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THE CISG AND COMMODITY SALES: A RELATIONSHIP TO BE REVISITED?

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The United Nations Convention on the International Sale of Goods is a remarkably successful example of uniform law in the private sector. It is confined to commercial sale transactions with the requisite international element, but the question is whether it is a suitable instrument for all types of international sale on a one-size-fits-all basis. In the commodity trades (the examples given here are oil, grain and soya transactions), there has been a resolute resistance to the Convention, as the standard form contracts routinely exclude the Convention. This article explains why certain provisions of the Convention may not be suitable for commodity sales but, more importantly, points to the dominant position of English law in these trades, together with a large bank of precedents giving certainty and predictability to transactions that often take on the character of market-driven, speculative financial dealings.

I. INTRODUCTION

This article deals with the relationship, or lack of it, between the United Nations ("UN") Convention on the International Sale of Goods ("CISG")[1] and the commodity trades. Its concern is with English law because of the extensive use of English law in international commodity sales, but its message is also of relevance in Singapore to the extent that Singapore law (minus the CISG) is used as the governing law in commodity sales. The article is not concerned with the questions why the United Kingdom ("UK") has not acceded to the CISG,[2] whether it should accede to the CISG, how close it came in the past to accession and whether the time is now ripe for accession.[3] As a matter of incidental observation, my own view is that the UK should accede to the CISG and also that, despite the country's apparent retreat from the world with its exit from the European Union ("EU"), a stated national justification for departure is that of engagement with the broader world. On one view, this points to accession given that the CISG has now been adopted by 94 States, which number

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1 *Convention on the International Sale of Goods*, 11 April 1980, 1489 UNTS 3 (entered into force 1 Jan 1988) [CISG].

2 Singapore, of course, has adopted the CISG but there appears to be little appetite for it on the part of contracting parties, who under the terms of art 6 of the CISG are free to exclude it from their dealings.

3 These questions are well explored in Heywood, Zeller & Baasch Andersen, "The CISG and the United Kingdom: Exploring Coherency and Private International Law" (2018) 67 ICLQ 607.

includes the great bulk of major trading nations. On another view, a country escaping multilateral ties in the EU may not have the taste for adhesion to a multilateral convention like the CISG. One reason in favour of accession is the freedom given to contracting parties by art 6 to opt out of the CISG altogether, which has anticipatorily been exercised in a great many standard form contracts dealing with commodities. The reasons for this action are understandable and are set out later in this article.

Let us now set out the scope of this article. As the title states, it concerns commodity sales and their relationship, or not, to the CISG. By commodities, I mean both "dry" and "wet" commodities. Dry commodities include grain, soya and vegetable oils. Wet commodities include crude and refined oil. It is these commodities on which I shall cast the spotlight. Certainly, there are others, notably cotton and minerals (metals and coal), but the other commodities that I have mentioned are particularly interesting because they have attracted speculative activity giving rise to multiple contracts between the first seller (the producer) and the last buyer (the consumer). A key feature of these contracts is that they very commonly involve marine transport because, as the old saying goes, the creator of the universe planted raw materials in places other than those where they were needed and covered two-thirds of the earth with water. Commodity sales, therefore, are intimately connected with charterparty and carriage contracts. This can give rise to considerable problems, particularly in the case of free on board ("FOB")[4] contracts. For example, timely performance is more strictly dealt with in (short-term) FOB contracts than in (long-term) time charterparties, so that the incorporation in an FOB contract of a charterparty clause[5] dealing with the arrival of the vessel at the commencement of the charter, thereby displacing the usual FOB clause dealing with the timely shipment of the goods, can give rise to intractable difficulties.[6]

Commodity Sales are creatures of standard form contracts. More particularly, the contracts in question are concluded expeditiously with a minimum of formality and pre-contractual planning. Lawyers are not involved in the negotiation of these contracts, which are commonly concluded between brokers or selling agents representing the contracting parties. In modern English contract law, much emphasis has been placed on the need to interpret contracts in their factual settings.[7] Mention has been made in the case law of the matrix of fact in which the contract is located,[8] as though it were some sort of amniotic fluid. A concern with the factual background

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4 The seller's duty of delivery means that it has to load, or cause to be loaded, the goods on board a vessel, usually nominated by the buyer, after first having cleared customs. See MG Bridge, *The International Sale of Goods* (Oxford: Oxford University Press, 4th ed, 2017) at paras 3.02 *et seq*.

5 A so-called laycan (short for laydays cancelling) clause. In charterparties, the failure of the vessel to be presented on time within the allotted laydays will be accompanied by an express right of cancellation.

6 See *eg*, *ERG Raffinerie Méditerranée v Chevron USA Inc (The Luxmar)* [2007] EWCA 494, [2007] 1 CLC 807, where there was no express right of cancellation for delay. On FOB contracts generally, see Bridge, *supra* note 4 at ch 3.

7 This opens up an expansive approach to interpretation of contracts with a substantial factual hinterland, as evidenced in a line of cases running from *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) [*Prenn*] to *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 WLR 896 (HL) [*Investors Compensation Scheme*] and multiple cases beyond to the present day.

8 *Prenn*, *ibid*.

means that the interpretation of the contract has to be treated as a matter of mixed fact and law. Well, the contracts I am concerned with today come with the most meagre of factual matrices. They are the contract forms generated by the oil majors, commonly used also by smaller oil companies,[9] and, in the case of dry commodities, promulgated by trading associations, most famously the Grain and Feed Trade Association ("GAFTA").[10] In effect, these forms function as a sort of private legislation governing the trade. The contract forms may be supplemented by special provisions[11] but these rarely alter the character of the contract. Rulings on the meaning of clauses in these standard form contracts are regarded as rulings of law,[12] rather than rulings of fact or, as might be the case with bespoke contracts, rulings of mixed fact and law.[13] This means that they are amenable to review by higher courts. Given the doctrine of precedent, binding case law on the meaning of contractual clauses therefore gives the trade a great deal of certainty and legal stability.

A common feature of many of these standard forms is that they provide for the application of English law.[14] Taking the case of dry commodities, GAFTA accounts for a very large percentage of world trade in dry agricultural commodities. It claims that 80 percent of world trade in grains is conducted on the basis of its standard terms.[15] In making provision for English law, this is not because of any close relationship between the trades and England. An entirely plausible and far from exotic example would be a sale of Argentinian wheat, shipped on board a bulk carrier flying the Panamanian flag and loading in Rosario, by a Swiss seller to an American buyer on cost, insurance, and freight ("CIF") terms, for discharge in one of the major northern European ports, such as Antwerp. There are no major grain traders based in London, but that is where the headquarters of GAFTA are located.[16] In the case of crude oil contracts, we are looking at forms generated by oil majors based in various countries. It may seem natural enough that Shell and BP forms would provide for English law but this is true also of oil companies based outside the UK. Examples

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9 See *eg*, *Phibro Energy Inc v Coastal (Bermuda) Ltd (The Aragon)* [1991] 1 Lloyd's Rep 61 (EWCA) (use of BP standard terms).

