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THE CISG AND THE UNITED KINGDOM—EXPLORING COHERENCY AND PRIVATE INTERNATIONAL LAW

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Abstract The United Kingdom remains one of the world's last industrialized nations not to have adopted the CISG. The UK CISG debate has endured for decades, with existing analysis largely focusing on competition, assessing the relative merits of the CISG and English law. This article's analysis is complementary; focusing instead on coherence, and the private international law implications of UK accession. This article assesses contractual interpretation, and commodity sales, within an overarching private international law framework. Recognizing the necessity of existing competitive analyses, it makes the case for UK CISG accession on the basis of its complementary coherency perspective.

Keywords: CISG, commodities, contractual interpretation, harmonization, private international law, sale of goods, Sale of Goods Act.

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods[1] ('CISG') is widely regarded as a success story.[2] It is an instrument of harmonization, seeking to reduce barriers to trade, and improve international economic well-being.[3] The CISG has 89 Contracting States, with Palestine most recently acceding in December 2017.[4] Estimates place over 80 per cent

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[1] *United Nations Convention on Contracts for the International Sale of Goods* (opened for signature 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

[2] I Schwenzer, 'Introduction' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 1; R Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 ICLQ 752.

[3] Preamble [3] CISG.

[4] United Nations, '*United Nations Convention on Contracts for the International Sale of Goods* – Vienna, 11 April 1980' (United Nations Treaty Collection – Chapter X – International Trade and Development, 2018) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en>.

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of the world's goods trade as *potentially* governed by the CISG,[5] subject to parties opting out, addressed in Parts III and V below. The CISG is an important instrument in the regulation of international sales.

Despite its reach and success, the United Kingdom has not adopted the CISG. It remains one of the world's last industrialized nations to resist accession. This article argues for UK accession to the CISG. Though much has been written on this topic, this article explores issues of coherency and private international law—themes absent from existing scholarly analyses.

The UK CISG debate is complex, reflected in its long history, and its presently-intractably-opposed positions. Existing literature takes a competitive perspective, assessing the relative merits of the CISG and English law. This type of analysis is both inevitable and useful—its focus is on merchant needs, the ultimate touchstone in matters of commercial law.[6] Nevertheless, it is not the only type of analysis which may be employed. This article's coherency perspective is a useful complementary analysis which, alongside existing competitive literature, supports the case for UK accession.

II. THE CISG AND THE UNITED KINGDOM[7]

With its objective of promoting international trade, adopting the CISG might appear entirely consistent with UK interests. The UK has always had an involvement with the Convention, from its very drafting.[8] For over 30 years, it has circled the CISG, not unlike a cat circling a bowl of cream[9]—committing in theory, but never actually advancing to ratification.

The CISG was carefully crafted, with one key goal being to achieve global acceptance. It grew from highly unsuccessful antecedents, thought of as not taking into account all of the legal diversity of the world's States.[10] The UK (amongst only a handful of States) adopted these antecedents[11]—they are still technically in force, though in practice are never used. The CISG was drafted at

[5] Schwenzer (n 2) 1.

[6] M Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years' in M Bos and I Brownlie (eds), *Liber Amicorum for the Rt Hon Lord Wilberforce* (Oxford University Press 1987) 149.

[7] Portions of this Part have been adapted from CB Andersen, 'Of Cats and Cream – The UK and the *CISG*' in I Schwenzer and L Spagnolo (eds), *Growing the CISG* (Eleven International Publishing 2016) 1.

[8] UNCITRAL, 'Texts Adopted by the United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980)' (1980) XI YB UNCITRAL 149 [3].

[9] Andersen, 'Of Cats and Cream' (n 7) 1.

[10] *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (opened for signature 1 July 1964, entered into force 23 August 1972) 834 UNTS 169; *Convention Relating to a Uniform Law on the International Sale of Goods* (opened for signature 1 July 1964, entered into force 18 August 1972) 834 UNTS 107.

[11] UNIDROIT, 'Status – *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods* (*ULFC*) (The Hague, 1964)' (UNIDROIT 2017) <http://www.unidroit.org/status-ulfc-1964>; UNIDROIT, 'Status – *Convention Relating to a Uniform Law on the International Sale of Goods* (*ULIS*) (The Hague, 1964)' (UNIDROIT 2015) <http://www.unidroit.org/status-ulis-1964>.

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diplomatic conferences spanning 13 years, enjoying the participation of 62 States, and other intergovernmental and non-governmental organizations.[12] This ensured a reconciliation of legal traditions, and the development of a globally acceptable law for international sales.

The UK was well represented at these proceedings. It was active in the CISG's drafting, ensuring that compromises necessary for its compatibility with English law were debated and considered. In some cases, the UK's views did not prevail. For example, it unsuccessfully proposed two amendments to the definition of fundamental breach, now found in Article 25 CISG.[13] Nevertheless, the common law's influence can be seen across many CISG provisions.[14]

Following the CISG's drafting, a comprehensive comparative and consultative report on its UK adoption was compiled in 1989 by Barry Nicholas, an esteemed Oxford professor and delegate to the drafting conferences.[15] This report recommended UK accession. But the UK did not go on to ratify, despite its active role in promulgating the CISG, and its initial conclusion to do so.

Following this 1989 report, other papers from the UK's then-styled Department of Trade and Industry ('DTI') steadfastly advocated accession.[16] Accession was part of the political platform of the New Labour party, before taking power in 1997.[17] And in 2005, Lord Sainsbury famously stated, in the House of Lords, that the UK 'intends to ratify the [*C*]*onvention*, subject to the availability of parliamentary time'.[18]

This qualification reflects the underlying reason for the UK's failure to accede. The problem has always been a distinct lack of urgency.[19] And now (more than ever) parliamentary time is at a premium, with the UK

[12] UNCITRAL, 'Texts Adopted' (n 8) 149 [3] and [5].

[13] First Committee, 'Summary Records of Meetings of the First Committee – 13th Meeting' (Legislative History – 1980 Vienna Diplomatic Conference, 19 March 1980) [1], [3]–[4] and [11] <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting13.html>.

[14] M Bridge, 'A Law for International Sales' (2007) 37 HKLJ 17 and n 1.

[15] Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document* (Department of Trade and Industry 1989). Though this report is now out of print, its findings are reproduced in B Nicholas, 'The *Vienna Convention* on International Sales Law' (1989) 105 LQR 201.

[16] Since known as the Department of Business, Enterprise and Regulatory Reform ('BERR'), the Department for Business, Innovation and Skills, and now the Department for Business, Energy and Industrial Strategy ('BEIS'). See Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention): A Consultation Document* (Department of Trade and Industry 1997); Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): Position Paper* (Department of Trade and Industry 1999).

[17] Andersen, 'Of Cats and Cream' (n 7) 2.

[18] HL Deb 7 February 2005, vol 669, col WA86.

[19] See generally M Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013) 470–1 [10.04].

progressing its separation from the European Union by means of a highly contested Great Repeal Bill.[20]

At one stage, a Member of Parliament was to introduce a Private Member's Bill concerning the CISG. When falling seriously ill, it was not a priority to replace him.[21] But for that illness, the CISG's adoption would have been considered by Parliament.[22]

When the BERR wanted to investigate a non-Parliamentary route to ratification, this was never achieved.[23] In 1997, when the DTI recognized the risks of UK isolationism as a non-CISG State, interest in ratification was renewed; 450 consultative documents were sent to relevant stakeholders, with 36 replies received[24]—a staggeringly low response rate. Only seven resisted adoption, but the overall *rate* of response from legal and trading communities was unsupportive.[25] Recent indications from the BEIS give an unsurprising message—the UK does wish to ratify, though it is not considered a priority.

Despite its lengthy history, the UK CISG debate persists to this day, with two contemporary events ensuring the issue remains live. First, 2011 saw the European Commission's proposal for a Common European Sales Law ('CESL').[26] The risk of an international sales law competing with non-harmonized English law suddenly seemed alarmingly real. Voices in the City of London were supportive, then, of adopting the CISG to keep CESL at bay. As of 9 December 2015, the project has effectively been abandoned, in favour of one addressing digital content sales, and digital contracting.[27] CESL's threat as a competitor to the CISG is eliminated, though UK opposition to CESL managed to reawaken interest in the Convention.[28]

Secondly, negotiations are underway for the UK's European Union exit, taking effect on 29 March 2019, following 23 June 2016's historic 'Brexit' referendum. That the CISG may figure within this process may seem counter-intuitive. A key Brexit campaign theme was the reclamation of sovereignty, and by voting to leave the EU, the UK has expressed a desire to break coherency with much of Europe. Nevertheless, Brexit is causing 'massive uncertainty' for UK and global markets,[29] and post-referendum efforts to re-secure

[20] For a media report noting a feared 'bottleneck of legislation … to make the necessary changes in time'—see H Stewart, '"Great Repeal Bill" Human Rights Clause Sets up Brexit Clash with Labour' *The Guardian* (London, 13 July 2017) <https://www.theguardian.com/politics/2017/jul/13/great-repeal-bill-human-rights-clause-sets-up-brexit-clash-with-labour>.

[21] S Moss, 'Why the United Kingdom Has Not Ratified the CISG' (2005) 25 JL&Com 484.

[22] Bridge, *The International Sale of Goods* (n 19) 470 [10.04].

[23] Moss (n 21) 484.

[24] ibid 483.

[25] ibid.

[26] The original proposal is published at EUR-Lex, 'Proposal for a Regulation of the European Parliament and of the Council on a *Common European Sales Law*' (2011) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0635>.

[27] European Parliament, '*Common European Sales Law* (*CESL*)' (Legislative Train, 20 January 2018) <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law>.

[28] See generally Andersen, 'Of Cats and Cream' (n 7).

[29] D Cumming and S Zahra, 'International Business and Entrepreneurship Implications of Brexit' (2016) 27 BJM 691.

coherency with the world at large are underway—including through trade negotiations with major economies and current EU partners.[30] CISG accession represents one possible ingredient of this overall effort.

This article's analysis focuses on themes of coherency and private international law, as well as the principle of party autonomy. Though used in the paragraph above in a general sense, the term coherency is given a particular meaning in the following analysis, referring to the effectiveness (or otherwise) of the interactions between various aspects of English private law. This definition explains the relevance of private international law, being 'that part of the law of England which deals with cases having a foreign element'.[31] One of these parts would, upon UK accession, be the CISG—necessarily implicating foreign case elements, being concerned with *international* sales. Finally, with respect to party autonomy, this term is used in two senses—first, private international law party autonomy (regarding party choice of the governing law); and secondly, contractual party autonomy (the choice of contractual terms, within a governing law). Taking all of these definitions on board, the key question asked by this article is: *if* the CISG were adopted, *how* would it work alongside English law—effectively, or otherwise—in regulating international sales?

This article's coherency analysis is therefore complementary to existing literature, which has been competition-focused; assessing the CISG's merits as compared to English law.[32] CISG proponents argue that accession generates real harmonization gains.[33] There is an abundance of English language CISG case law and literature, and much translated case law,[34] making the CISG highly accessible compared to many non-harmonized State laws. The grand old man of English commercial law, Professor Roy Goode himself, has advocated UK accession for over 27 years.[35]

[30] See generally P Foster and J Kirkup, 'What Will Brexit Mean for British Trade?' *The Telegraph* (London, 24 February 2017) <http://www.telegraph.co.uk/news/0/what-would-brexit-mean-for-british-trade/>.

