1. I shall divide this presentation into (a) external features; and (b) internal features. In the first part, I shall select features of the CISG that relate to its implantation in Singapore and that relate also to its area of coverage and its implementation. In the second part, I shall select features of the substantive law of sale that are particular interest to a common lawyer, especially those features that signify a departure from the Sale of Goods Act.

EXTERNAL FEATURES

2. The first point to understand is that we are not dealing with private international law (choice of law). Nor are we dealing with the various ways in which States accommodate their internal law to public international law. The CISG is law in Singapore because, after Singapore adopted the Convention, a statute of the Singapore legislature was passed making it applicable (Sale of Goods (United Nations Convention) Act). Since the CISG is part of the law of Singapore, it is not provable as a fact in the way that foreign law is. The provisions of the CISG have the force of law in Singapore (s 3(1) of the Act) and they prevail over “any other law in force in Singapore” in the event of inconsistency (s 4(1)). The court is therefore free to take judicial notice of the CISG’s provisions when it is applicable.

3. Importantly, however, the CISG leaves to contracting parties the freedom to exclude or modify its provisions and even the freedom to exclude it altogether (Art 6), as is currently the case with many common law standard form contracts. The exclusion may be express or implied. As for the latter, note that a clause such as “This contract is subject to the law of Singapore” will not suffice. The CISG is part of the law of Singapore. “This contract is subject to the law of Malaysia” will suffice because Malaysia is not a Contracting State. “This contract is subject to the law of Japan” should also not suffice because, since Japan is a Contracting State, the clause does not sufficiently express an intention to introduce that part of Japanese law that governs domestic Japanese transactions.

4. The CISG applies in Singapore when buyer and seller are resident (an undefined expression – the CISG is short on definitions) in different States and both States are Contracting States (CISG Art 1(1)(a)). Singapore declared against an additional ground of application (Art 1(1)(b)), namely, where buyer and seller were different in different States (with only one or neither party resident in a Contracting State) and the choice of law rules of the forum led to the law of a Contracting State. In making this declaration, Singapore joins a small number of other States, though this number includes China and the United States. Since 83 States have adopted the Convention (but not countries in south or south-east Asia and the United Kingdom), this is a matter of generally diminishing importance. It is still important in the case of Singapore, however, if there is a contract between a party resident in a south or south-east Asian State and a Singapore resident on Singapore law terms. If a dispute falls to be resolved by the courts of Singapore, the Singapore Sale of Goods Act would then apply.
5. Only commercial contracts are subject to the CISG, and even there exceptions exist (eg ships, electricity, auction sales). Moreover, the CISG does not deal with all issues arising under a contract of sale. First, the subject of “validity” is excluded. This exception would appear to cover matters such as illegality, mistake and duress, but the CISG gives no real guidance on the matter. That said, the CISG clearly dispenses with writing as a matter of formal validity (apart from those several States that have entered a permissible declaration to contrary effect). It also dispenses with any need for consideration in the variation of contracts (Art 29). A vexed question is whether national controls on contractual exclusion clauses can be applied to exclusions and limitations of CISG rights. There is a conflict here with the freedom given by the CISG itself to exclude and vary its provisions.

6. Secondly, the CISG excludes passing of property issues, in the sense of timing and conditions that have to be met before property can pass. But it does deal with the contractual duty of a seller to transfer a good title to goods free from encumbrances (Arts 30, 41-42). Apart from these exceptions, the CISG governs the rights and duties of the parties arising from their entry into the contract. This is a green light for the application of the CISG to general contractual duties. But how is that to be done in the case of a special sale convention?

7. The answer to this is something of which a common lawyer should take particular note. Whereas a common lawyer looking at the Sale of Goods Act, would apply the general law of contract as it stands outside the Act in an ancillary fashion, so long as this does not contradict the provisions of the Act, there is no uniform general contract law to complement the CISG. Article 7(2) requires courts and tribunals to search for an answer by discerning general principles underlying the express provisions of the CISG. This process is familiar to civil lawyers looking for an answer in the code when no explicit text is applicable. There is no authorised list of these principles, but they will for example include notions of estoppel. More controversially, they might include a duty of good faith and fair dealing, though an express duty on buyers and sellers to this effect was not adopted in the treaty process. In the event of an answer being unavailable in this way, then the governing law of the contract, identified through the forum’s choice of law process, comes into play.

