

# **DOES ENGLISH LAW PROVIDE THE BEST FRAMEWORK FOR THE SALE OF COMMODITIES? – A COMPARISON BETWEEN ENGLISH LAW, INCOTERMS AND THE CISG**

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(This manuscript is published in [South Asian Law Review Journal](#))

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ABBREVIATIONS

CIF	Cost, Insurance and Freight
CISG	United Nation Convention on Contracts of International Sale of Goods 1980
FOB	Free on Board
FOSFA	Federation of Oil, Seeds and Fats Association Ltd
GAFTA	Grain and Feed Trade Association
ICC	International Chamber of Commerce
SOGA	Sale of Goods Act 1979

## **INTRODUCTION**

We are in the fast-moving globalised world and there is a lot of international trade happening. For instance, the commodity such as a bushel of Wheat, which may be imported to Cape Town by a trader A, from a trader B, who is residing in Rotterdam. These bushels may have been purchased by B during their voyage from trader C, who is having his place of business in Texas. Further, these bushels may have been originally shipped by trader D from Gujrat. As these bushels of Wheat may be transported from factories to warehouses and then to port of shipments to the port of destination. In the process of transportation between various parties, there is a scope for many mishaps, such as, robbery of these bushels on port of shipment, capsizing of the ship during the voyage, occurring of fire in storehouse of ship resulting in damages to the Wheat and most importantly, the fluctuations in the prices of Wheat due to the global demand and supply.

In these kind of contracts, there are many sort of rights and duties inclined with traders who are the parties to such contracts, thus, there is necessity of rules to implement and define the same. As the buyers and sellers may be situated in different jurisdictions, there are issues in applying the private international laws of the parties, so there is a need for uniform set of rules to regulate these contracts and to avoid the recourse to the rules of different jurisdictions. To cater this need, the international sale of commodities concentrates on 3 different kinds of frameworks, i.e., United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereafter "CISG"), Sale of Goods Act 1979 and Incoterms by International Chamber of Commerce, emphasising on the international trade, which includes the contract of sale, purchase and trade of commodities between the parties.

This paper will evaluate the three regimes by looking at their history and their application, with an aim to determine that the whether English Law provides the optimal framework for the sale of commodities or not.

### Sale of Commodities- An Overview

The term Commodities in the present context includes the wide range of merchandises such as rice, wheat, chemicals, grains, oil and metals such as copper, gold, aluminium, silver and iron.<sup>1</sup> These products are generally produced in bulk quantity around the world. The exceptional feature of the commodities contracts that makes it different from the international sale of goods contracts is that they are substitutable and interchangeable<sup>2</sup>, as they are produced by several producers, for instance the bushel of wheat is been produced by farmers in China, United States, India and France. So the same product i.e., bushel of Wheat is being produced by different producers around the world. The purchasing and selling of the commodities in international markets determines its prices.

The trading of commodities usually takes place through the documents. These documents represent the actual goods. This trading of documents lasts until the final delivery of goods, thus these transactions are referred as string sales, as there are a number of traders dealing with this 'string' of documents.<sup>3</sup>

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<sup>1</sup> K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 25 February 2015

<sup>2</sup> Ibid

<sup>3</sup> Ibid

## String Contracts- Brief

As stated earlier, the commodities are often represented by the documents in International trade. Consequently, in a given contract where the seller ships the goods to buyer and tender the documents to buyer, the buyer pays the price of the goods against by tendering of these documents. Further, the buyer may sell these goods during the voyage to another party by tendering these documents to him. As a result, there is a string of contracts that has been created by tendering of the documents that represent the goods. The parties rely entirely on these documents. This chain of contracts is known as string contracts.

### **1 BRIEF HISTORY OF FRAMEWORKS**

With the brief knowledge about the sale of commodities, it is necessary to know the evolution of the present provisions which governs the same. This part aims to assess the brief history of legislations.

#### **1.1 Sale of Goods Act 1979**

The Sale of Goods Act is been enacted by the parliament of United Kingdom in 1979, which was put into effect on 1<sup>st</sup> of January 1980.<sup>4</sup> This Act governs the contracts where the goods are sold or transferred for consideration. This Act is a successor of Sale of Goods Act 1893, which was conscripted by Sir Mackenzie Chalmers with a view to define the rights and obligation of parties which are not usually defined in agreements.

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<sup>4</sup> *Sale of Goods Act 1979*, s 64(2)

The Sale of Goods Act 1979 has undergone numerous amendments since its inception. Few of the notable amendments are:

- The implied term “Merchantable quality”<sup>5</sup> was replaced with “Satisfactory quality”.
- The buyer of an undivided share of commodities in an identified bulk is being allowed to become an owner of common bulk on the pre-payment of the price.

## 1.2 United Nations Convention on Contracts for the International Sale of Goods 1980

In 1920s, the International institute for Unification of Private Law (UNIDROIT) probed the team of scholars to draft the uniform set of rules to govern the international trade. The first draft was presented by the scholars in 1935. The draft was deferred during the Second World War. Later it continued during the Hague Conference in 1951 and further, the drafts was adopted in 1964’s conference in Hague. The Convention on Uniform Law of International Sales (ULIS) and Convention concerning with Uniform Law in the Formation of Contracts for the International Sale of Goods (ULFC) was adopted in this conference. These conventions were important because of their contents and innovative procedures, but they resulted in being unsuccessful as they were not ratified by many countries.<sup>6</sup> Then United Nation’s General Assembly established a body named United Nations Commission on International Trade Laws (UNCITRAL) with an intention to stimulate “*the progressive harmonization and unification of the law of International trade*”<sup>7</sup>. In 1978, UNCITRAL presented the draft of convention in New York and this draft was adopted unanimously by sixty two states in Vienna in 1980.