[31] L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 3 [1-001].

[32] See, eg, R Beheshti, 'A Comparative and Normative Analysis of the Remoteness Test in the Availability of Significant Remedies in International Sales Transactions' [2016] JBL 289; Q Zhou, 'The CISG and English Sales Law: An Unfair Competition' in L DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 669; Bridge, 'A Law for International Sales' (n 14).

[33] S Kröll, L Mistelis and PP Viscasillas, 'Introduction to the CISG' in S Kröll, L Mistelis and PP Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary* (Hart Publishing 2011) 2 [2].

[34] See, eg, Pace Law School, 'Albert H Kritzer CISG Database' (Pace Institute of International Commercial Law 2017) <http://iicl.law.pace.edu/cisg/cisg>; UNCITRAL, 'CLOUT Abstracts' (United Nations Commission on International Trade Law 2018) <http://www.uncitral.org/uncitral/en/case_law/abstracts.html>; UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations 2016).

[35] R Goode, 'Why Compromise Makes Sense' *The Times* (London, 22 May 1990)—an excellent response to the objections raised in D Wheatley, 'Why I Oppose the Winds of Change' *The Times* (London, 27 March 1990). See also Goode, 'Insularity or Leadership?' (n 2) 755–6.

On the other hand, CISG critics argue that its terms are often vague and imprecise.[36] When compared to non-harmonized English sales law, there is real force in this argument. Criticism is particularly directed at Article 25 CISG, defining fundamental breach[37]—one of the Convention's preconditions for avoidance. Since avoidance is a self-help remedy, uncertainty 'becomes a powerful disincentive to avoidance',[38] given that unjustified avoidance is itself a fundamental breach.[39]

Non-harmonized English law, on the other hand, is more receptive to avoidance.[40] In this regard, self-interest in preserving English law's frequently-chosen status for commercial contracts and commodity sales (and London's status as a major arbitral centre) motivates perpetuating the status quo.[41]

CISG accession would involve the UK adopting a new body of law for international sales. At the UK CISG debate's heart is one fundamental question: should the UK commit itself to two bodies of sales law, or one? This question necessitates extensive analysis of the CISG's merits, compared to English law.

Nevertheless, other arguments add complexity to the debate, demonstrating the limits of exclusively competitive analyses. For example, China is an important UK trading partner,[42] and is a CISG Contracting State. Even aside from its CISG membership, however, China's 1999 contract law reforms took the Convention as an essential reference point.[43] English traders might be more successful in persuading Chinese counterparties to agree to English law, rather than Chinese law, should English law incorporate the CISG. From a Chinese party's perspective, the governing law would then more closely resemble its own, compared to ordinary English sales law.

[36] G Treitel, 'Overseas Sales in General' in M Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) 1164 [18-004]; Zhou (n 32) 675–6, 678–80 and 682; DJ Stephens, 'Introduction: The Contract for the Sale of Goods' in E McKendrick (ed), *Sale of Goods* (Routledge 2000) 54–5 [1-065].

[37] M Bridge, 'Avoidance for Fundamental Breach of Contract under the *UN Convention on the International Sale of Goods*' (2010) 59 ICLQ 917, 922, 936 and 939–40.

[38] ibid 915–16.

[39] M Müller-Chen, 'Article 49' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 782 [14]. The equivalent position is, of course, taken at common law, save as to the application of the repudiation doctrine instead—see, eg, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (HCA) 73–4.

[40] Bridge, 'Avoidance for Fundamental Breach' (n 37) 917 and n 32; Bridge, 'A Law for International Sales' (n 14) 19 and n 8.

[41] Bridge, *International Sales* (n 19) 470–1 [10.04]; Zhou (n 32) 669 and 672; Goode, 'Insularity or Leadership?' (n 2) 756–7; E Simos, 'The CISG: A Lost Cause in the UK?' (2012) 16 VJ 257–8.

[42] See generally House of Commons Library, 'Statistics on UK Trade with China' (10 November 2017) <http://researchbriefings.files.parliament.uk/documents/CBP-7379/CBP-7379.pdf>.

[43] D Ding, 'China and CISG' in M Will (ed), CISG *and China: Theory and Practice* (Université de Genève 1999) 25–6.

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As with competitive analyses, this article's coherency analysis focuses on merchant needs, though approached from a different private international law perspective. This article's analysis is not so much grounded in certainty, frequently invoked against UK CISG accession,[44] but in freedom and choice. Alongside certainty, party autonomy (in both its private international law and contractual manifestations) is a key merchant need.[45]

This article makes the case for UK CISG accession on this basis of its novel coherency perspective. Admittedly, the CISG's situation within domestic legal systems (a key point underpinning this article's perspective) is well understood. However, what is new about this article is its explicit analysis of the UK CISG debate within this context. It is not suggested that this matter is not understood by CISG critics, however, the three issues addressed in this article demonstrate that it is far from trivial to locate the CISG as a potential part of UK law. First, in Part III, this article addresses the private international law implications of UK accession—the basis of its coherency perspective. Secondly, in Part IV, it applies that perspective to philosophical differences between both bodies of law, evident in their contractual interpretation methodologies. Finally, in Part V, this article considers the potential interaction of the CISG and non-harmonized English law, regarding commodity sales—a practical application of its coherency perspective.

Commodity sales are an important part of England's trading profile,[46] and commodity contracts commonly choose English law.[47] The Sale of Goods Act 1979 (UK) ('SGA'), alongside a substantial body of case law, currently regulates all sales (including international and commodity sales) governed by English law.[48] Existing literature has dealt with the CISG's capacity to regulate commodity sales, compared to English law; this article instead explores how the CISG, the SGA and trade terms might all jointly regulate commodity sales, as part of an overall English sales law regime.

III. THE CISG'S POTENTIAL UK APPLICATION AND PRIVATE INTERNATIONAL LAW

Understanding this article's coherency perspective, and its distinction from existing competitive analyses, is achieved by exploring the CISG's application at private international law. This is a simple, yet easily overlooked, issue. Upon accession, the CISG would become *part of* English law—regardless of the trade sector involved, the litigation or arbitration

[44] See, eg, Bridge, *The International Sale of Goods* (n 19) 471 [10.04]; Bridge, 'Avoidance for Fundamental Breach' (n 37).

[45] See generally JW Carter, 'Party Autonomy and Statutory Regulation: Sale of Goods' (1993) 6 JCL 93.

[46] See generally Office for National Statistics, 'UK Trade: December 2017' (9 February 2018) <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/december2017>.

[47] Bridge, 'A Law for International Sales' (n 14) 27 and 40.

[48] E McKendrick, 'F.O.B. Contracts' in E McKendrick (ed), *Sale of Goods* (Routledge 2000) 587 [12-001].

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context or whether parties are simply seeking to ascertain required performance. Coherence is a useful complementary perspective as competitive analyses risk implying, incorrectly, that English law and the CISG would have fundamentally different natures.

A. The CISG's Nature as International Law

As explained in Part II, it is not suggested that CISG critics fail to understand its basic nature as a legal instrument, or the effects of its adoption. However, the risk of this implication arises as some articulations of the competitive viewpoint presuppose that the CISG and English law are (and would continue to be) different things.[49]

The CISG is international law; a treaty, intended to be binding on Contracting States. If this were the start and end of the matter, this presupposition would hold. A simple analysis of the relative merits of the CISG and English law would be a more definitive exercise.

B. The CISG's Nature as Domestic Law

Though itself international law, the CISG becomes part of a Contracting State's domestic law when adopted. The CISG is therefore not independent of Contracting States' laws; it *becomes* their law, for international sales.[50] It creates private rights and obligations, in addition to State-to-State obligations created at public international law.

Australia's position is an interesting comparator. CISG accession created obligations between Australia and other Contracting States at public international law. Local legislation then gave the CISG effect under Australian law, so that it may create private rights and obligations as well.[51]

Each internal Australian state and territory has enacted domestic goods legislation, based on the Sale of Goods Act 1893 (UK); with separate legislation also giving effect to the CISG.[52] In New South Wales, a typical jurisdiction, the Sale of Goods (Vienna Convention) Act 1986 (NSW) attaches the CISG as a schedule, gives the Convention 'the force of law',[53] and ensures that its provisions 'prevail over any other law in force in New South Wales to the extent of any inconsistency'.[54] The equivalent Sale of Goods (Vienna Convention) Act 1986 (Qld) formed the basis of a Draft Sale

[49] See, eg, Zhou (n 32) 673–5.

[50] I Schwenzer and P Hachem, 'Introduction to Articles 1–6' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 18 [3]. See, eg, *SCC Case Code 174 (2001)* in L Bergman (ed), *Casebook on Choice of Law in Arbitration* (Landa 2017) 136–7.

[51] See generally *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA) 286–7.

[52] cf Goods Act 1958 (Vic) Part IV.

[53] Sale of Goods (Vienna Convention) Act 1986 (NSW) section 5.

[54] ibid section 6.

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of Goods (United Nations Sales Convention) Act 199–, prepared by the Commonwealth Secretariat.[55]

Australian case law recognizes the CISG's domestic character. *Roder v Rosedown* explained that '[t]he Convention has become part of the law of Australia', so 'is not to be treated as a foreign law which requires proof as a fact'.[56] Similarly, *Olivaylle v Flottweg* described the CISG's Victorian enactment as 'an "Australian law"' when interpreting a contract's choice of law clause.[57]

Upon accession, the UK would be bound at public international law to implement the CISG's terms. Once adopted, the Convention would also constitute domestic law, binding private parties in individual transactions. The CISG's nature as domestic law is well understood at large, however it has implications for the UK CISG debate which are useful to explicitly acknowledge. From a private international law perspective, the CISG and English law would not compete, in the ordinary sense of that word. Rather, the CISG would become part of English law, with specific rules (like any area of English private law) delimiting its scope of application. Just as the SGA has conditions for its application, identifying when it (rather than only the common law) governs a contract,[58] the CISG's application rules would identify when it (rather than only the SGA and/or the common law) applies. The CISG would constitute an additional layer in UK sales law; an extra option for parties to consider when negotiating international sales and choosing to exercise (or not exercise) their private international law party autonomy rights to exclude the instrument.

Coherence is a useful complementary analysis because the CISG's application would not be mutually exclusive of the SGA, nor the common law. The SGA and the common law already interact; that different internal bodies of law may govern a single sales contract is already reality in the UK. The SGA relies upon judicial interpretation for its application,[59] with case law substantially fleshing out its application to commodities contracts. It also applies in conjunction with the common law of contract,[60] as well as other aspects of English law, such as bankruptcy law.[61] Relatively more forceful articulations of the competitive view, seeing the CISG as fragmented compared to English law,[62] fail to appreciate this common ground.

[55] M Ndulo, *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) – Explanatory Documentation Prepared for Commonwealth Jurisdictions* (Commonwealth Secretariat 1991) 37–8.

[56] *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216 (FCA) 222.

[57] *Olivaylle Pty Ltd v Flottweg AG [No 4]* (2009) 255 ALR 632 (FCA) 642 [28]. Though the *CISG* was in principle within the parties' choice of law, the clause was qualified, providing for 'Australian law applicable under exclusion of UNCITRAL law'. The Convention was therefore excluded on the facts of this particular case.

[58] Sale of Goods Act 1979 (UK), section 2(1).

[59] Carter (n 45) 93–4.

[60] Sale of Goods Act 1979 (UK), section 62(2).

