

**INTERNATIONAL SALES CONTRACTS IN CONGOLESE LAW -
A COMPARATIVE ANALYSIS**

by

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DECLARATION

Student Number: **4729-636-4**

I declare that **International Sales Contracts in Congolese Law: A Comparative Analysis** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Signature
(Mr) NA KAHINDO

February 2014
Date

This thesis is dedicated to my wife and friend
Edwige Waridi Tasisira
who always encourages me even where I have hesitation.
Waridi, words cannot suffice to express
my gratitude to you.

SUMMARY

To regulate and facilitate are the main functions of legal rules. These purposes are achieved by a harmonised legal system by which the law becomes identical in numerous jurisdictions. The process to unify the law of sale internationally started in the 1920s and culminated, in 1988, in the implementation of the CISG. This Convention intends to provide clarity for most international sales transactions by regulating the formation of contracts, and the rights and obligations of the seller and the buyer resulting from the contract. The CISG has these days enjoyed much ratification and influenced a number of legislation reforms worldwide. Despite the role it played during the drafting process of the CISG, the DRC has not yet ratified it. Instead, the country continued to rely, until recently, on colonial legislations which had become out-dated, and inadequate to meet modern international sales contracts requirements. The situation appears to have been improved a year ago as the effect of the adoption of OHADA law whose Commercial Act is largely inspired by the CISG.

Because the introduction of OHADA law in the DRC is very recent, this study intends to assess the current state of Congolese sales law by comparing it with the CISG and South African law, which is non-CISG but modernised. The comparative study aims at establishing whether current Congolese law, as amended by OHADA law, is sufficient or has shortcomings; if it has some, it aims to identify those shortcomings, and make suggestions for their improvements. After discussion, it has been discovered that the ratification of OHADA law has significantly improved Congolese domestic sales law. Given that there remain certain unresolved shortcomings in Congolese international sales law, however, the study ends by a proposal for the accession of the DRC to the CISG in order to fill them.

Key terms

CISG; Comparative law; Congolese contract law; Congolese sales law; Formation of the contract; International sales law; Obligations of the buyer; Obligations of the seller; OHADA law; Sale of goods; South African contract law; South African sales law.

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LIST OF ABBREVIATIONS

A/AD	Appellate Division of the Supreme Court of Appeal of South Africa
AFP	Agence Française de Presse
AJ	Analyses Juridiques (Les)
al	Others
al.	Alinéa
All ER	All England Law Reports
All SA	All South African Law Reports
Am J Comp L	American Journal of Comparative Law
AMCO	African and Malagasy Common Organisation
App RU	Appeal Court of Ruanda-Urundi
AUM	African Union and Mauritius
BA	Bulletin des Arrêts de la Cour Suprême de Justice
BCC	Banque Centrale du Congo
Bepress	Berkeley Electronic Press (The)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof (German Federal Supreme Court)
BLR	Belgrade Law Review
Boma	Appeal Court of Boma
Brux	Appeal Court of Brussels
C	Cape of Good Hope Provincial Division of the Supreme Court of Appeal of South Africa
Cass B	Belgian Court of Cassation
Cass civ	Chambre Civil de la Cour de Cassation (France)
Cass F	French Court of Cassation
CC	Constitutional Court
CC	Civil Code (Belgium and France)
CCJA	Cour Commune de Justice et d'Arbitrage
CCO	Congolese Code of Obligations
CCom	Congolese Commercial Code
CESL	Common European Sales Law
CFC	Congolese Family Code
CG App	Conseil de Guerre d'Appel
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Costs, Insurance, and Freight

CILSA	Comparative and International Law Journal of South Africa
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG-Advisory Council Opinion
Civ Brux	Civil Chamber of the Appeal Court of Brussels
CLOUT	Case Law on UNCITRAL Texts
Co	Company
Colum J Transnat'l L	Columbia Journal of Transnational Law
Com Tournai	Commercial Chamber of the Appeal Court of Tournai
Comm Brux	Commercial Chamber of the Appeal Court of Brussels
Cons Sup	Conseil Supérieur
Cornell Int'l LJ	Cornell International Law Journal
CPA	Consumer Protection Act
CPD	Common Pleas Division of the High Court of England and Wales
CSJ	Cour Suprême de Justice
D	Durban and Coast Local Division of the High Court of South Africa
Dickinson LR	Dickinson Law Review
DRC	Democratic Republic of the Congo
DUACL	OHADA Draft Uniform Act on Contract Law
Duke J Comp & Int'l L	Duke Journal of Comparative & International Law
E	Eastern Cape Local Division of the Supreme Court of South Africa
EC Model Law	Electronic Communications Model Law
ECT Act	Electronic Communications and Transactions Act
Ed(s)	Editor(s) or Edition(s)
EDI Law Review	Electronic Communication Law Review
Elis	Appeal Court of Elisabethville
ERCA	Exchange Regulation Control Act
FC	Franc Congolais
First Inst	Tribunal de Premiere Instance
Fn	Footnote
FOB	Free on Board
Gand	Appeal Court of Gand
Gde Inst	Tribunal de Grande Instance
Goma	Appeal Court of Goma
I.C.L.Q.	International and Comparative Law Quarterly
ICC	International Chamber of Commerce
IHR	Internationales Handelsrecht
Inc	Incorporated

Incoterms	International Commercial Terms
Int'l Comp. L.Q.	International Comparative Law Quarterly
Int'l L	International Lawyer (The)
JBL	Juta's Business Law
JDC	Jurisprudence et Droit du Congo
JI TR LP	Journal of International Trade Law and Policy
JL & Com	Journal of Law and Commerce
JORDC	Journal Officiel de la République Démocratique du Congo
JTO	Journal des Tribunaux d'Outre-mer
Jur Col	Revue de Doctrine et de Jurisprudence Coloniale
Jur Congo	Jurisprudence et Droit du Congo
Kin	Appeal Court of Kinshasa
Kisangani	Appeal Court of Kisangani
L'shi	Appeal Court of Lubumbashi
LC	Labour Court of South Africa
Léo	Appeal Court of Léopoldville
Lesotho LJ	Lesotho Law Journal
Liège	Appeal Court of Liège
LQR	Law Quarterly Review
Ltd	Limited
M J G Tr	Minnesota Journal of Global Trade
MB	Moniteur Belge
MC	Moniteur Congolais
NC	Northern Cape Local Provincial Division of the Supreme Court of South Africa
NCKH	Napoleonic Code for the Kingdom of Holland
NJCL	Nordic Journal of Commercial Law
OHADA	Organisation for the Harmonisation of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires)
OHADAOJ	Journal Officiel de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires
Ohio St LJ	Ohio State Law Journal
OJL	Official Journal of the European Union
Pace Int'l LR	Pace International Law Review
Pace Review of the CISG	Pace Review of the Convention on Contracts for the International Sale of Goods
Pas	Pasicrisie
PECL	Principles of European Contract Law

PER/PELJ	Potchefstroom Electronic Law Journal
PICC	UNIDROIT Principles of International Commercial Contracts
PIL	Private International Law
PILD	Private International Law Decree
PRC	People's Republic of China
Pty	Proprietary
RAC	Role des Affaires Commerciales
RADIC	African Journal of International & Comparative Law
RC	Role Civil
RCA	Role Civil en Appel
RCDA	Revue Congolaise de Droit et des Affaires
RCE	Role Commercial et Economique
Rev dr unif	Revue de Droit Uniforme
RJC	Revue Juridique du Congo
RJCB	Revue Juridique du Congo Belge
RJZ	Revue Juridique du Zaïre
S	Section
SA	Société Anonyme
SA Merc LJ	South African Mercantile Law Journal
SA	South African Law Reports
SADC	Southern African Development Community
SALJ	South African Law Journal
SCA	Supreme Court of Appeal of South Africa
SDR	Special Drawing Rights
SMS	Short Message Service
Sprl	Société Privée à Responsabilité Limitée
Stell LR	Stellenbosch Law Review
T	Transvaal Provincial Division of the Supreme Court of South Africa
Trib App	Tribunal d'Appel
Tricom	Tribunal de Commerce (Commercial Court)
Tul L Rev	Tulane Law Review
UAGCL	Uniform Act relating to the General Commercial Law
UCC	Uniform Commercial Code
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law

UNECIC	United Nations Convention on the Use of Electronic Communications in International Contracts
UNGA	United Nations General Assembly
UNIDROIT	Institute for the Unification of Private Law or International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review
UNILEX	International Case Law/UNIDROIT
VJ	Vindobona Journal of International Commercial Law & Arbitration
VJTL	Vanderbilt Journal of Transnational Law
VOC	Vereenigde Geoctryeerde Oost-Indische Companie
WIPO	World Intellectual Property Organisation
YB	Yearbook
<i>YB of PIL</i>	Yearbook of Private International Law

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INTRODUCTION

1.1 Overview of the Study

Trade and industry activities are characterised by the rapid progress and simplicity of relationships that exist when concluding and executing contracts. The sale of goods is one of the most important among these contracts.¹ Sales, in effect, are considered to be at the heart of international trade;² to use Lando's words, they are "paradigmatic contracts".³ The status of typical sales contracts is justified by the fact that everyone is, to some degree, a buyer of either commercial or consumable goods. Insofar as commercial transactions are concerned, they are in an exchange economy, "the essential means by which the various units of production exchange their outputs, thereby providing the opportunity for specialization and productivity."⁴ Because every person is to some extent a seller or a buyer, there are, practically speaking, millions of contracts of sale being formed and performed every day.⁵ As a result of this situation, "the critical role of the law of sales is to establish a framework in which those transactions may take place in a predictable, certain, and orderly fashion with a minimum of transaction costs."⁶

Congolese sales law, in particular, has for a very long time been out-dated and not suited to modern economic requirements, especially internationally. This

¹ See Van Niekerk/Schulze *Trade* 54; Kopel/Mukheibir/Schoeman in Scott *Commerce* 42; Mann/Roberts *Business* 318.

² Ndulo 1987 (3) 2 *Lesotho LJ* 127 130.

³ See Lando in Hartkamp et al *Civil Code* 204.

⁴ Mann/Roberts *Business* 318.

⁵ Stephens in McKendrick *Sale* 1; Eiselen in Scott *Commerce* 33; Mann/Roberts *Business* 318.

⁶ Mann/Roberts *Business* 318.

changed recently with the adoption of OHADA law.⁷ This study is aimed at assessing the current state of Congolese sales law critically by comparing it with the provisions of two other legal systems, namely the United Nations Convention on Contracts for the International Sale of Goods (CISG)⁸ and South African sales law which is non-CISG but modernised. The comparative study is aimed at establishing whether current Congolese law, as amended by OHADA law, is sufficient or has shortcomings; if it has shortcomings, it aims to identify those shortcomings, and make suggestions for improvements in domestic law. This study, furthermore, purposes to determine whether the CISG should be adopted for international sales.

In view of that, this introductory chapter intends to provide an overview of the content of the study. It explains the context of the study, provides a background to the harmonisation of international sales law, outlines the role the CISG and OHADA sales law have played in this regard, and presents the problem statement. In addition, this chapter summarises the aims, objectives, and delimitations of the study.

1.2 Context of the Study

The Democratic Republic of the Congo (DRC) is the second largest country on the African continent.⁹ The area currently known as the DRC was officially taken over in 1885 by the Belgian King Leopold II, and it became known as the Congo Free State.¹⁰ In 1908, its administration shifted to the Belgian government, which renamed the country the Belgian Congo. The Belgian Congo was granted its independence on

⁷ OHADA is the acronym of the expression “Organisation for the Harmonisation of Business Law in Africa”, in French, *Organisation pour l’Harmonisation en Afrique du Droit des Affaires*.

⁸ United Nations Convention on Contracts for the Sale of Goods, hereinafter referred to as, the CISG, the Vienna (Sales) Convention, or the UN Sales Convention, Final Act, 1980, U.N. Doc. A/Conf. 97/18 (1980), reprinted in S. Treaty Doc. No. 98-9 (1980), and in 19 Int’l Legal Materials 668 (1980). Available online at: http://www.uncitral.org/uncitral/en/uncitral/texts/sale_goods/1980CISG.html (last accessed 19-6-2013).

⁹ DRC comes second after Algeria, since South Sudan’s independence was recognised on 9 July 2011.

¹⁰ MacDonnell *King Leopold II* 165.

30 June 1960 and was given the new name of the Democratic Republic of the Congo.¹¹

During the colonial period, Belgians used to treat the colony as an area distinct from Belgium. Thus, the fact that Congo was officially an integral part of Belgium sovereignty did not automatically extend to it the application of Belgian laws. According to the 1908 Colonial Charter, the colony had to be ruled by particular laws.¹² Nevertheless, even though the colony had its own rules, Congolese law-making power was exercised by the Belgian king or by commissions established by him. As a result, Congolese contract law, in general, and its sales law, in particular, are legacies of the colonial power.¹³ In other words, since the Belgian legal system was based largely on French law, the DRC is a country with a civil legal system inspired by the Belgian version of French civil law. The DRC follows the Napoleonic French legal tradition.¹⁴

Despite the fact that Congolese basic provisions originated from French and Belgian laws, there are, however, certain features which distinguish them. For instance, unlike the law of its mother country, the DRC does not have a single civil code dealing with the law of persons, property law, and the law of obligations. Instead, it has three different civil codes, namely the Family Code for the law of persons,¹⁵ Land Law for property law,¹⁶ and the Code of Obligations for contractual, torts, and unjust enrichment matters.¹⁷ As far as the CCO is concerned, it sets out the

¹¹ For a brief overview of Congolese history, see CIA *Foreign Policy* 23; Crabb *Constitution* 14.

¹² See Article 1 of the Law relating to the Belgian Congo Government of 18 October 1908 (*BO* 1908 65); see also Crabb *System* 81.

¹³ For the case of almost all African countries in general, see Mbayé *Destin* 442. As Adei (*African Law* 1) has stated, in all African countries there are two legal systems, namely imported law introduced by the colonial powers, and indigenous systems.

¹⁴ Congolese law is based on the 1804 Napoleonic Code.

¹⁵ Law No. 87-010 of 1 August 1987 instituting the Family Code (*JO* Special No. 1 August 1987), hereafter CFC.

¹⁶ Law No. 73-021 of 21 July 1973 instituting the General Regime regarding Property and Land, as amended by Law No. 80-008 of 18 July 1980 (generally referred to as the Land Law) (*JO* Special No. 1980 1 December 2004).

¹⁷ Decree of 30 July 1888 relating to Contracts and Conventional Obligations (*BO* 1888 109), hereafter CCO. Compare this to French and Belgian Civil Code, Book Three 'Contracts or Conventional Obligations in General', Articles 1101 to 1369.

basic rules of contracts, rules that apply to all kinds of obligations, including sales contracts.¹⁸ Especially with regard to the law of sale, it is contained in Title III, which comprises seven chapters.¹⁹ Chapter one deals in detail with the nature and forms of sales.²⁰ Chapter two specifies the types of things which may be sold.²¹ Chapters three and four deal with the obligations of the seller and the buyer.²² These chapters are the most comprehensive sections of the third Title. Regarding the last three chapters, they regulate issues such as repurchasing, sales by auction, and transfer of debts.²³ It should immediately be noted that the CCO's content corresponds with that of Book III of the Belgian and French civil codes. Many of the Congolese articles are like "duplicates" of the civil code provisions of its mother country.²⁴

As mentioned earlier, the CCO aims to govern all kinds of contracts, regardless of their nature. Thus, although it does not contain a specific rule relating to international sales contracts,²⁵ it does apply to both domestic and international sales contracts.²⁶ In other words, Congolese law did not originally follow the example of other nations, which have enacted legislation formally making a distinction between domestic and international sales. Since there is no separate or identifiable body of principles applicable to international sales contracts, the common principles of the

¹⁸ Cf. Article 7 al. 1 CCO for which, "Contracts, whether they have a specific title or not, are subject to general rules" provided by the Code.

¹⁹ See Articles 263 to 364 CCO.

²⁰ Articles 263 to 274 CCO.

²¹ Articles 275 to 278 CCO.

²² Articles 279 to 334 CCO.

²³ Articles 335 to 364 CCO.

²⁴ Cf. *Crabb System* 83 and 85; see also *Mbayé Destin* 442-449. Owing to this similarity, the English translation used in this study is borrowed from the French civil code translation by Rouhette, available online at: <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code22.pdf> (last accessed 23-7-2012).

²⁵ Such provision can be found in Article 11 of the Decree of 20 February 1891, regulating the Status of Foreign Nationals in the DRC (*BO* 1895 138), which regulates contracts containing a foreign element. This Decree will be referred to as the Private International Law Decree, PILD in short. Article 11 PILD provides that (international) contracts are governed, according to their form, by the law of the place where they were concluded. The same provision specifies that, except when parties have provided otherwise, international contracts are governed, according to their substance, effects or evidence, by the law of the place where they were concluded.

²⁶ Cf. Masamba for whom, "Congolese commercial contract law takes refuge behind civil law." Masamba *Modalités* 22.

law of sale have to apply, even when the sale is described as international. This parity of rules is justified, according to Bonell, by the fact that “international commercial contracts do not differ fundamentally from other contracts, and contain only a limited number of special provisions that would not be appropriate for contracts generally.”²⁷

With the achievement of independence, the DRC’s government had the power to modify or reject the legal inheritance that it was given by the colonial power. Unfortunately, during 51 years of independence,²⁸ the DRC continued to apply legislation which had long been amended by the countries where they were originally enacted. In France, for instance, even though the 1804 Civil Code remains the principal source of French contract law, it has been supplemented by other sources, both national and international. French contract law has now, in addition to the civil code, international sources, above all, European law.²⁹ The Belgian parliament has, likewise, supplemented the civil code with a number of special statutes, and the decisions of Belgian courts have observed the guidelines contained in the supplementary statutes.³⁰

Compared with French and Belgian contract laws, however, the DRC law remained unchanged for a very long time, but it has now been modernised to some extent by the adoption of OHADA law. The fact that recent legal developments recorded in Belgium and France were not simultaneously extended to the DRC has not been without consequences. In the Congo, rules governing contracts for the international sale of goods have become old-fashioned.³¹ Dating back to the colonial era, those rules were no longer sufficient and relevant with respect to actual international sales contract requirements. In other words, owing to the fact that many

²⁷ See Bonell http://www.frontpage.cbs.dk/law/commissionon_european_contract_law/literature.htm/; quoted by Christie *Law of Contract* 59 62.

²⁸ A number of scholars have observed that, “The great preoccupations of all Congolese governments since independence have been those of organising the state (...) while (...) legislation expressly directed towards convention private law concepts has been rare at most”. Crabb *System* 87; Mbayé *Destin* 442 454.

²⁹ See Tallon *Contract* 205 207; see also Witz in Ferrari *CISG* 129; Halperin *Civil Code* 87.

³⁰ See De Bondt *Contracts* 222; Lecocq *Code* 234.

³¹ Vanderstraete *Business* 16; Masamba *Modalités* 22 and 53; Masamba *Adhésion* 347; Tshibende 2011 *RCDA* 67 71.

aspects of modern social and economic life have changed since the early twenty-first century, a number of Congolese provisions were no longer suitable for contemporary business needs. Numerous legislative modifications were, therefore, needed in order to move towards legal modernity and security. This objective was achieved by the ratification of OHADA law, which came into effect in Congo on 12 September 2012.³² But owing to the fact that this change is very recent, its practical effect is still difficult to assess this early on as there is no case law on it yet.

At the international level, on the other hand, the importance of international commerce has increased dramatically over the last century as a result of the reduction of barriers and globalisation trends in trade.³³ This development is largely due to developments in communication, transportation, and mass production of goods. Harmonisation of international sales law, which background is briefly discussed in the following section, has played a supporting role in facilitating trade across borders and lowering transaction costs.