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<sup>5</sup> *Sale of Goods Act 1893*, s 14(2)

<sup>6</sup> Ratified by 9 countries

<sup>7</sup> Resolution 2205 (XXI) of the UN General Assembly (17 December 1996), UNCITRAL *yearbook*, Vol. I, Part one, II (1968-1970)

Thereby, CISG came into the effect in January 1988, when diplomats from sixty two states sanctioned a set of rules in a conference held in Vienna. These rules aims to provide uniform laws governing the international sale of goods. Many countries including United States of America, China, France, Egypt, Italy, Hungary, and Zambia have ratified the CISG. But still some major trading countries such as Brazil, United Kingdom, South Africa, India and Hong Kong have not adopted the CISG.

### 1.3 Incoterms

Incoterms are the three-letter commercial terms that are internationally acknowledged in business transactions. International Chamber of Commerce started publishing Incoterms in 1936 with a view to provide standardized definitions and rules related to interpretation for the commonly used trade terms.<sup>8</sup>

Incoterms 2010 was the 8<sup>th</sup> edition, which came into force on 1<sup>st</sup> January 2011. It defines the 11 rules, categorized into group of two namely “Rules of any mode of transport” and “Rules for sea and inland waterway Transport”.<sup>9</sup> The earlier edition Incoterms 2000 was revised by ICC because of the ambiguity regarding their usage in practice and the need of the expanding their adaptability.<sup>10</sup>

## 2 FIELD OF APPLICATION

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<sup>8</sup> J. Ramberg, *ICC Guide to Incoterms 2010*, 8

<sup>9</sup> J. Ramberg, *ICC Guide to Incoterms 2010*, 9

<sup>10</sup> *Ibid*

## 2.1 Sale of Goods Act 1979

The United Kingdom depends on a substantial body of contract laws which contains the enactments and legislations comprising the Sale of Goods Act 1979. It is accompanied further by Supply of Goods and Services Act 1982 and the Sales and Supply of Goods Act 1994.

The vital peculiarity of Sale of Goods Act 1979 is that the goods which are to be delivered by seller to the buyer must 'conform to contract', must be as described<sup>11</sup>, must be fit for purpose<sup>12</sup> and must be of satisfactory (merchantable) quality<sup>13</sup>. Furthermore, it provides provisions on remedies available to buyer of goods, passing of risk from seller to buyer and passing of property.

This Act facilitates the string contracts by allowing the seller to buy goods that are already been afloat and sellers have an obligation to tender the effective documents. Therefore, the seller may buy the goods that are being sold by other seller. As Lord Lowry correctly stated that "today's buyer may become tomorrow's seller".<sup>14</sup>

Additionally, it is denoted as an applicable law by most of the commodity merchants. These merchants expressly exclude the provisions of the CISG and Incoterms in their contracts. In addition, GAFTA 100 also applies Sale of Goods Act as an applicable law and provides England as a place of arbitration for settlement of any disputes.<sup>15</sup>

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<sup>11</sup> Sale of Goods Act, s 13

<sup>12</sup> Sale of Goods Act 1979, s 14 (3)

<sup>13</sup> Sale of Goods Act 1979, s 14 (2), as amended, 'merchantable' has been replaced by 'satisfactory'

<sup>14</sup> *Bunge v Tradax Export [1981] 1 WLR 711, HL*

<sup>15</sup> K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' ( )  
<<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 26 February 2015



## 2.2 United Nations Convention on Contracts for the International Sale of Goods 1980

The rules related to application is contained in Part I of the CISG, which states that the contract will fall under the ambit of CISG if it fulfils the conditions that the contract has to be of selling of goods and the selling of goods has to be International.<sup>16</sup> On the other hand, Article 6 of CISG states that the parties to contract may opt out of the application of CISG.<sup>17</sup>

Article 2 of the CISG excludes six specific categories of contracts namely sales by auction, consumer contracts, sale of negotiable instruments, electricity, ships and aircrafts.<sup>18</sup> But it does not exclude the commodity sales.<sup>19</sup> However, the oil companies such as Shell and BP and majority of commodity traders expressly excludes the provisions of CISG from their standard contracts.<sup>20</sup> Even though, the flexibility of the CISG makes it appropriate for governing the contracts related to transnational sale of commodities. As the parties in contract are given the advantage of contractual freedom by the virtue of article 6 and 9.<sup>21</sup>

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<sup>16</sup> J. LOOKOFSKY, *Understanding the CISG*, 11 (as cited in M Buydaert, *The passing of risk in international sale of goods- A comparison between the CISG and the Incoterms'* [2012-13] 7, 11)

<sup>17</sup> J. LOOKOFSKY, *Understanding the CISG*, 27 (as cited in M Buydaert, *The passing of risk in international sale of goods- A comparison between the CISG and the Incoterms'* [2012-13] 7, 11)

<sup>18</sup> <sup>18</sup> J. LOOKOFSKY, *Understanding the CISG*, 17 (as cited in M Buydaert, *The passing of risk in international sale of goods- A comparison between the CISG and the Incoterms'* [2012-13] 7, 12)

<sup>19</sup> K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' ( ) <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 26 February 2015

<sup>20</sup>Ibid

<sup>21</sup> Ibid

## 2.3 INCOTERMS

Incoterms helps in reducing misinterpretation of terms of contracts by elucidating the obligations of purchasers and sellers of the goods. The rules of Incoterms can be applied by the parties to their contract by expressly including a reference of a specific ICC Incoterms. Thereby the rules of incoterms will become binding force. In a situation where the parties fail to refer to certain rules of incoterms, those rules may turn into the part of their contract as they reflect the universally accepted principles and practices. This was highlighted in BP Oil case<sup>22</sup>.

