
Political barriers in the ratification of international commercial law conventions

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Abstract

This article analyses the ratification of international commercial law conventions. The Convention for the International Sale of Goods (CISG) is almost 40 years old. In 2012, Switzerland proposed to the United Nations Commission on International Trade Law (UNCITRAL) to evaluate the CISG and assess whether there was need for a new convention. While UNCITRAL decided not to pursue this further, the questions that Switzerland raised remain pertinent. This is not just with regard to the legal and commercial need of a new convention but also regarding the political viability of such a project. This article focuses on the latter question. It analyses the main considerations that play a part in the ratification process of international commercial law conventions. It concentrates on agenda setting and the key actors and analyses the main barriers encountered during ratification. While this article is written in the context of the aforementioned proposal, the analysis has broader applicability to the ratification process of international commercial law conventions. The main conclusions highlight the importance of raising the visibility of commercial law conventions through lobbying by key stakeholders, including trade associations, formulating agencies, and businesses. The importance of this article lies in understanding the political barriers in the ratification of international commercial law conventions.

I. Introduction: the ratification of commercial law conventions

In 2012, Switzerland suggested that the United Nations Commission on International Trade Law (UNCITRAL) examine the current transnational legal framework for international contracts, notably the Convention on Contracts for the International Sale of Goods (CISG).¹ Central to this is the concern that the

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¹ A/CN.9/758 – Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law <<https://undocs.org/en/A/CN.9/758>>.

CISG does not adequately address all needs for international contracting as it is limited to the sale of goods and does not cover certain key contractual issues, such as validity. In its proposal, the Swiss government recommended an analysis of the existing legal framework and a feasibility study into potential future work, such as a new convention or a model law.²

UNCITRAL responded that the gaps in the CISG exist mainly because States could not agree on more precise provisions and there is no evidence that States are now more likely to agree.³ UNCITRAL also invoked the large number of resources that such a project would require and that the political feasibility was questionable.⁴ Therefore, while a new convention is currently not being pursued, it remains important to understand the viability of a new instrument as this issue is likely to come up again.

While there might be important legal reasons to create a convention, there is little point in pursuing this issue if the project is not politically viable. This article focuses on the key political barriers that arise during the ratification of international commercial law conventions. The focus is not on the legal need for a new contract law convention nor on whether conventions are the best method for legal harmonization.⁵ Rather, the key focus is on understanding the domestic political barriers to ratification through an examination of agenda setting in public policy. The article does not analyse the ratification process from the perspective of international organizations but does so from the domestic political perspective.⁶ Understanding the barriers to ratification contributes to the decision-making process on whether a new convention should be drafted because, if the instrument does not attract enough ratifications to enter into force, it would be a loss of opportunity for legal harmonization and a waste of resources.

Conventions are drafted on the transnational level, usually within the context of an international organisation. The most important formulating agencies of

² Ibid.

³ Report of the United Nations Commission on International Trade Law, Forty-fifth session (25 June-6 July 2012) General Assembly Official Records Sixty-seventh session, Supplement No. 17, p 31, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/551/54/PDF/V1255154.pdf?OpenElement>>.

⁴ Ibid, p 32.

⁵ On harmonization of law in general see for instance: Paul B. Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) *University of Virginia, Legal Studies Working Papers Series*, <http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>; Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000). On the legal issues with the CISG see for instance: Clayton P Gilette & Robert E Scott, 'the Political Economy of International Sales Law' (2005) *International Review of Law and Economics* 446 and Ingeborg Schwenzer and Pascal Hachem, 'The CISG- Successes and Pitfalls' (2009) 57 *American Journal of Comparative Law* 457.

⁶ For a discussion on issues from the perspective of the international organisation see for instance: Susan Block Lieb & Terence Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42 *Texas Journal of International Law* 475 and Herbert Kronke, 'Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law', (2005) 51 *Loyola Law Review* 287.

conventions in international commerce are the International Institute for the Unification of Private Law (UNIDROIT), UNCITRAL, and the Hague Conference on Private International Law. The instruments are then ratified by national governments. There are two important stages to ratification: the first stage is agenda setting, as the convention needs to be on the agenda before ratification is considered; the second stage occurs when the convention needs to pass through the national legislative process so that it can be ratified. This process requires understanding the national political landscape. While the specifics differ per country, the analysis in this article focuses on the most common barriers that arise in this context.

After this introduction, the second part of the article discusses the drafting and ratification process. The third part analyses the agenda-setting process. The fourth part considers key political barriers once the convention is on the legislative agenda, and the conclusion summarizes these findings.

II. Drafting and ratifying a convention

1. The drafting process

The drafting process is technical in nature, conducted mainly by subject experts, and removed from the political centre of the State.⁷ While the specific process differs by organisation, a simplified version can be summed up as follows:

1. a topic is put forward and becomes part of the working program;
2. a group of experts is appointed to study this topic and a decision is made on the type of instrument;
3. the instrument is drafted;
4. after approval by the organisation, the convention is scrutinized by delegates/experts from the members' governments;
5. once approved, a plenary conference is held where the convention is formally signed; and
6. the convention is now open for ratification/accession.

Conventions take a long time to draft as many different stakeholders are involved, including States, formulating agencies, interest groups (defined as a collection of people/organizations that unite to advance their desired outcomes),⁸ drafters, and delegates. It is important to include different stakeholders as participation and representation are the keys to legitimacy, which enhances the likely success of the work.⁹ The search to find a common legal language and

⁷ Paul B. Stephan. 'The Futility of Unification and Harmonization in International Commercial Law' (1999) *University of Virginia, Legal Studies Working Papers Series*, 10, <http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>.

⁸ Thomas A. Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* (fourth edition) (Routledge 2016) 158.

⁹ Terence C. Halliday, Josh Pacewicz and Susan Block-Lieb, 'Who Governs? Delegations and Delegates in Global Trade Lawmaking'. (2013) 7 *Regulation & Governance* 279, 281.

common legal principles is a lengthy process.¹⁰ It is consequently an expensive process.

Negotiations for the CISG show that the diverging approaches between States to international contracting led the drafters to leave out issues on which no consensus could be found.¹¹ This could be because legal positions are too far apart to make a compromise feasible, these are areas of greater public policy interest and State sovereignty concerns, or there is already a strong national law that States are unlikely to displace.¹² Compromises need to be found between the competing interests of the participating States. While the ratification of the convention will not occur until after it is finished, key stakeholders already anticipate issues that could arise and strategize accordingly.¹³ Reports from drafters of international conventions show that participants try to promote solutions originating or easily harmonized with their domestic law, which will make it easier to convince States to ratify the convention.¹⁴ To maximize the chances of the convention being ratified, controversial issues are left out or the drafters opt for generalist provisions that promote minimal harmonization.

The final text will be a compromise between the different proposed solutions and would most commonly be concluded along the lines of the lowest common denominator—that is to say, that the legislation reflects mostly the wishes of those participants that wanted the least amount of legislation—therefore, the lowest amount of harmonization on which agreement was found. This demonstrates that drafting an international convention is complicated and that political considerations play a key role from the start.

2. Ratification in the national policy process

It can take years before a convention has gained enough momentum to get the required number of signatures to enter into force, and sometimes this momentum is never achieved. Although still open to ratification, many older conventions are superseded by newer instruments or have lost importance because of changing economies and technologies. As conventions have to be ratified in their entirety, there is a higher access barrier *vis-à-vis* other types of harmonization; the convention represents a binary choice: either it is ratified or it is not.¹⁵ A State that is an active participant in the drafting process will not necessarily

¹⁰ Henry Deep Gabriel, 'UNIDROIT Principles as a Source of International Sales Law' (2013) 58 *Villanova Law Review* 661, 670.