1.3 Background to the Harmonisation of International Sales Law

It is undoubted that, these days, countries have started to extend their relationships with one another owing, *inter alia*, to modern means of transport and communication. Currently, international borders are becoming more and more irrelevant, especially with regard to international trade.³⁴ This globalisation growth requires the elimination of barriers to trade, and one of the obstacles in this regard is the divergence of rules among legal systems and the territoriality of the law. Practically speaking, domestic laws differ from one system to another, and, within the same legal system, from one country to another. To exemplify this, in the common law legal

³² Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf>; OHADA Newsletter (8 September 2012) <http://www.ohada.com/actualite/1659/ohada-rdc-le-traite-et-les-actes-uniformes-seront-d-applicati-on-effective-a-partir-du-12-septembre-2012.htm>; OHADA Newsletter (12 September 2012) <http://www.ohada.com/actualite/1663/12-septembre-2012-un-grand-jour-pour-la-rdcongo-un-grand-jour-pour-l-ohada-un-grand-jour-pour-l-afrique.html>.

³³ See Kröll/Mistelis/Viscasillas *UN Convention 2*; Coetsee *Incoterms 1*; Boghossian *Performance 1*.

³⁴ Eiselen *Globalization 97*; Coetsee *Incoterms 1*.

system, an offer is generally revocable, whereas under civil law it is in principle irrevocable.³⁵ In the same way, Eiselen remarks:

(...) most civil law systems require a buyer to inform the seller of any non-conformity of the goods within a fairly brief period of time, after which the buyer may lose the remedies available for such non-conformity. In systems based on the common law, the duty to notify the seller of deficient goods is much less clearly defined and usually it does not lead to a loss of remedies (...). Such differences may impact quite significantly on the conduct of the various parties to a sales contract, depending on their understanding of the law.³⁶

Additionally, every sales contract is governed by a specific legal system. In effect, in spite of the ease of communication, the law is still territorial in nature and is enforced only within a specified national boundary. As a result, another state is not bound to acknowledge or apply a foreign law.³⁷ As Coetzee has observed,

When a dispute arises it is often uncertain which country's law governs the transaction, which court is to be approached for legal relief, or whether there will be access to a favourable court at all. The multiplicity of legal systems relevant to the transaction results not only in problems of forum shopping, but also in uncertainty as to the respective rights and obligations of the parties to the contract. Although the parties are in general free to choose the law applicable to their contract, in practice, the choice of a legal system is often not provided for in the contract. If not chosen, it is left open to the relevant courts and arbitral tribunals to establish the applicable law by using conflict-of-law principles (...). This entails an extremely complicated and possibly expensive enquiry, the results of which are often haphazard and unclear. Contracting parties, therefore, could be faced with uncertainty as to which system governs their contractual dispute; and even if the choice of law is clear, they could still be confronted with problems because of differences in the substance of national laws. Moreover, different aspects of a contract could be governed by different legal systems, which could complicate the situation even further.³⁸

³⁵ See Zimmerman *Obligations* 560; Huber/Mulis *CISG* 81; Farnsworth in Galston/Smit *Sales* 3-10; Vincze in Felemegas *Interpretation* 85; Akseli in Felemegas *Interpretation* 301; Garro 1989 (23) *Int'l L* 443 455; Murray 1988 (8) *JL & Com* 11.

³⁶ Eiselen *Globalization* 97 98; see, in the same sense, Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 596; Schwenger in Schlechtriem/Schwenger *Commentary* 623-624.

³⁷ Eiselen 1999 (116) *SALJ* 323.

³⁸ Coetzee *Incoterms 2* and authorities quoted by her in Fn7 to 9; see also Eiselen *Globalization* 97 98; De Ly 2005 (25) 6 *JL & Com* 1; Viejobueno 1995 28 *CILSA* 201; Griffin *Trade* 1.

In order to overcome these abovementioned impediments with regard to international trade, it was necessary to unify the law internationally.³⁹ At that time, in effect, a number of legal systems “were obsolete, incomplete, fragmentary and inadequate to govern international transactions.”⁴⁰ The process of unification was intended to simplify issues relating to international transactions by providing one global law for all international sales contracts.⁴¹

The striving towards unification of the law of international sale of goods was started in the 1920s influenced by Ernst Rabel’s master-mind.⁴² The idea became a reality in 1926 through the creation of the Institute for the Unification of Private Law (UNIDROIT).⁴³ In 1964, the work of UNIDROIT led to the adoption of two uniform acts, viz. the Convention governing the rights and obligations of parties to international sale of goods contracts (ULIS),⁴⁴ and the Convention relating to the formation of international sales contracts (ULF).⁴⁵ The implementation of both ULIS and ULF did not, however, fulfil the unification purpose because of the limited

³⁹ Even though “harmonisation” and “unification” are two different concepts, in practice, however, they are often interchangeable. See Wethmar-Lemmer *Private International Law* 1-2. For a better understanding of ideas that are hostile to legal harmonisation, see Rosett 1992 (40) *Am J Comp L* 683; Rosett 1984 (45) *Ohio St LJ* 265; Stephan 1999 (39) *Virginia Journal of International Law* 743.

⁴⁰ Kröll/Mistelis/Viscasillas *UN Convention 2*.

⁴¹ Eiselen 1999 (116) *SALJ* 323 328.

⁴² Schlechtriem/Schwenzer *Commentary* 1; Huber/Mulis *CISG* 2; Schwenzer/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf; Cuniberti 2006 (39) 5 *Vand. J. Transnation'l L.* 1511; Coetzee *Incoterms* 158.

⁴³ UNIDROIT is an independent intergovernmental organisation the goal of which consists in studying needs and methods for modernising, harmonising, and coordinating private law, in particular, commercial law between states or groups of states. It formulates uniform law instruments, principles, and rules to achieve these objectives. See UNIDROIT’s purpose at: <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited on 18-6-2012). Created on 3 September 1926, UNIDROIT was inaugurated on 30 May 1928. Its headquarters are in Rome (Italy) and it has 63 member states to date. Further information can be found on its website at: <http://www.unidroit.org>. For comments, see Kröll/Mistelis/Viscasillas *UN Convention 2-3*; Schwenzer/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf>; Eiselen 1999 (116) *SALJ* 323 334; Eiselen *Globalization* 97 101.

⁴⁴ Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, reprinted in 13 *A.M. J. COMP.L*453 (1964). Available online at: <http://www.unidroit.org/english/conventions/c-ulis.htm> (last accessed 20-6-2013).

⁴⁵ Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 (1972), reprinted in 13 *AM. J. COMP.L*472 (1964). Available online at: <http://www.unidroit.org/english/conventions/c-ulf.htm> (last accessed 20-6-2013).

number of member countries. Nevertheless, their failure did not stop efforts to achieve the worldwide unification of international sales law. When it became evident that they would difficultly obtain sufficient members, the UN General Assembly undertook to produce their revised version, which would be more widely accepted, through the creation of the United Nations Commission on International Trade Law (UNCITRAL).⁴⁶ This goal was achieved on January 1988 when the CISG entered into effect.

1.4 The CISG and Harmonisation of International Sales Law

It is acknowledged that current harmonisation of international sales law is one of the consequences of the establishment of the Vienna Convention. Scholars are unanimous in this regard that the CISG is the most successful and noteworthy outcome of the process of the unification of international contract law.⁴⁷ Prepared by UNCITRAL, the CISG was adopted on 11 April 1980 at the conclusion of a Diplomatic Conference held in Vienna which saw the participation of delegates from 62 countries, and observers from eight international organisations.⁴⁸ The DRC, previously known as Zaïre, attended that conference. This country was, moreover, one of the fifteen member states elected to the Drafting Committee⁴⁹ and one of the twenty-two Vice-Presidents of the conference.⁵⁰ Unlike the DRC, during the CISG drafting process, South Africa had already been excluded from international

⁴⁶ See UN General Assembly Resolution 2205 (XXI) of 17 December 1966 establishing UNCITRAL, hereinafter Resolution 2205, in UNCITRAL 1968-1970 (I) YB 65. http://www.uncitral.org/pdf/english/YBs/yb-1968-70-e/yb_1968_1970_e.pdf (last accessed 20-6-2013); see also Schlechtriem *Uniform Law* 18; Huber/Mulis *CISG* 3.

⁴⁷ See, among others, Schlechtriem/Schwenzer *Commentary* 1; Kröll/Mistelis/Viscasillas *UN Convention* 1-2; Kritzer/Eiselen *Contract* §80:1; Eiselen 2011 (14) 1 *PER/PELJ* 1; Kokoruda 2011 (6) *Florida Bar Journal (The)* 103; Hofmann 2010 22 (1) *Pace Int'l LR* 145; Castellani 2009 (13) *IVJ* 241; Grebler 2007 (101) *American Society of International Law* 407; McNamara 2003 (32) *Colorado Lawyer* 11; Schroeter 2001 (5) *VJ* 74; Wethmar-Lemmer *PIL* 30; and Hugo 1999 (11) *SA Merc LJ* 1.

⁴⁸ Those 62 states included all countries with significant commercial interests; see Flechtner *Honnold's Uniform Law* 11.

⁴⁹ See UNCITRAL 1980 (XI) YB 150; Flechtner *Honnold's Uniform Law* 11.

⁵⁰ See Final Act (A/CONF/97/18), in UNCITRAL 1980 (XI) YB 149.

organisations and processes because of its internal race policies, and the international sanctions against it.⁵¹ This is why South Africa did not actively participate in the establishment of the CISG although it sent observers to the conference. Despite this, however, as an important economic force on the African continent, it would certainly have played a significant role in UNCITRAL activities.⁵²

As stated by Lookofsky, the Vienna Convention is “the most significant piece of substantive contract legislation in effect at the international level.”⁵³ With regard to its ambit, the CISG is an international set of rules designed to provide clarity for most international sales transactions.⁵⁴ Its preamble makes it clear that “the adoption of uniform rules which govern contracts for the international sale of goods (...) will contribute to the removal of legal barriers in international trade and promote the development of international trade.”⁵⁵ This purpose was reiterated by the American District Court of California in the *Asante Technologies* case,⁵⁶ in order to show that the CISG replaces internal domestic laws on matters within its field of application. In terms of its effect, the number of CISG contracting states had grown to 79,⁵⁷ which represent about 80 per cent of world trade.⁵⁸ As a result of this, the CISG has attained

⁵¹ See Eiselen 1999 (116) *SALJ* 323 353.

⁵² *Ibid.*

⁵³ Lookofsky CISG 18; see also Kröll/Mistelis/Viscasillas *UN Convention* 1.

⁵⁴ Cf. Schwenger/Fountoulakis *Sales Law* 21; Schlechtriem/Schwenger *Commentary* 1; Galston/Smit *Sales* 1.

⁵⁵ See CISG Preamble, Paragraph 4.

⁵⁶ USA 27 July 2001 Federal District Court [California] *Asante Technologies Inc. v PMC-Sierra Inc.*, CLOUT case No. 433 [<http://cisgw3.law.pace.edu/cases/010727u1.html>] (last accessed 20-6-2013). In this case, the court quoted, word for word, the second and third main clauses of the Preamble of the CISG. See, in the same sense, USA 10 May 2002 Federal District Court [New York] *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc.*, CLOUT case No. 579 [<http://cisgw3.law.pace.edu/cases/020510u1.html>] (last accessed 19-6-2013); and USA 3 September 2008 Federal District Court [Illinois] *CNA Int'l, Inc. v Guangdong Kelon Electronical Holdings et al* [<http://cisgw3.law.pace.edu/cases/080903u1.html>] (last accessed 19-6-2013).

⁵⁷ Up-to-date information on the CISG status is available on the UNCITRAL website at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 20-6-2013).

⁵⁸ See Schlechtriem/Schwenger *Commentary* 1; Eiselen *Globalization* 97 136.

the status of “a world sales law”⁵⁹ and is currently one of the most important harmonising international trade instruments.⁶⁰

The Vienna Convention does not, nevertheless, aim to regulate all legal questions which may relate to an international sale;⁶¹ neither does it cover all kinds of international sales contracts.⁶² As provided by Article 1, the CISG deals with sales contracts made between parties established in different states when those states have accessed it, or, if not, when the rules of private international law (PIL) lead to the application of the law of a CISG member country. More specifically, the Convention’s goal consists only in governing the formation of the contract, and defining the rights and obligations of parties resulting from international sale of goods contracts.⁶³ One of its valuable qualities is that CISG rules contain solutions from civil, common, and socialist legal systems, chosen and adopted on a consensus basis.⁶⁴ Owing to its influence, “the CISG has not only achieved the status of a veritable world sales law, but has also led a number of states to modernise their domestic sales laws.”⁶⁵ Countries which have drawn from the Convention in revisiting their sales law include European countries in general, as well as China, Australia, and African OHADA law states.⁶⁶

⁵⁹ Schwenger/Fountoulakis *Sales Law* 21; Lookofsky *Understanding* 1; Lando in Hartkamp et al *Civil Code* 68-697. In the words of Karollus, the CISG is on the way to becoming “the *Magna Carta* of international trade”. Karollus 1995 *Review of the CISG* 51 77.

⁶⁰ Eiselen *Globalization* 97 103. With regard to its structure, the CISG comprises 101 Articles divided into four parts. Part I (Articles 1 to 13) defines the Convention’s sphere of application, and contains general provisions related to the interpretation, usages, and requirements of contractual form. Part II (Articles 14 to 24) regulates the formation of international sales contracts. Part III (Articles 25 to 88) establishes the sale of goods regime by discussing the rights, obligations, and remedies available to the seller and buyer, as well as the passing of risk. Part IV (Articles 89 to 101) contains final public international law provisions, such as those dealing with administrative procedures, declarations, and reservations that are applicable to signatory states.

⁶¹ See Schlechtriem/Schwenger *Commentary* 65; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 63; Hugo 1999 (11) *SA Merc LJ* 1 15.

⁶² Cf. Article 2 CISG.

⁶³ Cf. Article 4 CISG.

⁶⁴ Schlechtriem/Schwenger *Commentary* 6.

⁶⁵ Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html> (last accessed 1-7-2012).

⁶⁶ See Ferrari *CISG* 413-480; Ferrari *OHADA* 79; Flechtner *Honnold’s Uniform Law* 14; Willmott/Christensen/ Butler *Contract Law* 869.

1.5 OHADA Sales Law and the CISG Compared

OHADA is a regional organisation which aims to provide member countries with a harmonised set of business laws by elaborating on, and adopting simple and modern common rules that have been adapted to African economies.⁶⁷ Its statutes, called Uniform Acts,⁶⁸ are directly applicable and binding in all member states, notwithstanding any conflicting provisions in current or future national laws.⁶⁹ Several Acts have been entered into force under the organisation's sponsorship, including the Uniform Act Relating to General Commercial Law.⁷⁰ The Commercial Act contains eight main Books, of which the eighth deals with commercial sales matters.⁷¹ Its sphere of influence is delineated by Articles 1 and 234, for which the Act applies to "contracts of sale of goods" between traders located in one of the OHADA member nations or when conflict-of-law rules lead to the application of the law of a member state. UAGCL's provisions govern both domestic and international commercial sales.⁷² This means that, with the accession to the OHADA community, modern Congolese commercial sale of goods law as well as international sales law is today achieved by the Commercial Act, of which Book VIII is expressly dedicated to commercial sales.

A brief overview of the OHADA Commercial Act reveals that it has largely adopted principles contained in the CISG. A number of the Convention's provisions

⁶⁷ See Article 1 of the Treaty of 17 October 1993 Establishing OHADA; entered into force on 18 September 1995, as amended in Quebec on 17 October 2008 (*OHADA OJ* No. 4 of 1 January 1997), hereafter OHADA Treaty.

⁶⁸ For an entire ruling on OHADA Uniform Acts, see Title II of the Treaty, viz. Articles 4 to 12.

⁶⁹ See Article 10 OHADA Treaty; see also Ferrari OHADA 79 88; Diédhiou OHADA 223; Martor et al *Business* 20; Mancuso 2006 (5) 2 *Jl TR LP* 55 59; Abarchi 2000 (37) *Revue Bourkinabé de Droit* 21.

⁷⁰ See Uniform Act Relating to General Commercial Law adopted on 17 April 1997; entered into force on 1 January 1998 (*OHADA OJ* No.1 of 1 October 1997), as amended on 15 December 2010 (*OHADA OJ* No. 23 of 15 February 2011). This Act will be referred to as the UAGCL, the (OHADA) Commercial Act, Uniform Act, or merely as the Act interchangeably.

⁷¹ See Articles 234 to 302 of the Commercial Act.

⁷² See Martor et al *Business* 29; Huber Sales Law 950; Santos/Toe *Commercial* 339; Masamba Adhesion 347 362; Mutenda *Apport* 13.

have been duplicated or merely adapted to the realities of the African continent.⁷³ Magnus said, in this regard, that African OHADA states have “adopted a modified CISG as their common sales law”.⁷⁴ Since Book VIII of the UAGCL did not transcribe UN Sales Convention rules but rather adjusted them in order to fit local needs, it follows that it is possible to compare its substantive provisions with those established by other legal systems as the CISG.

Before doing so, however, it is important to note that problems usually resulting from international sales contracts are related to the formation of the contract, the obligations of parties, and the applicable law. In effect, a seller and a buyer can safely enter into a contract on the condition that their rights and obligations are sufficiently protected by law. Is this condition effectively satisfied in Congolese law? In order to answer this question, the research problem that is the focus of this study will be discussed.

1.6 Problem Statement

It was mentioned earlier that the adoption of the CISG marked a turning point in the harmonisation of international sales law history. The Convention has, in effect, been implemented as a uniform law governing contracts for the international sale of goods in all contracting states.⁷⁵ Its significance is justified, in the view of Kröll and others, by the fact that,

The (...) Convention contains substantive rules on two of the most important questions in international sales transactions. Part II regulates the formation of the contract of sale by matching acceptance and performance. Part III contains rules on the rights and obligations of sellers and buyers arising from the international sale of

⁷³ For the meaning and difficulties to determine what the realities of the African continent are, see Fontaine Avant-Projet 3-5. The adaptation to African specificities is not necessarily considerable for international transactions as it will be discussed later. One example of this is the responsibility of the seller for patent and latent defects; and the silence of the Commercial Act in respect of third parties' legal claims.

⁷⁴ Magnus in *CISG vs 3*; see also Ferrari OHADA 79 81.

⁷⁵ Cf. Preamble, paragraph 3. The number of reported cases dealing with the CISG proves that the CISG is really applied in practice.

goods contract, as well as the remedies that parties to a contract of sale have in response to the breach of its counterparty.⁷⁶

The importance of the CISG is, furthermore, accounted for by the fact that it provides commercial operators from all over the world with “the same substantive regime to be applied to the contract of sale: the same uniform language, methodology and a common understanding to the basic issues of the international sale of goods contract.”⁷⁷ With such prestige, every country would normally access the UN Sales Convention, which is, however, not the case in reality.

In the light of the above, the main problem of this study is located in the fact that, although the DRC took part in meetings that led to the adoption of the Vienna Convention, it has not yet ratified it. The failure of the DRC to ratify the CISG has meant that international sales contracts were, for a long time, governed in the DRC by provisions dating back to colonial times. The fact that the CCO had become out-of-date suggested lacunas in the initial Congolese international sales contract law. These gaps have, to a certain extent, been filled by Articles 234 to 302 of the UAGCL. Compared to the CISG, Articles 234 to 302 also establish a set of rules dealing with the formation and performance of sales contracts, the rights and obligations of sellers and buyers, as well as remedies available to contracting parties in the case of a breach of contract.

Even though UAGCL provisions bear a resemblance to CISG rules, modern Congolese law has, nevertheless, its own salient features which deserve attention. To remain within the scope of this study, some of the characteristics alluded to above, which in turn can be described as gaps, may be found in principles applicable to international contracts in general, as well as in provisions governing the formation of contracts and the obligations of parties.