10 GAFTA contract forms are now freely available at www.gafta.com. Forms promulgated by the Federation of Oil Seeds and Fats Associations ("FOSFA") International can be downloaded for £15 each at www.fosfa.org.

11 They may be bespoke terms or additional standard terms. In the latter case, the additional terms may clash with the existing standard clauses: see *eg*, *Kurt A Becher GmbH & Co v Voest Alpine Intertrading GmbH (The Rio Apa)* [1992] 2 Lloyd's Rep 586 (*General Contract for Feedingstuffs in Bags or Bulk FOB Terms*, No 119 [GAFTA 119] coupled with Argentine Centro terms) (QB).

12 *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL) [*Bunge Corp*].

13 *Cf* the more expansive approach to interpretation of contracts with a substantial factual hinterland, as evidenced in cases like *Prenn and Investors Compensation Scheme, supra* note 7.

14 It is distinctly possible that the adoption of Singapore law will continue to grow in Asian trading in commodities.

15 See *eg*, "80 percent of grain trade is done according to GAFTA standards", *Miller Magazine*, online: <https://millermagazine.com/english/80-percent-of-grain-trade-is-done-according-to-gafta-standards/.html> (accessed 4 August 2021), summarising the views of the Director General of GAFTA.

16 In Lincoln's Inn Fields close to the heart of legal London. GAFTA has over 1900 members located in 100 countries. It includes traders, brokers, superintendents, analysts, fumigators, arbitrators, individuals, professionals and branches of members.

readily available online include Repsol (Spanish), Chevron (US), Total (French) and Neste (Finnish). The use of English law by an American and a French company is particularly striking; patriotism does not enter into it. London is no longer a major port and it produces invisible exports (including legal and insurance services) that greatly exceed in value its physical exports. Fair questions now to ask are: Why the continuing use of English law? Is it merely a case of path dependency or is there more to it than that?[17]

It is a notorious fact that the 94 Contracting States that have ratified or otherwise adopted the CISG do not include the UK. Consequently, there is no danger of contracting parties selecting English law as the applicable law drifting into the CISG by mistake, in the unfounded belief that the choice of a national law, such as German law for example, does not include that part of German law that applies the CISG to certain international sale contracts as defined by the CISG.[18] This was a common problem in the early days of the CISG, especially where pre-CISG contract forms were used by the parties. It is a notorious fact that the CISG often comes into play by accident in this way. It also seems to be the case that much of the opposition to the adoption of the CISG in the UK comes from those directly or indirectly connected with the commodity trades. In view of Article 6 and the freedom given to contracting parties to exclude the CISG, it may fairly be asked whether this opposition is unwarranted. The commodity forms very frequently and effectively exclude the CISG, by anticipation as it were. Take the following example contained in GAFTA 100[19] and other GAFTA contracts:

> "29. INTERNATIONAL CONVENTIONS
>
> The following shall not apply to this contract:
>
> (a) The Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967.
> (b) The United Nations Convention on Contracts for the International Sale of Goods of 1980.
> (c) The United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and the amending Protocol of 1980.
> (d) Incoterms."[20]

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17 See discussion below.

18 CISG, *supra* note 1, art 1. Taking German law as an example, does the choice of German law mean the whole of German law including that part committing Germany to apply the CISG when the jurisdictional test laid down in art 1 has been satisfied? This was a common question in the early days of the CISG, especially as old sales forms continued to be used. The clear view now is that if parties wish to exclude the CISG further to art 6, then they should have to do more than refer *tout court* to a national system of law. See further Bridge, *supra* note 4 at para 10.53.

19 *Contract for Shipment of Feedingstuffs in Bulk Tale Quale – CIF/CIFFO/C&F/C&FFO Terms*, No 100 [GAFTA 100].

20 ICC Rules for the Use of Domestic and International Trade Terms (2020 edition). The same exclusion is to be found in FOSFA contracts and also in the North American Grain Export Association ("NAEGA") No 2 form for FOB contracts (cl 27). The governing law of NAEGA No 2 is New York law.

Incidentally, it is remarkable that Incoterms are also excluded[21] but this may have some bearing on the continuing use of English law in the commodity trades. It is possible that the relevant ICC Incoterms rule does not quite match its equivalent in English law[22] and also that it might have attracted a divergent meaning in a foreign case report or arbitration.

II. Speculating in Commodities

International commercial law is not known for its light-hearted character, but here is a rare example. A contracts to sell B a large quantity of tinned sardines. Some time after taking delivery, B complains to A that the sardines were inedible. A's response is that these were not eating sardines but buying-and-selling sardines and perfectly suitable for the latter purpose. With that in mind, let us consider now the phenomenon of string trading.

A commonplace feature of international trading is commodities is that the number of contracts for the sale of a particular cargo far exceeds the number of physical cargoes that can be applied to the performance of a particular contract. This means that the extant contracts have to be linked together so that the number of end buyers matches the number of available cargoes. Although it has acquired some age now, the case of *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd*[23] contains a judgment that usefully incorporates information supplied in an expert's report. According to the report concerning the trade at that time, there exist something like nine contracts for the sale of Brent crude oil on FOB terms for each actual shipment of oil. The intermediate parties in this sales string—which in the oil trade has the rather fanciful name of a daisy chain—are acting as traders in the paper documents,[24] who are not involved in either the loading or unloading of the oil. In the dry commodities trade, this phenomenon is even more pronounced. In the heyday of string trading in the 1970s, there is reputed to have occurred a string incorporating in excess of 100 bilateral contracts. The number of commodities traders operating in this trading sector falls short of this number, so that we are looking here at a string in which certain parties appear on more than one occasion. When this occurs, there is said to be a circle, which gives rise under the terms of the applicable standard form contract chosen by the parties, to a financial settlement that precludes any further contractual performance involving documents by the affected parties. A contract that for those parties was a paper contract, which would have led to a bill of lading and associated documents passing through their hands on the due performance date down the string to an end buyer, is now transformed into the even more abstract form of a financial differences contract. The contracts are isolated from further performance

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21 Incoterms can hardly be described as an international convention. Reported cases in Lloyd's Reports demonstrate that they are commonly incorporated in oil contracts (though not in dry commodity contracts) but there is little evidence of their impact in the resolution of reported disputes.

22 For example, in English law, it may as a matter of contractual construction be the FOB buyer who has to apply for an export licence (see *HO Brandt & Co v HN Morris & Co* [1917] 2 KB 784), whereas in Incoterms it is always the seller.

23 [1987] 2 Lloyd's Rep 547 (QB).

