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Some considerations on the desirability of accession to the CISG by the UK

This article gives an analytical overview of up-to-date arguments for and against adoption of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) by the UK. It then attempts to address whether or not there is a need to accede to the CISG if English law is well established and frequently chosen by business as a governing law of international sales. Matters such as adjusting English law to the CISG in the interests of commercial parties, improving the legal environment in pursuit of wider economic gains, and the weight of recent attempts to harmonize contract laws across Europe are discussed in more detail in support of the general argument that accession to the CISG may be desirable for the UK.

I. Introduction

As international business practice shows, international sales contracts are steadily growing in instances governed by the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG). The CISG offers a common body of rules, which are particularly useful for exporting companies. Its purpose is to make it easier and more economical to buy and sell goods internationally.

Currently, 79 developed and developing States, including top world merchandise exporters and importers, have adopted the CISG.[1] Many of them have amended their contract and/or sales codes to align them with the CISG provisions. Further adoption by countries in South-Eastern Europe,[2] or in the Middle East,[3] may be anticipated in the near future. Due to the large number of States that have adhered to the CISG, it can be theorized that the majority of the import/export transactions carried out worldwide are conducted between CISG Member States.

The UK has not ratified the CISG. Attempts at accession have, so far, only been tentative and exploratory. Despite this, a great number of the States to whom UK small businesses sell their goods (mainly those in the European Economic Area) have ratified and follow the CISG. What is interesting is the fact that, despite the advantages of the CISG, business parties worldwide have frequently incorporated English law into their international sales contracts, particularly commodity agreements. The English legal system has unquestionably achieved wide international acceptance and familiarity. On the other hand, contracting parties (from the CISG Member States) often opt out of the Convention in their agreements.[4] It must, therefore, be noted that accession to the CISG and the use of the CISG by contracting parties seem to be two quite separate issues.

However, the desirability of adoption of the CISG by the UK remains to be determined. Before reaching any conclusion, a thorough analysis of all arguments in favor of and against the adoption, not only from the theoretical but also economic and political perspectives, is necessary. In particular, the following issues must be addressed:

1. Whether the need to accede to the CISG exists if English law is well-established and frequently chosen by businesses as the law that governs international sales contracts; and
2. if English law and the CISG are similar in their substance, would the UK legislature be interested in its accession?

Accordingly, this paper will first provide a general overview of the major arguments against accession to the CISG by the UK and then focus on the previously enumerated issues in greater detail.

A. *Overview of Arguments against Accession to the CISG by the UK*

The justification for the UK's continued refusal to adopt the CISG can be evaluated on a number of grounds. Eiselen, for example, categorized reasons against ratification into three general areas: legal, economic and political; these focus on the negative aspects of implementing uni-

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1. The updated list of current CISG Member States is available at UN Treaty Collection http://treaties.un.org, accessed March 18, 2013.
2. On CISG implementation in Albania, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro and Serbia see: UNCITRAL, 'Implementation of the United Nations Convention on the International Sale of Goods and of the system of International Commercial Arbitration in Southeast Europe' (2011) www.uncitral.org/pdf/english/whats_new/2011_02/GTZ_UNCITRAL_Southeast_Europe.pdf. Moreover, UNCITRAL has been actively engaged in promoting accession to the Convention at both regional and global levels; LG Castellani, 'Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *Vindobona Journal of International Commercial Law and Arbitration* 13 (2009), 241-248.
3. For example, Bahrain is now seeking accession to the CISG (as discussed by the author with a Bahraini government representative in July 2013).
4. F. Ferrari, 'The CISG and its Impact on National Legal Systems – General Report', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 413-483.

form laws.[5] Other reasons against its accession, which deterred many English commercial parties and practitioners from wanting to adopt the CISG, were detailed by the UK industry in their responses to the CISG consultations of 1989 and 1997,[6] as well as highlighted by a number of academic and professional commentators.

Many commentators emphasized notable differences between certain substantive provisions of the CISG and English law that make accession undesirable for the UK. The differences are a part of the civil law regime and may be unfamiliar to English lawyers.[7] Specifically, they concern aspects of contract formation[8] and buyers' remedies in case of a breach of contract.[9] It is argued that the latter make the CISG less suitable than English law in the realms of documentary and commodity sales. Notably, the CISG's non-requirement of 'consideration' in contract formation as well as the favoring of specific performance over damages may be considered as a 'bias towards civil law', which would discourage the UK from adopting it.[10]

Often, 'daunting prospects' relating to the uniform interpretation of the CISG as well as unclear or broadly formulated wording of some its provisions (which could end up in litigation) are indicated when arguing against accession.[11] These positions generally argue that the CISG may increase – rather than decrease – the complexity of the legal position of sales contracts in the UK. For example, Linarelli asserted that the key reasons against adherence were either official or conventional; both reasons are centered on the 'naive belief'[12] concerning the 'superiority' of English law over the CISG; more specifically, they are based on a 'public choice analysis' focused on the danger of potential damage to the English legal ser-

5. These justifications concern such undesirable attributes of uniform convention as compromised character, a lack of underlying principles, foreign formulations, artificial division between national and international transactions, static and unchangeable instrument, integrity endangered by multitude of linguistic and interpretational approaches, and legal uncertainty ('legal reasons'). The economic arguments focus on the insignificance of the CISG in terms of existing trade practices and standard contracts, or unnecessary complication of international trade law that it causes. The 'political reasons' focus on the idea of introducing foreign solutions to well-known problems, or inefficiency of uniform laws; S. Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa', *South African Law Journal* 116 (1996), 323-370; J.S. Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective', *New Zealand Business Law Quarterly* 6 (2000), 336-347. Moreover, voices of criticism were raised about the usefulness of unifying sales laws by legislative means. Fears were expressed that uniform laws may be rejected or fail to attract the interest of the business community. The difficulty of finding a methodology for the analysis, measurement or interpretation of the CISG (particularly in different legal, social and economic realities) created serious obstacles to unification. The prospect of the long bureaucratic process of implementing or amending uniform law treaties were also regarded as obstacles to unification. Hence, not all States may have expressed interest in the unification of laws. For more information, see: S. Eiselen *ibid.*; L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in: I. Fletcher, L. Mistelis & M. Cremona (eds.), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001), 11; C. Baasch Andersen, 'Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources', in: A. Janssen & O. Meyer (eds.), *CISG Methodology* (Sellier, 2009) 207; J.A.E. Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage', *Uniform Law Review* 1 (2009), 8.
6. The UK Government Department of Business Innovation and Skills (DBIS) kindly made the individual responses to the 1989 consultations accessible to the author. According to the DBIS, all responses by the DBIS to the official 1997 CISG consultations were destroyed and thus could not have been considered in this article; personal email correspondence on July 27, 2011.
7. R.M. Goode, *Report on the Seminar on the Vienna Convention on Contracts for the International Sale of Goods* (Queen Mary and Westfield College, University of London, 11 October 1989) 8.
8. As noted in many of the industry's responses to the Consultative Document of June 1989 on UN Convention for the International Sale of Goods. Also, M. Killian, 'CISG and the Problem with Common Law Jurisdictions', *Journal of Transnational Law & Policy* 10 (2001), 217-224; N. Fletcher & H. Bassindale, 'The UN Convention on Contracts for the International Sale of Goods ("The Vienna Convention")', *ICCLR* 3 (1992), 10-15.
9. E.g.: R.M. Goode, *ibid.* at 7; M.G. Bridge, 'A Law for International Sales', *Hong Kong Law Journal* 37 (2007), 22-23; B. Zeller, 'Commodity Sales and the CISG', in: C. Baasch Andersen & U. Schroeter (eds.), *Sharing International Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his 80th Birthday* (Wildy, Simmonds and Hill Publishing, 2008), 627-628; E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, Penguin, 2010), 101.
10. P. Schlechtriem & P. Butler, *UN Law on International Sales, The UN Convention on International Sale of Goods* (Springer, 2009), 7.
11. D. Wheatley, 'Why I oppose the wind of change', *The Times* (London, March 27, 1990); M. Killian, *ibid.* 217-241; M.G. Bridge, 'The Bifocal World of International Sales: Vienna and Non-Vienna', in: R. Cranston, *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press, 1997), 296. Also noted in many industry responses to the Consultative Document of June 1989 on UN Convention for the International Sale of Goods. But according to, e.g., Butler, the common law 'consideration' should not be considered as an obstacle for the common lawyer to embrace the CISG; P. Butler, 'The Doctrines of Parol Evidence Rule and Consideration – A Deterrence to the Common Law Lawyer?', UNCITRAL – SIAC Seminar on Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (September 22, 2005), 64-65. This was further noted in many of the industry's responses to the Consultative Document of June 1989 on UN Convention for the International Sale of Goods. E.g.: J. Linarelli, 'The economics of uniform laws and uniform law making', *Wayne Law Review* 48 (2003), 27; J. Beatson, *Anson's Law of Contract* (28th edn, OUP, 2002), 19; A. Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom', *University of Baltimore Law Review* 26 (1997), 53.
12. Goode believes that the refusal 'appears to be based on a naive belief in the superiority of the Sale of Goods Act which has remained largely unchanged for over 100 years, coupled with a failure to appreciate that for every international sales contract governed by English law there will be another one governed by a foreign law (...);' E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, Penguin, 2010), 1016.

