WHY GHANA SHOULD IMPLEMENT CERTAIN INTERNATIONAL LEGAL INSTRUMENTS RELATING TO INTERNATIONAL SALE OF GOODS TRANSACTIONS

by

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Abstract

This article argues that Ghana should implement certain international legal instruments (ILIs) relating to international sale of goods transactions. It submits that the recommended instruments, if implemented, would harmonise Ghana's laws with important aspects of laws that govern international sale of goods transactions; improve Ghana's legal environment for such transactions; afford entities located in Ghana better facilitation and protection in their trade with foreign counterparts; and improve how Ghana is perceived by the international trading community. The ILIs recommended are the CISG, Rotterdam Rules, and amendments to the Ghanaian Electronic Transactions Act to align with the UNCITRAL Model on Electronic Commerce and Convention on the Use of Electronic Commerce in International Contracts. The recommended actions hold advantages for Ghana, have no material disadvantages, and are easy and inexpensive to implement.

I. INTRODUCTION

This article argues that Ghana should implement[1] certain international legal instruments (ILIs) relating to international sale of goods transactions. The article submits that the recommended instruments, if adopted, would harmonise Ghana's laws with aspects of laws that govern international sale of goods globally, and improve Ghana's legal environment for international sale transactions. It would also afford entities located in Ghana better facilitation and protection in their trade with foreign counterparts, enhance their competitiveness in international sale transactions, and improve how Ghana is perceived by the international trading community.[2] The recommended actions hold advantages, have no material disadvantages, and are easy and inexpensive to implement.

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[1] For the sake of convenience, the term 'implement' is used broadly in this article to cover otherwise technically different terms such as 'ratification', 'accession', 'succession', 'enactment', and 'approval'. Roy Goode uses the term 'implementation' for "the ratification of international conventions and the adoption, wholly or in part, of model laws." (*See* Roy Goode, "Insularity of Leadership? The Role of The United Kingdom in The Harmonisation of Commercial Law" (2001) 50 *International and Comparative Law Quarterly* 751, at 752). The usage of 'implement' in this article is similar.

[2] While the discussions focus on the beneficial impact of the relevant International Instruments on Ghana, the thrust of the argument may be applicable to other African countries in similar situations, albeit with differences.

In an era of increasing globalisation of the world's economies, countries and businesses operating within them are constantly competing for resources, investments, markets and profits. Countries have no choice but to take part in international trade,[3] long recognised as an instrument for economic development.[4] Further, laws and policies to strengthen a country's international sale and purchase environment and competitiveness are crucial.[5] It is therefore imperative that Ghana implements laws that enhance its competitive environment so as to afford entities located within its economy better facilitation and protection in their trade with foreign counterparts.[6] This paper discusses how Ghana's legal regime for the international sale (and purchase) of goods transactions can be improved by the implementation of ILIs, and why that should be done.

Typically, an international sale of goods transaction would involve a number of interconnecting, but autonomous, contracts. There is usually a contract (or contracts) of sale of goods (often referred to as the underlying contract), a contract (or contracts) for the transportation of the goods from the exporting to the importing country (contract for the international carriage of goods), and contracts or arrangements for payment.[7] The medium of communication (or transacting) by the parties may vary from traditional post of documents, fax and/or telephone or, in more recent times, electronic contracting (e-commerce), or a combination of the various media.[8]

The interconnecting contracts constituting an international sale transaction are the subject of widely adopted ILIs in the forms of conventions, model laws, and legal guides. Some of the ILIs have been very successful, some have not. This article discusses some of these ILIs,

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[3] Ivohasina F. Razafimahefa and Shigeyuki Hamori, *International Competitiveness in Africa* (2007, Springer) 1.
[4] See, e.g., Gbenga Bamodu, "Transnational Law, Unification and Harmonisation of International Commercial Law in Africa" (1994) 38(2) *Journal of African Law* 125, 128; *UN General Assembly Resolution 1707 (XVI)*, 19 December 1961.
[5] Razafimahefa and Hamori, above note 3, at 1.
[6] Admittedly, the laws, policies, conditions and factors affecting a country's international competitiveness in its international trade are vast, the details of which are beyond the scope of this paper. The factors may include resources, productivity, physical and ICT infrastructure, business start-up costs, licensing regimes, labour market conditions, property rights and registration, access to credit, investor protection, taxes, enforcement of contracts, closing of business, and cross border trading (*See* The World Bank, *Doing Business in 2006: Creating Jobs,* (2005, The World Bank) 6, available at http://web.worldbank.org (last accessed 30 April 2010); See also The World Bank, *Doing Business in 2005: Removing Obstacles to Growth* (2004, The World Bank), available at http://web.worldbank.org (last accessed 30 April 2010)).
[7] *See*, Emmanuel Laryea, *Paperless Trade: Opportunities, Challenges and Solutions* (2002, Kluwer Law International), 1-2 (hereafter, "Laryea, *Paperless Trade"*)
[8] Ibid, 1-2.

particularly a few successful ones, arguing that there are advantages, and no material disadvantages, for Ghana to implement them. The article discusses ILIs relating to: (1) the underlying contract of sale; (2) international carriage of goods by sea[9]; and (3) e-commerce.

For the underlying contract, the discussion focuses on the *UN Convention on International Sale of Goods 1980* (CISG)[10]. For international carriage, the *International Convention for the Unification Certain Rules Relating to Bills of Lading 1924* (Hague Rules), the *Hague Rules as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 and/or SDR protocol* (Hague-Visby Rules), the *United Nations Convention on the Carriage of Goods by Sea, 1978* (Hamburg Rules)[11], and the *United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008* (Rotterdam Rules)[12] are discussed. Instruments discussed for electronic contracting are the *UNCITRAL Model Law on E-commerce* 1996 (MLEC)[13], the *UNCITRAL Model Law on Electronic Signatures 2001* (MLES)[14], and the *United Nations Convention on the Use of Electronic Communications in International Contracts 2005* (CUECIC)[15].

This article is divided into six parts, including this introductory part. Part II briefly outlines the rationale for ILIs in the area of international commercial law, noting there are both supporters and detractors. Part III discusses ILIs relating to the underlying contract of sale, and examines Ghana's position regarding the relevant ILIs. It finds that Ghana has not

[9] International carriage of goods could be by road, rail, air or sea or a combination of these modes. While there are ILIs on all these modes of carriage, this paper confines its discussion to sea-carriage, for two main reasons. First, most of the disadvantages identified in respect of the Ghanaian sea-carriage regime are not present with the other modes of carriage. Second, to the extent that any disadvantages in the non sea-carriage instruments may exist, the arguments in respect of sea-carriage may be a helpful template for their identification and rectification where appropriate.

[10] *See*, UNCITRAL, *United Nations Convention on International Sale of Goods 1980* (CISG), available at http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last accessed 30 April 2010)

[11] *See*, UNCTRAL, *United Nations Convention on the Carriage of Goods by Sea 1978* (Hamburg Rules) available at <http://www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf> (last accessed 30 April 2010)

[12] *See*, UNCITRAL, *United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008* (Rotterdam Rules), available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf (last accessed 30 April 2010). The Rotterdam Rules, adopted by the UN General Assembly on 11 December 2008, and opened for signature at a signing ceremony in Rotterdam, in the Netherland, on 23 September 2009, is aimed at replacing the Hamburg Rules, Hague-Visby and Hague Rules.

[13] *See*, UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* 1996 (MLEC) (1999, United Nations) available at <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf> (last accessed 30 April 2010).

[14] *See,* UNCITRAL, *UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001* (MLES), available at http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf (last accessed 30 April 2010).

[15] *See,* UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (*United Nations, 2007), available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (last accessed 30 April 2010)

implemented any ILIs on international sale, and recommends that Ghana should implement the CISG. Part IV discusses Ghana's position relating to ILIs on international Carriage by Sea. It observes that while Ghana has implemented an ILI in this area, it has adopted the Hague Rules, which is the least favourable of the available alternatives to Ghana. It argues that Ghana should have implemented the Hamburg Rules two decades ago. It goes on to suggest that Ghana has two choices: implement the Hamburg Rules now while monitoring progress on ratification of the new Rotterdam Rules or simply ratify the Rotterdam Rules now in anticipation that it would become operational in the near future. Part V discusses the position of Ghana regarding ILIs on e-commerce in trade. It finds that Ghana has sought to implement a mixture of instruments in this area, but has excluded the application of the relevant statute to important aspects of international trade transacting. It suggests that Ghana should rectify that anomaly. Part VI concludes the article with a summary of the arguments and submissions.

II. REASONS FOR INTERNATIONAL LEGAL INSTRUMENTS

Harmonisation (and/or unification)[16] of laws governing international commercial transactions has for a long time been considered to be important, and efforts made to achieve that goal. Institutions exist that aim to achieve the harmonisation uniformity of private international law.[17] Some of the main reasons given for the pursuit of harmonisation and unification are that they: contribute to the removal of cross-border legal barriers; increase stability and predictability of processes and results; lead to the avoidance of conflict of laws and reduction

[16] Conceptually, 'harmonisation' and 'unification' are to be differentiated. Harmonisation may be considered as the process of modifying domestic laws to enhance consistency and predictability in cross-border commercial transactions. 'Unification', on the other hand, is the adoption by States of a common legal standard governing particular aspect of domestic and international trade and commerce. See Rhys Bollen, "Harmonisation of International Payment Law: A Survey of the UNCITRAL Model Law on Credit Transfers" (2008) 23(2) *Journal of International Banking Law and Regulation* 44; See also UNCITRAL, "What Does UNCITRAL Mean by the 'Harmonisation' and 'Unification" of the Law of International Trade?", available at http://www.uncitral.org/uncitral/en/about/origin_faq.html (last accessed 30 April 2010), where, by way of example, UNCITRAL states: "A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level." However, the two terms are often used interchangeably. In this article the technical distinction in the two terms is ignored, as the article is discussing both conventions and model laws. The terms are thus used interchangeably. In any case, the idea of 'uniformity' in the context of international commercial law may itself be said to be 'functional' only, as opposed to 'absolute' or 'strict uniformity'; and 'functional uniformity' is "closer to the concept of 'harmonisation' in that the goal is to lessen the legal impediments to international trade." See, Peter J. Mazzacano, "Harmonizing Values, Not Laws: The CISG and the Benefits of a Non-Realist Perspective" (2008) *Nordic Journal of Commercial Law* 1, at 2, particularly text around footnote 10.

[17] For example: UNCITRAL; the International Institute for the Unification of Private Law (UNIDROIT); The Comité Maritime International (CMI); and the International Maritime Organisation (IMO), among others.

or simplification of litigation; reduce transaction costs and enhance efficiency; and promote the development of international trade.[18] Not all in the legal fraternity (scholars, practitioners and judges) agree with the much touted virtues of harmonisation of international commercial law. There are those who argue that harmonisation is neither attainable nor beneficial.[19] However, there are many who hold the view, and to which this author adheres, that harmonisation is beneficial and should be supported.[20]

Several legal instruments aimed at harmonising various aspects of international business transactions have been promulgated. These cover areas such as agency, contracts for the international sale of goods, limitation of action, conflict of laws, international carriage of goods (by sea, air, and land), international payment and credit transfer, dispute resolution, and e-commerce. Some have been successful (in terms of their international acceptability), while some have failed. It is not the aim of this paper to consider all such instruments, nor is it practicable to do so. This paper considers instruments on international sale of goods, international carriage of goods by sea, and electronic commerce. Even so, it is to be noted that most of the instruments under consideration have spun volumes of scholarly writings analysing either the entire instrument or some particular provisions of the instrument from a variety of perspectives. It is not intended in this article to engage in a similar exercise. This article simply observes whether or not an instrument under consideration has received acceptance internationally and have considerably wide application in international commercial transactions. The focus is on examining Ghana's position regarding the selected instruments, assessing whether Ghana should implement them and why. That is what the article now turns to.

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[18] *See*, e.g., John Linarelli, "The Economics of Uniform Laws and Uniform Law Making" (2002) 48(4) *Wayne Law Review* 1387-1447; Sieg Eiselen, "Adoption of the Vienna Convention for the International Sale of Goods (The CISG) in South Africa" (1999) 116 *South African L.J* 323, 325-330; Goode, above note 1, 752-754.

[19] For examples of arguments against harmonisation, see Paul B. Stephan, "The Futility of Unification and Harmonisation in International Commercial Law" (1999) 39 *Virginia Journal of International Law* 743-798; M. Boodman, "The Myth of Harmonisation of Laws" (1991) 39 *American Journal of Comparative Law* 699-724; and J. S. Hobhouse, "International Conventions and Commercial Law: The Pursuit of Uniformity" (1996) 106 *Law Quarterly Review* 530.

[20] For examples of views favouring harmonisation, see Salvatore Mancuso, "Trends on the Harmonisation of Contract Law in Africa" (2007) 13 *Annual Survey of International & Comparative Law* 157; Paul Myburgh, "Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?" (2000) 31 *Victorian University of Wellington Law Review* 355-383; Mazzacano, above note 16; Linarelli, above at note 18; Eiselen, above note 18; Goode, above note 1; Ernst Rabel, "Draft of an International Law of Sales" (1938) 5 *University of Chicago Law Review* 543. This article does not get into, or add to, the debate on whether or not harmonisation of international commercial law is beneficial. It acknowledges that there are ILIs relating to certain aspects of international commerce that are widely adopted, and argues that there are advantages in Ghana implementing those recommended for implementation.

III INSTRUMENTS RELATING TO THE (UNDERLYING) CONTRACT FOR THE INTERNATIONAL SALE OF GOODS

While there have been a few attempts at formulating ILIs on international sale of goods, resulting in a few such instruments, the CISG has been the most successful and dominant. Thus, in this article, the focus is on the CISG.