24 At least until paper is superseded by electronic documentation.

and settled by the flow of payment either to or from an affected party according to whether the contract is a winning or losing contract for that party.[25]

The question that now arises concerns how a string is formed. Imagine a body of unconnected contracts, all concluded on the same form and concerning the same type and quantity (or divisible units thereof) of goods for delivery to the vessel in the same shipment period, which is often one to two months in the dry trades.[26] The contract price will vary as the contracts will have been concluded on forward delivery terms but at different dates against the background of a fluctuating market.[27] Within a stated period running from the date of issue of the bill of lading, a party loading a physical cargo will pass on to one of its buyers—note that traders deal with a range of counterparties—a so-called "notice of appropriation".[28] This will state the bill of lading date, the quantity shipped and the name of the carrying vessel. The selected buyer is bound to accept this notice if it complies with the protocol laid down in the contract for the form and timing of the notice.[29] This buyer will in turn have to pass on the notice without delay to one of its sub-buyers and so on.[30] By the time account is taken of notices received towards the end of the business day or just before the weekend, when the clock is stopped until the next business day, the notice can take some considerable time to reach the end of the string constituted by the linkage of these sequential notices. As stated, the above process concerns the formation of a particular string, but the same process in respect of, say, a September cargo for a stated amount from a specified port or ports of loading, can result in the creation of a number of strings that, in gross, represent an agglomeration of individual contracts, formerly unconnected and assembled like random dots on a page.

A trader's decision about the timing of its contracts will depend on the view it takes of the market. Taking the case of an intermediate party interested in neither shipping nor unloading the particular contract goods, it may, if it expects the market

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[25] The lowest price in the circle is the point of reference. Each buyer pays each seller the excess of the contract price over the lowest price in the circle. Where the contractual quantities differ, the mean contractual quantity of all contracts in the circle is used to establish the amounts owed. Interestingly, circle clauses create a contractual nexus, in order to further the aim of transforming the contract into a financial differences contract, that binds all parties in the string and not just the parties to the immediate contract. According to GAFTA 100, *supra* note 19, cl 25 (2020 edition): "All Sellers and Buyers shall give every assistance to ascertain the circle and when a circle shall have been ascertained in accordance with this clause same shall be binding on all parties to the circle. As between Buyers and Sellers in the circle, the non-presentation of documents by Sellers to their Buyers shall not be considered a breach of contract."

[26] Significantly shorter in the wet trades.

[27] Since the 1980s, it has become common for crude oil sales to be conducted on a spot basis with a floating price, later determined by reference to average prices over a period of days around the time of delivery as reported by an agency such as S&P Global Platts (online: <https://www.spglobal.com/platts/>), "the leading independent provider of information, benchmark prices and analytics for the energy and commodities markets". A spot transaction is not to be literally understood; it covers transactions calling for delivery within, say, a month, hence the need for the stated price mechanism. Naturally, transactions of this type do not lend themselves to string trading.

[28] This is the expression used in GAFTA contracts. In contracts concluded on FOSFA International terms, the notice is called a "declaration of shipment".

[29] *Waren Import Gesellschaft Krohn and Co v Alfred C Toepfer (The Vladimir Ilich)* [1975] 1 Lloyd's Rep 322 (QB).

[30] The contract forms go into considerable detail about the timing of the issue of the notice and its subsequent transmission.

to fall, go "short" by selling goods before it acquires goods answering the contractual description from a prior seller in the string. Conversely, if it expects the market to rise, it may go "long" by purchasing goods before it concludes an onsale contract. As and when that relevant party acquires both a purchase and a resale commitment, it is in a position to string them together when the notice of appropriation process is set in train. A trader can control the amount of risk it assumes by entering into a hedging transaction in the futures market.[31] So, for example, a trader who has gone "short" in the physical market may enter into a matching contract to sell in the futures market, for settlement at around the time performance falls due under the physical contract. Losses made in the physical market might then be offset against corresponding gains in the futures market. It would hardly be sensible for an intermediate trader to conclude a matching transaction that eliminated risk altogether for that would simply generate two sets of transaction costs and no chance of a profit. The hedging operation may be carried out by selecting in the futures market an abstract commodity that is as close as possible to the physical commodity in the forward market given that the two markets—the physical and the futures market—can be expected to move in sympathy with each other.[32] It may not be possible, particularly in the case of refined oil for example, to find a very close abstract equivalent, so the hedging party will have to "aim off" the physical entity and find the closest abstract equivalent available in the futures market.[33] Differential movement between the two prices gives rise to what is called "basis risk".[34] Obviously, the closer the two contracts are in the allocation of contractual risk, the better, just as insurance companies find it desirable to match their insurance exposure to their indemnity rights under a treaty of reinsurance. It need hardly be said that having the matching contracts subject to the same applicable law is desirable in this respect. A CISG physical sale matched by an English law futures transaction, or *vice versa*, should therefore be avoided since the difference in approach of the two laws may upset the risk calculations that were made when the trader sought the closest of possible connections between the futures and the physical contracts.

It may be thought that the intervention of multiple paper traders in the market would have an inflationary effect on prices but the received wisdom is that adding bulk to the market in this way tends to stabilise commodity prices and encourage those with a physical interest to commit themselves to forward action,[35] whether as farmers planting crops or millers manufacturing flour or animal feed.

Notices of appropriation play an important role in supporting the market in forward string sales by providing a mechanism for transforming the impracticably general into the practicably specific. Hence, for example, a contract for North American grain CIF Rotterdam August/September 2021 can for example be transformed by a notice of appropriation into a contract for a quantity of goods on board a named vessel

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31 See *eg*, *Gebrüder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 (EWCA).

32 See A Slabotsksy, *Grain Contracts and Arbitration* (London: Lloyd's of London Press, 1984) at 49–54.

33 See *eg*, *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) at para 156 *et seq* (for an example of hedging activity); Niel C. Schofield, *Commodity Derivatives: Markets and Applications* (Hoboken, New Jersey: Wiley, 2007) at 142, 143.

34 Referred to as "a change in the differential" in Schofield, *ibid*.

35 See *Tradax Export SA v Andre & Cie* [1977] 2 Lloyd's Rep 484 at 491 (EWCA) ("a greater guarantee of supplies and stability of price than would otherwise be the case").

issuing a bill of lading dated September 15. The buyer receiving such a notice can, in its capacity of onseller, pass on that same notice to one of its buyers. In addition, given the predictability of trans-Atlantic shipping, the notice of appropriation gives some intimation of the arrival date of the vessel in the discharge port and thus permits the end buyer in our example to make arrangements for the discharge of the goods and their dispersal in Rotterdam.[36] The time of arrival is not a necessary or even a long-established characteristic of CIF contracts but provision is sometimes made for it, especially in oil contracts where the reception of the vessel in the limited slots available in the discharge port calls for careful planning.[37] The development of oil trading in the years following the 1970s has brought about in this sector the emergence of CIF (and C&F) delivered contracts.[38]

The market for commodities is very much a speculative market in which traders take sharp points against each other. Despite their multiple dealings with each other, this world is as far removed from the world of relational contracts as it is possible to imagine. Intermediate parties have no need to become involved in the underlying transaction and operated in unregulated market conditions.[39] The contracts they conclude are as close as one can get to a zero sum game.