INCOTERMS 2000 does not provide the favourable framework for string contracts as there is no provision for seller to buy or procure the goods during the voyage. Whereas, INCOTERMS 2010 facilitates the string contracts by giving an option to the seller 'to contract or to procure the contract for carriage of goods by introducing the CIF and CFR terms'.<sup>23</sup>

ICC recommends the parties to refer to latest version of Incoterms in their contracts to avoid the misunderstanding in applying and adopting the rules of Incoterms.<sup>24</sup>

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<sup>22</sup> US Court of Appeals (5th Circuit, USA) 11 June 2003, BP Oil International/Empresa Estatal Petroleos de Ecuador, *Clout case* no. 575, <<http://cisgw3.law.pace.edu/cases/030611u1.html>> accessed 26 February 2015

<sup>23</sup> International law firm, '*International Trade and Commodities Legal Update*' [March 2011] 1, 3

<sup>24</sup> J. RAMBERG, *ICC Guide to Incoterms 2010*, 16

### **3 COMPARISON OF FRAMEWORKS**

It is really important to compare the English Law with CISG and Incoterms in order to analyse whether the English law provides the best framework for the sale of commodities or not.

The comparison of laws will be based on the provisions provided by these laws on different areas such as duties of seller, remedies available to buyer, passing of risk, documentary breaches, specific performance and passing of property.

#### **3.1 Defining Trade terms**

Trade terms facilitates the clarity between the parties on various issues such as price, payment, carriage, delivery, documents by providing the standardized significance to the terms that are to be used in transaction.

The focus will be on the CIF and FOB terms as these trade terms are most commonly used in international trades.

##### **3.1.1 C.I.F Contracts**

The classic explanation of CIF contracts was given by Lord Porter in *The Julia*<sup>25</sup> as he stated that in CIF contract, ‘the seller have an obligation to provide bill of lading, invoice and

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<sup>25</sup> *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder (The Julia)* [1949] AC 283

insurance policy to the buyer. Further, the buyer has to pay the freight charges which would be deducted from the price'<sup>26</sup>. Further, Lord Wright stated in *Smyth vs Bailey* <sup>27</sup>that 'the price in CIF contract includes cost, freight and insurance'<sup>28</sup>.

English Law states that there are different ways of performing the CIF contract. Firstly, the contract is related to selling of unascertained goods in which the seller may arrange the shipment of the merchandise himself or he may purchase the consignment sent by another person and appropriate it. Secondly, selling the specific goods. Thirdly, Scrutton J opined in *Karberg v. Blythe, Green, Jourdain & Co*<sup>29</sup> that the CIF contract is a sale of documents which are related to goods rather than sale of goods. He backed his opinion by stating that the obligation of seller is just to provide the effective documents and the buyer pays the price for goods upon the tendering of the documents<sup>30</sup>.

Incoterms provides the similar framework on obligation of parties with relation to CIF contracts as provided by English law.<sup>31</sup>In addition, Incoterms permits the parties to use electronic format of bill of lading.

However, Incoterms 2000 doesn't provide the clarity on ways of performing the CIF contract when the goods are shipped by another person (third party). Moreover, no clarity on the appropriation and selling of goods during the voyage. Whereas, Incoterms 2010 is friendlier for commodity contracts, as it provides the option for seller to procure the goods that is being afloat by third party (A4 CIF).

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<sup>26</sup> Ibid

<sup>27</sup> *Smyth (Ross T.) & Co. v. T.D. Bailey & Co. [1940] 3 All ER 60 (HL)*

<sup>28</sup> Ibid

<sup>29</sup> *Karberg v. Blythe, Green, Jourdain & Co [1915] 2 KB 379*

<sup>30</sup> *Manbre Saccharine v. Corn Products Co. [1919] 1 KB 189*

<sup>31</sup> I Carr, Peter Stone, *International Trade Law* (5th, , 2014) 30

### 3.1.2 F.O.B Contracts

F.O.B contracts can be expanded as free on board. It can be performed by different ways and the contract is classified accordingly.<sup>32</sup> Usually, in classic fob contract, seller deliver the goods on the ship which is nominated by the buyer. In other type of fob contract, seller makes all the arrangement for carriage of goods.

In English law, sellers have an obligation to deliver the goods on the ship according to their description and pay for the transportation and handling charges. Oppositely, buyer has an obligation to nominate the ship, pay for the price of goods and obtain the insurance.

On the other hand, Incoterms 2000 provides that the seller does not have an obligation for the carriage arrangement (A3 FOB), instead, seller's main duty is to deliver the goods on the vessel which is nominated by the buyer (A4 FOB) and Buyer have an obligation to make a contract for carriage of goods and arrange insurance.

Although, Incoterms 2010 provides the similar framework as of English Law.<sup>33</sup> As Seller have an obligation to provide the goods according to their description in contract (A1 FOB) and deliver the goods on the buyer's nominated vessel. In addition, Seller can make the carriage arrangements on the buyer's expense and risk, if buyer fails to give the instructions regarding the carriage of goods (A3 (a) FOB). Whereas, Buyer have an obligation to arrange the carriage and pay the price to seller according to contract.