¹¹ Keith Loken, 'A New Global Initiative on Contract Law in Uncitral: Right Project, Right Forum?' (2013) 58 *Villanova Law Review* 509, 513.

¹² Marco Torsello, 'Reservations to International Uniform Commercial Law Conventions' (2000) 5 *Uniform Law Review* 85.

¹³ Susan Block-Lieb & Terence C. Halliday, 'Incrementalisms in Global Lawmaking' (2007) 32 *Brooklyn Journal of International Law* 851.

¹⁴ See for instance: Henry Landau, 'Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods' (1984) 18 *The International Lawyer* 29.

¹⁵ Susan Block-Lieb & Terence Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42 *Texas Journal of International Law* 475, 478.

ratify the convention. The USA is often an active participant in the elaboration of international commercial law conventions, but it has ratified only a relatively small number of these treaties.¹⁶

There can be a considerable time lapse between the plenary conference and entry into force. For instance, the CISG was signed in 1980 but did not get the required ratifications to enter into force until 1988. It is still receiving new ratifications every year, 40 years after it was first signed.¹⁷ Although the convention is developed in the transnational sphere, it needs to be ratified in the national/domestic (political) sphere. Therefore, the convention needs to have a place on the legislative agenda. Understanding the agenda-setting process is thus key to understanding how a convention can be ratified. Agenda setting can be defined ‘as the process by which problems and alternative solutions gain or lose public or elite interest’, while an agenda is defined as ‘a collection of problems, understandings of causes, symbols, solutions, and other elements of public problems that come to the attention of members of the public and their governmental officials’.¹⁸ There are two levels to agenda setting: the first level is about which issues make it to the agenda and the second level is about the perspective/lens from which these issues are framed.¹⁹ This article is mainly concerned with the first level: how does the issue make it to the agenda? Researchers identify multiple agendas: these include the public agenda (which issues citizens rate as the most important) and the political agenda (which issues politicians rate as the most important), and these influence each other, although it is uncertain who leads in this process: if policy-makers are mainly sensitive to the concerns of citizens or if the public mainly responds to the concerns of politicians and internalizes how important they find these issues.²⁰ A distinction should be made between the systematic agenda (all issues that could be potentially considered), the institutional agenda (issues/policies that are seriously considered by decision makers), and the decision agenda (issues that have made the agenda and on which a decision now needs to be made).²¹ For a policy to be enacted, the issue has to move from the systematic agenda to the decision-making agenda.

¹⁶ Amelia H Boss, ‘The Future of the Uniform Commercial Code Process in an Increasingly International World’ (2007) 68 *Ohio State Journal* 349, 368 (The US only ratified 1 out of 10 conventions drafted by UNIDROIT and 3 out of 8 Conventions drafted by UNCITRAL). The author also notes that the US is not the only country to have a less illustrious track record when it comes to ratifying international conventions.

¹⁷ For instance, Guatemala and Laos ratified the CISG in 2019 and Portugal in 2020.

¹⁸ Thomas A. Birkland, ‘Agenda Setting in Public Policy, in Frank Fischer’ in Gerald J. Miller (2017) *Handbook of Public Policy Analysis, Theory, Politics, and Methods* (2017 CRC Press) 63.

¹⁹ Maxwell E. McCombs, *Setting the Agenda: The Mass Media and Public Opinion* (2004 Blackwell).

²⁰ Pablo Barberà et al, ‘Who Leads? Who Follows? Measuring Issue Attention and Agenda Setting by Legislators and the Mass Public Using Social Media Data’ 113 *American Political Science Review* 883, 883.

²¹ Roger W. Cobb & Charles D. Elder, *Participation in American Politics: the Dynamics of Agenda Building* (John Hopkins University Press 1983) 85; Thomas A. Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* (fourth edition) (Routledge 2016) 203–04.

In his seminal work, John Kingdon analyses the concept of policy windows.²² He discusses how there is a continual interplay between interests, ideas, problems, and solutions in public policy. These crystallize in three streams: problems, policies, and politics. Problems are issues of interest that come to the foreground because there is at least some pressure from (factions in) society to solve them. The issue is not necessarily objectively problematic, but it is perceived or framed as problematic.²³ Policies are the potential solutions that are proposed by interest groups, politicians, organisations, and other stakeholders. Potential solutions should be technically feasible, anticipate future constraints, and have value acceptability—that is to say, they should fit in with the values of the community.²⁴ Politics are the processes through which the agenda is proposed and changed, such as the results of an election that changes political players. The three streams flow independently and only when they converge is a policy window opened—an opportunity for a new policy to be enacted.²⁵ From this, it can be gathered that, for an international commercial law convention to be ratified by a State, it should offer a solution to a perceived problem and there should be enough momentum to process this solution. Kingdon emphasizes that luck plays an important role and that policy windows are often open for a short amount of time before momentum passes and other concerns come to the foreground.²⁶

The convergence of these streams relies heavily on the acts of key stakeholders. The issue should be perceived as problematic by a group or groups in society, and it should be pushed on the agenda by what Kingdon refers to as policy entrepreneurs (stakeholders that invest time and money in influencing the agenda such as businesses, politicians, and interest groups). As the streams function independently, it is not the case that a solution is found once a problem has manifested itself. Rather, the policy is developed independently and proposed as a solution once an issue presents itself or a problem is created. Solutions are thus made to fit the problem, and the same policy can be framed

²² John Kingdon, *Agendas, Alternatives and Public Policies* (Little Brown 1984) and second edition John Kingdon, *Agendas, Alternatives, and Public Policies* (2nd ed. New York: Harper Collins 1995). Kingdon based his work on the earlier theories of Cohen et al regarding the 'garbage can model' of organisational choice (see: Michael Cohen, James March, and Johan Olsen, 'Garbage Can Model of Organizational Choice' (1972) 17 *Administrative Science Quarterly* 1). Kingdon's work has been heavily influential in policy studies and is applied in different situations (see for instance Valéry Ridde, 'Policy Implementation in an African State: an Extension of Kingdon's Multiple-Streams Approach' (2009) 87 *Public Administration* 938, and Michael Howlett, Allan McConnell, Anthony Perl, 'Streams and Stages: Reconciling Kingdon and Policy Process Theory' (2015) *European Journal of Political Research* 419–34).

²³ John Kingdon, 'A Model of Agenda-Setting, with Applications' (2001) *L. Rev MSU-DCL* 331, 333.

²⁴ John Kingdon, *Agendas, Alternatives, and Public Policies* (2nd ed. New York: Harper Collins 1995) 132–7.

²⁵ *Ibid.*

²⁶ *Ibid.*, 132–7.

as a solution for different problems.²⁷ The solution needs to be ready when the problem presents itself for a policy window to open.²⁸

To understand how key actors are involved in the agenda-setting process, it must be understood that the policy process is not linear and cannot be broken up in distinct phases even though these are often used to facilitate public policy study: ‘there is no beginning and end to public policy, for the most part there is just the middle.’²⁹ Policy is influenced and shaped by events and people; it floats around and changes depending on what events occur and who is involved.³⁰ A solution might not be implemented, but it will influence stakeholders and prepare the path for a future solution to be accepted (such as how the 1964 UNIDROIT Convention Relating to a Uniform Law on the International Sale of Goods paved the way for the CISG). It would be difficult to pinpoint the exact moment that particular stakeholders influenced the process. Stakeholders do not have equal resources and equal access to information.³¹ Their influence is determined not only by these resources but also by their moral authority, connections, and standing in society. Their influence rises and falls throughout the process.

III. Agenda setting and key actors

This section analyses how agenda setting works for international commercial law conventions and the role of key actors in this process. This process focuses on moving issues from the systematic agenda to the institutional agenda.

