

# SUBMISSION TO THE LAW COMMISSION CALL FOR EVIDENCE ON SMART CONTRACTS

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## I INTRODUCTION

The Law Commission for England and Wales (the ‘Law Commission’) opened its public call for evidence on the topic of smart contracts on 17 December 2020.<sup>1</sup> It is with great pleasure that we offer the following evidence, addressing the *United Nations Convention on Contracts for the International Sale of Goods*<sup>2</sup> (the ‘*CISG*’ or the ‘*Convention*’), in response to that call.

The desirability (or otherwise) of the United Kingdom’s (the ‘UK’s’) accession to the *CISG* is a matter that has been agitated in the scholarly literature for a great number of years.<sup>3</sup> We

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<sup>1</sup> Ministry of Justice, ‘Law Commission Call for Evidence on Smart Contracts’, *Law Commission: Reforming the Law* (Web Page) <<https://consult.justice.gov.uk/law-commission/smart-contracts/>>.

<sup>2</sup> *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (‘*CISG*’).

<sup>3</sup> For just a small number of contributions to this debate: see Camilla Baasch Andersen, ‘Of Cats and Cream: The UK and the *CISG*’ in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Growing the CISG: 6<sup>th</sup> Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2016) 1; Silvia Nikolova, ‘UK’s Ratification of the *CISG* – An Old Debate or a New Hope for the Economy of the UK on its Way Out of the Recession: The Potential Impact of the *CISG* on the UK’s SME’ (2012) 3(3) *Pace International Law Review Online Companion* 69; Alastair Mullis, ‘Twenty-Five Years On: The United Kingdom, Damages and the *Vienna Sales Convention*’ (2007) 71(1) *The Rabel Journal of Comparative and International Private Law* 35; Sally Moss, ‘Why the United Kingdom Has Not Ratified the *CISG*’ (2005) 25(1) *Journal of Law and Commerce* 483; Alison Williams, ‘Forecasting the Potential Impact of the *Vienna Sales Convention* on International Sales Law in the United Kingdom’ in Pace

note that the Smart Contracts Project's current scoping study has been described in the 'Smart Contracts Call for Evidence' (the 'Call for Evidence') as follows:

The Ministry of Justice has now asked us to undertake a scoping study on smart contracts. The scoping study will provide *an accessible account of the current law* and set out how it will, or may, apply to smart contracts. It will also discuss the use of smart contracts in practice and identify any difficulties or uncertainties *which arise under the law as it stands*. Our project is intended to inform public debate and seek a consensus about issues to be addressed in the future. *It will not offer formal recommendations for reform.*<sup>4</sup>

One of this Submission's authors has previously published research arguing in favour of the UK's accession to the *CISG*.<sup>5</sup> Nevertheless, and consistently with these instructions, this Submission takes no position on that issue. Instead, it addresses the *CISG* purely to the extent that it is an existing body of law, adopted by 94 current Contracting States.<sup>6</sup>

Analysis of the *CISG*'s application to smart contracts is still important in the context of the Smart Contracts Project, notwithstanding the fact that the UK is not yet a Contracting State.<sup>7</sup> This is because the *CISG* can (and already does) govern contracts to which UK businesses are party, even without the UK being a Contracting State. Given the nature of smart contracts, and the nature of choice of law clauses, it also stands to reason that *CISG*'s exclusion will be less common in the smart contracts context, with the consequence that it may apply more often to smart contracts: expanding the practical impact of its otherwise-default operation. These matters are addressed, in detail, in Part III. As a consequence of these conclusions, assessing the *CISG*'s interface with smart contracting is a matter of significant practical importance for UK businesses. This matter is dealt with in Part II.

While the *CISG*'s initial applicability is logically an anterior consideration to the operation of its individual rules, our Submission addresses the questions raised in Chapter 3: Formation of Smart Contracts (in Part II) and Chapter 7: Jurisdiction and Smart Contracts (in Part III) in the order that those Chapters appear in the 'Call for Evidence'. Concluding remarks are

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International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000–2001* (Kluwer, 2002) 9; Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom' (1997) 26(3) *University of Baltimore Law Review* 51; Barry Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' (Conference Paper, Centro di Studi e Ricerche di Diritto Comparato e Straniero, March 1993) <[https://iicl.law.pace.edu/sites/default/files/cisg\\_files/nicholas3.html](https://iicl.law.pace.edu/sites/default/files/cisg_files/nicholas3.html)>.

<sup>4</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 2 [1.9] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>> (emphasis added).

<sup>5</sup> Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The *CISG* and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607.

<sup>6</sup> United Nations, 'Chapter X: International Trade and Development: *United Nations Convention on Contracts for the International Sale of Goods*, Vienna, 11 April 1980', *United Nations Treaty Collection* (Database, 2021) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10)>. For the *CISG*'s current status in regard to its Contracting States, see also United Nations Commission on International Trade Law, 'Status: *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (*CISG*)', *Texts and Status* (Web Page) <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status)>.