[61] ibid sections 62(1) and (3).

[62] Zhou (n 32) 673–5.

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C. The CISG as a Potential Part of United Kingdom Law

The CISG's application at private international law involves a sophisticated interface with the State law of which it forms part. Choice of just the CISG is possible, and formed the premise of (part of) a recent empirical study.[63] Nevertheless, the CISG usually applies because a Contracting State's law brings the Convention's application with it.[64]

To be precise, should parties choose the CISG in itself, the legal effect of that choice differs depending on the context. In arbitration, parties are often permitted to choose 'rules of law', allowing them to exercise private international law party autonomy rights to choose non-national rules as governing.[65] In litigation, where choice of law is restricted to State law,[66] choosing the CISG itself instead amounts to an exercise of contractual party autonomy, incorporating its provisions as terms. Since incorporating the CISG as contractual terms in whole or part (where a contract is governed by English law) is already possible,[67] it might be queried what additional advantage UK accession would bring. Nevertheless, this status quo is not functionally equivalent to the CISG's application as law, subject to parties opting out.

Even putting aside the fact that incorporated terms are subject to the governing law's mandatory provisions, given the SGA is largely comprised of default rules,[68] other legal implications of accession remain. As a matter of private international law, the *CISG* is incapable of regulating contract formation where its provisions are only incorporated as contractual terms, significantly restricting its sphere of application. The Convention's harmonization objective would also be at risk where contractually incorporated, as its interpretation would become contractual (rather than statutory); even identically worded clauses can be given different meanings in different contracts, since contractual interpretation necessarily occurs in context.[69] Further, incorporation pits Article 8 CISG's contractual interpretation rules (addressed in Part IV) against Article 7 CISG's rules governing the Convention's own interpretation—the Convention itself having contractual force.

From a practical perspective, given the opt-out practices addressed in Section D, it may be easier to ask parties to opt-out of the CISG than asking interested

[63] J Coyle, 'The Role of the CISG in U.S. Contract Practice: An Empirical Study' (2016) 38 UPaJIntlL 220–3.
[64] See, eg, *SCC Case Code 95 (1996)* in Bergman (n 50) 81.
[65] N Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 216 [3.189].
[66] G Saumier, 'Designating the UNIDROIT Principles in International Dispute Resolution' (2012) 17 UnifLRev 538.
[67] See, eg, P Finn, 'National Contract Law and Transnational Norms and Practices' (Cross-Border Collaboration, Convergence and Conflict conference, Sydney, February 2010) 11–12.
[68] *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 AC 441 (HL) 501; Carter (n 45) 93.
[69] *Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 (QCA) [43].

parties to affirmatively opt-in by incorporation. And given potentially-continuing UK/EU trade relations after Brexit, and the China/Europe trade alliance being pursued through the One Belt One Road initiative, having a general awareness of the CISG and its full legal application is becoming increasingly important for UK traders. For all of these reasons, the CISG's application as one potential part of UK law merits consideration.

Central to the CISG's interface with State law are its preconditions for application, contained in Articles 1 to 5 and 100 CISG, marking the perimeter between its operation and non-harmonized State sales law.

Article 4 CISG demonstrates that the Convention's subject-matter scope is limited, governing only contract formation and party rights and obligations. Two matters are specifically excluded—validity in Article 4(a) CISG, and property's passage in Article 4(b) CISG. It is clear, however, that all other issues—not just these examples—fall outside of the Convention's coverage.[70] The CISG therefore endorses an 'eclectic model' of regulation, operating in conjunction with other bodies of law.[71] The Convention actually presupposes, rather than excludes, the operation of private international law.[72] Case law abounds recognizing the CISG's limited scope,[73] with private international law identifying legal rules governing matters outside those covered by Article 4 CISG.[74]

If the UK acceded, non-harmonized English law would remain applicable to matters outside the CISG's scope, and would continue to govern sales contracts in their entirety where parties opt-out in accordance with their Article 6 CISG private international law party autonomy rights. The common law of contract, the SGA or both (alongside other areas of English law) would continue to apply and supplement the CISG.

D. The CISG and United Kingdom Law—Coherence and Competition

English law's continuing supplementary role at private international law supports the usefulness of this article's coherence perspective. But what exactly does it mean to say that the CISG would become part of (and apply as part of) English law? This question goes to the heart of the coherence idea itself.

As already demonstrated, the CISG works alongside private international law, and supplementary bodies of substantive law. Three ways that the

[70] W Khoo, 'Article 4' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 45 [2.4].

[71] F De Ly, 'Sources of International Sales Law: An Eclectic Model' (2005-06) 25 JL&Com 1–4.

[72] F Ferrari, 'PIL and *CISG*: Friends or Foes?' (2012) 31 JL&Com 48–9.

[73] See, eg, *4A_68/2009* (Bundesgericht, Switzerland, 18 May 2009) [10.1] <http://cisgw3.law.pace.edu/cases/090518s1.html>; *C1 08 45* (Tribunal Cantonal du Valais, Switzerland, 28 January 2009) [3.a] <http://cisgw3.law.pace.edu/cases/090128s1.html>.

[74] P Schlechtriem, 'Requirements of Application and Sphere of Applicability of the *CISG*' (2005) 36 VUWLR 788. See, eg, *SCC Case Code 75 (1998)* in Bergman (n 50) 71–2.

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Convention interacts with State law are explored here, along with their implications for the UK CISG debate. The first arises through Articles 1(1)(a) and 1(1)(b) CISG; the second because of Articles 4 and 7(2) CISG; and the third is evidenced in Article 6 CISG's ultimate preservation of party autonomy.

Articles 1(1)(a) and 1(1)(b) CISG cause the Convention to apply to an international sale because it is part of the sale's governing law. The CISG then relies upon that law for essential support.

Pursuant to Article 1(1)(a) CISG, the Convention applies if both parties are from Contracting States. This can be seen as direct application, through the Convention's own conflict of laws rule.[75] Alternatively, Article 1(1)(a) CISG can be understood as an internal tool, demarcating the Convention's application as against non-harmonized State law, as suggested in Section C. Private international law identifies a State's law as applicable; it includes the CISG; and the CISG then applies (as part of that law) through Article 1(1)(a) CISG, if both parties come from Contracting States.[76]

Pursuant to Article 1(1)(b) CISG, the Convention also applies if the CISG is part of the governing law, even if one or both parties are not from Contracting States. In other words, an applicable law analysis leads to a particular State's law, and the CISG is part of that law—even if not part of another law that could have potentially applied. Article 1(1)(b) CISG triggers the Convention's application where a Contracting State's law is chosen by the parties,[77] and also where it is determined applicable by a court or tribunal absent party choice.[78]

Articles 4 and 7(2) CISG evidence the essential supporting role retained by State substantive law. As explained in Section C, Article 4 CISG sets out the Convention's subject-matter scope. Matters other than contract formation, and party rights and obligations, are necessarily subject to another law.[79] In other words, where a Contracting State's law governs, the CISG applies to those matters within its scope, and other legal issues are governed by the balance of that State's law. As a matter of private international law, the common law and the SGA would both supplement the Convention's potential UK application. Validity and property, specifically identified in Articles 4(a) and (b) CISG, provide good (respective) examples.

Under the CISG, validity matters 'are those where a contract is void ab initio by operation of law or rendered so either retroactively by a legal act of the State or of the parties'.[80] The English common law would supplement the CISG in

[75] E Jayme, 'Article 1' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 28 [1.2].

[76] See, eg, *SCC Case Code 764 (2014)* in Bergman (n 50) 290–1.

[77] *NV AR v NV I* (Hof van Beroep Ghent, Belgium, 15 May 2002) [5.2] <http://cisgw3.law.pace.edu/cases/020515b1.html>.

[78] Jayme (n 75) 32–3 [3.1].

[79] Schlechtriem (n 74) 788.

[80] I Schwenzer and P Hachem, 'Article 4' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 87 [31].

governing vitiating factors such as fraud and duress.[81] One potential difficulty in this application of common law arises where a misrepresentation, allowing rescission at common law, has become a term of the contract—and doesn't satisfy the CISG's high standard for avoidance.[82] As the CISG displaces non-harmonized State law to its scope's extent,[83] this exceptional issue would be determined under the CISG. Though this example focuses on the meaning of 'validity', to illustrate a particular supplementary application of the common law, it is acknowledged that all elements of Article 4 CISG must be read together in defining the CISG's subject-matter scope under that provision.[84]

Regarding property, the CISG addresses party rights and obligations concerning property,[85] but not when and how property passes; nor do trade terms, such as *Incoterms 2010*.[86] Property's passage is left to the otherwise applicable State law.[87] Under English law, the SGA would supplement the CISG.

Under the SGA, where goods are specific or ascertained, property passes at the time intended, assessed by reference to the contract, party conduct and the circumstances of the case.[88] Five presumptive rules contained in the SGA, section 18 are used to determine intention, absent contrary indication. Like the SGA as a whole, they have shaped the law in other common law States, including CISG Contracting States, where similar legislation already supplements the Convention in this way.[89] As an important practical matter, given their common use in international sales,[90] English law would continue to govern retention of title clauses. These clauses maintain ownership rights in a seller until the price is paid,[91] falling within the Article 4(b) CISG property exclusion.[92] Thus while Professor Treitel suggests UK accession to the CISG 'would produce one of two effects'—results significantly different to English law, or the production of uncertainty[93]—this is not so for property

[81] ibid 89 [37].

[82] Bridge, 'A Law for International Sales' (n 14) 24–5.

[83] UNCITRAL Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods Prepared by the Secretariat*, UN GAOR, UN Doc A/Conf 97/5 (1978) 17 [2].

[84] U Schroeter, 'Contract Validity and the *CISG*' (2017) 22 UnifLRev 51–2.

[85] Art 30 CISG.

[86] International Chamber of Commerce, *Incoterms 2010* (ICC Publishing 2010) 6.

[87] UNCITRAL Secretariat (n 83) 17 [4].

[88] Sale of Goods Act 1979 (UK), sections 17(1) and (2).

[89] See, eg, Sale of Goods Act 1923 (NSW) sections 21–23; Goods Act 1958 (Vic) sections 21–23; Contract and Commercial Law Act 2017 (NZ) sections 143–146; Sale of Goods Act, RSO 1990, c S-1, sections 17–19; Sale of Goods Act, RSBC 1996, c 410, sections 21–23.

[90] M Bridge, 'The Transfer of Risk under the *UN Sales Convention 1980* (*CISG*)' in C Andersen and U Schroeter (eds), *Sharing International Commercial Law across Boundaries* (Wildy, Simmonds & Hill Publishing 2008) 77.

[91] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (CA) 685–90 (Roskill LJ), 691 and 693 (Goff LJ) and 693–4 (Megaw LJ).

[92] Schwenzer and Hachem, 'Article 4' (n 80) 92–3 [47]. See, eg, *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216 (FCA) 222–3; *SCC Case Code 250 (2002)* in Bergman (n 50) 164–5.

[93] Treitel (n 36) 1164 [18-004].

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passing. As a matter of private international law, should the UK accede, the CISG's position on property *is* the English position on property.[94]

The application of State law and the CISG are therefore inherently connected. It is not the case, as put by Zhou, that parties must 'choose [the] contract law of one jurisdiction and [the] property law of another'[95]—at least where the CISG applies as part of a governing law, rather than as incorporated contract terms. Parties choose a Contracting State's law, and different elements of that law govern different legal issues. State law supports the CISG's application, given Article 4 CISG, and the Convention's limited subject-matter scope. It also does so through Article 7(2) CISG, for matters within the Convention's scope, but not expressly settled by it.