A. The CISG

As noted above, the most popular ILI in this area is the CISG. The object of the *CISG* was to provide a neutral, uniform, harmonised sales law around the world to reduce the uncertainty and costs of transacting across multiple jurisdictions.[21] It was aimed at replacing "the multitude of anachronistic, idiosyncratic localised sales laws around the world with one, relatively simple, pragmatic set of uniform laws designed specifically for international transactions."[22]

Efforts culminating in this instrument go back to the 1920s.[23] UNIDROIT drafted uniform laws on sales in the 1930s, but its efforts were interrupted by the Great Depression and World War II.[24] A diplomatic conference in 1964 considered UNIDROIT's work and adopted two instruments, the *Convention Relating to a Uniform Law on the International Sale of Goods (ULIS)* and the *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)*.[25] However, these instruments did not receive wide acceptance, partly due to a perception that they reflected European legal concepts that were

[21] Lisa Spagnolo, "The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers" (2009) 10 *Melbourne Journal of International Law* 141, 145-146 (hereafter, Spagnolo, "The Last Outpost").
[22] Ibid.
[23] Stephan, above note 19, 773; Eiselen, above note 18; John A Spanogle, "The Arrival of International Private Law" (1991) *George Washington Journal of International law and Economics* 477; Muna Ndulo, "The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis" (1989) 38 *International and Comparative LQ* 1; P. Winship, "Private International Law and the UN Sales Convention" (1988) 21 *Cornell International LJ* 489; John Honnold, "The United Nations Commission on International Trade: Mission and Methods" (1979) 27 *American Journal of Comparative Law* 201.
[24] Stephan, above note 19; Eiselen, above note 18.
[25] Ndulo, above note 23. ULIS and ULF were promulgated on 1 July 1964.

not recognised elsewhere.[26] Only nine states contracted to the instruments.[27] UNCITRAL took over the task, and its efforts resulted in the promulgation of the CISG in 1980.[28]

The CISG essentially merged civil and common law precepts in contract law through acceptable common denominators.[29] In doing so, it succeeded where ULIS and ULF failed. The CISG entered into force on 1 January 1988, after the required number of ten contracting states ratified it. As at 30 April 2010, seventy-four States had implemented the CISG.[30] The list of contracting states includes countries from every geographical region, every stage of economic development, and every major legal, social and economic system.

The CISG is divided into four main parts. Part one deals with the scope of application of the Convention and some general provisions. Part two contain rules governing the formation of international contracts of sale. Part three deals with the substantive rights and obligations of parties arising from contracts under the convention, and Part four contains final clauses concerning matters of enforcement, and reservations and declarations permissible under the instrument.[31]

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[26] Clayton P. Gillette and Robert E. Scott, "The Political Economy of International Sales Law" (2005) 25 *International Review of Law and Economics* 446, at 449; Michael P. Van Alstine, "Dynamic Treaty Interpretation" (1998) 146 *University of Pennsylvania Law Review* 687, at 725-726; Gyula Eörsi, "A Propos: The 1980 Vienna Convention on Contracts for the International Sale of Goods" (1983) 31 *American Journal of Comparative Law* 333, at 335.

[27] Namely Belgium, Gambia, Germany, Israel, Italy, Luxemburg, San Marino, The Netherlands, and the United Kingdom. *See* Filip De Ly, "Sources of International Sales Law: An Eclectic Model" (2005-06) 25(1) *Journal of Law and Commerce* 1, at 2. (Also, note that the manner of implementation in the UK meant that the instruments were easily ignored and basically remained on paper only.)

[28] John O. Honnold, *United Nations Convention on Contracts for the International Sale of Goods (1980)* (2nd edn, 1991) Kluwer Law Publishers, 4-5.

[29] Michael Bridge, *The International Sale of Goods: Law and Practice* (1999, OUP) 41; Harold S. Burman, "Building on the CISG: International Commercial Law Developments and Trends for the 2000's" (1998) 17 *Journal of Law and Commerce* 355; Luke Nottage, "Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan" (2005) 36 *Victoria University of Wellington Law Review* 815.

[30] See UNCITRAL's web page at http://www.uncitral.org for a full list of contracting states and details of their accession—when they acceded, date of entry into force, and any declaration or reservations that may have been made. The list is updated each time a new state accedes to the instrument. A sample list of countries that have implemented the CISG are USA, Canada, Mexico, most EU member countries (apart from the UK), Syria, China, Japan, Singapore, South Korea, Australia, New Zealand, Argentina, Chile, Cuba, and eight African countries—Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia. Japan and the UK were often cited as the two major economic powers outside of the CISG (see, for example, Luke Nottage, Ibid). With Japan's accession, the UK becomes the remaining most notable exception.

[31] For an analysis of the text of the CISG, see, for example, John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) As Uniform Sales Law* (2007, CUP); Peter Schlechtriem and Ingeborg Schwenzer (ed), *Commentary on the UN convention on the international Sale of Goods (CISG)* (2nd edn, 2005, OUP).

Most in the international business community consider the CISG to be one of the most successful conventions in international commercial law, due to the extent to which it has been adopted internationally, the body of jurisprudence it has generated, and its contribution to trade both in reducing uncertainty and transaction cost.[32] The CISG has been embraced by countries that constitute the great majority of the world's population, trade and economy. For instance, the top five world economies (USA, Japan, China, Germany, and France)[33] are all parties to the CISG.[34] The major economies of the world that account for a considerably large proportion of international trade and global economic output have implemented the CISG.[35] The CISG has been widely applied in international sale transactions in the twenty years since its entry into force, and has generated a body of case law and abundant scholarly writing.[36]

Implementation of the CISG affords parties to international sale transactions identifiable advantages.[37] First, the CISG gives a party the ability to standardise its preferred position on choice of law.[38] Second, as a neutral choice, the CISG might be more readily agreed upon by

[32] As noted earlier, the CISG has received the support and application of countries across every region on the globe, including major economic powers. The top five world economies (US, Japan, China, Germany, and France; see http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf which together accounts for great majority of international trade are all parties to the CISG.

[33] *See*, IMF, *World Economic Outlook Database* (October 2009), available at http://imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx (last accessed 30 April 2010); The World Bank, *The World Bank: World Development Indicators Database: Gross domestic product (2008),* available at http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf (last accessed 30 April 2010).

[34] See list of contracting States at, UNCITRAL, *Status: UN Convention on International Sale of Goods 1980 (CISG)* available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 30 April 2010).

[35] The most notable major world economies that have not implemented the CISG are the UK and Brazil. For discussion on the UK position, and arguments that the UK could benefit from implementing the CISG, and therefore should ratify, see, as examples, Linarelli, above note 18, at 1426-1442; Goode, above note 1; Alison E. Williams, "Forecasting The Potential Impact of the Vienna Sales Convention on International Sales Law In The United Kingdom" in Pace International Law Review (ed), *Review of the Convention on Contracts for International Sale of Goods (CISG)* (2000-2001, Kulwer Law International), 9-57; Anette Gärtner, "Britain and the CISG: The Case for Ratification—A Comparative Analysis with Special Reference to German Law", in Pace International Law Review (ed), *Review of the Convention on Contracts for International Sale of Goods (CISG)* (2000-2001, Kulwer Law International), 59-81; Robert Lee "The UN Convention on Contracts for International Sale of Goods: OK for the UK" [1993] *Journal of Business Law* 131. For a scholarly work recommending that Brazil implements the CISG, see Eduardo Grebler, "The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?" (2005-2006) 25 *Journal of Law & Commerce* 467.

[36] *See*, UNCITRAL, "Case Law on UNCITRAL Texts (CLOUT): UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods, available at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last accessed 30 April 2010). The Institute of International Commercial Law at Pace University maintains a current database on the CISG, which has a list of over 1800 decisions and 5000 case annotations available at http://www.cisg.law.pace.edu/cisg/text/case-annotations.html, (last accessed 30 April 2010). The site also lists a bibliography of over 1000 scholarly writing on the CISG (see http://www.cisg.law.pace.edu/cisg/biblio.bib2.html (last accessed 30 April 2010).

[37] Spagnolo, "The Last Outpost", above note 21, 149-159.

[38] While standardisation of a client's suite of contracts can presently occur with other choices of law, in an increasingly CISG trading area, recommending a preference for the CISG whenever appropriate may ramp up

counterparties as a 'level playing field', giving neither side a home-ground advantage, which reduces negotiation costs and delays.[39] Third, as neither side need familiarise themselves with foreign domestic sales and ancillary laws, conclusion of the contract may, at least in theory, be quicker, cheaper and, over time, yield further benefits in reduced compliance costs.[40] Fourth, the CISG may reduce, for parties and their lawyers, the risk of a forum seized of a dispute arising from the contract misapplying a foreign law and/or higher costs associated with proving a foreign law.[41] Fifth, the simplicity and accessibility of the CISG (as the text is not only available in six official languages, but also simple to comprehend) holds advantage for all users.[42] Materials on the CISG are easily accessible around the world on internet sites dedicated to the dissemination of CISG cases and scholarship. This means lawyers, clients, courts and tribunals around the world are effectively 'working from the same page', compared to the problems faced by anyone wishing to access the intricacies of specific points of any foreign law.[43] Sixth, the CISG is designed specifically for international sales as opposed to most domestic sales laws that are internally focused, and may be ill-suited to international sales with their own special circumstances of distance, delays and interaction between different legal cultures.[44] Seventh, the CISG is increasingly viewed by the international business community as a key choice of law, which is neutral and can may be expected to be uniformly applied anywhere in the world.[45] It must be noted, however, that, as

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the proportion of contracts under a single law for each client, and in turn maximise the benefits of reduced uncertainty in performance obligations and compliance costs. This advantage will be further heightened for multinational clients. *See* Spagnolo, "The Last Outpost", above note 21, 149.

[39] For instance, Spagnolo alludes to a survey which found that 26 per cent of Swiss lawyers believed the *CISG* makes negotiations easier because it was more readily agreeable than national law. Another survey stated CISG reduced costs by avoiding interminable discussions about legal details. *See* Spagnolo, "The Last Outpost", above note 21, 149; Corinne Widmer and Pascal Hachem, 'Switzerland' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (2008) 281, 281-286.

[40] Spagnolo, "The Last Outpost", above note 21, 149.

[41] Spagnolo, "The Last Outpost", above note 21, 150.

[42] Official texts of the *CISG* are in Arabic, Chinese, English, French, Russian and Spanish. See UNCITRAL, *1980 — United Nations Conventions on Contracts for the International Sale of Goods* <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> (last accessed 30 April 2010). For further (non-official) translations, see Pace Law School, *CISG Database: Texts of the CISG* <http://cisgw3.law.pace.edu/cisg/text/text.html> (last accessed 30 April 2010).

[43] Spagnolo, "The Last Outpost", above note 21, 150-151.

[44] Spagnolo, "The Last Outpost", above note 21, 151. *See* also, Hans Corell, 'The Business Lawyer and International Law: Reflections on the Lawyers Role with respect to Teaching International Law, the Global Compact and International Trade Law' (Speech delivered at the Section of Business Law of the American Bar Association, 2004 Midwinter Council Meeting, Santa Barbara, US, 17 January 2004) 9, available at <http://www.un.org/law/counsel/english/address_17_01_04.pdf> (last accessed 30 April 2010) warning that outdated laws 'not based on harmonized or transparent standards … increase commercial risks and transaction costs and may seriously hamper the activities of commercial entities'; and Franco Ferrari, 'Applicability and Applications of the Vienna Sales Convention (CISG)' (1998) 4 *International Legal Forum: English Language Edition* 137, at 139, where the author described national laws in this area as 'the merchants' worst enemy'.

[45] Spagnolo, "The Last Outpost", above note 21, 151. For further discussion of the growing acceptance of the *CISG*, noting the benefits of the CISG as a neutral law in negotiating choice of law, see Alison E Butler, 'The

there is no *stare decisis* in relation to the CISG, courts in different countries may adopt different interpretations despite the injunction in Art 7 to adopt interpretations consistent with the purpose of the CISG)

Inevitably, the CISG is not perfect, and does not cover all conceivable issues that may flow from international sale of goods contracts. Like all international treaties, there were compromises made to ensure its passage, which left out certain issues and some provisions seemingly ambiguous. It has been criticised for these shortcomings.[46] Examples are the issue of set-offs, which is not directly covered by the CISG, and the notion of 'good faith' in the CISG.[47] Another key omission, from a common law perspective, is the issue of transfer of property.

However, such criticisms, some more academic than practical, do not mean the CISG is not a good set of rules and principles for international sales. After all, no sale of goods law in any domestic jurisdiction is flawless.[48] A great deal of supporting material is now available. There are now numerous CISG cases to draw upon, and plentiful scholarship. The bare bones of the CISG are now fleshed out by much in the way of guidance, although naturally there are still some areas of disagreement.[49] Further, the CISG allows parties to modify most of its rules.[50] Parties concerned about a certain issue can agree on the solution. The CISG also has an internal interpretive method that guides resolution of ambiguities within it. For matters

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International Contract: Knowing When, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods' (2002) 76 *Florida Bar Journal* 24, 26.

[46] Gillette and Scott, above note 26, 446-486; Stephan above note 19, at 774-776; Jacob S Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 *New Zealand Business Law Quarterly* 336, 345–6; Patrick Thieffry, 'Sale of Goods Between French and US Merchants: Choice of Law Considerations under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 22 *International Lawyer* 1017, 1033; Gilles Cuniberti, "Is the CISG Benefiting Anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 1511, 1515–19.

[47] As there is no express provision on set-off in the CISG, most conclude that it is an issue outside the Convention. *See*, e.g., Peter Schlechtriem, 'Sphere of Application and General Provisions: Sphere of Application: Arts 1–6' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed, 2005) 15, 72; Peter Schlechtriem, 'Sphere of Application and General Provisions: General Provisions: Art 7' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed, 2005) 93, 103; Franco Ferrari, 'Interpretation of the Convention and Gap-Filling: Article 7' in Franco Ferrari, Harry M Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 138, 167–8.

[48] For an examination of the main critique of the CISG, and responses to them, see Mazzacano, above note 16.