<sup>7</sup> See generally Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The *CISG* and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607.

provided in Part IV. Select published research relevant to Part II and Part III's evidence is then attached to this Submission as Appendix 1 and Appendix 2, respectively.

## II CONTRACT FORMATION

Just as the *CISG*'s text does not directly address other post-1980 technological advances, such as commercial trade in computer software<sup>8</sup> or the use of the Internet in commercial transactions,<sup>9</sup> the *CISG* 'does not directly address the formation of smart contracts in international trade'.<sup>10</sup> The *CISG* does, however, address contract formation in general terms, in Part II of the *Convention*. Those rules can be applied to all species of contract – including smart contracts – and are helpfully summarised by Duke in a recent analysis of the *CISG*'s application to smart contracts.<sup>11</sup> That analysis is attached to this Submission as Appendix 1.

Before considering the specifics of the *CISG*'s contract formation rules, it may assist to summarise the *Convention*'s interpretative provisions at this initial stage. These diverge from the common law's objective approach to contract formation. Art. 8(1) *CISG*, for example, permits reference to subjective intent 'where the other party knew or could not have been unaware what that intent was'. Art. 8(2) *CISG* then provides an objective intent rule where Art. 8(1) *CISG*'s threshold conditions are not satisfied. Since it will rarely be the case that an addressee will know or could not have been unaware of the other party's subjective intent, Art. 8(2) *CISG*'s objective intent test is by far the predominant test applied in practice.<sup>12</sup> The evidentiary basis for determining the intent of a party (or the understanding that a reasonable person would have had) is outlined in Art. 8(3) *CISG*, which requires that 'due consideration' be given 'to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'. Preliminary negotiations and subsequent conduct must therefore be taken into account in assessing contract formation under the *CISG*.<sup>13</sup> This accords with the English position on contract formation, although not on contractual interpretation.<sup>14</sup>

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<sup>8</sup> Sarah Green and Djakhongir Saidov, 'Software as Goods' [2007] (2) *Journal of Business Law* 161, 162, 178.

<sup>9</sup> The *CISG* does mention facsimiles (faxes) and telegrams, but was concluded before the creation of the world wide web. Notably, this is also true of the *Sale of Goods Act 1979* (UK).

<sup>10</sup> Anna Duke, 'What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis' (2019) 20(1) *Chicago Journal of International Law* 141, 145. See also 170–1.

<sup>11</sup> Anna Duke, 'What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis' (2019) 20(1) *Chicago Journal of International Law* 141, 155–9.

<sup>12</sup> Martin Schmidt-Kessel, 'Article 8' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4<sup>th</sup> ed, 2016) 143, 154 [22]–[23]; Lisa Spagnolo, 'Contract Interpretation' in Larry DiMatteo et al (eds), *International Sales Law: Contract, Principles & Practice* (CH Beck, Hart & Nomos, 2016) 713, 730 [32].

<sup>13</sup> The *CISG*'s interpretative rules can be applied to the acts constituting contract formation: Martin Schmidt-Kessel, 'Article 8' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4<sup>th</sup> ed, 2016) 143, 144–5 [1]–[3].

<sup>14</sup> On the different treatment of evidentiary relevance for the purposes of contract formation and contract interpretation at common law: see DW McLauchlan, 'Contract Formation, Contract Interpretation, and Subsequent Conduct' (2006) 25(1) *University of Queensland Law Journal* 77, 82.

### A Question 9: Agreement<sup>15</sup>

The *CISG* adopts an offer-and-acceptance model of contract formation.<sup>16</sup> As the ‘Call for Evidence’ notes, there are different varieties of smart contracts, ranging from ‘natural language contracts in which some or all of the contractual obligations are performed automatically by ... code’, to ‘hybrid contract[s] in which some contractual obligations are recorded in natural language and others are recorded in ... code’, to ‘contract[s] recorded solely in the code of a computer program’.<sup>17</sup> Duke’s recent analysis confirms that even where smart contracts consist entirely of code – that is, even in the hardest category of case – they are still capable of satisfying the *CISG*’s offer and acceptance rules and are thus capable of constituting legally binding contracts under the *Convention*.<sup>18</sup> Duke’s detailed account of the contract formation process, as it applies to smart contracts governed by the *CISG*, can be referred to in Appendix 1.