8. Uniform legislation needs to be interpreted uniformly if it is to remain uniform. In Article 7(1), courts and tribunals are required to interpret the CISG in an internationalist spirit and in accordance with good faith (not a duty on the contracting parties themselves). They must also interpret it with an eye to the maintenance of uniformity. This uniformity duty does not mandate any international doctrine of precedent, but the absence of an international commercial court does remind us that continuing uniformity is a challenge. One way to do this is for courts to treat as persuasive the decisions, especially the settled decisions, of courts and tribunals in other Contracting States. This puts a premium on the decisions in States where the CISG has been interpreted on multiple occasions. There are very many German decisions, for example, far outnumbering those in the United States, where the applicability of the CISG in all probability often escapes the attention of counsel and court. The danger is that courts might interpret the CISG with a national slant (there is evidence of
this in the case of notice of defect for example – see below) and thus put an onus on other national courts to follow them in the cause of uniformity.

9. There is no authorised repository of decisions on the CISG. The United Nations (through UNCITRAL) maintains a data bank of the briefest of summaries of decisions sent in by volunteer national correspondents. But there are numerous examples of private enterprise, run out of universities in Freiburg and New York (Pace) for example, where the full text of decisions can be obtained, very often translated into English. Private enterprise emerges again in the form of the CISG Advisory Council, which issues fully reasoned opinions on the meaning of different provisions of the CISG and particular problems arising under the CISG. UNCITRAL maintains a descriptive digest of decisions organised under each Article but there is no critical comment: the United Nations does not criticise Member States.

10. There is a provision (Art 8) that is directed to the interpretation of the words and conduct of particular parties. The approach adopted is a compromise between the civil law subjective approach and the common law objective approach. As Lord Hoffmann would approve, it looks at all the surrounding circumstances and goes further in embracing also post-contractual conduct. It is uncontroversial that the technique in Article 8 can be applied to the interpretation of the contract as a whole. Although Lord Hoffmann sees Article 8 as civilian in spirit, my own view is that its objective aspect is the dominant one.

11. Established international usage can also be brought into the contract as long as it is recognised in the particular trade (Art 9). The standard of regularity required for incorporation is probably somewhat lower than that required by a common law court. It is sometimes asked whether the Unidroit Principles of International Commercial Contracts (2010) might be brought in as usage. This might be true for some of its provisions, relating for example to the modalities of payment but it is not true of the Principles as a whole. Incidentally, they have no standing in Article 7(2) as indicative of the general principles on which the CISG is based. The Principles are a soft law instrument that applies when voluntarily adopted by contracting parties.

INTERNAL FEATURES

12. The substantive law of sale is divided into two parts, the first dealing with formation and the second with performance. Both parts evidence a spirit of compromise between civil law and common law. As for the common law, there is clearly evident the influence of Article 2 of the Uniform Commercial Code. Even when its subject is private law, the treaty-making process is a political one.

(a) formation and contents

13. In the area of formation, issues to note are as follows. First, there is doubt about whether a contract of sale can be concluded without the price, or the method of determining it, being specified (contrast Arts 14 and 55). This is one of those issues about which some civil lawyers and common lawyers might quarrel, hence the lack of clarity. Secondly, the postal rule of
acceptance – a bone of contention between civil and common lawyers - is not adopted but a useful compromise is reached. An acceptance concludes the contract in all cases only when it “reaches” the offeror (a vague word), but, once it has been sent, the offer may no longer be revoked (Arts 16(1), 18(2)).

14. Thirdly, following the Uniform Commercial Code as well as civil law principle, an offer may not be retracted before acceptance if it indicates that it is irrevocable or if the offeree reasonably relied on it as being irrevocable (Art 16(2)). If the purportedly withdrawn offer is not in fact accepted, one wonders how this provision will work since the CISG applies once an international sale contract has been concluded.

15. Fourthly, while not fully engaging with the so-called “battle of forms”, the CISG does deal with inconsistencies between offer and acceptance. A purported acceptance containing additional or different terms will be treated as a true acceptance, bringing those terms into the concluded contract, unless the offeror timeously objects to these terms (Art 19(2)). This is a strange provision because it does not apply to terms that “materially” alter the offer and materiality is defined in very broad terms indeed (Art 19(3)), so that it is difficult to imagine a case where the additional or different terms could set up an acceptance. The general question whether standard form terms of exclusion and limitation of liability are incorporated in a contract by reference is not one explicitly dealt with by the CISG. The consensus in the literature and decided cases (mainly German) is that this is a question of interpretation of intention and therefore governed by Article 8.

16. Fifthly, the CISG does not pronounce explicitly on the question whether and pre-contractual statements are incorporated in the contract. Case law demonstrates that the common law parol evidence rule (at least in its extreme American form) has no place in the CISG. Moreover, a contract may be proved by any means, including witnesses (Art 11). This should leave the way open for arguing, in a way similar to the common law approach, that pre-contractual statements, interpreted as being made with contractual commitment, become part of the ensuing contract. The CISG has no provision corresponding to inducing misrepresentations and rescission.

