensure parties retain clear rights to terminate, especially when involved in (back-to-back) "string contracts" for commodities. More generally, as a major provider still of insurance and shipping services, many CIF sales are probably concluded in England or otherwise subjected to its law. To a lesser extent, this may also be true in the United States, which might provide a further more rational explanation for excluding CISG from contracts involving United States parties to which the convention might otherwise apply. It might also play a (minor) role in explaining why certain Japanese companies (including general trading companies dealing in commodities) might be ensuring CISG does not apply. But it seems very unlikely that New Zealand or even Australia experience similarly high proportions of CIF sales. Anyway, there is scope for drafting into CISG-governed CIF contracts some of the purported benefits of the English law approach. Thus, once again, exclusion of CISG in these two countries seems to involve more of a gut reaction."*

A similar stance is taken by Prof. Ingeborg Schwenzer. Her view is that the general use of the International Chamber of Commerce's *Incoterms 2000* containing detailed rules governing the obligations of the seller to provide for documents and the buyer to accept them, respectively, and the *Uniform Customs and Practice for Documentary Credits* of the ICC (UCP 500), which lay down special rules for cases where payment is to be made by means of documentary credit, including standby letters of credit, together create an equivalent situation to that which applies under English law. She states that both sets of rules are widely incorporated into international sales contracts, either by express reference or – according to the prevailing view, especially in court decisions – as a usage in international trade within the meaning of article 9(2) of the convention. She goes on to express her view that:[27]

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25 *Op. cit.* near fn. 24.

26 Nottage, *op. cit.* at 836-837.

27 *The Danger of Domestic Pre-conceived Views with respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the case of Non-conforming Goods and Documents* [2005] 36 VUWLRev at 807.

> *…the CISG, used in conjunction with the INCOTERMS and the UCP 500, offers a workable solution for the scope of issues and potential problems in the area of commodity and documentary sales law. Rather than working against the pressures of time and efficiency required in such transactions, the CISG instead plays a supplementary role. Consequently, the fears expressed about the use of the CISG in documentary and commodity sales have proven to be unjustified and can be laid to rest. In this way, despite the continuing presence of pre-conceived domestic views, the CISG will define its position as the true international sales law instrument, which may even prove palatable to the United Kingdom – one day!*

The convention also has many defenders of its operation when compared with the English common law tradition. As Mr Luke Nottage says: 'Overall, the key benefits of being able to apply CISG to these transactions are its accessibility, its intelligibility to business people as well as to legal professionals, and its potential for consistent interpretation (particularly if combined with dispute resolution through arbitration).[28]

Opportunities for arbitrators

The current situation is that, unless excluded from operation, the convention governs a large proportion of Australia's international sales contracts. Those contracts may lead to disputes susceptible of arbitration by members of this Institute. Many such disputes are already arbitrated through the International Court of Arbitration established by the International Chamber of Commerce which is based in Paris but composed of members from over 80 countries. A significant part of its work is to help resolve disputes arising under the convention and it publishes arbitral awards setting out the anonymous details of those disputes. When I visited the International Court of Arbitration last year, during a comparative law summer school I was attending in Paris, I was told by one of the Australian employees there that they would prefer to have more Australian and New Zealand members available for their panels than they then had. It seems to me that this may well be an area with potential for development for Australian arbitrators and one which the Institute could pursue with an eye to the future by encouraging those with the relevant expertise among its members.

To those who may think that British accession to the convention presents either an opportunity or a threat, or both, to Australian commercial arbitrators I might conclude by telling you that the author of the question answered by Lord Sainsbury on 7 February 2005, where he predicted British ratification of the convention, was Lord Lester. He asked the same question on 12 January this year – why the British Government had not yet ratified the convention. He has not yet received an answer, in public at any rate.

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28 Nottage, *op. cit.* at 818. As to the preference for arbitration rather than litigation as the primary method of dispute resolution in international transactions see Prof. Michael Pryles, *The International Arbitration Regime in the Asia-Pacific Region (1995) The Arbitrator 69-83 and Sir Daryl Dawson, International Commercial Arbitration in Australasia* (2000) 28 Int'l J. Legal Info. 396-406