### B Question 14: Consideration<sup>19</sup>

Unlike the common law, the *CISG* does not have an independent consideration requirement for the purposes of contract formation. It is true that offers under the *CISG* must expressly or implicitly fix or make provision for determining the price in order to meet the threshold of being ‘sufficiently definite’ offers,<sup>20</sup> but if the parties fail to reach an agreement on price, the *CISG* provides that there is an obligation to pay ‘the price generally charged’ for such goods ‘under comparable circumstances in the trade concerned’.<sup>21</sup> In other words, ‘market price’ may be used as a default price,<sup>22</sup> and contracts therefore do not necessarily fail on account of lacking a specified price alone.<sup>23</sup> Indeed, *CISG* cases demonstrate a *favor contractus*

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<sup>15</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 29 [3.13] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>16</sup> Ingeborg Schwenzer and Florian Mohs, ‘Old Habits Die Hard: Traditional Contract Formation in a Modern World’ (2006) 6(6) *Internationales Handelsrecht* 239, 239.

<sup>17</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 15–16 [2.32] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>18</sup> Anna Duke, ‘What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis’ (2019) 20(1) *Chicago Journal of International Law* 141, 163–74, 176–7.

<sup>19</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 34 [3.30] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>20</sup> Art. 14(1) *CISG*.

<sup>21</sup> Art. 55 *CISG*.

<sup>22</sup> This may be on the basis that the parties intended to derogate from Art. 14 *CISG* to conclude an open price contract, or where part performance has occurred: Florian Mohs, ‘Article 55’ in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4<sup>th</sup> ed, 2016) 844, 847–8 [7]–[10].

<sup>23</sup> Art. 55 *CISG* states: ‘Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned’. Concluding that ‘the dust has settled’ on previous controversy, and that Art. 55 *CISG* may ‘save’ contracts where the parties have not agreed expressly or implicitly on the price (nor a mechanism to fix it): see Loukas Mistelis, ‘Article 55 *CISG*: The Unknown Factor’ (2005) 25(1) *Journal of Law and Commerce* 285, 296. See also Alejandro Garro, ‘Reconciliation of Legal Traditions in the *U.N. Convention on Contracts for the International Sale of Goods*’ (1989) 23(2) *International Lawyer* 443.

approach to upholding the contract.<sup>24</sup> Moreover, with respect to the subsequent modification and termination of contracts, ‘the mere agreement of the parties’ is sufficient under the *CISG*: no exchange of consideration is required at all.<sup>25</sup> This stands in contrast to the English position which still relies upon the rather strained and highly criticised concept of ‘practical benefit’ in lieu of consideration to support contractual variations.<sup>26</sup>

The absence of any consideration requirement under the *CISG* should be kept in mind when assessing any consideration-related challenges identified by other Submissions responding to Question 14.

### C Question 17: Intention to Create Legal Relations<sup>27</sup>

The ‘Call for Evidence’ notes that difficulties in finding an intention to create legal relations may arise at common law where agreements are reached entirely on a distributed ledger.<sup>28</sup> Duke’s analysis draws attention to circumstances where, under non-harmonised US law, the very nature of a smart contract may make it difficult to show that there was an intention to be legally bound.<sup>29</sup> In the *CISG* context, however, there is no stand-alone intention to create legal relations requirement. This presents little by way of practical issue, as intention to create legal relations would readily be inferred (in the common law context) in the business-to-business transactions that the *CISG* governs. Notably, the *CISG* does not apply to the types of contracts in which intention to create legal relations is often called into question on the basis of social elements, and specifically excludes consumer contracts from its scope.<sup>30</sup>

Intention is still relevant, however, under the *CISG*’s rules relating to offer and acceptance. An offer must indicate ‘the intention of the offeror to be bound in case of acceptance’,<sup>31</sup> whilst an acceptance must indicate ‘assent to an offer’.<sup>32</sup> As identified in this Part’s opening remarks, Art. 8 *CISG*, depending on the circumstances, allows reference to either subjective

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<sup>24</sup> See Lisa Spagnolo, ‘*CISG*: Article 14’ in Peter Mankowski (ed), *Commercial Law: A Commentary* (CH Beck, Hart & Nomos, 2018) 58, 59–60 [4]; Loukas Mistelis, ‘Article 55 *CISG*: The Unknown Factor’ (2005) 25(1) *Journal of Law and Commerce* 285, 294–5; *Seafood and Meat Case (CISG-Online Case No 671)*, Oberlandesgericht Rostock, Germany, 10 October 2001 <<https://cisg-online.org/search-for-cases?caselid=6613>>; *Sour Cherries Case I (CISG-Online Case No 1190)*, Landgericht Nuebrandenburg, Germany, 3 August 2005 <<https://cisg-online.org/search-for-cases?caselid=7113>>; *Dutch Fabrics Case (CISG-Online Case No 336)*, Bezirksgericht St Gallen, Switzerland, 3 July 1997 <<https://cisg-online.org/search-for-cases?caselid=6308>>. *Contra Special Screws Case (CISG-Online Case No 110)*, Oberlandesgericht Frankfurt am Main, Germany, 4 March 1994 <<https://cisg-online.org/search-for-cases?caselid=6089>>.