vices market.[13] Additionally, Atiyah argued that 'opposition from a number of influential organizations' and 'lack of public service resources' were possible grounds for rejection of the CISG.[14]

Additionally, Rogowska argues that the limited teaching of the CISG in English law schools results in a lack of familiarity with the Convention; this means that practitioners may not be fully able to make informed decisions about the desirability of CISG, which delays the possibility of its accession.[15] It is tempting to argue that the lack of familiarity with the CISG amongst practitioners and industry in both Member and non-Member States can be considered a significant hindrance to its popularity, ultimately preventing contracting parties from using it,[16] or governments from acceding to it,[17] respectively.

Generally, the introduction of the CISG into the UK has been rather uncertain. The government has never issued an official statement or opinion challenging the CISG or detailing reasons against its ratification. In the 1980s, the government decided to abstain from ratification until 'the reactions of its major trading partners were known.'[18] Subsequently, two public consultations of the CISG were conducted in 1989 and 1997; in both instances, the government indicated its intention to accede. Both consultations attracted very few responses.[19] The businesses that responded during the consultations were divided about ratifying; however, the majority supported the move. Based on these positive responses, the government recommended accession.[20] Despite this, nothing definite has happened since 1997, leading some to believe that the consultations may have hindered the accession efforts.

The 1997 consultations highlighted the fact that the domestic and international developments[21] as well as the positive recommendation from the English and Scottish Law Commission,[22] made the case for ratification stronger.[23] However, the consultations also showed that the UK's practitioners had some concerns about jeopardizing the prestige of the English legal system if the CISG were to be adopted. Some English lawyers may also consider English law 'more sophisticated' than the CISG.[24]

In the past, the government may have supported the drafting and eventual ratification of the Convention; however, after the consultations, no progress had been made towards ratification. As such, it 'abandoned' the CISG without adequate explanation.[25] Currently, the government seems to be undecided with regard to accession; it is either acting in a manner that suggests that it agrees with the practitioners' views on this front or may

13. As also noted in many of the industry's responses to the Consultative Document of June 1989 on UN Convention for the International Sale of Goods.
14. J.N. Adams & H. MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson Education, 2010), 433. Similarly, S. Moss, 'Why the UK has not ratified the CISG?', *Journal of Law and Commerce* 25 (2005), 485.
15. A. Rogowska, 'Teaching the CISG at U.K. Universities – An Empirical Study of Frequency and Method of Introducing the CISG to U.K. Students in the Light of the Desirability of the Adoption of the CISG in the U.K.', in: I. Schwenzer & L. Spagnolo (eds.), *International Commerce and Arbitration. Towards Uniformity* (Eleven International Publishing, 2011), 131-153. On UNIDROIT Principles and Principles of European Contract Law see: A. Rogowska, 'The UNIDROIT Principles and PECL: Experiences in the English Academic Circles', *Uniform Law Review* 16 (4) (2001), 867-875.
16. Particularly in the common law jurisdictions that adopted the CISG, e.g. in the USA; P.L. Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States', *Journal of Law and Commerce* 27 (2008), 1-127.
17. As apparently was in the case in Brazil, which only recently decided to accede to the CISG; I. de Aquilar Vieira, 'The CISG impact in Brazil', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 9.
18. As briefly mentioned in the 1997 Consultation Document: Department of Trade and Industry, 'United Nations Convention on Contracts for the International Sales of Goods (the Vienna Sales Convention), A Consultation Document' (October 1997) 5.
19. The 1989 CISG public consultation attracted only 55 responses, while the 1997 consultation managed only 37.
20. S. Moss, *ibid*.
21. Domestic developments included the amendments to the SGA introduced by the Sale and Supply of Goods Act 1994. Further relevant amendments to English law were also implemented with the EU legislation.
22. Law Commission, 'Comments on DTI Proposals for the Implementation of the United Nations Convention on Contracts for the International Sale of Goods' (30-826-03, 1997) and Law Commission, 'Law Commission's Comments on DTI Consultative Documents on the United Nations Convention on Contracts for the International Sale of Goods' (30-826-03, 1989) as well as: Scottish Law Commission, 'Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods' (Scot Law Com No 144 HMSO, 1993).
23. Despite the fact that the UK Parliament is the only body that can implement any legislative amendments, it does not necessarily always agree with the Law Commission; the recommendations of the Law Commission reflect the needs of modern law; as such, its changes further aim to establish a 'fair, modern, simple and a cost-effective' set of rules. The importance of the findings of the Law Commission was also underlined by the fact that, until now, more than two-thirds of its law reform recommendations were subsequently implemented by the Parliament; The English Law Commission, www.lawcom.gov.uk.
24. J. Beatson, *Anson's Law of Contract* (28th edn, OUP, 2002), 19. Similarly, A. Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom', *University of Baltimore Law Review* 26 (1997), 51-66. Some commentators went so far as to suggest that the UK rejected the Convention because of 'pride in its longstanding common law legal imperialism or in its long-treasured feeling of the superiority of English law to anything else that could even challenge it'; A.F.M. Maniruzzaman, 'Formation of International Sales Contracts: a Comparative Perspective', *IBL* 29 (2001), 489.
25. E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, Penguin, 2010), 1016.

be just waiting for business to 'firmly press for ratification.'[26] Interestingly, governmental initiatives related to the CISG appear to be quite a marginal value given that only few of them took place from the moment the text of the CISG was released in the 1980s. It seems as though there may be some sort of reluctance to set institutional machinery in motion for its implementation in the UK.[27] In fact, the most recent CISG consultations in the UK in 2007 were informal;[28] they targeted a limited number of specific participants whilst the official public consultations took place a long time ago.[29] Given that the government has not announced any firm position towards ratifying the CISG nor has any governmental legislative proposal, impact assessment, or cost calculation of the CISG been undertaken,[30] it could be suggested that this atmosphere, along with the critical remarks against ratification, is completely open to various theoretical speculations.