A requirement of string trading is that each connected contract must mirror the others except for the price.[40] The wheat, for example, must be the same type and grade of wheat, say, no 2 Canada Western Red Spring wheat.[41] It is not just the physical product that has to be uniform for the purposes of string trading. Each of those contracts must be subject to the same contract form and the same applicable law. This means that eradicating English law as the applicable law of choice in a contract of sale is always going to be difficult. If the CISG is perceived to have qualities that make it suitable for commodity trading, then this is ultimately a matter for GAFTA or an equivalent trade association, or for an oil major whose contract forms are used by other companies, and not for individual traders. Even then, the matter would not be straightforward. It would not be enough to eliminate the International Conventions Clause in GAFTA contracts for example. Clause 26 of GAFTA 100,[42] the so-called "Domicile Clause", provides that the contract "shall be deemed to have been made in England and to be performed in England, notwithstanding any contrary

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36 Nevertheless, it is not uncommon for a vessel to arrive prior to the receipt of the notice by the last buyer in the contractual string, a matter dealt with in GAFTA 100, *supra* note 19, cl 11(g) (2020 edition) (seller to pay for extra expenses due to this).

37 The large vessels used for carrying oil "require a dedicated port infrastructure and the terminals used in the oil trade… are often in remote locations": M Stopford, *Maritime Economics*, 2d ed (Milton Park, Oxfordshire: Routledge, 1997) at 309.

38 See *eg*, *Vitol SA v Esso Australia Ltd (The Wise)* [1989] 1 Lloyd's Rep 96 (QB); *Nova Petroleum International Establishment v Tricon Trading Ltd* [1989] 1 Lloyd's Rep 312 (QB); *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd (The Azur Gas)* [2006] 1 Lloyd's Rep 163 (EWHC).

39 It is, however, possible that the absence of a practical connection with the trade itself will place them in certain circumstances within the reach of regulatory financial services legislation. See *CR Sugar Trading Ltd v China National Sugar & Alcohol Group Corp* [2003] EWHC 79 (Comm), [2003] 1 Lloyd's Rep 179.

40 A bulk can also be split so that, for example, the recipient of a notice of 20,000 tonnes may divide it into separate parcels for two sub-contracts each of 10,000 tonnes.

41 The grade of the wheat is determined by the standard of the overall crop in a given year and by the protein count.

42 *Supra* note 19.

provision, and this contract shall be construed and take effect in accordance with the laws of England", before going on to provide for the exclusive role of English courts in supervising arbitral proceedings to the limited extent permissible under the Arbitration Act 1996. If English law were no longer the applicable law, then what would that applicable law be,[43] how would the CISG be applied pursuant to it,[44] and would it matter where the arbitral proceedings were conducted? And would there be uniformity of the applicable law for all contracts in the string?[45] If buyer and seller have their places of business in the same State (quite often the case),[46] so that the CISG could not apply,[47] what would the position be? If arbitration is the chosen vehicle for dispute resolution, which most often would be the case in commodity trading, then the contract form could simply provide directly for the application of the CISG[48] without any concerns about the requirement that the contracting parties have their places of business in different Convention States or the selection of the law of a State that has adopted the CISG.

III. The Financial Markets Law Committee

I shall speak to particular features of the CISG that might trouble those active in commodity sales later, but now I shall deal with the concerns entertained by the London-based Financial Markets Law Committee ("FMLC") when it reviewed the CISG in 2008 in response to a reference from a government department.[49] The

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43 For example, the applicable law for each contact according to the Rome I Regulation (EC, *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177/6) would, if not chosen by the parties, be the law of habitual residence of the characteristic performer, who is the seller in a contract of sale: arts 3, 4(1)(a).

44 It applies on its own terms in the courts of Contracting States (art 1: both parties have to have their places of business in different Contracting States or the choice of law rules of the forum State lead to the law of a Contracting State), but where the forum is located in a Non-Contracting State, the CISG applies only according to the choice of law rules of that State (which of course is not treaty-bound to apply the CISG). The choice of law rules of the Rome I Regulation, for example, do not allow contracting parties a free-standing choice of the CISG: the CISG would apply only if part of the law that is applicable by virtue of the choice of law rules of the Rome I State. See James Fawcett, Jonathan Harris & Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford: Oxford University Press, 2005) at ch 16.

45 In the absence of a chosen law that is the same for all contracts, then the answer to the question is no according to arts 3 and 4(1)(a) of the Rome I Regulation, in view of the different places of business of the totality of contracting parties.

46 Sometimes buyer and seller are branches of the same company.

47 The contracting parties must at least have their places of business in the different States: places of business even in the same Contracting State will not suffice unless the choice of law rules of the forum State lead to the law of a Contracting State independently of the provisions of the CISG.

48 As opposed to the difficulties that arise in many States' rules of private international law when they require the choice of State-based law. See *eg*, *Arbitration Act 1996* (UK), c 23, s 46(1)(b) and *Arbitration Act* (Cap 10, 2002 Rev Ed Sing), s 32(3) (Singapore) (the arbitral tribunal may resolve the dispute "if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal").

49 Issue 130 Working Group, "Issue 130 – Implementation of the Vienna Sales Convention" (2008) Financial Markets Law Committee Working Paper, available at http://fmlc.org/wp-content/uploads/2018/02/Issue-130-Implementation-of-the-Vienna-Sales-Convention.pdf [Issue 130]. The FMLC is a registered charity located in the Bank of England but independent of it.

FMLC's concerns were with derivative trades in the futures market. Futures contracts, unlike forward physical sales, which are over the counter transactions and are unregulated, are regulated and conducted through intermediated counterparties like the London Clearing House. The FMLC approached the matter of the CISG mindful of its mandate "to identify issues of legal uncertainty. . . in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed".[50] The FMLC seems to have considered that the CISG would not apply to pure derivatives but, as I have been reminded by colleagues from civil law jurisdictions on more than one occasion, the meaning of goods in the CISG cannot be assumed to be confined to the physical meaning that the expression has acquired in the UK *Sale of Goods Act*.[51] There is a real possibility, in my view, that the CISG could be applied to a future hedge against a forward physical sale in the absence of any provision excluding the CISG. The FMLC was more concerned, however, about those futures contracts that were "physically-settled commodity derivatives".[52] Such contracts, one imagines, might be covered from the outset as conditional physical sales or else, once the option to take physical delivery is exercised, might at that time fall under the CISG. Such a transition at that point from an applicable English law to the CISG would be undesirable to say the least. The FMLC indeed did recognise that: "It is clear that the scope of the Convention extends beyond simple contracts for the sale of goods."[53]

The FMLC was well aware of the virtues of the CISG, particularly its clarity, flexibility and commitment to freedom of contract.[54] It duly noted that Article 6 supported the exclusion of the CISG by contracting parties but took rather too seriously perhaps the risk that a choice of English law as the law of a Non-Contracting State might not be recognised as an implied exclusion in those cases where both parties have their places of business in Contracting States.[55] The FMLC was particularly concerned about the effect of good faith on contracts of sale. For the most part of its discussion, it drew no distinction between a duty of good faith resting on the contracting parties and the duty on courts to interpret the CISG in the light of good faith[56] when pointing

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50 Issue 130, *ibid* at para 1.1.

51 *Ibid* at paras 6.1–17, but see para 6.3 ("it is understood that under the law of certain contracting states, the term 'goods' may include *choses in action*"). *Sale of Goods Act 1979* (UK), c 54 [*Sale of Goods Act*].