1. Agenda setting

For policy scholars, the key question is why specific issues make the agenda.³² This is important because if an issue is absent from the agenda, then it is absent from the policy process.³³ Most research concentrates on issues that have made the agenda and not on those that have not,³⁴ just like most research focuses on policy action and not inaction, which by its nature is more difficult to research.³⁵

²⁷ John Kingdon, ‘A Model of Agenda-Setting, with Applications (2001) L. Rev MSU-DCL 331, 332.

²⁸ *Ibid.*, 335.

²⁹ Peter John, *Analysing Public Policy* (Continuum 2005) 26.

³⁰ John Kingdon, ‘A Model of Agenda-Setting, with Applications (2001) L. Rev MSU-DCL 331, 332.

³¹ Peter John, *Analysing Public Policy* (Continuum 2005) 26.

³² Michelle Wolfe, Bryan D. Jones & Frank R. Baumgartner, ‘A Failure to Communicate: Agenda Setting in Media and Policy Studies’ (2017) 30 *Political Communication* 175, 177.

³³ Bruce K Berger, ‘Private Issues and Public Policy: Locating the Corporate Agenda in Agenda-Setting Theory’ (2001) 13 *Journal of Public Relations Research* 91, 112.

³⁴ Jai Mehta, ‘The Varied Roles of Ideas in politics: From “Whether” to “How”’ in Daniel Béland and Robert Henry Cox (editors), *Ideas and Politics in Social Science Research* (Oxford University Press 2011) 9.

³⁵ Allan McConnell & Paul Hart, ‘Inaction and Public Policy: Understanding Why Policy Makers ‘do nothing’ (2019) 52 *Policy Sciences* 645, 646.

Regardless of the national political framework, political institutions do not have the capacity to address all problems, and, therefore, agenda setting is a competitive process where choices need to be made.³⁶ Stakeholders (or policy entrepreneurs) influence these choices, and this influence is shaped by the institutional framework of the State.³⁷ Factors that push issues on the agenda include media attention, public opinion, focusing events, and lobbying by interest groups.³⁸ The following paragraphs look at each of these factors.

Agenda-setting research focuses predominantly on the interaction between politics, media, and public opinion. Much of the research on agenda setting concentrates on public law issues—that is to say, on those issues that attract public and media attention—and there has been relatively little focus on how private law issues, which do not captivate the same public attention, make it to the agenda.³⁹ While there is no complete separation of private and public issues, the dichotomy is useful as it touches on the key barriers that commercial law conventions face. When discussing private international commercial law conventions, there is a lack of media attention and an absence of public opinion, and, therefore, traditional agenda-setting research is more difficult to apply. The same holds true for research theories, such as Anthony Downs' 'issue attention cycle', in which the public becomes aware of an issue but then also loses interest again (sometimes very quickly).⁴⁰

Policy scholars focus more on how interest groups and communities set the agenda than on how the media influence the agenda, and research about media influence shows diffuse effects.⁴¹ The media play a three-fold role in agenda setting. They act both as a filter and as a booster to the issues.⁴² First, they bring the demands, problems, and concerns of citizens to the attention of political actors.⁴³ Second, political actors use the media to bring issues to the attention of the public. Third, the media have independent agency both in which issues they bring to attention and how they frame these, which leads to media-savvy

³⁶ Thomas A. Birkland, 'Agenda Setting in Public Policy, in Frank Fischer' in Gerald J. Miller (2017) *Handbook of Public Policy Analysis, Theory, Politics, and Methods* (2017 CRC Press) 63.

³⁷ Daniel Béland, 'Kingdon Reconsidered: Ideas, Interests and Institutions in Comparative Policy Analysis' (2016) 18 *Journal of Comparative Policy Analysis: Research and Practice* 228, 231.

³⁸ Fay Lomax Cook et al, 'Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers, and Policy' (1983) 47 *Public Opinion Quarterly* 16, 17.

³⁹ Bruce K Berger, 'Private Issues and Public Policy: Locating the Corporate Agenda in Agenda-Setting Theory' (2001) 13 *Journal of Public Relations Research* 91, 92/93.

⁴⁰ Anthony Downs, 'Up and Down With Ecology: The "Issue Attention Cycle"' (1972) 28 *The Public Interest*.

⁴¹ Michelle Wolfe, Bryan D. Jones & Frank R. Baumgartner, 'A Failure to Communicate: Agenda Setting in Media and Policy Studies' (2013) 30 *Political Communication* 175, 177 (Kingdon for instance dismisses the influence of the media whereas Baumgartner & Jones give this a more prominent place).

⁴² J.W Dearing & E.M Rogers, *Agenda Setting* (Sage 1996); F.R Baumgartner, B.D Jones, and B.L Leech, 'Media Attention and Congressional Agendas' in S. Iyengar & R. Reeves (editors) *Do the Media Govern? Politicians, Voters, and Reporters in America* (Sage 1997) 349–63.

⁴³ S. Soroka, 'Issue Attributes and Agenda Setting by Media, the Public, and Policy Makers in Canada' (2002) 14 *International Journal of Public Opinion Research* 264.

issues (such as scandals and disasters) reaching the agenda more easily.⁴⁴ The media can thus both lead (set the agenda) and lag (index issues on the agenda).⁴⁵

Even if the media are not successful in telling people how to think, they are successful in telling people what to think about.⁴⁶ This is key for agenda setting because, first, the issue needs to come to the attention of the public and policy-makers (first-level agenda setting). An issue becomes more accessible if people are aware of it and can form an opinion on it.⁴⁷ For international contract law, this represents a conundrum, as it will be difficult to capture the attention of the media and the public. The problems that an international contract law convention solves include extra transaction costs because of a lack of legal harmonization, and diverging laws stop at least some businesses from trading abroad as it is perceived as being riskier.⁴⁸ However, these problems seem far removed from general public opinion and not savvy enough for prolonged media attention.

Issues can come to the foreground because of focusing events—those events that are sudden, uncommon, and attention grabbing, such as a nuclear disaster or a pandemic.⁴⁹ The additional media and public attention can lead to a policy window opening. Lobbying groups claim policy failure caused the event to happen and propose their solutions as the needed policy change.⁵⁰ But it would be difficult to think of a focusing event in the context of international commercial law. This is especially so as events that occur over a longer period where the effects are only gradually noticed would not usually lead to the same type of policy window as a focusing event. For instance, ‘Brexit’ will affect international commerce, but it is a longer-term, ongoing issue where the effects are disputed and unclear. The initial referendum results (which could be a focusing event) were four years ago, and other issues have since pressed to the foreground. Perhaps once the effects of Brexit on international commerce are clearer, a policy window could open, but it is likely to be a series of smaller events rather than a single focusing event. Next to focusing events, indicators play a role: gradual changes in statistics and other data that, when interpreted by interest

⁴⁴ Nayla Fawzi, ‘Beyond Policy Agenda-Setting: Political Actors’ and Journalists’ Perceptions of News Media Influence Across all Stages of the Political Process’ (2018) 21 *Information, Communication, and Society* 1134, 1135, 1145; Ruud Wouters & Stefaan Walgrave, ‘Demonstrating Power: How Protests Persuades Political Representation’ 82 *American Sociological Review* 361.

⁴⁵ Michelle Wolfe, Bryan D. Jones & Frank R. Baumgartner, ‘A Failure to Communicate: Agenda Setting in Media and Policy Studies’ (2013) 30 *Political Communication* 175, 179.

⁴⁶ Bernard C. Cohen, *The Press and Foreign Policy* (Princeton University Press 1963) 13.

