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Interpreting an International Sale Contract

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The United Nations Convention on Contracts for the International Sale of Goods ('CISG' or 'the Convention') approaches the interpretation of contracts somewhat differently from what common law lawyers are used to. This paper highlights the concepts contained in the CISG and compares them to the rules of interpretation in common law systems like Singapore.

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ('CISG') was given the force of law in Singapore by the Sale of Goods (United Nations Convention) Act 1995 ('the 1995 Act'). The 1995 Act came into effect on 1 March 1996.

Where the CISG applies, its provisions prevail over any other law in Singapore to the extent of any inconsistency.[1] Thus, Singapore case law and statutes like the Evidence Act (Cap 97) and the Sale of Goods Act (Cap 393) must bow to the provisions of the CISG. The CISG applies to contracts of sale of goods between parties whose places of business are in different Contracting States.[2] The CISG is not exhaustive, however, and leaves matters like validity of the contract, rights of third parties and passing of title to domestic law.

Singapore's contract law mainly reflects jurisprudence developed first in England and adapted to the local context. Ancient pronouncements of English judges who developed commercial law through 19th century sensibilities continue to wield influence in modern-day Singapore. In contrast, the CISG is the product of a diplomatic conference comprising 62 States and eight international organisations.[3] Not surprising then, that the solutions chosen by the draftsmen of the CISG **[page 67]** are not always familiar to a lawyer used to seeking guidance from common law precedents.[4]

In Singapore, the interpretation of contracts is rooted partly in case law and partly in the Evidence Act. The CISG provisions on the interpretation of contracts are found primarily in Article 8. Before getting to Article 8 and related provisions, another aspect of interpretation should be looked, namely interpretation of the *Convention* under Article 7.

II. INTERPRETING THE CONVENTION

The Convention should not be read like a normal domestic statute. While statutory interpretation strives to 'promote the purpose or object underlying the written law' over an interpretation that would not promote that purpose or object,[5] the plain meaning rule remains the first port of call for the courts. This rule requires that words and sentences be construed in their ordinary and natural meaning, save where there is ambiguity or such a meaning would lead to an absurd result.[6] The Interpretation Act (Cap 1), too, contains specific guidelines on how to interpret particular provisions of parent and subsidiary legislation. Bennion's *Statutory Interpretation*, a leading text on the subject, contains over 1,000 pages of advice on how to interpret a statute. It is important that the common law jurist does not immediately reach for his manual on statutory interpretation when faced with a question concerning the operation of the CISG.

The Convention requires a more holistic approach. Article 7 of the Convention provides that:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. **[page 68]**

1. Article 7(1)

Article 7(1) contains some familiar ideas such as having regard to the international character of a Convention and the need to promote uniformity. This is not new to Singapore or other common law systems.[7] Referring to the *travaux préparatoires* of the Convention to ascertain its intention is not controversial either. It is now accepted in Singapore that the court may refer to extrinsic materials for statutory interpretation even in the absence of ambiguity.[8]

The idea of giving effect to 'good faith in international trade' is likely to give a Singapore court more pause. This is not quite the same as interpreting a treaty in good faith, such as propounded in Article 31 of the Vienna Convention on the Law of Treaties.[9] Nor is Article 7(1) worded to affirmatively impose an overriding obligation of good faith in performance of the contract. This may be compared to other instruments which do impose such an obligation.

For example, Article 1.7 of the International Institute for the Unification of Private Law ('UNIDROIT') Principles of International Commercial Contracts 2004 ('UNIDROIT Principles 2004') provides that in international trade, parties must act in accordance with good faith and fair dealing, and this duty cannot be excluded or limited.[10] In the United States, the Uniform Commercial Code [11] and the *Restatement of Contracts, Second* [12] impose a duty of good faith in the performance and enforcement of a contract.

Article 7(1) is actually a compromise between those who advocate a specific obligation of good faith in the formation of the contract, and those who feel that an obligation of good faith should not be imposed loosely.[13] The result is that good faith becomes a factor to be taken into account in interpreting the CISG. **[page 69]** What does it mean in practical terms? Many are of the view that the CISG itself is built on notions of good faith or reasonableness.[14] Examples are Article 8(1) (giving effect to one party's actual intent that is known to the other), Article 46(1) (buyer cannot require performance if he has resorted to an inconsistent remedy) and Article 80 (party who caused other party's failure to perform cannot rely on it). It is probably intended that, when interpreting the rights and duties of parties under particular provisions of the CISG, the court is expected to give regard to notions of fair play.[15] Yet, given that the drafters of the CISG have consciously refrained from explicitly imposing a duty of good faith across the board, to what extent can courts invoke this notion?[16]

Civil systems, where 'good faith' is part and parcel of the legal landscape, do not appear to be agonising over this. For instance, a German court has decided that a declaration of avoidance of the contract under the CISG is unnecessary if the seller had refused to perform its obligations. To insist on such a declaration would be contrary to the principle of good faith.[17] In a French decision, the buyer had refused to disclose the destination of the

goods even though the contract specified the destination, and took an aggressive approach by suing the seller when the seller refused to make further deliveries. The French court found that the buyer had conducted itself 'contrary to the principle of good faith in international trade as laid down in Article 7 CISG' and was in abuse of process.[18] In yet another case, the Swiss Federal Court held that the principle of good faith required the seller to inform the buyer if he did not accept the buyer's confirmation of purchase. The confirmation would have been defective but for the seller's conduct in acting on the confirmation, which gave the impression of acceptance of the confirmation of purchase.[19]