With regard to general provisions relating to international contracts, Congolese PIL rules defer contracts with a foreign element, *inter alia*, to the law of

⁷⁶ Kröll/Mistelis/Viscasillas *UN Convention* 5-6 §10; see also Oosthuizen *Rights* 3.

⁷⁷ *Ibid.*

the place where they are concluded. As it is stated by Article 11 PILD, “Agreements are governed by the law of the place where they are made. (...) Contracts are governed, as for their substance, effects, and evidence by the law of the place where they are concluded, unless when parties provide otherwise.”⁷⁸

Since the provision designates the law of the place of conclusion of the contract as the law governing international contracts, it follows that the CISG may apply to contracts formed by Congolese entities by virtue of PIL principles.⁷⁹ Article 1(1) (b) CISG specifies, in this respect, that the Convention applies to contracts of sale of goods between parties whose places of business are in different states “when the rules of private international law lead to the application of the law of a Contracting State”. Consequently, despite the fact that the DRC has not yet ratified the Convention, Congolese businessmen might be surprised by its application to their contracts without choosing it as the applicable law, a situation that leads to legal insecurity. Where, however, contracts are concluded in the DRC, Congolese law, including OHADA law, will be applicable. Since the integration of OHADA law in the DRC is very recent, there is a need to assess critically the impact it has had on the historical Congolese sales law. It also needs to be compared to other modern systems of law, such as the CISG and South African law.

It has already been noted that the CISG is a unified substantive law aimed at unifying the law of sale of goods internationally. Its importance for comparative purposes is then indisputable. With regard to South African law, on the other hand, it is a mixed legal system which combines both civil law and common law principles. Two main characteristics are common to the DRC and South Africa which justify the significance of a comparative undertaking between their legal systems. Firstly, both countries are CISG non-contracting states where the same rules apply to both

⁷⁸ Article 11 al. 1 and 3 PILD, in Piron/Devos *Codes et Lois* 52. Piron and Devos’ book will simply be referred to in the following development as Piron.

⁷⁹ Cf. Kadner 2011 (13) *YB of PIL* 165. For a comparative view with regard to South African law, see Eiselen 2007 (19) *SA Merc LJ* 14 and 25; Eiselen 1999 (116) *SALJ* 323 369; Hugo 1999 (11) 1 27; Van Niekerk/Schulze *Trade* 108; Oosthuizen Rights 5.

domestic and international sales contacts.⁸⁰ Secondly, South African historical sales law is, like Congolese law, based on the Roman civil law tradition.⁸¹ Although both countries were influenced by Roman civil law, however, Congolese law follows the French Code Civil tradition while South African followed the non-codified Roman-Dutch tradition. What is more, because of the Anglo-American common law influence, South African law departs from the law of the DRC on the basis that it is secular, and, as such, it is increasingly flexible, admitting, and undergoing constant changes in response to worldly exigencies.⁸² Owing to its flexibility, South African sales law is more updated than Congolese law, and that might enable it to serve as a reference to assess the latter.

Coming back to the scope of this study, rules governing the formation of international sale of goods contracts are provided in Part II of the CISG. This part deals, among other things, with the offer and acceptance as essential elements of any valid international sales contract. Like the CISG, Article 241 UAGCL specifies that a contract is concluded either by the acceptance of an offer or by the conducts of the parties which indicate acceptance of the agreement. The provision does not, however, define what such conducts are. Similarly, Article 245 UAGCL states that any acceptance that contains material modifications amounts to a rejection of the offer, which then constitutes a counter-offer. Once again, in contrast to its equivalent CISG provision, this Article is silent with regard to additional terms that can be viewed as substantial alterations. Because the definition of conducts and material changes is left to the discretion of the judge, there is a risk that this situation will lead to uncertainty in commercial dealings.

On the other hand, contracts are generally defined as agreements which give rise to obligations.⁸³ Their most important effect is to establish rights and obligations for both the seller and buyer. As far as the obligations of the seller are concerned,

⁸⁰ For the specific case of South Africa, see Van Niekerk/Schulze *Trade* 65.

⁸¹ See Palmer *Mixed Jurisdictions* 23; Joubert *Contract* 1; Hahlo/Kahn *Union* 18; Hahlo/Kahn *Legal System* 585-586; Hahlo/Kahn *Union* 42; Zimmerman *Mixed System* 41 48.

⁸² Cf. Owsia *Contract* 4; for illustrations, see Chapter III below.

⁸³ Cf. Article 1 CCO.

Congolese rules in Articles 250 to 259 UAGCL are almost in agreement with the CISG's provisions in Articles 30 to 44. Both sources of law oblige the seller to deliver goods that are, among other things, of the right quantity, quality, and description, as stipulated in the contract, otherwise it will be sued for lack of conformity, and to protect the buyer against any third-party claims. If, however, the CISG has established a single concept of non-conformity, modern Congolese law gives the impression of maintaining the dual distinction between hidden and patent defects.⁸⁴ Establishing the seller liable for hidden defects is reasonable. Holding him responsible for disclosed defects, however, appears to be irregular. This situation has as consequence to generate negligent dealers. Such situation, in addition, places the seller in a condition that it may be sued anytime for discrepancies the buyer was presumed having agreed to tacitly, which is source of legal insecurity. Similarly, where the Convention requires the seller to protect the buyer against every intellectual property right,⁸⁵ Congolese law appears to lack such a specific obligation. The lack of an explicit obligation in respect of eviction based on intellectual and industrial property rights means that claims relating to them are ruled by the general principle of guarantee against eviction. Such a situation is not favourable to the seller owing to the specificity of intellectual rights. With regard to the obligations of the buyer, both the Vienna Convention⁸⁶ and modern Congolese law⁸⁷ require the buyer to pay the price of the goods, take delivery of them, and examine the goods for a probable timely lack of conformity notification. Nevertheless, the shorter notice period provided by Congolese law seems to be more prejudicial than that indicated in both the CISG and South African law.

From the illustration above, it appears that, in spite of some similarities between the Vienna Convention, South African law, and modern Congolese law, these legal systems differ in terms of many specific aspects relating to international

⁸⁴ Cf. Articles 258 and 259 UAGCL.

⁸⁵ Cf. Article 42 CISG.

⁸⁶ Articles 53 to 60 CISG.

⁸⁷ Articles 262 to 274 UAGCL.

sales contracts throughout their conclusion and performance. Such differences may have a significant impact on the behaviour of parties to international sales contracts⁸⁸ and contribute to the slowing down of international transactions in the DRC.

Normally, the law should evolve with the society by developing and being adapted to modern demands. The existence of a modern sales contract law that incorporates rules recognised and accepted universally should undoubtedly reassure and protect contracting parties. Thus, in order to deal with the above research problem, two relevant questions need to be asked. Firstly, what are the shortcomings of Congolese law in terms of international sales contracts? Secondly, how can these shortcomings be dealt with in order to comply with the requirements of modern international transactions?

1.7 Aims and Objectives of the Study

In the context of international sales law, diversity of substantive rules may lead to additional costs such as transactional costs and opportunity costs, as well as to losses both in terms of money and time spent trying to determine the law governing the contract. Such situations have been managed by the CISG since it entered into force in 1988. In effect, the Convention provides a satisfactory set of rules for international transactions, and it successfully balances the interests of contracting parties. On the other hand, though South Africa has not yet accessed the CISG, its legal system is very supple and modernised. As Christie and Bradfield have said, South African Courts have, indeed, acquired a long tradition of developing the common law from case to case⁸⁹ in order to suit, *inter alia*, commercial contemporary requirements. With regard to modern Congolese sales law, it is governed by a new set of rules provided by the OHADA Commercial Act which appears to have been inspired by the CISG.

⁸⁸ Cf. Eiselen Globalization 97 98.

⁸⁹ Christie/Bradfield *Contract* 1.

Owing to the fact that these rules are still very new in the country, this study aims at assessing them critically by establishing a comparison between the CCO, the Commercial Act, the CISG, and South African law provisions. Undertaking a comparative analysis has the intention of establishing whether current Congolese law is adequate for modern international commercial dealings requirements or, alternatively, whether it is still has gaps. Should the latter be the case, this study is aimed at identifying those gaps, and making proposals about how to provide appropriate solutions to help fill them. In addition, bearing the importance of the Vienna Convention for international sale of goods contracts in mind, this study aims to consider how the CISG could serve as a useful model to improve Congolese international sales law. The study, therefore, ultimately considers the accession of the CISG by the DRC in this regard. Likewise, given that there is no current treatise on Congolese contract law, this thesis will contribute to the goal of providing a systematic exposition of current Congolese law in its historical context and may provide the foundation for such a treatise.

By conducting a comparative study relating to international sales contracts in Congolese law, the researcher would like to achieve the following objectives:

- 1) To outline the basic principles of Congolese contract and sales laws;
- 2) To compare Congolese sales law rules with those established by the CISG and South African law, in order to amend the former;
- 3) To evaluate the extent to which OHADA law provisions have improved Congolese sales law in order to determine remaining gaps and propose the means to fill them; and
- 4) To recommend that the Congolese Government ratifies the 1980 Vienna Convention.

The above objectives are justified by the fact that, although the OHADA Commercial Act may have modernised domestic sales law, the failure of the DRC to ratify the CISG has led to gaps in Congolese international sales law. Its adoption should certainly harmonise Congolese law with aspects that regulate international sales of

goods worldwide. This ratification would, furthermore, improve the legal environment of the DRC for international sales transactions and protect Congolese dealers in their commercial transactions with foreign partners.

1.8 Methodology

In order to achieve the identified objectives, this study has, primarily, made use of the comparative method. According to its definition, a comparative approach is used to conduct legal research in countries that represent different legal systems, for instance, one with a civil law system and another with a common law system. Holmes JA has confirmed the importance of such an approach in *Government of the Republic of South Africa v Ngubane*,⁹⁰ in which the learned judge demonstrated the significant role of considering the law of other countries. For the purpose of this study, the Vienna Sales Convention and South African law have been selected as the focus areas. Of course, reference is also made occasionally to other jurisdictions, such as those of Belgian, French, English, German, American laws, the UNIDROIT Principles on International Commercial Contracts (PICC), and the Principles of European Contract Law (PECL) but not as frequently as the first two legal systems.

It should be noted immediately that the Vienna Convention is not, strictly speaking, an independent legal system, but rather a combination of legal systems. Its rules constitute a compromise between civil law and Anglo-American common law families.⁹¹ Thus, the comparative approach used in this study is not the classical comparative method, but an adapted one. Still, however, the CISG operates as the international sales code in many different countries. In this regard, the choice of the CISG is justified by the fact that the Convention is currently the most important instrument dealing with international sale of goods contracts worldwide. Owing to

⁹⁰ *Government of the Republic of South Africa v Ngubane* 1972 SA 601 (A).

⁹¹ See Kritzer/Eiselen *Contact* §85:11 85-29; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 127; Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 119; Brunner CVIM 91 111.

the fact that OHADA law, which constitutes the basis of modern Congolese sales law, referred to this convention in order to modernise its sales Uniform Act shows its relevance to, and influence on, international commercial transactions.

As regards South African law, South Africa is currently the most developed country on the African continent. Moreover, the DRC shares with South Africa membership of the Southern African Development Community (SADC)⁹² and the same basic Roman civil law tradition, while both countries are non-CISG members. In addition, South African law is flexible and evolving constantly. All of these reasons, and mostly the last, motivated us to examine how South African law can also be used in appraising Congolese sales law in order to align it with modern commercial laws instruments.

Undertaking a comparative study is not an easy task especially when the legal systems that are being compared do not have similar features.⁹³ This statement seems, however, inapplicable with regard to Congolese law, South African law, and the CISG. As it was mentioned in previous sections, the DRC is a civil law country which has been influenced by the French Napoleonic code. With regard to South African law, it is a mixed jurisdiction which combines rules from both civil and common law legal systems. The CISG, on the other hand, is a result of cooperation between different legal systems, including civil and common law. The fact that all three legal systems have civil law aspects in common means that there are many similarities among them.

Additionally, this study has also relied on the literature review approach. Sources of relevant information include statutes and conventions, judicial decisions, textbooks, journal articles, and electronic data. In particular, the database provided by the Institute of Peace, with special reference to case law and arbitral decisions

⁹² The SADC Treaty was signed in Windhoek (Namibia) on 17 August 1992 and amended in Blantyre (Malawi) on August 2001. The Organisation focuses on both socio-economic and political-security cooperation. The SADC comprises the following member states: Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia, and Zimbabwe. For an historical background, see Zenda SADC 9; Kihangi Environmental Rights 1.

⁹³ Cf. Owsia *Contract* 3.

applying the CISG, as well as scholarly publications collected by UNCITRAL, have been useful for the most part. Specific research on international sales contracts in Congolese law is, nevertheless, wanting. Furthermore, there is no systematic publication of judicial decisions in the DRC, which made the accessibility of local case law difficult. Owing to this situation, it was necessary to collect this case material at the courts and rely on foreign literature.

1.9 Delimitations and Structure of the Study

The international sale of goods as a research area covers several topics, including the formation of contracts, the rights and obligations of contracting parties, and remedies allowed to the injured party in cases of the breach of the contract. International transactions, likewise, involve numerous contracts, among which are the contract of sale itself, carriage of goods, marine insurance, and the issuing of bankers' letters of credit. Despite their importance for international dealings, this study's limited scope does not permit it to address each of these topics. The comparative study concerns only rules relating to the process of the conclusion of the contract, and those governing the obligations of sellers and buyers. Because no legal system can adequately be understood without looking at its historical development and framework, comparative chapters are, nevertheless, preceded by an overview of the three legal systems under consideration.

Overall, this study contains six chapters, in addition to the introduction. Chapter II deals with the historical process which has shaped modern Congolese law, as well as the fundamental principles on which its contract and sales laws are based. It demonstrates that Congolese law derives from the French Napoleonic civil code via Belgian law. The chapter shows that colonial law has stayed alive in the DRC for a very long time, but has recently been supplemented by OHADA law in order to try to meet the needs of modern international transactions. In addition, this chapter

discusses the general principles of Congolese contract law, which include freedom of contract, party autonomy, and good faith.

Chapter III has adopted a framework similar to that of the second chapter with regard to South African law. It explains that, even though South African law has been influenced by Roman-Dutch and English law, its legal system has acquired its independence as a mixed legal system under the direction of the Constitutional Court. This chapter also examines the general principles on which South African law is founded, including consensual and reasonable reliance theories, freedom of contract, good faith, and compliance with public policy conditions. It is shown that, in accordance with public policy requirements, for a contract to qualify as one of sale, parties must reach agreement upon the thing sold, and the seller must transfer ownership of the item bought to the buyer, who, in turn, must pay for it and take delivery.

Chapter IV discusses the process which led to the adoption of the Vienna Sales Convention, its field of application, and the impact it has had on national sales laws in different countries and regions. After a comprehensive discussion of reasons for a harmonised legal system and the advantages of such a structure, the chapter explores the kinds of contracts that fall within the scope of the CISG. In addition, this chapter demonstrates how the Convention can be applied in the DRC, despite the country's lack of interest in it.

With regard to chapters V and VI, they constitute the crux of this study. These chapters consist of a comparative approach whereby the CISG, South African law, and Congolese law are critically compared. At every stage, the Vienna Convention is discussed first, followed by South African law, and then Congolese law. An assessment of the state of current Congolese sales law is provided in concluding comments in order to determine the similarities among the three legal systems. In the case of differences, suggestions for the improvement of Congolese law are made.

Explicitly, Chapter V deals with the formation of contracts in terms of offer and acceptance, and it discusses different theories relating to the time and place of

the contract. The chapter shows that, even if the offer and acceptance approach was now to form part of Congolese contract law, as in the CISG and South African law, historically this has not been the case. It then considers the influence that the CISG may have had on the OHADA Commercial Act provisions, but observes, however, that there are still aspects that need attention. Chapter VI focuses on the obligations of the seller and buyer. This chapter shows how UAGCL rules have improved Congolese law in order to align it with CISG provisions and South African law rules. On the other hand, the chapter also highlights omissions recorded in the Act which have resulted in gaps that need to be filled.

Finally, Chapter VII presents a conclusion to the discussion in the previous chapters and ends with a proposal for the accession of the DRC to the Vienna Sales Convention, after having reminded us of the compatibility between the CISG and OHADA law.

Chapter Two

THE HISTORICAL DEVELOPMENT OF THE CONGOLESE CIVIL LAW AND ITS SALES LAW BASIC PRINCIPLES

2.1 Introduction

In general, the study of any legal system must include an understanding of the significant points in its development.¹ Concerning Congolese civil law, its historical development can be traced back to Belgian law which originated from the French civil code and was brought to the DRC during the colonial period. Even many days after independence, the DRC continued to apply legislation inherited from the colonial power,² although that law had long been adapted in its mother country. Because of such a lack of modernisation, Congolese civil law rules became outdated, insufficient, and irrelevant³ with respect to modern international sales contract requirements, and they needed to be improved. The first step in the reform process was accomplished on 12 September 2012 with the coming into force of OHADA law in the DRC. Since then, the basic principles provided by the OHADA Commercial Act have constituted one of the bases of the Congolese contract law and its sales law in particular. These principles include the freedom of contract, the autonomy of the will, and the obligation of good faith.

In that sense, this chapter has three main sections dealing successively with the historical development of the Congolese civil law, the principles on which Congolese contract law is based, and the essential elements of a contract of sale under the Congolese law perspective. With such an outline, this chapter does not, however,

¹ See Elliott/Jeanpierre/Vernon *Legal System* 1.

² The great preoccupations of all Congolese governments, since independence, have been those of organising the state. See Crabb *Legal System* 87; Mbayé Destin 442 454.

³ Vanderstraete *Business* 16; Masamba Adhesion 347; Masamba Modalités 22 and 53.

intend to provide a comprehensive study of the historical development of the Congolese legal system. It attempts merely to highlight a few fundamental aspects of the origins of the French civil code before its reception in Belgium, and explains how it gained recognition in the DRC through the Decree of 30 July 1888. In addition, this chapter intends to show that, until recently, commercial sales contracts were governed, in the DRC, by the same rules as civil sales contracts. This situation has been changed by the adoption of OHADA law.

2.2 The Historical Development of Congolese Civil Law

2.2.1 Introduction

At the outset it should be noted that detailed investigations into the development of Congolese civil law are largely wanting.⁴ That is to be regretted because one has to search in a number of different places to reconstitute the salient elements of Congolese legal history. What is evident, however, is that, before the coming into force of the colonial power in the DRC, the country was ruled largely by customary rules like other African countries.⁵ But, when the earlier Belgian settlers conquered the country, they substituted local customary rules considered at that time as contrary to the needs of public policy by their law.⁶ The colonisers brought with them the Napoleonic Civil Code they had inherited from France for, when the latter was enacted in 1804, Belgium was part of France. That is why, before examining the process of the introduction of the French Civil Code in the DRC, it is useful to go over the genesis of the said civil code and look at the means by which it was received in Belgium. After that a discussion of the characteristics of the earlier Congolese civil law and the impact of OHADA law upon the legal system under examination will follow.

⁴ See Mukadi Bonyi Preface to Kalongo *Obligations* 7.

⁵ See Lamy 1969 (Special No.) *RJC* 135 139.

⁶ *Ibid.*

2.2.2 French Civil Code Origin

Historically speaking, the French Civil Code is a product of a long evolution which began during the twelfth century with the movement towards the reduction into writing of substantive customary law. Such a process had largely been completed by the end of the sixteenth century.⁷ Reforms to this legal system were basically introduced by royal ordinances during the seventeenth and eighteenth centuries.