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<sup>32</sup> *Pyrene v. Scindia Navigation* [1954] 2 QB 402

<sup>33</sup> I Carr, Peter Stone, *International Trade Law* (5th, 2014) 45

### 3.1.3 CISG on Trade Terms

Article 9 of the CISG states that, the parties to contract are bound by any usage or any practices which is established by them or any usages which are widely practiced in international trade. Therefore, relying on INCOTERMS and national elucidations of trade terms. Therefore, CISG itself doesn't provide a framework for interpretation of trade terms.<sup>34</sup>

### 3.2 Obligation of quality, fitness and description

English law and CISG have relatively similar provisions on fitness for purpose. English law requires the fitness of goods to be 'reasonable', whereas, CISG requires just fitness.<sup>35</sup> Furthermore, English law entails the seller to deliver the merchandise to the buyer which are fit for buyer's actual purpose, that is been made known to seller expressly or impliedly.<sup>36</sup> Similarly, CISG necessitates that the goods to be fit for the purpose of the buyer, which he specifically or impliedly affirmed to the seller.<sup>37</sup> The language of English law is been persistently followed by the CISG.<sup>38</sup>

However, English law and CISG differ in some areas. Firstly, CISG simply requires the expressed obligation in regards to the description and quality of the goods<sup>39</sup> and does not have

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<sup>34</sup> L Graffi, 'Remarks on Trade Usages and Business Practices in International Sales Law' <<http://www.cisg.law.pace.edu/cisg/biblio/graffi1.html>> accessed 28 February 2015

<sup>35</sup> Article 7(1) states that the convention to be interpreted in good faith and English law's concept of reasonableness is the result of fair dealing and good faith.

<sup>36</sup> *Sale of Goods act 1979* s 14(3)

<sup>37</sup> Article 35 (2) of CISG

<sup>38</sup> M Bridge, '*A Law for International Sales*'(2007) 37 HKLJ 20

<sup>39</sup> Article 35 (1) of CISG

the technical implications as under English law. Secondly, CISG fails to provide the provision for implied term of satisfactory (Merchantable)<sup>40</sup> quality as required by English law.

In CISG, implied terms related to quality, fitness and description of goods are expected to be the foundation. Whereas, express terms plays the crucial role. On the other hand, the English law provides the complex framework as it rely upon a comprehension of the historical background.<sup>41</sup>Therefore, the CISG provides the simpler provision for the parties involved in international trade.<sup>42</sup>

Whereas, Incoterms 2010 requires seller to provide goods which should be in conformity with the contract between the parties.<sup>43</sup> Therefore, it fails to provide the detailed provisions when compared with English law and CISG.

### 3.3 Obligation related to quantity

The duty of seller related to quantity of goods to be supplied is not expressly acknowledged by English law, although it is impliedly recognized by the provisions pertaining to the consequences of not delivering the right quantity of goods to the buyer.<sup>44</sup>

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<sup>40</sup> *Sale of Goods act* s 14(2) replaced 'Merchantable' by 'Satisfactory'.

<sup>41</sup> K Georgiadou, *The Transformation of the UN Convention on Contracts for the International Sale of Goods (CISG) into the UK Legal Order: Two Legislative Models* [2014] 1, 51

<sup>42</sup> B Zeller, 'making the right choice of law: how the CISG can solve your problems. An intercontinental exchange of views' <[http://www.lawcouncil.asn.au/ILS/images/pdfs/2007\\_International\\_Australian\\_European\\_Lawyers\\_Conference\\_-\\_Making\\_the\\_right\\_choice\\_of\\_law\\_by\\_Dr\\_Bruno\\_Zeller.pdf](http://www.lawcouncil.asn.au/ILS/images/pdfs/2007_International_Australian_European_Lawyers_Conference_-_Making_the_right_choice_of_law_by_Dr_Bruno_Zeller.pdf)> accessed on 28 February 2015

<sup>43</sup> Incoterms 2010 (A1)

<sup>44</sup> *Sale of Goods Act* s 30

Similarly, Incoterms 2000 and Incoterms 2010 does not provide the detailed framework. Whereas, the CISG states that the quantity of goods to be delivered as required by the contract.<sup>45</sup>

### 3.4 Terminating the contract

English Law and CISG provides the entirely different framework for termination of the contracts. CISG facilitates the performance of the contract therefore, the provisions under CISG makes it harder for the buyer to avoid or terminate the contract.<sup>46</sup> Whereas, English Law provides the simpler provision for the termination of the contract.<sup>47</sup>

According to Article 25 of CISG, the parties can only terminate or avoid the contract if the breach cause by other party is Fundamental breach, which means that the breach resulted in substantially depriving the party from the expected benefits of the contract. In addition, the advisory council of CISG opined that the buyer may avoid the contract if there is failure by seller to perform any of his contractual obligation such as non-conformity of the goods.<sup>48</sup>

In English Law, the parties can terminate the contract if there is a breach related to the condition of the goods.<sup>49</sup> But with an introduction of Section 15A in Sale of Goods Act 1979, the automatic right to terminate the contract in case of breach related to statutory implied terms

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<sup>45</sup> Article 35 (1) of CISG

<sup>46</sup> Article 25 of CISG

<sup>47</sup> *Sale of Goods Act 1979* ss 13-15 and 11(2)

<sup>48</sup> CISG Advisory Council Opinion No. 5, '*The buyer's right to avoid the contract in case of non-conforming goods or documents*' (2005) <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html>> accessed on 01 March 2015

<sup>49</sup> *Bunge v Tradax Export* [1981] 1 WLR 711



and quantity of goods was removed on the recommendations made by the Law commission. Therefore, the buyer cannot reject the goods if there is a slight breach.<sup>50</sup>

On the other hand, INCOTERMS 2010 does not provide the rules related to remedies for breach of contract.<sup>51</sup>