[49] Spagnolo, "The Last Outpost", above note 21, 152-154; Butler, above note 45, 26 (arguing that the increasing number of decided cases around the world have reduced uncertainty).

[50] CISG, art 6.

falling outside the CISG, the usual conflict rules determine the law applicable to the issue.[51] Moreover, the content of the CISG is no worse. It is in fact often very much better suited to international sales than an outmoded sales law oriented toward domestic trade.[52] In any case, the criticisms of the CISG have not dissuaded its increasing implementation by States and its application to international sale transactions.

B. Ghana and the CISG

Considering the breadth of acceptance of the CISG, and the perceived benefits of its implementation, it is the view of this author that Ghana's implementation of the convention would be beneficial for the country's economy. Ghana should remain outside of the Convention only if its implementation would result in greater disadvantage than benefit to businesses operating within the country, and to the economy in general. Where there are conceivable benefits to Ghana, and no outweighing disadvantages, it makes sense for Ghana to implement the convention.

1. Possible Disadvantages to Ghana's Implementation of the CISG

There appears to be no material disadvantages to the Ghanaian if it implements the CISG. A conceivable disadvantage to Ghana's implementation may be that argued by Akaddaf[53]. Akaddaf argues that the provisions of the CISG dealing with examination of goods (article 38), timely notification of lack of conformity (article 39) and sellers knowledge of non-conformity (article 40) may work to the disadvantage of parties in developing countries who purchase advanced and sophisticated equipment from developed countries.[54] She argues that a developing country purchaser of sophisticated machinery may lack the technological knowledge to be able to comprehensively examine the machinery, and to detect all faults

[51] On the preliminary need to determine whether an issue falls within or outside the *CISG*, see Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG' (2007) 21 *Temple International and Comparative Law Journal* 261, 308–309.

[52] Spagnolo, "The Last Outpost", above note 21, 153. See also, Jacob S Ziegel, 'Commentary on Party Autonomy and Statutory Regulation: Sale of Goods' (1993) 6 *Journal of Contract Law* 123, 127-128 (where the author argues that the CISG is better than British sale of goods models in some respects while being less preferable in others).

[53] Fatima Akaddaf, "Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?" (2001) 13 *Pace International Law Review* 1.

[54] Ibid, at 11-12. By definition, Ghana is a developing country. Thus Akaddaf's arguments are applicable to Ghana to the extent of their validity.

within the time allowed by the convention, which is two years.[55] Article 39(2) imposes a maximum period of two years from the date of delivery within which a purchaser must notify the seller of lack of conformity. The buyer loses the right to rely on a lack of conformity of the goods if it does not give the seller notice of default within two years. Akaddaf argues that it "may take more than two years before a [latent] defect in sophisticated machinery can be discovered,"[56] as in developing countries, inspecting and discovering defects in sophisticated goods generally involves the difficult and often expensive tasks for qualified experts, sometimes from industrialised countries.[57]

Indeed, this argument is not new. It was canvassed by delegates of developing countries at the drafting stages of the provisions of the CISG.[58] There was spirited discussion over the articles at the Diplomatic Conference, since many developing countries considered that the two-year period was too short.[59] "The Ghanaian delegation to the Diplomatic Conference deprecated the drastic consequence of failure to give the required notice under article 39(1), which is loss of the right to rely on the non-conformity."[60] However, it was noted that the two-year period was much longer than pertains in many (domestic) jurisdictions.[61] To that extent, the period adopted was thought to be a reasonable compromise. A further compromise was procured by developing countries to insert article 44, which allows the buyer to reduce the price in accordance with article 50 or claim damages, except for loss of profit, if the buyer has reasonable excuse for its failure to give the required notice.[62]

It might also be contended, in addition to the above compromises, that the likelihood of the above disadvantage materialising is either small or steps can be taken to eliminate it altogether. The likelihood of the disadvantage materialising is small because, in the first place, a Ghana located purchaser of sophisticated equipment is likely to have reasonable sophistication or be able to afford sophisticated examiners to detect defects within two years of the equipment being delivered. This is because sophisticated equipment is likely to be

[55] *See* CISG, Article 39(2).
[56] Akaddaf, above note 53, 13.
[57] Akaddaf, above note 53, 13.
[58] Samuel K. Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selected Commentary" (1979) 11 *Review of Ghana Law* 50, 66 (hereafter, Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980")
[59] Date-Bah, ibid, 66.
[60] Date-Bah, ibid, 66.
[61] Date-Bah, ibid, 66.
[62] Date-Bah, ibid, 66. See also the text of article 44 of the CISG.

acquired and used in reasonably sophisticated environments. Second, if the equipment is deployed, it is likely that latent defects would become apparent within two years.

The disadvantage may be eliminated by two means. First, the two year time-limit prescribed in article 39(2) does not apply where it "is inconsistent with a contractual period of guarantee."[63] Thus purchasers of complex equipment may be able to obtain extended periods of suppliers guarantee beyond the two years. The second means is by exercising the option granted in article 6 to opt out of the application of the CISG all together, although the parties' places of business are located in contracting States. So, if Ghana implements the CISG, a Ghanaian located party who perceives the Convention to be disadvantageous in a particular case may explore the possibility of opting out of its application. Admittedly, an entity located in Ghana may lack the bargaining power to push for extended supplier's guarantee or opt-out of the convention if the supplier is reluctant. Nonetheless, the options discussed remain possible avenues for ameliorating the perceived disadvantage presented by articles 38-40. In any case, many developing countries to which this disadvantage applies have implemented the CISG. Moreover, the Ghanaian delegate that had an input into the final instrument recommended that Ghana implements the instrument.[64]

2. Benefits of the CISG to Ghana

Beyond the above unlikely pitfall posed by the CISG to entities located in Ghana, there are, arguably, many advantages in Ghana's adoption of the instrument. First, accessibility of the CISG affords Ghanaian businesses and their foreign counterparts reduced transaction costs and enhanced efficiency. Ghanaian laws are not very obvious or easily accessible to overseas parties seeking to do business with Ghana. A party seeking to familiarise itself with Ghanaian laws relating to international sale of goods may have to employ the services of lawyers at substantial costs and time. Such costs may hamper the transaction or, if the transaction proceeds, are likely to be passed on and manifest in terms of higher domestic prices of goods. Those costs may be obviated if Ghana implements the CISG, as the implementation would be published, making Ghana's position readily available to prospective traders with Ghanaian counterparts.

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[63] *See* CISG, article 39(2).
[64] Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980", above note 58.

Second, Ghana's implementation of the CISG may eliminate costs relating to negotiation of governing law of the contract of sale if a foreign counterpart transacting with a Ghanaian located entity is located in another contracting State. Negotiation of governing law can be time consuming and costly, particularly where the laws of the respective parties are perceived to be different or confer peculiar advantages to one party.[65] Where the parties are negotiating at arms-length, the issue could be protracted. Where there is inequality of bargaining power or negotiation ability, the preference of the stronger party or the party with the better negotiation ability is likely to prevail. In a transaction between a party in Ghana and counterparty in a developed economy, it is likely that the Ghanaian party would be the economically weaker party or the party with the less negotiation skills, and therefore the one who will suffer an imposition of the stronger party's preference. Ghana's implementation of the CISG may eliminate such a disadvantage to the Ghanaian party.

Third, when a dispute has arisen, a Ghana located party may find its contract with an international counterpart governed by the CISG if that counterpart is located in a contracting State in which Article 1(1)(b) of the CISG applies and the rules of conflict of laws leads, probably fortuitously, to the laws of that jurisdiction. This is because under Article 1(1)(b) of the CISG, the convention applies "when the rules of private international law [of the forum] lead to the application of the law of a Contracting State". This means of application is often described as 'indirect'.[66] Although, Article 95 permits a Contracting State to declare it is not bound by this indirect means of application, most Contracting States have not made such a declaration.[67] So there is a likelihood that Ghanaian located parties and their lawyers may be caught by indirect application of the CISG. If that happens, the parties and their lawyers may find themselves unfamiliar with, and deficient in, the necessary understanding and application of the CISG, which could have consequences for the administration of justice.

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[65] Linarelli, above note 18.

[66] See, for example, Spagnolo, "The Last Outpost", above note 21, 143. The direct application provision is found in Article 1(1)(a), which provides that the Convention applies to contracts of sale of goods between parties whose places of business are in different States "when the States are Contracting States".

[67] Only seven (namely, China, Czech Republic, Germany, Singapore, Saint Vincent and the Grenadines, Slovakia, USA) out of the 74 Contracting States have made reservation under Article 95 to exclude or limit the application of Article 1(1)(b), See the list of Contracting States and details of their implementation at *Status: UN Convention on International Sale of Goods 1980 (CISG)* available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 30 April 2010).

Fourth, non-implementation of the CISG means the deprivation of the possible reductions in transactions costs already alluded to. In a world of increased globalisation, higher transactional (time and financial) costs will reduce the competitiveness of doing business with Ghana located entities. All things being equal, a foreign buyer who has alternative sources of supply will choose the country with lesser costs. Conversely, a foreign seller may demand higher prices from a country with which transaction costs are higher. These, then, disadvantage Ghana located businesses.

Fifth, implementing the CISG will enhance how Ghana is perceived within the international business community, as it announces the country's intentions to operate by internationally accepted laws and standards. This may help assuage the often existing perceptions, rightly or wrongly, that doing business with sub-Saharan Africa, and Ghana for that matter, is risky due, in part, to unpredictable laws and dubious standards.

Sixth, the CISG is substantially the same as Ghanaian domestic law of contract and sale of goods law. Much of the CISG is in line with the common law principles of contracts for the sale of goods. One major departure from the common law, in favour of civil law systems, is that consideration is not required under the CISG. Thus, under the CISG, a promise to keep an offer open for a specified period may be binding although the offeree has given no consideration for that promise.[68] Similarly, the difficulties posed by the existing legal duty principles at common law would not arise under the CISG.[69] While the position under the CISG introduces a shift from most common law jurisdictions that have ratified the convention (such as the USA, Australia, Canada, New Zealand and Singapore) on the issue of consideration, it rather aligns perfectly with Ghanaian law. Aspects of the common law doctrine of consideration regarding open offers and existing legal duty were reformed by the *Contracts Act* 1960, Ghana (Act 25), sections 8 and 9 respectively.[70] Other departures from the general law of Ghana are minor, commercially realistic and of little legal significance. It must be noted too that major common law jurisdictions (such as Australia, Canada,

[68] CISG, article 16.

[69] The existing legal duty (or pre-existing obligation) rule is to the effect that, at common law, a promise to perform or the performance of an existing duty is not sufficient consideration. *See*, e.g., Jeannie Paterson, Andrew Robertson and Peter Heffey, *Principles of Contract Law* (2nd edn, 2005) Lawbook Co., 91-93.

[70] *Contracts Act* 1960, Ghana (Act 25). For a discussion of the reform in Ghana, see C. Dowuona-Hammond, "The Reform of Consideration By The Contracts Act, 1960 (Act 25): Implications for The Law of Contract in Ghana" (1993-95) *University of Ghana Law Journal* 1-31.

Singapore, and the USA) whose laws are slightly more divergent from the CISG have implemented the instrument.

Considering the above enumerated potential benefits of the CISG to Ghana, why has Ghana not implemented the CISG; are there any particular reasons why Ghana has not yet implemented the CISG?

3. Why Has Ghana Not Implemented the CISG?

This is a question that has been asked of other non-Contracting States to the CISG.[71] In the case of Ghana, it is particularly poignant because Ghana was one of only five countries that signed the instrument on the day it opened for signature on 11 April 1980?[72] Ghana is the only remaining country of those initial five signatories that has not yet ratified the convention.[73] Meanwhile several non-signatory countries have since acceded to the instrument.

More perplexing is the fact that Ghana was also among the initial 14 countries represented in UNCITRAL's Working Group charged with the development of the CISG, as an instrument to be acceptable "by countries of different legal, social and economic systems".[74] Ghana was represented throughout the development and promulgation of the instrument, to which it made contributions.[75] Furthermore, a Ghanaian representative[76] to the Plenipotentiary

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[71] For instance, in the case of the UK, see Goode, above note 1, 756-758; Linarelli, above note 18; Williams, above note 35; Gärtner, above note 35; Lee, above note 35. For Brazil, see Grebler, above note 35. For Japan, before it implemented the instrument, see Nottage, above note 29. For South Africa, see Eiselen, above note 18.

[72] The other four were Austria, Chile, Hungary and Singapore, all of which have since ratified the instrument. *See* UNCITRAL, *Status: UN Convention on International Sale of Goods 1980 (CISG)* available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 30 April 2010)

[73] The only other signatory, though not in the initial five, that has not yet ratified the CISG is Venezuela, which signed on 28 September 1981. *See Status: UN Convention on International Sale of Goods 1980 (CISG)* available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 30 April 2010).