B. Why Mend what is not Broken?

Long-standing English law concerning the sale of goods is very well-developed and engenders comparative legal certainty. As mentioned earlier, English law is frequently used as the law that governs international sales contracts, particularly commodities agreements. It has thus produced a substantial body of precedents in the field of international commercial law. London is often chosen as the seat of international arbitration and litigation. The strong international reputation of English law seems to suggest that there may be no urgency to 'replace' it with the 'uncertain' CISG and the material defects of some of its provisions.[31] The English Law Societies[32] on behalf of the English legal profession raised this argument during the CISG consultations in 1981,[33] and later during the governmental consultations in 1989 and 1997. The reluctance to replace well-respected laws with the relatively unknown Convention seems to have remained one of the principal factors that has influenced the lack of parliamentary work on the CISG and has impeded its adoption. In addition, accession could have an adverse impact on the 'exportability' of English law.[34] Practitioners assert that accession could potentially trigger disappearance of English law[35] or, at the very least, dilute its value at the international level; additionally, it could endanger the importance and international reputation of London as an international arbitration/litigation center.[36] This could injure some of the English law firms who would risk losing their wealthy clients.

Another important fact that is often stressed is that the UK has gone for many years without adopting the Convention and has seen no hard evidence of being disadvantaged. Potentially, accession could result in a blurred mixture of sales laws being applicable in the UK. This would include laws set out in the Sale of Goods Act 1979 (SGA), common law, European and domestic consumer laws, and the CISG (although they would be operating in different spheres, with the CISG confined to interna-

26. S. Moss, *ibid.*
27. As noted by Moss, 'after the 1997 consultation the Ministers gave approval for the UK to proceed towards accession (...).' However, the 'progress on the bill was (...) stalled and has remained this way due to a lack of resources in the Department,' S. Moss, *ibid.*
28. Statements from the DBIS (personal email correspondence on June 22, 2011).
29. I.e., in 1997.
30. In brief, before introducing any new regulations, the UK government will consider their potential impact. This can be measured by an 'impact assessment' or by the 'consultations.' According to the governmental policies, impact assessments will particularly address following questions: why the government is proposing to intervene; how and to what extent new policies may impact on them; what are the estimated cost and benefits of proposed and actual measures. For more details see the UK Government's Code of Practice www.bis.gov.uk/policies/better-regulation/policy/scrutinising-new-regulations.
31. As noted by R.M. Goode, *Report on the Seminar on the Vienna Convention on Contracts for the International Sale of Goods* (Queen Mary and Westfield College, University of London, October 11, 1989), 6. A similar argument is apparently considered against adopting the CISG in India. According to Dholakia, if India were to sign the CISG it would have to depart from its well-established principles under the Indian Sale of Goods Act 1930 (which is based on English law); S. Dholakia, 'Ratifying the CISG – India's Options', UNCITRAL – SIAC Seminar on Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005), www.cisg.law.pace.edu/cisg/biblio/dholakia.html.
32. I.e., The Law Society of England and Wales and The City of London Law Society.
33. As noted by J.H. Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law* (3rd edn, Hart Publishing, 2007), 403 404.
34. The City of London Law Society (also for The Law Society for England and Wales), Response to the Department of Trade and Industry to Consultative Document of June 1989 on UN Convention for the International Sale of Goods (October 25, 1989).
35. In light of Bridge's conclusion: 'It may be that my own plea for differentiation [between CISG and English sales law] can be seen as expressing premature nostalgia for the disappearance of my own national law'; M.G. Bridge, 'Uniformity and Diversity in the Law of International Sale', *Pace International Law Review* 15 (2003), 89.
36. The City of London Law Society *ibid.* Also, E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, Penguin, 2010), 1016; S. Moss, *ibid.* Similarly, as argued by The Law Society of England and Wales, further development in area of harmonization of European contract law could in the long term dilute the effects of English law in favor of New York or Swiss law in international trade with the consequent loss of economic activity and export earnings for the EU as a whole; The Law Society of England and Wales 'Response to Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business' (January 2011), 2, 9, as well as: The Law Society of England and Wales 'Response to Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business' (January 2011), 18-19.

tional sales only).[37] Accordingly, English lawyers would have to brief clients on a further body of law.

Undeniably, English law and the English court system have been very successful and popular among international businessmen, particularly in terms of the sales of commodities. Moreover, English law has always been cherished by English lawyers who have promoted its high status overseas. To this extent, even European law has been seen as a threat to its position.[38] However, the lack of evidence regarding problems with English law might suggest that there is no real reason to mend that which is not broken.[39] In other words: is there a need for the UK to accede to the CISG? On the other hand, English lawyers cannot be sure that, if a question or dispute arises, the CISG would not give their clients a more favorable result than English law. The following arguments can be made in order to address these competing ideas.

1. Adjusting to the CISG in the Interests of Commercial Parties

From theoretical point of view, it has traditionally been one of the goals of the harmonization and unification of laws to create similarity in the rules of different States.[40] As Lord Hope stressed during his public lecture in 2010, 'it has long been recognized that in questions of mercantile law, which is based after alllargely on international practice, it is desirable to have uniformity of rules.'[41]By establishing a common legal framework, general economic efficiency of transactions can be increased whilst reducing transaction costs.[42]

Typically, States adopt uniform laws for so-called normative reasons[43] (i.e., because such international conventions on sale of goods may have offered a 'better' or more modern legal regime than their respective domestic laws on sale of goods). This was the case for the Eastern European countries that ratified the CISG back in the 1980s.[44] As previously mentioned, English law is sophisticated and internationally recognized, and as such, there may be no urgent need to ratify. Moreover, it appears that adoption of the CISG in the UK could be justified only if the Convention's rules were greatly superior to English law (which does not seem to be the case, although the CISG represents a good compromise solution).

However, some civil and common-law countries that had well-established systems of law nevertheless ratified the Convention (e.g. Germany, France, and the US). The US government placed emphasis on the fact that the CISG can provide important benefits to exporters as it 'enables the parties to avoid difficulties in negotiating "whose law will govern" by utilizing internationally accepted, substantive rules on which contracting parties, courts, and arbitrators may rely.'[45] Due to the phenomenal success

37. However, it should be noted that in Scotland reforms were already proposed in the past to align the contract law to the CISG.
38. As mentioned by Lord Goff, 'Lord Denning, a patriotic defender of the common law of England, saw European law as an invader, even a potential conqueror, travelling up the rivers and estuaries of England, like the Anglo-Saxons and the Danes many centuries ago,' Lord Goff, 'The future of the common law' (written version for publication of The Wilberforce Lecture 1997, delivered by Lord Goff of Chieveley on 11 March 1997 at Gray's Inn, London) (1997) 46 ICLQ 746. The fnture optional instrument on European contract law may also be considered a threat to the English law of contracts; see: The Law Society of England and Wales, 'Response to Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business' (January 2011), or Professor E. Clive, contribution to European Private Law News, Edinburgh Law School (June 21, 2009), www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=7817, accessed March 13, 2013.
39. The author cannot claim originality by using this expression for the comparison of the CISG and English law as it has been already used in: L. Mistelis, 'Is Harmonisation a Necessary Evil? The Futnre of Harmonisation and New Sources of International Trade Law', in: I. Fletcher, L. Mistelis & M. Cremona (eds.), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001), 15, as well as C. Baasch Andersen, 'The CISG impact in the United Kingdom', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 309.
40. L. Mistelis, *ibid.* 3-27.
41. Lord Hope of Craighead, 'The Role of the Judge in developing Contract Law', paper delivered at the Contract Law Conference (Jersey, October 15, 2010), www.supremecourt.gov.uk/docs/speech_101015.pdf.
42. H. Kronke, 'International uniform commercial law conventions: advantages, disadvantages, criteria for choice', *Uniform Law Review* 13 (2000), 16; S. Vogenauer & J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP, 2009), 3.
43. D.W. Leebron, 'Claims for Harmonization: A Theoretical Framework', *Canadian Business Law Journal* 27 (1996), 63.
44. R. Knieper, 'Celebrating success by accession to CISG', *Journal of Law and Commerce* 25 (2005-2006), 477-481.
45. Hence, e.g., the CISG would not apply to contracts between an American party and a party whose place of business is in a State that has not adopted the CISG; US Department of Commerce, 'The U.N. Convention on Contracts for the International Sale of Goods' (August 2002), www.osec.doc.gov/ogc/occic/cisg.htm. However, due to a popularity of the Uniform Commercial Code which can be easily ascertained by the foreign parties, the USA derogated from subparagraph (1) (b) of Art. 1 CISG pursuant to Art. 95 CISG; P. Butler, 'Celebrating Anniversaries', *Victoria University of Wellington Law Review* 4 (2005), 776.