For these internal gaps, Article 7(2) CISG requires that a solution be sought from the Convention's general principles, before resorting to the otherwise applicable law. Being more akin to a civilian code, recognized in New Zealand's implementing legislation,[96] the CISG's first recourse to general principles differs to gap filling for ordinary English legislation.[97] From a competitive perspective, some uncertainty is necessarily implicated. Nevertheless, Article 7(2) CISG also emphasizes the Convention's interaction (and coherency) with State law, if no general principle is found.

The third way in which the CISG interacts with State law is through Article 6 CISG. This provision preserves party autonomy rights to exclude, derogate from or vary the effect of the Convention's provisions; the first right being private international law party autonomy, with the latter two reflecting contractual party autonomy. Article 6 CISG has been a matter of quite some interest, and was the subject of recent analysis by the CISG Advisory Council.[98] Independently of the UK CISG debate, much attention has been directed at the provision,[99] automatic opt-out practices[100] and what will or will not constitute opting out.[101] Within the debate, the provision is identified as a means by which problematic aspects of Article 25 CISG may be overcome.[102] Article 6 CISG ensures that specific merchant expectations and needs can be protected; provided merchants are educated as to the provision's appropriate use.[103]

[94] cf *SCC Case Code 699 (2013)* in Bergman (n 50) 278–9.
[95] Zhou (n 32) 674.
[96] Contract and Commercial Law Act 2017 (NZ) section 205.
[97] Bridge, *The International Sale of Goods* (n 19) 511 [10.45].
[98] CISG Advisory Council, 'CISG Advisory Council Opinion No 16 – Exclusion of the CISG under Article 6' in I Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing 2017) 523.
[99] See generally L Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer 2014).
[100] See generally L Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10 MelbJIntlL 141.
[101] I Schwenzer and P Hachem, 'Article 6' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 105–13 [10]–[22].
[102] Bridge, 'Avoidance for Fundamental Breach' (n 37) 934–5 and 940.
[103] ibid 940.

Article 6 CISG is important for present purposes because it reiterates the Convention's relationship with domestic law. The CISG contains default rules, as its application (being commercial law) is necessarily subject to party will.[104] Should they wish, parties may exclude the CISG through a clear and considered choice of law; party autonomy in the private international law sense. Providing that the CISG 'shall not apply to this contract',[105] or even choosing a State's law 'under exclusion of UNCITRAL law',[106] would be sufficient. Where excluded, as a matter of private international law, the CISG is displaced in favour of the otherwise applicable State law. Article 6 CISG is itself part of that law, ensuring this result. As explained in Section C, this operation of the CISG as law is meaningfully distinct from its incorporation as contractual terms.

In practice, some parties to international sales contracts governed by English law already exclude the CISG, notwithstanding its present UK inapplicability. Though there are no comprehensive statistics addressing this phenomenon, Bridge suggests it is 'routine' for standard form commodity contracts to 'invariably exclude the CISG'.[107] Such exclusions can be seen in contracts issued by two key international commodity associations—the Grain and Feed Trade Association ('GAFTA'), and the Federation of Oils, Seeds and Fats Association Ltd ('FOSFA'). GAFTA contracts 100 and 119, and the FOSFA contracts for Canadian/USA soya beans (CIF terms), and for vegetable and marine oil in bulk (FOB terms), all exclude the CISG, whilst otherwise governed by English law.[108] By way of further example, the parties' choice of law clause in *Traxys Europe v Balaji Coke* provided:

> This contract, including the arbitration clause, shall be governed by, interpreted and construed in accordance with the substantive laws of England and Wales excluding the *United Nations Convention on Contracts for the International Sale of Goods* of April 11, 1980 (CISG).[109]

There is practical wisdom in clearly stating things that might otherwise be thought of as going without saying.[110] Nevertheless, given that the UK has not yet adopted the CISG, these exclusions are legally unnecessary. In particular, for contracts already formed,[111] they do not even protect against future accession, as the CISG's temporal application is non-retroactive.[112] If

[104] L Castellani, 'Foreword' in I Schwenzer and L Spagnolo (eds), *State of Play* (Eleven International Publishing 2012) ix.

[105] This wording is used in clause 29 of the Grain and Feed Trade Association contract number 100—Bridge, *The International Sale of* Goods (n 19) 636.

[106] *Olivaylle Pty Ltd v Flottweg AG [No 4]* (2009) 255 ALR 632 (FCA) 642–3 [28].

[107] Bridge, 'A Law for International Sales' (n 14) 39–40.

[108] See appendices 2–5 in Bridge, *The International Sale of Goods* (n 19).

[109] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd [No 2]* (2012) 201 FCR 535 (FCA) 539 [14].

[110] WW Park, 'Truth and Efficiency: The Arbitrator's Predicament' in M Arsanjani *et al.* (eds), *Looking to the Future* (Martinus Nijhoff Publishers 2011) 770.

[111] Standard form contracts could, of course, form the basis of contracts entered into post-accession, were the UK to adopt the CISG.

[112] Arts 100(1) and (2) CISG.

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traders are already excluding the CISG in contracts governed by English law, UK accession may have little prejudicial impact for those not wishing to be bound.[113] However, accession would open up an additional avenue of choice (within UK law) for traders open to the regime, in the sense that parties could elect not to opt-out of the CISG.[114] At present, UK traders can only adopt the CISG if their contracts are governed by a Contracting State's law rather than English law—or if they adopt it as contractual terms, which has distinct legal and practical implications.

Since the CISG is itself domestic law when applied to individual sales contracts, Article 6 CISG's contractual party autonomy powers are not unlike powers already granted under the SGA. The SGA is also largely comprised of default rules, preserving the parties' right to contrary agreement. Under the SGA, any 'right, duty or liability' arising under the Act can be 'negatived or varied' by an express agreement, or by a course of dealings, including applicable usages.[115] Such are the parties' autonomy rights under the SGA, that it is the parties' contract itself (rather than the Act's provisions) that tends to be controlling in commodity sales.[116]

E. The Importance of Both Coherence and Competition

This Part's analysis has demonstrated that the CISG typically applies as part of a broader governing law, its true character being domestic law when applied to particular sales. In this capacity, it interacts with the balance of that State's law, as a matter of private international law. In the UK context, should the UK accede, the common law, the SGA and the CISG would all work together (subject to the exercise of party autonomy) in regulating international sales.

These aspects of the CISG's operation may be uncontroversial, but they provide important insights for the UK CISG debate. Should the UK accede, rather than competing with English law, the CISG would become part of English law. Accession would allow merchants to accept the CISG's operation where their contracts are governed by English law, though would also protect choices of existing non-harmonized English sales law.

Competitive analyses of the CISG and English law are essential in assessing the desirability of UK accession. However, on the basis of this Part's analysis, coherence emerges as a useful complementary consideration. The focus here is on matters of interaction. *If* the CISG were adopted, *how* would it work alongside English law—effectively, or otherwise—in regulating international sales? There is nothing, as a matter of private international law, obstructing the CISG's effective absorption into English law.

[113] cf R Goode, 'The Harmonization of Dispositive Contract and Commercial Law – Should the European Community Be Involved?' in E-M Kieninger (ed), *Denationalisierung des Privatrechts?* (Mohr Siebeck 2005) 20 and 26.
[114] cf Goode, 'Insularity or Leadership?' (n 2) 757.
[115] Sale of Goods Act 1979 (UK), section 55(1).
[116] Bridge, 'A Law for International Sales' (n 14) 22 and 26.

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IV. PHILOSOPHIES OF CONTRACTUAL INTERPRETATION UNDER THE CISG AND ENGLISH LAW

Contractual interpretation methodologies are a well-known point of difference between the CISG and English law.[117] Understanding the CISG as (potentially) part of English law shines a new and useful light on this methodological difference. From a coherence perspective, that the CISG and English law differ is not in itself objectionable; it is given. Differences between State laws create the transaction costs that harmonized law seeks to reduce,[118] and it is in the nature of harmonized law to differ from existing solutions.[119]

From a coherence perspective, analysing each approach's strengths and weaknesses is not the imperative. Differences in contractual interpretation methodology are important instead because they challenge the CISG's cultural reception into English law.[120] To this extent, they stand to affect the degree to which the CISG may coherently interface with existing UK sales law.

The common law's approach to contractual interpretation is objective, and is preserved for sales governed by the SGA.[121] Common law asks 'what reasonable persons, circumstanced as the actual parties were, would have had in mind'.[122] Recourse to extrinsic materials is controlled.[123] The parol evidence rule also continues to apply at common law,[124] even if significantly qualified in its operation.[125] While its effect can be overstated, the parol evidence rule 'is not dead, or even ill, but merely misunderstood'—being a rule of construction, rather than evidence, having continuing relevance to modern commercial contracting.[126]

The CISG, on the other hand, does not confine itself to objective assessments of party intention. Pursuant to Article 8(1) CISG, party statements and conduct 'are to be interpreted according to [their] intent where the other party knew or could not have been unaware what that intent was'. It is only where this

[117] See, eg, Bridge, *The International Sale of Goods* (n 19) 547 [11.21].

[118] Preamble [3] CISG.

[119] L Kähler, 'Conflict and Compromise in the Harmonization of European Law' in T Wilhelmsson, E Paunio and A Pohjolainen, *Private Law and the Many Cultures of Europe* (Kluwer 2007) 126.

[120] cf Bridge, 'A Law for International Sales' (n 14) 24; H Collins, 'Why Europe Needs a Civil Code' (2013) 21 ERPL 912–13; H Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 ERPL 361–3.

[121] Sale of Goods Act 1979 (UK), section 62(2).

[122] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 AC 749 (HL) 768.

[123] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 (HL) 1112 [14] and 1115–1123 [27]–[47].

[124] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 913; *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1383 and 1385. See also ibid 1115 [28].

[125] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 913; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 (HCA) 352; *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604 (HCA) 605 [3]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 343 ALR 58 (HCA) 61 [7] and [9] (Kiefel CJ, Bell and Gordon JJ) and 77–8 [73] and 81 [85] (Nettle J).

[126] R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press 2007) 107–10.

reciprocal knowledge test fails that Article 8(2) CISG provides a (secondary) objective test, though Article 8(1) CISG's threshold requirements may lead to the objective approach prevailing in most cases.[127] Article 8(3) CISG goes on to explain that, in either case, 'due consideration is to be given to all relevant circumstances of the case' including negotiations, practices, usages and subsequent conduct. Recourse to extrinsic materials is expressly permitted in all cases, and despite early United States authority,[128] it is clear that no parol evidence rule applies.[129] Restricting construction to the written document is inconsistent with an interpretative methodology making use of the supporting materials listed in Article 8(3) CISG, and the CISG's 'directive' to admit subjective intent.[130]

These differences may lead to different results. However, more importantly from a coherence perspective, they reflect deeper philosophical differences between the CISG and English law. This was explained by Lord Hoffmann in *Chartbrook v Persimmon Homes*.[131] *Chartbrook* reaffirmed the position that pre-contractual negotiations are inadmissible for the purposes of contractual interpretation at common law. Lord Hoffmann explained why English law persists with this tradition, despite the approach of the CISG and other international (and continental) bodies of law, in a passage worth recounting at length:

> Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that continental legal systems seem to have little difficulty in taking them into account. Both the *UNIDROIT Principles of International Commercial Contracts* (1994 and 2004 revision) and the *Principles of European Contract Law* (1999) provide that in ascertaining the 'common intention of the parties', regard shall be had to prior negotiations: [A]rticles 4(3) and 5(102) respectively. The same is true of the *United Nations Convention on Contracts for the International Sale of Goods* (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law … French law regards the intentions of the parties as a pure question of subjective fact, their *volonté 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, must be relevant to 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

[127] EA Farnsworth, 'Article 8' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 99–100 [2.4]–[2.5].