[74] See, UNCITRAL, "Report of the Working Group on International Sale of Goods, First Session, 5-10 January 1970", *Yearbook of the United Nations Commission on international Trade Law* (1970) Vol. 1, 176, at 177 (extracted at http://daccessdds.un.org/doc/UNDOC/GEN/NL7/001/02/PDF/NL700102.pdf?OpenElement, (last accessed 28 February 2009). The initial 14 countries were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, USSR, the United Kingdom, and the United States, to which four other countries—Austria, the then Czechosolovakia, the Philippines, and Sierra Leone—were added later, see Massimo C. Bianca and Joachim M. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987, Giuffrè, Milan), 3

[75] Not only was Ghana represented at the first meeting (by K.K Dei-Anang, then Lecturer in Commercial Law at the University of Ghana), Ghana's Emmanuel Sam was also elected at the same meeting as the Rapporteur to

Conference on CISG that adopted the Convention recommended the CISG for Ghana's ratification shortly after the instrument was adopted.[77] Indeed the representative hoped that not only Ghana would ratify, but "that the convention will be ratified by ECOWAS member-states so that sales transactions between Francophone and Anglophone members of ECOWAS may be facilitated."[78] Other scholars have argued forcefully that implementation of the CISG is beneficial to African economies.[79] Yet, to-date, only two out of the fifteen ECOWAS member countries are parties to the CISG (and only nine from Africa as a whole).[80] This is despite a general recognition by academics and governments of African States that harmonisation of business laws within the continent and with the outside world is vital, and some measures have been initiated towards that end.[81] For example, an Organization for the Harmonization of Commercial Law in Africa (OHADA) was formed in 1993 to pursue uniform commercial laws across member countries.[82]

The idea behind OHADA is laudable, and it has made good progress towards its aims.[83] However, an ILI such as the CISG (and the UNIDROIT Principles), which has clearly influenced OHADA's work,[84] could have been adopted by member countries in addition to the organisation's drafting efforts. Implementation of the CISG by OHADA member

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the meeting (see UNCITRAL, "Report of the Working Group on International Sale of Goods, First Session, 5-10 January 1970", *Yearbook of the United Nations Commission on International Trade Law* (1970) Vol. 1, 176, at 177).

[76] In the person of Samuel K. Date-Bah. *See* Samuel K. Date-Bah, "The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa" (2004) 2 *Uniform Law Review* 269.

[77] Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980", above note 58. The text of the publication suggests it was published after the CISG was adopted and opened for signature on 11 April 1980, though the publication appeared in a 1979 issue of the journal. This is likely to be due to the relevant issue of the journal being published late.

[78] Samuel K. Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980", above note 58, 67**.** ECOWAS is the Economic Community of West African States, a regional group of fifteen West African countries, founded on May 28, 1975.

[79] *See* Eiselen, above note 18, 339-356.

[80] The two ECOWAS countries are Guinea and Liberia. The additional seven African countries are Burundi, Egypt, Gabon, Lesotho, Mauritania, Uganda and Zambia.

[81] Mancuso, above note 20; Eiselen, above note 18; Bamodu, above note 4, 125; Muna Ndulo, "Harmonisation of Trade Laws in The African Economic Community" (1993) 42 *International and Comparative Law Quarterly* 101; Anthony Allott, "Towards the Unification of Laws in Africa" (1965) 14(2) *International and Comparative Law Quarterly* 366, 378; Anthony Allott, "The Unification Of Laws in Africa" (1968) 16 *American Journal of Comparative Law* 51.

[82] OHADA has 16 African member countries, namely Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. For discussions of the OHADA treaty and work, see Nelson Enochong, "The Harmonisation of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem" (2007) 51(1) *Journal of African Law* 95-116; (2008) 8 *Uniform Law Review*, an issue dedicated to the work of the organisation.

[83] Mancuso, above note 20, 168-171.

[84] Mancuso, above note 20, 168-171.

countries (and, possibly, non-member countries as well) would not only harmonise international sales laws between member countries, it would also harmonise their laws with the wider CISG Contracting States elsewhere.[85] A similar argument, that the CISG be implemented as the harmonising law for international sale of goods, has been proposed for Asia.[86] Indeed there is interest in Asia moving in that direction, particularly with Japan's accession to the CISG.[87] The European Union (EU) has adopted a similar approach.[88] The three member States of the North Atlantic Free Trade Area (NAFTA) have already incorporated the CISG as uniform law for their cross-border transactions.[89] Anyway, as Ghana is not, as yet at least, a member of OHADA, it would not have been affected even if OHADA had gone down the CISG path as has been argued.[90]

So, coming back to the particular issue under consideration, why has Ghana abstained from ratifying the CISG?[91] There are no known official reasons why Ghana has so far abstained from ratifying the CISG. It is the same for most countries that have not implemented the instrument.[92] For those that attempt to give official reasons, they tend to be unconvincing.[93] That leaves the reasons for conjecture. Two factors may come to mind: (1) political interruptions or instability; and (2) lack of appreciation of the benefits of implementing the CISG on the part of government, business and the legal community.

(a) Political Interruption or Instability

[85] It is to be noted that none of the member States of OHADA is a party to the CISG.
[86] *See* Gary F. Bell, "Harmonisation of Contract Law in Asia—Harmonising Regionally or Adopting Global Harmonisations—The Example of the CISG" [2005] *Singapore Journal of Legal Studies* 362, at 366-372, where the author argues that Asian countries should implement the CISG instead of attempting their own harmonisation of their laws of sales.
[87] *See* Spagnolo, "The Last Outpost", above note 21, 146; UNCITRAL Secretariat, *Technical Co-operation and Assistance*, UN Doc A/CN.9/627 (18 April 2007) [8]–[9]
[88] Most of the EU member States are parties to the CISG, but that has not stopped the EU taking steps to further harmonise their contract laws, particularly laws outside of sale of goods. For a discussion of the interaction between the CISG and European contract law, see Ulrich G. Schroeter, "Global Uniform Sales Law—With A European Twist? CISG Interaction With EU Law" (2009) 13 *Vindobona Journal* 179-196.
[89] Fernando Hinestrosa, "Harmonisation of Sales Law in the Americas and Regional Economic Integration: A Cautious Appraisal" (2003) 8 *Uniform Law Review* 211, 213.
[90] Except that an en-mass implementation of the CISG by OHADA member countries may raise fresh interest in the instrument in Ghana.
[91] Discussion of reasons why other African countries have not ratified the CISG is beyond the scope of this article.
[92] For instance, there is no official reason for Brazil's refusal to implement the CISG; *see* Grebler, above note 35, 467.
[93] For instance, the official reason given to explain why the UK has not yet implemented the CISG is lack of Parliamentary time (*see* Goode, above note 1, 757). Japan also cited lack of Parlimentary time for a long time before implementing the instrument, eventually, in 2008 (*see* Nottage, above note 29, 840).

Ghana signed the CISG under the government of the Peoples National Party (PNP) in the Third Republic, which governed for only twenty-seven months, from September 1979 to December 1981.[94] The government may have intended to ratify the convention, but was ousted by the Provisional National Defence Council (PNDC) in 1981, before it probably had an opportunity to ratify and, in any case, well before the CISG entered into force in 1988.

The PNDC, which ruled for the next 10 years (from 31 December 1981 to 7 January 1992), and therefore had a lengthy stable period, took no steps to ratify the CISG during its time. Neither did the National Democratic Congress (NDC) that succeeded the PNDC for another eight years, with similar personnel as the PNDC.[95] It may be argued that the PNDC had more difficult and mundane issues to grapple with at the beginning, and the CISG was itself not yet in force. However, the PNDC commenced active promotion of engagement in international trade, particularly the promotion of Ghanaian exports, in the mid 1980s, and as well sought to attract foreign investments to Ghana in that period. These policies were continued by its successor, the NDC. Ratification of the CISG, particularly after it entered into force in 1988, should have been seriously considered as part of the export promotion and facilitation initiatives.

The immediate past government, the National Patriotic Party (NPP),[96] also ignored the CISG in its eight years at the helm. This is despite the government's claim of implementing, as a matter of priority, policies to create a 'golden age of business' on its assumption of office in 2001.[97] The "Golden Age of Business" was supposed to indicate the then government's commitment to assisting the private sector in spearheading Ghana's economic development process, and to attract foreign direct investment, boost exports and overcome the problem of underdevelopment and unemployment in Ghana. The government embarked on some legal reforms, including on aspects of Ghanaian commercial and mining laws. Again, ratification of the CISG should have been considered.

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[94] For a Chronology of the political history of Ghana, which would be referred to in this paragraph and the next few that follows, see Joseph G. Amamoo, *Ghana: 50 Years of Independence* (2007, Jafint Ent, Accra)

[95] The PNDC ruled from 31 December 1981 to 7 January 1993 when it was succeeded by the NDC, which then ruled till it was succeeded by the NPP from January 2001 to the end of 2008. The NDC regained power again in January 2009, following elections in December 2008. See Amamoo, ibid, for political history of Ghana up to 2007.

[96] As mentioned in note 58 above, Ghana had a change of government (from the NPP to the NDC) in January 2009.

[97] Peter Arthur, "The State, Private Sector Development, and Ghana's "Golden Age of Business"" (2006) 49(1) *African Studies Review* 31.

There is no indication that the NDC, which returned to power in 2008, is taking steps to implement the CISG. It would appear that the possible benefits of implementing the CISG has not been appreciated by successive governments in Ghana. It is submitted that the Ghanaian government should take steps to ratify the CISG, as it offers benefits, with no obvious disadvantages to the country.

(b) Lack of appreciation of the benefits of implementing the CISG

It would appear also that the possible benefits of adopting the CISG has not been appreciated by the business and the Ghanaian legal community, including judges and academics. There is no visible pressure from business or debate from the legal community for government to implement the CISG. It is hoped that this article will contribute to initiating debate towards consideration for the implementation of the CISG.

IV Contracts for the International Carriage of Goods by Sea

Over 80 percent of international cargo is carried solely or partly by sea.[98] This is of particular importance to Ghana as a coastal nation. Due to the transnational character of seaborne carriage, international uniformity of maritime law has for long been regarded as vital. While uniformity of the broad aspects of maritime law is important, this paper focuses on cargo liability regimes relating to sea-carriage of goods. At present, there are three international regimes in operation (namely the Hague Rules[99], Hague-Visby Rules[100], and Hamburg Rules[101]) and a fourth, and most recent, the Rotterdam Rules[102], that is yet to enter into force.

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[98] UNCTAD, *Review of Maritime Transport 2008* (2008, UNCTAD) 8, available at http://www.unctad.org/en/docs/rmt2008ch1_en.pdf (last accessed 30 April 2010).

[99] *International Convention for the Unification Certain Rules Relating to Bills of Lading 1924* (Hague Rules), text available at http://www.admiraltylawguide.com/conven/haguerules1924.html (last accessed 30 April 2010)

[100] *International Convention for the Unification Certain Rules Relating to Bills of Lading 1924* (Hague Rules), as amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 and/or SDR protocol* (Hague-Visby Rules), text available at http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/landscape.pdf (last accessed 30 April 2010).

[101] See the *United Nations Convention on the Carriage of Goods by Sea 1978* (Hamburg Rules) available at <http://www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf> (last accessed 30 April 2010).

[102] *See*, UNCITRAL, *United Nations Convention on the Carriage of Goods Wholly or Partly by Sea 2008,* available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf (last accessed 30 April 2010). The Rotterdam Rules, adopted by the UN General Assembly on 11 December 2008, and opened for signature at a signing ceremony in Rotterdam, in the Netherland, on 23 September 2009, is aimed at replacing the Hamburg Rules (and indeed the Hague and Hague-Visby Rules). For a discussion of the instrument, see

A. ILIs on Carriage of Goods by Sea

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1. Hague Rules

The Hague Rules was the first major successful instrument on the subject, standardising the rights, obligations and liabilities of cargo and carrier interests.[103] The rules impose some minimum liability regime on carriers. They were a compromise instrument between carriers' imposition of exculpatory clauses in standard from carriage contracts to immunise themselves from cargo liability by the late 19th century, on the one hand, and statutory response by governments of cargo owning countries to proscribe such practice and to impose certain minimum obligations and liabilities on carriers.[104] The reaction started with the enactment of the *Harter Act* 1893 by the US government, followed with similar legislation by New Zealand[105], Australia[106], and Canada[107]. Other European and Asian countries either followed suit or were reportedly on the verge of doing so by the early 1920s.[108] The Hague Rules imposed some minimum liability regime on carriers, while acknowledging circumstances in which carriers may be exempted. The Hague Rules were well-received in the Anglo-Common Law world. The instrument was ratified by the UK,[109] Australia,[110] Canada,[111] New Zealand,[112] the USA,[113] and other countries

2. Hague-Visby Rules

Despite the initial positive view of the Hague Rules, deficiencies within the regime emerged over_time, for which amendments to the instrument were thought necessary. Difficulties emerged, among other things, in respect of package limitation, scope of application of the

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Mary Carlson, "U.S. Participation in the International Unification of Private International Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention" (2007) 31 *Tulane Maritime Law Journal* 615-637

[103] Myburgh, above note 20; Frances Hannah, "Carriage of Goods by Sea", in Michael White (ed), *Australian Maritime Law* (2nd edn, 2000) 62, at 64

[104] Hannah, Ibid.

[105] *Shipping and Seamen Act* 1903, 1908, 1911 (NZ)

[106] *Sea-Carriage of Goods Act* 1904 (Cth)

[107] *Water-Carriage of Goods Act* 1910 (Canada)

[108] Myburgh, above note 20, 359.

[109] *Carriage of Goods by Sea Act* 1924 (UK)

[110] *Sea-Carraige of Goods Act* 1924 (Cth)

[111] *Water Carraige of Goods Act* 1936 (Canada)

[112] *Sea-Carraige of Goods Act* 1940 (NZ)

[113] *Carriage of Goods by Sea Act* 1936 (46 USC 1300-1313)

Rules, the evidential effect of bills of lading and effect of time bar.[114] A protocol that amended several provisions of the Hague Rules, including increasing the minimum liability of carriers to a higher amount, was signed in Visby, Sweden, in 1963, and adopted in Brussels in 1968.[115] However, the protocol did not attract the requisite number of ratifications until 1977.

The amended Hague Rules is commonly known as the Hague-Visby Rules.[116] There was a further technical amendment in 1979, by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1979, the main purpose of which was to change the unit of currency to the Special Drawing Rights (SDR), compiled by the International Monetary Fund (IMF).[117]

Many countries implemented the amended Hague Rules (Hague-Visby Rules), while a few, such as Ghana and the USA, retained the unamended Hague Rules. Thus two regimes—Hague Rules and Hague-Visby Rules—became operational in different countries around the world.