and wide acceptance of the CISG, Turkey,[46] Japan,[47] and Brazil[48] recently adopted it. Apparently, the Japanese government expected the CISG to 'remove uncertainty regarding the law applicable to trade between Japanese parties and those of other Contracting States, and (…) facilitate international trade involving Japanese parties.'[49] This indicates that, in this instance, non-normative reasons for the adoption of uniform laws may exist. As noted by Kozuka, alleged benefits of unification are not found within the substance of the uniform laws but in the exclusion of the differences themselves. To this extent, States would adopt a uniform law 'only because of the benefit of sharing a common rule with other States, whatever the substance of that rule might be.'[50] In this context, the Scottish Law Commission acknowledged the 'obvious advantages for Scottish traders, lawyers and arbiters in having (…) internal law the same as the law that is now widely applied throughout the world in relation to contracts for the international sale of goods' back in 1993.[51] It follows, then, that non-normative reasons should be considered by the UK because without them, the possible benefits of ratification may not be fully appreciated by the English business and legal communities.

Even in cases where the national rules are, to some degree, similar to those of the unifying instrument (which may be also the case with English law and the CISG), there may still be a reason for its adoption. In fact, the implementation of a uniform law may assist with amending national law to bring it in line with current international practices. The goal of a law reform such as this would be to establish a system of better laws that would serve the needs of international trade. Accordingly, similarities between the CISG and some national laws were actually considered as reasons for its adoption, even in non-common law countries (e.g. Georgia).[52] In other non-common law countries, where many of the provisions differed (e.g. Uzbekistan), accession was regarded as an opportunity to align the old national commercial and civil codes with the modern, internationally geared CISG.[53] Despite this, parts of domestic laws in certain CISG Member States may still deviate from CISG law. This could occur when, for example, a particular common law concept has been implemented into a diverging civil law system when the CISG is ratified. Janssen and Schulze argue that, in such cases, the combination of the national laws and the foreign CISG concepts creates a so-called 'legal hybrid' that may (for better or worse) work in practice.[54]

Nevertheless, the CISG has been generally considered to be a good law that promotes fair and honorable solutions without giving advantages to either side.[55] It is also seen as being more predictable regarding the international sale of goods than many foreign laws. As such, it has become influential in practice over the years (although, as compared to English law, perhaps among a different range of parties[56] and in relation to certain types of contracts).[57] It gained considerable international influence due to its many advantages, especially its applicability in arbitral tribunals and courts. The CISG is not a new law. It is not untried or largely unfamiliar to common law lawyers (which would introduce completely alternative legal culture and expose English lawyers to irreconcilable problems of interpretation or application); in various ways, it already affects English merchants.[58] To this end,

46. According to the Turkish Prime Minister who led Turkey to accession in 2010 'the development of international trade on the basis of equality and mutual benefit is an important element of promoting friendly relations among States (…). As such, improvement of the legal framework in which international trade operates is a fundamental aspect of this development process (…), [thus] we would like to call other States that are not party yet to consider becoming parties to the Convention'; Depositary Notification, Fazlı Çorman, Deputy Permanent Representative, *Chargé d'affaires a.i*, of the Permanent Mission of Turkey to the United Nations (CN 428, July 7, 2010). On Turkey's ratification see W.P. Johnson, 'Turkey's Accession to the CISG: The Significance for Turkey and for Sales Transactions with U. S. Contracting Parties', *Ankara Law Review* 8 (2011), 5.
47. H. Sono, 'Japan's Accession to the CISG. The Asia Factor', *Pace International Law Review* 20 (2008), 108-110. The CISG entered into force in Japan in 2009.
48. The CISG will enter into force in Brazil in 2014.
49. G.P. McAlinn, 'Japan and the United Nations Convention on Contracts for the International Sale of Goods (Part 1)', The Japan Commercial Arbitration Association (24 JCAA Newsletter, May 2010).
50. S. Kozuka, 'The Economic Implications of Uniformity in Law', *Uniform Law Review* 4 (2007), 683. This also seems to be in compliance with the earlier mentioned statement of the Turkish Prime Minister.
51. Scottish Law Commission, Report on Formation of Contracts: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (1993), Scot. Law Com. No. 144, para. 1.7.
52. R. Knieper, 'Celebrating success by accession to CISG', *Journal of Law and Commerce* 25 (2005-2006), 480.
53. R. Knieper, *ibid*. Similarly in Japan or Germany.
54. A. Janssen & R. Schulze, 'Legal Culture and Legal Transplants: Germany; Past, Present and Future', *Saidat Law Review* 1 (2011), 39-40.
55. See, e.g., a voice of practitioner: S. Cook, 'CISG: From the Perspective of the Practitioner', *Journal of Law and Commerce* 17 (1998), 349-350.
56. I.e. small and medium-sized enterprises (SMEs) as opposed to large multinational enterprises, as well as to those parties that either did not make a valid choice of law or are opting for a neutral law.
57. The contracts governed by the CISG seem to mainly concern manufactured goods as opposed to commodities sales. However, this does not mean that the CISG is not appropriate for commodities agreements.
58. A. Rogowska, 'CISG in UK: How does the CISG govern the contractual relations of English businessmen?', *International Company and Commercial Law Review* 7 (2007), 226-230.

many common law lawyers support accession.[59] They claim that the CISG may be either well suited, or even more adequate than English law, in terms of governing certain types of international sales contracts.[60]

From a legal standpoint, applying the CISG may be more useful than having to choose an obscure foreign law, especially those that are only accessible in a foreign language. The UK could, therefore, adopt it not because it would be similar in value or even better than the common law; it would be because the Convention could offer a neutral system of law which would, in certain circumstances, be better than using foreign and/or unknown laws.[61] As noted by Nicholas, this advantage of the Convention is a 'prudential' and 'strong' argument in favor of the UK's accession.[62] That explained, the CISG contains a number of shortcomings. Although those may not appear to be any 'worse' than those found in the SGA, the introduction of a similar law could cause confusion. No matter which law the parties decide to apply to their cross-border sales (whether it be the CISG or another foreign law), reservations about using a legal system unfamiliar to lawyers or judges would naturally remain. Those reservations would have to be assessed on an individual basis, which would place an additional burden on both lawyers and clients.

Despite the nearly unanimous international support, it must be asserted that English law is not free from deficiencies and is far from perfect. As any product of human labor and particularly any other domestic law on sale of goods, no lawyer would claim that it is faultless in every respect. The same holds true for international accords such as the SGA. It was drafted in the last century and some of its provisions may be ignorant of the needs of modern commerce in general and international sales in particular, especially considering that the SGA is designed to govern both domestic and international sales. Indeed, there exists a body of case law supplementing the SGA provisions. The well-reasoned yet lengthy judgments that are the specialty of common law judges may be, however, difficult for foreign lawyers who are used to deriving rules of law from the statutes to read. To this extent, any improvement of the SGA would be potentially welcome. The same could be said for the CISG, especially considering that it reflects modern practices in an international manner. According to Schlechtriem, by integrating the CISG into the national civil codes, 'States could enrich their domestic sales laws with the CISG jurisprudence.'[63] However, law reforms are usually difficult to carry out, which could impede the adoption of the CISG.