[128] *Beijing Metals v American Business Center* (5th Circuit Court of Appeals, United States of America, 15 June 1993) [II.A] n 9 <http://cisgw3.law.pace.edu/cases/930615u1.html>.

[129] *CISG* Advisory Council, 'CISG Advisory Council Opinion No 3 – Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' in I Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing 2017) 68 [1].

[130] *MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino* (11th Circuit Court of Appeals, United States of America, 29 June 1998) [II] <http://cisgw3.law.pace.edu/cases/980629u1.html>.

[131] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 (HL).

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> 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 depersonalising 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 transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a continental system.[132]

This explanation could be criticized for failing to acknowledge that the CISG (as a whole) embodies a global, rather than purely civilian, perspective. However, the importance of the philosophical differences adverted to by Lord Hoffmann are reinforced by their broader implications. Articles 8(1) and (2) CISG apply to 'statements made by and other conduct of a party', including their agreement on contractual terms, but also other conduct such as the acts constituting contract formation.[133] The common law applies its objective perspective to contract formation.[134] Further, Lord Hoffmann's differentiation of factual and legal enquiries reflects differing notions of the contract itself. French law, referenced by His Lordship, subscribes to the maxim *le contrat fait loi entre les parties*—the contract is the law between the parties.[135] English law instead insists that contracts are contracts only because the law recognizes their binding effect.[136]

Do these differing philosophies (as opposed to differences in the rules themselves) mean that the CISG is fundamentally incapable of integrating into English law? They may represent a challenge. As the CISG displaces otherwise-applicable State law to its scope's extent, Article 8 CISG operates to the exclusion of domestic interpretation principles where the Convention applies.[137] The common law has firmly maintained its approach, based upon policy concerns that admitting subjective intent would cause evidentiary difficulties and uncertainty.[138] That subjective intent's primacy 'would make common law practitioners uncomfortable' is seen as a major obstacle to the UK's CISG ratification.[139] Nevertheless, it is questionable whether the common law's approach is really all that different from civilian subjective

[132] ibid 1119–1120 [39]. Although the UNIDROIT Principles 2004 have now been superseded by 2010 and 2016 editions, the interpretative rule referred to remains the same in each.

[133] M Schmidt-Kessel, 'Article 8' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 144–5 [1]–[3].

[134] *Smith v Hughes* (1871) LR 6 QB 597 (QB) 607.

[135] See generally J Spigelman, 'Contractual Interpretation: A Comparative Perspective' (2011) 85 ALJ 425–6.

[136] *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab)* [1984] 1 AC 50 (HL) 65.

[137] Schmidt-Kessel (n 133) 144 [1] and 145 [3].

[138] See generally Spigelman (n 135).

[139] cf G McMeel and HC Grigoleit, 'Interpretation of Contracts' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context* (Oxford University Press 2013) 371—regarding the Draft Common Frame of Reference and CESL.

approaches, and thus whether these philosophical differences are as wide as might first appear, as reference to objective evidence and objective factors in the ascertainment of subjective intention is necessarily required.[140] In addition, CISG accession would have no impact upon contracts governed only by non-harmonized English law—those outside the CISG's scope, or excluding the CISG. Here, existing common law rules (and their philosophies) would retain their full effect.

Further, any challenge is not insurmountable. The 11th Circuit Court of Appeals in the United States adverted to similar philosophical differences between the CISG and US law.[141] Though the US has had mixed experience with its CISG case law, problems tend to arise around matters of detail, rather than on the basis of philosophical difficulties. One example is seen in the US courts' initial acceptance of the parol evidence rule under the CISG, referred to above. In a further example, a 2nd Circuit Court of Appeals case recently found an implied CISG exclusion through party reliance on New York law during litigation.[142] Though inconsistent with international understandings of the CISG's exclusion process,[143] the Court still recognized the CISG's integration (as a treaty) into federal US law.[144]

English law has previously effectively embraced uniform law. Two UK decisions have referred to the CISG itself as expressing general contractual principles, where it did not otherwise apply.[145] English legislation implementing EU law is interpreted so as to give effect to that EU law, even if involving departure from ordinary English statutory interpretation rules.[146] And in the *Fothergill* case, the House of Lords was required to interpret the *Warsaw Convention*;[147] in so doing, it endorsed reference to the instrument's *travaux préparatoires*,[148] and also held that the domestic Carriage by Air and Road Act 1979 (UK) (statutorily clarifying an aspect of the Convention's interpretation from the time of its enactment) could not be used for pre-

[140] S Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press 2007) 125–9.

[141] *MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino* (11th Circuit Court of Appeals, United States of America, 29 June 1998) [I] <http://cisgw3.law.pace.edu/cases/980629u1.html>.

[142] *Rienzi & Sons, Inc v N Puglisi & F Industria Paste Alimentari SpA*, 638 Fed Appx 87, 89–90 (2nd Cir, 2016).

[143] CISG Advisory Council, 'Opinion No 16' (n 98) 524 [5].

[144] *Rienzi & Sons, Inc v N Puglisi & F Industria Paste Alimentari SpA*, 638 Fed Appx 87, 89 n 2 (2nd Cir, 2016).

[145] *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 (CA) [57]; *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWCA Civ 1690 (CA) [61]–[63].

[146] J Cartwright, *Contract Law* (3rd edn, Hart Publishing 2016) 30.

[147] *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (opened for signature 12 October 1929, entered into force 13 February 1933) 137 LNTS 11; as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air* (opened for signature 28 September 1955, entered into force 1 August 1963) 478 UNTS 371.

[148] On both less qualified, and more qualified, bases—see *Fothergill v Monarch Airlines Ltd* [1981] 1 AC 251 (HL) 283 (Lord Diplock) and 294 (Lord Scarman) (the former); 278 (Lord Wilberforce) and 287–8 (Lord Fraser) (the latter).

enactment claims.[149] Both aspects of *Fothergill* reflect an internationalist approach to the *Warsaw Convention*, and similar principles of uniformity and autonomy apply in interpreting the CISG.[150] English law might very well integrate the CISG more effectively than the *Warsaw Convention*, given that the CISG expressly enshrines internationally-minded interpretative rules within its own text.[151]

Though the CISG and ordinary English law adopt very different interpretative philosophies, they are not *necessarily* incapable of effectively working together as part of an overall English law of sales. On the one hand, the practical implementation of their philosophies has more in common than first appears.[152] But more fundamentally, from a coherence perspective, just as contracts subject to the SGA are treated differently to those governed only by the common law, contracts governed by the CISG would be treated differently too. Its unique rules (including those addressing contractual interpretation) would apply where the Convention applies—though where excluded, or otherwise inapplicable, the common law would remain as it is today.

V. THE COMMODITIES TRADE, THE CISG, ENGLISH LAW AND TRADE TERMS—COHERENT COMBINATION?

Part III demonstrated the benefit of a coherence perspective on the UK CISG debate. Part IV applied this perspective to issues of contractual interpretation. It can also usefully be applied to other issues across the UK CISG debate.

One of these is the hotly contested commodities trade topic. English law has played a significant role in developing the commodities trade,[153] while the CISG's capacity to regulate commodity sales is consistently critiqued in existing competitive literature.[154] Fundamental breach is an exemplar point;[155] English sales law (in comparison) is 'much more receptive to avoidance'.[156]

This paper's coherency perspective asks a complementary question: can a state of English law, incorporating the CISG as one element, effectively serve commodity merchant needs? As trader needs are key to this analysis, the trade's characteristics must be kept in mind. Commodity markets involve volatile prices, speculation and futures contracts,[157] and also string sales.[158] Ultimate sellers and buyers at each end of a string deal in physical goods, while traders in between effectively undertake 'not a trade in goods but in contracts

[149] ibid 271 (Lord Wilberforce), 288 (Lord Fraser) and 302 (Lord Roskill).
[150] PP Viscasillas, 'Article 7' in S Kröll, L Mistelis and PP Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary* (Hart Publishing 2011) 112 [2].
[151] Art 7(1) CISG.
[152] Vogenauer (n 140) 125–9.
[153] Zhou (n 32) 672.
[154] See, eg, Treitel (n 36) 1163–5 [18-004].
[155] See, eg, Bridge, 'Avoidance for Fundamental Breach' (n 37) 931.
[156] ibid 917.
[157] C Bain, *The Economist Guide to Commodities* (Economist Books 2013) 23–46.
[158] K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] JBL 116–17.

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for the shipment of goods'.[159] The documentary (and largely standardized) basis of sales, combined with volatile prices, mean that great importance is placed on conforming documents[160] as well as timeliness—'August wheat, for example, is not the same commodity as September wheat'.[161] All in all, legal certainty is highly valued.

A. The CISG and English Law—An Exercise in Altering Default Rules

Future CISG accession would leave the UK's existing body of sales law intact. Both the common law of contract and the SGA would remain capable of regulating commodity sales. Accession would only alter the UK's default rules for international sales. This goes to the heart of the coherency perspective's application to commodity sales, and the party autonomy considerations which are key to this analysis.

Given Articles 4 and 7(2) CISG, the Convention's default application would not completely exclude ordinary English sales law. Parties to an international sales contract wishing to adopt non-harmonized English sales law could also still achieve that result, by opting out using their private international law party autonomy rights under Article 6 CISG. Similarly, Article 6 CISG's contractual autonomy powers allow parties to modify particular parts of the Convention felt problematic. English law is a popular choice of law for international contracts,[162] and for commodity sales in particular.[163] Article 6 CISG (as part of English law) would ensure that non-harmonized English law remains a viable choice for traders preferring its more hard-nosed legal regime. The words required for CISG exclusion are 'generally well known',[164] and as Part III demonstrated, contracts governed by English law already tend to exclude the CISG.

Article 6 CISG's very existence, and its place *within* English law (upon future accession), underscore the Convention's sophisticated default operation within broader bodies of State law. At the same time, the Convention is far from irrelevant, notwithstanding Article 6 CISG and its protection of both private international law and contractual party autonomy. Empirical evidence assessing routine CISG exclusion 'varies';[165] automatic opt-outs are risky for lawyers from a professional liability perspective;[166] and the *CISG's* application may have real advantages in the manufactured goods trade.[167]

[159] *Procter & Gamble Philippine Manufacturing Corporation v Kurt A Becher GmbH & Co KG* [1988] 2 Lloyd's Rep 21 (CA) 22.
[160] See, eg, ibid 22–3.
[161] Bridge, 'Avoidance for Fundamental Breach' (n 37) 931.
[162] Along with laws of the USA, English law was the most popular choice of law in ICC arbitration in 2016—International Chamber of Commerce, '2016 ICC Dispute Resolution Statistics' [2017] (2) ICC DispResBull 112.
[163] Bridge, 'Avoidance for Fundamental Breach' (n 37) 931.
[164] Spagnolo, *CISG Exclusion* (n 99) 98.
[165] Spagnolo, 'The Last Outpost' (n 100) 160; see generally 160–2.
[166] ibid 163–5.
[167] Bridge, 'A Law for International Sales' (n 14) 39.