⁴⁷ Dietram A. Scheufele & David Tewksbury, ‘Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models’ (2007) 57 *Journal of Communication* 9, 13/14.

⁴⁸ 39 per cent of EU Businesses that do not trade abroad cited diverging contract laws as one of the reasons European Commission, ‘A Digital single market strategy for Europe’ (2015) Com 192 6 May 2015.

⁴⁹ Thomas A. Birkland, ‘Focusing Events, Mobilization, and Agenda Setting’ (1998) 18 *Journal of Public Policy* 53.

⁵⁰ *Ibid.*, 55.

groups and other actors, show that a specific situation is changing (usually getting worse) and, therefore, attention should be paid to this situation.⁵¹ If available, economic data can be used to set international commercial law on the agenda, if it can show that harmonized legislation bolsters international trade and reduces transaction costs, but it can be difficult to find and interpret such data.

Consequently, international private law can have low political priority. The issues it regulates are not highly visible and are not a concern to the average voter. Research shows that the influence of the media is strong when the issue is firmly in the public arena, but this influence vanishes if the issue is debated behind closed doors.⁵² Therefore, the role of the media in opening a policy window in this area is marginal. International commercial law does not regulate controversial issues that allows politicians to gain a more visible profile: 'National politicians frequently succumb to the dictates of short-term political expediency in deciding which legislation should go forward at any given time, and which pieces of law-making can wait for another day (or another government).'⁵³ The reputation of politicians is determined by their stance on issues and not by one single piece of legislation like an international convention.⁵⁴ The ratification of an international commercial law treaty might do little to contribute to electoral success because the voters do not perceive that there was a problem in the first place, so they will not care enough that a politician has advocated for the convention to vote for them for this reason. Therefore, politicians do not generally pay a great deal of attention to international commercial law conventions.⁵⁵ The lack of public attention stops politicians from prioritizing this among the issues competing for their attention.⁵⁶

So, if the public and media do not care enough, who does? Private issues are controlled mainly by strong interest groups that have a stake in the outcome.⁵⁷ Interest groups usually have in-depth knowledge on the issues they promote, and they share information with policy-makers that draw upon this to make decisions.⁵⁸ There is often an information asymmetry between policy-makers and interest groups, whereby the latter know more about the topic than the

⁵¹ John Kingdon, *Agendas, Alternatives, and Public Policies* (rev. 2nd ed. Longman 2011).

⁵² Nayla Fawzi, 'Beyond Policy Agenda-Setting: Political Actors' and Journalists' Perceptions of News Media Influence Across all Stages of the Political Process' (2018) 21 *Information, Communication, and Society* 1134, 1138.

⁵³ William Tetley, 'Uniformity of Law' (2000) 24 *Tulane Journal of Maritime Law* 773, 810.

⁵⁴ Clayton P Gillette & Robert E Scott, 'The Political Economy of International Sales Law' (2005) *International Review of Law and Economics* 446, 462.

⁵⁵ José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 *Uniform Law Review* 22.

⁵⁶ Peter B Mortensen, 'Political Attention and Public Policy: A Study of How Agenda Setting Matters' (2010) 33 *Scandinavian Political Studies* 356, 359.

⁵⁷ E.E Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Dryden Press, Chicago 1960) 20.

⁵⁸ Michael Howlett, M Ramesh, and Anthony Perl, *Studying Public Policy: Cycles & Policy Subsystems* (third edition) (OUP 2009) 69.

former. Therefore, through sharing information interest groups contribute to how a specific issue is framed (second-level agenda setting). Of course, this does depend upon the interest group being able to access policy-makers, which is contingent upon financial resources.⁵⁹ Lobbying by interest groups is thus an important push factor for agenda setting. Corporations and trade associations play a key role in the agenda-setting process for private issues.⁶⁰ The media has far less influence on the perception of interest groups than on the general public, which is likely because these already have significant knowledge of the issue and already consider this to be important.⁶¹ The link between the media and agenda setting is thus less important in legal areas where interest groups are the key stakeholders. This includes international commercial law.

Within international commercial law, politicians would prioritize projects that are pushed by a specific group that holds some electoral power.⁶² Political agendas are often driven by the priorities of strong supporters of certain issues.⁶³ An example would be a convention benefiting a specific industry like shipping. Given the lack of participation of specific interest groups in general international contract law, this would be a challenge for a successor to the CISG.

The United Kingdom (UK) has not ratified the CISG. There are a number of reasons for this, including that the CISG is more orientated towards civil law, that businesses do not care enough to push for ratification, and that it could diminish the importance of London as a seat of commercial arbitration.⁶⁴ The official line is that the CISG will be ratified once Parliament finds enough time. Both Law Commissions have given favourable advice for ratification.⁶⁵ The fact that the convention never made it to the legislative agenda is partly explained by a lack of stakeholders lobbying for ratification.⁶⁶ There is a general apathy among the legal profession in the UK towards the CISG.⁶⁷ Two consultations

⁵⁹ Ibid, 70.

⁶⁰ Bruce K Berger, 'Private Issues and Public Policy: Locating the Corporate Agenda in Agenda-Setting Theory' (2001) 13 *Journal of Public Relations Research* 91, 92/93.

⁶¹ Fay Lomax Cook et al, 'Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers, and Policy' (1983) 47 *Public Opinion Quarterly* 16, 26.

⁶² Clayton P Gilette & Robert E Scott, 'The Political Economy of International Sales Law' (2005) *International Review of Law and Economics* 446, 463.

⁶³ Pablo Barberà et al, 'Who Leads? Who Follows? Measuring Issue Attention and Agenda Setting by Legislators and the Mass Public Using Social Media Data' 113 *American Political Science Review* 883, 898 and see also Jonathan Kastellec et al, 'Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics' (2015) 77 *Journal of Politics* 787.

⁶⁴ Sally Moss, 'Why the United Kingdom has not Ratified the CISG' (2005) 25 *Journal of Law and Commerce* 483.

⁶⁵ Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom' (1997) 26 *University of Baltimore Law Review* 51,65.

⁶⁶ Sally Moss, 'Why the United Kingdom has not Ratified the CISG' (2005) 25 *Journal of Law and Commerce* 483.

⁶⁷ Roy Goode, 'Insularity or Leadership—The Role of the United Kingdom in the Harmonisation of Commercial Law', (2001) 50 *International & Comparative Law Quarterly* 756.

from the government on the CISG yielded, respectively, 55 responses (in 1989) and 36 responses (in 1997).⁶⁸ While the majority of responses were in favour of ratification, the limited number is hardly an encouragement to prioritize ratification. The argument that there was a lack of time lost its credibility after more than 30 years, but this demonstrates that if a project is not a priority it will not make the agenda. The same issue also played out in Japan, where ratification of the CISG was considered from the early 1990s but did not happen until 2009, when there was a push from stakeholders for ratification.⁶⁹ One of the key arguments from the USA about why they objected to the Swiss proposal was that they had not observed any demand from either lawyers or businesses for a new convention.⁷⁰

The main issue is thus a lack of incentive for politicians to push for ratification as there is little electoral gain in international private law. In 2002, of the 42 current Member States, only two voted to increase their contributions to UNIDROIT.⁷¹ This is mostly explained by the low legislative priority that (international) commercial law has.⁷² Therefore, to raise the legislative priority, there should be pressure from stakeholders to make it a priority. Only in that case will a policy window that leads to ratification open.

