SHOULD MALAYSIA JOIN THE CISG?

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Abstract

The United Nations Convention on the International Sale of Goods ('CISG') has been in effect since the early 1980s and some 94 member states of the United Nations have joined the Convention. These members account for close to 75% of world trade and include many of Malaysia's largest trading partners. This essay reviews the major objections that have been raised to the CISG among common law nations, such as the United Kingdom, and how those objections have been managed by substantial economies, such as the United States, Canada, Australia, and Singapore, which are within the common law family of nations. Many Malaysian traders already are subject to the CISG as a result of the operation of private international law, and the conclusion of the essay is that, on balance, Malaysia may find it beneficial to join the CISG. Those issues which may arise can be managed through careful drafting and negotiation.

Keywords: CISG, international sale of goods, contract

I INTRODUCTION

The United Nations Convention on the International Sale of Goods ('CISG') is a treaty which creates a uniform set of rules for sale of goods across national boundaries between commercial buyers and sellers. Malaysia is not a party to the Convention although Malaysian buyers and sellers regularly engage in transactions for the sale of goods (steel, chemicals, automotive vehicles, agricultural machinery and agricultural products, textiles, and so on) across national boundaries. Should Malaysia consider joining the CISG or would doing so, on balance, be of little practical assistance to the Malaysian economy? Is there a risk that joining the CISG would affect traditional domestic common law rules of contract law?

One answer, of course, is that the Malaysian economy, including sales of goods for export and purchases of goods for imports, has been performing reasonably well, on average, for years. Joining the CISG might have little or no appreciable effect on the growth of the Malaysian economy. The economy has been affected more by externalities such as the Covid-19 pandemic than by the details of sales law. Doing nothing may be the right choice in that the risks, to the extent they exist, of being outside the CISG are

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known whereas the gains, if any, to be realised from joining the CISG are speculative. But joining the CISG would place Malaysia in the mainstream of international trade.

Currently, many Malaysian buyers and sellers are subject to the CISG now if the CISG is the governing law of their transactions whether by operation of a choice of law clause or by reasons of private international law. An examination of the possible objections to the CISG from common law lawyers are worth considering in order to strike a balance between the perceived risks and the possible rewards. Careful consideration might show that joining the CISG has certain advantages and that the risks can be minimised or avoided altogether as the Malaysian economy grows and becomes even more closely integrated with the economies of other countries around the globe. Foreign traders might appreciate having a uniform sales law. At present, traders must be aware of two slightly different regimes of sales law in that the states of Peninsula Malaysia are subject to the Malaysian Sale of Goods Act of 1957, as revised in 1990, whereas the states of Sabah and Sarawak in Borneo adhere to the United Kingdom Sale of Goods Act of 1979. All contracts are subject to the Contracts Act of 1950, although if there is a contradiction or inconsistency, the legislation on sales law prevails.[1] The differences in the applicable law between the States of Peninsula Malaysia and the States of Sabah and Sarawak are not great, and the underlying approaches to contract law are much the same, but a foreign trader might find it to be more convenient to rely on the internationally applied CISG.

Foreign trade is a substantial factor in the Malaysian economy. World Bank statistics from 2020 indicate that exports amounted to 68.76% of Malaysia's GDP, and imports were 61.75% of its GDP. Despite some downturn as a result of the Covid-19 pandemic, foreign trade in 2020 continued to be very important, and the trend for a number of years has been upward.[2]

Any outsider should be careful about making recommendations for a nation to adopt a particular law or policy. Someone who is not a member of the society may be unaware of the many different domestic interests and tensions and may, by ignorance, make suggestions that are unrealistic or, in some cases, even offensive. Nonetheless, an outsider may have the advantage of being neutral and without a connection to any particular interest group within the domestic society. With these thoughts and caveats in mind, it may not be inappropriate for someone who is from a different country, but who is a keen and sympathetic observer of economic and political developments in Malaysia, to offer a few thoughts on the CISG which is a subject of potential interest to international traders and lawyers. This particular observer is from a common law jurisdiction, has worked mostly in common law jurisdictions, and was engaged with the legal profession in neighbouring Singapore for fourteen years as a legal academic and consultant.

As of this writing, 94 nations are member states of the CISG, a Convention that has been in effect in some countries for more than three decades. The member states account for about 75% of world trade. Contracts for the sale of goods are commonplace, and the main issues generally revolve around questions of clarity, efficiency, and remedies. Sales

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1 See Lim Koon Huan and Manshan Singh, *Sales and Storage of Goods in Malaysia: Overview* (ThomsonReuters, 2021).

2 See for a wide range of statistics: www.wits.worldbank.org; www.dosm.gov.my

contracts between international traders do not usually involve any great social, ethical, or moral issues that would create tensions between different cultures. The five largest economies of the world (United States, China, Japan, Germany, France) are member states as are most members of the European Union and a number of nations around the world which have large economies (Brazil, South Korea, Australia, Canada, Mexico, Russia, and others). Many of Malaysia's trading partners are member states. In order, the top five countries for Malaysian exports in 2019 and 2020 were: China, Singapore, USA, Hong Kong, and Japan.[3] All but Hong Kong are member states of the CISG. Of Malaysia's top fifteen trading partners (accounting for more than 81% of all trade), nine are member states of the CISG.[4]

If a nation's trading partners are split between member states and non-members, then is there any reason to consider becoming a member? Absent strong countervailing reasons, the answer is at least an equivocal 'yes'. When contracting parties are from member states, the CISG presumptively applies, but the parties are free to 'opt out' of the coverage of the CISG pursuant to Article 6 and to choose to apply the domestic law of one jurisdiction or the other.[5] A member state can file a reservation whereby the CISG applies only if *both* contracting parties are from member states regardless of what the rules of private international law may say about the applicable law.[6] As things now stand, a Malaysian company might be subject to the CISG if it has a contract of sale or purchase with a company from a member state and the rules of private international law would result in the application of the law of the member state to the transaction unless the agreement includes a negotiated and clear choice of law clause to the contrary. Careful attention to the details of the sales agreement is necessary to avoid the CISG.