<sup>25</sup> Art. 29(1) *CISG*.

<sup>26</sup> See Lisa Spagnolo, ‘The International Dimensions of Australian Contract Law’ in John Eldridge and Tim Pilkington (eds), *The Australian Law of Contract in the 21<sup>st</sup> Century: Debates and Directions* (The Federation Press, 2021) 221, 230–4: comparing, among other things, the UK practical benefit doctrine of contractual variation with the *CISG*’s position.

<sup>27</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 41 [3.51] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>28</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 37–8 [3.39], 40–1 [3.47]–[3.50] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>29</sup> Anna Duke, ‘What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis’ (2019) 20(1) *Chicago Journal of International Law* 141, 159–60.

<sup>30</sup> Art. 2(a) *CISG*.

<sup>31</sup> Art. 14(1) *CISG*.

<sup>32</sup> Art. 18(1) *CISG*.

or objective intentions for these purposes. This approach is distinct from the common law approach which, as noted in the ‘Call for Evidence’,<sup>33</sup> focuses on an objective determination.

In the scenario where agreement is reached entirely on a distributed ledger, application of the *CISG* would allow reference to an extremely wide variety of circumstances (including, in some cases, subjective intent) to determine whether the requisite intention for contract formation purposes is met.<sup>34</sup> Indeed, it has been argued by one author of this Submission that in certain circumstances ‘an intention to be bound may be found even where an offeror lacks any knowledge that a proposal has been made, a situation which could arise by way of automated proposals’.<sup>35</sup> This could include situations where parties have already agreed upon a framework for automated protocols within a smart contract setting.

Given that the ‘contractual language’ used in smart contracts may consist of code, one of the parties may be unaware of the terms contained within what might be viewed (as a matter of law) as an offer. Absent a framework agreed by the parties, this has potential consequences when assessing whether that party intended to ‘assent’ to the offer, so as to validly accept it for the purposes of contract formation under the *CISG*.<sup>36</sup> At common law, the same problem arises in the context of the ‘battle of forms’. Guidance issued by the *CISG* Advisory Council suggests that for standard terms to be incorporated under the *Convention*, there must be both reference to the terms *and* either awareness of them by the addressee, or the making available of those terms to the addressee.<sup>37</sup> This is a critical test in the cross-border sales context, where standard terms may be difficult to access: especially if expressed in a language or languages other than that of the offeree.<sup>38</sup> Under the *CISG*, the burden of making terms accessible (and understandable) rests on the offeror, who stands to benefit from their incorporation.<sup>39</sup> By analogy, the inaccessibility and/or incomprehensibility of code could

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<sup>33</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 36 [3.36] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>34</sup> Anna Duke, ‘What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis’ (2019) 20(1) *Chicago Journal of International Law* 141, 159. See also 168–9, 174.

<sup>35</sup> Lisa Spagnolo, ‘*CISG*: Article 14’ in Peter Mankowski (ed), *Commercial Law: A Commentary* (CH Beck, Hart & Nomos, 2018) 58, 61 [9].

<sup>36</sup> Art. 18(1) *CISG*.

<sup>37</sup> *CISG* Advisory Council, ‘*CISG* Advisory Council Opinion No 13: Inclusion of Standard Terms Under the *CISG*’ in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing, 2017) 295, 296 [2]–[3.4], 304 [2.3]–[2.4]. This *CISG* Advisory Council’s Opinions are also available online at *CISG* Advisory Council, ‘Opinions’ (Web Page, 2021) <<http://www.cisgac.com/opinions/>>. See also Olaf Meyer, ‘Constructive Interpretation: Applying the *CISG* in the 21<sup>st</sup> Century’ in Olaf Meyer and André Janssen (eds), *CISG Methodology* (Sellier European Law Publishers, 2009) 319, 342.

<sup>38</sup> *CISG* Advisory Council, ‘*CISG* Advisory Council Opinion No 13: Inclusion of Standard Terms Under the *CISG*’ in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing, 2017) 295, 296 [6.2], 313 [6.5]. See also Ulrich Schroeter, ‘Article 14’ in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4<sup>th</sup> ed, 2016) 269, 305 [69], 306–7 [71]; Lisa Spagnolo, ‘*CISG*: Article 14’ in Peter Mankowski (ed), *Commercial Law: A Commentary* (CH Beck, Hart & Nomos, 2018) 58, 69 [26]; *Fleck Elektroinstallation GmbH v Transquest Tag & Tracing Solutions BV (CISG-Online Case No 2590)*, Rechtbank Gelderland, The Netherlands, 6 November 2013 <<https://cisg-online.org/search-for-cases?caselid=8504>>; *Car Phones Case (CISG-Online Case No 915)*, Oberlandesgericht Düsseldorf, Germany, 21 April 2004 <<https://cisg-online.org/search-for-cases?caselid=6840>>; *Tantalum Powder Case I (CISG-Online Case No 828)*, Oberster Gerichtshof, Austria, 17 December 2003 <<https://cisg-online.org/search-for-cases?caselid=6754>>.