Common law countries would probably grapple with where to put this principle of good faith. **[page 70]**

Common law has traditionally favoured precise rules that lead to certainty in commerce over subjective value-based ideas. Famously, the House of Lords in *Walford v Miles* held that an agreement to negotiate in good faith is unenforceable, being unworkable.[20] Even leading advocates of *justice and fairness* in law, like Andrew Phang JC, recognise that there must be some clear parameters. '[T]he concept of mere justice and fairness in the abstract is too disembodied and impractical' without a doctrinal structure.[21]

It may be that 'good faith' and notions of fairness are manifested in some aspects of common law, such as restitution, estoppel or relief from the consequences of misrepresentation or undue influence. But notwithstanding Lord Mansfield's ancient pronouncement that 'good faith' is the governing principle applicable to all contracts and dealings,[22] it has not developed in Singapore, or England, into a recognisable, stand-alone principle with bite.[23]

In less conservative jurisdictions like Canada, Australia and New Zealand, the courts have been more open to upholding the duty of good faith as a principle of law.[24]

Given that the United Kingdom has not ratified the CISG, but Canada, Australia and New Zealand have, should Singapore lean more towards these jurisdictions? What practical effect the 'good faith' provision in Article 7(1) will have in Singapore remains to be seen.

2. Article 7(2)

Article 7(2) is a gap-filling provision. It attempts to guide the courts in the case of a lacuna. First, the general principles of the Convention are to be used before domestic law. Secondly, this gap-filling provision applies only to matters governed by the CISG. Article 4 makes it clear that the CISG governs only formation of the contract and the substantive rights and obligations under it. It does not deal with the validity of the contract or the passing of property. But Article 7(2) will leave much room for exploration. What are the general principles of the Convention? On an elevated plain, we can say that 'good faith', reasonableness **[page 71]** and priority of substance over form are general principles of the Convention. The situation is probably rare where there are questions on matters governed by the CISG which are answered not by CISG rules or general principles, but by domestic law.

An argument was once presented to the CISG Advisory Council ('CISG-AC') that the parol evidence rule was a matter of domestic law which is not expressly settled in the CISG.[25] The CISG-AC referred to Articles 8 and 11, and concluded that the CISG had specifically resolved questions governed by the parol evidence rule and there was no gap in the CISG. There were therefore 'no grounds for recourse to non-uniform domestic law'.[26] There will be further discussion on the parol evidence rule below.

III. INTERPRETING THE CONTRACT

Article 8 of the CISG lays down the methodology for interpreting an international sale contract:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8 applies to conduct as well as statements. They are relevant to interpreting unilateral acts of parties as well as the interpretation of a contract embodied in a single document.[27] **[page 72]**

1. Article 8(1)

The leading principle under the CISG is that interpretation must follow the intent of the party. Is the common law any different from Article 8 of the CISG? The casual observer might say that common law has its equivalent to each of the paragraphs of Article 8 of the CISG. It is submitted here that, as with languages, a little similarity can be dangerous. One must beware of *faux amis* (false friends).

While common law, too, does allow reference to the true intent of a party, this is in very limited circumstances. The question of when and whether the true intent should override the objective interpretation has launched voluminous treatises. For a start, there is no general principle in common law that one should immediately look for the true intent of the parties to interpret the contract.

In *Reardon-Smith Line Ltd v Hansen-Tangen*, Lord Wilberforce clarifies the common law approach:

> When one speaks of the intention of the parties to the contract one speaks objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.[28]

There has been a shift towards a less literalistic methodology, most notably marked by Lord Hoffmann in the House of Lords decision in *Investors Compensation Scheme v West Bromwich Building Society*. It is worth bearing in mind his five propositions:[29]

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. **[page 73]**
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of the words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens

in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 794.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Renderierna AB* [1985] AC 191 at 201:

> 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

While modern contract law is paying more regard to substance over form, it would be a mistake to think that it has changed fundamentally.

In a recent Singapore decision, *Chia Ee Lin Eveyln v Teh Guek Ngor Engelin*, Lai Kew Chai J reaffirmed that 'the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind'.[30] **[page 74]**

Two doctrines that do allow references to the true intent, in mitigation of the impersonal objective approach, are estoppel and mistake.[31] At the outset, it should be made clear that these are not really concepts in aid of interpretation. More often than not, these doctrines are invoked to allow one party to depart from the written word.

Estoppel requires a representation that the innocent party has relied on, and that it would be inequitable in the circumstances for the representor to go back on his representation.