### 3.5 Obligations related to documents

English Law provides the stringent framework for documentary performance as compared to CISG and Incoterms. In English Law, shipping documents are distinctive from other documents. Generally, the shipping documents such as invoice, insurance and bill of lading are tendered by the seller to obtain the payment from the buyer.<sup>52</sup> Other documents that seller may require to tender are certificate of quality and origin. Moreover, it requires the bill of lading to be of transferable form.<sup>53</sup> In addition, the documents provided by seller must be valid, clean, genuine and effective in nature. Furthermore, the law recognize marine insurance policy as an effective document of insurance and other documents such as certificate of insurance and broker's note are not accepted.<sup>54</sup>

In contrast, Incoterms 2010 does not provide any distinction between shipping documents and other documents. As Incoterms 2010 requires seller to provide usual transport documents along with commercial invoice and notice of appropriation. The transport documents could be negotiable or non-negotiable bill of lading, straight bill of lading or

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<sup>50</sup> Law Commission (Report No 160) *Sale and Supply of Goods* (1987) [1994] para 4.21

<sup>51</sup> World Trade Press, '*Guide to Incoterms 2010- A comprehensive guide to the 11 INCOTERMS 2010*' 1, 3

<sup>52</sup> M Bridge (ed), *Benjamin's Sale of Goods* (8th edition, 2010), para 19-024

<sup>53</sup> M Bridge (ed), *Benjamin's Sale of Goods* (9th edition, 2014), para 19-026

<sup>54</sup> *Wilson Holgate v. Belgian Grain* [1920] 2 KB 1

delivery order. Additionally, these documents should provide the details of voyage and must cover the goods as per contract. As similar to English Law, the marine insurance policy is the only acceptable insurance document.<sup>55</sup>

On the contrary, CISG provides limited information about the shipping documents. As stated by Article 30 of the CISG, the seller is only required to deliver the documents required by contract to the buyer. Although, CISG requires the notice of appropriation from the seller to notify the buyer about specific goods.<sup>56</sup> Hence, CISG fails to provide details about the documents that are required to be tendered by seller.

### 3.6 Curing the breach

In English law, the seller's right to cure his breach is not settled. The provisions usually favours the rejection and termination of contract, thus it is evident that right to cure is not granted by English law. Although, in exceptional circumstances the right to cure was supported.<sup>57</sup>

However, CISG recognize seller's right to cure his breach. The contended reason to allow this right is to curtail the sufferings of the parties that may be caused by termination of the contract.<sup>58</sup> Thus, minimizing loss to economy and wastage of time.<sup>59</sup> The breach can be cured by seller by delivering the correct documents before the fixed time and it should not cause buyer the unreasonable expense and inconvenience.<sup>60</sup> Therefore, by allowing seller to

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<sup>55</sup> INCOTERMS 2010 A3 (b)

<sup>56</sup> Article 32 (1) of CISG

<sup>57</sup> *Borrowman v. Free* (1878) LR 4 QB 500

<sup>58</sup> K M Khandani, 'Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?' [2012] 99, 123

<sup>59</sup> *Ibid*

<sup>60</sup> Article 34 of CISG

cure the documentary breaches, CISG is providing the encouraging standpoint for commodity trades.

Whereas, Incoterms 2010 does not provide relevant framework related to seller's right to cure the breach.<sup>61</sup>

### 3.7 Acceptance and Restoration

In English law, the right of the buyer to repudiate the goods is by and large lost with the elapse of time.<sup>62</sup> The provisions in English law does not apply in case of privilege to discard the non-conforming documents. Therefore, when a buyer accepts the shipping documents, he misses the benefit of discarding those documents.<sup>63</sup> Thus, this privilege of buyer is restricted till the point of tender, where he chooses to accept or discard those documents.<sup>64</sup>

Alternatively, the right to avoid the contract in CISG is infrequent and not barred by time.<sup>65</sup> Moreover, the rules related to affirmation and renunciation are not covered in CISG, Even though robust contentions can in fact be propelled that standards of this nature can be derived from the entire package of CISG.<sup>66</sup>

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<sup>61</sup> World Trade Press, '*Guide to Incoterms 2010- A comprehensive guide to the 11 INCOTERMS 2010*' 1, 3

<sup>62</sup> Sale of Goods Act 1979 s 35.

<sup>63</sup> M Bridge, 'A Law for International Sales'(2007) 37 HKLJ 32

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

### 3.8 Specific Performance

Specific performance is defined as an order which obliges the party to perform according to the contract, if the party has breached the terms of the contract. In international sale of commodities, English Law and CISG provides the different framework for specific performance. Common law jurisdictions provides the restrictive provisions for specific performance.<sup>67</sup> Therefore, as English law tends to be based on rules of common law, it provides the limited framework when compared with CISG. Historically, the development of equity courts in common law systems emphasised on offering the remedies to the parties, which are not available in the law, thus their key role is to ease the adversity on the parties.<sup>68</sup> Therefore, in a situation of conflict between parties over the unavailability of remedies, they have a route to equity courts. However, with passage of time, English courts have been reluctant in ordering the remedy of specific performance therefore, it been acknowledged as ‘discretionary remedy’<sup>69</sup> in English law. Whereas, the CISG adopted the permissive approach towards this remedy.<sup>70</sup>In addition, Specific performance is considered to be a primary remedy in CISG<sup>71</sup>. Thus, these provisions reflects that the foremost aim of the CISG is to avert the avoidance or termination of the contract.