<sup>39</sup> Ulrich Schroeter, ‘Article 14’ in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4<sup>th</sup> ed, 2016) 268, 295–6 [48]–

play a role in contract formation under the *CISG* regarding smart contracts, because it may result in coded terms not being incorporated into the contract, although this has not yet been tested.

#### D Question 18: Formality Requirements and Deeds<sup>40</sup>

In the ordinary course, formality requirements do not apply under the *CISG*. Pursuant to Art. 11 *CISG*:

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

Provided that smart contracts satisfy the *Convention's* offer and acceptance requirements, their embodiment in code has no effect on their binding nature under the *CISG* because of this freedom of form rule.

It is possible for Contracting States to make a declaration under Art. 96 *CISG*, imposing domestic writing requirements over the general freedom of form rules that are otherwise enshrined in Arts 11 & 29 *CISG*.<sup>41</sup> Such declarations cannot be contracted out of by the parties to the contract.<sup>42</sup> Nevertheless, only nine States (out of the *CISG's* 94 current Contracting States) have made (and currently retain) written form declarations: these are Argentina, Armenia, Belarus, Chile, the Democratic People's Republic of Korea, Paraguay, the Russian Federation, Ukraine, and Viet Nam.<sup>43</sup> Several States that had previously made Art. 96 *CISG* declarations – namely China, Estonia, Hungary, Latvia, and Lithuania – have since withdrawn them,<sup>44</sup> in line with a general trend toward States withdrawing their *CISG* declarations and reservations.<sup>45</sup>

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[49]; Lisa Spagnolo, 'CISG: Article 14' in Peter Mankowski (ed), *Commercial Law: A Commentary* (CH Beck, Hart & Nomos, 2018) 58, 63–9 [9]–[28].

<sup>40</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 44 [3.62] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>41</sup> See also Art. 12 *CISG*.

<sup>42</sup> Arts 6 & 12 *CISG*. The *CISG* can still be excluded as a whole, inclusive of the declaration: Ulrich Schroeter, 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 *CISG* in Theory and Practice' (2014) 33(1) *Journal of Law and Commerce* 79, 116–17. A further exception to this restriction on party autonomy exists in the arbitration context, where parties may choose to be governed by the *CISG* in the abstract (excluding any written form declaration that exists in any relevant State legal system) as rules of law: at 114–15.

<sup>43</sup> United Nations Commission on International Trade Law, 'Status: *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (*CISG*)', *Texts and Status* (Web Page) <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status)>.

<sup>44</sup> Ulrich Schroeter, 'The Withdrawal of Hungary's Declarations Under the *CISG*: Law and Policy' (2015) 15(5) *Internationales Handelsrecht* 210, 211; Ulrich Schroeter, 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 *CISG* in Theory and Practice' (2014) 33(1) *Journal of Law and Commerce* 79, 87–9.

<sup>45</sup> *CISG* Advisory Council, '*CISG* Advisory Council Declaration No 2' in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing, 2017) 675, 678–9. The *CISG* Advisory Council's Declarations are also available online at *CISG* Advisory Council, 'Declarations', *Opinions* (Web Page, 2021) <<http://www.cisgac.com/opinions/#dec>>.

The UK's top five trading partners in goods trade, for the first half of 2020, were the United States of America, Germany, China, the Netherlands, and France.<sup>46</sup> All five are Contracting States to the *CISG*, and none have written form declarations that are currently in force.<sup>47</sup> Nevertheless, even where trade does occur with parties from Contracting States that have made written form declarations, it does not necessarily follow that formality requirements automatically apply. The majority (and preferable) view is that private international law rules then determine whether that State's written form rules actually apply or not.<sup>48</sup> And even if a declaration State's laws are applied to matters of form, the State's domestic rules of form will be applied on their current terms. It is actually now the case that 'almost all Article 96 reservation States no longer impose writing requirements on international sales contracts in their domestic laws'.<sup>49</sup>

### III GOVERNING LAW

As explained in Part I of this Submission, assessing the *CISG*'s application to smart contracts is important in the context of the Smart Contracts Project notwithstanding the fact that the UK is not yet a *CISG* Contracting State. This is because the *CISG* can still apply to international sales contracts entered into by UK businesses, even without the UK's accession.

In this Part, departing from the order set out in the 'Call for Evidence', Question 50 is addressed first, followed by Question 49. This is necessitated by our analysis, in the context of Question 50, of the *CISG*'s rules on application.