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[3] China was a member state of the CISG in 1997 when the British colony of Hong Kong became a part of China as the Hong Kong Special Administrative Region, but Hong Kong has continued to follow the English common law for contracts and other private law subjects. China did not include the CISG among the United Nations Treaties and Conventions to which it was a party and which it asked to be applicable to Hong Kong after the transfer from British control.

[4] For these and other statistics, see the sections on Malaysia in: www.worldstopexports.com; www.nordeatrade.com

[5] Some courts have concluded that an 'opt out' must be explicit. A reference to 'German law' does not satisfy Article 6 because the CISG is, in fact, 'German law' as a ratified and domesticated treaty of Germany: *Roser Technologies, Inc. v. Carl Schreiber GmbH*, 2013 WL 4852314 (W.D.Pa.) (United States). See also *Eastern Concrete Materials Limited*, 2019 WL 6734511 (D. N. J.) (United States). A choice of law clause that specified 'Australian law' and excluded 'UNCITRAL law' was sufficient to opt out of the CISG notwithstanding that the CISG is Australian law and that UNCITRAL is an organization and not a law-making state: *Olivaylle Pty Ltd v Flotweg GmbH Co.* [2009] FCA 522 (Australia). For a criticism of the somewhat casual attitude of Australian courts and lawyers to the CISG, see L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Cost of Ignoring the Vienna Sales Convention for Australian Lawyers'(2009) 10 *Melbourne J. Intl. L.* 141. See also Borisova, 'Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG' (2005) *9 Vindobona J. Int'l. Com. L. & Arb.* 153. ; 'How to be or not to be: The United Nations Convention on the International Sale of Goods, Article 6' (1996) *4 Cardozo J. Int'l. & Comp. L.* 423. For a clear, straightforward and effective 'opt out' clause, see *Gea Systems North America LLC v. Golden State Foods Corp.*, 2020 WL 3047207 (Del.) (United States).

[6] At present, only six countries require that both parties be from member states, but three of Malaysia's significant trading partners, China, Singapore, and the United States, are among that small group. The other three are: Czech Republic, Slovakia, and the small Caribbean nation of St. Vincent and the Grenadines. Otherwise, the choice of law rules of private international law apply if the parties have not specified the applicable law in their contract with the result that the CISG may apply even if only one party is from a member state.

II SHOULD TRADERS FROM A COMMON LAW COUNTRY BE CONCERNED THAT THE CISG IS TOO MUCH LIKE A CIVIL LAW CODE?

One of the objections among English lawyers to the CISG is that it appears to be more closely aligned with various strands of the civil law than with the common law, especially on matters of construction (no parol evidence rule) and on the possible incorporation of a civil law notion of 'good faith' along with a command that deference be paid to international decisions in order to achieve uniformity.[7] There is some merit to these arguments, but the concerns are overstated.

A number of substantial common law countries already are member states. These include Australia, Canada, New Zealand, Singapore and the United States. Admittedly both Canada and the United States have some connections with the civil law (Quebec in Canada and Louisiana in the United States), and the domestic sales law in the United States, which is contained in Article 2 of the Uniform Commercial Code, includes a specific requirement of 'good faith' in sales transactions. Nevertheless, all these jurisdictions are members of the common law 'family' of nations and the law of contracts is based on English law.

International sales agreements for centuries have followed various customary law rules of the *lex mercatoria*. Traders dealing across national boundaries, especially those who are repeat players in a commodities market, want some degree of consistency and predictability in their transactions and do not want to be at the mercy of competing and conflicting domestic systems. Nor do they want to be overly concerned about problems of language or of cultural nuance. They prefer to have a reasonably efficient, predictable system for buying and selling goods that is much the same from place to place. For example, traders generally agree, regardless of domestic law, about the meaning of what are now called 'Incoterms', such as 'free on board' or 'free alongside ship' which are highly useful shorthand ways to establish passage of the risk of loss, to identify which insurer bears a risk at a given place or time, and to trigger various financing arrangements.[8]

The meaningful variations in the CISG from ordinary common law contract rules are relatively few in number. These variations often can be avoided. An obvious example has to do with remedies. The preferred remedy under the CISG is the civil law remedy of performance,[9] but Article 28 provides that a court need not order such performance if it would not be the normal remedy available for breach of contract in that jurisdiction. Other variations can be managed through careful drafting, although, in all candour, the

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7 See CISG art 7. See generally Cross, 'Evidence under the CISG: The "Homeward Trend" Reconsidered' (2007) *68 Ohio State L. J.* 133..