### 3.9 Damages and Price Reduction

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<sup>67</sup> N Boghossian, ‘A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods’  
<<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>> accessed on 09 March 2015

<sup>68</sup> Ibid

<sup>69</sup> K M Khandani, 'Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?' [2012] 99, 127

<sup>70</sup> K M Khandani, 'Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?' [2012] 99, 100

<sup>71</sup> Article 46 and 62 of CISG

The remedy of reducing the price in a situation when the goods delivered to buyer are defective, is generally not acknowledged by common law systems.<sup>72</sup> As a result, there is no direct mentioning of price reduction in the provisions of Sale of Goods Act 1979. However, it's often been argued that Section 53 and Section 30 of Sale of Goods Act 1979 indirectly identifies the remedy of price reduction. As a matter of fact, Section 53 acknowledges the remedy of set-off.<sup>73</sup> Whereas, Section 30 of Sale of Goods Act provides similar context as given by Article 50 of the CISG in recognizing the price reduction. Alternatively, the damages is conventional remedy in Sale of Goods Act 1979. The Act states that the buyer should be awarded with damages for any loss borne by him due to the breach of contract.<sup>74</sup>

On the other hand, Article 50 of the CISG offers the remedy of price reduction to the buyer in case when goods delivered to buyer does not conform to the agreement.<sup>75</sup> This remedy is available to buyer even though he fails to perform his duty to mitigate his loss.<sup>76</sup>

It can be contended that the remedy of price reduction in the CISG is much more effective than remedy of damages under Sale of Goods Act.<sup>77</sup>

### 3.10 Passing of risk

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<sup>72</sup> Alison E. Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' ( ) <<http://www.cisg.law.pace.edu/cisg/biblio/williams.html#ivc>> accessed 09 March 2015

<sup>73</sup> R Beheshti, 'A Comparative Analysis of Damages along with Set-off under the SGA versus Price Reduction under the CISG and the CESL' [2014] 0, 7

<sup>74</sup> Sale of Goods Act 1979 s 51(1)

<sup>75</sup> R Beheshti, 'A Comparative Analysis of Damages along with Set-off under the SGA versus Price Reduction under the CISG and the CESL' [2014] 0, 2

<sup>76</sup> Ibid

<sup>77</sup> Ibid

Risk is an imperative concept in International contracts related to selling of commodities because of its latent consequences on both parties involved in the contract. The concept of risk generally involves the damage or loss to the goods during the transaction. English law, CISG and Incoterms provides different frameworks on diverse aspects of risk. Generally, the provisions under CISG seems to be efficient as they are simple, accurate and they refer to the realistic circumstances such as in case of multimodal and containerization mode of transport.<sup>78</sup> However, the provisions of CISG lacks the clarity on some facets. In addition, the CISG fails to provide clarification in a circumstances where the goods are being sold from the undivided bulk.<sup>79</sup>

The provisions under English Law proposes the constricted view on passing of risk, thus they does not have an effective relevance in the matter of trade terms such as CIF and FOB.<sup>80</sup>

On the other hand, Incoterms doesn't clarify about the consequences that may occur from the passing of risk. Therefore, this is resolved by relevant national laws. However, Incoterms concentrates on providing a framework that identifies the bearer of the risk of damages and loss in relation to the explicit trade terms including CIF and FOB.

Incoterms 2000 provided the framework which is similar to English law, which stated that risk passes to buyer after seller performs his delivery obligation. Whilst, there is a significant difference between both while taking CIF terms into consideration, as Incoterms

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<sup>78</sup> D Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' <[http://www.jus.uio.no/pace/transfer\\_of\\_risk\\_contract\\_of\\_sale\\_involving\\_carriage\\_of\\_goods\\_comparative\\_study.dionysios\\_flambouras/doc.html](http://www.jus.uio.no/pace/transfer_of_risk_contract_of_sale_involving_carriage_of_goods_comparative_study.dionysios_flambouras/doc.html)> accessed 12 March 2015

<sup>79</sup> Ibid

<sup>80</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402; *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder (The Julia)* [1949] AC 283

2000 specified that risk passes from seller to buyer on shipment and there is no remark on 'as from shipment' rule.

Nevertheless, Incoterms 2010 articulated few changes on the rules related to risk. Firstly, the term "ship's rail" was been replaced by the term "on board" in the rules of risk in FOB and CIF terms.<sup>81</sup> Secondly, Incoterms 2010 was updated to make it appropriate for commodity contracts by permitting the CIF seller to acquire the goods that are already been shipped. However, the rules on risk is now been convoluted by Incoterms 2010 as A5 CIF and A5 FOB articulates that the "seller bears the risk of damage or loss of goods until the goods have been delivered in accordance with A4..."<sup>82</sup> Therefore, the rules on passing of risk does not provide clarity as to when the risk will be conveyed from seller to buyer, whether on shipment or on appropriation of goods.<sup>83</sup>

### 3.11 Passing of Property

As far as English Law is concerned, it provides the detailed framework on passing of property. As property is considered to play a vital role in every contract.<sup>84</sup> Furthermore, English Law emphasize on the pertinent areas such as importance and consequences of passing of property under a contract.<sup>85</sup>

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<sup>81</sup> International Trade Blog, 'The Ship's Rail is Dead: Incoterms 2010' ( 2010)

<<http://www.shippingsolutions.com/blog/the-ships-rail-is-dead-incoterms-2010>> accessed 15 March 2015

<sup>82</sup> A5 CIF and A5 FOB Incoterms 2010

<sup>83</sup> D Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods'

<[http://www.jus.uio.no/pace/transfer\\_of\\_risk\\_contract\\_of\\_sale\\_involving\\_carriage\\_of\\_goods\\_comparative\\_study.dionysios\\_flambouras/doc.html](http://www.jus.uio.no/pace/transfer_of_risk_contract_of_sale_involving_carriage_of_goods_comparative_study.dionysios_flambouras/doc.html)> accessed 12 March 2015

<sup>84</sup> M Bridge (ed), *Benjamin's Sale of Goods* (9th edition, 2014), para 5-001

<sup>85</sup> Ibid

On the contrary, CISG missed the mark to govern the provisions related to passing of property.<sup>86</sup> In addition, Article 7 (2) of the CISG states that the private international law would be the applicable law in considering the matters related to passing of property.<sup>87</sup> The CISG does not comprised the provisions related to passing of property because it was not considered essential and there were other rules and provisions in CISG those were indirectly associated to passing of property.<sup>88</sup>

Similarly, Incoterms 2010 does not provide a framework to regulate the passing of property.<sup>89</sup>

#### **4.0 Evaluation of Frameworks**

It is essential to evaluate the perspective of these regimes in order to ascertain the optimal set of rules for governing the trade of commodities.