3. Hamburg Rules

The Hamburg Rules resulted from the work of UNCITRAL, due to developing countries' agitation for a more fundamental reform (beyond the Visby amendments) to the international sea-carriage of goods regime. Developing countries considered the Hague and Hague-Visby Rules to be "biased in favour of carrier interests from the industrialised nations and a contributory cause of unnecessarily high insurance and transport costs"[118]. The Hamburg Rules were signed in 1978, but did not come into force until November 1993 when the necessary ratifications were achieved. The Hamburg Rules were viewed as an improvement over the Hague and Hague-Visby Rules since they extended the scope of a carrier's liability

[114] *See* Myburgh, above note 20, 360.
[115] *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading,* 23 February 1968.
[116] A. Diamond, "The Hague Visby-Rules" [1978] *Lloyd's Maritime and Commercial Law Quarterly* 225
[117] Myburgh, above note 20, at 360.
[118] Myburgh, above note 20, at 361.

for loss of or damage to cargo to the entire period that the goods are in the charge of the carrier rather than just for the time that the goods are physically aboard the vessel. They also established liability of the carrier when economic loss occurs due to delay in delivery and place the onus on the carrier to prove that all reasonable measures were taken to avoid damage or loss rather than requiring the claimant to prove the carrier's negligence. Further, they increased the carrier's limit of liability.

Having been adopted by the United Nations with the participation of traditional maritime nations and developing countries, the Hamburg Rules were expected to have a broader political base than the Hague and Hague-Visby regimes. However, they were considered to favour shipper-dominated economies.[119] As such, no major maritime jurisdictions have implemented them to date. The majority of countries that have adopted the Hamburg Rules remain developing cargo-owning countries.[120] There is at present only one developed country (Austria) out of 34 contracting parties to the Hamburg Rules.

Implementation of the Hamburg Rules by the 34 countries means three international regimes became operational (Hague, Hague-Visby and Hamburg Rules) in different countries around the world, which remains the case today.[121] Despite the perceived advantages of the Hamburg Rules to shipper-dominated developing countries, Ghana did not, and has not, implemented the instrument.[122]

4. Rotterdam Rules

As the Hamburg Rules lacked the support of developed countries, interest in another cargo liability treaty that would be more widely accepted by most, if not all, countries soon generated. Several States and international non-governmental organizations felt it was time to

[119] C.C Nicoll, "Do the Hamburg Rules Suit a Shipper-Dominated Economy?" (1993) 24(1) *Journal of Maritime Law and Commerce* 151.
[120] D. Frederick, "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules" (1991) 22 *Journal of Maritime Law and Commerce* 81
[121] Of course these three regimes are in addition to a few countries that are not parties or have not implemented any of the three regimes, but have pure domestic regimes.
[122] Ghana's position regarding Hamburg Rules, and the other sea-carriage instruments, are discussed in more details below, under Section B of this part.

find a solution to the lack of uniformity and create a modern, technologically up-to-date Convention. This eventually led to *The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (the Rotterdam Rules), which was opened for signature on 23 September 2009. The task of drafting the new instrument fell to the Comité Maritime Internationale (CMI), whose draft was reviewed by an UNCITRAL Working Group on Transport Law. The completed work was adopted by United Nations General Assembly in December 2008.

The Rotterdam Rules has a very broad scope, applies to door-to-door cargo movements provided there is an international sea leg. It accommodates the use of electronic transport documents (in Chapters 3 and 8), and reflects more modern practices in international carriage. It also addresses issues such as the seaworthiness of the vessel, transfer of rights and many other aspects of the relationship between carriers and cargo owners, set out in nearly 100 articles. At the same time, it introduces contractual freedom, allowing carriers and cargo owners to agree to contract out of some provisions.

Sixteen States, including Ghana, signed the instrument at the ceremony at which it was opened for signature, "making it the most successful of the conventions developed by the United Nations Commission on International Trade Law (UNCITRAL) so far in terms of signatures obtained on opening day"[123]. Five more have since signed,[124] bringing the total number of contracting States over the threshold of 20 States required to bring the Rotterdam

[123] *See*, UNCITRAL, "Rotterdam Rules Gain Momentum as 20th State Signs" (Press Release, 23 October 2009) available at http://www.unis.unvienna.org/unis/pressrels/2009/unisl133.html (last accessed 30 April 2010). The initial signatories were: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America.

[124] Namely, Armenia, Cameroon, Madagascar, Mali and Niger. The 21 signatories represent a mix of developing and developed countries, including several major trading and maritime nations. The Arab League, representing some 21 countries in the Middle East, has recommended a joint signing to its member states in a declaration, the "Alexandria Declaration 2010" (3 February 2010) to sign the Rotterdam Rules. See the declaration available at http://www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf (last accessed 30 April 2010).

Rules into force at the international level.[125] However, none of the signatories has ratified the instrument as yet. Signing a convention only signifies an in-principle expression by the signatory State to become a Party to the instrument; it usually does not oblige the State to ratify or implement it.[126] Thus achieving the 20 implementations to bring the Rotterdam Rules into operation may still be far off. Further, it is one thing for the instrument to garner the 20 implementations necessary to bring it into operation, and it is another thing to be widely adopted so as to achieve its aim of achieving international uniform cargo liability regime. Only the future will tell whether the Rotterdam Rules will enter into force, and the extent to which international carriage of goods would be subjected to the instruments, but the initial signs are promising. Developed and developing countries as well as industry seem to favour its implementation.

B. Ghana and the Carriage of Goods by Sea Regimes

1. Implications of the Different Regimes to Ghana

Of the three currently operational regimes, Ghana has implemented the Hague Rules, enacted into its domestic laws in 1961.[127] The Hague Rules were the sole operative regime on the subject existing at the time of Ghana's implementation in 1961. The Visby protocol was adopted later, in 1968, and the Hamburg Rules another decade after, in 1978. Being a country that exports mainly commodities, imports lots of physical goods, and is not a ship-owing country, one would have expected Ghana to have implemented the Hamburg Rules when it entered into force in 1992. Somehow, Ghana has taken no steps to improve its international carriage of goods by sea regime since 1961, despite major developments in this area internationally.

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[125] Rotterdam Rules, article 94.

[126] For instance, as already noted above, Ghana signed the CISG when it opened for signatures in 1980, but it is yet to ratify the instrument. And, there are many State signatories to the Hamburg Rules that have not ratified the instrument.

[127] *Bills of Lading Act* 1961 (Act 42), Ghana.

Ghana's continuous adherence to the Hague Rules, particularly in the light of all the changes in international carriage and movement to the later regimes by most countries, disadvantages cargo owners and shippers from Ghana. The Hague Rules afford Ghanaian located parties less protection and compensation for their cargo than is available under the Hague-Visby or Hamburg Rules. The scale of difference between the protections and compensation available under the Hague Rules, on the one hand, and the Hague-Visby and Hamburg Rules, on the other, may be illustrated through the following cases: (1) *J.C.B Sales Ltd, Caterpillar Inc. & Land Rover Exports Ltd v Wallenius Lines (Wallenius Lines North America Inc) & Others*[128]; (2) *Ferrostaal Inc v M/V Sea Phoenix, Interway Shipping Co Lt & Others*[129]; (3) *John Holt Shipping Services v Edward Nassar & Co Ltd*[130]*;* (4) *Fan Milk Ltd. v. State Shipping Corporation*[131]; and (5) *The "River Guarara"*[132].

In *J.C.B Sales Ltd*[133]*,* the second plaintiff-appellant (Caterpillar Inc.) delivered, in February 1995, fifteen items of construction equipment to a vessel (M/V Seijin) of the carrier

[128] 124 F.3d 132; 1997 US. The US provides unique avenue for illustration because its law compulsorily applies the US carriage of goods by sea regime to both outgoing and incoming cargo (See *Carriage of Goods by Sea Act* 1936 (46 USC 1300-1315)), whereas most jurisdictions compulsorily apply their regimes to outgoing cargo while remaining silent or deferring to the law of the jurisdiction of shipment for incoming cargo (see the Ghanaian *Bills of Lading Act* 1961 (Act 42), s 1, which applies the Hague Rules to only outbound cargo, remaining silent on inbound cargo; and the Australian *Carriage of Goods by Sea Act 1991* (Cth), Schedule 1A, article 10, which applies compulsorily to outbound cargo and applies to inbound only if none of the three regimes apply by virtue of the country of shipment). Thus, US courts have sometimes been called upon to determine whether other regimes are applicable to cargo entering the US, particularly where the jurisdiction of shipment compulsorily applies the Hague-Visby or Hamburg Rules, either of which affords the cargo owner higher protection and compensation in the event of damage or loss. It is not difficult to anticipate which party will argue for the application of which regime; the carrier agues for the application of the Hague Rules (which imposes the lowest liability) while the cargo owner argues for the other (which imposes a higher liability on the carrier, and affords higher compensation for the cargo owner). The cases discussed below illustrate the point. Belgium seems to be the only other country applying its regime similarly to the US, to both outbound and inbound.

[129] 477 F.3d 212; 2006 U.S App

[130] [1971] 1 GLR 205

[131] [1972] 2 GLR 1

[132] [1996] 2 Lloyd's Rep. 53

[133] 124 F.3d 132; 1997 US. The US provides unique avenue for illustration because its law compulsorily applies the US carriage of goods by sea regime to both outgoing and incoming cargo (See *Carriage of Goods by Sea Act* 1936 (46 USC 1300-1315)), whereas most jurisdictions compulsorily apply their regimes to outgoing cargo while remaining silent or deferring to the law of the jurisdiction of shipment for incoming cargo (see the Ghanaian *Bills of Lading Act* 1961 (Act 42), s 1, which applies the Hague Rules to only outbound cargo, remaining silent on inbound cargo; and the Australian *Carriage of Goods by Sea Act 1991* (Cth), Schedule 1A, article 10, which applies compulsorily to outbound cargo and applies to inbound only if none of the three regimes apply by virtue of the country of shipment). Thus, US courts have sometimes been called upon to determine whether other regimes are applicable to cargo entering the US, particularly where the jurisdiction of shipment compulsorily applies the Hague-Visby or Hamburg Rules, either of which affords the cargo owner higher protection and compensation in the event of damage or loss. It is not difficult to anticipate which party will argue for the application of which regime; the carrier agues for the application of the Hague Rules (which imposes the lowest liability) while the cargo owner argues for the other (which imposes a higher liability on the

(Wallenius Lines) at Antwerp, Belgium, for carriage to Baltimore. The vessel then journeyed to Southampton, England, where it loaded on-board twenty-four additional items of construction equipment to Baltimore under a contract of carriage with Caterpillar. At Southampton, the vessel also took on further eighty-one pieces of construction equipment from JCB to be transported to Baltimore. The vessel delivered the bulk of the cargo at Baltimore seriously damaged, and the plaintiffs sued for compensation. The defendant carriers argued that the basis of their liability was the Hague Rules, as applied in the US.[134] If this argument was upheld, the carrier's liability would have been limited to $500 per package, leading to a total liability of $18,061.84 to JCB and $5,094.06 to Caterpillar. The plaintiffs argued that the defendants' liability was determined by the Hague-Visby Rules, as applied in the two jurisdictions of shipment, Belgium and the UK. Under those rules the carrier's liability to JCB was to be $648,662.35 (instead of $18,061.84) and $128,141.36 to Caterpillar (instead of $5,094.06). Both the district and appellate courts held that the Hague-Visby Rules applied, and the plaintiffs received the higher amounts. The main reason given for the decision was that the sea-carriage document issued, Data Freight Receipt (DFR), in respect of the shipments was construed not to be a bill of lading within the meaning in the US COSGA, and so the limitation in the relevant section did not apply.[135]

In *Ferrostaal Inc v M/V Sea Phoenix & Others*[136], Ferrostaal, the plaintiffs, were consignee owners of 402 coil steel, weighing a total of 3,628,480 kilograms, shipped on board the carrier's vessel from Tunisia to the US. Part of the cargo was damaged in transit, the estimated cost being $507,892.00. Ferrostaal argued that the Hamburg Rules applied in Tunisia, the country of shipment, and so the defendant's liability should be determined under those rules, which would have entitled them to the full amount of the loss. The defendant

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carrier, and affords higher compensation for the cargo owner). The cases discussed below illustrate the point. Belgium seems to be the only other country applying its regime similarly to the US, to both outbound and inbound.

[134] *Carriage of Goods by Sea Act* (COSGA), 46 U.S.C App. 1300 (1936).

[135] The Court of Appeal also took the opportunity to overrule the "fair opportunity doctrine", a much criticised doctrine which some courts had used in previous cases to side-step the application of the liability limitations under the USA COSGA, section 4(5). For a discussion of the "fair opportunity doctrine", see Alexander J. Marcopoulos, "*Ferrostaal Inc v M/V Sea Phoenix*: The Third Circuit's Sinking of the Fair Opportunity Doctrine (Case note)" (2007) 31(2) *Tulane Maritime Law Journal* 679-688; Arik A. Helman, "Limitation of liability under COGSA: in the wake of the fair opportunity doctrine." (2000) 25(1) *Tulane Maritime Law Journal* 299-326; Michael Sturley, "The Fair Opportunity Requirement Under COSGA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act—Part I" (1988) 19(1) *Journal of Maritime Law and Commerce* 1-35; Michael Sturley, "The Fair Opportunity Requirement Under COSGA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act—Part II" (1988) 19(1) *Journal of Maritime Law and Commerce* 157-206.

[136] 477 F.3d 212; 2006 U.S App

carriers argued that the Hague Rules, as applied in the US, was the basis of liability and that limited the amount to $140,000.00. The courts held that the Hague Rules as applicable under US law applied, for the reason that the plaintiffs were unable to prove to the satisfaction of the courts the Hamburg Rules had been properly incorporated into Tunisian law.

The difference in the recoverable amounts of compensation under the Hague Rules on one hand, and the Hague-Visby and Hamburg Rules on the other hand, as illustrated in the above cases, may even be wider under the Hague Rules as applied in Ghana. This is because the US COGSA specifies a limit of US$500 while the Ghanaian *Bills of Lading Act* 1961 (Act 42), article 4(5) imposes a limit of "£200 Ghanaian pounds" (the equivalent of UK£100 at the time of enacting the Ghanaian statute).[137] The differences in the recoverable amounts under the different regimes could be the difference between the survival and insolvency of a small Ghanaian business.