8 See, eg, *In re World Imports, Ltd*, 549 B. R. 820 (E.D.Pa. 2016) (United States) (where CISG and 'incoterms' were used to determine the date of passage of property in a corporate bankruptcy proceeding). There is an interesting debate among academic commentators about the extent to which 'usage' and the terms representing various 'usages' are normative and which are based within separate contractual relationships. See, eg, Phillip Hellwege, 'Understanding Usage in International Contract Law Harmonization' (2018) *66 Am. J. of Comparative L.* 127.

9 CISG art 46.

CISG does effectively exclude the parol evidence rule in construing terms of an agreement governed by the Convention.[10]

Why worry about modest variations in rules of contract law for international sales transactions? The general common law of contracts provides the background law for huge numbers of agreements, but every common law country already has in place a number of sub-categories of contracts that are governed slightly differently from the general background law and from other contracts. Insurance agreements are one example. Trust agreements are another. Maritime charters for vessels are yet another. Agreements between a publicly held corporation and members of its Board or its shareholders comprise yet another sub-set of contracts which are subject to specific rules and regulations. Some of these variations are the result of statutes and regulations promulgated pursuant to those statutes. Some have developed from the common law itself and from, for example, property law or fiduciary law. Where there is a domestic sale of goods law in place, whether derived from the 1893 United Kingdom Sale of Goods Act or otherwise, sales transactions already are subject to a slightly different regime of law. Another modest variation is unlikely to weaken the overall structure nor to cause any special concerns for the legal profession. That is especially the case when the proposed system (the CISG) is, for the most part, consistent with the domestic law of sales.

The CISG applies only to commercial parties, and even then, some large areas of commercial activity are excluded.[11] Consumer sales transactions are unaffected, and a domestic concern for individual consumer welfare is unaffected by the CISG.[12] Commercial entities dealing internationally are, for the most part, sophisticated parties that can look after their own interests and contract around provisions that are undesirable while also enjoying the uniformity and predictability of the CISG.

The CISG is neutral law which is easily accessible and transparent. The Convention is effective in the official languages of the United Nations, and the most commonly used version is the one published in English. Many commercial sales agreements include arbitration clauses, and the CISG provides a straightforward structure for arbitrators to use no matter what jurisdictions may be involved. From all indications, the CISG has been employed regularly in sales agreements with Chinese traders. Doing so in an arbitration setting avoids the problems of dealing with a language that can be difficult for those not

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10 CISG art 8.

11 Article 2 excludes from the CISG sales:

a. Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.
b. By auction.
c. On execution or otherwise by operation of law.
d. Of stocks, shares, investment securities, negotiable instruments or money.
e. Of ships, vessels, hovercraft or aircraft
f. Of electricity

The exclusion of consumer contracts means that the CISG has no practical effect on domestic consumer protection laws and regulations. The consensus is that the CISG does not apply to distributorship contracts either. See, e g, *Reecon North America, LLC v. DuHope International Group*, 2019 WL 2542536 (W. D. Pa.) (United States).

12 Thus the Consumer Protection Act 1999 of Malaysia would be unaffected by the CISG were Malaysia to join the Convention.

fluent in Chinese, and a legal system that is not as transparent as those in most common law countries. Because the CISG is 'neutral' there is much less concern about possibilities of domestic bias that may appear to be an issue when a court applies its own domestic law, most especially if the process is not open and transparent.

III THE SPECIAL PROBLEM OF PAROL EVIDENCE

One of the characteristics of contract interpretation under the common law is that the agreement itself sets the boundaries for considering the intentions of the parties. By comparison, the civil law allows a court to consider not only the context, which may be relevant in a common law case as well[13], but also the negotiations that took place prior to conclusion of the agreement and communications subsequent to formation of the agreement. The CISG follows the lead of the civil law. Article 8 (3) states:

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The parol evidence rule is not a simple procedural rule. To the contrary it is a substantive rule of contract law and, as such, is deeply embedded in the common law notion of a contract as the final manifestation of an agreement. Lord Hoffmann, then a member of the House of Lords, clearly stated the common law position in a 2009 judgment:

> …the French philosophy of contractual interpretation…is altogether different from that of English law….French law regards the intention of the parties as a pure question of subjective fact, the *volont psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant in establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalizing the contracting parties and asking not what their intentions actually were, but what a reasonable outside observer would have taken them to be. One cannot in my opinion simply transform rules based on one philosophy of contractual interpretation to another, or assume the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a Continental system.[14]

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[13] See, eg, *R1 International v. Lonstroff* [2014] SGCA 56 (Singapore).

[14] *Chartbrook Limited v. Persimmon Homes Limited* [2009] UKHL 38, 39 (United Kingdom). For a more general discussion of some of the fundamental differences in approach between English and French contract law, see S. Rowan, *Remedies for Breach of Contract*, (OUP: New York, 2012).