Mistake is a big subject, and there is danger here of inaccurate generalisation. Even within one common law jurisdiction, it has been admitted that '[n]o one could fairly suggest that in this difficult area of the law there is only one correct approach or solution'.[32] It has also been frankly acknowledged that it is 'not possible to reconcile the cases or the reasoning in each case'.[33] One must be mindful of the divergence in approach in even common law jurisdictions. Countries like Canada, Australia and New Zealand will have their own philosophy on the subject. New Zealand has legislation to bring some order to this unruly subject.[34]

To be brief, it has recently been decided in Singapore that common law will come to the rescue of a party acting under a unilateral mistake only if the other party had actual knowledge of his mistake. And the mistake must be of a fundamental nature.[35] Constructive knowledge (knowledge that is imputed by the objective **[page 75]** test of what a reasonable man would have known) is not sufficient to displace the written word. But equity can intervene if there is constructive knowledge coupled with some sharp practice or impropriety in the conduct of the other party.[36] It must be borne in mind that the effect of an operative mistake is often to render a contract void, though equity can intervene to protect third party interests.[37]

Perhaps the closer comparison between the operation of mistake in common law and Article 8(1) is the remedy of rectification that allows words in the contract to be altered to reflect the true intention of the parties. Rectification is a discretionary remedy that may be available if there has been a common mistake in recording the terms agreed - the key idea here is that the contract does not accurately record *what was agreed*. It does not avail the innocent party if he has certain intentions that were not manifested, or if he agreed to something under a mistake. In Singapore, the High Court [38] has endorsed the criteria pronounced in *The Demetra K*:

> The antecedent agreement need not amount to a binding contract but there must be a common accord as to what the parties' mutual rights and obligations are to be, to which they fail to give effect in their subsequent written contract ... Where the parties have recorded their agreement in a written contract, convincing evidence is necessary to discharge the burden of proving that they made a common mistake in

> so doing, albeit that the standard of proof is the civil standard. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself.[39]

Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* added his usual lucid touch to the subject:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of the contract, you do not look into the inner minds of the parties - into their intentions - any more than you do in the formation of any other contract.[40] **[page 76]**

Returning to Article 8(1) then, interpretation by reference to the true intention of the parties does not have an exact counterpart in common law. Common law doctrines that allow an enquiry into the actual intention of the parties operate within certain boundaries, albeit ill-defined.

On the other hand, as the CISG does not exhaustively cover all rights and obligations under international sale contracts, there might still be room for the application of common law doctrines like estoppel, mistake or duress to a CISG contract. This is due to Article 4 which stipulates that the Convention is not concerned with the validity of the contract, and Article 7 that allows recourse to domestic law where the specific provisions and general principles of the Convention do not provide answers to matters governed by the Convention.

A US District Court has found, for example, that it could apply Ontario law on waiver and promissory estoppel to resolve a question regarding a warranty in a CISG contract. This was justified under Article 7, and Ontario law applied as the parties' express choice of law.[41] Care must taken, however, not to rush immediately into the common law doctrines, because there are some aspects of these doctrines that are reflected in the CISG. For example, Article 46(1) provides that the buyer may require performance by the seller unless the buyer has resorted to a remedy which is inconsistent with this requirement. In this situation, it is unlikely that one needs to refer to the ingredients of estoppel under the common law. Another example is Article 16(2)(b), which provides that an offer cannot be revoked if the offeree had reasonably relied on the offer as being irrevocable. A US District Court held that Article 16(2)(b) establishes a modified form of promissory estoppel that does not appear to require foreseeability or detriment, and the US version of promissory estoppel should not apply where Article 16(2)(b) applies. Other forms of promissory estoppel, applying in situations not contemplated by the CISG, might not be pre-empted by the CISG.[42] Sometimes, civil courts simply resorted to the 'waiver' concept as an integral part of the CISG solution, such as the Swiss case on good faith mentioned above [43] and the German case on Article 8(2) (see below).[44]

Where the intention is not manifested so that Article 8(1) does not operate, there is less of a divergence between common law and the CISG, save for the remnants of the parol evidence rule. This brings us to Article 8(2) of the CISG. **[page 77]**

2. Article 8(2)

Article 8(2) requires interpretation 'according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. This refers to what a person of the same background engaged in the same occupation or trade as the recipient of the statement would understand it to be.

It is worth remembering that Article 8, including Article 8(2), deals not only with interpreting contractual terms. It covers all statements and conduct. In Germany, the court has applied it to post-contractual conduct that amounted to the equivalent of common law estoppel or waiver. In that case, the court considered the conduct of the seller in entering into negotiations over the lack of conformity of goods.[45] Pursuant to Article 8, paragraphs 2 and 3, the buyer could only reasonably understand from the seller's conduct *in that case* that the seller would not invoke the delay in giving a notice of non-conformity and the seller had waived its right to rely on such delay.[46]

The German Supreme Court demonstrated the test of the 'reasonable person of the same kind' in a case involving a sale of an old machine. As the buyer was an expert, the technical limits of an old machine would have been known to him and the specifications of the contract were read with these limits in mind.[47]

The common law's objective test of interpretation is not that different from Article 8(2), even if it does not have the refinement of Article 8(2) that specifies a reasonable person 'of the same kind'. Generally, you do not need to call a sample reasonable man as a witness. Singapore judges are entitled to decide what a reasonable man would think. But under Article 8(2), can a judge decide for himself, for instance, how a reasonable Sarawakian bird nest gatherer would interpret an offer from Microsoft? A Singapore judge has yet to be faced with a situation where he has to decide whether he can put on more exotic eyes, or whether he would prefer to have a bird nest gatherer turn up in his court to give him an honest opinion.