In *John Holt Shipping Services v Edward Nassar & Co Ltd*[138]*,* the appellants were the agents for the carriers of respondents' goods imported into Ghana. The goods arrived safely and were unloaded and stored in a warehouse. However, when the respondents sought to take delivery, the goods could not be found. The respondents sued for loss of the cargo. The trial judge held that the Hague Rules applied, and awarded the respondents £G1,050 in damages for the appellants' failure to deliver the goods in accordance with the bill of lading. The appellants appealed on the ground that the Hague Rules ceased to apply after the goods were unloaded, and that the trial judge erred by not giving full effect to an exemption clause in the bill of lading that, inter alia, exempted the carrier and its agents from any liability after the goods were unloaded at their port of destination. It was held that: (1) the Hague Rules only applied during the actual carriage of goods on a ship and ceased to apply when the goods were discharged; and (2) Although at common law the shipowner's liability does not cease on

[137] It must be noted, however, that the relevant provision of the Hague Rules (article IV rule 5, combined with article IX) have been interpreted in several cases, in different jurisdictions, to refer to the gold value of the pound sterling not its nominal or paper value: see, e.g. *The "Rosa S"* [1988] 2 Lloyds Rep 574, 581, per Hobhouse J. In *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co*, Yeldham J decided that the limitation confining recovery to £100 per unit in article IV rule 5 was, in the light of article IX, to be calculated by reference to "the quantity of gold which was the equivalent of £100 sterling in 1924", and his decision was upheld by the Court of Appeal of New South Wales: (1989) 93 ALR 171, 172, 175, 188, 192.

[138] [1971] 1 GLR 205

the landing of the cargo, the appellants were exempted from liability by reason of the express provisions in the exemption clause contained in the bill of lading.[139]

The Court of Appeal's ruling in this case was based on the reasoning that the minimum liability imposed on the carrier under the Hague Rules, which the carrier cannot contract out of, is only for the period from loading (on board a vessel) to the time of discharge (i.e. unloading from the vessel) at the port of destination, the period referred to as "tackle to tackle".[140] On that basis, the Court of Appeal's decision was sound.

The question, though, is whether the provisions in the other regimes (Hague-Visby Rules and the Hamburg Rules) would have yielded a different result. The result would have been similar under the Hague-Visby Rules, as they contain the same 'tackle to tackle" provision,[141] but different under the Hamburg Rules. Article 4(1) of the Hamburg Rules provides that the period of responsibility "covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge". Article 4(2) goes on to explain that the carrier is deemed to be in charge of the goods the time it takes over the goods from the shipper until the time it delivers the goods by handing over the goods to the consignee (or some other authorised person or entity). As it was found in the case that "the goods were still in the custody of the appellants who were, until delivery had been completed, still the agents of their principals [the carrier]"[142], delivery did not occur within the meaning of the Hamburg Rules. The appellants would have therefore been liable, and the respondent would have succeeded. Thus, the Hamburg Rules would have yielded the opposite result, in favour of the cargo owner.[143]

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[139] The exemption clause provided in clause 13 of the bill of lading that: "Goods in the custody of the carrier or his sub-contractors or agents before loading on the ship and after discharge therefrom shall be deemed to be in such custody as agents only for and at the entire risk of the shipper and/or consignee, and the carrier and his sub-contractors shall not be responsible for any act, neglect or omission on the part of his or their servants or agents in relation to the goods while in such custody."

[140] *John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, 208.

[141] *See* Hague-Visby Rules, Article III, rule 2. The Visby Protocol that amended the Hague Rules dealt mainly with the financial limits of liability under the Hague Rules; it did not alter the basic regime of the Hague Rules or the allocation of risks effected by the rules. See, for example, *Explanatory Notes* to the *United Nations Convention on the Carriage of Goods by Sea, 1978*, attached to the Hamburg Rules (appearing at 22-29, (hereafter, "*Hamburg Rules: Explanatory Notes*") at 22 para 6). The Hamburg Rules are available at UNCITRAL's web site: http://www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf) (last accessed 30 April 2010)

[142] *John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, at 210.

[143] One must concede that the Hamburg Rules were not in existence at the time of the *John Holt Shipping Services* case and, therefore, the Hamburg Rules could not have assisted the respondents in this case.

It is instructive to note that the kind of outcome in the *John Holt Shipping Services v Edward Nassar & Co Ltd* case was one of the major reasons for the change of the period of responsibility in the Hamburg Rules.[144] The Rotterdam Rules retains a similar provision in Article 12. Thus, as a mainly cargo owning (as opposed to ship owning) country, Ghanaian businesses would have better protection under the Hamburg and Rotterdam Rules.

In *Fan Milk Ltd. v. State Shipping Corporation*[145] the plaintiffs shipped their goods on the vessel of the defendants. The contract of carriage was contained in a bill of lading made subject to the Hague Rules.[146] The goods, which were shipped in apparent "good order and condition", were delivered damaged. In an action by the plaintiffs for damages, the defendants denied liability, among other arguments, on the ground that it was protected by clauses contained in the bill of lading. It was held that a carrier cannot be protected beyond the limits provided by the Hague Rules. Therefore the protection (exemption) clauses in a bill of lading, which were wider than those allowed by the *Bills of Lading Act* 1961 (Act 42), were void. The defendants were therefore liable for the amount claimed (¢4081.74).[147]

In *The "River Gurara",* the defendant's vessel, *River Gurara*, which was carrying plaintiffs' cargo from West African ports (including the Port of Tema, Ghana) to Europe, suffered an engine breakdown, broke up and sank off the Portuguese coast resulting in a loss of life and entire cargo on board. Much of the cargo was containerised. Most of the goods were shipped under bills of lading in the West Africa Line form, which, typical of liner bills of lading used around the globe, provides that the bill of lading shall have effect subject to any national law making the Hague Rules, Hague-Visby Rules or Hamburg Rules compulsorily applicable.[148] The defendant admitted liability, and that the Hague Rules applied by virtue of the laws of the ports of shipment. The issue was whether, as argued by the defendant, the container was to be treated as the package or unit or, as argued by the plaintiffs, the separate packages within the containers were the package or units for the purposes of the limitation of liability

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[144] See *Hamburg Rules: Explanatory Notes,* 23 paras 14 & 15.
[145] [1972] 2 GLR 1
[146] *Carriage of Goods by Sea Act* 1924 (14 & 15 Geo 5, c. 22) (UK).
[147] There are not sufficient details on the facts in this case about the cargo and the extent of damage caused to it to enable calculation of the possible difference in the monetary claim awarded with reference to the other regimes. Nor did the case raise an issue regarding the applicability of other sea-carriage regimes, as sometimes happens in the US.
[148] *See*, e.g., clause 2, Paramount Clause, of the EuroAfrica Shipping Lines, West Africa Services Bill of Lading form, available at http://www.euroafrica.com.pl/img/konosamenty/Konosament_Afryka_str_1.pdf (last accessed 30 April 2010).

provisions of the Hague Rules. For instance, whether "one bill of lading evidencing shipment of a container from Tema stated ... to contain eight pallets said to contain 1855 bundles of veneer"[149] constituted one (container) unit or 1855 separate units. It was held that the latter (1855 units) applied; a decision that was affirmed on appeal.[150]

The River Gurara case has two import points for our purpose. First, for the cargo shipped from Tema, the quantum of compensation was calculated based on a limit set in 1961instead of the higher amount available under the amended Hague-Visby provisions. Second, the central issue raised by the case was one that has long been recognised and ameliorated by the Visby amendments. Here Colman J. lament:

> The problem was recognised by those who framed the protocol known as the Hague-Visby Rules at Brussels in 1968 ... However, there are still many States which have not incorporated the Hague-Visby Rules into their domestic legislation and there are consequently many movements of cargo which even today are still govern by the Hague Rules in their original form.[151]

If Ghana had implemented the Hague-Visby Rules, not only would the plaintiffs have received a higher amount of compensation, the litigation and its associated costs and time wasted, at least in respect of the cargo (including the 1855 bundles of veneer) shipped from Tema, would have been avoided.[152] Parties are afforded the level of protections their governments have chosen of the available alternatives to accord them. It is imperative that Ghana accords businesses located within it the higher protections available.

2. Why Has Ghana Not Implemented Hague-Visby or Hamburg Rules?

Considering that the Hague Rules is the least favourable to Ghanaian businesses, why has Ghana failed to update its laws to either the Hague-Visby Rules or, preferably, the Hamburg

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[149] *The "River Gurara"* [1996] 2 Lloyd's Rep. 53, 55

[150] *See*, *The "River Gurara"* [1998] 1 Lloyd's Rep. 225

[151] *The "River Gurara"* [1996] 2 Lloyd's Rep. 53, 55.

[152] The cases discussed here are a fraction of the volume of transactions and cases affected by the Hague Rules as it applies in Ghana. It has been observed, in the Ghanaian context, that "[a]ctions involving the application of the Hague Rules are very rare and cannot be found"[152] in the available law reports (see *John Holt Shipping Services v Edward Nassar & Co Ltd* [1971] 1 GLR 205, at 212, per Archer JA). But this does not necessarily mean damage to, or loss of, cargo rarely occurs. Liabilities are often settled out of court based on the liability regime outlined in the applicable rules (e.g., the Hague Rules as enacted in the *Bills of Lading Act* 1961 (Act 42), Ghana). Parties workout their liabilities and entitlements with reference to the applicable regime, which makes it unnecessary to litigate. This, indeed, is an aim of the carriage by sea conventions--to standardise the liability regime and reduce transaction costs.

Rules? Ghana was one of fourteen (out of seventy-eight represented) jurisdictions that signed the Hamburg Rules when it was opened for signature on 31 March 1978.[153] More than three decades on, Ghana has still not ratified the instrument. As observed in respect of the CISG, again, there appears to be no official or documented reasons for Ghana's failure to ratify the Hamburg Rules. So, again, one has to infer the reasons. The two possible reasons discussed in respect of the CISG, namely political instability and lack of appreciation by government and business come to mind, and remain the only plausible reasons.

Ghana should have taken steps to ratify the Hamburg Rules to improve its regime for carriage of goods by sea for the benefit of business. In the context of Ghana, the Hamburg Rules had advantages over the Hague-Visby. First, the sea-carriage documents that trigger the application of the Hague-Visby Rules are much narrower than under the Hamburg Rules.[154] The Hague-Visby Rules, as exist in most jurisdictions, apply to contracts of carriage evidenced by a bill of lading 'or any similar document of title'.[155] "However, receipt as a document of title will not be sufficient to trigger the Hague-Visby Rules unless it has the character of a bill of lading"[156] In contrast, the Hamburg Rules apply to sea-carriage regulated by "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another."[157] There is no mention of document of tile, and that simplifies the often contentious question as to the qualification of the documents relating to a

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[153] The other thirteen were: Brazil, Chile, Ecuador, Egypt, Germany, Holy See, Madagascar, Mexico, Panama, Portugal, Senegal, Singapore, and Venezuela. See, Status: United Nations Convention on the Carriage of Goods by Sea - the "Hamburg Rules" 1978, available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (last accessed 30 April 2010)

[154] Scholarly literature abounds that engage in detailed comparative analysis of the various instruments of carriage of goods by sea. It is not intended to engage in any detailed analysis here; only a few core provisions are mentioned. For some of the comparative literature, see Sze Ping-fat, C*arrier's Liability Under the Hague, Hague-Visby and Hamburg Rules* (2002, Kluwer Law International); Hugh Kindred*, The Hamburg Rules: From Hague to Hamburg via Visby* (2nd edn, 1997); Samuel R. Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COSGA, Visby and Hamburg Conventions" (1996) 23 *Transport Law Journal* 471; Robert Force, "A Comparison of the Hague, Hague Visby, and Hamburg Rules: Much Ado About (?)" (1996) 70 *Tulane Law Review* 2051-2089; George F. Chandler III, A Comparison of "COSGA", the Hague-Visby Rules and the Hamburg Rules (1984) *Journal of Maritime Law and Commerce* 233-291; R.G. Baur, "Conflicting Liability Regimes: Hague-Visby v Hamburg Rules—A Case by Case Analysis" (1993) 24 *Journal of Maritime Law and Commerce* 53.

[155] See, for example, article 1 of the Hague-Visby Rules as contained in "Schedule 1—The amended Hague Rules (unmodified text)" of the Australian *Carriage of Goods by Sea Act 1991* (Cth). Australia has now broadened the application of its regime to apply to sea-carriage documents other than the bill of lading or documents of tile. See Schedule 1A, which came into effect in 1998 and replaces Schedule 1.

[156] Scott Thompson, "The Hamburg Rules: Should They Be Implemented in Australia and New Zealand?" (1992) 4 *Bond Law Review* 168, at 172. *See* also *J.C.B Sales Ltd, Caterpillar Inc. & v Wallenius Lines (Wallenius Lines North America Inc) & Others* 124 F.3d 132; 1997 US; and *Hugh Mack & Co Ltd v Burns & Laird Lines Ltd* (1944) Ll L Rep. 377.