With regard to this background, West is of the opinion that it seems wrong to consider the 1789 Revolution and the promulgation of the Civil Code in 1804 as “representing a completely fresh start, as the Code draws heavily on the substantive law of pre-revolutionary times.”⁸ As far as the pre-revolutionary period is concerned, Roman law played a crucial part in the historical development of French civil law, especially contract law.⁹ Before the 1789 revolution, in effect, France had no code of general law governing the entire territory. In other words, there were different laws and legal systems generally mentioned as the “Ancien Droit” (Old Law)¹⁰ that could be divided into two families. South of the River Loire, on the one hand, Roman law remained important as a source for each region’s written laws. It was also used to supplement gaps in customary laws. Two written records were available for this purpose, the *Lex Romana Visigothorum*¹¹ and the *Justinian Corpus Juris Civilis*.¹²

⁷ For a comprehensive discussion upon the history of French law, see among others, Viollet *Histoire* 1ff; Zweigert/Kötz *Comparative* 74-84; Seruzier *Summary* 1ff; Van Caenegem *Introduction* 1ff; West et al *Legal System* 1ff.

⁸ West et al *Legal System* 1, see also Zweigert/Kötz *Comparative* 75.

⁹ Tallon *Contract Law* 205-206; Whittaker *Obligations* 296; Elliot/Jeanpierre/Vernon *Legal System* 1. As stated by Zweigert/Kötz (*Comparative* 77) during the pre-revolutionary era, contract law was inadequately regulated by customary laws. Lawyers, therefore, preferred Roman law considered at that time as the most developed and refined source of law. For ample information in relation with the reasons of the reception of the Roman contract law system and legal tradition, see Watson *Evolution* 3-41 & 66-97; Ourliac/Malafosse *Histoire* 7ff.

¹⁰ Elliot/Jeanpierre/Vernon *Legal System* 1; Seruzier *Summary* 9.

¹¹ Published in 506 AD, the *Lex Romana Visigothorum* was a summary of Roman law prepared for the administration of Roman law for Romans. See Elliot/Jeanpierre/Vernon *Legal System* 2.

¹² The *Justinian Corpus Juris Civilis* was a compilation of different laws put together from the twelfth century under the Byzantine emperor Justinian to supplant the *Lex Romana Visigothorum*. (See Marryman *Civil Law* 27). The *Lex Romana Visigothorum* did not contain the laws of Visigothic kings, but Roman imperial constitutions and writings of Roman jurists. It is usually thought that

North of the River Loire, on the other hand, the main source of the laws adopted by the feudal system was tribal customs, mostly from Germanic tribes. At that time, customary law dealt with private law, but covered a restricted subject area. So, Roman law principles had to be introduced to complete it.¹³ The only laws applicable across the whole of the French kingdom then were Canon law and King's ordinances.¹⁴

The division of the country into two principal legal systems was certainly noteworthy when one is aware that Roman influence was felt almost equally in the North and in the South. That diversity in the law, associated with the number of different customs,¹⁵ however, created natural and almost diverse obstacles to national unity. As stated by Zweigert and Kötz, for instance, the proliferation of different customs and the difficulty of discovering their real content naturally gave rise to great legal uncertainty.¹⁶ In order to unify the law on a national level, simplify it, and remove some of the above practical difficulties, King Louis XI recognised the advantages of the unification of the law.¹⁷ In this regard, he developed the plan to establish a uniform French law. After his death in 1588, his successor, Henri III, undertook to pursue the unification plan. He gave the task of gathering into one volume the ordinances still in effect and the plan for new laws to Barnabé Brisson.

this work had been issued with a political motivation, to try to retain the loyalty of Alaric's Gallo-Roman subjects who were Catholics and inclined them to join the Franks. See Watson *Evolution* 81; Ankum Codification 1.

¹³ West et al *Legal System* 17; Dadomo/Farran *Legal System* 5; Zweigert/Kötz *Comparative* 77 & 79 who briefly note that France was divided into two legal areas, the *Pays the droit écrit* in the South, and the *Pays the droit coutumier* in the North.

¹⁴ For example, Canon law influenced the development of French contract law, with its moral approach, by the adoption of principles such those of *pacta sunt servanda*, good faith, and equity. See Tallon Contract Law 205-206.

¹⁵ Commentators are not unanimous about the number of French customs of that time. According to Ferriere (*Dictionnaire de Droit et de Pratique*, V° Coutume), there were more than three hundred; one hundred and forty-four according to Voltaire (*Dictionnaire Philisophique*); two hundred and eight-five according to Fleury (*Précis Historique de droit Francais*); and for Dupin (*Oeuvres de Pothier*), five hundred fifty customs. Sources quoted by Seruzier *Summary* 13 Fn1.

¹⁶ Zweigert/Kötz *Comparative* 77.

¹⁷ David *French Law* 12; David/De Vries *Legal System* 11; Dickson *Introduction* 4; Oosterhuis *Performance* 125.

This work, known as the *Code Henri III*, had not yet been finalised when its author died in civil wars.¹⁸

After him, during the reign of Louis XIII, a new code, known as the *Code Michaud*, was enacted in 1629. The *Code Michaud* contained 461 articles regulating, *inter alia*, civil and commercial matters.¹⁹ Likewise, under the reign of Louis XIV, through the efforts of famous lawyers of the time, such as Lamoignon, Auzane, Fourcroy, Pussort, Savary, Colbert and Dustarlet, several important statutes were published among which was the 1667 statute, also called the *Code civil*. According to Ourliac and Malafosse, French law makers inherited some general principles like those governing the proof of contracts from this code.²⁰

From the different attempts of regulation referred to above, it appeared that the monarchy had been unable to provide France with a uniform code of law. That is why the 1789 French Revolution was to overcome all obstacles in the legal domain. Concerning civil law, for instance, an Act of 24 August 1790 expressly provided the possibility of reviewing and reforming the civil code in order to adapt it to the Constitution. In addition, the Constitution of September 1791 reaffirmed the principle of a civil code applicable throughout the entire kingdom,²¹ the civil code of which the codification process is briefly examined in the following section.

2.2.3 The Process of the Codification of the French Civil Code

As was claimed in the previous paragraph, the view developed during the eighteenth century was to provide France with a bill of law having national effect. One of the most important aims of the 1789 Revolution was, moreover, to unify private law in France. That is the reason why the Constitutional Assembly established by the Revolution decreed, “A code of civil law common to the whole kingdom will be

¹⁸ See Seruzier *Summary* 11.

¹⁹ *Ibid.*

²⁰ Ourliac/Malafosse *Histoire* 35.

²¹ See West et al *Legal System* 21; Elliot/Jeanpierre/Vernon *Legal System* 6; Seruzier *Summary* 16-17.

drawn up.”²² The first attempt at codification was carried out by Jean-Jacques Régis de Cambacérès²³ from 1793 onwards. Cambacérès submitted three drafts of the civil code, unfortunately none of them being accepted by the legislature.²⁴

When Napoleon Bonaparte came to power in 1799, he wanted the new order to be legitimised by the creation of a unified legal system. He, therefore, made it a priority to draw up the civil code. In the Constitution introduced by him, Napoleon empowered three Consuls with executive and legislative competences, practising himself as the First Consul and the other two as assistants.²⁵ As First Consul, Napoleon appointed a commission of four committed lawyers, namely Tronchet, Bigot de Préameneu, Malleville, and Portalis,²⁶ in August 1800 with the task of drafting a civil code. The commission worked very hard. Within four months it produced a draft civil code inspired by the writings of Pothier and Domat.²⁷ That

²² Clause cited by Zweigert/Kötz *Comparative* 82.

²³ Jean-Jacques Régis de Cambacérès was a practising lawyer who was later to become president of the famous “Comité du Salut Public”, then Minister of Justice, and who would finally share the “Consulat” with Napoleon during 1799. See West et al *Legal System* 21.

²⁴ Dickson *Introduction* 4; Van Caenegem *Introduction* 4; Dadomo/Farran *Legal System* 8. The first draft was submitted on 9 August 1793 and had 719 articles. It was rejected, not only as being “incompatible with the ideas or the great philosophical principles of the time”, but also unnecessarily “complicated”. (See Portalis “Discours préliminaire du premier projet de Code Civil de Cambacérès”, 1793; reported in West et al *Legal System* 35; see also Zweigert/Kötz *Comparative* 83.) The second draft, submitted on 9 September 1794, was rejected on the grounds that “it was too short (297 articles), offering only a superficial outline of the law, rather than being a genuine code.” The last draft, submitted in 1796, did not have time to be discussed in Parliament as Napoleon’s arrival to power stopped the proceedings. (See Elliot/Jeanpierre/Vernon *Legal System* 6; Seruzier *Summary* 18; Dadomo/Farran *Legal System* 8; Zweigert/Kötz *Comparative* 83).

²⁵ See Zweigert/Kötz *Comparative* 83.

²⁶ Francois-Dénis Tronchet (1726-1806) and Félix-Julien-Jean Bigot de Préameneu (1747-1825) came from the customary law region; Jacques de Malleville and Jean-Etienne-Marie Portalis from the written law region. In addition, the three first named were members of the *Cour de Cassation*, while Portalis was a commissioner of the government in the *Tribunal de Prises*, a Maritime court. See West et al *Legal System* 21; Seruzier *Summary* 22 Fn1; Elliot/Jeanpierre/Vernon *Legal System* 6; Dickson *Introduction* 4; Oosterhuis *Performance* 126; Zweigert/Kötz *Comparative* 82.

²⁷ Domat’s (1625-1696) and, particularly, Pothier’s influence on the law of contract and sale was undeniable at that time and the draft civil code commission could not manage without their ideas. Concerning the first named, his main works were published in *Les lois civiles dans leur ordre naturel* (1689-1694), translated by W Strahan as *The Civil Law in its Natural Order: Together with the Publick (sic) Law*, Vol. I (London 1722). From him, the Commission inherited the principle of binding force of contractual obligations. Domat stated, for example, “*Les conventions étant formées, tout ce qui a été convenu tient lieu de loi à ceux qui les ont faites; elles ne peuvent être révoquées que de leur consentement commun (...)*”. (Excerpt quoted by Oosterhuis *Performance*

draft was then submitted for consultation to the Higher Court (Tribunal de Cassation), the Appeal Courts (Tribunaux d'Appel), and referred finally to the "Conseil d'Etat" for discussion.²⁸ After the Council had received the draft civil code, its legislative group examined each of its titles in the presence of the draftsmen. The draft, approved title by title, was then printed and distributed to all of the "Conseillers d'Etat",²⁹ and discussed once again in a General assembly.

In December 1801, the two Parliamentary Assemblies, the *Tribunat* and the *Corps Législatif*, also examined the draft civil code but rejected it. As Napoleon had, however, been established "Consul for life" with wide executive powers that year,³⁰ it enabled him to introduce a streamlined procedure bypassing the legislative resistance. As a result of this, the different chapters of the code were promulgated by a series of 36 laws passed from March 1803 to March 1804. The entire project of 2,281 articles entered into effect on 21 March 1804 as the *Code Civil des Français* (the Civil Code of the French People). The civil code later became known as the *Code*

55.) This idea was reproduced latter in the 1804 Napoleonic civil code through Article 1134 which assimilates legal agreements to other lawful obligations so that contracting parties must give way to them.

Regarding Pothier (1699-1772), his ideas were published in two important documents: the *Pandectae Justinianae in novum ordinem digestae* (1748-1750) and the *Traité des Obligations* (1761). The drafting Commission inherited from him, among other things: the definition of agreements; the principle of freedom of contract; the method of contracting by means of offer and acceptance; and the subdivision of agreements according to their nature of performance. Pothier believed in parties' freedom as one of the cornerstones of an agreement. He, therefore, defined a contract as "an agreement by which two parties reciprocally, or only one of them, promise and bind themselves towards the other to give something, or to do, or not to do something." Pothier's definition was replicated in Articles 1101 and 1126 of the Napoleonic civil code. (See Oosterhuis *Performance* 69 and 126-127; Imbert *Histoire* 89).

Further to the impact of Pothier's understandings on the French civil code drafters, his influence also overextended into Roman-Dutch law where he inspired Van der Linden (1807-1808) (See Wessels *History* 353; Wijffels *Contracts* 21 30; Oosterhuis *Performance* 202), who, in turn, heavily influenced early South African law. (See Du Bois in *Principles* 75; Thomas/Van der Merwe/Stoop *Historical* 69). The same author indirectly influenced Congolese law because, as will be explained later, many of French civil code provisions were merely duplicated in the DRC.

²⁸ For a brief overview of the French law-making procedure of that time, see Dadomo/Farran *Legal System* 9; West et al *Legal System* 21; Elliot/Jeanpierre/Vernon *Legal System* 6; Seruzier *Summary* 22; Zweigert/Kötz *Comparative* 83. The "Conseil d'Etat" (Council of State), hereinafter the Council, was the final court of appeal of the Administrative court structure and also government advisory body. See Glossary of terms annexed to West et al *Legal System* V° Conseil d'Etat 336.

²⁹ The "Conseillers d'Etat" was the highest category of members of the Council of State.

³⁰ Cf. Decree of 4-6 August 1802.

*Napoleon*³¹ owing to Napoleon's active role in the drafting process and his involvement in the civil code implementation.³² It seems that Napoleon was himself satisfied by the role he had played as law-maker. Evidence of this is the observation he made during his exile on Saint Helena Island in the last years of his life: "My glory is not to have won 40 battles, for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."³³ The merit of the civil code consists of the fact that it unified civil law for all the territories comprising the French empire.³⁴

With regard to the content and structure of the civil code, it originally aimed to regulate the life of a private individual from birth to death. It was conceived, in the words of Marryman, as being a handbook for citizens "to determine by themselves their legal rights and obligations."³⁵ Thus, in order to achieve this purpose, the civil code drafters divided it into three main Books.³⁶ Book III of these considers the contract as one of the ways to obtain property in addition to the law of successions, matrimonial property, gifts and wills, and the law of torts. As far as

³¹ The originally entitled *Code Civil des Français* was changed to *Code Napoleon* in 1807. See David/De Vries *Legal System* 13; West et al *Legal System* 21. For the best *Civil Code*'s reproduction in English that could be obtained from the original French version, see Berrett *Code* in two Volumes. The French civil code will be referred to in this study as the code civil, civil code, code Napoleon, Napoleonic code, and French civil code interchangeably, in short FCC.

³² Commentators are unanimous that Napoleon "presided over more than half of the 107 sessions of the Council while the remaining sessions were presided over by Cambacérès," and that he was personally present at about one half of the discussions of the council. See Elliot/Jeanpierre/Vernon *Legal System* 6; West et al *Legal System* 21; Zweigert/Kötz *Comparative* 83.

³³ Quoted in Schwartz *Code* vii; Elliot/Jeanpierre/Vernon *Legal System* 6; Zweigert/Kötz *Comparative* 84. Napoleon's law-making goal was not limited to the civil code. In the private law field, for example, the civil code was followed, two and three years later, by the Code of Civil Procedure (1806) and the Commercial Code (1807), and, in criminal matters, by the Code of Criminal Procedure and the Criminal Code in 1808 and 1810 respectively. Cf. Bell/Boyron *Sources of Law* 23; Van Caenegem *Introduction* 5.

³⁴ Bermann/Picard *Introduction* xxx.

³⁵ Marryman *Civil Law* 28.

³⁶ The first Book relating to Persons (Articles 7 to 515) is composed of eleven titles; the second Book regulating Property and different types of ownership (Articles 515 to 710) contains four titles; and the third Book, which is the most important, deals in twenty titles with different modes of acquiring property (Articles 711 to 2281). These principal Books are preceded by a Preliminary Title concerning the publication, effects, and application of laws in general (Articles 1 to 6).

contracts are concerned, they are dealt with in Title III³⁷ which provides general rules governing all contracts. Sales contracts, in particular, are regulated by Articles 1582 to 1701 which cover the sixth Title. As a whole, provisions governing contracts are based on the Republic's principle of *liberty*, a principle according to which people were allowed the freedom to make any contract, subject only to the needs of *public policy*.³⁸

From this development, it is clear that one of the most notable events in all the legal history occurred when the French civil code came into force. At that time, the French civil code was considered to be “the first great modern codification of the law”;³⁹ it has become, two centuries later, “the oldest surviving post-Enlightenment code.”⁴⁰ This reputation justified its influence beyond the French territory and its adoption as a model for civil law in parts of Europe, especially in Belgium.

2.2.4 Reception of the Napoleonic Civil Code in Belgium

2.2.4.1 Dutch legal background in Belgium

Politically, Belgium became independent from the United Kingdom of the Netherlands in 1830.⁴¹ Before its independence, Belgium was part of the territory known as the “Low Countries” that comprised the current Benelux countries.⁴² Concerning its legal history, the country probably followed the pattern of the rest of Western Europe previous to the Napoleonic period. Its law was primarily customary at the beginning. But, throughout the period, the main development in private law lay in the interaction between custom and Roman law.⁴³ According to a number of

³⁷ Articles 1101 to 1369 FCC.

³⁸ See Zweigert/Kötz *Comparative* 86; see also Article 6 Civil code wherein, “Statutes relating to public policy and morals should not be derogated from by private agreements.”

³⁹ See Schwartz *Code* vii; Van Caenegem *Introduction* 1; see also Zweigert/Kötz *Comparative* 90 who describe the French civil code as “the leading code of the Romanistic family.”

⁴⁰ Vogenauer *Avant-projet* 3 4.

⁴¹ Heirbaut *Tradition* 1.

⁴² See Van Caenegem *Reflexions* 148-163; Lesaffer *History* 31.

⁴³ Watson *Evolution* 66.

commentators, an attempt at the centralisation of customary laws was made by the Burgundians and Habsburgs from 1400 to 1581.⁴⁴

When Joseph II came to power in 1780, he started an ambitious programme of legal reform. His project was unluckily obstructed by the October 1789 revolt. Austrian authority was later restored, but any plan of reform had to be given up. In the 1795 revolution, France annexed the Southern Netherlands, i.e. today's Belgium, and the principality of Liege.⁴⁵ As a result of that event, all French revolutionary legislation was disseminated into the annexed departments as was the 1804 Napoleonic codification a short time after.⁴⁶

In 1807, Louis Napoleon assigned to Johannes Van der Linden (1756-1835) the task of preparing a new draft civil code for the Kingdom of the Netherlands. A year after, Van der Linden submitted his draft, inspired by the preceding drafts of the Commission of Twelve; Pothier's works, and the French civil code, in addition to his personal main beliefs on Roman-Dutch law.⁴⁷ In the meantime, Napoleon I ordered

⁴⁴ In 1531, for example, Emperor Charles V ordered the homologation of local customs. These were to be codified and sent to Brussels for promulgation. One of the aims of the homologation was to bring about legal unification in Low Countries. At first sight, it was fairly successful. Though the law remained largely un-codified in Northern provinces, about 600 customs were abrogated and less than 100 were homologated. See Lesaffer *History* 42-43ff; Heirbaut *Tradition* 6.

⁴⁵ Crabb *Constitution* 11; Van Caenegem *Introduction* 151.

⁴⁶ See Heirbaut/Storme <http://storme.be/taiwan2012HeirbautandStorme.pdf>; Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf> (both accessed 4-3-2013). Of course the Batavian Republic (1798-1800) initially went through different legal systems. Within the "Commission of Twelve" charged from 1798 with the codification task, the law of obligations was delegated to three members, Bondt, Farjon, and Walraven. For all practical purposes, let us remind ourselves that the Batavian Republic was a satellite kingdom of revolutionary France and its ally in its wars against Britain. In 1805, Napoleon I enforced a new regime upon it. He consequently imposed, one year after, his young brother Louis Napoleon as sovereign. After his coming to power, the Commission of Twelve was sent home, and the codification programme was speeded up.