52 It observed that some commodity contracts already contained provisions excluding the CISG: Issue 130, *ibid*, para 4.8 (natural gas, coal, liquefied natural case, refined petroleum products). For example, the European Federation of Energy Traders ("EFET") *General Agreement Concerning The Delivery And Acceptance Of Natural Gas*, 11 May 2007, version 2.0 (a), online: <http://www.bog-gmbh.at/fileadmin/user_upload/Files_englisch/General__Agreement_Gas_2.0.pdf> gives contracting parties a choice between English law and German law but in both cases explicitly states that this "exclud[es] any application of the 'United Nations Convention on the International Sale of Goods' of April 11, 1980".

53 Issue 130, *supra* note 49 at para 1.7.

54 *Ibid* at paras 2.7–9.

55 *Ibid* at paras 4.10–18 (somewhat tortuous). This issue arises even if the UK remains a Non-Contracting State. If it did become a Contracting State, then a choice of English law would not be sufficient to exclude the CISG for the familiar reason that the CISG would now have become part of English law.

56 Art 7(1) requires the Convention to be interpreted having regard to "the observance of good faith in international trade". This duty of observance is not laid on the contracting parties themselves, but such a duty may possibly arise as an unstated, immanent duty by virtue of art 7(2) which calls for matters

to the risk of "unpredictability in commercial activity",[57] before briefly conceding at the end that Article 7(1) would "not be used for the interpretation of contractual documents".[58] There was no detailed discussion of particular provisions dealing with the rights and duties of the parties, apart from the expressed concern about the rule of fundamental breach in Article 25, which attracted criticism because of its lack of precision and because, concerned as it was with effects rather than the quality of the breach, it meant that the party in breach might not be aware that it had committed a fundamental breach.[59] This concern about the awareness of a breaching party, rather than the other party, whether it has committed a fundamental breach, however, seems to identify a problem whose existence is not easy to recognise.

In sum, the FMLC did not make any general recommendation about whether the CISG should or should not be adopted, but it did note certain problems for business-to-business transactions and it did consider that any implementing legislation should make it clear that the CISG does not apply to pure derivatives,[60] as if such legislation could achieve an outcome of that sort by means falling short of a permissible declaration under the CISG, which is not available for this purpose in any case.[61] The CISG is a treaty and not a model law. The FMLC also noted, however, the existing practice of excluding the CISG in standard form futures contracts that permitted transactions to be physically settled. Moreover, although the general question whether the CISG is suitable for derivative transactions and might be extended to reach them is not the same question as whether the UK should adopt the CISG, the FMLC took care to note that the adoption of the CISG might "jeopardise" the UK's "special position" in the world legal order and "bring with it a risk that London would lose its edge in international arbitration and litigation".[62]

IV. Why English Law?

The role of English law in commodity contracts is at least as old as the trade associations that promote it. The antecedents of GAFTA lie in the creation of the Liverpool Corn Trade Association 1871 and the London Corn Trade Association 1878. FOSFA can trace its roots to the Incorporated Oil and Seeds Association 1863. According to one American commentator: "The historical development of English contracts explains why transactions between Argentine shippers and Italian importers are made under the basic conditions of an English contract, and subject to English law."[63] This does not sufficiently explain the continuing role of English law in these trades, nor does it explain the attraction of English law for those in the oil trade, where forward

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not settled by the Convention to be determined "in conformity with the general principles on which it is based".

57 Issue 130, *supra* note 49 at paras 5.01–10.

58 It did list a number of provisions that it considered were inspired by a notion of good faith, *viz*, arts 16(2)(b), 21(2), 29(2), 37, 38–40, 47(2), 48 (wrongly identified as 46), 64(2), 82, 85–88.

59 Issue 130, *supra* note 49 at paras 4.1–5.

60 *Ibid* at para 6.17.

61 CISG, *supra* note 1, art 98 (which states that the only permissible reservations are those allowed for in the CISG itself).

62 Issue 130, *supra* note 49 at para 3.5.

63 Slabotsksy, *supra* note 32 at 3.

selling is very much a creature of trading conditions brought about in the wake of the Arab-Israeli war of 1973.

At this point, I have no desire to wave the Union Jack or to act as a cheerleader for the Law Society of England and Wales[64] or the Commercial Bar Association. Nevertheless, it has to be said that English law has acquired a reputation for certainty that exercises a particular appeal for those in market-sensitive areas.[65] This stance is deep-rooted. In the 18th century, Lord Mansfield remarked: "In all mercantile contracts the great object should be certainty. And therefore, it is of more consequence that a rule should be certain, than whether it is established one way or the other. Because speculators in trade then know what ground to go upon."[66] English law is fine-grained, speaks to the specific aspects of contractual practice, and gives answers to practical problems. It has the reputation of being transparent and accessible, despite the absence of a code or restatement. In this respect, practitioner treatises like *Chitty on Contract* and *Benjamin's Sale of Goods* play a key role as far as contractual issues are concerned because they seek meticulously to track the positive law rather than to bend it towards an author's will of what it should be. In commodities transactions in particular, the courts do not see it as their role to sacrifice commercial certainty on the altar of contractual fairness. Here are just two rather shocking examples that demonstrate that fact.

In *Richco International Ltd v Bunge & Co Ltd (The New Prosper)*,[67] an FOB contract for the sale of 35,000 tonnes of Australian bulk barley gave the seller the option of deciding from which of nine identified Australian ports shipment was to be made. As was the normal case, it was up to the buyer to nominate the vessel, which had to be suitable to lift the cargo at any one of those ports. It was not then and is not now the usual case that the FOB seller chooses the port and the buyer chooses the vessel; the sensible approach is for the buyer to have the choice of both. But this was a newly developed trade and at that time the Australian Barley Board (ABB) held an export monopoly and so exercised a controlling power over the choice of port for export. The seller had gone short on a rising market and rejected the buyer's choice of vessel. That vessel could not enter all of the listed ports and there were doubts as to whether any vessel in existence could comply with the draught, beam and length requirements of all of those ports. The seller rejected the buyer's nomination so the buyer made an end-run to the ABB, which indicated a willingness to provide a cargo for some of the ports on the list. It was all to no avail; the seller's objections prevailed. The obvious "remedy" in a case of this kind is to re-draft the standard form so that the seller has to choose the port in time for the buyer to choose the vessel. Voyage charters can be "fixed"[68] quite quickly.

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64 See G Cuniberti, "The International Market for Contracts: The Most Attractive Contract Laws" (2014) 34 Nw J Intl L & Bus. 455 at 494: "The Law Society of England and Wales issued an infamous brochure marketing England as the jurisdiction of choice for international transactions." The author is referring to a document issued in 2007 and entitled "The Jurisdiction of Choice", and by "infamous" appears to mean vulgarly bombastic.

65 The FMLC goes so far as to say: "The UK legal system is viewed with high regard and holds a unique position throughout the world": Issue 130, *supra* note 49 at para 3.5. The same may fairly be said about Singapore law.