Article 8(2) does not stand alone, because Article 8(3) adds that, in determining the intent or what a reasonable person would understand, due consideration is to be given to all relevant circumstances. Does the addition of Article 8(3), which sounds eminently sensible, change anything in the common law? **[page 78]**

3. Article 8(3)

There is no limit under Article 8(3) as to what one can refer to in order to get at the meaning of a statement or conduct. As alluded to by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society*, [48] there are limits to what one can look at in common law.

(a) The parol evidence rule

Common law jurisdictions, to varying degrees, still have vestiges of what is called the parol evidence rule. At the risk of oversimplification, this is the rule that says that, if a contract has been reduced to writing, the terms of the contract can only be found within the four corners of the document, i.e. by reference to the meaning of the words expressed. Matters extrinsic to the document cannot be used to interpret or contradict its terms. The parol evidence rule does not exactly take pride of place in common law. In 1986, the Law Commission of England and Wales concluded that it had been whittled down so much that it could hardly be considered a rule of law, and it did not stop evidence from being admitted if justice was to be done.[49] The rule has survived, though its application is uncertain and varies from country to country.

Singapore, like India and Malaysia, has an Evidence Act that contains the parol evidence rule.

Sections 93 to 100 of the Evidence Act, in fact, are conveniently structured to highlight the three aspects of the parol evidence rule:

> (1) Section 93 expresses the 'best evidence rule', namely that the contents of a document should be proved by production of the document, not by secondary evidence.
> (2) Section 94 prohibits admission of extrinsic evidence to contradict, vary, add to or subtract from the terms of a document.
> (3) Sections 95 to 100 set out when one can interpret documents by reference to extraneous facts.

The subject is complex, made more so by the uneasy relationship between the statute and common law (mainly English case law).[50] For example, negotiations **[page 79]** and subsequent conduct are inadmissible in the interpretation of a non-CISG contract but even this simple proposition has attracted debate and distinctions.[51] Distinctions exist between admitting extrinsic evidence to interpret and admitting extrinsic evidence to contradict the written terms. Reference to the factual context, for instance, can be made to interpret, but not contradict the document.[52] Sometimes, the distinctions are overlooked.[53] Calls have been made to review the doctrine, or at least the legislation as it stands.[54]

Thankfully, an international sale contract under the CISG does not have to be subject to these mental acrobatics. It is fairly established that the parol evidence rule does not apply under the CISG.[55] Article 8(3) expressly allows recourse to 'the negotiations, any practices which the parties have established between themselves, usages

and any subsequent conduct of the parties'. The reference to the true intent of the parties in Article 8(1) drives home the point.

Thus, any statement or conduct outside the document can be invoked to interpret, or even contradict the written contract. In the leading US decision of *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostino S.p.A.*, pre-printed terms on the reverse side of the written contract allowed the seller the right to cancel the agreement if the buyer failed to make payment (by monthly instalments). The buyer introduced evidence from negotiations to show that the pre-printed terms were not incorporated. The 11th Circuit Court, on appeal from the trial court, held that the parol evidence rule did not apply to a CISG contract, and the evidence was admitted.[56]

Furthermore, the 'best evidence' rule requiring proof of the written contract by reference only to the document is displaced by the second sentence of Article 11 of the CISG, which provides that a contract of sale 'may be proved by any means, including witnesses'.[57] **[page 80]**

The CISG-AC offers several practical reasons why the parol evidence rule is excluded from the CISG:

> First, most of the world's legal systems admit all relevant evidence in contract litigation. Secondly, the Parol Evidence Rule, especially as it operates in the United States, is characterized by great variation and extreme complexity. It has also been the subject of constant criticism.[58]

(b) 'Entire agreement'/merger/integration clause

The 'entire agreement' clause is sometimes known as the merger or integration clause. It stipulates that the written contract contains the entire and only agreement between the parties and supercedes all previous agreements relating to the subject-matter of the contract. It usually adds that neither party has relied on any representation or undertaking save as expressly stated in the written contract.

It is meant to exclude any implied warranties or collateral contracts, or evidence of negotiations. However, it may not stand in the face of actual misrepresentation and its efficacy is not uniformly respected.[59] The Law Commission of England and Wales opined that:

> It may have a strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term because such was the intention of the parties.[60]

The merger clause does not seem to be as unpopular as the common law parol evidence rule, which it seeks to incorporate by contract. Article 2.1.17 of the UNIDROIT Principles 2004 recognises it:

> A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Is such a clause effective under the CISG, as it seeks to exclude evidence of statements or contracts not contained in the document? Article 6 of the CISG does allow parties to contractually exclude the application of the Convention or derogate from its provisions. The US 11th Circuit Court seems to recognise **[page 81]** this possibility as it commented that 'to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing'.[61]

Caution has been expressed that a standard merger clause that does not explicitly exclude the admission of extrinsic evidence, or trade usages might not be given this effect. Ironically, whether or not a merger clause does have the effect of excluding extrinsic evidence depends on its interpretation by reference to all the circumstances stated in Article 8.[62]

(c) Standard form contracts

A contract contained in a standard form usually raises questions on not just the meaning of its terms, but whether all its terms are binding. This is because the usual complaint by the recipient is that his attention was not drawn to all the terms, or that he might not even have a copy of the standard form.