[157] The Hamburg Rules, article 1(6). The Rotterdam Rules retains a similar provision in Article 1(1).

pending dispute under the Hague-Visby regime.[158] It also removes the unnecessary disadvantage that occurs when goods are carried under other widely used documents such as sea waybills.[159]

Second, while the Hague-Visby Rules are excluded from applying to carriage of live animals and deck cargo,[160] the Hamburg Rules are more flexible. The definition of goods capable of being subject to the Hamburg Rules does not exclude live animals.[161] The carrier may carry goods on deck if "such carriage is in accordance with an agreement with the shipper or with the usage of particular trade or is required by statutory rules or regulations."[162] The carrier has normal responsibilities in respect of such cargo, and may be liable for breaches.[163] However, the carrier is protected against "loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck,"[164] except where the carriage on deck was contrary to article 9.1 and 9.2.[165] Thus, a lot of deck cargo, particularly containerized cargo, would be subjected to the Hamburg Rules. Arguably, the provisions of the Hamburg Rules relating to the carriage of deck cargo can be problematic. For instance, the term 'usage' of a trade in the article 9.1 exception is not defined. Determination is thus left to the courts, in resulting litigation, and that could lead to vast differences across jurisdictions. It has been argued by some that it would have been better "to nominate the sorts of cargo and containers that are acceptable in the trade for deck cargo"[166]. It is probably not as simple as suggested. It suffices to say for the purposes of this publication that the more important point is that the Hamburg Rules expands on the rights and liabilities relating to deck cargo, and is to be preferred.[167]

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158 Thompson, above note 156, at 172.

159 It is possible, though, to enact the Hague-Visby Rules as to make them applicable to documents other than the bills of lading. Australia, for instance, has amended its carriage of goods by sea laws to extend its Hague-Visby regime non-bills of lading (*see* the Australian *Carriage of Goods by Sea Act 1991* (Cth), Schedule 1A), but the hybrid approach has been severely criticized as constituting a source of confusion rather than harmonizing with adopted regimes internationally (*see* Myburgh above note 20, 365-379).

160 *See* Hague-Visby Rules, article 1.

161 Hamburg Rules, article 1.5, defines goods to include live animals. That the carriage of live animals may be governed by the Hamburg Rules is not of much significance to Ghana, as Ghana is not a major live stock trader.

162 Hamburg Rules, article 9.1.

163 Hamburg Rules, article 5.

164 Hamburg Rules, article 9.3.

165 Hamburg Rules, article 9.2 requires that an agreement between the carrier and the shipper to carry cargo on deck to be noted on "the bill of lading or other document evidencing the contract of carriage by sea", in the absence of which the carrier is disentitled form invoking such agreement against a third party.

166 Thompson, above note 156, at 173.

167 The Rotterdam Rules also allows for deck cargo. *See* Article 25.

Third, the Hague-Visby Rules apply from 'tackle to tackle', as has been alluded to already. That is, the rules apply from the time the goods are physically aboard the carrier's vessel to when they are unloaded.[168] The Hamburg Rules, on the other hand, extend the liability of the carrier to the entire period the carrier is in charge of the goods.[169] The carrier is liable from the time it receives the goods from the shipper or responsible third party until the goods are delivered to the consignee or responsible third party. This ameliorates problems presented by the Hague-Visby rules in situations where goods are damaged during transhipment from one vessel to another or where they are at the dock or in a warehouse, as happened in the *John Holt* case discussed above. The Hamburg Rules may have continuous application.[170] The carrier, if unable to deliver the goods to the consignee, is allowed to "place them at the disposal of the consignee in accordance with the contract, or with the law, or with the usage of the particular trade applicable at the port of discharge,"[171] after which its liability discharges. Here again reference to 'usage of the particular trade' is undefined, and could potentially lead to litigation, and diverse interpretations, despite the admonition in article 3 that regard be had to the international character of the instrument when interpreting or applying it.

Fourth, the Hamburg Rules impose on the carrier extended duty of care over the cargo. The carrier has a duty to exercise due diligence in respect of the cargo at all times while the cargo is in the charge of the carrier.[172] The carrier is required to provide a seaworthy vessel during the entirety of the voyage. Article 3 of the Hague-Visby Rules, on the other hand, imposes a on the carrier to provide seaworthy vessel only at the beginning of the voyage.

Fifth, the basis of liability under the Hamburg Rules, which are outlined in a single test in article 5, is arguably simpler, clearer and fairer.[173] The 'list' of defences available to the carrier under Article 4(2) of the Hague-Visby Rules, which included defences of negligent navigation, or negligent management of the ship, is discarded in the Hamburg Rules. Some of these defences were archaic, found in no other law of transport.[174] The basis of liability

[168] Hague-Visby Rules, article 1.
[169] Hamburg Rules, article 4.1
[170] Hamburg Rules, article 4.2(b) (ii)
[171] Hamburg Rules, article 4.2(b)(ii)
[172] Hamburg Rules, Article 5.1
[173] John Honnold, "Ocean Carriers and Cargo; Clarity and Fairness—Hague or Hamburg?" (1993) 24 *Journal of Maritime Law and Commerce* 75; Thompson, above note 156, at 174.
[174] Thompson above note 156, at 175.

under the Hamburg Rules is in line with the evolving trend established in other transport conventions towards carrier liability based on negligence. The burden of proof rests with the carrier to establish that it took all reasonable care to avoid the loss or that the loss resulted from circumstances beyond the carrier's control.[175]

Sixth, the Hamburg Rules set a minimum liability of the carrier in the event of a loss at a level that is slightly higher than is set under the Hague-Visby Rules. Adopting SDR as the unit of account,[176] the limits for damage or loss of cargo under the Hamburg Rules are an amount equivalent to 835 SDR per package or other shipping unit or 2.5 SDR per kilogram, whichever is higher.[177] The liability limits for delay in delivery is two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage.[178] While the limits in the Hamburg Rules for damage or loss are still low,[179] representing only a 25 percent increase over that set by the Hague-Visby Rules,[180] it is the better of the two regimes. In any case, it is much better than the current Ghanaian provision contained in the Hague-Rules provided way back in 1961.

With the Rotterdam Rules now promulgated, and signed by Ghana, two questions arise. First, is the Rotterdam Rules better for Ghana than the Hamburg Rules? Second, should Ghana implement the Hamburg Rules while it monitors progress on the ratification of the Rotterdam Rules or should it simply proceed to implement the Rotterdam Rules and hope sufficient number of countries implements to bring it into operation?

Briefly stated the Rotterdam Rules combines aspects of the Hague-Visby and Hamburg Rules, as well as introduce new aspects to reflect modern methods and modes of international carriage of goods including the application of new technologies. The Rotterdam Rules better clarifies the rights, obligations and responsibilities of the parties, while allowing for parties' freedom to contract out of the instrument within certain limits. The scope of application of

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[175] Thompson above note 156, at 175.
[176] The SDR became the unit of account of the Hague-Visby regime in countries that adopted the *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (21 December 1979) (commonly referred to as the "The SDR Protocol of 1979").
[177] Hamburg Rules, article 6.1(a).
[178] Hamburg Rules, article 6.1(b). Thus, where the delivery of an entire cargo in shipment is delayed, the shipper would receive not more than the fright paid under this provision.
[179] Particularly when compared to other limits in the world of transportation. For instance, article 23 of the CMR provides for 8.33 SDR per kilogram, plus the costs of carriage.
[180] Under the Hague-Visby Rules, the limits are 666.67 SDR per package or 2 SDR per kilogram, whichever is higher.

the limits of liability has been widened in the Rotterdam Rules, to cover generally breaches of the carrier's obligations under the Rules.[181] The minimum liability is higher under the Rotterdam Rules, at 875 SDR per package or unit and 3 SDR per kilogram, compared to 835 SDR and 2.5 SDR respectively under the Hamburg Rules, and 666.67 SDR per package or unit and 2 SDR per kilogram under the Hague-Visby Rules as amended by the SDR Protocol.[182]

It is submitted that Ghana should implement the Rotterdam Rules. However, while one may anticipate that the Rotterdam Rules would probably attract wider international implementation than the Hamburg Rules, and become more successful, past experience suggests that would take several years, if not decades. Ghana may therefore consider immediate ratification of the Hamburg Rules in the meantime, to benefit its international traders. After all, countries are still acceding to the Hamburg Rules. Kazakhstan, for example, only recently acceded to the Hamburg Rules, where the instrument entered into force on 1 July 2009, after the Rotterdam Rules had been adopted by the UN in 2008.[183]

A question that may be raised is whether Ghana's implementation of the Hamburg or Rotterdam Rules would lead to higher freight charges for cargo shipped from or to Ghana. This issue, sometimes referred to as the "insurance argument"[184] has been a long-standing debate between shipping interest and cargo owning interest.[185] On the one hand, shipping interests argue that an increase of their liability would lead to higher insurance costs, which would be offloaded unto shippers in the form of higher freight. On the other hand, is the argument that higher carrier liability limits provide an incentive for loss avoidance, lower

[181] Rotterdam Rules, Article 59.
[182] For a detailed analysis of the Rotterdam Rules and its comparison with the Hamburg and Hague-Visby Rules, *see*, e.g., Michael F. Sturley, Tomotaka Fujita & Gertjan van Der Ziel, *The Rotterdam Rules: The UN Convention on Contracts for The International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell 2010); Francesco Berlingieri, "A Comparative Analysis of The Hague-Visby Rules, The Hamburg Rules and The Rotterdam Rules", (A Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009), available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (last accessed 30 April 2010)
[183] *See* UNCITRAL, "Status: United Nations Convention on the Carriage of Goods by Sea - the "Hamburg Rules"", available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (last accessed 30 April 2010)
[184] Michael Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 *Journal of Maritime Law and Commerce* 119, at 120 (hereafter, Sturley, "Changing Liability Rules and Marine Insurance").
[185] Sturley, "Changing Liability Rules and Marine Insurance", ibid.

insurance and other costs for both parties.[186] It is not intended, in this article, to go into the details of the "insurance argument", much of which has "been characterised by a surfeit of legal discourse, voodoo economics and generalised speculation, and an almost total lack of detailed empirical economic research"[187]. Suffice it observe that there is little evidence that the different regimes influence freight charges.[188] Ghana should therefore not be swayed by arguments of possible increased costs in its consideration of implementing the Hamburg or Rotterdam Rules for the benefits of its traders.

As Ghana was one of the initial 16 countries to sign the Rotterdam Rules at the open for signing ceremony, it might be argued Ghana would implement the instrument. As has been discussed already, however, it is to be noted that Ghana signed both the Hamburg Rules and CISG at their open for signature ceremonies, in 1978 and in 1980 respectively, but has failed to ratify them. Discussing the merits for implementation is thus important.

V Electronic Commerce (E-commerce)

Undoubtedly, advancements in Information and Communications Technology (ICT) have revolutionized the ways in which business is currently conducted. Electronic methods of contracting afford several efficiencies including speedy transacting, automation (which may reduce preparation, sorting and filing time, eliminates data re-entry and associated potential errors), cheaper record keeping and more efficient data collection and analysis.[189] Ecommerce is also considered to widen market access to small and medium-sized enterprises (SMEs) at the regional and the international level.[190] The benefits of business to business (B2B) ecommerce are particularly distinct in international trade.[191]

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[186] For a detailed discussion of the arguments, see Sturley, "Changing Liability Rules and Marine Insurance", above note 184; Erling Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practices" (1981) 12 *Journal of Maritime Law and Commerce* 299; C.W.H Goldie, "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 *Journal of Maritime Law and Commerce* 111.

[187] Eun S. Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 *ILSA Journal of International and Comparative Law* 153-172; Myburgh, above note 20, 365.

[188] *See* Sturley, "Changing Liability Rules and Marine Insurance", above note 184; Selvig, above note 186.

[189] Emmanuel Laryea, "Facilitating Paperless International Trade: A Survey of Law and Policy in Asia" (2005) 19(2) *International Review of Law, Computers & Technology* 121, at 121-122 (hereafter, Laryea, "Facilitating Paperless International Trade").

[190] UNCTAD, *Information Economy Report 2007-2008* (2008, UNCTAD), 321 available at http://www.unctad.org/en/docs/sdteecb20071ch8_en.pdf (last accessed 30 April 2010)

[191] Laryea, *Paperless Trade*, above note 7, 1.

A potential barrier to the development, use and reliance on ecommerce is lack of an e-commerce friendly legal framework to provide recourse for users: legal uncertainty.[192] Thus, more than two decades ago, the UN called on governments and international organisations to put in place new laws as well as revise existing legal rules and other texts to facilitate electronic transacting.[193] For this reason, the international business community, including UN organs and other vital international organisations, have been working hard to facilitate the utilisation of ICT in international (and domestic) trade transactions.[194] UNCITRAL in particular has been particularly active in this area, having promulgated three ecommerce related instruments: (1) MLEC[195]; (2) MLES[196]; and (3) CUECIC[197]. These instruments, and Ghana's position regarding them, are briefly now considered.

A. The ILIs on E-commerce

1. MLEC

The MLEC was published by the UN in 1996 for adoption by governments into domestic law. The instrument was intended to facilitate the use of modern means of communications and storage of information. It is based on the establishment of functional equivalence in electronic media for paper-based concepts such as "writing", "signature" and "original".[198] It was expected that, by providing standards by which the legal value of electronic messages can be assessed, the MLEC would play a significant role in enhancing the use of paperless communication in modern business transactions.

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[192] *See*, e.g., Laryea, "Facilitating Paperless International Trade, above note 189, 122-127; APEC, *Paperless Trading: Benefits to APEC* (2001), 18, available at http://www.dfat.gov.au/publications/paperless/index.html, (last accessed 30 April 2010).

[193] *See* UN General Assembly, "UNCITRAL Recommendation on the Legal Value of Computer Records (1985)", UN GAOR, 40th Sess., Supp. No. 17, at 360, U.N. Doc. A/40/17, 1985.

[194] Laryea, "Facilitating Paperless International Trade: A Survey of Law and Policy in Asia", above note 189.

[195] UNCITRAL. *UNCITRAL Model Law on Electronic Commerce (1996)*, UN GAOR 51st Sess., 85th plenary mtg., UN Doc. A/51/162 (1996)

[196] *UNCITRAL Model Law on Electronic Signatures* (2001)

[197] UNCITRAL, *UN Convention on the Use of Electronic Communications in International Contracting* (2005), UN Doc. A/60/515 (Nov. 23, 2005)

[198] The Model Law was expanded in 1998 to cover rules for electronic commerce in specific areas, such as carriage of goods, by the addition of Article 5*bis*. *See* UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with additional article 5 bis as adopted in 1998*, available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last accessed 30 April 2010)

Many countries around the world have enacted laws based on or influenced by the provisions of the MLEC in order to facilitate ecommerce.[199] Ghana has incorporated a significant part of MLEC in its *Electronic Transactions Act* 2008 (Act 772). However, as would be noted under Section B below, section 4 of the statute excludes its application to negotiable instruments and bills of lading, which affect international sale transactions. These should be corrected.