⁴⁷ Though Van der Linden wrote a number of law-books, his famous manual was *Rechtsgeleend, Practicaal en Koopmans Handboek* (1806), translated later, by G T Morice, as the *Institutes of the Laws of Holland*. The *Institutes*, conceived for the use of judges, practitioners and merchants, had the ambition of laying down the basic rules of Roman-Dutch law. It "enjoyed great popularity in earlier legal circles in South Africa." (See Du Bois in *Principles* 75; Wessels *History* 351.) As far as Pothier's influence on Van der Linden's draft is concerned, the latter contained, *inter alia*, a number of principles governing the law of obligations and the law of contracts. Its Book III dealt in general with contractual obligations and with specific contracts among which is the contract of sale. With regard to the law of obligations, for example, Oosterhuis argues that Van der Linden resorted to a mixture of sources in the general part of the obligations. While defining the object of

his young brother, Louis Napoleon, to introduce the 1804 Napoleonic code in the Kingdom of Holland. Louis refused to follow his brother's suggestion, emphasising the need of legislation adapted to the Dutch legal tradition for the Kingdom. He then installed a new drafting commission with the task of preparing a Dutch version of the civil code inspired by Van der Linden's draft.⁴⁸ Following the King's advice, the commission completed its task in one year. It submitted, in May 1808, a draft *Wetboek Napoleon ingerigt voor het Koninkrijk Holland*, i.e. a draft "Napoleonic Code for the Kingdom of Holland," (NCKH) which entered into force on May 1, 1809.⁴⁹

The NCKH's implementation was extremely ephemeral, however, because it was supplanted immediately after its enactment by the Code Napoleon.⁵⁰ At that time, in fact, the Kingdom of the Netherlands was again annexed to the French empire. Upon that annexation, Napoleon I decreed the application of all French codes there. As a result, from March 1811, the 1804 Civil Code replaced the NCKH.⁵¹ Although France withdrew two years later, its legislation survived, particularly in Belgium.

2.2.4.2 Preservation of the Napoleonic civil code in Belgium

After the French withdrawal, the great powers of Europe convened in Vienna to redraw the map of the old continent. At the end of the conference, Belgium and the Netherlands were merged under William I into the United Kingdom of Netherlands.⁵²

a legal obligation, Van der Linden "held that the object of an obligation could be a good (*zaak*) or the commission or omission of an act". For it to produce legal effect, however, the object "had to be possible, permissible and certain, and it had to have a certain (monetary) value (...)". (See Oosterhuis *Performance* 202; citing Article 43 of the draft civil code; see also Wijffels *Contracts* 21 30.

⁴⁸ Van Caenegem *Introduction* 152; Lesaffer *History* 53; Limpens "Expansion" 94; Wijffels *Contrats* 21 29-30.

⁴⁹ *Ibid.*

⁵⁰ See Wessels *History* 241&353.

⁵¹ Hondius *Code Civil* 157; Wijffels *Contrats* 21 32; Lesaffer *History* 53; Van Caenegem *Introduction* 152; Wessels *History* 241&353. According to Lecocq (Code 227), the French civil code was published in Brussels from 1804, together with its Dutch version.

⁵² Wijffels *Contrats* 21 32; Van Caenegem *Introduction* 152.

Immediately after his inauguration, King William I expressed the desire to have his own Dutch codes; he accordingly appointed a drafting commission on April 1814. A draft civil code, generally referred to as the Kemper draft, was ready three months after this based on the previous NCKH.⁵³ Two other drafts followed, the first submitted on March 1816,⁵⁴ and the second in 1820 which was finally submitted to Parliament for discussion.⁵⁵ The Parliament worked on it for the next six years and produced, in 1825-1826, a draft civil code which was to enter into force on 1 February 1831.⁵⁶

Soon after this, the above draft was amended, during the 1828-1829 parliamentary sessions, in accordance with the three subsequent codes: the commercial, civil procedure, and criminal procedure codes.⁵⁷ By 1829 three of the four codes were adopted, the criminal code being the exception. In the same way, an Act of 16 May 1829 claimed to abrogate the French civil codes and confirmed the abolition of the Roman law authority as initially stated in France from 1804. By the end of 1830, however, discontent between the Southern and Northern Netherlands led to an insurgence and subsequent Belgian independence with the country still having French law as its legal system. Consequently, the 1804 Napoleonic code remained in force in both Belgium and the Netherlands.⁵⁸

Concerning the Netherlands, however, just after Belgian revolution, the Dutch Parliament decided to revise the 1830 draft civil code and, to that end, published the *Burgerlijk Wetboek* in 1838, which was replaced by a new Dutch civil code in 1992. Compared with the 1838 civil code, which apart from some typically Dutch features,

⁵³ Ibid.

⁵⁴ It was, according to Lesaffer (History 56) based on the old Roman-Dutch law and Kemper's works.

⁵⁵ See Wijffels Contrats 21 33; Lesaffer History 56.

⁵⁶ See Decree of 5 July 1830, in Caenegem *Introduction* 153; see also Wijffels Contrats 44; Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf>; Heirbaut/Storme http://storme.be/taiwa_n2012HeirbautandStorme.pdf.

⁵⁷ Wijffels Contrats 44; Van Caenegem *Introduction* 153; Lesaffer History 57.

⁵⁸ See Decree of 1 February 1831 suspending the Decree of 5 July 1830; for comments, see Hondius Code 158; Wijffels Contrats 55; Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf>.

was very close to the French civil code,⁵⁹ the 1992 one was influenced by German law.⁶⁰

As for the Netherlands, Article 139 of the 1830 Belgian Constitution called for a speedy amendment to the existing French codifications.⁶¹ Unfortunately the country limited itself to a “pious wish” and Belgium is still waiting for its fulfilment more than two centuries later.⁶² As Heirbaut and Storme have stated, the failure of Belgium to write a new civil code has been analysed as the most conspicuous feebleness of Belgian private law.⁶³ Of course there were some attempts at revising the civil code which unluckily failed. Two instances can be mentioned in that regard, the Francois Laurent’s draft published in 1884, and the works of a draft commission appointed in 1889 to suggest modifications to the 1804 civil code.⁶⁴ Since the 1960s, and during the Napoleonic civil code bicentenary commemoration in 2004, there were once again several calls for a new civil code for Belgium.⁶⁵ That has, however, taken a long time to happen. Owing to such shortcomings, Belgium continues to apply the original civil law it inherited from France.⁶⁶ As Limpens has said,

⁵⁹ Taekema Private 192.

⁶⁰ In passing, halfway into the 20th century, pleas began to be heard for a new codification in the Netherlands. In 1947, the Government appointed E.M. Meijers to design a new civil code. The first outcome of his works was published in 1954 and continued after his death. At the end, a new Dutch civil code was published in 1992 now inspired by German law instead of French law. In contrast to the FCC, for example, the New Dutch civil code has eight Books. General rules concerning the law of obligations which include contracts are dealt with in the sixth Book while the contract of sale is ruled in the seventh one. (For more comments, see Taekema Private 193ff; Lesaffer History 57-58; Ranieri Influence 832; Hondius Code 158; and Lecocq Code 228).

⁶¹ See Article 139 11° of the Belgian Constitution of 7 February 1831, article abrogated by the Law of 14 June 1971 before the Code be amended in full; Constitution translated in English by Crabb *Constitution* 36.

⁶² See Lecocq Code 229 ; Fontaine Code 393; Fontaine Obligations 10.

⁶³ See Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf> 5.

⁶⁴ Laurent was at that time considered as the greatest Belgian lawyer. See Lecocq Code 229 ; Fontaine Code 393; Fontaine Obligations 10 ; Heirbaut/Storme https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbaut_storme.pdf 5.

⁶⁵ Heirbaut/Storme <http://storme.be/taiwan2012HeirbautandStorme.pdf> 3.

⁶⁶ Ranieri Influence 833 ; Crabb *Constitution* 2; Herbots *Contracts* 45 ; Fontaine Code 383 ; Fontaine Obligations 9 ; Wijffels *Contrats* 55 ; Van Hoecke/Elst *Features* 45. Heirbaut and Storme put it that, owing to the failure to provide the country with a new civil code, nowadays “Belgian lawyers seem to have resigned themselves to the survival of the French Civil Code in their country.”

“[Belgium] has remained more faithful to the original text of the Code Napoleon than most other countries. The few modifications made in the Civil Code there have been less far-reaching than those made in France itself.”⁶⁷

Regarding its contract law, for instance, Belgian contract law forms, as in France, a part of the third Book of the civil code governing the different ways of acquiring property.⁶⁸ That law is ruled by Articles 1101 to 1369 which have remained almost unchanged.⁶⁹ This does not mean that Belgian contract law has remained stationary. Enhancements have taken place outside the civil code by means of judicial decisions. De Bondt observes that,

[Belgian] courts have adapted the law of contracts to the needs of time. Important doctrines, such as pre-contractual liability, the abuse of rights, (...) the acknowledgement of the complementary and corrective function of good faith, (the process of concluding contracts by means of offer and acceptance,⁷⁰) have indeed been created by the judges.⁷¹

Heirbaut and Storme specify that the actual meaning of a number of provisions of the Belgian civil code cannot be comprehended without a thorough knowledge of case law.⁷² In other words, currently one has to read in the provision the meaning the case law has given to it in order to arrive at its real interpretation, though that interpretation seems to conflict with the literal meaning of the text. One case in point is the actual understanding of Article 1142 of the civil code relating to remedies for breach of contracts. Literally, this provision stipulates that “every obligation to do,

Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf> 5; Heirbaut/Storme <http://storme.be/taiwan2012HeirbautandStorme.pdf> 2.

⁶⁷ Limpens Expansion 92; see also Lecocq Code 229; Heirbaut Tradition 12.

⁶⁸ See Title III of Book III entitled “Contracts or Conventional Obligations in general”.

⁶⁹ For an illustration, only 19 articles out of the 268 articles that govern contracts have been modified. Likewise, under the sixth Title dedicated to sales contracts (Articles 1582 to 1701), only five articles out of 120 have been revised. See, for comments, Fontaine Code 383; De Bondt Contracts 222; Lecocq Code 234.

⁷⁰ See Cass B 23 September 1969 *Arr Cass* 1970 84; quoted in De Bondt Contracts 222.

⁷¹ De Bondt Contracts 222. That is also Dieux’s opinion on which, the civil code offers nowadays “(...) *sur de nombreux points, qu’une espèce de verbo ou de nomenclature, sur la base de laquelle il est possible de situer les règles et principes du droit positif, qui dans une très large mesure, sont d’origine jurisprudentielle et doctrinale* (...)” See Dieux “Les articles 1101 à 1133 du code civil: dispositions préliminaires et conditions de validité des contrats”; in Lecocq Code 234.

⁷² Heirbaut/Storme <http://storme.be/taiwan2012HeirbautandStorme.pdf> 6.

or not to do is resolved into damages in case of non-performance.” According to the case law, however, Article 1142 “means that the principal remedy is specific performance, unless specific performance cannot be granted because of impossibility, disproportionality or the personal character of the performance.”⁷³

In addition to case law, modern Belgian contract and sales law have been enhanced by the implementation of European Regulations and the adoption of international sales conventions such as the CISG.⁷⁴ As far as EU Directives are concerned, Belgium has transposed into domestic law the Directive 1999/CE of 13 December 1999 relating to electronic signatures⁷⁵ as well as the e-commerce Directive of 8 June 2000.⁷⁶ In conformity with the first quoted Directive, for example, Article 1322 of the civil code dealing with handwritten signatures has, since October 2000, been amplified by a second paragraph giving effect to electronic signatures.⁷⁷ Likewise, Belgium enacted an Act carrying out the e-commerce EC Directive on 11 March 2003,⁷⁸ particularly its Article 9, which requires all EU member states to allow the conclusion of e-contracts in their legal systems.⁷⁹ This has as a consequence that,

⁷³ Heirbaut/Storme <http://storme.be/taiwan2012HeirbautandStorme.pdf> 7. Buyer’s obligation to claim performance by the seller is also the solution adopted by Article 46(1) CISG which states, “The buyer may require performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement.”

⁷⁴ The CISG was ratified in Belgium by the Law of 4 September 1996. It entered into force on 1 November 1997. See Status at: www.uncitral.org/uncitral/eu/uncitraltexts/sale_goods/1980_CISGstatus.html.

⁷⁵ See Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures (*OJ Law* 13 of 19 January 2000 12-20). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L_0093:en:HTML (accessed 08-3-2013).

⁷⁶ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (*OJ Law* 178 of 17 July 2000 1). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0001:EN:PDF> (accessed 08-3-2013).

⁷⁷ Article 1322 al. 2 civil code as amended by Law of 20 October 2000 (*MB* 22 December 2000 42698).

⁷⁸ Cf. Act of 11 March 2003 (*MB* 17 March 2003 12962).

⁷⁹ As stated by Article 9(1) e-commerce Directive,

Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

under contemporary Belgian contract law, a contract should not be denied legal effect because it was concluded electronically, a situation not consistent with the original 1804 civil code.⁸⁰

In a few words, apart from some improvements made here and there especially with regard to e-commerce, the commonality of French and Belgian law is evident. Many of Belgian contractual law provisions remain identical in text to their French civil code equivalents. They bear the same article numbering as well. Furthermore, the Belgian civil code still has several legal clauses which duplicate provisions of the ancient French law. As stated earlier, Belgium has remained even more faithful to the original Code Napoleon than has France.

Nevertheless, though Belgian and French texts are similar, there has sometimes been different interpretation and judicial treatment in the two countries.⁸¹ Two instances should be quoted in this respect. The first is the liability of the professional seller for lack of conformity;⁸² the second is recourse to the non-performance exception. Under Belgian case law, in contrast to French case law, the presumption that the seller knew of the defects is rebuttable while in France it is irrevocable.⁸³ Similarly, since the end of the nineteenth century Belgian courts agreed with defences based on the non-performance exception, whereas French courts recognised it only after 1914.⁸⁴

From what has been said so far, it appears that, with the exception of some more recent developments, it is the contract law Belgium acquired from France during the Napoleonic era that it brought to the DRC through colonisation.

⁸⁰ The 1804 civil code drafters had envisaged contracts concluded on a face-to-face rank. Cf. Articles 1101, 1108, and 1134 civil code.

⁸¹ Crabb *Constitution* 3; Herbots *Contracts* 46; Heirbaut/Storme <https://lirias.kuleuven.be/bitstream/123456789/250351/1/heirbautstorme.pdf> 23.

⁸² See Article 1641 common to French and Belgian civil codes, and particularly Article 1643 which says, “[The seller] is liable for hidden defects, even though he did not know of them, unless he has stipulated that he would not be bound to any warranty in that case.”

⁸³ Herbots *Contracts* 30.

⁸⁴ *Ibid.*

2.2.5 Export of the Napoleonic Civil Code in the DRC

2.2.5.1 Introduction

This section exposes, first, the background of the Congolese civil law, and an overview of the DRC's administrative history. After that, it discusses what the civil law was before, during, and after independence. The section insists on the signs of the Napoleonic civil code in Congolese law, signs which have determined the DRC membership in the civil law family.

2.2.5.2 The backdrop to Congolese civil law

Congolese legal history is intimately linked to Belgian colonial power in Africa. When the Belgians conquered the Congo they did not, however, find a country without law. Before their coming, the country was divided into different indigenous clans, each of them with its own rules, tribunals, and legal authorities.⁸⁵ In other words, on their arrival, Belgian colonisers found a diversity of unwritten customary laws in the Congo as existed in all other African countries.⁸⁶ Congolese official legal organisation started from as early as 1885. In the meantime, the effective occupation of the territory spread. The personal rights of the various groups that it absorbed, however, remained. Political power was placed in the hands of the local authorities whose organisational principles were, for the first time, acknowledged.⁸⁷

Soon after this, the area of public law, i.e. constitutional law, administrative, criminal, and international law, was pre-eminently dominated by written law to the detriment of customary laws. With regard to private law, viz. family law, property

⁸⁵ Sohier *Coutumier* 9; Crabb *Legal System* 24.

⁸⁶ Cf. Seidman *African* 8; Lamy 1969 (Special No.) *RJC* 135 142. In the *Monge Ngele v Mbaka Mabako* case, the Supreme Court of Justice (CSJ) defines "legal custom" as practices dedicated by usages and endowed by legal effect. CSJ 2 July 2006 RC 2244 *Monge Ngele v Mbaka Mabako BA* 2004-2009 TI 221. It should immediately be noted that translation of Congolese and OHADA law case law used in the present thesis is our own translation.

⁸⁷ Vanderlinden Congo 7.

law, and the law of obligations and evidence, it was still widely influenced by customary laws.⁸⁸ Such a situation was not pleasing to the colonial power which wanted inexorably to eradicate local customs which it then considered to be inconsistent with general principles of civilisation. As Lamy has said,

(...) au début du gouvernement colonial belge à proprement parler, il y eut une accentuation de la méconnaissance ou du mépris des coutumes juridiques congolaises de la part de ceux qui, sur le terrain, auraient dû les connaître, les défendre et les appliquer, à savoir les territoriaux et les magistrats. De plus en plus, la coutume était oubliée parce qu'elle n'avait pas encore bénéficiée d'un cadre organique où elle aurait eu sa place précisée, son plein exercice et partant son autonomie.⁸⁹

Despite such a discrediting, Congolese local customary laws have survived throughout history by somewhat indirect legalisation. That is why Article 153 al. 4 of the Constitution of 18 February 2006 recognises their legal effect provided, however, that the practice in question conforms to public policy and morality requirements.⁹⁰ It was even ruled, with respect to international contracts, that public policy requirements that contest the application of local customary laws are international public policy requirements, not those of Congolese written law.⁹¹

2.2.5.3 Overview of the Congolese administrative history

From 15 November 1884 to 26 February 1885, European powers and the USA convened a conference in Berlin to discuss outstanding problems connected with the African continent.⁹² Three subjects were high on the agenda: the sharing of Africa;

⁸⁸ See Lamy 1969 (Special No.) *RJC* 135 139.

⁸⁹ ("At the beginning of the colonial government in the Congo, there was an accentuation of ignorance and disregard for Congolese legal customs by those who were supposed to know, protect, and apply them, namely local administrators and magistrates. Customary laws were progressively forgotten because they were not yet codified, and finally replaced by written law.") (Own translation). See Lamy 1969 (Special No.) *RJC* 135 147.

⁹⁰ Article 153 al. 4 of the Constitution of 18 February 2006 as amended by Law No. 11/2011 of 20 January 2011 (*JORDC* Special No. 5 February 2011 5).

⁹¹ See First Inst Elis 8 October 1913 *Jur Congo* 1921 321.

⁹² Crowe *Conference* 5.

the freedom of commerce in the basin of the Congo; and free navigation on the Rivers Congo and Niger.⁹³ Fourteen states attended the conference⁹⁴ which held ten full sessions. Its decisions were contained in a “General Act” signed and ratified by all the participants except the USA.⁹⁵ At the end of the conference, the area currently known as the DRC was allocated to the Belgian king Leopold II.

With regard to Belgium, two problems regarding it emerged before the end of the conference. The first of these problems was that the Belgian Parliament had to ratify the Berlin General Act; the second was related to Leopold II’s simultaneous position as king of two states.⁹⁶ To overcome these problems, the first step consisted in ratifying the Berlin General Act which happened in the course of March 1885. The much more difficult matter of Leopold’s position as king of two states then followed. Indifferent to the colonial business at that period, Belgium’s Representatives opposed Belgium’s involvement in the Congo. They suggested that from then onwards the King’s presence in that country should be on a purely personal basis.⁹⁷

After the two Chambers met the Constitution’s Article 62 requirements, Leopold II had to decide what title he should carry as head of the Congo. He adopted that of “Roi-Souverain” (Sovereign-King). In May 1885, he appointed three “General Administrators”, with Strauch running the Department of Home Affairs. The new state was quietly inaugurated by means of a confidential decree. During July 1885, De Winton, one of the three General Administrators, officially notified local merchants and missionaries of the establishment of the new state, attaching to

⁹³ Ibid 106-191.

⁹⁴ These were Austria-Hungary, Belgium, Denmark, France, Germany, Italy, The Netherlands, Portugal, Russia, Spain, Sweden, Norway, Turkey, and the USA. Five of these countries, namely France, Germany, Great Britain, Portugal, and the International Association of the Congo (AIC), which was not legally represented there at all, were of real importance.