2. Lobbying for ratification: companies and trade associations

As the legislative agenda is crowded, it is necessary for those who have an interest in the project to push the convention on the agenda.⁷³ It is unlikely for an issue to make it on to the agenda if at least one influential group is not pushing for it.⁷⁴ To influence agenda setting in international commercial law, lobbying is key. The classic definition of lobbying is ‘the stimulation and transmission of a communication, by someone other than a citizen acting on his own behalf, directed to a government decision maker with the hope of influencing his decision’.⁷⁵ As discussed, private commercial law conventions that are aimed at business-to-business relations have limited interest to civil society (at least not enough to lobby for ratification), and, thus, the key interest groups would be trade associations, businesses, and the formulating agency itself. Lobbyists can

⁶⁸ Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): A Consultation Document* (1997).

⁶⁹ Hiroo Sono, ‘Japan’s Accession to the CISG: the Asian Factor’ (2008) 25 *Pace International Law Review* 105, 107.

⁷⁰ Keith Loken, ‘A New Global Initiative on Contract Law in Uncitral: Right Project, Right Forum?’ (2013) 58 *Villanova Law Review* 509, 513.

⁷¹ Herbert Kronke, ‘Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law’, (2005) 51 *Loyola Law Review* 287.

⁷² *Ibid.*

⁷³ Roy Goode, ‘Insularity or Leadership—The Role of the United Kingdom in the Harmonisation of Commercial Law’ (2001) 50 *International Law & Comparative Quarterly* 751, 758.

⁷⁴ *Ibid.*, 757.

⁷⁵ Lester W Milbrath, *The Washington Lobbyists* (Rand McNally, 1963) 21.

be regarded as policy entrepreneurs that bring together the problem and policy streams to open a policy window.

Multinationals spend large sums on lobbying. In the USA, companies spend significantly more than trade associations do.⁷⁶ The harmonization of commercial law is less important for large companies as they can afford to buy the legal expertise needed for international contracting and therefore are less hampered by legal barriers and might perceive less need for an international convention.⁷⁷ For small and medium-sized enterprises (SMEs), the harmonization of law is more advantageous as they do not necessarily have the financial means to get this expertise.⁷⁸ However, SMEs would not have the lobbying capacity as individual units, which means that trade associations are important.

Industrial lobbying can have a strong influence on ratification. The 2001 Convention on International Interests in Mobile Equipment (Cape Town Convention) has 79 ratifications.⁷⁹ UNIDROIT formed an industry advisory group that participated in the drafting process.⁸⁰ Whereas the aircraft industry was supportive of the Aircraft Protocol to the Cape Town Convention, the satellite industry opposed the Space Assets Protocol.⁸¹ The first protocol is successful with 76 ratifications, and the latter has not (yet) entered into force.

Involving the industry not only contributes to ensuring its support but also leads to the instrument promoting industrial interests. The Hague-Visby Rules on Carriage of Goods by Sea are perceived as favourable to carriers through the inclusion of extensive grounds of exoneration for liability as well as strong limitations on damages. The shipping industry had a strong influence on the Hague-Visby Rules that ensures their relative advantageousness for the industry.⁸² Mainly emerging economies pushed for a new instrument that would seek a fairer balance between the interests of the shippers and the carriers.⁸³ The shipping industry did not support the resulting UN Convention on the Carriage of Goods by Sea (Hamburg Rules) because it was deemed less advantageous for carriers.⁸⁴ The interests of shipping companies were not widely represented

⁷⁶ Lee Drutman, *The Business of America is Lobbying* (OUP 2015).

⁷⁷ Ingeborg Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58 *Villanova Law Review* 723, 723–5.

⁷⁸ *Ibid.*

⁷⁹ See for contracting states: <<https://www.unidroit.org/status-2001capetown>>.

⁸⁰ Jeffrey Wool, 'The Next Generation of International Aviation Finance Law: An Overview of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applied to Aircraft Equipment' (1998) 17 *Annuals Air & Space Law* 243.

⁸¹ Satellite Industry Association, *Global Satellite Industry denounces UNIDROIT Protocol*, (2012) <<http://www.spaceref.com/news/viewpr.html?pid=36355>>.

⁸² Paul B. Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) University of Virginia, *Legal Studies Working Papers Series*, 13, <http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>.

⁸³ Peter Pfund, 'International Unification of Private Law: A Report on United States Participation, 1985–86' (1986) 20 *The International Lawyer* 623–31.

⁸⁴ *Ibid.*

during the negotiations and these lobbied against ratification.⁸⁵ Partly due to pressure from the industry and to protect economic interests, high tonnage States opposed ratification, and the Hamburg Rules are currently ratified by 35 mainly low-tonnage States.

Apart from the industrial opposition, high tonnage economies were also concerned about the effects of the Hamburg Rules on their arbitration and litigation industry. Governments predicted that the choice of forum rules in the Hamburg Rules would diminish the importance of these arbitration clusters.⁸⁶ Thus, the Hamburg Rules did not become the leading Convention, in large part because of industrial pressure against ratification and the worry of States about how it would affect their economy if major players in the shipping industry relocated to a country that had not ratified the Convention as well as the fear that it would lead to a diminished importance for their legal industries.

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) attempts to unify the carriage of goods by sea conventions into a single modern instrument. The shipping industry objects to the Rotterdam Rules for the same reasons as they object to the Hamburg Rules: the distribution of liability between carriers and shippers.⁸⁷ The shipping industry was better represented during the negotiations than for the Hamburg Rules but still objected to the resulting document.⁸⁸ In the USA, the American Association of Port Authorities, for instance, lobbied against the ratification.⁸⁹ So far, the convention has received only five ratifications.⁹⁰

Industrial support is thus an incentive for ratification, while industrial opposition makes it significantly harder to have an instrument ratified. As legislative bodies are already passive about private law conventions, it is easier to keep ratification of the legislative agenda than to push it onto it. When interests compete, the status quo is more likely to win than change as more competition in lobbying makes change harder; those seeking to change the status quo need to devote more resources to achieving their goals than those seeking to maintain the current policies.⁹¹ Lee Drutman notes how major political change has

⁸⁵ Sergio M Carbone, 'Rule of law and non-State actors in the international community: are uniform law conventions still a useful tool in international commercial law?' (2016) 21 *Uniform Law Review* 177, 179.

⁸⁶ William Tetley, 'Uniformity of Law' (2000) 24 *Tulane Journal of Maritime Law* 773, 807.

⁸⁷ Michael F Sturley, 'What Has Become of the Rotterdam Rules?' (2016) 83 *Journal of Transportation Law Logistics & Policy*, reprinted in *Maritime Law Association of the United States, MLA Report* (fall 2016), MLA document no 825, 19367.

⁸⁸ Sergio M Carbone, 'Rule of law and non-State actors in the international community: are uniform law conventions still a useful tool in international commercial law?' (2016) 21 *Uniform Law Review* 177–83, 179.

⁸⁹ Michael F Sturley, 'What Has Become of the Rotterdam Rules?' (2016) 83 *Journal of Transportation Law Logistics & Policy*, reprinted in *Maritime Law Association of the United States, MLA Report* (fall 2016), MLA document no 825, 19367.

⁹⁰ Spain, Togo, Cameroon, Benin, and the Republic of Congo (Brazzaville).