2. MLES

In addition to the generic ecommerce law, as provided in the MLEC, it is considered that electronic signatures, an electronic means of authenticating documents, pose particular challenges and deserve specific treatment.[200] An e-signature may be described, generically, as data in an electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of information contained in the data message.[201] There are different types of e-signatures providing different levels of security, including biometric records, scanned manuscript signatures, typing a name on electronic documents, and digital signatures.[202]

UNCITRAL has worked on this aspect of ecommerce to produce its MLES in 2001. MLES builds upon the signature provisions in the MLEC to provide: (1) greater legal certainty about the use of certain types of electronic signatures; (2) conduct rules for various parties dealing with electronic signatures; and, (3) basic standards for the recognition of electronic signatures from other jurisdictions.

[199] See UNCITRAL, *Status: UNCITRAL Model Law on Electronic Commerce*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last accessed 30 April 2010), for a list of countries have implemented laws based on influenced by the MLEC.

[200] See, UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods* (2007), available at http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf (last accessed 30 April 2010); Anda Lincoln, ''Electronic Signature Laws and the Need for Uniformity in the Global Market'', (2004) 8 *The Journal of Small & Emerging Business Law* 71;

[201] *See* UNCITRAL (2001), The Model Law on Electronic Signature 2001, available at: www.uncitral.org; Minyan Wang, "Do the Regulations on Electronic Signatures Facilitate International Electronic Commerce? A Critical Review" (2007) 23 C*omputer Law & Security Report* 32.

[202] Wang, ibid.

MLES has struggled to attract uniform implementations.[203] Many countries around the world have adopted differing approaches to electronic signature legislations to support electronic transacting.[204] Ghana too has incorporated digital signature provisions in its *Electronic Transactions Act* 2008 (Act 772) (Ghana). However, here again, the exclusion of negotiable instruments and bills of lading from the application of the statute undermines the Act's facilitative potential for international sale transactions, which needs to be corrected.

It has been argued that the divergent approaches to electronic signature legislation detract from the uniformity desired by the international business community and, "create new barriers to electronic authentication and international e-commerce."[205] However, many ecommerce stakeholders have been working on international co-operation towards the establishment of uniform law.[206] CUECIC, which is discussed in the next section, takes "a big step forward in the process of harmonizing laws."[207] Unfortunately, as would be seen below, CUECIC has also struggled to attract ratifications.

3. CUECIC

The aim of CUECIC was to eliminate legal obstacles to the use of modern means of communication in contract formation. The provisions of CUECIC are based on the CISG and the MLEC.[208] It was developed to remove obstacles to the use of electronic communications

[203] As at 30 April 2010, only ten jurisdictions—Cape Verde, China, Costa Rica, Guatemala, India, Jamaica, Mexico United Arab Emirates, and Thailand, The UAE and Vietnam— had enacted laws based on or influenced by the *Model Law on Electronic Signatures*. See UNCITRAL, *Status: UNCITRAL Model Law on Electronic Signatures 2001,* available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html (last accessed 30 April 2010).

[204] *See*, Wang, above note 201, at 33; Lorna Brazell, *Electronic Signatures Law and Regulation* (2004), Sweet & Maxwell, 2; Dennis Campbell (ed.), *E-Commerce and the Law of Digital Signatures* (2005), Oceana Publications, 2005.

[205] Wang, above note 201, at 41.

[206] Wang, above note 201, at 41; Mathias M. Siems, "The EU Directive on Electronic Signatures – A Worldwide Model or a Fruitless Attempt to Regulate the Future?" (2002) 16(1) *International Review of Law Computers & Technology* 7, at 9.

[207] Wang, above note 201, at 41.

[208] It is important to mention that the MLEC, in particular, focused on having basic and flexible principles that would facilitate its adoption within the laws of the member countries in order to achieve uniformity in the laws of international trade, *see* A. Brooke Overby, "UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce" (1999) 7 *Tulane Journal of International & Comparative Law* 219, 225; Charles H. Martin, "The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?" (2005) 17 *Pace International Law Review* 261, 263 (hereafter, "Martin, The UNCITRAL Electronic Contracts Convention").

in international contract, formation and performance.[209] It establishes a treaty-based framework of rules to legitimize contract formation and performance through electronic communications by commercial parties whose contract places of business are in different nations, unless the parties effectively choose an alternative applicable law.[210] Additionally, CUECIC validates the use of electronic communications for notice, filing, and other procedures prescribed by international treaties that were drafted prior to the advent of modern electronic communications.[211] CUECIC is, thus, intended to clarify or adapt the traditional rules on contract formation to accommodate the realities of electronic contracting in an internationally uniform manner. Unfortunately, while the instrument has attracted 18 signatures so far, it has not obtained the three implementations to bring it into force. [212]

B. Ghana and the ILIs on E-commerce

Ghana recognises information and communication technologies (ICT) as an important tool in its socio-economic development, as do an increasing number of developing countries who "are adapting their legislation to e-commerce to remove barriers to online services and provide legal certainty to business and citizens"[213]. In mid 2003, the Ghana government published its official policy on communications and national development, *The Ghana ICT for Accelerated Development (ICT4AD) Policy*.[214] The aim, as expressed in the document, was "to transform Ghana into information-rich knowledge-based society and economy through the development, deployment and exploitation of ICTs within the economy and society."[215] The underlying assumption was that ICTs are a critical instrument for Ghana's

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[209] Charles H. Martin, "The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law" (2008) 16 *Tulane Journal of International & Comparative Law* 467, 471 (hereafter, Martin, "The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law"); Martin, "The UNCITRAL Electronic Contracts Convention", ibid, at 264.

[210] Martin, "The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law", Ibid.

[211] Martin, "The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law", above note 209.

[212] *See*, UNCITRAL, *Status: United Nations Convention on the Use of Electronic Communications in International Contracts* 2005, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last accessed 30 April 2010).

[213] UNCTAD, *Information Economy Report 2007-2008,* (2008) 321, available at http://www.unctad.org/en/docs/sdteecb20071_en.pdf (last accessed 30 April 2010).

[214] Government of Ghana, *The Ghana ICT for Accelerated Development (ICT4AD) Policy* June 2003, available at http://img.modernghana.com/images/content/report_content/ICTAD.pdf (last accessed 30 April 2010) (hereafter, *ICT4AD)*; Amin Alhassan, *Development Communication Policy and Economic Fundamentalism in Ghana* (2004), (a dissertation submitted to the Universitas Tamperesis (2004), available at http://acta.uta.fi/pdf/951-44-6023-5.pdf, last accessed 30 April 2010);

[215] ICT4AD, ibid, 1.

development because they could help Ghana, and other developing countries, leap-frog the key stages of industrialisation and transform its economy from agriculture dominated to sector-driven, high value added information and knowledge based economy.[216] The ICT4AD is designed as a 25-year 'road-map', with five rolling plans to the end of 2022. It has 14 key areas of consideration including the provision of appropriate legal, regulatory, and institutional framework.[217]

In 2008, some four years after the launch of the ICT4AD initiative, the NPP government enacted a suite of four Acts for the national ICT environment. These included the *Electronic Transactions Act* 2008 (Act 772) (Ghana) (hereafter ETA), the *National Information Technology Agency Act* 2008 (Act 769) (Ghana), the *Electronic Communications Act* 2008 (Act 775) (Ghana) (subsequently amended by the *Electronic Communications Amendment Act* 2009 (Act 786) (Ghana)), and the *National Information Technology Agency Act* 2008 (Act 771) (Ghana).

For the purposes of this article, the most important of these Acts is the ETA. The ETA is an ambitious Act designed as a comprehensive statute to cover most aspects of ecommerce, from providing for functional equivalence of electronic documents, to evidence, digital signatures, retention of records, regulation of domain names, spam and cyber crime. Somewhat perplexingly, however, section 4(a)&(f) of the ETA expressly excludes the application of the statute to negotiable instruments and bills of lading respectively. The reasons for the exemptions are not immediately clear. It is obvious, however, that the exemptions are a major flaw in the Act, and needs to be rectified in the statute as a vital legal facilitative e-commerce provision for international trade transaction. MLEC and CUECIC do not make such exemptions, and most jurisdictions, including Australia, that have implemented electronic transactions law do not make such exemptions.[218] Electronic trade documentation, including paperless bills of lading and negotiable instruments, are a major goal of the international business community.[219]

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[216] ICT4AD, ibid, 2.
[217] ICT4AD, ibid, 2; Ibid, 145
[218] For example, see the Australian *Electronic Transactions Act* 1999 (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_act/eta1999256/ (last accessed 30 April 2010).
[219] For discussions of the efforts and systems on paperless trade documentation, see Miriam Goldby, 'Electronic bills of lading and central registries: what is holding back progress?' (2008) 17 *Information and Communications Technology Law* 125; Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) 23 *Arizona Journal of International and Comparative Law* 437; Laryea, "Facilitating Paperless International Trade", above note 184; Laryea, *Paperless Trade*, above note 7; Emmanuel

It must be acknowledged that legislation is not the only means by which electronic transacting, and attendant documentation, may be facilitated legally. There other sources of law by which legal barriers to electronic transacting may be removed and, facilitation achieved.[220] These include the use of private contracting and custom and judicial adaptation of existing (general) laws to suit new methods of transacting.[221]

Private contracting may be used in the absence of or in conjunction with legislation to overcome the legal problems with electronic transacting. For instance, the parties may enter into a contract detailing the legal status of transactions concluded with each other electronically, and undertaking not to challenge its validity.[222] While private contracting may work in most situations, its effectiveness may be limited by statutory requirements in certain situations.[223]

The general law may also adapt to recognise electronic transactions in the absence of legislation or private contract. As Justice Bingham, as he then was, once put it: The common law "has in the hands of judges the same facility [as the law merchant] for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence."[224] There have already been various instances where courts have adapted old rules to suit new methods. For instance, it has been recognised that signatures are only identification marks for authentication, so that the method (manual signing on paper) is not necessary, and a PIN is valid. However, the general law does not change swiftly to adapt itself to accommodate all the complex issues raised by the use of new technologies in international trade.

T. Laryea, "Paperless Shipping Documents: An Australian Perspective" (2000) 25(1) *Tulane Maritime Law Journal* 255.

[220] *See,* Martin, "The Electronic Contracts Convention; the CISG and New Sources of E-Commerce Law", above note 209.

[221] Laryea, "Facilitating Paperless International Trade", above note 184, 127.

[222] Laryea, "Facilitating Paperless International Trade", above note 184, 127

[223] Private contracting is sometimes needed in to be used in conjunction with statutes, such as to outline systems specifications, security measures to be taken by all parties, responsibilities and consequences of breach. *See,* e.g., Laryea, "Facilitating Paperless International Trade", above note 184, 127.

[224] See *Edelstein v Schuler & Co.* [1902] 2 KB 144, at 155.

Of the above mentioned methods of removing legal uncertainty to electronic transacting, legislation is preferable because, private contracting, and custom and judicial adaptation could be slow to develop, inconsistent and, possibly, exacerbate the problems. That is the reason for the efforts invested in developing the model laws and Convention discussed above, which are aimed at forging international harmonisation in this area. Ghana's ETA, though belated, is a good step. However, the exclusion of negotiable instruments and bills of lading (documents that are regularly used in international sale transactions) from its application is an anomaly. Ghanaian should rectify the flaw by extending the application of its ETA to those documents.

VI. CONCLUSION

In an increasing globalised world economy, countries and businesses operating within them are constantly competing for resources, investments, markets and profits. Ghana must, and does, participate in international trade, and laws that facilitate and improve Ghana's international sale regime are important. While the laws, conditions and factors affecting a country's international competitiveness in its international trade are vast, and complete reforms would require major work, time and costs, there are some simple and inexpensive aspects that can be accomplished quickly.

This paper has discussed one such step. That is, how Ghana's legal regime for the international sale (and purchase) of goods transactions can be improved by the implementation of certain ILIs. It has demonstrated how and why Ghana's implementation of certain ILIs relating to contracts for the international sale of goods (CISG), international carriage of goods (Hamburg Rules or Rotterdam Rules) and alignment of Ghana's electronic transactions legislation with MLEC and CUECIC would be beneficial to Ghana and businesses located within it. Implementation of the recommended instruments would afford Ghana, its businesses and their foreign counterparts the benefits of reduced transaction costs, enhanced efficiencies, increased competitiveness, and improved perception of the country by the international business community. Failure to implement the instruments unnecessarily disadvantages businesses operating within, and with, Ghana.

Serious consideration, therefore, should be given to implementing the relevant ILIs. It must be acknowledged that similar calls have been made in the past unsuccessfully, in respect of Ghana and other jurisdictions.[225] That such recommendations are sometimes ignored is no reason to not raise the issue. Fresh initiative to raise awareness and discuss is important. It is hoped that this article would at least influence considerations and debate for an improved legal regime for international sale transactions in Ghana. The discussions in this paper have focused on laws relating to international sale and carriage of goods, and in the context of Ghana. However, the presented arguments may be applicable to other areas of law, and to other countries in similar situations, albeit varyingly. It is hoped that this article has that effect.

[225] See, for instance, Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980", above note 58, recommending, some three decades ago, that Ghana should implement the CISG. For jurisdictions such as the UK, see Goode, above note 1, 756-758; Linarelli, above note 18; Williams, above note 35; Gärtner, above bite 35; Lee, above note 35. For Brazil, see Grebler, above note 35. For South Africa, see Eiselen, above note 18