Nonetheless, it is doubtful whether, if enacted, the CISG would trigger major amendments of English law concerning the sale of goods (unless the UK would seek to assimilate them into the SGA). The UK has never expressed an intention to adjust its sales laws to a uniform law such as the CISG as some other countries have (e.g. Germany or the Scandinavian States), except, perhaps, for the long-debated matter of the abolition of the doctrine of consideration (which would be in line with the CISG). Similarly, in such common law States as Canada or New Zealand, no specific laws were passed to amend domestic sales rules to conform to the provisions of the CISG.[64] In case of accession, the deviating parts of English law would need to be, in the long term, aligned with the CISG to ensure all domestic legislation would be consistent.[65] Such a project is feasible yet would consume considerable amounts of time and effort.[66]

59. E.g.: R.M. Goode, 'Why compromise makes sense', *The Times* (London May 22, 1990); R.G. Lee, 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?', *JBL* 3 (1993), 131-148; F.M.B. Reynolds, 'The Vienna Sales Convention on the Sale of Goods: A Note of Caution', in: P. Birks (ed.), *The Frontiers of Liability, 2nd Volume* (OUP, 1994), 18-28; A. Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom', *University of Baltimore Law Review* 26 (1997), 51-66; A.E. Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom', in: *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International, 2000 2001), 9-57.

60. According to Nottage, 'by more readily upholding contract formation than in the English law tradition, and then being cautious about allowing termination unless all hope is lost for the relationship, CISG seems to mesh better with the expectations and practices of traders world-wide'; L. Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan', *Victoria University of Wellington Law Review* 4 (2005), 829. As Bridge says, the CISG may be even 'better suited' than English law for 'certain types of sale, especially those involving continuing co-operation, such as contracts for the supply of machinery to be installed by the seller, where contractual continuance is more desirable than hair-trigger termination rights' while English law which is 'more than adequate' for commodity sales; M.G. Bridge, 'What is to be done about sale of goods?', *Law Quarterly Review* 119 (2003), 177. Similarly, R. Bradgate & F. White, *Commercial Law* (3rd edn, OUP, 2007), 16.

61. For example, where contract negotiations are on hold due to a disagreement on a governing law of contract, the CISG could be proposed as a neutral and compromise governing law (assuming that English law would not be applicable).

62. B. Nicholas, 'The Vienna Convention on International Sales Law', *Law Quarterly Review* 105 (1989), 241-242. Also, R.M. Goode, *Report on the Seminar on the Vienna Convention on Contracts for the International Sale of Goods* (Queen Mary and Westfield College, University of London, October 11, 1989), 7.

63. P. Schlechtriem & P. Butler, *UN Law on International Sales, The UN Convention on International Sale of Goods* (Springer, 2009), 7.

64. F. Ferrari, 'The CISG and its Impact on National Legal Systems – General Report', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 472; P. Butler, 'The CISG impact in New Zealand', in: F. Ferrari, *ibid.* 258.

65. However, it should be noted that if the CISG applies it would be in relation to international sales and would displace the SGA/English law except for its gaps; in relation to the continued application of the SGA/English law to domestic sales, there would not seem to be any urgent need to align it to the CISG.

66. Its accomplishment can be particularly evidenced by the works of the Scottish Law Commission that has already prepared such law amendment proposal for Scotland as well as by the review of different jurisdictions worldwide that have changed their civil codes according to the rules provided by the CISG (e.g., Germany, the Netherlands, Sweden, Finland, Estonia, or China).

2. Improving the Legal Environment in Pursuit of Economic Gains

Unification in the field of commercial law may be result and policy-driven; agreement, therefore, would not only be measured by the merging of differing standards, but by economic gains.[67] In this context, the CISG could help to standardize the law of contracts for the benefit of all of its Member States,[68] both industrialized and developing nations. In reality, it could have a much greater value for the low-income or less-developed countries.

As noted by Posner, 'a poor country may not be able to afford a good legal system, but without a good legal system it may never become rich enough to afford such a system.'[69] Adoption of more transparent and internationally recognized rules would, thus, improve legal predictability in those States and help enterprises based in those countries to engage in mutually beneficial and profitable business transactions. Generally, facilitating international trade allows developing economies to become part of global supply chains. It can also have a role in the transfer of know-how and international technologies.These facts are particularly important in the current economic situation and amid forecasts of the continued slowdown of global economic growth that will naturally affect those developing countries.

It follows, then, that less-developed States stand to benefit economically from the neutrality and some of the modernizing aspects of an instrument like the CISG. They may be more comfortable with adopting the CISG when trading with countries of similar status and especially with more developed countries and merchants with greater bargaining power to dictate law. Consequently, more foreign investment and business transactions could potentially be facilitated in those less-developed States.[70] It is against this background that large international organizations such as UNCITRAL, UNIDROIT (of which the UK is an active member), or OHADA[71] have begun to use concepts of harmonization, standardization, or unification of commercial practices on an international scale. As such, adopting a convention such as the CISG in those countries may have a long term effect on robust trade and commerce, which can, in turn, contribute to overall economic stability. This directly concerns English companies, which would have more investment opportunities there.

Economic stability has the potential to help reduce sources of unrest and ultimately contribute to support the rule of law and bolster a democratic process, e.g., in the North African or Middle Eastern countries, which are currently experiencing political, economic, and social turmoil.[72] Accordingly, UNCITRAL has been helping to achieve the rule of law by preparing uniform instruments of law. For example, Johnson argues that the ratification of the CISG by Turkey could have broad legal and economic implications and help Turkey play an important role in stabilizing the region. This could be also true in some Anglophone African countries (e.g. Ghana or Nigeria) where the legal system is founded on the common law and where the law governing sale of goods is based on the original English SGA.[73]

In this context, it can be said that the UK, a country of origin of one of the most prominent legal systems of the world, has the ability to play an important role and to exercise meaningful influence in those unstable States. The UK, which has one of the world's strongest economies and actively trades with many countries, would very likely be followed by those less-developed common law States. A more positive attitude to the CISG by the UK, which provided the less-developed countries with the essential basis of their legal system and their sale of goods laws, would, therefore, likely encourage a favorable disposition to the adoption of the CISG in those countries as well. In turn, UK firms could benefit from those countries' economic growth.

A desire for economic gain through foreign investment could be a motivation for the adoption of the CISG by the UK; the understanding that most transactions would take part under the CISG would result in mutual benefits for all parties involved, particularly those from States with weaker economies. Currently, the approach of English lawyers towards the CISG and harmonization of laws can be compared to the attitude of the Australian lawyers who, in the view of Spagnolo, 'certainly appreciate the importance of standardisation of trade and investment laws, but have simply not translated this into a good working knowledge of harmonised sales law in practice.'[74] On the other hand, it may not be sensible for the UK to

67. H.S. Burman, 'Building on the CISG: International Commercial Law Developments and Trends for the 2000's', *Journal of Law and Commerce* 17 (1998), 355.
68. E.g., R.M. Goode, *Report on the Seminar on the Vienna Convention on Contracts for the International Sale of Goods* (Queen Mary and Westfield College, University of London, October 11, 1989) 7; M. Cenini & F. Parsi, 'Economic Analysis of the CISG' in: A. Janssen & O. Meyer (eds.), *CISG Methodology* (Sellier, 2009), 151.
69. R.A. Posner, 'Law and Economics in Common-Law, Civil-Law and Developing Countries', *Ratio Juris* 17 (1) (2004), 77.
70. As, e.g., in case of Ghana; E. Laryea, 'Why Ghana should implement certain international legal instruments relating to international sale of goods transactions', *African Journal of International and Comparative Law* 19 (2011), 16-17; or N. Maduekwe, 'The CISG and Nigeria: Is there a meeting point?', www.dundee.ac.uk/cepmlp/gateway/?news=31303, accessed March 13, 2013.
71. A program for the harmonization of commercial law in Western Africa has been set up by OHADA (The Organization for the Harmonization of African Business Laws) in the 1990s. Bills prepared by the OHADA draw upon the CISG and other international instruments of contract law. See for more detail www.ohada.com/.
72. W.P. Johnson, 'Turkey's Accession to the CISG: The Significance for Turkey and for Sales Transactions with U.S. Contracting Parties', *Ankara Law Review* 8 (2011), 2-3.
73. E. Laryea, *ibid.* 16-17.
74. L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Cost of Ignoring the Vienna Sales Convention for Australian Lawyers', *Melbourne Journal of International Law* 10 (2009), 146.

adopt the CISG only to harmonize international sales laws for the benefit of the less-developed States if the UK would only gain minimal advantages while, at the same time, business would exclude the CISG from their contracts regardless.