The consensus among courts that have considered Article 8 is that it supplants the parol evidence rule and that a court should be free to consider a wide range of extrinsic evidence in construing the terms of a contract that is governed by the CISG.[15] In his opinion for the court in a CISG case between an American company and an Italian company, Judge Stanley Birch of the United States Court of Appeals for the Eleventh Circuit stated:

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system should apply. Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying the directive to consider this type of parol evidence.[16]

If a party in a common law jurisdiction is concerned about the use of extrinsic evidence should a dispute arise in connection with a sales agreement under the CISG, what are the options to consider? One option, of course, is to negotiate a choice of law clause that opts out of the CISG and applies the domestic law of the party's home jurisdiction, although doing so may be difficult if the other party is not keen to be subject to that particular domestic law. Another option which is possible under Article 6 of the CISG is to exclude Article 8 but not the remainder of the CISG. This limited 'opt out' may be more palatable to the other side, but many parties might object to a piecemeal application of the CISG. If the parties cannot reach agreement about excluding Article 8, then it may be possible to negotiate a clear, unambiguous and definite 'whole agreement' clause that requires a judge or arbitrator in a subsequent dispute to restrict the boundaries of construction to the four corners of the document. Even so, there may be uncertainties or ambiguities that arise after formation and during performance which undercut the 'whole agreement' clause.[17]

If all else fails, a party may wind up being subject to a more extensive use of extrinsic evidence pursuant to Article 8, but, in all likelihood, there will be few major difficulties. Common law courts already take account of context (nature of the business, relationship of the parties, subject matter of the contract, customs of the trade, etc.), and there are exceptions to strict application of the parol evidence rule for explanations of

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15 See generally CISG Advisory Council, 'CISG Advisory Council Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (2005) *17 Pace Int'l. L. Rev.* 61. See also, *Treibacher Industries AG v. Allegheny Technologies, Inc.,* 464 F 3d 1235 (11th Cir. 2006) (United States); *Shuttle Packaging Systems, LLC v. Tsonakis*, 2001 WL 34046276 (W.D. Mich. 2001) (United States).

16 *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F 3d 1384, 1391 (11th Cir. 1998) (United States).

17 That was an issue in *Tee Vee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537 (S.D.N.Y. 2006) (United States).

ambiguities and technical terms.[18] The performances of the parties may themselves have raised questions, especially if one side has performed in a non-conforming way and the other side has (or is said to have) acquiesced in the non-conforming performance. Certainly the trade context is important in ascertaining the meaning of the agreement.[19]

IV REMEDIES – ARE THE DIFFERENCES SIGNIFICANT?

The remedial issue is solved, for the most part, by the CISG itself. A common law court need not grant a remedy that it would not normally grant in a similar case under domestic law. In other words, civil law courts can go ahead and order performance pursuant to Article 46 as they would in a civil law proceeding, but common law courts may award damages as an economic substitute for performance as they would in an ordinary contracts case pursuant to Article 28.

The basic damage measures are the same under the CISG as under the common law, i.e., contract-market differential or the differential between the contract and a 'cover' contract (for the buyer) or a 'resale' contract (for the seller).[20] The principle of mitigation applies as it does in a standard common law case.[21]

There has been some discussion among commentators about whether Article 74 of the CISG expands upon the consequential damages recovery allowed in cases that meet the requirements established by the seminal decision in *Hadley v Baxendale*.[22] Article 74 of the CISG provides:

> Damages for breach of a contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

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18 See generally *Carnival Cruise Lines, Inc. v Goodin,* 535 So. 2d 98 (Ala. 1988) (United States) (for the meaning of 'certain bathrooms' in release signed by wheelchair bound passenger on a cruise ship); *Berwick v. Riordan Protective Services, Inc.,* 185 Ga. App. 232, 363 S. E. 2d 864 (1987) (United States) (for the meaning of the phrase 'we are even on amount due'). Even the presence of a merger or integration or 'whole agreement' clause will not necessarily preclude the consideration of parol evidence to explain an ambiguous term or a clause that is inherently unclear: *PT Panasonic Gobel Indonesia v. Stratech Systems* [2009] 1 SLR(R) 470 (Singapore).

19 See, eg, *R1 International v. Lonstroff* [2014] SGCA 56 (Singapore). As the Singapore Court of Appeal noted in a 2016 judgment, the construction of a contractual term is 'not done in the abstract or in a vacuum, but is, instead, to be anchored in the express contractual language, the internal and external contexts of the contract, and, more broadly speaking, the contractual purpose': *Hewlett-Packard Singapore (Sales) Pte Ltd v. Chin Shu Hwa Corinna* [2016] SGCA 19 [53] (Singapore).

20 See generally CISG Advisory Council Opinion No. 6 (2006); Gotanda, 'Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation' (2005) *37 Georgetown J. Int'l. L.* 95; Comment (2005) *26 U. Penn. J. Int'l. Econ. L.* 601. For an application of CISG rules in a falling market situation, see *Kantonsgericht Zug* [A3 2001 34] (Switzerland 12/12/2002)..

21 CISG art 77.

22 (1854) 9 Ex 341 (United Kingdom).