Commencing from English Law, It is well known that Sale of Goods Act 1979 is an indispensable bit of enactment in the UK and it is been acknowledged around the globe, as UK is preferred to be a place for resolving the international trade and commercial disputes.<sup>90</sup>

There are number of provisions in which English Law, CISG and Incoterms provides the similar position. However, there are some other instances in which English Law provides

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<sup>86</sup> Article 4 (b) of CISG

<sup>87</sup> M Wesiack, 'Should the CISG contain a rule on the passing of property?' ( 2004) <<http://www.cisg.law.pace.edu/cisg/biblio/wesiack.html>> accessed 15 March 2015

<sup>88</sup> Ibid

<sup>89</sup> J. Ramberg, *ICC Guide to Incoterms 2010*, 17

<sup>90</sup> 'CISG And Sale Of Goods Act' <<http://www.lawteacher.net/free-law-essays/commercial-law/cisg-and-sales-of-good-act-commercial-law-essay.php>> accessed 18 March 2015



detailed clarification, such as difference between warranties and conditions and dependence on damages as the primary remedy. Likewise, the terms of quality obligation, the condition and state of goods delivered is also considered, including their appearance, defects and durability. By the virtue of its history, English Law have the package of provisions dealing with law of sales, insurance, transactions, property, payments and carriage of goods. Therefore, when the traders opt for English Law as the applicable law to their contract, they are not only opting for English sales law but the entire scheme of English Law.<sup>91</sup> Whereas, when the traders opt for CISG to be as their applicable law, due to its constricted scope, they are required to pick any supplementary national law, to resolve certain issue which are not administered by it.<sup>92</sup>

In addition, one of the major drawback of CISG is that it is characteristically an incomplete body of legal provisions.<sup>93</sup> Whereas, English law is a comprehensive body of rules. The another arguable shortcoming of CISG is that it contains the abstract legal terminologies and vague principles, as there is no clear description and no clarity on process to identify the fundamental breach in Article 25.<sup>94</sup> Whereas, the ambiguities in English Law have been resolved to greater extent due to the development of legal rules over the years, as a result of continuous communication between the traders and judges over the disputes. Hence, when there is a usage of ambiguous terms in provision, the guidance to infer those terms is provided by the Act. For instance, The Sale of Goods Act provided the guidance under Section 14 (2) (A) and 14 (2) (B) to interpret the vague term of “Satisfactory Quality” used in Section 14 (2) of the Act.<sup>95</sup>

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<sup>91</sup> Qi Zhou, '*CISG and English Sales Law: An Unfair competition*' [2013] 669, 673

<sup>92</sup> Article 4 of CISG

<sup>93</sup> Ibid

<sup>94</sup> Qi Zhou, '*CISG and English Sales Law: An Unfair competition*' [2013] 669, 676

<sup>95</sup> Ibid

However, it is important to examine the advantages that CISG offers while dealing with sale of commodities. The foremost merit of CISG is that it fosters the uniform set of rules, which are supportive in governing the standard commercial contracts.<sup>96</sup> By fostering the uniform set of rules, CISG tends to achieve its objective of encouraging the international trade by solving the legal obstructions.<sup>97</sup> This objective of CISG is revealed in one of its article.<sup>98</sup>

When it comes to contractual obligations of quality and quantity of goods to be supplied by seller to buyer, CISG provides the similar framework to that of English Law. Nevertheless, CISG stands out from the provisions of English Law, while dealing with the remedies. The buyer can avoid the contract and further, he can request for replacement and refurbishment of goods in case of fundamental breach by seller.<sup>99</sup> Moreover, CISG encourages the performance of commodity contract by permitting the buyer to cure the breaches related to quantity of goods. Therefore, in case where seller delivered the less quantity of goods, the buyer is allowed to buy the required number of goods from the spot market and thereby claim the damages from the seller.<sup>100</sup>

As discussed earlier, the commodity markets are often prone to rise and fall of prices due to the widespread trade of commodities and other economic effects. Due to these price fluctuations, the buyer often tends to get considerably deprived of contractual expectation and thereby, seek for avoiding the contracts. In such circumstance, CISG provides an important provisions for balancing the interests of the buyer and seller. Consequently, reassuring the

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<sup>96</sup> J P McMahon, 'When the UN Convention on Sales Applies and Why It Matters to You and Your Clients', (1996) <<http://www.cisg.law.pace.edu/cisg/biblio/mcmah.html>> accessed 23 March 2015

<sup>97</sup> K Georgiadou, 'The Transformation of the UN Convention on Contracts for the International Sale of Goods (CISG) into the UK Legal Order: Two Legislative Models' [2014] 1, 61

<sup>98</sup> Article 7 of CISG

<sup>99</sup> Article 49 and Article 46 of CISG

<sup>100</sup> K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' ( ) <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 23 March 2015

performance of contract. In contrast, English law does not provide the favourable provisions for prospective commodity traders because of its extensive provisions on right to terminate the contract available with the parties.<sup>101</sup>