⁹¹ Lee Drutman, *The Business of America is Lobbying* (OUP 2015), 45.

become difficult to achieve in the USA, partly because the increase in lobbying activities means that competing interests cause a gridlock.⁹²

Opposition to (legal) change is widespread and can be found in institutions, organisations, businesses, and among academics and lawyers.⁹³ One of the reasons why Japan ratified the CISG relatively late (in 2009) was because of business opposition to the introduction of a new, unfamiliar law.⁹⁴ Increased familiarity with the convention because of more frequent usage worldwide led to businesses and the legal community supporting ratification.⁹⁵

A convention that targets a specific industry can benefit significantly from early industry involvement. Interest groups are often invited to participate, but do not always attend, and all groups might not be represented.⁹⁶ With the Aircraft Protocol of the Cape Town Convention, the concerned industry was represented and convinced of the need for a convention.⁹⁷ This is a barrier for a new contract law convention as this would have a general nature and not benefit one specific industry. Every company is both a buyer and a seller. By being everyone's instrument, it risks becoming no-one's instrument. Therefore, one of the most important barriers such a project would encounter is that there would not be any significant industrial push for its ratification. The CISG shows that no particular interest group had a strong influence on its contents, as industries were indifferent to the outcome; instead, decisions were mainly made by subject experts.⁹⁸ For an international contract law instrument, there is thus less risk that a specific industry can shape the instrument to reflect its interests.⁹⁹ So, while the instrument is more likely truly neutral and does not advance the interests of a specific industry, the downside would be a certain indifference towards promoting the instrument. This is not to say that businesses cannot find any value in such an instrument once it exists. For instance, in Japan, the business

⁹² Ibid.

⁹³ Roy Goode, 'Reflections on the Harmonisation of Commercial Law' (1991) 1991 *Uniform Law Review* 54, 74.

⁹⁴ Hiroo Sono, 'Japan's Accession to the CISG: the Asian Factor' (2008) 25 *Pace International Law Review* 105, 108.

⁹⁵ Ibid.

⁹⁶ For instance when the UNCITRAL Model Law on Cross-Border Insolvency was drafted diverse interest groups were invited to participate: international financial institutions (such as IMF), international economic governance organisations (such as OECD), international professional associations (such as the IBA) and other international organisations such as UNIDROIT Trade associations (ICC), labour representatives (ILO) were invited but did not attend, trade creditors were not represented (Terence C. Halliday, Josh Pacewicz, and Susan Block-Lieb, 'Who Governs? Delegations and Delegates in Global Trade Lawmaking' (2013) 7 *Regulation & Governance* 279, 286).

⁹⁷ Jeffrey Wool, 'The Next Generation of International Aviation Finance Law: An overview of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applied to Aircraft Equipment' (1998) 17 *Annals Air & Space Law* 243.

⁹⁸ Paul B. Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) University of Virginia, *Legal Studies Working Papers Series*, 23, <http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>.

⁹⁹ Clayton P Gilette & Robert E Scott, 'The Political Economy of International Sales Law' (2005) *International Review of Law and Economics* 446, 458.

community became more supportive of the CISG when they realized that they would have further advantages in international trade because of lower transaction costs, including in inter-Asia trade.¹⁰⁰ However, it would be more difficult to convince specific industries to devote resources to the project.

As lobbying is more 'art than science', results cannot be predicted with accuracy, attention spans are short, the political landscape is constantly changing, people come and go, and interests change.¹⁰¹ What becomes clear from the above section is that lobbying by interest groups is key in ensuring a private law convention has a high enough profile to make it onto the agenda.

3. Drafters and delegates

Participation and representation is key to legitimacy, and, therefore, if different stakeholders are involved in drafting the legislation, it enhances the success and effectiveness of the work.¹⁰² The drafters have the most intricate knowledge of the instrument and are thus best placed for promoting the merits of the convention to decision-makers in national governments. However, they do not necessarily have the political means to do so. Drafters are experts on the issues that the convention regulates. Governments do not necessarily take a great interest in their activities. They seldom impose political demands upon drafters or delegates.¹⁰³ Those that drafted the instrument take an active role in promoting the convention through attending government meetings, organizing public lectures and writing materials, and other ways of raising awareness.¹⁰⁴ However, given that they usually have many other demands on their time, as they do this work in addition to their core professional activities, they are limited in what they can do. Their professional position might also be such that it does not allow easy access to decision-making circles, and, therefore, their efforts might not translate into significantly greater political visibility of the instrument.

Delegates to the plenary conference are not necessarily the same people as the drafters (although they can be). Political associations are often limited as the emphasis in recruitment is more on legal subject expertise than on centrality to the government.¹⁰⁵ Delegates are more often academics than diplomats and are thus removed from the political sphere.¹⁰⁶ Furthermore, due to the large

¹⁰⁰ Hiroo Sono, 'Japan's Accession to the CISG: the Asian Factor' (2008) 25 *Pace International Law Review* 105.

¹⁰¹ Lee Drutman, *The Business of America is Lobbying* (OUP 2015) 2–6.

¹⁰² Terence C. Halliday, Josh Pacewicz, and Susan Block-Lieb, 'Who Governs? Delegations and Delegates in Global Trade Lawmaking' (2013) 7 *Regulation & Governance* 279, 281.

¹⁰³ Paul B. Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) University of Virginia, *Legal Studies Working Papers Series*, 10, <http://www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>.

¹⁰⁴ Roy Goode, 'Reflections on the Harmonisation of Commercial Law' (1991) 1991 *Uniform Law Review* 54, 72.

¹⁰⁵ Alan Schwartz and Robert Scott, 'The Political Economy of Private Legislators' (1995) 143 *University of Pennsylvania Law Review* 595.

¹⁰⁶ Paul B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy' (1996) 17 *Northwestern Journal of International Law and Business* 681, 714.

number of individuals participating in plenary conference nowadays, the delegates are less likely to develop personal ties between them or to form an attachment to the convention, which means that they might be less likely to push for ratification.¹⁰⁷ Turnover is higher among delegates than among drafters, which means their involvement is shorter in duration.¹⁰⁸ Research on UNCITRAL delegates showed a high turnover in delegates and also discussed how those delegates that attended regularly had more overall influence.¹⁰⁹ This could also indicate a higher degree of commitment to the instrument.

There is also an information asymmetry in which drafters are more knowledgeable about the convention than delegates because of the shorter involvement of the latter.¹¹⁰ They are thus less well placed substantively to promote the instrument and might feel less inclined to do so if they feel less invested. After the conference is concluded, those that were involved in drafting the instrument no longer have a formal role and will move on to different projects, which also diminishes their influence.

4. The role of the formulating agencies

The formulating agency of the convention has a key role in the push for ratification. These organisations have an inherent interest in having successful instruments as this contributes to maintaining and enlarging the influence of the organisation. These organisations cannot impose new legislation—they can only propose it. Their reputation is important as it ensures that they have more clout with governments. If they have delivered successful instruments in the past, States are more likely to put ratification of new instruments higher on the agenda.¹¹¹ As international organisations, they are limited in the influence they have on the domestic legal structures and on the politics of Member States.¹¹² They are limited in what they can achieve by several factors: a limited budget, relatively small permanent staff, and a high turnover of those involved in the project.¹¹³

¹⁰⁷ Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 *Uniform Law Review* 129, 129.

¹⁰⁸ Paul B. Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) University of Virginia, *Legal Studies Working Papers Series*, 10, <http://www.jus.unittn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf>.

¹⁰⁹ Terence C. Halliday, Josh Pacewicz, and Susan Block-Lieb, 'Who Governs? Delegations and Delegates in Global Trade Lawmaking' (2013) 7 *Regulation & Governance* 279, 288.

¹¹⁰ *Ibid.*, 12.

¹¹¹ Paul B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy' (1996) 17 *Northwestern Journal of International Law and Business* 681, 689.

¹¹² José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 *Uniform Law Review* 5, 22.

¹¹³ Roy Goode, 'Reflections on the Harmonisation of Commercial Law' (1991) 1991 *Uniform Law Review* 54, 71. José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 *Uniform Law Review* 5, 22.