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B. The SGA, the CISG and Trade Terms—Effective Architectural Interaction?

Alongside fundamental breach, the CISG's interaction with trade terms is an ongoing point of contention in the literature's commodity-specific analysis. Being a matter of interaction, this issue can usefully be considered from a coherence perspective.

Both the SGA and the CISG support adoption of trade terms, such as CIF (cost, insurance and freight) and FOB (free on board), being common features of the commodities trade. Trade terms are shorthand references to bundles of rights and obligations surrounding particular legal issues including transport formalities, cost allocations, insurance, delivery and risk.[168] They are not themselves comprehensive contracts.[169] Trade terms are given meaning according to their context, with meanings deriving from both the common law and the International Chamber of Commerce's *Incoterms 2010* publication. It is therefore necessary to address how the SGA and the *CISG* accommodate trade terms as understood in both senses.

This issue is already canvassed in the literature, but from a competitive starting point—a perspective seeking to establish the relative superiority of one regime over the other. The coherency-focused question asked by this article, instead, is: would a state of English law, inclusive of the CISG, secure effective co-existence and interaction between all three of the SGA, the CISG and trade terms of any kind? Misgivings as to the CISG's ability to accommodate trade terms, evident in competitive literature, are clarified by a careful coherency analysis, and a consideration of contractual party autonomy—key themes underpinning this article.

Though trade terms are common in commodity sales, views differ as to the frequency with which common law and *Incoterms* trade terms are adopted.[170] In any event, though the SGA and the CISG both contain default rules for typical legal issues addressed by trade terms, both also respect contractual party autonomy's primacy. Both have the potential to interface effectively with chosen trade terms of either kind, as well as each other (and the common law), in regulating commodity contracts.

The SGA's position is conceptually simple. The SGA, section 55(1) permits negating or varying rights, duties or liabilities implied by the Act, and the SGA's provisions governing typical trade term issues individually identify themselves as subject to contrary agreement. This is seen, for example, in the SGA, section 20(1) regarding risk passing,[171] sections 29(1) and 29(2)

[168] *C1 08 45* (Tribunal Cantonal du Valais, Switzerland, 28 January 2009) [4.a.aa] <http://cisgw3.law.pace.edu/cases/090128s1.html>.

[169] International Chamber of Commerce, *Incoterms 2010* (n 86) 6.

[170] See, eg, *C1 08 45* (Tribunal Cantonal du Valais, Switzerland, 28 January 2009) [4.a.aa] <http://cisgw3.law.pace.edu/cases/090128s1.html>; McKendrick (n 48) 590 [12-004]; Treitel (n 36) 1162–3 [18-002]; Bridge, *The International Sale of Goods* (n 19) 526 [10.62].

[171] cf Sale of Goods Act 1979 (UK), section 20(4); Consumer Rights Act 2015 (UK), section 29.

regarding delivery[172] and sections 32(2) and 32(3) regarding carriage and insurance.

The contrary agreement envisaged by these provisions could involve parties adopting either common law or *Incoterms 2010* trade terms. Where sales contracts are governed by English law, as a matter of private international law, trade terms are given their common law meanings absent indication to the contrary, and English case law substantially fleshes out the SGA's application to commodity sales through the meaning given to trade terms.[173]

Should parties wish to adopt an *Incoterm* into a contract governed by English law, they can also do so, though should clearly express their intention to adopt its *Incoterms* meaning. A reference to FOB or CIF in itself, given the broader English law context, is unlikely to suffice. *Incoterms 2010* gives as suggested wording '[the chosen *Incoterms* rule including the named place, followed by] *Incoterms* ® 2010'.[174] As opposed to bare FOB or CIF notations, wording of this kind would unambiguously and objectively demonstrate an intention to adopt a term's *Incoterms 2010* (rather than common law) meaning. An Australian example, *Onesteel Manufacturing v Bluescope Steel*, involved parties adopting the *Incoterms 2000* DEQ trade term in a contract otherwise governed by the Sale of Goods Act 1923 (NSW), and the Australian common law.[175] This example is particularly pertinent evidence of the ability to combine *Incoterms* and the SGA, given that the Sale of Goods Act 1893 (UK) is the model upon which the New South Wales legislation is based. Interestingly, the DEQ term used in this case made no specific reference to *Incoterms*. Its interpretation as an *Incoterm* was probably affected by the particular term chosen;[176] though 'ex quay (port of arrival)' is recognized at common law,[177] the DEQ notation is a creature of *Incoterms* itself.

Contrary to commentary suggesting otherwise,[178] adopting trade terms creates no difficulty under the CISG either, leading to a conclusion that the *SGA*, the common law, the CISG and trade terms could all coherently interact. It is true that the CISG does not 'specifically' deal with trade terms,[179] lacking express mention of CIF terms, FOB terms or other commonly used trade terms.[180] It is nevertheless well equipped to support

[172] cf Sale of Goods Act 1979 (UK), sections 29(3) and (3A); Consumer Rights Act 2015 (UK), section 28.

[173] See, eg, *KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG (The Mercini Lady)* [2009] EWHC 1088 (Comm), [2009] 2 Lloyd's Rep 679 (QBD) 685–6 [38]–[41].

[174] International Chamber of Commerce, *Incoterms 2010* (n 86) 5 (emphasis altered).

[175] *Onesteel Manufacturing Pty Ltd v Bluescope Steel (AIS) Pty Ltd* (2013) 85 NSWLR 1 (NSWCA) 9 [25].

[176] cf. Bridge, *The International Sale of Goods* (n 19) 526–7 [10.62].

[177] R Burnett and V Bath, *Law of International Business in Australasia* (The Federation Press 2009) 76.

[178] Treitel (n 36) 1164–5 [18-004].

[179] ibid 1164 [18-004].

[180] H Gabriel, 'International Chamber of Commerce *Incoterms 2000*: A Guide to Their Terms and Usage' (2001) 5 VJ 44.

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their use.[181] Though Article 9(1) CISG binds parties to any 'usage' agreed, and Article 8(3) *CISG* recognizes 'usages' as extrinsic evidence to be used in interpreting contracts and party conduct, it is acknowledged that whether or not trade terms constitute usages is contentious.[182] For this reason, *Incoterms* should not necessarily be considered automatically applicable to commodity sales only by virtue of Article 9(2) CISG.[183] Nevertheless, even aside from Articles 9(1) and 8(3) CISG, trade terms are accommodated by Article 6 CISG, and its preservation of contractual party autonomy.

The CISG's capacity to accommodate trade terms is not dissimilar to its affinity with arbitration. The Convention is well suited to application in arbitration,[184] despite arbitration only being fleetingly referred to in its text.[185] Both cases prioritize substance over form.[186] The Convention provides a 'general background', and successive iterations of *Incoterms* are said to represent its 'fine-tuning'.[187] The same can also be said for trade terms defined at common law.

When the CISG forms part of the applicable law, Article 6 CISG in particular is part of that law. With the Convention comprising default rules, Article 6 CISG confirms its 'dispositive' nature, allowing parties to exclude it as a whole, or exclude or vary the operation of particular provisions.[188] The latter (contractual) forms of party autonomy have been discussed in the UK CISG context, with Bridge suggesting UK merchants might consider varying the fundamental breach test if otherwise bound by the Convention.[189] Like the SGA, the Convention contains a number of provisions addressing legal issues also dealt with by trade terms.[190] When adopting trade terms, including *Incoterms*, parties contractually vary the CISG's particular provisions relating to delivery, risk and other relevant aspects of their rights and obligations.[191] They vary the governing law's effect through agreement, just as they would by adopting common law trade terms in an SGA contract.

It has been queried whether this is 'too elliptical a way' to exclude these provisions, and suggested that 'a contractual reference to FOB or CIF surely is not clear enough to carry conviction with a tribunal'.[192] Nevertheless, this is indeed the result (providing intention to adopt a term's *Incoterms* meaning

[181] I Schwenzer and P Hachem, 'The *CISG* – Successes and Pitfalls' (2009) 57 AmJCompL 476–7.
[182] See, eg, Treitel (n 36) 1164 [18-004].
[183] cf Bridge, *The International Sale of* Goods (n 19) 526 [10.62].
[184] I Schwenzer and C Kee, 'Global Sales Law – Theory and Practice' in I Schwenzer and L Spagnolo (eds), *Towards Uniformity* (Eleven International Publishing 2011) 157–8.
[185] PP Viscasillas and DR Muñoz, '*CISG* & Arbitration' in A Büchler and M Müller-Chen (eds), *Private Law: National – Global – Comparative* (Intersentia 2011) 1355. See arts 45(3) and 61(3) *CISG*.
[186] cf Gabriel (n 180) 44.
[187] Schwenzer and Hachem, 'Successes and Pitfalls' (n 181) 477.
[188] R Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 ICLQ 555–6.
[189] Bridge, 'Avoidance for Fundamental Breach' (n 37) 934–5 and 940.
[190] See, eg, arts 30–34, 53, 60 and 66–70 CISG.
[191] Schwenzer and Hachem, 'Successes and Pitfalls' (n 181) 476–7.
[192] Bridge, 'A Law for International Sales' (n 14) 38.

is clear), as adopting an *Incoterm* is an incorporation of that term's 20 individual clauses into the parties' contract by reference.[193] Rather than being elliptical, those clauses actually define party obligations 'with considerable precision'.[194]

Though the CISG does not contain specific rules addressing the incorporation of standard terms,[195] this result is reached by applying the Convention's ordinary contract formation provisions to the standard terms context.[196] When parties adopt trade terms, Article 6 CISG ensures that these contractual provisions take primacy over the Convention's default rules. Though admittedly making the CISG's 'extensive treatment of risk … a rather pointless business' in commodity sales, it does not necessarily follow that this is inconsistent with the instrument's intent.[197] The Convention's risk provisions retain an important scope for operation in the manufactured goods trade, where trade terms are not necessarily at play. Trade terms (alongside associated case law) substantially displace the SGA's risk provisions as well.[198]

What if the UK adopted the CISG, but parties to an international sale sought to adopt common law trade terms? As the UK is not yet a Contracting State, case law demonstrating the effectiveness of such choices does not currently exist. Nevertheless, the CISG would (in principle) interface effectively with common law trade terms. Trade terms are ordinarily given meaning by the common law because English law is governing; this would still be so following UK accession. Though impossible to say with absolute certainty in the abstract, reference to FOB or CIF may import (without more) those terms' common law meaning, even in a CISG contract, given the overall English law context. This is not the result of Article 7(2) CISG, an analysis fairly critiqued in the literature,[199] but of parties once again exercising Article 6 CISG contractual autonomy rights. Deference to contractual party autonomy is a general principle of the Convention.[200] The key question in any particular case would be *whether* (typically on an objective basis) relevant intent exists.