The boundaries of recovery for consequential damages are not clear. The various judgments of members of the House of Lords in *The Achilleas*[23] a few years ago revived the long standing debate about the precise meaning of the *Hadley* decision.[24] After all the discussions what seems clear is that the determination of consequential damages remains a highly fact and context based issue. Chief Justice Sundaresh Menon of Singapore may have captured the essence of the issue as well as anyone in a 2013 judgment:

> [T]he law imposes limits on the extent of the contract breaker's liability by rules that help a court decide whether the particular type of damages claimed is too remote and hence irrecoverable. The rules as to remoteness of damage serve to impose a horizon on the extent of the contract breaker's liability. Losses that are within this notional boundary are in principle recoverable while those beyond it are not. But although this horizon is not illusory, equally it is not a rigid or empirically precise boundary. Rather, like the horizon of human experience, its range depends on the circumstances. For this purpose, the relevant circumstances include those in which the contract was entered into and what both parties knew or must be taken to have known about the venture they were about to undertake. According to these circumstances, the horizon may sometimes extend further than at other times.[25]

That is not to say that the determination of what are or are not recoverable consequential damages will always be easy. The New York Court of Appeal, a court that is well known for its expertise in matters of commercial law, divided 4-3 over the question whether lost profits on a resale by a distributor were 'general' damages under limb one of *Hadley* or were 'special' damages under limb two.[26]

A case from the State of Florida in the United States provides a good example of the application of Article 74 and an opportunity to compare it with the damages that would reasonably be recoverable under the common law. The seller agreed to sell a large quantity of equine quality hay to a buyer who intended to re-sell the hay to the Government of Abu Dhabi in the UAE. The CISG applied to the transaction. The buyer made a substantial advance payment to the seller and provided a performance bond to the Government of Abu Dhabi. The seller breached the contract and delivered no hay at all. The court ordered the defendant seller to return the advance payment, to pay the buyer an amount equivalent to the lost profits on resale of the hay to the Abu Dhabi Government, and to pay the cost of the performance bond. Return of the advance payment was a matter of simple justice. It was not a forfeitable 'deposit'. The seller reasonably knew or should have known that the buyer was not purchasing so much hay for its own use but was

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23 *Transfield Shipping, Inc. v. Mercator Shipping, Inc.* [*The Achilleas*] [2008] UKHL 48; [2008] 3 WLR 345; [2009] 1 AC 61 (United Kingdom).

24 See, eg, Hunter, 'Has *The Achilleas* Sunk?' (2014) *31 J. C. L.* 120

25 *Out of the Box Pte. Ltd. v. Wanin Industries Pte. Ltd.* [2013] SGCA 15 (Singapore).

26 The characterisation was important because the contract included a negotiated clause that excluded recovery of consequential (limb two) damages. Based on the relationship between the parties and the seller's knowledge of the buyer's intended use (resale), the majority concluded that the lost resale profits were general damages and therefore not excluded, but it was certainly not an 'open and shut' case as the dissenters made clear: *Biotronik AG v. Conor Medsystems Ireland Ltd.* 22 N. Y. 3d 799, 11 N. E. 3d 676, 988 N. Y. S. 2d 527, 2014 WL 1237514 (N.Y.C.A. 2014) (United States).

buying as a distributor or wholesaler. Failure to deliver reasonably could be understood to lead to a loss of profits on resale, and, therefore, the seller could be held liable for the loss of profits. The cost of the performance bond was not quite as clearly identifiable as a damage item, but the court took into account the context and the known facts. The seller knew the hay was to be shipped to the UAE, and the seller knew, or reasonably should have known, that only a large equine enterprise would be interested in such a substantial quantity of hay. In the UAE, such enterprises are owned or controlled, most likely, by one or more of the Sheikdoms that comprise the UAE. Governments often require contracting parties to provide performance bonds, and the seller should reasonably have anticipated that one of the buyer's costs of doing business would be the cost of a performance bond which would be forfeited upon default. The court noted, in passing, that the same result would have been reached had the court applied the common law rules of the State of Florida (largely the same as those of England) or the rules of Article 2 of the Uniform Commercial Code, the sales article.

The CISG provides certain self-help remedies which can be useful and which may force the parties to communicate with one another in ways that could avoid further disputes and litigation. A buyer, for example, can notify the seller of non-conformities (e.g., quantity variations, quality problems, etc.) and give the seller an opportunity to cure the non-conformities without losing any right to claim damages if the non-conformities persist, but the buyer is required to give the seller a fair chance and cannot file suit until the seller fails or refuses to cure.[27] The seller can do the same if the buyer is delinquent in making payment – that is, provide reasonable time for a cure without losing any rights to claim for the payment in full.[28] The buyer also can reduce the amount of the payment for non-conforming goods with proper notice to the seller.[29] If the buyer makes a reasonable reduction, then the parties may be able to walk away from the deal without the need for further litigation or arbitration. One can see a pattern whereby the CISG attempts to provide the parties with opportunities for informal, private dispute resolution which is likely to reduce costs and which may result in satisfactory performance. In this sense the CISG appears to be consistent with what many commercial parties consider to be the better way to resolve disputes.[30]

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27 CISG art 47.

28 CISG art 63.

29 CISG art 50. See, eg, Court of Appeals Schleswig [11 U 40/01] (Germany 22/08/2002) (where an agreement on a price reduction for 400 sheep that were 'too thin' precluded a subsequent claim for damages).

30 See generally T. Diehl, *Global Order Beyond Law* (Hart Publishing: Oxford and Portland, 2014). Professor Diehl conducted a study of the contractual relationships between a group of German companies and software development firms in India, Romania, and Bulgaria. The study concluded that the parties relied primarily upon informal communications, both between the contracting parties and among peers, for the successful realisation of the goals of the agreement and for the resolution of disputes. These informal mechanisms were of far greater importance than the formal, structural mechanisms of the positive law – although the positive law provided a helpful backdrop and matrix for the development of the informal relationships. The contracts studied were for services in the Information Technology industry, but the lessons learned from that study may well apply to other contractual relationships over time and distance, most especially among repeat players.