#### A Question 50: Governing Law<sup>50</sup>

Question 50 of the 'Call for Evidence' poses the question: '[c]an an express choice of applicable law be embodied in computer code?'<sup>51</sup> Since some difficulty may arise in integrating express choices of law into code, our evidence relating to this question emphasises a related point: that the *CISG*'s default operation has wider scope for practical impact in the smart contracts context, as compared to traditional methods of contracting.

Pursuant to Art. 1(1) *CISG*, the *Convention* applies as the governing law of a contract if (amongst other things) the parties have their 'places of business in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the

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<sup>46</sup> Office for National Statistics, 'UK Trading Partners and Trade Relationships: 2020', *International Trade* (Web Page, 2 December 2020) <<https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/uktradingpartnersananalysisoftraderelationships/2020>>.

<sup>47</sup> The People's Republic of China withdrew its Art. 96 *CISG* declaration on 16 January 2013: see Li Wei, 'On China's Withdrawal of its Reservation to *CISG* Article 1(b)' in Jichun Shi (ed), *Renmin Chinese Law Review: Selected Papers of The Jurist, Volume 2* (Edward Elgar Publishing, 2014) 300, n 2.

<sup>48</sup> Ulrich Schroeter, 'The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 *CISG* in Theory and Practice' (2014) 33(1) *Journal of Law and Commerce* 79, 101–9, 112–14.

<sup>49</sup> *CISG* Advisory Council, '*CISG* Advisory Council Declaration No 2' in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing, 2017) 675, 677.

<sup>50</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 119 [7.45] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>51</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 119 [7.45] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

application of the law of a Contracting State'. While contracts entered into by UK-based businesses will not trigger the *CISG*'s application pursuant Art. 1(1)(a) *CISG*, since the UK is not a Contracting State, they may still be governed by the *Convention* as a result of Art. 1(1)(b) *CISG*. This will be the case if:

- There is a choice of law clause in a contract in favour of the law of a Contracting State, and that choice of law clause does not exclude the *CISG*; or
- Relevant conflicts of laws rules that are used to determine the governing law absent party choice (such as those contained in Art. 4 *Rome I Regulation*) lead to the application of a Contracting State's law.

The *CISG* can apply on either of these bases even if one or both of the parties do not have their place(s) of business in Contracting States.<sup>52</sup>

Empirical evidence confirms that UK law is a popular choice of law in international trade.<sup>53</sup> If a smart contract contains a choice of law clause in favour of UK law, the *CISG* will not apply.<sup>54</sup> However, the laws of numerous other States which are *CISG* Contracting States are also commonly chosen in international trade. In the arbitration context, these include the laws of Switzerland, the United States of America, France, Brazil, and Spain.<sup>55</sup> In fact, according to the International Chamber of Commerce's (the 'ICC's') 2019 dispute resolution statistics, five out of the seven most commonly chosen laws in ICC arbitration in that year were the laws of *CISG* Contracting States.<sup>56</sup>

While UK businesses (like businesses anywhere in the world) are likely to favour the application of their home law,<sup>57</sup> this will not necessarily be the end result of their contractual negotiations. As a result, UK businesses can be – and actually are – already party to *CISG* contracts.<sup>58</sup> This practical point is noted in a recent analysis by Hayward, Zeller and

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<sup>52</sup> Benjamin Hayward, 'The *CISG* in Australia: The Jigsaw Puzzle Missing a Piece' (2010) 14(2) *Vindobona Journal of International Commercial Law and Arbitration* 193, 199–202; Lisa Spagnolo, 'The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10(1) *Melbourne Journal of International Law* 141, 144.

<sup>53</sup> International Chamber of Commerce, 'ICC Dispute Resolution: 2019 Statistics', *Find a Document* (Statistical Report, 2020) 15 <<https://iccwbo.org/publication/icc-dispute-resolution-statistics/>>. Free registration is required in order to access this statistical report from this source. A copy is held on file with the authors.

<sup>54</sup> Provided that the parties' purported choice of law is valid pursuant to the conflict of laws rules of the forum.

<sup>55</sup> International Chamber of Commerce, 'ICC Dispute Resolution: 2019 Statistics', *Find a Document* (Statistical Report, 2020) 15 <<https://iccwbo.org/publication/icc-dispute-resolution-statistics/>>.

<sup>56</sup> International Chamber of Commerce, 'ICC Dispute Resolution: 2019 Statistics', *Find a Document* (Statistical Report, 2020) 15 <<https://iccwbo.org/publication/icc-dispute-resolution-statistics/>>.

<sup>57</sup> Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer, 2014) 105; Christiana Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7(3–4) *European Journal of Law Reform* 303, 304; Luiz Gustavo Meira Moser, 'Parties' Preferences in International Sales Contracts: An Empirical Analysis of the Choice of Law' (2015) 20(1) *Uniform Law Review* 19, 27. See also Joseph Lookofsky, 'Online with AI K.' in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law Across National Boundaries* (Wildy, Simmonds & Hill Publishing, 2008) 287, 290–1.