3. Weight of Europeanization of Contract Law

Arguably, at least 85% of the laws affecting businesses in Europe are based upon a supreme EU law, i.e., treaties, regulations, directives, or case law precedents created by the European Court of Justice (ECJ).[75] While there are just four countries in the EU that could be described as common law countries (the UK, Ireland, Cyprus, and Malta), EU legislation (which is mainly based on civil law concepts) is equally applicable within EU borders, including those four common law States. EU legislation thus has an impact on many areas of English law and imposes various obligations on UK businesses.

The law of contracts is one of the foundations of commercial law, whilst the harmonization of international sales laws has influenced the development of a general contract law.[76] Notably, the EU has endeavored to 'strengthen the internal market by making progress in the area of European Contract Law.'[77] The EU was driven to 'Europeanize'[78] the 'fragmented and uncoordinated'[79] contract law by reducing internal legal barriers and costs, which may arise in cross-border transactions due to the differences between the national contract laws.[80]

Accordingly, in light of the plans to harmonize consumer laws throughout the EU, the European Commission has since the early 1990s issued several directives providing protection for consumers as contracting parties. Of importance is the fact that some of those directives were directly or indirectly influenced by the CISG (although the CISG itself excludes consumer transactions). Therefore, upon their implementation, they have formed part of the law applicable in the UK and prevail over English law in the instance of any divergences. Consequently, it can be argued that some of the concepts adopted by the CISG have already been implemented in the UK through EU legislation.[81] The plan further anticipated an improvement of existing and future *acquis communautaire* in the field of contract law. The idea of a common instrument in European contract law has been developed since then and was subject to wide public consultations in the EU.[82] At this stage, the EU is pursuing an optional instrument in Common European Sales Law that primarily focuses on creating a unified law of contract within the EU.[83] The draft of the optional instrument, which is directed at both businesses and consumers, is based on the CISG (as well as certain model laws).

The UK government was initially supportive of the EU proposal to reduce inconsistencies in existing EU legislation. However, it was 'not attracted to new comprehensive legislation to replace national contract law, which would involve substantial legal, political, and cultural difficulties.'[84] The House of Lords,[85] as well as The Law

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75. Eversheds, 'How to be international lawyer', (2010), 89, www.eversheds.com/documents/How-to-be-int-lawyer.pdf, accessed August, 8 2013.
76. E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, Penguin, 2010), 11. The contracts for sale of goods concern a multitude of international transactions and have direct impact on a development of technologies in such important fields as, e.g., transportation, telecommunication or manufacturing. Since any business deal has to be in conformity with a contract, whether written or oral, agreements are obviously a key part of every transaction.
77. EU Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses' dated 1.7.2010 (COM(2010)348 final), para 1.
78. The term 'Europeanization' refers to attempts at unification or harmonization of the European law within the borders of the European Union.
79. According to Lando, European contract law has been 'fragmented and uncoordinated;' O. Lando, 'Some Features of the Law of Contract in the Third Millennium', in: P. Wahlgren (ed.), *Legal Theory, Scandinavian Studies in Law, Vol. 40* (Stockholm Institute for Scandinavian Law, Stockholm, 2000), 343-402.
80. EU Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses', *ibid*. However, those prospects could be considered as mere assumptions given that the responses to the 'Communication from the Commission to the Council and the European Parliament on European contract law,' dated July 11, 2001 (COM(2001)398), mostly did not consider the differences in contract laws as significant obstacles for cross-border trading. For example, the responding legal practitioners explained: 'Language barriers, cultural differences, distance, habits and judicial attitudes are seen as more significant than the diversity of laws. It is suggested that divergences in civil procedure should be addressed as a priority.'
81. For a more detailed discussion on this point see, e.g., S. Troiano, 'The CISG impact on EU Legislation', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 354.
82. Which eventually led to the publication of a 'Draft Common Frame of Reference' (DCFR) in 2009; C. von Bar, E. Clive & H. Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), Interim Outline Edition* (Sellier, 2008).
83. Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, COM(2011)635 final, 2011/0284 (COD).
84. As stated by the UK government in response the Commission's Communication on European Contract Law (COM(2001)398), published on July 11, 2001); M. Wills, Parliamentary Secretary, Lord Chancellor's Department, 'Communication on European Contract Law, UK Government Response' (October 25, 2001).
85. According to the House of Lords (House of Lords, European Union Committee, 'European Contract Law: the Draft Common Frame of Reference, Report with Evidence' (12th Report of Session 2008-09, HL Paper 95, 2009), 8, the 'lack of harmonization of substantive law is not normally identified as a main obstacle to the good functioning of civil proceedings in the Member States, even in a cross-border context.' The House of Lords also stressed some differences between the DCFR and the English law of contracts, e.g.: the concept of contract, pre-contract negotiations, mistake as a ground for setting aside a contract, party autonomy, and contractual certainty.

Society of England and Wales[86] subsequently criticized the proposed legislation. The UK (along with three other countries) then exercised its right under the Treaty of Lisbon to challenge the EU's proposed Common European Sales Law on the grounds that it infringed upon the principle of subsidiarity.[87] However, if the EU were to implement the optional instrument in the future, the UK may be forced to consider the CISG. In such case, adoption of the CISG by the UK may actually happen, but it may take substantially more time to take effect. On the other hand, pursuing yet another uniform instrument in the area of sales law (that could coexist with the CISG) may be seen as a failure of the CISG in this field.[88]

Essentially, the growth of EU legislation in the area of commercial and contract law has had an undoubted impact on the long-established English contract law. Some of the CISG concepts were imposed upon the English legal system through implementation of relevant EU directives. Therefore, the respective CISG principles, or even the CISG itself, can no longer be considered completely unfamiliar in the UK. In view of the work that has taken place in the area of European harmonization of international sales law, it appears even more strongly that the UK might not be able to isolate itself completely from the Convention and should, therefore, take its provisions into account. English lawyers need to be familiar with the CISG, especially considering that the ECJ frequently analyzes or refers to particular provisions of the Convention in its judgments.[89] Finally, it is obvious that by adopting the CISG, the UK would minimize the possibility of EU intervention because of the harmonization of English law and the Convention. The arguments towards ratification of the CISG by the UK were actually missing or may have not been that clear and significant in the past as they are now.

4. Can the Value of English Law be Diluted by the CISG?

Turning to those claims that the value of English law may diminish after accession, it is true that, as with implementation of any new laws (particularly successful ones), the CISG would have some effect on the use of English law. It is important that, due to its automatic application, it would govern all relevant contracts unless explicitly excluded by the parties. Because of such widespread and immediate application, it is argued that there is increasing evidence of a process of denationalization of private laws that has been bolstered by international law and economics, particularly the CISG.[90] Arguably, such uniform laws can, in the long term,gradually denationalize commercial law in international contexts.[91] This is because it may not be desirable to have two separate systems of sales law in a country that is heavily engaged in international commerce.[92] Similarly, upon accession, English law would also be ousted as the proper contract law in many international cases as the CISG operates as a second national regime for cross-border sales.[93] As such, some English lawyers have considered the surrender of familiar English law in favor of the more uncertain (and influenced by civil law) CISG as undesirable.[94]

Certainly, the efforts to unify international sales laws have lived up to, or even exceeded,[95] the expectations of those who initiated the process. However, the CISG did not aim to suppress national differences for the sake of uniformity, but aimed to exist alongside domestic codes. It does not force Contracting States to fully change their tried and tested national rules. In fact, its goal may have been not to harmonize the national commercial laws of signatory nations, but, rather, to try to isolate from the body of commercial law a special subset (international sales) and create a unified set of rules for that group of