V IMPLIED WARRANTIES OF PERFORMANCE AND QUALITY

The CISG adopts a 'perfect tender' rule in that the seller is expected to deliver goods that conform exactly to the description of the goods in the agreement or to samples provided to the buyer for inspection.[31] The common law and most statutes on sales of goods are not dissimilar. The CISG goes on to establish that the goods delivered are expected to be reasonably satisfactory – at least of ordinary quality. If the seller knows of the intended use, and especially if the buyer has asked the seller to provide goods suitable for a particular use, then the expectation is that the goods will be satisfactory for that use. These 'implied warranties' follow the goods unless the seller explicitly limits any warranty of quality by saying that the goods are sold 'as is' or 'with all faults' or unless it can be shown that the buyer was aware of any defects or limitations prior to agreeing to purchase the goods. The rules of the CISG are not so different from the usual rules and expectations in sales transactions governed by the common law. To the extent that a seller may be concerned about implied warranties of satisfactory quality or suitability for a particular purpose, the seller can negotiate a sale that identifies shortcomings or that excludes liability for defects of one kind or another. Inviting a buyer to inspect and test the goods also serves to protect the seller from a subsequent claim of defects if the goods delivered are consistent with those inspected and tested.[32]

There is some question whether the CISG's definition of 'fundamental breach' in Article 25[33] is the same as or different from the common law's notion of a breach that amounts to a failure of a condition which then justifies the non-breaching party in avoiding the contract. That uncertainty is likely to continue because the distinction between those breaches which amount to a failure of a condition and those which are of 'innominate' terms will vary from context to context. The expectation that a seller will deliver exactly what is identified in the contract as the goods (right quantity, right qualities, right timing, right place) is akin to a condition, the breach of which would justify avoidance. But on closer examination, there are opportunities to cure and 'reasonability' provisions that are related to context which suggest that an imperfect tender may not constitute a fundamental breach. In this regard, contracts governed by the CISG are not all that different from contracts subject to the common law.[34]

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31 CISG art 35.

32 See, eg, CISG art 35(3). See also CISG art 40.

33 For applications of Article 25, see, eg, *Diversitel Communications, Inc. v. Glacier Bay, Inc.* 03-CV-23776SR (Ontario SC, Canada, 06/10/2003); *Downs Investments v Perwaja Steel* (Queensland SC, Australia 17/11/2000); *Delchi Carrier, Spa v. Rotorex Corp.* 1994 WL 495787 (N.D.N.Y. 1994) (affirmed in part, reversed in part on other grounds) 71 F. 3d 1024 (2d Cir. 1996) (United States).

34 For general discussions of the common law concept of fundamental breach, see *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kaisen Keisha Ltd.* [1962] 2 QB 26, 1 All ER 474 (United Kingdom); *RDC Concrete Pte Ltd v. Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 (Singapore).

VI DOES THE CISG CREATE A GENERAL OBLIGATION OF GOOD FAITH?

Article 7 of the CISG states:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

There are two substantive directions in Article 7. One is a requirement that courts (and arbitrators) take into account other CISG decisions in the interest of harmonising sales cases around the world. The other makes reference to the concept of 'good faith' in international trade.

The first requirement is sensible and straightforward. One of the main purposes of the CISG is to create a uniform, harmonious and predictable regime of law for international sales transactions among commercial parties. In this sense the CISG is a statutory form of the *lex mercatoria*. Sometimes courts may be hesitant to look beyond their national boundaries for guidance, but that is the charge of Article 7 which was enthusiastically followed by a New Zealand court:

> …the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and Convention related decisions in overseas jurisdictions. Recourse to domestic law is to be avoided.[35]

In the context of sales agreements, common law courts already have some historical precedents for looking beyond their national boundaries. Common law courts regularly consider decisions from other common law jurisdictions. The most obvious examples involve judgments from the United Kingdom, but one can find examples that involve a wide range of common law jurisdictions. It is a step further to consider judgments from civil law courts, but, in the context of the CISG, doing so makes sense if the goal is to achieve a reasonable level of uniformity. It is also easy thanks to the excellent – and free – website maintained by the Pace University School of Law[36] as well as the website of UNCITRAL.[37] All the reported decisions of courts around the world are included. Major cases reported in languages other than English have, in many instances, been translated into English. A lawyer or a judge with access to the internet can review every reported CISG decision quickly and easily. The websites also include most of the academic

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[35] *Smallmon v. Transport sales Limited* [2010] NZHC 1367, [88], appeal dismissed [2011] NZCA 340. An Italian court cited decisions from nine different countries, both civil and common law, in its analysis of a case under the CISG. See *Al Palazzo Srl v. Bernardaud di Limoges, SA, Tribunale di Rimini* (Italy 26/11/2002).

[36] www.cisg.law.pace.edu

[37] www.uncitral.org

commentary on various aspects of the CISG. Thus, a court should have little difficulty in dealing with the first requirement of Article 7.