<sup>58</sup> See, eg, *Kingspan Environmental Ltd v Borealis AS* [2012] EWHC 1147 (Comm): where the *CISG* applied via the parties' choice of Danish law.

Andersen,<sup>59</sup> which is attached to this Submission as Appendix 2. The deciding factor here will be the influence of the parties' bargaining strengths on their choice of law.<sup>60</sup>

As foreshadowed by the 'Call for Evidence',<sup>61</sup> the nature of choice of law clauses (being 'non-operational clauses [that] do not embed conditional logic') may preclude their incorporation into some types of smart contracts.<sup>62</sup> Nevertheless, this is no obstacle to the *CISG*'s application. The *CISG* constitutes a default legal regime for international sales contracts: where its application rules (as outlined above) are satisfied, it will automatically apply unless its operation is excluded by the parties.<sup>63</sup> Since *CISG* exclusions would typically be expressed in choice of law clauses,<sup>64</sup> it stands to reason that the *CISG*'s practical application in the smart contracts context may in fact be wider than is the case with traditional contracts. If smart contracts are less likely to contain choice of law clauses, they are equally less likely to exclude the *CISG* (which may otherwise, by default, apply).

### B Question 49: Choosing Non-State (Rules of) Law<sup>65</sup>

Regarding party choice (in smart contracts) to be bound by platform protocols, the 'Call for Evidence' correctly notes that Art. 3(1) *Rome I Regulation* only permits the choice of national law.<sup>66</sup> Since platform protocols are not part of any national legal system, it follows that Art. 3(1) *Rome I Regulation* does not permit parties to choose platform protocols as a governing law. On the question of whether parties to smart contracts can choose to be governed by platform protocols pursuant to Art. 3(1) *Rome I Regulation*, the answer is an absolute and unequivocal no.

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<sup>59</sup> Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The *CISG* and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607, 622, 640.

<sup>60</sup> For analysis of the likely extent to which bargaining strength influences choices of law, as opposed to other reasons: see Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer, 2014) 152–81; Lisa Spagnolo, 'Green Eggs and Ham: The *CISG*, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts' (2010) 6(2) *Journal of Private International Law* 417, 421–33.

<sup>61</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 119 [7.44] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>62</sup> Anna Duke, 'What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis' (2019) 20(1) *Chicago Journal of International Law* 141, 150.

<sup>63</sup> Arts 1(1) & 6 *CISG*; *CISG* Advisory Council, '*CISG* Advisory Council Opinion No 16' in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing, 2017) 523, 524 [1]; Lisa Spagnolo, '*Iura Novit Curia* and the *CISG*: Resolution of the Faux Procedural Black Hole' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2<sup>nd</sup> Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011) 181, 196, 205; Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The *CISG* and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607, 631.

<sup>64</sup> See, eg, *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 206 [55]: quoting a choice of law clause which selected 'the laws of Luxembourg, excluding the law of conflicts and the *Convention on Contracts for the International Sale of Goods (CISG)*'.

<sup>65</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 119 [7.42] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>66</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 118 [7.40] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>. See, eg, Helmut Heiss, 'Party Autonomy' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier European Law Publishers, 2009) 1, 2.

As to whether Art. 3(1) *Rome I Regulation* ‘should’ permit such a choice,<sup>67</sup> the answer is also a very firm no. First, such a reading of Art. 3(1) *Rome I Regulation* would be inconsistent with the provision’s legislative history. Wider powers of party choice (which would have extended beyond laws contained in State legal systems) were considered and rejected during the *Rome I Regulation*’s drafting.<sup>68</sup> Secondly, reading Art. 3(1) *Rome I Regulation* in this way would be out of step with the general position taken in State choice of law rules worldwide, which typically only permit parties to choose State law.<sup>69</sup> And thirdly, any potential reading of Art. 3(1) *Rome I Regulation* as permitting the choice of platform protocols would be inconsistent with the provision’s text. Reference can be made here to private international law operating in the arbitration context, where it is necessary for a provision to use language other than ‘law’ (such as ‘rules of law’) in order to support party choice of non-national rules.<sup>70</sup> In addition, as a practical matter, platform protocols (unlike State laws) are necessarily incomplete. Even if parties could choose platform protocols as their governing law, which we reiterate is not the case, resort to a supplementary body of law may still be required in any event.