66 *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153.

67 [1991] 2 Lloyd's Rep 93 (QB).

68 In the jargon of maritime parties and lawyers.

Again, in *The Bonde*,[69] the FOB buyer had invoked an extension of shipment option in the contract which meant that the buyer had to pay a *per diem* rate for every day that the vessel was in port in the time extending beyond the original shipment period. The contract also provided for the seller to load the goods at a guaranteed rate per day and to pay a stated sum for each excess day caused by a failure to load at the prescribed rate. The daily rate the buyer had to pay in the extension period was twice the daily rate payable by the seller when in breach of its loading rate guarantee. The buyer objected that the seller was making money out of its own breach. Again, this was to no avail. The buyer's payment obligation was not a penalty payment but the agreed price for exercising an option.[70] The seller's payment obligation was a freely agreed payment under a liquidated damages clause. The court was evidently reluctant to find an implied term in the contract that the seller might not claim under the extension clause at a time when it was in breach of the loading rate guarantee. This is a hard case but, once more, if the trade does not like it, then the trade should modify the form for the future. In the meantime, hard-nosed traders are quite capable of retaliating when the opportunity arises at some time in the future. All of this may seem very shocking to a CISG lawyer schooled in the cooperative mores of that Convention. The commodity markets are not for the faint-hearted or the under-capitalised. Those traders succeed who have the resources to achieve a measure of vertical integration, ranging from agricultural interests, through storage facilities and transport networks. But it is certainly the case that the notion of good faith and fair dealing is becoming more debated in English contract law. That said, much of this is due to one particular judge[71] and one should not equate sound with action. Moreover, the commodity trades would be the last area for any concrete development along these lines to occur, as remote as they are from the world of so-called relational contracts.

As stated above, the doctrine of precedent maintains a high degree of stability and certainty in the law. It is sometime said, however, that English contract law is also flexible, which is a quality that is not easy to reconcile with certainty. Yet this can be done if one associates flexibility with adaptability to change, which is a process more suited to a non-codified system than to a system with a contract or obligations code. The symbiotic relationship between case law and the development of contract forms is also a characteristic of the English law of commodity sales. If the trade perceives that the courts have got it wrong, then the remedy for this is the modification of the contract form. A good example of this in recent years is *Ramburs Inc v Agrifert SA*,[72] which concerned a substitution clause in an FOB contract. It is not uncommon for FOB buyers to seek to substitute a new vessel for the nominated vessel when the nominated vessel is unable to load in time or at all in accordance with a previously given notice of expected arrival given to the seller.[73] Initially, the default position was that the name of the vessel was not needed in a so-called

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69 [1991] 1 Lloyd's Rep 136 (QB).

70 In English law, the rule against penalties, now largely deprived anyway of its sting, is confined to sums payable in the event of a breach of contract.

71 Lord Leggatt, now in the Supreme Court but formerly pressing the case for good faith and fair dealing in the Commercial Court and the Court of Appeal.

72 [2015] EWHC 3548 (Comm), [2016] Bus LR 135.

73 The nominated vessel might have run aground or otherwise have suffered the perils of the sea.

pre-advice or nomination given or passed on[74] to the seller.[75] The buyer had of course to nominate a vessel suitable for the port and cargo and, if naming the vessel, was merely performing an act of courtesy. Consequently, a buyer complied who provided a suitable vessel by the expected loading date. Amendments to the standard forms used in the commodity trades later required the buyer to name the vessel without giving a right of substitution. Since the nomination had to be made a certain number of days before the expected readiness to load date, buyers who needed to substitute would have to start the process afresh unless they were able to build on the original nomination by altering the name of the nominated vessel to that of the substitute. Since the identity of the vessel was judicially recognised as a vital matter, they were not permitted to do this and were required to start the process of nomination afresh.[76] Later still, the standard forms were altered to give an express right of substitution, but without clearly permitting buyers to build on the original notice.[77] It was firmly ruled in *Ramburs* that in such a case the process of timely nomination would still have to start all over again. This outcome did not appeal to the commodities trade so the commodity forms were then altered to give an explicit right of substitution within a stipulated time frame unconstrained by the need to start the process again.[78]

There is also the high reputation enjoyed by English courts and advocates to consider, though it now has to be acknowledged that the limited recourse to the courts available in the case of arbitration means that they have only a small part to play in the continuing development of the law on international commodity sales. In this area, to use an expression of Sir Bernard Rix,[79] the common law has gone underground. That is a matter of no small concern when it comes to the re-editing of books like *Benjamin's Sale of Goods*, which as mentioned above is foremost a work of authority rather than of opinion. It is perhaps unduly sanguine to say that, by now, the law has achieved a maturity of expression that it is plain sailing ahead. GAFTA arbitrations are carried out by traders and not by lawyers[80] and neither first-tier nor second-tier awards are reported. And GAFTA disputes, of course, go to arbitration in the first instance.

V. Particular Provisions of the CISG and Commodity Sales

I shall not attempt an exhaustive review of the CISG to determine where it might give cause for uncertainty in the commodities trades but shall instead focus on a

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74 The notice passed on by the buyer may have come from a previous buyer in the sale string.

75 *Agricultores Federados Argentinos v Ampro SA* [1965] 2 Lloyd's Rep 157 (QB).

76 *Cargill UK Ltd v Continental UK Ltd* [1989] 2 Lloyd's Rep 290 (EWCA).

77 See *eg*, GAFTA 119, *supra* note 11, cl 6 (2016 edition): "Buyers have the right to substitute the nominated vessel, but in any event the original delivery period and any extension shall not be affected thereby."

78 See *eg*, GAFTA 119, *ibid*, cl 6 (2020 edition): "The Buyer has the right to substitute any nominated vessel. Buyer's obligations regarding pre-advice shall only apply to the original vessel nominated. No new pre-advice is required to be given in respect of any substitute vessel, provided that the substitute vessel arrives no earlier than the estimated time of arrival of the original vessel nominated and always within the delivery period."

79 In conversation with the author.

80 They must have been actively engaged in the grain and feed trade for at least ten years. Approved arbitrators and mediators are based in a wide range of countries.

few areas that might be thought to be particularly relevant, starting with the fundamental breach rule in Article 25, which in particular attracted the attention of the FMLC. Broadly, there two avenues to avoidance in the CISG in the event of non-performance, non-conforming performance and delayed performance.[81] There is the fundamental breach rule itself[82] and there is the failure of a contracting party to comply with a time notice.[83] I shall focus on the former as more relevant in commodities transactions.