The second aspect – that of good faith – presents a few more questions.[38] Under the civil law there is an expectation of good faith in both the negotiation and the performance of a contract.[39] The scope of good faith varies among common law jurisdictions, but none imposes an affirmative duty of good faith during the negotiating process. 'Bad' faith can be a problem. A party has no right to be untruthful or misleading, especially in response to a query, but there is no affirmative obligation to be forthcoming. During the performance of a contract, the issue is not quite so clear. Some courts have suggested that there is an obligation to make an effort to have the contract become fulfilled and not just to sit on one's hands.[40]

In a typical sales transaction, performance is easy enough to identify. The seller either delivers the correct goods in the right quantity at the right place and time or does not. Failure to do so is a breach and not an issue of good faith. Likewise, the buyer either pays the right amount on time or does not and failure to do so is a breach. The performance issue arises more often in a situation of a continuing relationship.

For the common law lawyer who has some concern about the imputation of a civil law notion of good faith through Article 7, there are several ways to protect a client. One would be to negotiate, if possible, an exclusion of all or part of Article 7 pursuant to the provisions of Article 6. Another would be to negotiate a definition of 'good faith' within the context of the particular agreement. Yet another would be to define carefully the expectations of performance by the seller and the buyer so that there is little or no chance for misunderstanding in connection with the respective levels of performance.

All in all there is a good argument that the reference to good faith in Article 7 means nothing more than adherence to the general expectation of the CISG that sales transactions will be treated as uniformly as possible across jurisdictions. It does not necessarily suggest a substantive imputation of a general concept of good faith from the civil law tradition into sales agreements subject to the CISG. Care in drafting and reasonable management of mutual expectations between the parties should suffice.

VII EXCUSE BY FRUSTRATION

The common law doctrine of frustration of purpose provides an excuse for performance, but successful assertion of the frustration defence is difficult. Its origin is in the defence of impossibility, and performance generally must be close to impossible or completely

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38 Lord Hoffmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) *22 Pace Int'l. L. Rev.* 145.

39 See generally S. Rowan, *Remedies for Breach of Contract* (Oxford Press, 2012).

40 One of the most famous comments was made by Judge Cardozo (later a Justice of the United States Supreme Court) of the New York Court of Appeal in a 1917 decision in which he said that every contract is 'instinct with an obligation, imperfectly expressed' of 'good faith': *Wood v. Lucy, Lady-Duff-Gordon*, 222 N.Y. 88, 118 N. E. 214 (1917) (United States). In the particular context, he meant that a retailer with an exclusive right to sell millinery produced by Lady Duff-Gordon, impliedly undertook to make a reasonable effort to do so. He did not have to be successful, but for the agreement to have any meaning at all, he was expected to make some efforts.

without purpose for the excuse to be available. Even a major disruptive event such as the Asian financial crisis of the late 1990s or the financial crisis of 2008-09 generally is not sufficient to provide an excuse by way of frustration under the common law.[41] Does the CISG provide a somewhat more lenient basis for asserting an excuse? Article 79(1) states:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

The language of Article 79 is similar to the common law test for excuse by way of frustration, and, if anything, it is only slightly more lenient than the common law.[42] One could argue that it is essentially the same. The best way to avoid disputes about frustration is to draft a clear *force majeure* clause that is directly related to the facts and context of the contract. In the past several years, the Singapore Court of Appeal has published several judgments on the question of frustration which provide a useful guide not only for common law courts but for courts that may be dealing with CISG disputes. The Singapore cases arose as a result of a ban imposed by Indonesia in February 2007 on the export of sand to Singapore. The ban occurred in the middle of a construction boom and there were a number of substantial disruptions in the supply chain for ready mixed concrete (sand is a major component) from suppliers to building construction firms. The Indonesian sand came from the Riau Islands just a short distance across the Straits of Singapore. Sand was available from other sources but at substantially higher prices due to longer lines of transportation and higher acquisition costs. Each contract had to be examined carefully with particular attention to the relevant – if present – *force majeure* clause.[43]

Careful drafting is once again the answer to most concerns. A 'boilerplate' *force majeure* clause from a formbook may be insufficient, but one that is drafted with a clear eye on the details of the particular transaction may help avoid disputes about the availability of the frustration excuse whether the contract is governed by the common law, by a sale of goods act or by the CISG. In any event, Article 79 of the CISG is not an impediment to acceptance of the CISG by a common law jurisdiction. If there are issues surrounding the doctrine of frustration, those issues are more fundamental than any relatively minor differences between the language of Article 79(1) of the CISG and the common law test for frustration. As one commentator has noted:

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41 See, eg, *Chinaya a/l Ganggaya v. Sendal Raya Sdn. Bhd.* [2008] 2 MLJ 468 (Malaysia); *Highseed Corp. Sdn. Bhd. v. Warisan Harta Sabah Bhd.* [2000] 5 MLY 337 (Malaysia); *Ner Tanrid Congregation of North Town v. Krivoruchko* 638 F. Supp. 2d 913 (N.D.Ill. 2009) (United States).

42 Reported decisions have been, for the most part, similar. Price fluctuations generally have not been accepted as excuses under Article 79 or other impediments that were known or could have been avoided. See, eg, *Commercial Court of Tongeren* [AR A/04/1960] (Finland 25/01/2005); *Arbitration Court of Budapest Chamber of Commerce and Industry* (Hungary 10/12/1996). But in a Belgian case a 70% price change was found to be an excusing contingency in the context of the particular agreement: *Seafoam International BV v. Lorraine Tubes, SA, Cour de Cassation* (Belgium 19/06/2009).

43 For an overall discussion of the series of cases, see *Alliance Concrete Singapore Pte Ltd v. Sato Kogyo (S) Pte Ltd* [2014] SGCA 35 (Singapore).