The CISG is silent on how, specifically, to interpret a standard form contract or whether a party's general conditions are incorporated into the contract. The generally accepted view is that one resorts to Article 8 to determine what the intentions of the parties are regarding such general conditions. Professor Schlechtriem's view, which has been endorsed by a German District Court, is that:

> An indication of the standard terms and/or trading conditions has to be made in a way that it is understandable to a reasonable person from the recipient's point of view. Moreover, the addressee has to be able to get to know its content, because a 'reasonable person' in the manner of the 'recipient' must have an understanding of the content of the declaration 'under the same circumstances'.[63]

Apart from this commonsensical guidance, the application of Article 8 to the problem of standard form contracts varies from case to case. In particular, since the CISG applies to international sale contracts, it is not uncommon that one party's standard terms might be in a language that the other party does not understand. Sometimes, it is held that standard terms in a language foreign to **[page 82]** the counterparty do not bind that party, if he was not given a translation.[64] In another case, the court put the burden on the recipient to get acquainted with the contents of a notice of assignment in a foreign language.[65]

Common law, too, takes a sensible approach in using a 'reasonableness notice' gauge when it comes to incorporation of general conditions. As with other areas of common law, one can spend a very happy afternoon trying to reconcile the case law. But on the whole, there are some fairly clear and uncontroversial principles that can be stated:

> (1) If a person signs on a contractual document, he would be bound by its terms even if he has not read them.[66] A contractual document refers to a document which one may reasonably expect to contain terms of the contract, for example, a sale and purchase form or an insurance policy. It would not include, for instance, a weekly timesheet that a worker cannot reasonably expect to contain terms as it was meant only to record hours worked.[67]
>
> (2) If the person receiving the document did not know that there was writing on it, he is not bound.
>
> (3) If reasonable notice had been given of the terms, and the recipient knew that there was writing on the document, he would be bound even if he did not read the terms.
>
> (4) Even if the recipient knows the document contains terms, a term that is particularly onerous or unusual will not bind him unless it has been brought fairly and reasonably to his attention.[68]

It is submitted that the guidelines developed in common law, such as those outlined above, are not inconsistent with Article 8 of the CISG. **[page 83]**

IV. USAGES

Article 8(3) of the CISG allows interpretation by reference to all relevant circumstances, including established practices between the parties and 'usage'. Article 9 follows up with these provisions:

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

1. Article 9(1)

There is no definition of 'usage' or 'practices' in the CISG, but the two are clearly distinct. Practices are specific to the two parties, for example, giving credit, paying interest or time of delivery, and 'are established by a course of conduct that creates an expectation that this conduct will be continued'.[69] In one case, the ICC Court of Arbitration found that prompt delivery of parts had become such established practice under Article 9(1).[70] Common law frequently refers to such practices as a 'course of dealing' between the parties. An example of this working in common law is where standard terms that are found on the reverse of one party's invoices and letters can, by a long consistent course of dealing, be deemed to be accepted as part of the contract.[71]

A 'usage' is of more general application. It does not spring merely from the interaction between two parties to a contract. Lewison, *The Interpretation of Contracts*, explains the role of usage in common law:

> A usage grows up because everybody in the market, knowing the usages, tacitly assumes that the contract he is making, whether as a buyer or seller, is subject to the usage. The binding character of a usage is born of innumerable individual transactions entered into by the parties to them in the knowledge that certain usages are in practice habitually followed in that market. For a practice to amount to a recognized usage, it must be certain, in the sense that it is so well known in the market in which it is alleged to exist, that those who conduct business in the market contract with the usage as an implied term; and it must be reasonable. [72]

The 'usage' under Article 9(1) will apply only if the parties so intend. Although the words 'expressly or impliedly' are not used, the agreement can be express, or implied by conduct, the meaning of such conduct to be interpreted in accordance with Article 8.[73] **[page 84]** The usage under Article 9(1) does not have to be well known in international trade. It can even be a local usage, as long as the parties have agreed to it.

2. Article 9(2)

The 'usage' under Article 9(2) applies as a matter of presumption. To effectively bind the parties in the absence of agreement, it must be widely known in international trade and the parties knew or ought to have known of it. It has been held, for example, that the trade terms codified in INCOTERMS are usages that are incorporated through Article 9(2).[74]

Article 9(2) of the CISG differs from the UNIDROIT Principles 2004 in that there is no proviso that the usage will not apply if unreasonable.[75] Nonetheless, this may be a difference more in semantics than substance. If the application of the usage is unreasonable, it may be that the parties have not intended it to apply. Article 9(2) is subject to the parties' agreement, and the parties' intent is interpreted under Article 8 based on either actual intent or the reasonable person test. In the context of a common law contract, the reasonableness requirement is sometimes seen as another way to ascertain whether there is indeed such a usage, or if parties could have tacitly intended the usage to apply.[76]

Common law too has recourse to the usages or the practices of parties to interpret, add to or modify a contract that has been reduced to writing. But it contains limits, expressed within the parol evidence rule, that do not apply under the CISG. **[page 85]**

It should be noted that the CISG does not use the word 'custom'. 'Custom' has a specific meaning in common law, although it is sometimes mistaken as synonymous with usage. *Halsbury's Laws of England* takes pain to differentiate the two:

> To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin ...'[77]

Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life or entering into a common type of contract, or more fully as a particular course of dealing or line of conduct that, where persons enter into contractual relationships of the particular kind, or in the particular place, to which the usage is alleged to attach, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or implied stipulated to the contrary.[78]

Although the terms usage and custom are often used interchangeably, they are in law distinct. Usage differs from custom properly so called in that, whereas custom takes the place of the common law for certain purposes in the locality where it operates, usage cannot contradict or replace the common law and can only bind parties who have acted voluntarily in a context where the usage prevails. Unlike custom, usage is not inveterate and can emerge from or adapt to changing conditions, whereas custom is law only within a definite locality.[79]

Under common law, as under Singapore's Evidence Act, either a custom or usage may cause the words of a contract to be interpreted in a special or peculiar sense.[80] The custom or usage may also be used to 'annex incidents' to a written contract if such incidents are usually annexed to such contracts.[81] But such custom or usage cannot be inconsistent with or repugnant to the written terms of the contract.[82] **[page 86]**

A custom or usage under common law must meet certain requirements before it has any impact on the contract. It must be notorious, certain and reasonable and does not violate any legislation.[83] Notoriety means it must be well known in the context in which it applies, and can be readily ascertained by any person who proposes to enter into a contract affected by the usage.[84] A usage is not reasonable unless it is fair and proper and such as reasonable, honest and right-minded men would adopt.[85] As for legality, a usage cannot prevail if it contravenes any law.[86] As Article 4(a) provides that the CISG is not concerned with the validity of the contract 'or any usage', it is arguable that even a usage under Article 9 must meet the criteria of notoriety, certainty, reasonableness and legitimacy before it can be deemed incorporated into the sale contract.

V. UNIFORMITY

It can be seen that common law jurists have a lot of baggage to discard when faced with the CISG. The tricky question is what to discard and what to apply in conjunction with the stipulations in the CISG. The CISG is not exhaustive. There is still an important role for domestic law, but there is a risk of the homeward trend even on matters governed by the CISG. The knee-jerk recourse to the comfort of familiar domestic methodology must be suppressed.

Realistically speaking, is it possible to get all the national courts of all 65 States that have adopted the CISG to row in tandem? Even within a single jurisdiction, it can be hard to get national courts to agree among themselves. Is uniformity then a pipe dream?

Professor Hillman argues that it would be easier for tribunals from different jurisdictions to take a uniform approach to the CISG if it is recognised that the CISG can be reduced to four instrumental policies:

(1) Enforce parties' intentions;
(2) Ensure that parties receive the fruits of the exchange;
(3) Keep the deal together; and
(4) Award compensation, not punishment.[87] **[page 87]**

One cannot hope for absolute uniformity, but one may justifiably expect that all jurisdictions uphold the policies reflected in the CISG. Differences in interpretation can be reduced, and along with them some of the uncertainty that impedes international trade.[88] To a large extent, the publication of the UNCITRAL Digest and Case Law on UNCITRAL Texts ('CLOUT') enables national courts to see how other jurisdictions have addressed a particular problem under the CISG. One must also acknowledge the excellent database and website maintained by the Institute of International Commercial Law at Pace University.[89] Albeit in the context of the Warsaw Convention, Lord Scarman had declared that: 'Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case, a course of action by no means unfamiliar to common law

judges.'[90] This is also the philosophy of the Singapore courts, when interpreting an international Convention. [91] In a case on the CISG, the US District Court in *St Paul Ins Co v Neuromed Med Sys* has committed itself to interpretations grounded on the underlying principles of the CISG rather than in specific national conventions. [92]

Many decisions on the CISG do contain a reference to case law from other Contracting States. In this sense, the CISG has led to a convergence of ideas and is serving the needs of international merchants. **[page 88]**

FOOTNOTES

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1. Section 4 of the 1995 Act.

2. Article 1(1)(a). Article 1(1)(b), which provides for the application of the CISG where the rules of private international law lead to the application of the law of a Contracting State, is excluded by section 3(2) of the 1995 Act.

3. Singapore was represented by former Justice Warren Khoo (when he was Senior State Counsel) who chaired the Drafting Committee.

4. The United Kingdom has not adopted the CISG, although it did adopt the predecessors to the CISG, the two Hague Conventions of 1964, namely the Uniform Law for the International Sale of Goods ('ULIS') and the Uniform Law for the Formation of Contracts for the International Sale of Goods ('ULF').

5. Interpretation Act (Cap 1), section 9A.

6. *Pinner v Everett* [1969] 1 WLR 1266, 1273, per Lord Reid; Bennion, *Statutory Intepretation* (2002, 4th ed), 470.

7. *The Trade Fair* [1994] 3 SLR 827 (on the International Convention on the Arrest of Seagoing Ships 1952); see also the English Court of Appeal decision in *Sea Empress* [2003] 1 Lloyd's Rep 327, 336, on the International Convention on Civil Liability for Oil Pollution Damage 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

8. *The Seaway* [2005] 1 SLR 435.

9. Article 31(1) provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its purpose and object.'

10. The UNIDROIT Principles 2004 are an enlargement rather than a revision of the UNIDROIT Principles 1994, which the Working Group had found to be successful. These are a set of recommended principles put together by a Working Group represented by jurists from all the major legal systems and regions of the world.