Nevertheless, Professor Treitel adverts to two potential difficulties. First, Treitel questions the Article 6 CISG implications of adopting common law trade terms. Would adopting CIF or FOB terms (as understood at common law) completely exclude the CISG, where English law is applicable?[201] That is, would such adoption amount to an exercise of private international law, rather than only contractual, party autonomy? Secondly, Treitel queries

[193] W Johnson, 'Analysis of *INCOTERMS* as Usage under Article 9 of the CISG' (2014) 35 UPaJIntlL 421–2.
[194] Burnett and Bath (n 177) 77.
[195] P Huber, 'Standard Terms under the *CISG*' (2009) 13 VJ 125.
[196] CISG Advisory Council, 'CISG Advisory Council Opinion No 13 – Inclusion of Standard Terms under the *CISG*' in I Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing 2017) 296 [1] and [2].
[197] cf Bridge, 'A Law for International Sales' (n 14) 38.
[198] ibid 38–9.
[199] Bridge, *The International Sale of* Goods (n 19) 527 [10.63].
[200] I Schwenzer and P Hachem, 'Article 7' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 135 [32].
[201] Treitel (n 36) 1164 [18-004].

whether the English conception of CIF or FOB trade terms might constitute practices or usages relevant to contractual interpretation pursuant to Article 8(3) CISG;[202] a matter adverted to above. Both concerns highlight the importance of critically analysing the CISG's application as part of an overall English law for commodity sales, the focus of this article's coherency perspective. On such analysis, both concerns can be resolved.

As to the first, an affirmative and deliberate decision is required to exclude the CISG as a whole.[203] Trade terms are not comprehensive contractual arrangements; their adoption cannot properly constitute this decision. Adopting trade terms would derogate from the Convention's individual provisions governing trade term issues. However, this is the very point of adopting trade terms, of any kind. The CISG's default rules on delivery, risk and other related issues are displaced in favour of rules specifically chosen by the parties; if it were otherwise, the very concept of trade terms would be redundant.

As to the second concern, this would be a potentially legitimate application of Article 8(3) CISG, if warranted by the circumstances of a particular case (as where common law trade terms are specifically chosen). Nevertheless, it is more likely that Article 6 CISG would give effect to the parties' adoption of trade terms. Article 8(3) CISG is part of the Convention's contractual interpretation toolkit. The circumstantial matters referred to are extrinsic sources that reference may be had to in interpreting the parties' contract. They are not a direct source of rights and obligations. As explained in Part III, it is only where there is a gap in the CISG and where English law is governing that the common law would supplement the Convention's rules. The CISG does itself contain default rules for legal issues addressed by trade terms at common law.

C. The SGA, the CISG and Trade Terms—Effective Substantive Interaction?

Turning now to those rules, much commodities-related criticism of the CISG has been directed at its contents.[204] This is squarely competitive analysis. Adopting a coherence perspective, we can also usefully ask: can the SGA and trade terms work effectively alongside the CISG, in regulating commodity contracts, as a matter of substance? This question admittedly blurs the line between coherence and competition, and it is not the purpose of this article to retread what is already well-covered ground. However, this article does not suggest that either perspective is superior, or that they are mutually exclusive. Both are legitimate and useful considerations in assessing the desirability of UK CISG accession. To the extent that overlap is evident in

[202] ibid. [203] CISG Advisory Council, 'Opinion No 16' (n 98) 524 [3]–[5].
[204] See, eg, Bridge, 'The Transfer of Risk' (n 90).

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this section, their complementary natures—identified in Part II of this article—are recognized.

There are strongly held opposing views about the CISG's suitability for commodity sales, in existing competitive literature. One view argues that the CISG's contents are not well suited to commodity contracts. The right to cure defective documents has attracted criticism,[205] as has fundamental breach.[206] The fundamental breach test—classifying breaches, rather than terms—necessarily implicates uncertainty. This can be contrasted with the common law, where key obligations around timeliness and documentation are conditions[207]—in the commodities trade, speed and certainty are paramount.[208] The opposing view argues that the CISG is well suited to govern international sales of any kind, as its operation can adapt to the requirements of particular contracts—if not by virtue of a flexible text,[209] through contractual party autonomy, and the adoption of *Incoterms* trade terms.[210]

These arguments illustrate the deadlock resulting from existing analyses. This article's coherence perspective—focusing on the interactions between the SGA, the CISG and trade terms—supports UK adoption of the CISG. It would be tempting to simply rest this conclusion upon Article 6 CISG's respect for private international law party autonomy—that since parties can exclude the CISG, it is *unnecessary* to evaluate its substantive provisions. Instead, it reaches a more moderate conclusion, falling somewhere in between the existing opposed views. This conclusion is supported by analysing delivery, and the passage of risk, under the CISG. Though not the only targets of commodity critique, they are legal issues of particular significance to the commodities trade, and are focal points of the commodities controversy.[211]

Professor Bridge has undertaken a rigorous analysis of the complexities of the CISG and SGA's rules on delivery and risk, with reference to both common law and *Incoterms* trade terms. Bridge concludes that the CISG's provisions are 'far from exemplary' in their 'mesh' with trade terms, and argues that they do not 'capture the central ground of sales practice' by failing to embody rules 'from which the parties depart in only a minority of cases'.[212] Bridge identifies several ways that the CISG's rules—in isolation, and when coupled with trade terms—embody failings in light of commodities practices. Given the importance of commercial reality, there is much force in this analysis, from a competitive point of view.

From a coherence perspective, however, Bridge's analysis might instead support this article's more moderate conclusion. On a close examination,

[205] Bridge, 'A Law for International Sales' (n 14) 29–32.
[206] Beheshti (n 32) 309–10; Zhou (n 32) 675–7.
[207] Bridge, 'Avoidance for Fundamental Breach' (n 37) 917 n 32.
[208] ibid 931–2.
[209] cf ibid 931–6.
[210] Schwenzer and Hachem, 'Successes and Pitfalls' (n 181) 476–7.
[211] See, eg, ibid.
[212] Bridge, 'The Transfer of Risk' (n 90) 105.

some of the CISG's identified failings are also seen in the SGA. With respect to other problematic issues, the Convention's operation can be recalibrated along more commercially feasible lines through the adoption of trade terms. While it is not the role of this article to compare the merits of the CISG and SGA's rules, these conclusions demonstrate that the CISG can effectively interact as part of an overall English law of sales. From a coherence perspective, this section's analysis is therefore inherently connected with that in Section B. It is exactly to the point that the CISG can coherently integrate trade terms, when addressing its delivery and risk rules in the commodities context. Trade terms represent commercially reasonable solutions to problems that might not otherwise arise where manufactured goods are involved, where the CISG's own text has greater scope for application.[213] The issue ultimately comes down to the SGA, CISG and trade terms' interactions—and party autonomy powers to choose amongst them.

Article 66 CISG confirms the effect of risk passing, in that loss or damage to goods occurring after that time does not discharge the buyer from its obligation to pay the price. Since responsibility for deterioration is allocated by general contractual risk, rather than by Part III, Chapter IV of the CISG, Bridge points out that a buyer examining goods upon arrival 'may … have to face the difficult question of determining whether any non-conformity in the goods was due to the seller's non-performance or was due instead to a risk event that occurred in the course of transit'.[214] Bridge points out that in some factual circumstances, as in the *Mash & Murrell* case,[215] this is a difficult practical problem for a buyer.[216]

Nevertheless, as Bridge also points out, this same difficulty is encountered under the SGA. The *Mash & Murrell* decision is itself an English case, decided under the Sale of Goods Act 1893 (UK). Bridge commends the 'practical wisdom' in buyers and sellers agreeing upon a binding, independent examination process where goods are handed to a carrier, particularly for commodities transactions where goods can be 'adequately examined in a superficial manner'.[217] To the extent that commodity market needs justify departure from the CISG's default rules here, a similar departure is also required from the SGA,[218] and the parties' agreement would be respected in both cases.

Article 67(1) CISG addresses risk where goods are to be carried, providing that risk passes when goods are handed over to the first carrier. By way of exception, where the contract requires goods to be handed to a carrier at a particular place, risk passes when the goods are handed over at that place. Though Article 67(1) CISG refers to handing over the goods, not delivery,

[213] See generally Bridge, 'A Law for International Sales' (n 14).
[214] Bridge, 'The Transfer of Risk' (n 90) 82.
[215] *Mash & Murrell Ltd v Joseph I Emmanuel Ltd* [1961] 1 WLR 862 (QBD).
[216] Bridge, 'The Transfer of Risk' (n 90) 82–3. [217] ibid 82. [218] ibid 82–3.

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Article 31(a) CISG independently uses that same act to define the delivery obligation. Bridge critiques Article 67(1) CISG as 'wholly unsuitable for certain long-established shipping terms used in international sales transactions', being 'particularly … FOB and CIF contracts'.[219] Bridge casts some doubt as to whether adopting a trade term would constitute an Article 6 CISG contractual derogation from the Convention's risk provisions, and concludes that in any event 'there is something unsettling about a rule that is as detached from commercial practice as this one'.[220] Bridge also critiques Article 67(1) CISG's inconsistency with risk passing at the ship's rail, now adopted in several *Incoterms 2010* trade terms,[221] which has 'the great merit of visibility' and which makes commercial sense where loose commodities (like wheat and oil) are incrementally loaded.[222] Elsewhere in the literature, Bridge has criticized Article 67(2) CISG, where '[n]evertheless' risk does not pass 'until the goods are clearly identified to the contract'; problematic where commodity traders sell part of a cargo, though cannot identify exactly what part was sold.[223]

Bridge's criticisms of Article 67(1) CISG come to two points—that it does not embody the rule most suitable for commodities trading, and that it would not effectively interface with chosen trade terms that otherwise are. These points—also encompassing Bridge's criticism of Article 67(2) CISG—come back to the issues of interaction and party autonomy, addressed in Section B. As to the first, in addition, it is unsurprising that the CISG does not reflect solutions entirely optimal for commodities contracts in absolutely all respects. The CISG embodies default rules intended to apply to all kinds of sales, including commodity sales, and also sales of manufactured goods.

As Bridge has elsewhere concluded, the CISG has 'a great deal to commend it' for manufactured goods sales.[224] Even there, its application is not perfect—for example, the strictness of fundamental breach raises the practical possibility of sellers 'forc[ing] severely non-conforming goods on an unwilling buyer'.[225] But no body of law is perfect, and merchants will ultimately exercise their private international law party autonomy rights to adopt the law felt best suited to their transactions, and their contractual autonomy rights within the limits allowed by that law. This could include allowing the CISG's default rules to apply, in appropriate cases, if such application is available.

As Bridge acknowledges, the general policy of buyers bearing transit risk is sound, as 'it is better to give the buyer as the person on the spot the task of determining what has happened to the goods in transit'.[226] Article 67(1)

[219] ibid 87.
[220] ibid 87–8.
[221] Arts A4 and A5 DAP, *Incoterms 2010*; Arts A4 and A5 DDP, *Incoterms 2010*; Arts A4 and A5 FOB, *Incoterms 2010*; Arts A4 and A5 CFR, *Incoterms 2010*; Arts A4 and A5 CIF, *Incoterms 2010*.
[222] Bridge, 'The Transfer of Risk' (n 90) 89.
[223] Bridge, 'A Law for International Sales' (n 14) 39.
[224] ibid.
[225] Bridge, 'Avoidance for Fundamental Breach' (n 37) 939–40.
[226] Bridge, 'The Transfer of Risk' (n 90) 86.

CISG is at least consistent with this general policy; commonly chosen trade terms can readily adjust the exact moment risk passes, if required. Though Bridge suggests that the Convention's default rule does not correspond to commercial practice,[227] the more important point from a coherence perspective is contractual party autonomy. Commodities contracts adopting no trade term of any kind (displacing this default rule) would be unusual.