⁹⁵ Crowe *Conference* 102.

⁹⁶ According to Article 62 of the 1831 Belgian Constitution,

The [Belgian] King may not at the same time be chief of another State, without the assent of the two Houses. Neither one of the two Houses may decide on this subject if at least two-thirds of the members which compose it are not present, nor is the resolution adopted only if it receives at least two-thirds of the votes.

⁹⁷ Ewans *Atrocity* 104; Vanderlinden Congo 7.

his letter a decree allocating all “vacant lands” to the state.⁹⁸ On 19 July 1885, a formal state birth ceremony was held in Banana Port. Finally, on the 1st August 1885, Leopold II notified each of the powers involved in the Berlin Conference of his sovereignty over the *Etat Indépendant du Congo* (Independent State of the Congo)⁹⁹ with the consent of the Belgian Parliament. An announcement to that effect was also published in the new State’s Official Gazette, the *Bulletin Officiel*.¹⁰⁰ Since then, the date of 1st August 1885 has always been considered to be the official anniversary of the Congo Free State.

As regards the Free State’s administration, it was highly centralised in Leopold II’s hands. He was considered to be the designer of the Congo and was accordingly endowed with the most absolute powers.¹⁰¹ All important decisions concerning the country were taken by him from Brussels; all the rights and duties of the government were summarised and incorporated in his person.¹⁰² Briefly, Leopold was titular sovereign of the Congo.¹⁰³ He had, among other things, exclusive legislative power *vis-à-vis* the country that he could, occasionally, delegate to a “State Secretary”¹⁰⁴ but more often to a “General Governor”.¹⁰⁵

In brief, the Congo initially entered contemporary history not as a Belgian colony, but as the personal possession of the Belgian King. In 1908, Leopold II transferred his “property” to Belgium by means of a will. The Congo was then annexed to the Belgian state as a colony named the “Belgian Congo” until its independence which it gained in 1960.

⁹⁸ See Decree of 1 July 1885.

⁹⁹ The name “Independent State of the Congo” came to be translated as the “Congo Free State”. According to Crowe (*Conference* 103), this new title was conferred by Bismarck at the last meeting of the Berlin Conference on 23 February 1885.

¹⁰⁰ See MacDonnell *Leopold II* 165; Ewans *Atrocity* 105.

¹⁰¹ See Louwers *Droit* 4.

¹⁰² *Ibid.*

¹⁰³ Cattier quoted in Ewans *Atrocity* 105 Fn8.

¹⁰⁴ The State Secretary (*Secrétaire d’Etat*) was the chief of the Central Government and could countersign some of the decrees enacted by the King. See Article 1 of the Decree of 1 September 1894 *BO* 186.

¹⁰⁵ General Governor’s legislative power was delineated by a Regulation of 10 October 1894 *BO* 1894 209; quoted by Louwers *Droit* 6ff.

2.2.5.4 Congolese civil law during the colonial period

It was mentioned in the previous section that one of the subjects discussed in Berlin was the freedom of commerce in the basin of the Congo. Accordingly, one of the requirements imposed on Leopold II was to establish, as soon as possible, a very efficient judicial organisation and adequate legislation in the Congo.¹⁰⁶ As far as the judicial organisation was concerned, two texts were immediately enacted: the decree of 7 January 1886 relating to the organisation of justice in criminal matters;¹⁰⁷ and the Ordinance of 14 May 1886 regulating the jurisdiction and procedure of civil and commercial courts.¹⁰⁸

With regard to the civil legislative issue, on the other hand, the King was uncertain about whether it would be best to transpose Belgian laws into the Congo or adopt new regulations. In the French colonies, for instance, the Code Napoleon was immediately applicable. Without following the French option, Leopold II decided to enact new laws adapted to the Congolese situation. To achieve this, he appointed a drafting civil code commission composed of experienced Belgian lawyers. That commission later came to be known as the “Superior Council”.¹⁰⁹ In the meantime, the Congolese General Administrator passed a “provisional civil code” by Ordinance of 14 May 1886.¹¹⁰ As stipulated by its preamble, the Principles Applicable to Judicial Decisions Ordinance aimed “to determine temporarily rules to be followed in civil and commercial matters until special rules are promulgated.”¹¹¹

¹⁰⁶ See Kalongo *Obligations* 14.

¹⁰⁷ See Lamy 1969 (Special No.) *RJC* 135 145.

¹⁰⁸ See Ordinance of 14 May 1886 approved by Decree of 12 November 1886 *BO*187, as revoked by Article 199 of the Code of Civil Procedure Decree of 7 March 1960 (*MC* 1960 961).

¹⁰⁹ Cf. Decree of 16 April 1889 *BO* 161, completed by the Decree of 21 March 1893 *BO* 245.

¹¹⁰ Principles Applicable to Judicial Decisions Ordinance of 14 May 1886; approved by Decree of 12 November 1886 (*BO* 1886188 and 189). Though enacted the same day, this Ordinance is different from the Ordinance dealing with the jurisdiction of civil and commercial courts above. The Ordinance regulating civil procedure matters has been repealed by the 1960 Code of Civil Procedure, whereas the former is still in force.

¹¹¹ Despite its apparent provisional character, the Principles Applicable to Judicial Decisions Ordinance continues, to be intensively invoked by the CSJ. See CSJ 8 July 2009 RC 2378 *BA* 2004-2009 TII 216; CSJ 18 August 2006 RC 1965 *BA* 2004-2009 TI 304; CSJ 1st October 2005 RA 729 *BA* 2004-2009 TI 141; CSJ 15 September 2004 RP 2297 *BA* 2004-2009 TI 46; CSJ 24 May 2002

Article 1 of the Ordinance specifies that all matters not specifically regulated in Congolese law had to be resolved in conformity with local customs, general principles of law, and equity.¹¹² To this we shall return in section 2.2.6 below.

When it came to the drafting process of the Congolese civil code, it was obvious that the Superior Council had Belgian law as a principal source of inspiration. Nevertheless, as it was intended to produce an original law for the country, the Council refused to transpose Belgian laws into the Congo. The Council created, as was said by Verstraete, “experimental legislation”.¹¹³ This opinion is in conformity with Mansco’s argument according to which, although African legal systems resemble the legal systems of their respective settler countries, it cannot be deduced that legal rules in African countries are merely copies of the laws of their mother countries.¹¹⁴ There are some important differences between them. Concerning the Congo, in particular, its drafting commission took cognisance of the freshest civil codes of the time.¹¹⁵ It compared them with both the 1884 Laurent’s

RC 2438 BA2000-2003 143; CSJ 10 March 2001 RC 2003 BA2000-2003 69; CSJ 29 December 1993 RC 014/TSR BA 1990-1999 97. The CSJ’s view is even supported by a number of scholars who believe that that regulation has never been revoked. Among those scholars are Nkata *Violation* 45; and particularly Meli 2007-2008 (13-14) AJ 42; and Kifwabala 2009 (15) AJ 34 37. As stated by Meli,

L’Ordonnance du 14 mai 1886 sur les principes généraux du droit n’a jamais été abrogée. C’est donc de bon droit que la Cour Suprême de Justice continue à se référer à cette Ordonnance qui n’est pas abrogée et qui, par ce fait, n’est pas un ancêtre illogiquement vénéré par la Haute Cour. (“The General Principles of Law Ordinance of 14 May 1886 has never been repealed. It is, therefore, right that the CSJ continues to refer to this Ordinance which still remains in force, and which, accordingly, is not an ancestor illegally venerated by the Supreme Court.”) Such is also the opinion of Kifwabala who confirms that the application of 1886 Ordinance by the CSJ is consistent with the law in force in the DRC.

¹¹² For the meaning of the concept “legal custom”, see CSJ 2 July 2006 RC 2244 *Monge Ngele v Mbaka Mabako* BA 2004-2009 TI 221.

¹¹³ Verstraete *Personnes* 13.

¹¹⁴ Mansco 2006 (5) 2 *JJ TR LP* 55 57.

¹¹⁵ To illustrate this, the Land law uses the mechanism of the Australian Torrens Act of 2 July 1858; see Verstraete *Personnes* 18; Dévaux 1966 (42) *RJC* 195 200. With regard to the cut-off period for notice of non-conformity in the goods delivered, moreover, it is possible that it is the Italian 60-day limitation period that inspired the Congolese legislator. As it is stated by Article 1667 (2) of the Italian Civil Code, “The customer shall, under penalty of forfeiture, notify the contractor of non-conformity or defects within 60 days from discovery thereof. The notice is not necessary if the contractor acknowledged such non-conformity or defects or concealed them.” (English translation by Beltramo et al *Civil code* 76). Compare this to Article 325 CCO in which, “Proceedings resulting

draft and the works of the 1889 Belgian reform civil code commission.¹¹⁶ As a result of this, the commission produced a new law adapted to the needs of the country,¹¹⁷ although it was inspired by Belgian law.

Forced by the need to secure free trade in the basin of the Congo as required in Berlin, the Council gave priority to the Law of Obligations. On 30 July 1888, it decreed the Book relating to Contracts or Conventional Obligations,¹¹⁸ prior to those of Persons and Property adopted in 1895¹¹⁹ and 1912¹²⁰ respectively. Similarly, pursuant to Article 3 of the Berlin General Act, the Congo Free State had to assure to the citizens of the Berlin powers a large enjoyment of their civil rights. To this end, the King published a decree about the status of foreigners in the Congo on 20 February 1891.¹²¹ That statute was integrated into the Book of Persons four years later under a special Title dedicated to the Status of Foreign Nationals.¹²² The Decree of 20 February 1891 purported to protect economic interests of foreigners in the Congo; it still constitutes the basis of Congolese PIL rules.¹²³

When Belgium annexed the Congo in 1908,¹²⁴ a problem arose about the application of the legislation of the mother country in the colony. Fortunately, the

from redhibitory defects must be sued at latest within a period of 60 days, non-included the day fixed for delivery.”

¹¹⁶ Those reforms failed, however, in Belgium.

¹¹⁷ Verstraete *Personnes* 13.

¹¹⁸ Decree of 30 July 1888 relating to Contracts or Conventional Obligations (*BO* 1888 109).

¹¹⁹ See the Civil Code of Persons Decree of 4 May 1895 (*BO*1895 138), as revoked by the Family Code, Law No. 87-010 of 1 August 1987 (*JO* Special No. 1 August 1987).

¹²⁰ See Decree of 31 July 1912 relating to things and the different modifications of the property *BO* 1912 386, as revoked by the Land Law No. 73-021 of 21 July 1973 as amended by Law No. 80-008 of 18 July 1980 (*JO* Special No. 1980 reedited on 1 December 2004).

¹²¹ PIL Decree of 20 February 1891 integrated in the Civil Code of Persons Decree of 4 May 1895 (*BO* 1895140).

¹²² Though the Book of Persons has, from 1987, been expressly repealed by the CFC, its Title II dealing with the Status of Foreign Nationals remains in force up to the present time. (Cf. Article 915 CFC; see also Kandolo *Privé* 81).

¹²³ See Verstraete (*Personnes* 15) who says that the Congolese PILD marked an enormous progress on the Belgian civil code which, at that time, contained only sporadic principles of conflict-of-laws rules.

¹²⁴ Following the annexation, the previous “Superior Council” was replaced by a new institution named as the “Colonial Council” assigned to examine decree proposals prepared by Colonies Departments, other than civil law statutes, particularly the law of obligations, which were kept intact.

Belgian Constitution had already rejected all attempts at legislative unification in its colonies through the first sentence of Article 1 al. 4, which stated that colonies had to be governed by particular laws.¹²⁵ This rule was scrupulously followed by the Congolese “Colonial Charter” of 18 October 1908.¹²⁶ Article 1 of this Colonial Charter specified that, “The Belgian Congo has a personality distinct from Belgium. It is ruled by particular laws.” By stating that the Belgian Congo was ruled by statutes of its own, the Colonial Charter logically meant that laws concerning Belgium could not have any effect in the colony.¹²⁷ In the affirmative case, they had to be especially signed into law for the colony. In one decision, dated 3 June 1935, the Belgian Supreme Court evoked the fact that the Belgian Congo and Belgium were subject to distinct and independent rules, although those rules emanated from the same sovereignty, i.e. the King. It then ruled that statutes of the mother country should be invoked in the colony on the condition that they are expressly required by a colonial regulation.¹²⁸

Despite its legal independence, nevertheless, the Belgian Congo was subject to Belgian sovereignty. It could, therefore, not be considered as a foreign country with regard to Belgian law,¹²⁹ particularly “the fundamental norms of its civil law.”¹³⁰ In conformity with this principle, the Congo had, as explained in the following section, to share the civil law legal system legacy with its fatherland.

¹²⁵ Article 1 al. 4, first sentence, of the 1831 Belgian Constitution, amended on 7 September 1893, has been repealed since 1970 by the Law of 24 December 1970.

¹²⁶ See the Colonial Charter Law of 18 October 1908 (*BO* 1908 65).

¹²⁷ There are authorities that state that, “although in the case of doubtful interpretation of Congolese regulations, one may consult the corresponding text of Belgian law, this cannot and must not be understood as meaning the extension of the application of Belgian statutes in the Congo.” Translated from the original French worded as follows: “Si, en cas d’interprétation douteuse des lois congolaises, on peut s’en rapporter au texte des lois belges sur la matière, *cette faculté ne peut ni ne doit s’étendre jusqu’à permettre l’application des lois belges au Congo* (italics added).” See Boma 5 March 1912 *Jur Congo* 1913 240; CG App Boma 30 April 1912 *Jur Congo* 1914-1919 1.

¹²⁸ Cass B 3 June 1935 *RJCB* 1935 201.

¹²⁹ Cass B 31 May 1928 *Jur Col* 1928 33, and *RJCB* 1928 257.

¹³⁰ Civ Brux 20 June 1957 *RJCB* 1958 115.

2.2.5.5 Signs of the Napoleonic civil code in Congolese civil law

As in many other civil law countries, Congolese civil law is divided into three areas, the Law of Persons, Property Law, and the Law of Obligations. Compared to its parent countries, the three traditional Books of the Congolese civil code were enacted at different times, as in France and Belgium, but “out of order”¹³¹ for the DRC. Under Congolese law, the Book concerning obligations should chronologically constitute the first Book of the civil code.¹³² In that order, the Books governing persons and property would respectively form the second and the third Books. This appears to have been the Congolese legislator’s purpose for two reasons. Firstly, the Decree of 30 July 1888 is entitled “Civil Code - 1st Book: *Of Contracts or of Conventional Obligations*”.¹³³ Secondly, its introductory Article stipulates explicitly, “Will form the ‘first book’ of the civil code: *of Contracts or of Conventional Obligations*, the titles I to XII which text is annexed to the present Decree consisting of 660 articles.”¹³⁴

Although previous to the two others, the book of obligations was, however, relegated to the third position from 1929 by the first code’s publishers, Louwers and Kuck, after Persons (Book I) and Property (Book II).¹³⁵ Those publishers were followed, twenty years later, by Piron and Devos, apparently in order to fit Congolese legal classification to Belgian law and, indirectly, to the Napoleonic Code.¹³⁶ Piron and Devos are aware of the infringement. They confessed, moreover, to not having

¹³¹ See Crabb *Legal System* 89.

¹³² This Book was decreed in 1888, whereas the Book of Persons intervened in 1895, and the Book of Property in 1912.

¹³³ In the original French, “Décret du 30 Juillet 1888 portant Code Civil – Livre Premier : *Des contrats ou des obligations conventionnelles*”, in Piron 98.

¹³⁴ As regards the Book of Persons, however, Article 1 of the Decree of 4 May 1895 provided only that the provisions annexed to it would constitute the titles of the “Book of the Civil Code entitled: *Of Persons*” without indicating its order. This was also the same for the Book of Property enacted by different successive decrees, particularly the decrees of 31 July 1912, 30 June 1913, 6 February 1920, and the decree of 20 July 1920. The single articles of each of these decrees stipulated merely that its provisions would form Titles I, II, III, and IV and V of the Book of the Civil Code entitled: *Of things and the different modifications of the property*, Piron 50 and 81.

¹³⁵ Louwers/Kuck *Codes et Lois* 1.

¹³⁶ See Kalongo *Obligations* 15; Mubalama *Obligations* 25.

conformed to the directions given by the legislator.¹³⁷ According to them, the addition of two supplementary books to the civil code, viz. the Book of Persons and the one of Property, made the initial ordering valueless.¹³⁸

With humility, this justification gives the impression of not being convincing. It is believed that the Congolese civil code's publishers could have met the initial legislator's ordering without detracting from the compilation value of the existing texts. Currently, it is thought that the original legislator's categorisation should be undervalued. Confirmation of this is the fact that, from 1987, the Book of Persons has been abrogated by the Family Code,¹³⁹ and the Book of Property repealed by the 1973 Land Law.¹⁴⁰ Such being the situation, it is, therefore, incorrect that some people continue to refer to the Book of Obligations as the "Third Book of the Civil Code", the first two books having already been revoked.

To be precise, under current Congolese civil law, the law of persons, the law of property and land, and the law of obligations are independent from one another. Each is governed by an autonomous statute: the law of persons by the 1987 CFC; property law by the 1973 Land law; and the law of obligations by the 1888 CCO. Congolese civil law is ruled by three different civil codes, i.e. the CFC, Land law, and the CCO. It is the sum of the provisions of these three codes that form the Congolese civil law. Concerning the law of obligations, in particular, it includes contract law,¹⁴¹ torts law,¹⁴² and unjust enrichment rules¹⁴³. If one considers private law in general, there is also, in the Congo, a "Code of Commerce".¹⁴⁴ This Code has, however, never been formally enacted as a self-governing code; it consists rather of loose-standing acts dealing with different commercial matters such as cheques,¹⁴⁵

¹³⁷ Piron 98.

¹³⁸ Ibid.

¹³⁹ Article 915 CFC.

¹⁴⁰ Article 398, 26° Land Law.

¹⁴¹ See Articles 1 to 245 and Articles 263 to 551 CCO.

¹⁴² See Articles 258 to 262 CCO.

¹⁴³ See Articles 246 to 257 CCO.

¹⁴⁴ See Commercial Code Decree of 2 August 1913 (*BO* 1913 775), hereinafter CCom.

¹⁴⁵ Decree of 10 December 1951 (*BO* 1952 342).

bankruptcy,¹⁴⁶ and commercial companies.¹⁴⁷ These Acts were passed at widely separated dates and were grouped under the CCom heading for convenience by editors of the Congolese codes.¹⁴⁸

As has been mentioned previously, all of the Congolese codes were in general inspired by Belgian law and the Napoleonic civil code itself. One commentator states, in this regard, that if the law of persons and the law of property have moved some distance away from the Napoleonic code,¹⁴⁹ such is not the case with the law of obligations.¹⁵⁰ This is summarised nicely by Crabb as follows:

Although the law of Belgium as such never extended to the Congo, the form and techniques of the Congolese written law have naturally reflected those of the Belgian legal system. Since the Belgian system is largely based on the French legal system, the Congolese legal system in its written law component is aligned with the nations that follow the Napoleonic French legal tradition.¹⁵¹

Similarly, the fact that the Belgian Congo was ruled by particular laws did not necessarily entail the disappearance of different laws inherited from the Congo Free State at independence. Those statutes, including the CCO, remained in force until the country became independent in 1960.

2.2.5.6 The Congolese law of obligations after independence

It is usually accepted that a successor regime preserves in force the body of law it has inherited or changes it immediately. Regarding the CCO, the Congolese Government adopted the first option following the days of independence. The CCO

¹⁴⁶ Decree of 27 July 1934 (*BO* 796), as amended by the Decrees of 19 December 1956 (*BO* 1957 89) and of 26 August 1959 (*BO* 2195).

¹⁴⁷ Decree of the Sovereign King of 27 February 1887 (*BO* 24), as amended and completed by Law No. 10/008 of 27 April 2010 (*JODRC* Special No. 3 March 2010).