Financial means enlarge lobbying powers. Budgetary constraints restrain what the organisation can do.¹¹⁴ Resources are needed for promotion, and if these are not sufficient to promote the instrument, it is more likely that the project will not get the needed recognition.¹¹⁵ This is an ongoing issue. For instance, one of the ways that UNCITRAL promotes usage of the CISG is through its on-line caselaw database. A lack of resources means that the system is not updated frequently.¹¹⁶ This would influence usage and means it loses some of its promotional value. Without a higher budget, this is difficult to achieve.

Domestic political actors might not be aware of the existence of the instrument because it was drafted by an international organisation that is far removed from the national government. Decision-makers cannot contemplate the convention as a solution to a problem if they are not aware of its existence. Lobbying is needed to raise visibility. Trade associations and industrial groups have a key role. For a contract law convention, there is likely to be less-targeted industrial interest. This makes the role of the formulating agency even more important, as there will be less corporate lobbying.

IV. Political barriers during ratification

The previous part of the article considered how an international contract law convention makes it on the agenda and concluded that lobbying by interest groups is key to achieving this. However, once the issue is on the (decision) agenda, there are still important political barriers that need to be overcome before ratification takes place. The following paragraphs discuss several of these barriers.

1. Perception

The instrument should be perceived as a clear solution to a problem. The focus should be on framing the problem as it is the key to opening a policy window. The issues that the convention deals with need to be framed as a problem. Concrete and utilitarian arguments carry more weight than arguments of principle. Kevin Esterling distinguishes between normative and instrumental arguments.¹¹⁷ Normative arguments are about what we should do because it is the right thing to do. Instrumental arguments give utilitarian—usually economic—reasons on why the policy should be enacted. An example is the estimation that the Aircraft Protocol to the Cape Town Convention could save the industry US

¹¹⁴ Herbert Kronke, 'Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law' (2005) *Loyola Law Review* 287 (p 298 on UNIDROIT: 'the annual budget chapter "promotion of instruments" covers three transatlantic airfares').

¹¹⁵ Keith Loken, 'A New Global Initiative on Contract Law in Uncitral: Right Project, Right Forum?' (2013) 58 *Villanova Law Review* 509, 519.

¹¹⁶ Renaud Sorieul, Emma Hatcher, Cyril Emery, 'Possible Future Work by Uncitral in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58 *Villanova Law Review* 491, 502.

¹¹⁷ Kevin M Esterling, *The Political Economy of Expertise: Information and Efficiency in American National Politics* (Michigan University Press 2004) 139.

\$4 billion annually in borrowing costs.¹¹⁸ Economic impact studies are crucial as demonstrating the economic advantages of a project is more likely to engender support.¹¹⁹ These economic arguments are more difficult to substantiate with a more general convention. The CISG spans all sectors and covers an estimated 80 per cent of worldwide trade.¹²⁰ This makes the true impact impossible to measure although, of course, estimations can be made, but it is difficult to calculate the concrete cost reductions because of the convention.

To frame an issue as a problem, Jai Mehta proposes that the following things should be taken into account: causality (the link between problem and solution), numerical indicators (the importance of economic numbers), effective story telling (building the narrative of the problem and solution), shifting the burden of proof (let the other prove there is no problem), metaphors (similar type situations that have occurred before), symbolic boundaries (defining the group for which the issue is a problem), and cultural symbols/values (frame the issue within the culture as a problem.)¹²¹ Not all of these proposals would be equally important for an international contract law convention, but framing the issue could include a focus on new developments in trade and technology (causality establishing a need), economic impact (costs that are saved through the harmonized law, preferably concrete verifiable numbers), a narrative of the issues with which the convention deals, such as encouraging trade abroad (story telling), letting others defend why the current regime is good enough (shifting the burden of proof), pointing to other conventions and how successful these are at solving problems (metaphors), defining groups for which the convention would be especially relevant, such as SMEs (symbolic boundaries), and emphasizing certain values the instrument promotes, such as free trade and internationality (cultural symbols/values). Even if the concrete numbers for the economic argument are difficult to find, framing the narrative brings clarity to the reasons why the convention should be ratified.

Once an instrument has been ratified and entered into force, it gains prominence, and the perception changes. If an instrument becomes the standard in transnational law, it is more likely that it will be ratified by further States.¹²² This could explain why there is a discrepancy between the number of

¹¹⁸ Roy Goode, 'Contract and Commercial Law: The Logic and Limits of Harmonisation' (2003) 7 *Electronic Journal of Comparative Law* 5 and Anthony Saunders and Ingo Walter, 'Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment' (Sept. 1998) 32.

¹¹⁹ José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 *Uniform Law Review* 5, 14.

¹²⁰ Ingeborg Schwenzer, 'Global Unification of Contract Law' (2016) 21 *Uniform Law Review* 60, 64.

¹²¹ Jai Mehta, 'The Varied Roles of Ideas in Politics: From "Whether" to "How"' in Daniel Béland and Robert Henry Cox (editors), *Ideas and Politics in Social Science Research* (Oxford University Press 2011) 14.

¹²² Paul B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy' (1996) 17 *Northwestern Journal of International Law and Business* 681, 689.

signatories. The successful conventions are ratified by 90 or more States, while the less successful conventions trail at less than 20 ratifications. There is a clustering of conventions at the top and at the bottom of the number of signatories, with few in the middle. The CISG currently has 93 ratifications/accessions. Now that a significant number of States have ratified the Convention, it is easier to push for new ratifications. The political benefits of ratification are clearer at this stage, regardless of any legal benefits.¹²³ States are more likely to ratify a convention once other States have done so, especially if these are key trading partners.¹²⁴ For instance, Denmark and Norway have prepared the necessary legislation to incorporate the Rotterdam Rules but are holding out on ratification until other States do.¹²⁵ Of course, if all States play the waiting game, this significantly hinders the ratification process. It is thus beneficial if several larger economies accept the convention. This makes it likelier others will follow. For instance, the US ratification of the CISG is said to have played an important role in attracting further ratifications.¹²⁶

2. *The issue is elsewhere: domestic political considerations*

Domestic political issues can form a barrier against ratification. An example from the USA is the discussion on states' rights versus federal powers. In the USA, most aspects of commerce fall under the jurisdiction of the individual state. However, through the Commerce Clause (Article 1, Section 8, Clause 3 of the US Constitution), Congress has the power to 'regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes', and through the Supremacy Clause, international treaties are the supreme law of the land.¹²⁷ The federal government can ratify international conventions which are then applied in state courts.¹²⁸ Apprehension towards the interference of federal law can play a part in states lobbying actively against the ratification of international conventions.¹²⁹ This diminishes the role of state law. The US government bypassed state law through the adoption of the CISG and shifted the centre of commercial law-making further to the federal government.¹³⁰ This is an example of how an important domestic political ideological debate (federal powers versus state powers) plays a role in whether a convention should be

¹²³ Ibid, 690.

¹²⁴ José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (2009) 14 Uniform Law Review 5, 22.

¹²⁵ Michael F Sturley, 'Bringing Carriage of Goods into the Twenty-First Century', (2018) *CML Working Paper Series No 18/01*, 24, <<https://law.nus.edu.sg/cml/pdfs/wps/CML-WPS-1801.pdf>>.

¹²⁶ Sieg Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1999) 116 *South African Law Journal* 323, 336.

¹²⁷ Article VI 2 Constitution United States of America.

¹²⁸ *Missouri v. Holland*, (1920) 252 U.S. 416, 432.

¹²⁹ Amelia H Boss, 'The Future of the Uniform Commercial Code Process in an Increasingly International World' (2007) 68 *Ohio State Journal* 349.

¹³⁰ Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 *Ohio State Journal* 265.

ratified. The focus is not on the legal merits of the convention but, rather, on the larger political agenda. With the Cape Town Convention, there was no argument that ratification would have a significant impact on US states' rights (or interests) because of the nature of the transactions that are beyond the remit of the individual state.¹³¹ This would not be the same for an international contract law convention, which would encroach on areas covered by state law.