(b) performance and remedies

17. Basic rules concerning delivery and payment in the Sale of Goods Act and the CISG are broadly aligned, so I shall say no more about that. Both instruments say little or nothing about detailed matters relating to documents, such as bills of lading. There is a rich vein of common law experience in these matters but the CISG case law has so far little to offer.

18. Unlike the Sale of Goods Act, the CISG has nothing corresponding to the rule of description. Nor is there a rule of satisfactory quality (along common law lines) or a guarantee against latent defects (along civil law lines). Instead, the CISG provides, in addition to express quality terms, that the goods shall be fit for the buyer’s purpose (Art 35(2)). It is likely that this rule will be applied in a way similar to its counterpart, but just because the wording is very close indeed to that in the Sale of Goods Act is no reason to suppose that it will be interpreted in
an identical way. Beware of what translators call “faux amis”. As the common law has had to do in the past, courts (particularly German again) have had to wrestle with questions of divided skill and expertise. Is the seller liable for the compliance of goods with safety and similar standards in the buyer’s country or is that a matter for the buyer?

19. Liability for breach of contract is strict, as it is in the common law systems. This is not true of all civil law systems. This provision has been loyally applied by German courts when they would not have held a seller liable in damages in a domestic case. They might have applied in broad terms a provision dealing with exemption from liability (Art 79), which corresponds to common law frustration, in order to relieve the seller, but they did not.

20. Perhaps the most distinctive difference between the Sale of Goods Act and the CISG lies in the treatment of contractual termination (called “avoidance” in the CISG). The governing rule in the CISG is that the breach, as measured by its factual consequences, must be fundamental to justify avoidance (Art 25). This test is applied in the case of a substantial deprivation of benefit, but the case law (mainly German and Swiss) has interpreted this in such a way as largely to confine buyers to damages or price reduction claims. If the buyer can make some use of the goods, even if not the one contemplated by the contract, then the breach is not fundamental. There is, however, a slender strain of German authority applying a strict approach to time and documents (as a common law court would) in CIF and related contracts, but the text of the CISG does not support this approach. Common lawyers may well be struck about the free and easy way their civil law colleagues often interpret legislative texts.

21. An alternative route to avoidance is given to buyers and sellers facing non-performance. They can set an additional period of reasonable time for the other to perform (Arts 47, 63). If performance is not forthcoming, then they may avoid the contract. The non-performance does not then have to be fundamental. This is similar to, but probably more extensive than, making time of the essence.

22. The CISG permits the seller a chance to cure a defective performance (Arts 37, 48). Normally, cure will be by repair or replacement. This is drawn from the Uniform Commercial Code, where cure performs an altogether different function. There, it gives the seller a chance to prevent the buyer from exercising strict termination rights. A notion of cure, working in the same way, is starting to develop in Singapore case law. Under the CISG, there are no strict termination rights. It seems to be accepted that a seller may exercise the right to cure under the CISG even if only making a minor improvement in the buyer’s position. Since the CISG already has a mitigation rule (Art 77), it is arguable that cure serves no practical purpose. The silence of the case law on cure is eloquent.

23. Unlike the Sale of Goods Act, the CISG contains a strict rule that the buyer must notify the seller of a defect in the goods within a reasonable time not to exceed two years (Art 39). Otherwise, with partial exceptions, the buyer loses all remedies. In other words, the buyer’s delay is not merely treated as making his case more difficult in evidentiary terms as time elapses. I believe this to be an unsatisfactory and unfair provision. German and Austrian
courts, familiar with this rule in their own systems, have interpreted it in domestic terms in some cases to require notice within a short period, sometime two weeks. There are now clear signs now of a slightly more relaxed approach in these courts. Since a reasonable time is a question of fact, there is no good reason why other courts, even approaching the CISG with an eye to uniformity, should step into line on this issue.

24. The CISG contains rules dealing with loss of the right of avoidance (Arts 49, 82) akin to loss of the right to reject the goods under the Sale of Goods Act. They deal with the lapse of time and alteration in the state of the goods and are more generous than their common law counterparts. In consequence, the CISG contains elaborate rules on restitution, not just of the goods and price, but also of benefits and interest (Arts 81, 84) which are absent in the common law. Apart from that, the common law makes it easy to terminate but puts strict limits on the exercise of termination right. The CISG makes it hard to avoid the contract but imposes laxer limits on the exercise of avoidance rights.