¹⁴⁸ See Piron 225 to 303; Crabb *Legal System* 89.

¹⁴⁹ It was said before that the Land law decree referred to the mechanism of the 1858 Australian Torrens Act which is posterior to the original Code Napoleon. See Verstraete *Personnes* 14 *in fine*; Dévaux 1966 (42) *RJC* 195 200.

¹⁵⁰ Crabb *Legal System* 83.

¹⁵¹ *Ibid*; see also Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf>.

remained unchanged even after decolonisation. Of course, the reform of the law of obligations was envisaged from time to time. In 1976, for instance, Parliament proposed the creation of a commission that would consider the question of reform and the unification of Congolese law.¹⁵² This commission had the task, among other things, of observing legal changes registered since independence, and verifying whether there was any need to revise some civil code provisions in order to adapt them to the economic context of the time.¹⁵³

In answer to Parliament's suggestion, a reform commission was appointed by Law No. 76-017 of 15 June 1976.¹⁵⁴ The commission was led for a long period by Kalongo Mbikayi. That commission became later known as the Permanent Commission for the Reform of Congolese law. Unfortunately, the results of its work have never been published. As a result, the CCO, as inherited from the Congo Free State, has remained in force up to the end of 2012, particularly for commercial contracts. This situation leaves one asking whether it has some of its own features.

2.2.6 Characteristics of the Congolese Law of Obligations and Gap-filling

As was noted in section 2.2.5.3, from the beginning Belgium treated the Congo as a distinct jurisdictional entity. In legislating for this country, it avoided reproducing massive parts of Belgian laws. But, as “no-one can give greater rights than he has”;¹⁵⁵ Belgian law of obligations naturally inspired the Congolese one. Notwithstanding that influence, the Congolese law of obligations was different from the law of the mother country from time to time. One example of this is the difference between Article 325 CCO and Article 1648 BCC dealing with actions for redhibitory defects. The first provision provides the buyer with a *60-day* period limit to start proceedings,

¹⁵² Kalongo *Obligations* 16.

¹⁵³ Mubalama *Obligations* 26.

¹⁵⁴ See Kalongo *Obligations* 16.

¹⁵⁵ Cf. a well-known Latin maxim: *Nemo plus iuris as alium transferre potest, quam ipse haberet.*

whereas the second requires a *brief delay* only.¹⁵⁶ Further to the time limit itself, another difference relates to the meaning of the two provisions. According to Congolese case law, the Belgian law “brief delay” is supposed to run from the discovery of the defect, while under Congolese law it was presumed that the defect should be discovered within 60 days and the claim sued in the same delay.¹⁵⁷

Of course, there is a close similarity between the Congolese law of obligations and Belgian law, and, accordingly, the French law of obligations too. Many articles are common to these three legal systems. Nevertheless, there are some articles which are identical in Belgian and French laws, but which do not exist in Congolese law, apart from those that are merely formulated differently.¹⁵⁸ One illustration is Article 1107 al. 2 of the Belgian and French civil codes which is differently worded compared with its Congolese equivalent, Article 7 al. 2 CCO.¹⁵⁹ Both provisions

¹⁵⁶ Article 325 CCO requires the notice of lack of conformity in the goods to be given in 60-days. With regard to Article 1648 BCC, it states that, “Any action resulting from redhibitory vices must be brought by the buyer within a *brief delay*, according to the nature of the defects and the usages of the place where the sale was made.”

¹⁵⁷ Drawn from Elis 7 April 1917 *RJCB* 1932 28, confirmed in Elis 21 March 1942 *RJCB* 1942 124, whereby:

Si le législateur Congolais s’est inspiré de la législation métropolitaine, il y a lieu de noter qu’il existe des différences essentielles dans les textes et que l’Article 325 CCL III implique une interprétation différente de celle de l’Article 1648 du code civil belge livre III. En effet, le bref délai qu’assigne ce dernier article, suivant la nature des vices rédhibitoires et l’usage du lieu où la vente a été faite, ne court qu’à partir du moment où le vice rédhibitoire a été découvert; le texte congolais par contre, suppose que le vice doit être découvert dans les 60 jours et l’action intentée dans ce délai.

(“Even if Congolese law is inspired by Belgian legislation, there are some important differences in the texts. In this regard, Article 325 CCO implies an interpretation different from that of Article 1648 BCC. The brief delay provided for by Article 1648, depending on the nature of the redhibitory defect and usages of the place where the contract was made, runs from the day of discovery of the defect, whereas the Congolese law provision assumes that the defect must be discovered in the 60 days and the claim sued within the same period.”) See also Katuala *Code* 189; Bours *Répertoire* 135; and Piron 126.

¹⁵⁸ For instances of common or different provisions between Congolese, Belgian, and French laws, see Mubalama *Obligations* 24 in Notes 67 to 70.

¹⁵⁹ According to Article 1107 al. 1 FCC, and Article 7 al. 1 CCO, “Contracts, whether they have a specific designation or not, are subject to general rules, which are the subject matter of (the Civil Code or CCO Title III relating to contracts and conventional obligations in general).” Concerning the second paragraph, however, Article 7 al. 2 CCO appears to be incomplete compared with its equivalent Article 1107 al. 2 FCC. As stated by the latter provision, “Particular rules for certain contracts are laid down under the Titles relating to each of them; and ‘the particular rules for

contain the principle that, in addition to general rules governing all kind of contracts, particular rules for classical contracts, such as the contract of sale, are established under the headings relating to each of them.¹⁶⁰ With regard to commercial transactions, Article 1107 al. 2 specifies, in contrast to Article 7 CCO, that commercial contracts are governed by “particular rules established by laws relating to commerce”.¹⁶¹ By so ruling, French and Belgian laws distinguish civil contracts from commercial ones. Under those legal systems, commercial contracts will be governed by additional or derogatory rules of the commercial code, unless the civil code provides to the contrary. Concerning Congolese law, given that at that time there was no specific provisions related to commercial contracts, Masamba put it that, “Congolese commercial contract law (have to) take refuge behind civil law.”¹⁶² More specifically, in the DRC concepts such as those of “commercial sales contracts” were not regulated, except when borrowed from civil law provisions.

Article 1341 of the Belgian and French civil code relating to oral evidence, likewise, has a different wording from the corresponding Article 217 CCO.¹⁶³ Both provisions concede that legal acts the value of which is more than a certain sum of money¹⁶⁴ legally determined must be made in writing, viz. by private writing or

commercial transactions are laid down by the legislation that relates to commerce’.” Article 7 al. 2 CCO lacks the last phrase determining the legal regime of commercial contracts.

¹⁶⁰ Cf. Part 1 of Article 1107 al. 2 FCC, and single part of Article 7 al. 2 CCO.

¹⁶¹ Cf. Part 2 of Article 1107 al. 2 *contra* Article 7 al. 2 CCO which does not provide a special legal regime applicable to commercial contracts. Of course Piron (99 and 231) refers commercial transactions to the commercial code, mainly the Trade register Decree of 31 July 1912 (*BO* 1912 726), amended by the Decree of 6 March 1951, and by Law No. 10/9 of 27 February 2010 (*JORDC* Special No. 3 March 2010 1). This regulation is, however, concerned with the proof of commercial transactions rather than by the conclusion of contract, the rights and the obligations of parties to a contract.

¹⁶² Masamba *Modalités* 22; see also Vanderstraete *Business* 16.

¹⁶³ According to Article 1341 FCC and Article 217 CCO,

An instrument before notaries or under private signature must be executed in all matters exceeding a sum or value (fixed by decree), even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value. All of which without prejudice to what is prescribed in the statutes relating to commerce. (For French and Belgian codes).

See, for comments, Youngs *Comparative* 542.

¹⁶⁴ Cf. Three hundred seventy-five Euros for Belgium; Eight hundred Euros for France; and Two thousand Congolese Francs for the DRC.

notarial document, except for commercial transactions. Compared with its equivalent parent civil codes' provisions, Article 217 al. 2 CCO appears clearer than Article 1341 al. 2 of the Belgian and French civil codes.¹⁶⁵ In the same way, contrary to France and Belgium, the CCO did not initially regulate some important matters such as those of wills, gifts, and matrimonial regimes.¹⁶⁶ Happily, all of these legal topics are now dealt with by the 1987 Family Code.¹⁶⁷

From the above background, it would be wrong to pretend that the Congolese law of obligations is not different from the one of the mother country.¹⁶⁸ The CCO is “incomplete” when compared with the Third Book’s Civil Code of its mother country.¹⁶⁹ The fact that the CCO did not regulate a number of matters has left numerous unavoidable gaps in the Congolese law of obligations. Those gaps had to be filled in accordance with the Principles Applicable to Judicial Decisions Ordinance of 14 May 1886 as indicated above. According to this Ordinance, all matters not specifically regulated had to be resolved in conformity with local customs, general principles of law, and equity.

One may realise that the colonial legislator did not allow courts to apply Belgian law provisions directly when filling the gaps in Congolese law. Instead, it required them to refer to customary laws, general principles of law, and equity. As argued by Devaux, when the law referred courts to these legal sources, it indirectly resolved matters for which no other provision had been made.¹⁷⁰ The author goes on to specify that, the direction shown by one or the other of these sources “takes a

¹⁶⁵ As stated by Article 217 al. 2 CCO, “Nevertheless, commercial contracts should in any case be proved by witness where the Court will believe to admit it.” This provision is identical to Article 9 CCom.

¹⁶⁶ The same situation was also observed with regard to the Belgian and French civil codes’ action in rescission of agreements (Articles 1305 to 1314) which have been omitted from the CCO.

¹⁶⁷ With regard to matrimonial regimes issues, they are ruled under Book III of the CFC as Effects of the contract of marriage (Articles 487 to 537). Regarding successions, wills, and gifts, they are regulated under Book IV of the CFC whereby the first Title is dedicated to Succession (Articles 755 to 818), and the second to Donations (Articles 819 to 914).

¹⁶⁸ See Botson’s Preface to the *Précis de Droit Colonial Congolais* of Dufrenoy 5; quoted by Verstraete *Personnes* 14 Fn18.

¹⁶⁹ See Verstraete *Personnes* 15-21.

¹⁷⁰ Dévaux 1966 (42) *RJC* 195 198.

legislative value that helps in filling the gaps.”¹⁷¹ Though the legislator lists three different kinds of sources, however, the 1886 Ordinance has often been interpreted in practice as referring mainly to general principles of law.¹⁷²

When courts are, therefore, faced with one issue for which there appears to be no applicable law, or for which the law is poorly conceived, they may use the general principles of law to enable them to reach a decision.¹⁷³ That is to say, while quoting the “general principles of law”, the 1886 Ordinance aimed to allow courts necessarily to refer to a determined positive law in the case of silence of Congolese law. A problem emerged, however, in relation to the choice of the appropriate law in practice.¹⁷⁴ The fact that Congolese civil and commercial law was inspired by Belgian law led judges to prefer it. General Administrators Van Eetvelde and Janssen, in a report dated 16 July 1891 to the Sovereign King, recognised that Congolese civil law was inspired by Belgian law, although it had been adapted to the special needs of the country.¹⁷⁵ They concluded that, for matters not regulated under Congolese law, courts would refer to the general principles of Belgian law and to local customs.¹⁷⁶ According to the understanding of this report, courts have to adopt the dominant principles of Belgian law to enable them solve any unregulated issue.¹⁷⁷

Advising Congolese courts to turn to “Belgian general principles of law” did not, however, imply that they could apply a specific Belgian legislative provision.¹⁷⁸

¹⁷¹ Ibid.

¹⁷² Nkata *Violation* 21; Meli 2007-2008 (13-14) *AJ* 42; Kifwabala 2009 (15) *AJ* 34 35; see also a wealthy of authorities quoted in Note 111 above.

¹⁷³ Cf. Youngs *Comparative* 57; see also Nkata (*Violation* 16) who describes the concept “general principles of law” as a set of unwritten rules deriving from the spirit of laws which apply in the absence of a specific regulation governing a matter.

¹⁷⁴ On the choice of the appropriate general principles challenge, see Nkata *Violation* 13.

¹⁷⁵ Report of 16 July 1891 (*BO* 1891 165); referred to by Verstraete *Personnes* 23; Louwers *Droit* 50 ; Dévaux 1966 (42) *RJC* 195 199; and Piron 49.

¹⁷⁶ Ibid.

¹⁷⁷ See Louwers *Droit* 50; see also Leo Arbitral Award 11 December 1931 *Jur Col* 1936 23. But, Nkata *Violation* 13 according to whom, the 1886 Decree did not specifically indicate Belgian law as the legal system of reference for Congolese courts. It rather referred to general principles applicable universally everywhere where the rule of law reigns. This is a broadly statment which should be taken with reservations.

¹⁷⁸ Cf. Boma 5 March 1912 *Jur Congo* 1913 240; and CG App Boma 30 April 1912 *Jur Congo* 1914-1919 1.

It rather entailed the application of the legal principle of which that text was the expression. Such an option was justified, according to Sohier, by the fact that Belgian texts constituted the source of the corresponding Congolese ones.¹⁷⁹ One illustrative case is the decision of the former Appeal Court of Leopoldville¹⁸⁰ dealing with sales by correspondence or by representative.¹⁸¹ *A propos* of this, the court found it logical to presume the will of contracting parties whilst referring to the usages generally admitted in Belgian trade,¹⁸² without necessarily applying the provisions of the Belgian Civil Code, Book Three. In accordance with those usages, for sales concluded by mail, the contract was formed from the time acceptance reached the person making the offer, but not when the letter of acceptance was sent.¹⁸³

Similarly, Belgian decisions in contractual matters were not binding on Congolese courts. Thus, when those cases are quoted in this study, they are not being referred to as being authoritative, but as having an illustrative value. In other words, when those cases are cited, it is submitted that the principles underlying the decisions are common to both Belgian and Congolese legal systems.¹⁸⁴ Congolese law has developed, however, so that currently one has first to look at proper Congolese legislation and case law before seeking elsewhere. It is only when these main sources

¹⁷⁹ Sohier *Procédure* 13.

¹⁸⁰ This court will be referred to in this study as the Appeal court of Kinshasa.

¹⁸¹ Ruled in Léo 28 October 1941 *RJ* 1942 68 (quoted by Bour *Répertoire* 134) that :

A défaut d'usages locaux suffisamment établis, il est logique de recourir, pour présumer la volonté des parties litigantes, à l'usage le plus généralement admis dans le commerce belge.

D'après la jurisprudence métropolitaine la plus abondante, la plus récente et la plus autorisée, il n'y a vente accomplie, réalisée, lorsque la transaction se fait par représentant, voyageur de commerce ou agent de ventes, qu'après confirmation de la commande par le patron du dudit représentant, voyageur ou agent de ventes commerciales.

(“In the absence of sufficiently established local practices, it is logical to assume the willingness of litigants, by consulting usages admitted generally in the Belgian trade. According to the most abundant, recent and official metropolitan jurisprudence, when the transaction is made by representative or by middleman, the formation of the contract is fulfilled after confirmation of the order by the manager.”)

¹⁸² Léo 28 October 1941 *RJ* 1942 68 §1.

¹⁸³ *Ibid*, §2. Another general principle relates to the fact that the judge must take into account the circumstances, the character of contracting parties, and the goal pursued by them while determining the object and effects of a contract. See Léo Arbitral Award 11 December 1931 *Jur Col* 1936 23.

¹⁸⁴ It was said above that those principles continue to be applied by the CSJ. Cf. authorities quoted in Note 110.

are silent on a subject that general principles of law should intervene to resolve the matter. That is the reason why, owing to the absence of particular rules dealing with commercial contracts, these resorted to civil law rules.

Before examining other things, it is necessary to bear in mind that not long ago the Congolese law of obligations was still ruled by the Decree of 30 July 1888 as inherited from the colonial legislator. Its field of application, as stated in the preamble, consisted in regulating “the validity, effects, extinction, and the proof of obligations in general.”¹⁸⁵ With such a goal, the CCO purports to lay down general principles applicable to all kinds of contracts. The Code also contains particular rules for certain special contracts such as the contract of sale. As far as the contract of sale is concerned, it is particularly regulated by the third Title of the CCO which covers Articles 263 to 364, an average of 102 sections. These provisions deal with both civil and commercial contracts.¹⁸⁶

The CCO, as enacted in 1888, might well appear to be unsuited to the needs of a modern society, many aspects of social and economic life having changed since the early twenty-first century. A number of Congolese provisions had become outdated.¹⁸⁷ Numerous legislative modifications to the CCO have, therefore, been necessary in order to move towards legal modernity and security. To achieve this objective, the DRC experienced the need to ratify OHADA law bringing its law into line with that of its neighbours, rather than embarking on an effort of its own.

¹⁸⁵ General rules relating to contracts are provided for by the first Title relating to contracts or conventional obligations in general (Articles 1 to 245); chapter VII of the third Title dealing with the transfer of claims (Articles 352 to 358); and by the twelfth Title regulating prescriptions (Articles 613 to 659).

¹⁸⁶ See Masamba *Modalités* 22; Vanderstraete *Business* 16.

¹⁸⁷ Masamba *Adhésion* 347; Masamba *Modalités* 53; Tshibende 2011 *RCDA* 67 71; Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf> 1.

2.2.7 Adoption of OHADA Law in the DRC

2.2.7.1 OHADA law and OHADA sales law framework

Commercial patterns have substantially influenced African history and the interaction of Africans with foreigner businesspersons. Recognised as one of the continents empowered with vast potential resources, Africa would naturally attract foreigner investors. Its legal system, nonetheless, did not favour that. Indeed, most African countries suffered from out-dated or incomplete legal systems,¹⁸⁸ which also varied from one country to another.¹⁸⁹ The problem of this diversity of laws was likely to give rise to uncertainty which in turn discouraged investment.¹⁹⁰ *A propos* of this, there is unanimity that a strong investment cannot be achieved without a secure legal and commercial environment.¹⁹¹ That is why, in the interests of a greater cooperation among African states, fourteen countries from West and Central Africa decided to harmonise¹⁹² their legal systems in the area of business law. To this end, they adopted the Treaty creating OHADA on 17 October 1993.

As Mouloul has said, however,

OHADA was not born only from the initiative of the heads of state of the African Franc Zone; it was above all an idea, and even a requirement from African traders who demanded that the legal and judicial environments of businesses should be improved, in order to secure their investments. Indeed, with the slowdown of investments, due to the economic recession, and the legal and judicial insecurity that prevailed in this region during the 1980s, it was necessary to restore investors'

¹⁸⁸ In the case, Fontaine argues, for example, that before the establishment of OHADA, almost all members maintained contract laws left them as a legacy of the colonial power. As a result, contract and commercial law reflected the French civil code tradition, except for Guinea Bissau and Equatorial Guinea. At that time, only a few countries have adopted a new law of contract or modified their code of obligations. See Fontaine 2008 (1/2) *Unif L Rev* 633; see also Sossa 2008 *Rev dr unif* 339; Coetzee/De Gama 2006 (10) 1 *VJ* 15; Dickerson 2005 (44) *Colum J Transnat'l L* 17 25 and 31; Santos/Toe *Commercial* 359.

¹⁸⁹ Martor et al *Business* 1.

¹⁹⁰ Mancuso 2006 (5) 2 *Jl TR LP* 55 57.

¹⁹¹ See Martor et al *Business* 1; Castellani 2008 (1/2) *Rev dr unif* 115.