Before proceeding to the conclusion, it is necessary to evaluate the suitability of Incoterms with respect to sale of commodities. The purpose of creating the Incoterms was to provide the standard definition and eliminating the confusions related to the usage to traditional trade abbreviation. The earlier version of Incoterms i.e., Incoterms 2000 also provided the universally accepted interpretation to standard trade terms. Therefore, helped in minimizing the misunderstanding and chances of disputes between the traders. However, it fails to clarify the obligations related to insurance and string sales. Nevertheless, these matters were addressed by newly updated version of Incoterms i.e., Incoterms 2010. This new version facilitated the usage of electronic communication between the parties and facilitating the string sales by amending the trade terms such as CIP, CPT, FAS, FCA, CFR, FOB and CIF. Thereby, allowing the seller to procure the carriage contract.<sup>102</sup> Lastly, as it was mentioned earlier in this paper that, Incoterms 2010 does not provide clarity on certain issues such as related to the buyer's remedies on occasion of breach of contract by seller and other obligations related to quality and fitness.<sup>103</sup>

Regardless of that fact, Incoterms 2010 can be used to fill up the gaps left by CISG by providing the provisions on delivery, risk and costs. Therefore, the usage of Incoterms 2010 with CISG may provide the feasible solution to commodity traders by providing the uniformity

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<sup>101</sup> Ibid

<sup>102</sup> J. Anthony Hardenburgh, 'Understanding INCOTERMS 2010' ( 2012)

<<http://www.inboundlogistics.com/cms/article/understanding-incoterms-2010/>> accessed 24 March 2015

<sup>103</sup> World Trade Press, 'Guide to Incoterms 2010- A comprehensive guide to the 11 INCOTERMS 2010' 1, 3

to trade terms and prevailing sales law.<sup>104</sup> Even though, there are still some matters which cannot be resolved by this combination. Thus these matters have to be addressed by applicable national law.<sup>105</sup>

## **5.0 Conclusion**

This paper has scrutinised the standpoint of different framework on the sale of commodities with a vision to identify the best framework amongst them. On careful evaluation, it has been discovered that the adaptation of each of these frameworks have their own merits and demerits. To begin with, Incoterms provide the well designed and comprehensive mechanism. Moreover, their usage is effective and efficient in International trade because of its universally accepted terminologies. Conversely, they failed to address some of the key issues of commercial trades. As far as CISG is concerned, the foremost advantage is that it provides set of neutral rules, thereby it is unbiased towards the parties. In addition, it offers the flexibility to the traders, which is considered as an essential element of commodity trading and applicability of CISG is time and cost effective.

Nonetheless, it's been contended that CISG have few competitive disadvantages when compared with English Law. Firstly, the development of English law took place much earlier than CISG and Incoterms.<sup>106</sup> As a result, English law is able to establish the dominant position in International trade of commodities. Secondly, English law has been categorised as comprehensive body of law.<sup>107</sup> Whereas, there are several gaps in the provisions of CISG,

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<sup>104</sup> K Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' ( ) <<http://www.cisg.law.pace.edu/cisg/biblio/winsor.html>> accessed 24 March 2015.

<sup>105</sup> Douglas W Bateson and Dionysios Flambouras , 'International trade law and the Greek shipping sector' ( 2003) <<http://www.cisg.law.pace.edu/cisg/biblio/flambouras2.html>> accessed 24 March 2015

<sup>106</sup> Qi Zhou, '*CISG and English Sales Law: An Unfair competition*' [2013] 680

<sup>107</sup> Ibid

which are required to be filled up by applicable national laws.<sup>108</sup> Thirdly, English law provides more certainty because of its less ambiguous provisions than CISG, besides, the legal uncertainties in English Law are often solved through the interpretation of judges on various case laws.<sup>109</sup> Therefore, there is a continuous development of English Law with the change in trade practices, which makes it adaptable to these changes. In contrast, it is not easy to resolve the ambiguities of CISG, as it is an International convention and it is applied with different national laws, thus, there is no certain foundation which is obliged to construe the provisions of CISG.<sup>110</sup>

Lastly, the preeminent trading associations such as GAFTA and FOSFA, and leading oil trading companies such as Shell and BP have expressly opted out of CISG provisions and apply English Law as their applicable law for governing their contracts.<sup>111</sup> This is arguably the notable advantage of English Law, as these organizations hold the dominating position in commodity trading around the globe.

To sum up, it can be said that the English Law provides the superlative framework to govern the International sale of commodities because of its comprehensiveness and scope of further improvements. However, the contractual flexibility that CISG offers makes it viable for the traders dealing in commodity market to adopt it. As a matter of fact, 83 states around the globe have ratified CISG till date.<sup>112</sup> But, the majority of commodity traders had opted out from it. On perusing various authorities on this standpoint, the recommendations for CISG to be more effective in commodity trading throughout the world could be, (A) it should contemplate

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<sup>108</sup> Ibid

<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Michael G. Bridge, 'Uniformity and Diversity in the Law of International Sale' <<http://www.cisg.law.pace.edu/cisg/biblio/bridge.html>> accessed 27 March 2015

<sup>112</sup> 'CISG: Table of Contracting States' (2014) <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 28 March 2015

the interest of commodity traders, by making it more suitable for commodity trading, (B) it should be updated and developed regularly, to keep pace with the developments in International trade, (C) there should be a formation of International body to provide a standardized clarifications of CISG's rules, with the purpose to elude the conflicting interpretation by the different national courts.<sup>113</sup> Accordingly, on adaptation of these recommendations, CISG can able to provide a more favourable framework for trading of commodities. Otherwise, in present situation, it can be argued that the English Law is having a dominant status in International sale of commodities.

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