11. Section 1-203.

12. Section 205.

13. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999, 3rd ed), 99.

14. Ibid, p 95.

15. As an illustration, in the case of a merchant, UCC, section 2-103(1)(b) defines 'good faith' as 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade'.

16. Professor Schlechtriem argues that the 'good faith' provision should not be limited to interpretation of the Convention, but should be treated as a general principle of conduct, even though Article 7(1) is not expressed as such: *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed), 61, 63.

17. CLOUT Case No 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] A/CN.9/SER.C/ ABSTRACTS/26, 9.

18. CLOUT Case No 154 [Cour d'appel Grenoble, France, 22 February 1995] A/CN.9/SER.C/ABSTRACTS/11, 6.

19. Swiss Supreme Court (Bundesgericht) 5 April 2005; translation available at <http://cisgw3.law.pace.edu/cases/050405s1.html>.

20. [1992] 2 AC128, 136-138.

21. Phang, 'Vitiating Factors in Contract Law - Some Key Concepts and Developments' (2005) 17 SAcLJ 148, 246-247.

22. *Carter v Boehm* (1766) 3 Burr 1905, 1909 (97 ER 1162, 1164).

23. Lord Steyn notes the progress made in English law, but does not challenge the point that good faith has not crystallised into an independent, enforceable rule of law, in his paper, 'Contract Law: Fufilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433.

24. Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 LQR 66.

25. The Association of the Bar of the City of New York Committee on Foreign and Comparative Law requested an opinion from the CISG-AC on whether the parol evidence rule applies under the CISG. The CISG-AC is a private initiative by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. It aims to support understanding and promote uniform interpretation of the CISG.

26. CISG-AG Opinion No 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004.

27. The Secretariat Commentary on the 1978 Draft of the CISG.

28. 1976] 1 WLR 989.

29. [1998] 1 WLR 896, 912-913.

30. 2004] 4 SLR 330, at [43]; Subjective intention also received short shrift from VK Rajah J in *Standard Chartered Bank v Neocorp International Ltd* [2005] SGHC 43, at [44].

31. There are other equitable doctrines that look to the subjective state of mind of parties, like duress, undue influence and misrepresentation. But we will stray further from the subject of interpretation if we go into these.

32. *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 267-268, per Steyn J; endorsed by the Singapore Court of Appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502, at [55].

33. *Chwee Kin Keong v Digilandmall.com Pte Ltd,* ibid, at [70].

34. Contractual Mistakes Act 1977.

35. What is fundamental is also a source of uncertainty. The English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, at [61], [76] imposed a rather stringent standard akin to the doctrine of frustration - contractual performance or the contractual adventure must be rendered impossible. The Singapore Court of Appeal has hinted that it prefers not to fetter the role of equity in intervening in appropriate cases, whether to give a wider meaning to what is a fundamental mistake, or to protect the interests of innocent third parties: *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502, at [75]-[76]. The Singapore case was on unilateral mistake whereas *Great Peace* was on common mistake.

36. *Chwee Kin Keong v Digilandmall.com Pte Ltd,* ibid, at [80].

37. Ibid; see also the Australian High Court decision in *Taylor v Johnson* (1983) 151 CLR 422; cf *Chitty on Contracts* (2004, 29th ed), Vol 1, para 5-067, p 407. Where common mistake is concerned, the English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 has held that there is no equitable jurisdiction to rescind agreements on the ground of common mistake. In common law, rights cannot be accrued or transferred under a contract that is void *ab initio*. A contract that is initially valid but is subsequently rescinded can create transferable rights before it is rescinded. If there is an operative mistake that nullifies consent in common law, the contract is void *ab initio*.

38. Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd [2004] SGHC 279, at [55].

39. [2002] 2 Lloyd's Rep 581, at [23] and [24], per Lord Phillips MR.

40. [1953] 2 QB 450, 461.

41. *Ajax Tool Works, Inc v Can-Eng Manufacturing Ltd (2003)*. There are also civil courts in Switzerland, Germany and Austria that have decided the same way, for example, for doctrines of agency and mistake. Ajax Tool Works and abstracts of these other cases can be obtained from <http://www.unilex.info>.

42. *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* (2002), from <http://www.unilex.info>.

43. See footnote 19 above.

44. See footnote 45 below.

45. CLOUT Case No 270 (Bundesgericht, Germany 25 November 1998), cited in UNCITRAL Digest of case law (8 June 2004), A/CN.9/SER.C/DIGEST/CISG/8, para 13.

46. The court cautioned that not every negotiation will amount to a waiver.

47. Bundesgericht, Germany, 22 December 2000, published on the internet at <http://www.cisg.law.pace.edu/cisg/text/001222s1german.html>; cited in UNCITRAL Digest of case law (8 June 2004), A/CN.9/SER.C/ DIGEST/CISG/8, para 11.

48. [1998] 1 WLR 896, 912-913.

49. The Law Commission Report on *The Parol Evidence Rule* (Law Com No 154), para 2.45.

50. An express attempt by a Singapore court to tackle the relationship between a common aspect of the rule, the 'factual matrix', and its statutory equivalent in section 94, proviso (f), can be seen in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] SGHC 40, at [51] and [53].