Parties *may* still incorporate platform protocols as contractual terms, just as they can incorporate the *CISG*’s provisions as contractual terms instead of having them apply as hard law via a Contracting State’s national legal system:<sup>71</sup> or, for that matter, just as they can contractually incorporate the *UNIDROIT Principles of International Commercial Contracts*<sup>72</sup> or other soft law instruments. This is specifically recognised by Recital [13] *Rome I Regulation*, which confirms that ‘[t]his *Regulation* does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’. Nevertheless, this situation is very different to choosing platform protocols as a governing law. Where platform protocols are incorporated as contractual terms, there is still an underlying applicable (national) law, the mandatory rules of which will prevail over the only-contractually-applicable protocols.<sup>73</sup> In addition, contractual terms are always interpreted in context. Thus, where platform protocols are incorporated as contract terms, the very same protocols could conceivably be subject to different interpretations in the context of

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<sup>67</sup> Law Commission, ‘Smart Contracts Call for Evidence’ (Call for Evidence Paper, December 2020) 119 [7.42] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>68</sup> Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 201–2 [5.34]. Even the original draft rule would still have excluded ‘private codifications not adequately recognised by the international community’, and thus would not have permitted party choice of platform protocols in any event: Commission of the European Communities, ‘Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)’, COM(2005) 650 final, 5.

<sup>69</sup> Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 201 [5.34].

<sup>70</sup> Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6<sup>th</sup> ed, 2015) 216 [3.189].

<sup>71</sup> Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, ‘The *CISG* and the United Kingdom: Exploring Coherency and Private International Law’ (2018) 67(3) *International and Comparative Law Quarterly* 607, 616.

<sup>72</sup> International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2016* <<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>>.

<sup>73</sup> Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier European Law Publishers, 2007) 66; Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, ‘The *CISG* and the United Kingdom: Exploring Coherency and Private International Law’ (2018) 67(3) *International and Comparative Law Quarterly* 607, 616; Lisa Spagnolo, ‘The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers’ (2009) 10(1) *Melbourne Journal of International Law* 141, 144–5.

different contracts.<sup>74</sup> Taking all of these matters into account, platform protocols are an inadequate substitute for a governing law.

#### IV CONCLUSION

As Part II of this Submission has demonstrated, with reference to Duke's analysis, the *CISG*'s contract formation rules are capable of applying to smart contracts. Furthermore, as Part III of this Submission has confirmed, this matter is highly relevant to UK businesses. Notwithstanding the fact that the UK is not yet a *CISG* Contracting State, UK businesses may still be (and in practice, are) bound by the *Convention* on the present state of the law. It also stands to reason, given the nature of smart contracts and the nature of choice of law clauses, that *CISG* exclusions will be less common in the smart contracts context: widening the practical influence of the *Convention*'s default operation in relation to UK traders engaged in international trade.

We commend the Smart Contracts Project's investigation of the capacity of existing laws to adequately govern smart contracts. In the context of Question 56 of the 'Call for Evidence'<sup>75</sup> (requesting comment on any other issues), however, we urge the Law Commission's scoping study to take an international perspective that is inclusive of the *CISG*. This is important for the legal reasons that have been set out in Part II and in Part III of this Submission. However, this is also important as a matter of commercial necessity. As Duke has noted, 'without an international legal framework, legal ambiguities surrounding smart contracts may discourage entrepreneurs from developing this technology and thereby deter increasing trade flows and enhancing trade efficiency'.<sup>76</sup>

We would gladly assist the Law Commission with any further matters arising from our Submission. We can be contacted, for this purpose, at the email addresses set out in this Submission on page 1.



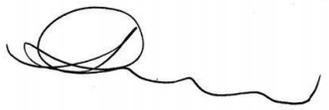
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<sup>74</sup> See, eg, *Wagners Nouvelle Caledonie SARL v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219, [43]: in the context of arbitration rules. See generally Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The *CISG* and the United Kingdom: Exploring Coherency and Private International Law' (2018) 67(3) *International and Comparative Law Quarterly* 607, 616.

<sup>75</sup> Law Commission, 'Smart Contracts Call for Evidence' (Call for Evidence Paper, December 2020) 130 [8.3] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>>.

<sup>76</sup> Anna Duke, 'What Does the *CISG* Have to Say About Smart Contracts? A Legal Analysis' (2019) 20(1) *Chicago Journal of International Law* 141, 145.



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**APPENDIX 1:**  
**ANNA DUKE, 'WHAT DOES THE CISG HAVE TO SAY ABOUT SMART  
CONTRACTS? A LEGAL ANALYSIS' (2019) 20(1) *CHICAGO JOURNAL OF  
INTERNATIONAL LAW* 141**

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**APPENDIX 2:**  
**BENJAMIN HAYWARD, BRUNO ZELLER AND CAMILLA BAASCH  
ANDERSEN, 'THE CISG AND THE UNITED KINGDOM: EXPLORING  
COHERENCY AND PRIVATE INTERNATIONAL LAW' (2018) 67(3)  
*INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 607**

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