Let us begin with a provision in the Uniform Law on International Sale ("ULIS")[84] that was consciously omitted from the CISG. Both ULIS and the CISG contain a fundamental breach rule providing for a test that is exclusively effects-based. But ULIS had, together with its much-criticised version of the fundamental breach rule,[85] the following qualification in Article 28 of the effects-based approach: "Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them." That provision, which may be thought to have been over-inclusive, went some way towards appeasing the concerns of commodity traders operating in dynamic markets where the time of performance has long been seen as being of primordial importance. Its omission from the CISG undoubtedly raises concerns about the lack of certainty in the Convention in the case of untimely performance.[86] Those concerns would not be abated by German decisions providing that time was of the essence for CIF contracts,[87] given that there was no shred of support in the CISG for finding a fundamental breach in the absence of a sufficiently demonstrated degree of prejudice flowing from the facts arising out of a breach. If it is thought that a Convention drafted 50 years ago can withstand a measure of so-called "dynamic interpretation" to extend the reach of Article 25, let it be said that this is a specious way of redrafting the CISG and is inconsistent with the rule of law. It should not be forgotten that the Secretariat Commentary on the buyer's avoidance provision, Article 49, had this to say: "The rule that the buyer can normally avoid the contract

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81 In arts 49, 64 CISG, *supra* note 1, putting aside for the moment what in English law is called anticipatory repudiation (see art 72 CISG).

82 Art 25 CISG, *ibid*: see MG Bridge, "Avoidance for Fundamental Breach under the CISG" (2010) 59 ICLQ 911; M Will in CM Bianca & MJ Bonell, eds, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987).

83 Arts 49, 61 CISG, *ibid*.

84 *Convention relating to a Uniform Law on the International Sale of Goods*, 1 July 1964, UNIDROIT, annex [ULIS].

85 Art 10 ULIS, *ibid*, (containing the so-called double foresight test): "For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."

86 Documentary non-conformity remained an issue under ULIS, *ibid*, and is an issue under the CISG, *supra* note 1.

87 Oberlandesgericht Hamburg (Germany) 28 February 1997, translated at <http://cisgw3.law.pace.edu/cases/970228g1.html>); Oberlandesgericht Düsseldorf (Germany) 24 April 1997, translated at <http://cisgw3.law.pace.edu/cases/970424g1.html>. See also Bundesgerichtshof, 3 April 1996 (Germany), translated at <http://cisgw3.law.pace.edu/cases/960403g1.html> (considering that a fundamental breach can be derived from the contract itself rather than from any intention of the parties pursuant to art 6 CISG that modifies art 25 CISG).

only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales."[88]

The CISG has little to say about documentary performance in the case of contracts such as CIF and FOB contracts. No mention is made in the Convention of bills of lading. This in itself should not be seen as a problem. The same could be said for the UK *Sale of Goods Act*. Unlike the English law of sale, however, which attaches considerable importance to documentary performance in these cases, so that non-conformity is usually treated as a breach of condition entitling the buyer to terminate the contract,[89] the rule of fundamental breach in the CISG gives no reason to believe that the same strict standard applies to contracts under the CISG. Furthermore, there also has to be considered the doctrine of cure, which in the form of curing non-conforming performance has no part to play in English sales law. So far as cure, with all its uncertainties, relates to goods, it might be thought to be an obstacle to the acceptability of the CISG in the commodity trades. This would not, however, seem to be so since there is no scope for repairing commodities and so one of the critical questions under Article 48—should cure take the form of repair or substitution?—is eliminated. Curing non-conforming performance in the case of machinery now located in the buyer's premises is one thing, but how does one cure, except by substitution, a consignment of sub-standard wheat or of a refined oil product that falls short of its specification? The seller's offer of a reduced price is not an offer to cure. A market for the sub-standard goods can always be found in such cases. Moreover, contract forms will regularly provide for a price allowance for goods supplied that are non-conforming.[90] As strict as English law is in the matter of time and documents, this approach, also evident in the provisions of the *Sale of Goods Act* on quality and fitness for purpose,[91] is not, as a result of price allowance clauses in the contract forms, permitted to apply to the goods themselves.

Where cure does pose a barrier to the acceptance of the CISG, however, is in Article 34, which deals with cure in the case of documents. A seller who has "handed over" documents relating to the goods before the time required by the contract may up to the due date "cure any lack of conformity" in the documents if this does not cause the buyer unreasonable inconvenience or expanse. This provision appears to have as much practical importance as the mirror provision (Article 37) dealing with the early delivery of goods, which is to say no practical importance at all since it deals with premature performance. But there is Article 48, the general cure provision, to consider. This is not confined to cure in respect of the goods themselves and invites the possibility of a seller seeking to correct documents that are not the subject of an early handing over. The obvious problem that presents itself is whether a seller can

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88 Technically, the Secretariat Commentary on the 1978 draft (when what became art 49 CISG was art 45) has no official standing in the interpretation of the CISG and the Vienna Conference in 1980 did not authorise a revision, but the Commentary does possess some persuasive authority. And see Bundesgericht, 15 September 2000 (Switzerland), translated at <http://cisgw3.law.pace.edu/cases/000915s2.html> ("The importance of the breach is not determinative; only the consequences of the breach to the damaged party are determinative").

89 See *eg*, *SIAT di Del Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53 (EWCA); *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 (HL) [*Hansson*].

90 See *eg*, GAFTA 100, *supra* note 19, cl 5 (2020 edition).

91 *Sale of Goods Act*, *supra* note 51 at ss 14(2), (3).

correct a non-conforming bill of lading without offending the cardinal rule that a bill of lading must be clean. For example, could the seller alter the date of shipment on a bill of lading to show the true date of shipment? Articles 34 and 48 in combination provide some comfort for such a view. Any assertion that the seller's right of cure in Article 48 is subject to the requirement of reasonableness is met by the objection that the introduction of fact-based criteria judging the seller's cure would be destructive of the clarity and certainty of the clean documents rule,[92] and would also involve a view to be taken of the attitude of third parties such as banks that would handle such documents. Moreover, there is the possibility of a seller seeking to substitute a fresh bill of lading for the one rejected by the buyer. This would be an example of a so-called "switch" bill of lading,[93] otherwise constituting a defective tender in the absence of consent by the buyer because it does not represent an original document issued in the place of shipment and at the time of shipment.[94] In this regard, the CISG would seem to confront established strict rules of documentary compliance in the commodity trades. Lord Sumner once said: "These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce."[95] Traders and banks do not relish handling documents that pose questions, even if in the end there are answers to those questions.

Another problem, identified by the FMLC, concerns the potential role of a duty of good faith and fair dealing. If such a rule existed in the case of commodity sales governed by English law, many examples of its breach could be found. As stated above, the FMLC, in taking Article 7(1) of the CISG in its sights, did not with sufficient clarity distinguish between a duty resting on courts and tribunals to follow good faith in the interpretation of the CISG and a duty resting on the contracting parties themselves. Despite the rejection of the latter duty in the course of drafting the CISG, there is a case for treating good faith and fair dealing as an immanent if unstated principle in the CISG in accordance with Article 7(2). Support for this view is to be found in the Secretariat Commentary, which I have criticised elsewhere because of its reductive character.[96] In addition, though I do not believe that the corpus of the Unidroit Principles of International Commercial Contracts can be brought into the CISG, whether under Article 7(2) or under Article 9 (usage), there are no doubt scholars, courts and tribunals that believe the opposite. The introduction of an open-ended principle of good faith and fair dealing would be an unpalatable outcome for participants in the self-policing commodity markets: it would compromise the

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92 The same concerns about certainty in the fast-moving commodity trades would also apply in the case of curing non-conformity in the goods themselves.