Article 68 CISG addresses risk where goods are sold in transit. Risk passes upon contracting, or retrospectively (if indicated by the circumstances) when the goods were earlier handed over to the carrier. Risk remains on the seller if they knew of loss or damage at the time of contracting. Bridge points out that Article 68 CISG is 'silent' on cases where the chosen trade term provides that risk does not pass until goods arrive at their destination.[228] More fundamentally, Bridge critiques this provision for its division of transit risk between sellers and buyers, and its retrospective allocation of risk in circumstances that are not clearly defined, where Articles 6 and 9 CISG could have secured this same result.[229]

As to Article 68 CISG's relationship with trade terms causing risk to pass at arrival, this is exactly the kind of clear derogation that Article 6 CISG respects, and that would displace the Article 68 CISG default rule. The very omission referred to by Bridge illustrates the CISG's receptiveness to 'fine-tuning'[230] by trade terms, of common law or *Incoterms* origin, and thus its ability to integrate into an overall English sales law regime. Consistently with commercial expectations,[231] contractual party autonomy prevails.

As to Articles 6 and 9 CISG already having the capacity to secure retrospective risk transfers where agreed (or where usage requires), Article 68 CISG's restatement is not so different to similar restatements seen in the SGA. Once again, the point here is not to show the necessary superiority or inferiority of either regime, but that they may both form part of a workable system. Under the SGA, section 55(1), the parties' power to reach their own agreement (contrary to the Act's default rules) is confirmed. Nevertheless, the SGA is otherwise replete with provisions individually recognizing their application as subject to contrary agreement. For example, risk passes with property unless otherwise agreed;[232] the primary rule regarding delivery refers to the parties' contract;[233] and it is only absent contractual stipulation that the SGA fixes the place of delivery.[234] The main difference here is that the 'circumstances' referred to in Article 68 CISG may include circumstances short of agreement,

[227] ibid 87. [228] ibid 94. [229] ibid 95–6.

[230] Schwenzer and Hachem, 'Successes and Pitfalls' (n 181) 477.

[231] School of International Arbitration, '2010 International Arbitration Survey' (Research at the School of International Arbitration 2010) 16 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf>.

[232] Sale of Goods Act 1979 (UK), section 20(1). cf Sale of Goods Act 1979 (UK), section 20(4); Consumer Rights Act 2015 (UK), section 29.

[233] Sale of Goods Act 1979 (UK), section 29(1). [234] ibid section 29(2).

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such as the presence or availability of insurance.[235] On the other hand, those circumstances would certainly include party agreement, if such agreement is reached.[236]

Finally, regarding the division of transit risk (and the retrospective passage of risk in general), these rules are admittedly more complex than the SGA's position that risk passes with property.[237] However, complex risk rules are inevitable where the Convention does not itself deal with property's passage. This is a limitation of the CISG; and given that harmonizing property rules was considered too difficult a task,[238] it illustrates a limitation of treaties themselves. Nevertheless, Bridge acknowledges that even under existing English law, risk rarely passes with property in actual practice, given the widespread use of retention of title clauses.[239] Elsewhere in his work, Bridge suggests that the CISG exemplifies a 'trend' in more closely aligning risk with delivery[240] that 'accords with international sales practice'.[241] As Bridge also points out, there is often no genuine delivery of goods in commodity sales, delivery instead being of documents, where intermediate commodity sales occur in-transit along a string between ultimate sellers and buyers.[242] In this sense, these risk rules' complexity may not be as problematic as first appears, when situated within the broader context of English law.[243]

In relation to Article 67(1) CISG, Bridge gives an example involving a CIF contract, pertinent to the present analysis of Article 68 CISG. In that example, a notice of appropriation is given after shipment, and having risk pass during the voyage may be inconsistent with commercial expectations given the risk of incremental damage from sea water.[244] This example demonstrates that retrospective risk passage, in appropriate circumstances (to which Article 68 CISG refers), might be a commercially realistic solution. In exercising their private international law and contractual party autonomy rights, it is ultimately commercial parties who would decide whether this is so.

Problems with the CISG's delivery and risk provisions, in the commodities trade, should be understood in context, where the Convention's potential interactions with English law are concerned. This context, and this article's coherency analysis, provide an informative (and more hopeful) complementary perspective to the literature's existing competitive view.

[235] P Hachem, 'Article 68' in I Schwenzer (ed), *Schlechtriem & Schwenzer – Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 981–3 [8]–[11]. [236] cf ibid 981 [8]. [237] Sale of Goods Act 1979 (UK), section 20(1). [238] UNCITRAL Secretariat (n 83) 17 [4]. [239] Bridge, 'The Transfer of Risk' (n 90) 77. [240] ibid. [241] ibid 94. [242] ibid 90–1 and 97. [243] cf Bridge, 'Avoidance for Fundamental Breach' (n 37) 913—'complexity breeds expense'. [244] Bridge, 'The Transfer of Risk' (n 90) 93–4.

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D. The CISG as Part of an Effective English Commodity Sales Regime

This Part has demonstrated that both the SGA and the CISG accommodate the use of trade terms, sourced from both the common law and *Incoterms 2010*. Both also accommodate each other, and share more in common than may initially be apparent. If the UK were to accede, the SGA and the common law would fill the CISG's gaps. The CISG in turn accommodates existing English sales law by recognizing private international law party autonomy rights to exclude the Convention, and contractual party autonomy rights to exclude or modify particular provisions.

From a coherency perspective, the CISG can operate effectively as part of an overall English commodity sales regime. Rather than being fundamentally incompatible with English law or the commodities trade, the CISG would represent one feature of English law open to parties' consideration when making choices of law. UK accession would open up an avenue of choice for merchants wishing to adopt the CISG, in the sense that they may allow its default rules to operate if desired (as opposed to incorporating its provisions as contractual terms). For those not wanting to do so, their power to exclude its operation would be protected by law.

VI. CONCLUSION[245]

Though the Convention is over 35 years old, debate surrounding the UK and its position on the CISG continues. CESL's short-lived threat reawakened interest in this problem, and the UK's impending EU exit once again presents an opportunity to ask whether its interests would be served by accession. Existing analysis has rightly focused on practicalities, by way of competitive analysis. This is appropriate, and essential, having the needs of merchants at its heart. Nevertheless, it has failed to secure a definitive view. This article argues for the CISG's UK adoption through an also-useful, and complementary, analysis—based on coherence. From this point of view, accession is not about having one body of law *or* the other, but whether there can be one body of law *and* the other.

There are real advantages in applying non-harmonized English law to international sales. It has a particular reputation as being hard-nosed and certain—evidenced in its receptiveness to termination. Several foundation common law contract cases—the mainstay of English contract textbooks[246]—have involved parties using English law as a weapon in commodity markets.[247] As explained by Bridge, '[t]he commercial logic …

[245] Portions of this conclusion have been adapted from Andersen, 'Of Cats and Cream' (n 7).

[246] See, eg, H Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015).

[247] *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344 (CommPleas) (boxes of tin plates); *Stevenson, Jaques, & Co v McLean* (1880) 5 QBD 346 (QBD) (iron ore); *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] 1 AC 93 (HL) (Sudanese groundnuts).

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is that sellers exercise termination rights on rising markets and buyers on falling markets'.[248] Nevertheless, from this article's coherency perspective, the issue is less about certainty, and more about freedom—merchants' party autonomy rights to choose their governing law, and to shape their contracts as they see fit.

Merchants already exclude the CISG in commodity contracts governed by English law. The CISG does not yet apply in English law, and future accession cannot retrospectively make it apply to contracts already concluded. The requirements for opting out are well known, and are already being employed. Little prejudice would be suffered by merchants who do not wish to be bound by the CISG, were the UK to accede. Assuming a minimal level of merchant sophistication, additional transaction costs (and the time required for adjustment) would be negligible. This is an important observation when reflecting on the reality that international instruments necessarily have 'at least some measure of departure from cherished legal traditions'; with the question being 'how extensive will the sacrifice have to be before … fatal … to treaty accession'.[249]

For merchants wishing to contract on the Convention's terms, accession would grant them the opportunity to do so, whilst also being supported by the balance of English private law. At present, English (or foreign) traders can only take advantage of the CISG if their contracts are governed by the law of a non-English, Contracting, State—or if their contracts adopt the CISG in and of itself, which may have distinct legal and practical implications. For this avenue of choice to work in practice, merchants would need to understand the CISG, its benefits and limitations. As put by Bridge, '[a] brief practical guide about some of the pitfalls in the CISG, and about some of the choices that contracting parties might want to make, would have much to commend it'.[250] Given that commodity sectors tend to be relatively well organized,[251] commodity trade organizations would be a good place to start.

Over more than 35 years, the CISG has grown in significance, while the UK has remained cautious. Abstaining from accession even now prevents the UK from helping shape (from the inside) what is becoming a global law of international sales. Consider the view of Barry Nicholas in 1993:

> Now that the *Vienna Convention* is in force and, more importantly, now that it has been ratified by the United States and other [c]ommon law countries and by our main trading partners in the European Community, can the United Kingdom afford to remain outside?[252]

[248] Bridge, 'A Law for International Sales' (n 14) 27.
[249] ibid 18.
[250] Bridge, 'Avoidance for Fundamental Breach' (n 37) 940 n 142.
[251] EA Farnsworth, 'Uniform Law and its Impact on Business Circles' in UNIDROIT (ed), *International Uniform Law in Practice* (UNIDROIT 1988) 548.
[252] B Nicholas, 'The United Kingdom and the *Vienna Sales Convention*: Another Case of Splendid Isolation?' (Centro di Studi e Ricerche di Diritto Comparator e Straniero conference, Rome, March 1993).

At that time, the CISG's Contracting States were not nearly as numerous as they are now, and the CISG has since become an expression of customary international trade law.[253] This article's coherency analysis demonstrates that adopting the CISG is consistent with merchant interests. Even aside from any desire (or lack thereof) from the UK's legal and trading communities, accession would also be a matter of good governance. The UK must become a Contracting State to help shape the Convention's dynamic interpretation.[254] And while the ongoing Brexit process marks a break with EU coherence, adopting the CISG would allow the UK to secure coherence with all 89 States currently signatory to the Convention. In a private international law environment characterized by Brexit's 'considerable uncertainty',[255] uniform private law is a 'way to attack the choice of law problem at its root'.[256] Accession would also allow English law to supplement the CISG, not currently possible as a matter of private international law.

The DTI recognized this in 1997, when the number of CISG ratifications had doubled, and it expressed concern that the UK would isolate itself, disadvantage its traders and rob its courts of the opportunity to help shape the Convention.[257] That was over 20 years ago, and the justifications for UK accession are as relevant today as they have ever been.

Existing competitive analyses demonstrate that resolving the UK CISG debate is not easy. However, additional insights can be obtained by considering the coherency perspective advocated by this article. An exploration of coherency and private international law shows there is room for the CISG in the UK legal system. The United Kingdom would serve the interests of its traders, and its public policy, by accession as a Contracting State.

[253] C Andersen, 'Breaking the Mould of Scope – Unusual Usage of the CISG' (2012) 16 VJ 161–2.
[254] Goode, 'Insularity or Leadership?' (n 2) 756.
[255] A Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws' (2016) 12 JPrivIntL 210.
[256] J Blom, 'Whither Choice of Law? A Look at Canada and Australia' (2014) 12 WillametteJIntlL&DispRes 213.
[257] Department of Trade and Industry, *A Consultation Document* (n 16) [22]–[23].

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