51. See generally McKendrick, 'Interpretation of Contracts and the Admissibility of Pre-contractual Negotiations' (2005) 17 SacLJ 248; Chan, 'Resolving Ambiguity Through Extrinsic Evidence' (2005) 17 SAcLJ 277, 282-283, 296-298.

52. See generally McKendrick, 'Interpretation of Contracts and the Admissibility of Pre-contractual Negotiations' (2005) 17 SacLJ 248; Chan, 'Resolving Ambiguity Through Extrinsic Evidence' (2005) 17 SAcLJ 277, 282-283, 296-298.

53. As when the Malaysian court admitted a collateral contract that contradicted the main written contract: *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16.

54. *China Insurance*, above, at [62] - [63].

55. *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostino S.p.A.* 144 F 3d 1384 (11th Cir 1998); cf *Beijing Metals & Minerals Import/Export Corp v American Business Center, Inc* 993 F2d 1178 (5th Cir 1993); David A Levy, 'Contract Formation under the UNIDROIT Principles of International Commercial Contracts, UCC, Restatement and CISG' (1998) 30 UCC LJ 249; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer (1999, 3rd ed), 115-123.

56. Ibid.

57. Article 11 also dispenses with any formal requirements in the making of a contract.

58. CISG-AG Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004, para 2.4.

59. *Chitty on Contracts* (2004, 29th ed), Vol 1, para 12-104.

60. The Law Commission Report on *The Parol Evidence Rule* (Law Com No 154), para 2.15.

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

62. CISG-AG Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004, paras 4.6-4.7.

63. Cited in CLOUT Case No 345 [Landgericht Heibronn, Germany, 15 September 1997]; translation and abstract available at <http://cisgw3.law.pace.edu/cases/970915g1.html>.

64. Ibid.

65. CLOUT Case No 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; translation and abstract available at <http://cisgw3.law.pace.edu/cases/950208g3.html>.

66. *'Estrange v F Graucob Ltd* [1934] 2 KB 394. In very limited circumstances, English law allows the signer to plead *non est factum*, but this doctrine nullifies the entire contract if it applies.

67. *Grogan v Robin Meredith Plant Hire*, *The Times*, 20 February 1996; cited in Treitel, *The Law of Contract* (2003, 11th ed), 217.

68. *Chitty on Contracts* (2004, 29th ed), Vol 1, paras 12-013-12-015; see also *Hakko Products v Danzas* [2000] 3 SLR 488. This is quite apart from the Unfair Contract Terms Act, which strikes down clauses excluding or limiting liability unless they are shown to be reasonable. This restriction does not apply to international sale or supply contracts: section 26.

69. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999, 3rd ed), 126.

70. ICC Court of Arbitration, case No 8611/HV/JK of 23 January 1997; available at <http://cisgw3.law.pace.edu/cases/978611i1.html>; cited in UNCITRAL Digest of Article 9 case law, A/CN.9/SER.C/DIGEST/CISG/9 (8 June 2004), at para 6.

71. *Circle Freight International Ltd v Mideast & Golf Exports Ltd* [1988] 2 Lloyd's Rep 427.

72. (1997, 2nd ed), 139.

73. Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed), 78; see also UNCITRAL Digest of case law, A/CN.9/SER.C/DIGEST/CISG/9 (8 June 2004), at para 3.

74. *St Paul Ins Co v Neuromed Med. Sys* 2002 U.S. Dist. LEXIS 5096 (SDNY 26 March 2002).

75. Article 1.9 of the UNIDROIT Principles 2004 reads as follows:

> '(1)--The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2)--The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.'

76. *Halsbury's Laws of England* (1998, 4th ed Reissue), Vol 12(1), para 659.

77. Ibid, para 606.

78. Ibid, para 650.

79. Ibid, para 651.

80. For example, the meaning of cider in *Studdy v Sanders* (1826) 5 B&C 628; Evidence Act, section 100.

81. Evidence Act, section 94, proviso (e); for example, a broker for an undisclosed principal may be liable personally according to the usage of the trade: *Humfrey v Dale* (1858) EB & E 1004.

82. Evidence Act, section 94, proviso (e). The common law applies the same qualification. One view has it that the custom or usage must be consistent with both the express and implied terms of the contract: *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 661, 675; followed by the Malaysian High Court in *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33 despite the wording of proviso (e), which expressly prohibits inconsistency with only the express terms of the contract.

83. *Chitty on Contracts* (2004, 29th ed), Vol 1, para 12-129.

84. *Halsbury's Laws of England*, above, para 657.

85. Ibid, paras 659-660.

86. *Halsbury's Laws of England* expresses the view that a usage cannot contradict either legislation or common law. A custom, on the other hand, necessarily changes the application of common law in the locality to which it applies, although even a custom should not directly contravene the Crown (legislation). Ibid, paras 601, 605, 661.

87. Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21.

88. For rather impressive stock-taking, see Di Matteo et al, 'The Interpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (Winter 2004) 34 Northwestern Journal of International Law and Business 299.

89. <http://www.cisg.law.pace.edu>.

90. *Fothergill v Monarch Airlines* [1980] 2 All ER 696, 715.

91. *The Trade Fair* [1994] 3 SLR 827.

92. 2002 US Dist LEXIS 5096 (SDNY 26 March 2002).

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