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86. The Law Society of England and Wales, 'Response to Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business' (January 2011).
87. The other countries include Austria, Belgium, and Germany, www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0284&appLng=EN.
88. Law Commission and Scottish Law Commission, 'An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government' (November 10, 2011) 96. The EU Commission is in fact developing yet another legal regime to be applicable to commercial contracts alongside the CISG (in the EU only optionally). Thus, the EC seems to ignore the fact that the law in respect of business-to-business transactions may have been already harmonized in the EU by the CISG (except for the four EU countries where the CISG has not been ratified). Nevertheless, it would be difficult to harmonize contract law if business transactions were excluded from the reform. Hence, the optional instrument concerns both consumer and business contracts.
89. See e.g.: *Car Trim* [2010] EUECJ C-381/08 (February 25, 2010) where the ECJ referred to the CISG provisions to decide how 'contracts for the sale of goods' are to be distinguished from 'contracts for the provision of services;' or *Putz* [2010] EUECJ C-87/09_O (May 18, 2010) where the court made comparative reference to Art. 45 CISG, etc.
90. Apparently, about 80% of all German legislation in the field of commercial law is prescribed by the EU law; almost 50% of all German regulations find their origins in the EU law; H. Roesler, 'Eliminating borders of national private law – potentials analysis of EU private law, the CISG and the Principles', *The European Legal Forum* 4 (2003), 205.
91. L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in: I. Fletcher, L. Mistelis & M. Cremona (eds.), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001), 25.
92. As e.g. argued by Lorenz with reference to the (already accomplished) proposals to reform German Civil Code in light of the CISG, W. Lorenz, 'Reform of the German Law of Breach of Contract', *Edinburgh Law Review* 1 (1995), 317.
93. M. Hesselink, 'How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation?', Centre for the Study of European Contract Law Working Paper No 2011-15, http://ssrn.com/abstract=1950107.
94. See, e.g., R.M. Goode, *Report on the Seminar on the Vienna Convention on Contracts for the International Sale of Goods* (Queen Mary and Westfield College, University of London, 11 October 1989), 8.
95. I. Schwenzer, *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP, 2010), 1.

transactions.[96] Some authors may still consider such a dichotomy a 'mistake,'[97] but due to legal, economic, and political differences, it would not have been possible to completely unify sales laws.[98] Accordingly, the CISG only applies to the international sale of goods and not to all commercial law.[99] As such, practicing lawyers from CISG Member States do not invoke the CISG in purely domestic disputes.[100] Domestic sales contracts are still governed by national laws that remain in effect. Additionally, national laws are still required to fill the gaps of the CISG, to govern issues that are explicitly excluded from the scope of the Convention or where the CISG does not apply. Moreover, generally accepted international usages and practices are to be taken into consideration. Finally, the agreement between parties concerning the law that is utilized will always have priority over the Convention in accordance with its Article 6. Thus, the CISG can be excluded from application by express agreement of the parties and is not 'mandatory' in the sense that it applies regardless of the parties' wishes. Since the CISG cannot be used in the realm of domestic sales, the body of domestic laws continues to evolve alongside it.

Since the British Empire – through which the English law achieved a truly global reach by the late 19th century – no longer exists, the UK is now part of the European and international communities.[101] It follows, then, that any idea that English law is somehow 'superior' in international contracts or that only English and New York are the only 'truly international' legal systems[102] may be considered largely 'mythical.'[103] The reason why English lawyers would consider giving more attention to the Convention, then, is because it potentially has significance in terms of international sales as well as a growing influence among international businessmen. It is for this reason that many commentators assert that accession would not be a threat, but an opportunity to improve English law and raise London's internationally recognized status.[104] As such, English law would not disappear or cease to exist in case of adherence to the CISG. It would remain of considerable importance to commodity traders and those involved in other specialized forms of international trade.

In addition, several other strong jurisdictions (e.g. German, Swiss, or New York State) are also highly regarded and often used in international agreements. Adoption of the CISG did not jeopardize their position among CISG Member States because traders from the CISG Contracting States often choose to opt out of the CISG in favour of those national laws. Thus, in fact, none of the CISG Member States has ever given any indication that its domestic law suffered upon adoption of the CISG.[105] There seems to be widespread satisfaction with the CISG among adherents with no legal or economic problems related to its application. Cases were even reported where the courts applied the CISG to interpret domestic contracts (e.g. Spain).[106] Many traders and lawyers from Member States may also think of the CISG as their national law and not as a separate international convention. New accessions to the Convention are pending due to its popularity. Apparently, it was the business industry in one Member State that pressed for revoking previously made CISG reservations.[107] Various other common law jurisdictions (e.g. Australia and Canada), which have sales codes

96. A. Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods', *Ohio St LJ* 45 (1984), 265-305.

97. According to Rosett, 'this dichotomy is undefinable in a world economy that is increasingly integrated across borders', A. Rosett, *ibid.* 575.

98. R.G. Lee, 'The UN Convention on Contracts for the International Sale of Goods: OK for the UK?', *JBL* 3 (1993), 1993, 147.

99. Not all sales contracts are covered by the CISG (in accordance with Article 4 CISG).

100. F. Ferrari, 'The CISG and its Impact on National Legal Systems – General Report', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 435.

101. In fact, it could be said that common law is less influential in Europe where only four countries belong to the so-called 'common law family.'

102. As stated by the UK's Confederation of Business Industry in its response to European Commission Green Paper on policy options for progress towards a European Contract Law for consumers and business (January 2011) 4, http://ec.europa.eu/justice/news/consulting_public/0052/contributions/54 en.pdf.

103. J. Linarelli, 'The economics of uniform laws and uniform law making', *Wayne Law Review* 48 (2003), 35.

104. Law Commission, 'Law Commission's Comments on DTI Consultative Documents on the United Nations Convention on Contracts for the International Sale of Goods' (30-826-03, 1989); Law Commission, 'Comments on DTI Proposals for the Implementation of the United Nations Convention on Contracts for the International Sale of Goods' (30-826-03, 1997); A. Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom', *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International, 2000-2001), 9-57; J. Linarelli, 'The economics of uniform laws and uniform law making', *Wayne Law Review* 48 (2003), 35.

105. For detailed reports on how the CISG impacted national laws of particular Member States after accession see: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008).

106. M. del Pilar Perales Viscasillas, 'CISG Case Law in Spain (2004-2006)', in: C. Baasch Andersen & U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing, 2008), 392-393.

107. For example, Denmark recently withdrew a declaration made under Art. 92 CISG upon ratification (C.N.347.2012.TREATIES-X.10 (Depositary Notification)). Furthermore, a quite recent government bill (Proposition 2010/11:97, April 28, 2011) states that Sweden revokes reservation made to Part II of the Convention in accordance with its Art. 92 CISG. According to Thomaeus, 'following the global acceptance of the convention, the notion has grown stronger that the Nordic countries' stance with regard to the reservation could, e.g., imply a reluctance on the part of Nordic judges and arbitrators to apply the convention. Consequently, the reservation has come to be viewed by many as an unnecessary barrier to the world market;' and it was Nordic business that petitioned the Nordic governments to revoke the reservation; B. Thomaeus, 'Sweden to revoke reservation to Part II of the CISG' (June 2011), www.garde.se/filer/sweden_to_revoke_reservation_to_part2_of_cisg.pdf.

mainly based on the SGA and the underlying case law,[108] have also managed to integrate the CISG into their sales law regimes. Notably, non-common law countries agreed to accept the common law solutions that the CISG embodies upon its adherence (and vice versa). In these (and many other) cases, the CISG coexists with – but does not replace – the national systems of commercial law altogether in every instance, especially in relation to domestic sales transactions.