93 On switch bills of lading generally, see M Goldby, "Managing the Risk of Switch Bills of Lading" [2019] Lloyd's Maritime and Commercial LQ 457.

94 *Hansson*, *supra* note 89.

95 *Ibid* at 46.

96 MG Bridge, "Good Faith, the Common Law and the CISG" (2017) 22(1) Uniform LR 98. Good faith is excessively reductive. The UN Secretariat Commentary on the 1978 Draft of the CISG identified a substantial number of provisions as imbued with good faith and could have identified yet more. As the saying goes, to a man with a hammer everything looks like a nail.

position of contracting parties taking a view of their contractual rights based upon market considerations at that time.

VI. Why Change a Successful Model?

Now, it is all very well to say that the concerns expressed above can be alleviated by disputes being handled by expert arbitral tribunals as opposed to national courts with no record of expertise in international trading, by unpalatable provisions in the CISG being excluded by the contracting parties under Article 6, and by the CISG itself being interpreted in such a way as to recognise the character of the commodity trades.[97] The question is whether commodity traders would ever want to be placed in the position of hoping that these developments will take place. Anyone asking the question why commodity traders would want on mature reflection to exclude the CISG is asking the wrong question. The question is why they would want even think about being governed by it in the first place. There is no good reason to patronise them by pointing to the considerable merits of the CISG and ascribing their resistance to what Marxists call false consciousness, as though they do not know what is good for them. Nor should they be regarded as captured in a determinist way by the forces of historic change as (non-mandatory) uniform law sweeps all before it.[98]

For these traders, the adoption of the CISG would not rescue them from the cacophony of multiple legal tongues, or from a governing law that is archaic and unresponsive to their concerns. They already have uniformity in the form of the same governing law which, in the case of English law, is angled towards the commodity trades, and to such an extent, quite possibly, as to be less suited to other forms of international trading[99] where the CISG may prove to be a more palatable choice in some trades.[100] Nor can English law be faulted on the ground that it is unduly favourable to buyers. It is a marked characteristic of commodities contracts, particularly evident in string trading, that participants operate as both buyers and sellers.[101] A string participant buys goods in order to onsell them. Nor can it be argued that the

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97 As is valiantly attempted by I Schwenzer, "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 Victoria U Wellington LR 795. Professor Schwenzer places particular importance on arts 8(2), (3) CISG in protecting the character of the commodity trades and thus rejecting the possibility of a documentary cure under art 48 CISG, but I cannot see how rules of interpretation in art 8 can achieve this outcome. For other arguments about the adaptability of the CISG to the commodity trades, see Heywood, Zeller & Andersen, *supra* note 3, where these questions are well explored.

98 Which appears to be the tenor of Zeller, "Commodity Sales and the CISG", in CB Andersen & UG 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)) 627 at 637: "Considering that international trade law is in a state of flux, the legal world of commodity trades will change. The reason is simple. Conventions are becoming more prevalent."

99 For example, should the strict approach to timely performance in the commodities trades (*eg*, *Bowes v Shand* (1877) 2 App Cas 455) be applied in a sale involving complex machinery adapted to the buyer's needs? I think not.

100 The restrictions placed on avoidance by the fundamental breach rule in art 25 may make the CISG a preferable choice for some sellers. Sellers do not relish having to deal with goods rejected in a distant place.

101 *Bunge Corp*, *supra* note 12 at 720 (Lord Wilberforce): "There are enormous practical advantages in certainty, not least in regard to string contracts where today's buyer may be tomorrow's seller."

large body of English law decisions on commodity sales can be incorporated in CISG transactions as usage under Article 9. Moreover, a comparison of the competing merits of the *Sale of Goods Act* and the CISG does not enter into it. The vast majority of reported cases on commodity sales governed by English law make no mention of the *Sale of Goods Act*; the Act therefore plays only a marginal role in international commodity sales.[102] The questions faced by the courts are almost always questions of contractual construction or, less frequently, of the common law of contract in general. The *Sale of Goods Act* itself provides little assistance in determining whether breaches concerning time and documents permit contractual termination. It is silent on the subject of documents and states that whether time is of the essence other than for the buyer's duty to pay is a matter of construction of the contract.[103] Those issues have been left to the courts. We are therefore not looking at a simple choice between two instruments, the CISG and the *Sale of Goods Act*. The case for the CISG cannot be made by saying, as with some States' laws, that the *Sale of Goods Act* is unmodernised and not apt to deal with international sales in current times.[104]

The CISG is a fine but less than perfect instrument crafted for a world where the seller is commonly the producer of goods and the buyer commonly the consumer of those goods. It is transparent and open to access by both parties, except, perhaps, to the extent that the language of one of them is not one of the official UN languages.[105] The more that States adopt it—and perhaps more importantly the more that contracting parties do not exclude it—the more it reduces the need for buyers and sellers (together with their advisers) dealing across national frontiers to acquaint themselves with a multiplicity of national laws and to become entangled in the choice of law process. The CISG's abiding approach is to make the contract work as well as it can do, which means keeping it alive in the cause of avoiding economic waste. In consequence of the limited circumstances in which a contract may be avoided, the complex restitutionary regime of Articles 81–84 will only rarely be brought into play.[106] It is generally better that goods be dealt with where they lie so as to minimise the risk of excessive cost in transporting and dealing with them and waste in abandoning them.[107] In this respect, the CISG seeks also to establish a fair balance between the interests of buyers and sellers by recognising the particular vulnerability of sellers if it ever came to the rejection of goods by the buyer in a place distant from the seller. This should not be seen as unduly favouring sellers. But even if it were, other features, for example the strict liability of the seller, might be thought to favour buyers. Nevertheless, just as sellers might have difficulty in dealing with goods thrown back on them in a distant place, buyers might be placed in difficulties

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[102] For example, the rules on damages in the Act are displaced by default clauses in practice.

[103] *Sale of Goods Act*, *supra* note 51, s 10(2).

[104] The Act certainly contains anachronistic features that I should very much like to see banished from a revised version of the Act, but there is no sign of any movement in this respect in the future. See MG Bridge, "Do We Need a New Sale of Goods Act?" in J Lowry & L Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths LexisNexis, 2006), 15–47.

[105] But there are many translations into other languages.

[106] On which see CISG-AC, *Opinion No 9, Consequences of Avoidance of the Contract*, adopted 15 November 2008.

[107] Even in the strict world of commodities, the standard form contracts favour price allowances over rejection when goods are non-conforming or off-specification: see *eg* GAFTA 100, *supra* note 19, cl 5 (2020 edition).

if having to prove the fault of a distant seller. So far as sellers have a larger say than buyers in the choice of applicable law, buyers should be wary of agreeing to the exclusion of the CISG in individual contracts.[108] But, as stated above, commodity traders are usually in the buying and selling business, rather than the producing and consuming businesses. Remember the tale of the sardines.

[108] H Belloc, *Jim*:"[A]lways keep a-hold of Nurse, For fear of finding something worse."