25. The CISG has rules dealing with anticipatory repudiation (though repudiation is not the word used), where it is “clear” that performance will not occur (Art 72). This is a case of prospective fundamental breach. They also allow for suspension of performance where it is “apparent” (a weaker test) that a substantial part of the other party’s performance (again, weaker than fundamental breach) will not be performed. In both cases, provision is made for the seller to reinstate himself by providing “adequate assurance” of performance. The notion of adequate assurance is drawn from the Uniform Commercial Code. Its meaning is entirely unclear in the CISG and there is no case law to enlighten us.

26. In the area of remedies, a major difference with the common law is that specific performance in the CISG (more accurately called requiring performance, because this also brings in debt claims) is seen as a non-discretionary remedy available as of right. It does not however permit a buyer to reject defective goods in the absence of a fundamental breach so as to require the seller to make a fresh delivery (Art 46(2)). There is a special exception, designed to alleviate the concerns of common law courts (Art 28). A court need not require performance where, in a comparable case in domestic conditions, it would not decree specific performance. This should not extend to actions for the price.

27. As for damages, the CISG contains a remoteness of damage rule (Art 74) that looks more generous to the claimant than the rule in *Hadley v Baxendale*, but it should not be thought that one would be able to detect in practice any differences between the two formulas. The CISG also contains a remedy for defective goods, reduction of the price (Art 50), that is not truly a damages claim. The buyer does not have to show loss.

28. Whereas the Sale of Goods Act, in the case of non-delivery and non-acceptance leading to termination, applies a market rule of damages assessment, ignoring any substitute transaction (cover purchase or resale) carried out by the injured party, the CISG adopts the approach of the Uniform Commercial Code. The current (or market) price only comes into play in the absence of a substitute transaction (Arts 75-76).
29. Whereas common law systems treat interest on sums in arrear as a matter of civil procedure, express provision is made for this in the CISG (Art 78). As might be imagined, interest is a highly controversial subject in some parts of the world. The CISG provision provides no detail on the rate or starting-point of interest or on whether it is simple or compound. If this cannot be settled by reference to general principles in the CISG – and there is an argument that interest is a damages claim for non-payment and the CISG adopts a compensatory approach to damages – then the matter will have to be resolved according to the choice of law rules of the forum.

30. Finally, we come to the so-called exemption from liability for non-performance. Where non-performance is due to an impediment, unforeseeable at the date of the contract and beyond the control of the obligor, the obligor is exempted from liability in damages (Art 79). The obligee may however avoid the contract for fundamental breach if the non-performance is serious enough. The language of the CISG provision is drawn from the Uniform Commercial Code. Unlike the general common law approach, it is not a case of the contract being automatically discharged for frustration. The uncertainty of this provision, replicating the uncertainty of the frustration doctrine at common law, makes a compelling case for an express contractual provision dealing with the range and effect of untoward events. The CISG makes no provision for rewriting the contract in the case of so-called “hardship” (though the highest Belgian court for unclear reasons invented such a provision). The common law, of course, does not permit a rewriting of the contract.

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31. The practising lawyer’s response, a fair one, to all of this may be, Why should I have to master another system of law? This will only increase legal costs. That lawyer might also ask whether a client’s interests should be sacrificed in pursuit of an idealistic dream of uniformity. These are fair points to which I would add my own conviction that the CISG would not suit established commodities markets. This is for two reasons. First, well over a century of case law development, involving an interplay between standard form contracts and judicial decisions, has created a substantial measure of legal certainty in these markets. Although the development of the CISG is impressive, it lacks the experience of dealing with maritime matters and the connection between different types of contract, such as sale and charterparty contracts.

32. A second reason is that the CISG was not drawn to deal with the sale of goods in volatile market conditions. Its emphasis is on the survival of the contract wherever possible. Its rules, moreover, are drawn at a higher level of abstraction than those to which common lawyers are accustomed, which inevitably leads to a reduction of the certainty that market operators cherish.

33. Should we therefore turn our backs on the CISG and allow it to remain dormant on the statute book in Singapore? I would say no. The CISG is a reasonably balanced instrument for dealings in manufactured goods. It is less generous to the buyer than the Sale of Goods Act,
but this reflects a concern for vulnerable sellers having to deal with rejected goods in a distant place. A practising lawyer acting for the seller may find this attractive. On the other hand, a lawyer acting for a Singapore client and able to secure the agreed application of the Sale of Goods Act may prefer a known quantity, namely the Act. But the CISG, about which we are learning ever more, may well be a better alternative for a Singapore lawyer than a foreign law, whose character and contents may be an unknown, and linguistically inaccessible, quantity.

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