II. Concluding Observations

It is undeniably true that there is a market for a legal instrument such as the CISG. There is also a significantly large market in which the CISG could potentially develop in the UK. Some English companies may actually want to give a thought to application of the CISG before its accession because it can be convenient for traders who are not familiar with the contents of foreign laws and cannot choose their domestic law as the law that governs their contract.[109] The CISG can simply exclude the possibility of a still 'worse' law being chosen. As such, it is correct to assert that the 'idea that application of the CISG leads to uncertainty does not mean that it would not, nevertheless, be the preferable choice where the trader would otherwise be faced with the application of a foreign law.'[110]

There may be a market for the CISG in the UK; ultimately, though, it is a question of how likely it is that British traders would want to choose the CISG upon adoption as well as whether the Convention would have significant practical value in the UK if it were adopted. Arguably, if the answer to the latter question is negative then there should be no urgency to proceed with accession.

It may be too difficult to say what effect the CISG would have in practice in the UK. It is by no means certain that English businessmen will be willing to write their contracts in line with the CISG immediately after its implementation; instead, they might still opt for domestic English law if they are wary of something new and potentially hazardous.[111] It is incorrect to assume that businesses would suddenly decide to abandon the existing contract laws in favor of a system that is less familiar to them, their judiciary and legal counsels, and that which has been untried in English courts.[112] However neutral the CISG is, it is highly likely that most businesses would continue selecting English law for their contracts. It would take some time to assess or be advised by lawyers on the extent to which such companies may embrace or exclude the CISG.[113] In fact, some studies indicate that, in reality, the CISG may have had only a minor impact on practicing lawyers from the Member States.[114] Many companies and trade associations even within countries that were signatories contract out of the CISG in their standard contracts as a matter of policy.

Nonetheless, it can be argued that even if only few English companies decide to apply the CISG in their contracts, the objectives of the Convention will be fulfilled. It should also be noted that although some parties from European Member States might often seem to opt out of the Convention, this might not necessarily be the case for powerful non-European traders such as China.[115] If, for example, a Chinese company has a stronger bargaining power and insists on the application of the CISG, the Convention might find its way into business, particularly with English traders.

With regard to the question raised at the beginning of this section ('why mend what is not broken'), one could say that, on one hand, it may be unfortunate that English lawyers and policy makers may be resistant to implementation of the CISG. Considering the quality of the material provisions of the CISG supported by underlying case law as well as a comprehensive scientific database, the Convention would be a good addition, in its own sphere of operation, to existing English law. It is anticipated that the result of adoption would not be a major upheaval of English law; ultimately, more international sales transactions made by the UK parties would be governed by the Convention (with financial markets and services being unaffected). In the interests of some English businesses,

108. Since most of the court made law derives from the English common law many legal principles in those common law jurisdictions have the same roots.

109. As mentioned earlier, those enterprises which would most benefit from it, or that may have interest in it, would include those English SMEs that contract with other foreign SMEs who may either insist on using their domestic law or simply prefer to apply a compromise law neutral to both parties. In such cases, the CISG would provide them with another possible choice of law. Due to the high value of the material provisions of the Convention, parties would be inclined to agree to use it without difficult negotiations; this would save their money and time.

110. A. Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom', in: *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International, 2000-2001), 9-57.

111. Still, the CISG would automatically apply upon accession unless parties opt out. Yet, the CISG does not apply to contracts entered into prior to its accession – here the private international law rules would be applicable by English courts to determine the applicable body of law.

112. In fact, 59% of respondents of the 2010 International Arbitration Survey indicated that familiarity and experience is one of the most important factors taken into account by companies when selecting the law that will govern their disputes. On the other hand, most respondents (66%) considered neutrality and impartiality of the legal system as the key factors; Queen Mary, University of London, White & Case, '2010 International Arbitration Survey: Choices in International Arbitration', www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

113. The consequences of applying the CISG, including the implications for the usual terms of business and internal procedures and risk analysis, would need to be assessed first.

114. F. Ferrari, 'The CISG and its Impact on National Legal Systems – General Report', in: F. Ferrari (ed.), *The CISG and its Impact on the National Legal Systems* (Sellier, 2008), 413-483.

115. As stated by Han in his report on the impact of the CISG in China, in: F. Ferrari (ed.), *ibid.* 72.

this would be the actual price of the adherence to the CISG as well as for contributing to international harmonization of sales law. Adopting the CISG in the UK does not mean trying to reinvent the wheel. It is an attempt to introduce a law reform that has been successfully implemented in other countries, including top world economies, from which much can be gained. Utilizing the CISG in conjunction with well-functioning English law could be better, especially in complex operations such as restructuring a thriving business entity, which can be done in an attempt to obtain new capital or due to legal or tax reasons, and so on. In the case of the CISG, implementation does not impose any burdens on business or create any trading barriers. On the contrary, it may open new opportunities and make trading more flexible.

On the other hand, English lawyers may still remain 'deeply skeptical of or even hostile'[116] to the CISG as they may have a perception that the CISG is either a new and different law or that it is, unlike English law, a purely theoretical exercise that has little practical value and was pursued only for the delight of academics.[117] Ratification would require compromises on the part of English lawyers as it may be far from self-evident that the CISG would make a significant material contribution to the UK. Given that English law provides a strong and appropriate framework for economic activities in the UK (in addition to the fact that it is often utilized by international parties as well), it may be difficult to convince English lawyers that introducing the CISG into the UK system should be seen as a priority or that it is currently even wise to adopt it at all.

The UK's long-term isolation from the CISG community could be still described as regrettable in the absence of some valid overriding or compelling grounds precluding accession. The 'absolute reasons' against the implementation of an international convention would typically include major incompatibilities or irreconcilable differences with the national law,[118] legal or procedural uncertainties,[119] political reasons (such as political interruption and instability),[120] issues of public security, substantial negative impact on parties affected by the convention (such as business, consumers or government), or major adverse financial consequences. As of today, it can be said that such absolute reasons are not applicable in the case of the CISG. What may be missing to effect the accession in the UK is a thorough impact assessment regarding the British industrial sectors. Additionally, some prospective costs of accession and legislative changes required upon the UK's adoption of the CISG would have to be measured.

Nevertheless, in order to fully address the question of whether adopting the CISG is favorable for the UK, further arguments against adherence must be assessed in greater detail. These include: uncertainties resulting from compromise solutions provided by the CISG, divergences between particular provisions and English law, the unique situation of documentary sales, as well as questions surrounding the issue of uniform interpretation of the Convention (including lack of a proper concept of *stare decisis* under the CISG regime). The evaluation of all those issues, particularly of the negative implications that accession could possibly bring in those fields, should provide a comprehensive perspective from which a balanced conclusion could be reached as to whether the disadvantages can outweigh the advantages of adhering, or whether or not the accession of the CISG is ultimately desirable for the UK.

116.R. Bradgate and F. White, *Commercial Law* (3rd edn, OUP, 2007), 16.

117.As suggested by Farran, the tools of a common law lawyer are 'more usually the case-reports of previous cases than academic writing'; S. Farran, 'Legal Culture and Legal Transplants: England and Wales', *Saidat Law Review* 1 (2011), 30. Additionally, as responded by one the participants of the survey on the CISG, UNIDROIT Principles and CISG 'one has to be skeptical about Unidroit Principles and PECL: they are earnest professors' dreams rather than hard or necessarily accurate law'; see for more details: A. Rogowska, 'The UNIDROIT Principles and PECL: Experiences in the English Academic Circles', *Uniform Law Review* 16 (4) (2011), 867-875.

118.For these reasons, the CISG will not be accepted in those countries that are fully governed by Islamic law (e.g. Saudi Arabia) as certain principles of the CISG obviously contradict main portions of the Islamic law, such as prohibition of interest (Quran 2:275).

119.It should be noted that the CISG has never intended to unify procedural or conflicts laws.

120.E. Laryea, 'Why Ghana should implement certain international legal instruments relating to international sale of goods transactions', *African Journal of International and Comparative Law* 19 (2011), 16-17.