There is a degree of legal competition between States, especially in international commercial law.¹³² Law firms compete by selling their legal system as the most suitable for international trade.¹³³ Roy Goode discusses how the UK is reluctant to ratify international commercial law conventions partly because of a belief that English law is superior to transnational solutions.¹³⁴ English law represents a unique selling point to attract arbitration/litigation to the country. In two-thirds of the cases before the Commercial Court of London, neither party is British.¹³⁵ English law is seen as an export product that should be protected. Again, the substance of the convention is less important than that which it represents: a perceived erosion of the uniqueness of English law, which would make the brand less attractive.¹³⁶

For other countries, ratifying a convention is advantageous precisely because it aligns the law further with the international standard. If a legal system is relatively unknown, the parties to the contract would usually refrain from choosing it as the applicable law because of the uncertainty in how the law would affect the contract.¹³⁷ A harmonized law removes this uncertainty and can make the law of that country more attractive as a choice of law.

Of course, this paints a binary division of States that is not the complete picture. The UK has ratified a large number of international commercial law conventions.¹³⁸ Nevertheless, it stands to reason that a country like the UK, which has a strong legal export product and attracts high profile litigation and arbitration, profits more from legal diversity, which allows English law to keep its independent position.¹³⁹ This is besides whether factually ratifying international

¹³¹ Amelia H Boss, 'The Future of the Uniform Commercial Code Process in an Increasingly International World' (2007) 68 *Ohio State Journal* 349, 387.

¹³² Galf-Peter Callies and Insa Buchmann, 'Global commercial law between unity, pluralism, and competition: the case of the CISG' (2016) 21 *Uniform Law Review* 1, 12.

¹³³ *Ibid.*

¹³⁴ Roy Goode, 'Insularity or Leadership—The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 *International & Comparative Law Quarterly* 751, 756.

¹³⁵ Charles Balmain et al, 'The Role of the English Courts Post Brexit: Emerging Challengers?' (October 2018) White & Case, <<https://www.whitecase.com/publications/alert/role-english-courts-post-brexit-emerging-challengers>>.

¹³⁶ Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom' (1997) 26 *University of Baltimore Law Review* 51, 58.

¹³⁷ *Ibid.*, 57.

¹³⁸ Roy Goode, 'Insularity or Leadership—The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 *International and Comparative Law Quarterly* 751, 755.

¹³⁹ John Linarelli, 'The Economics of Uniform Laws and Uniform Lawmaking' (2003) 48 *Wayne Law Review* 1387, 1430.

commercial law treaties would diminish the importance of English law. The experience with the ratification of the CISG in the USA seems to suggest that this had no influence on the popularity of the courts and laws of New York, which are also a leading international contract law regime, and fear of diminished importance thus seems unfounded.¹⁴⁰

3. *The rising and waning interest of governments*

Although active participation in the drafting process would ideally be a strong sign of commitment to ratifying the convention, this is not necessarily the case. Part of this is unintended as the process of elaboration is disjointed and lengthy. When the instrument is finished, governments have changed (perhaps more than once), and those that encouraged the project might no longer be in office. The project was started under a different administration with other legislative priorities. So, while a previous government might have pushed for the creation of the instrument, it is not certain that the new government will have the same interest in it. Other concerns have become more pressing, and the policy window has closed.

Ratification of a convention is easier if the needed changes in domestic law are minimal. States prefer international commercial law to reflect the principles of State law.¹⁴¹ Conventions can be used as a vehicle by States for promoting national legal solutions. Ralph Amisshah refers to this as ‘state contracted international law’.¹⁴² One of the issues that the 2001 United Nations Convention on the Assignment of Receivables in International Trade (which has one ratification) encountered was that most States needed to make significant changes to harmonize the Convention with domestic law.¹⁴³

A convention is more likely to be successful if there is no or little existing domestic legislation in the area. This was the case with the 1929 Convention for the Unification of certain rules relating to international carriage by air (Warsaw Convention). Commercial flying was a new development, so most States had no legislation, and the Convention did not need to be harmonized with existing domestic law. The international nature of flying also contributed to the ease of ratification as there was a clear necessity. The Convention provided a ready-made solution to the new problems that arose with the introduction of commercial international flights. Ratifying the Convention is more

¹⁴⁰ Ibid, 1435.

¹⁴¹ Roy Goode, ‘Reflections on the Harmonisation of Commercial Law’ (1991) 1991 Uniform Law Review 54, 63.

¹⁴² Ralph Amisshah, ‘Revisiting the Autonomous Contract—Transnational Contract Law Trends and Supportive Structure’ in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000) 327.

¹⁴³ Amelia H Boss, ‘The Future of the Uniform Commercial Code Process in an Increasingly International World’ (2007) 68 Ohio State Journal 349, 393.

logical under these circumstances then if there is already extensive domestic legislation.

V. Conclusion

This article has analysed the key political factors in the ratification of international commercial law conventions. It has examined how a policy window leading to ratification could open. For this, it is key that the convention has a place on the agenda. The main factors pushing an issue on the (institutional) agenda are the media, public opinion, focusing events, and lobbying by interest groups. International commercial law conventions often have low legislative priority because of their low visibility. The issues that these conventions address are not seen as problems by the media or the general public. Focusing events in the area of international commerce are rare. Therefore, the key push factor that stands out is lobbying by interest groups (which would consist of industry, trade associations, and formulating agencies). It is therefore important that interest groups are at the centre of the process from the start as they play such a key role. Consensus building produces transnational law, and this takes time and political skill.¹⁴⁴

The above analysis has shown significant hurdles for the viability of an international contract law convention. A choice to draft a new convention would come at the expense of other initiatives.¹⁴⁵ Another problem that would arise is competition with the CISG itself. If there are two conventions that both cover international (sales) contracts, this hinders harmonization. In the carriage of goods by sea, there are two main conventions: the Hague-Visby Rules (with some States being party to only the Hague Rules, others to the Hague-Visby Rules, and yet others are also signatory to the 1979 Protocol) and the Hamburg Rules (and now also the Rotterdam Rules). This leads to a divergence in the legal landscape. Therefore, a new convention could be counterproductive. While it is true that the CISG is incomplete, the question is whether a new instrument would be able to redeem any deficiencies. If some provisions are vague and general and some issues are not covered, this is mainly because politically there was no consensus on these points. It is doubtful whether this consensus could be reached now.¹⁴⁶

Finally, it should be noted that because of the costs and risks that drafting a convention brings, it can be observed that formulating agencies are focusing

¹⁴⁴ Susan Block-Lieb & Terence C. Halliday, 'Incrementalisms in Global Lawmaking' (2007) 32 *Brooklyn Journal of International Law* 851, 903.

¹⁴⁵ Michael Bridge, 'An Overview of the CISG and an Introduction to the Debate about the Future Convention' (2013) 58 *Villanova Law Review* 487, 489.

¹⁴⁶ Michael J Dennis, 'Modernizing and harmonizing international contract law: the CISG and the UNIDROIT Principles continue to provide the best way forward' (2014) 19 *Uniform Law Review* 114, 115.

more on other methods of legal harmonization. The current work programmes of UNIDROIT and UNCITRAL mainly focus on non-State rules as a method of harmonization.¹⁴⁷ Nevertheless, the existence of successful conventions shows that it can be worthwhile to undertake such a project, provided the right support from stakeholders is in place.

¹⁴⁷ UNCITRAL working programme: <https://uncitral.un.org/en/working_groups>; UNIDROIT working programme: <<https://www.unidroit.org/about-unidroit/work-programme>>.