> Perhaps the time has come for a reconsideration of the frustration excuse. Indeed, it may be better to borrow language from the UCC [Uniform Commercial Code of the United States] and talk in terms of commercial practicality and to develop a rule that encourages re-negotiation with an attendant re-consideration of the risk allocation of the contract. The current default rule, which is very close to impossibility, is one that was derived from a seventeenth century case on impossibility and that was developed when trade and economic activity were not so closely intertwined among multiple jurisdictions around the world.[44]

VIII MISCELLANEOUS

There are a couple of other minor variations from the common law within the CISG, but none that cannot be avoided or otherwise managed.

For example, under the CISG an 'acceptance' is not effective until it has been received.[45] That is different from the rule of *Adams v Lindsell*[46] which established the general common law rule that an acceptance is effective upon dispatch – not receipt. Both are 'bright line' rules that, if known to the parties, can be managed easily. One rule allocates a risk to the offeror (who does not know that the offer has been accepted and a contract formed until receipt) and the other puts a risk on the offeree (the offer may be withdrawn after posting but before receipt). The original offeror can protect against risk by stating how the offer may be accepted. The offeree can protect against risk by using a fast, efficient and effective means of communicating an acceptance. With modern information technology the parties should be able to communicate rapidly and clearly, although time zones may create some issues. The parties can adopt the old fashioned 'belt and braces' approach as well by communicating through various mediums – email, facsimile, hard copies by courier, telephone, etc.

The CISG rule on non-conforming acceptances is essentially the same as the common law. Article 19(1) of the CISG states that a communication which purports to be an 'acceptance' but which contains 'additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.' Article 19(2) notes that minor variances which do not materially alter the offer do not turn the response into a rejection and counter-offer unless the offeror objects to the variances. Article 19(3) then goes on to identify a non-exclusive list of variances that would be material and the list includes just about any matter of substance (eg, time, payment terms, quantity, quality, place of delivery, dispute resolution). A common law lawyer should find little or nothing in Article 19 to be unexpected or difficult.[47]

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44 H. Hunter, 'From Coronations to Sand Bans: Frustration and Force Majeure in the Twenty-first Century' (2011) *28 J. C. L. 61*, 77. The restrictions on trade that have resulted from the Covid-19 pandemic almost certainly will lead to litigation in which the issue of frustration will arise. The topic will continue to be discussed and debated. For a preliminary consideration, see Stephen Younger, Muhammad Faridi, and Timothy Smith, 'COVID-19's Impact on Commercial Transactions and Disputes' (2020) *92 N. Y. State Bar J.* 22.

45 CISG arts 15, 16 and 17 deal with offer, acceptance and timing issues.

46 106 ER 250 (KB 1818) (United Kingdom).

47 It is true that some courts have taken slightly different approaches to the aftermath of mis-matching offers and acceptances. Some follow the usual common law path. A non-conforming acceptance equals a rejection and counter-offer and then follow through to find the final offer and acceptance: see, eg, *Magellan International*

Article 16 of the CISG provides for 'firm offers', that is, offers which are irrevocable for the time stated or which an offeree could consider to have been intended to be irrevocable.[48] The notion of an offer being open without consideration for an indefinite period of time is consistent with the civil law in that consideration is not necessary to the formation of a bargain. Common law lawyers, of course, are not comfortable with the notion of an open ended offer unsupported by any consideration, but an offeror can easily avoid the possibility of being caught by an unexpected acceptance. The offer should state clearly that it is revocable, or, if the offeror so wishes, there can be a limited time stated for the offer to be held open. As 'master of the bargain', the offeror need not worry about Article 16, but should be aware of its presence in order to avoid an accidental 'acceptance'.

IX CONCLUSION

The question whether Malaysia should join the community of nations that have adopted the CISG may not be at the top of the list of priorities for the Government. There are undoubtedly many other more pressing issues, and Malaysian companies are managing successfully to engage with trading partners in many other countries, some of which are CISG member states and some of which are not. That being said, there are two points to consider in concluding this short essay.

First, the portions of the CISG which differ from the norms of the common law are relatively few in number and may be addressed in several ways that would do no harm to the traditional common law structure. Second, the CISG is a neutral law that both civil and common law countries have adopted and use regularly for sales transactions between commercial enterprises. Arbitrators and judges in the member states have become familiar with the CISG, and its use generally avoids any concerns that a party might have about 'homeward bias' in a foreign forum. There are substantial economies which are not in the CISG (e.g., United Kingdom, Indonesia, Thailand), but the member states account for 75% or more of the total world economy and include some of Malaysia's most valuable trading partners. Acceding to the CISG would bring the Malaysian economy into partnership with the largest trading nations in the world and would help to maintain the presence of common law thinking and interests within the CISG community.

Corporation v. Salzgitter Handel GmbH 76 F. Supp. 2d 919 (ND Ill 1999) (United States). But at least one major judgment applied the 'knock-out' rule and found that the differences between the offer and acceptance cancelled each other and applied the default rules of the law to fill the gaps: Federal Supreme Court of Germany [VIII ZR 304/00] (09/01/2002). But *contra*, Appellate Court of Cologne [16W 25/06] (Germany 24/05/2006). See generally K. Wildner, 'Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law' (2008) *20 Pace Int'l. L. Rev*. 1.

[48] CISG art 16(2)(a) and (b).