¹⁹² To harmonise a legal system means to bring "the legal provisions or processes of two or more legal systems closer to one another or seeking to achieve equivalence between them." See Coetzee *Incoterms* 138.

confidence, both domestic and foreign, in order to promote the development of entrepreneurship and to attract foreign investments.¹⁹³

Historically speaking, the idea of creating a harmonised business law on the African continent goes back to 1961. That idea was conceived at a meeting of Ministers of Justice from West and Central African French speaking countries and was later adopted by distinguished jurists of the same zone. The harmonisation of law idea got its first achievement in the African Union and Mauritius (AUM) Act, dated 12 September 1961.¹⁹⁴ It was developed in Yaoundé (Cameroon) in March 1963 when AUM was converted into the African and Malagasy Common Organisation (AMCO).¹⁹⁵ As it is stated by Article 2 of the Convention establishing AMCO, “The High Contracting Parties undertake to take all measures to harmonise their respective trade laws to the extent consistent with requirements that result from the requirements of each of them.”¹⁹⁶ This purpose was implemented by Article 3 of the Convention establishing the African and Mauritian Bureau for Research and Legislative Studies, dated 5 July 1975. The aim of the later institution consisted of assisting AMCO member countries in the manner that their applicable legal rules could “be worked out under conditions that permit their harmonisation.”¹⁹⁷ It is regrettable that neither organisation did afford the harmonisation of law goal.

The failure of AMCO and the Bureau did not, however, stop the harmonisation of business laws initiative in Africa. In effect, about sixteen years later, the harmonisation idea recurred in April and October 1991 following meetings of the Ministers of Finance of former French colonies held in Ouagadougou (Burkina Faso) and in Paris (France) respectively. At the end of the Paris meeting, particularly,

¹⁹³ Mouloul Understanding 8.

¹⁹⁴ The African Union and Mauritius Organisation (AUM), in French *Union Africaine et Malgache*, was an intergovernmental organisation, created in Antananarivo (Madagascar) on 12 September 1961, to promote cooperation among former African French colonies.

¹⁹⁵ The African and Malagasy Common Organisation, in French *Organisation Commune Africaine et Malgache*, had the same aims as the AUM, viz. striving, *inter alia*, towards economic cooperation.

¹⁹⁶ Quoted by Mouloul Understanding 17; see in the same sense, Diallo *Vente* 14.

¹⁹⁷ *Ibid.*

participants constituted an *ad hoc* commission of seven members led by Keba Mbaye to require the interest of countries in the harmonisation project. It followed from the commission's report presented in Libreville (Gabon) on October 1992, on the behalf of Ministers of Finance, that almost all countries visited were interested in the harmonisation of their commercial laws. In the Final Act of the Libreville meeting, it was clearly stated that delegates "have approved the project on harmonisation of business law conceived by the Ministers of Finance of the Franc Zone, and agreed to its immediate implementation and asked the Ministers of Finance and Justice to all States concerned to make it a priority."¹⁹⁸ At the same occasion the report of the *ad hoc* commission was adopted, another Special Commission of three members was established with the task to prepare the OHADA Treaty. The Draft Treaty prepared in this regard was submitted at the meeting of Ministers of Justice convened in Libreville on July 1993; finalised in Abidjan (Cote d'Ivoire) on October 1993; and finally adopted in Port-Louis (Mauritius) on 17 October 1993. The Treaty of OHADA, hereafter referred to as the "Treaty", entered into force on 18 September 1995 after a concurrent ratification of fourteen countries pursuant to its Article 52 al. 2.¹⁹⁹

The purpose of OHADA consists, *inter alia*, in providing member states with a harmonised set of business laws by elaborating and adopting simple and modern common rules adapted to African economies.²⁰⁰ By so ruling, many commentators have said that, the Organisation intends to make member states more attractive to

¹⁹⁸ Ibid; see also Secretariat of the OHADA comments available online at: http://perso.mediaserv.net/fatboy/cd_ohada/pres/pres.02.en.html (accessed 5-8-2013).

¹⁹⁹ Article 52 al. 2 of the Treaty provides that, "The (...) Treaty shall come into force 60 days after the date of deposit of the seventh instrument of ratification." The original OHADA parties were Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo Brazza, Cote d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal, and Togo. Guinea and Guinea-Bissau joined thereafter. (For an updated list of OHADA member states, see <http://www.ohada.com/etats-membres.html> (last accessed 8-8-2013); see also Mouloul Understanding 18; Ba OHADA 413; Dickerson 2005 (44) *Colum J Transnat'l L* 17 19; Feneon Arbitration 53.

²⁰⁰ Article 1 of the Treaty is clear that, "The objective of the (...) Treaty is the harmonisation of business laws in the contracting states by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes."

foreign investors from the developed world.²⁰¹ It should be noted that OHADA is an open organisation. In accordance with Article 53 of the Treaty, its membership is opened to any African Union (AU) member state that is not original signatory to the Treaty. The membership status is also extended to non-AU member countries invited to accede by common consent of all existing parties.²⁰² With regard to its functioning system, OHADA had initially four institutions, the Council of Ministers, the Permanent Secretariat, the Common Court of Justice and Arbitration (CCJA), and the Regional Training Centre for Legal Officers.²⁰³ From October 2008, it has been endowed with a fifth institution, the Conference of Heads of State and Government.²⁰⁴

According to Articles 5 and 6 of the Treaty, OHADA statutes are prepared by the Permanent Secretariat in association with governments of member states. They are adopted by the Council of Ministers on the advice of the CCJA. Those statutes are known as “Uniform Acts”,²⁰⁵ and they are “exclusively business-related”.²⁰⁶ So far nine various Uniform Acts have, up to the present time, been enacted under OHADA’s sponsorship. These include the Acts relating to General Commercial Law,²⁰⁷ and Commercial Companies and Economic Interest Groups;²⁰⁸ the Acts regulating Securities,²⁰⁹ Arbitration,²¹⁰ and the Carriage of Goods by Road;²¹¹ the

²⁰¹ Those commentators include: Yakubu *Business 1*; Martor et al *Business 1*; Mancuso 2006 (5) 2 *JITR LP* 55 59; Dickerson 2005 (44) *Colum J Transnat’l L* 17; Feneon *Arbitration* 53.

²⁰² Cf. Article 53 al. 1 of the Treaty; see also Meyer 2008 (1/2) *Unif L Rev* 393; Ba OHADA 413; Mouloul *Understanding* 22.

²⁰³ Article 3 of the Treaty; for the attributions of each of the institutions above, see Articles 27 to 42 of the Treaty.

²⁰⁴ Cf. Article 3 al. 2 and Article 27 (1) of the Treaty, as revised in Quebec on 17 October 2008.

²⁰⁵ Article 5 al. 1 of the Treaty; for instances of Uniform Acts currently in force, see: <http://www.ohada.com/actes-uniformes.html>.

²⁰⁶ Dickerson 2005 (44) *Colum J Transnat’l L* 17 20; Coetzee/De Gama 2006 (10) 1 *VJ* 15 19.

²⁰⁷ General Commercial Law Uniform Act adopted on 17 April 1997, entered into force on 1 January 1998 (*OHADA OJ* No. 1 of 1 October 1997), as revised on 15 December 2010 (*OHADA OJ* No. 23 of 15 February 2011).

²⁰⁸ Commercial Companies and Economic Interest Groups Uniform Act adopted on 17 April 1997, entered into force on 1 January 1998.

²⁰⁹ Securities Uniform Act adopted on 17 April 1997, entered into force on 1 January 1998.

²¹⁰ Arbitration Uniform Act adopted on 11 March 1999, entered into force on 11 June 1999.

²¹¹ Carriage of Goods by Road Uniform Act adopted on 22 April 2003, entered into force on 1 January 2004.

Acts organising Simplified Recovery Procedures and Enforcement Measures,²¹² Collective Insolvency Proceedings,²¹³ and Accounting Systems;²¹⁴ and more recently, the Uniform Act relating to Cooperative Corporations.²¹⁵ Other Uniform Acts are still in preparation amongst which are the Uniform Acts relating to Contract Law, Labour Relations, and the Uniform Act on Evidence.²¹⁶

As far as the Commercial Act is concerned, the OHADA Permanent Secretary remarks that before the adoption of the current version of this Act, matters relating to general commercial law and other connected issues were ruled by the 1807 French Commercial Code introduced in French colonies since December 1850.²¹⁷ Since this Code did not record significant amendment after independence,²¹⁸ on the one hand, and that improvements encountered in France were not gradually extended to its former colonies, on the other hand, commercial law of the Franc Zone countries became increasingly out-dated and obsolete. As was claimed earlier, in effect, until the 1980s, only a limited number of countries located in the region under examination have tried to modernise their law of obligations, in general, and their commercial law, in particular.²¹⁹ For almost all other countries, commercial subjects were ruled by a number of sparse regulations dated back to the colonial times.

²¹² Simplified Recovery Procedures and Measures of Execution Uniform Act adopted on 10 April 1998, entered into force on 10 July 1998.

²¹³ Collective Proceedings for Wiping off Debts Uniform Act adopted on 10 April 1998, entered into force on 1 January 1999.

²¹⁴ Undertakings' Accounting Systems Uniform Act adopted on 23 March 2000, entered into force on 1 January 2001 for Enterprise Accounts, and on 1 January 2002 for Combined Accounts (*OHADA OJ* No. 10 of 1 January 2002).

²¹⁵ Cooperative Corporations Uniform Act adopted on 15 December 2010 (*OHADA OJ* No. 23 of 15 February 2011).

²¹⁶ See Meyer 2008 (1/2) *Unif L Rev* 394; Coetzee/De Gama 2006 (10) 1 *VJ* 19-20; and Fontaine Avant-Projet 1.

²¹⁷ See OHADA Secretariat http://perso.mediaserv.net/fatboy/cd_ohada/pres/pres.02.en.html; see in the same sense Fontaine Avant-Projet 3.

²¹⁸ Some amendments include those made in July 1852, July 1902, March 1931, and March 1955, but not so far reaching.

²¹⁹ That was the case with Senegal (Law of 10 July 1963 relating to Civil and Commercial Obligations); Burkina Faso (Ordinance of 26 August 1981 regulating Commercial Activities); Guinea-Conakry (Civil Code of 1983); Central African Republic (Order of 3 October 1983 dealing with the Carrying on of Commercial Activities and Provision of Services); Mali (Law No. 87-31/AN-RM of 29 August 1987 relating to General Rules of Obligations); and Congo Brazza (Laws of April 1981 and September 1990 regulating Accession to the Commercial Profession). See

Conscious that a harmonised general commercial law and corporate law “should foster trade and make it safe between economic operators,”²²⁰ OHADA members gave priority to these two topics. A seminar bringing together lawyers, magistrates, and businesspersons was then organised in Abidjan on April 1993 in this regard. With regard to what have to become the content of the Act, it was discussed at a second seminar held in Ouagadougou in March 1994. During these discussions, different working groups selected five topics to be integrated in the coming Commercial Act among which are commercial sale contracts.²²¹ At the end of the seminar, a Special Working Group was established with the task to coordinate observations and comments made by different delegations, and to mould them into a draft Commercial Act. In 1995, a draft prepared by the Ouagadougou Special Working Group was discussed article by article, and adopted during a third seminar held in Bangui. After then, this draft was sent to National OHADA Commissions in different member countries for consideration.²²² The draft Commercial Uniform Act was finally adopted unanimously by the Council of Ministers during a meeting organised in Cotonou (Benin) on 17 April 1997. It entered into force on 1 January 1998 pursuant to Article 289 of the Act.²²³

It is important to note that during the preparation and adoption of the OHADA Commercial Act, only one of the OHADA member countries was part to the CISG.²²⁴ In addition to this, there were no specific provisions dealing with commercial sales in the African Franc Region. The only rules applicable in this regard were the provisions of Title VI of Book III of the Napoleonic civil code, i.e. Articles 1582 to

Fontaine 2008 (1/2) *Unif L Rev* 633; Sossa 2008 *Rev dr unif* 339; Coetzee/De Gama 2006 (10) 1 *VJ* 15 18-19; Dickerson 2005 (44) *Colum J Transnat'l L* 17 25 and 31.

²²⁰ Tumnde et al *OHADA* 31.

²²¹ The other topics are: the status of commercial operators, commercial registry, commercial leases and business, and trade middlemen.

²²² On the drafting of Uniform Acts process, see Articles 5 to 12 of the Treaty; see also Mouloul Understanding 26-27.

²²³ The Commercial Act adopted in 1997 has been revised from 15 December 2010; see *OHADA OJ* No. 23 of 15 February 2011.

²²⁴ As it is said in Section 4.2.4.3 below, the coming into effect of the CISG in the first OHADA country, viz. Guinea, dates to February 1992. See CISG Status at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

1701 regulating sales contracts. Commercial sales were, in other words, ruled at that time by the same rules as civil or consumer sales. It is clear that the application of civil law rules to commercial transactions was “generally inappropriate for a developing economy.”²²⁵ For that reason, the OHADA Permanent Secretariat notes that, “As most major international trading countries have (...) acceded to the Vienna Convention, it was essential to introduce in the positive law of the Contracting States to the Treaty a law that is as close as possible to the provisions applicable now in most of the States.”²²⁶ Thus, as it is observed in the following paragraphs, and mostly in the comparative chapters, the OHADA Commercial Act owes a significant debt to the CISG. Magnus remarks in this sense that, the Act “provides for rules on commercial sales *which widely copy the CISG* (emphasis added).”²²⁷ According to him, “a modified CISG has been made the sales law among and in the OHADA States.”²²⁸

From the initial five Books, the current version of the Commercial Act contains eight main Books,²²⁹ in addition to the preliminary chapter,²³⁰ and the ninth Book laying down final provisions,²³¹ the Book VIII of which deals with commercial sales.²³² According to Articles 1 and 234 UAGCL, the Act applies to contracts of sale

²²⁵ Coetzee/De Gama 2006 (10) 1 *VJ* 15 18.

²²⁶ See OHADA Secretariat http://perso.mediaserv.net/fatboy/cd_ohada/pres/pres.02.en.html; see also Fontaine Avant-Projet 14. When the Commercial Act was adopted on April 1997, the CISG was already in effect in approximately 50 countries. See status at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

²²⁷ Magnus in *CISG vs. 4*; see also Ferrari OHADA 79 80-96; and Fontaine Avant-Projet 14.

²²⁸ Magnus in *CISG vs. 4*.

²²⁹ Book I (Articles 2-33) relates to the legal status of traders and businessmen; Book II (Articles 34-72) deals with the trade and personal property register; Books III and IV (Articles 73-78) are concerned with the national and regional records of traders; Book V (Articles 79-100) relates to the computerising of the trade register and traders files; Book VI (Articles 101-168) regulates commercial lease and business; Book VII (Articles 169-233) is concerned with trade middlemen; and Book VIII (Articles 234-302) deals with commercial sales contracts.

²³⁰ Article 1 UAGCL.

²³¹ Articles 303 to 307 UAGCL.

²³² See Ferrari OHADA 79 80; Martor et al *Business* 29; Huber Sales Law 950; Masamba Adhesion 347 362; Mutenda *Apport* 13; Santos/Toe *Commercial* 339; Dieng Vente 1. See also Article 2 OHADA Treaty which lists “sales laws” among subjects included into its operation area.

of goods between businessmen²³³ on condition that the parties have their place of business in one of the OHADA member states or when conflict-of-law rules lead to the application of the law of one OHADA country.²³⁴ Following from these provisions, it is clear that the eighth Book is vital in matters regarding domestic sales and international sales contracts alike. Its provisions govern both national and international sales transactions;²³⁵ they are up-to-date with regard to contemporary commercial law requirements.²³⁶ Book VIII provides the definition of concepts such as those of “offer and acceptance”, viz. rules relating to the formation of contracts.²³⁷ It also determines the obligations of each party²³⁸ and the remedies for breach of contract.²³⁹ This Act also modernises the rules governing the effects of contractual agreements, namely the rules relating to the transfer of ownership and the transfer of loss in the goods bought.²⁴⁰

In brief, compared to the CISG, the Commercial Act is in line with contemporary commercial law requirements. It regulates the conclusion of contracts by means of offer and acceptance, and it balances the rights and obligations of sellers and buyers. Such are some of the key features which justified the adoption of the OHADA Treaty by the DRC. They will be given further consideration in Chapters 5 and 6 below.

²³³ See Article 1 al. 1 of the Treaty which reads, “Any commercial operator, natural or legal person, including all commercial companies whose place of business or registered office is situated on the territory of one of the Contracting States to the Treaty on the Harmonisation of Business Law in Africa (...) shall be subject to the provisions of this Uniform Act.”

²³⁴ Article 234 UAGCL.

²³⁵ Cf. Article 1 OHADA Treaty according to which the Organisation intends to provide member countries with a simple and modern uniform business law adapted, among others, to “transnational trade transactions”. See also Dieng Vente 1; Martor et al *Business* 29; Huber Sales Law 950; Masamba Adhesion 347 362; Mutenda *Apport* 13; Santos/Toe *Commercial* 339.

²³⁶ As is explained in Section 4.4.3 below, Book VIII of the UAGCL is primarily based on the CISG. See Coetzee/De Gama 2006 (10) 1VJ 15 24; Dieng Vente 1; Santos/Toe *Commercial* 361-362; Schwenzer/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf>; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>; Castellani 2008 (1/2) *Rev dr unif* 115 119; and Fontaine *Avant-Projet* 14.

²³⁷ Articles 241-249, with Articles 210 to 218 UAGCL.

²³⁸ Articles 250-274 UAGCL.

²³⁹ Articles 281-293 UAGCL.

²⁴⁰ Articles 275-280 UAGCL. For comments, see Masamba Adhesion 347 362; Santos/Toe *Commercial* 339ff.

2.2.7.2 The impact and process of the introduction of OHADA law in the DRC

The intention for the DRC's access to OHADA law goes back to the end of 2003 when the government notified the International Monetary Fund on that subject.²⁴¹ Five years after, on February 2008, it revealed the same intention to the designated authorised OHADA law depository, the government of Senegal.²⁴² On 4 August 2009, a draft law approving the ratification of the OHADA Treaty was adopted by the Council of Ministers. That draft was transmitted to the Parliament on October 2009. On 12 November 2009, it was rejected by the Senate.²⁴³ But, following the President's State of the Nation Address, dated 7 December 2009, prioritising the adoption of OHADA law issue,²⁴⁴ Parliament was almost obliged to allow the ratification on 15 December 2009. On 5 February 2010, the Draft, initially adopted by the Assembly, was declared to be in conformity with the Constitution by the

²⁴¹ On an exhaustive historical development of Congolese adherence, see Tshibende 2011 *RCDA* 67 77-80; and Balingene <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene1.pdf>.

²⁴² Cf. Article 57 Treaty. Congolese letter was acknowledged in April and August 2008 by three affirmative letters: Letters No. 115/SP/DAJ/OHADA/2008; No.1123/SP/DD/NC/CAB/MIN/JHDH/2008; and No. 232/SP/DAJ/ OHADA/2008.

²⁴³ For a series of arguments against the DRC's accession to the OHADA community, see Kalukuimbi 2011 *RCDA* 45; Balingene <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf> 5.

²⁴⁴ As the President has declared,

(...) I have decided to make *improving the business climate a priority*; one of events over which should be considered the effectiveness of the Government (...). (...) Reasons for the low ranking of our country in the reference directory "Doing Business" are known. The solution to get a better rating is also known. It consists of *transparency, simplification and flexibility*. The Government has already identified approximately ten steps towards this direction. I wish we were going further and faster. So, I assign complementary objectives to achieve this project by the end of March 2010. *This is a priority of our country's accession to OHADA, which was essential to reassure the private sector of legal certainty which is paramount concern*. I hope that a happier outcome to this matter, which is struggling to obtain legislative support, can be found at the very next opening Parliamentary sessions (highlights added).

See RDC, Discours du Président de la République sur l'état de la Nation, Kinshasa 7 December 2009; excerpt translated by Balingene <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf> 5; see for the French original version, Tshibende 2011 *RCDA* 67 78; and Koso <http://ddata.over-blog.com /1/35/48/78/RD-Congo/Marcel-Wetsh-okonda-Koso-arret-CSJ-5-fevrier-2010-OHADA.doc> (last accessed 26-7-2013).

Supreme Court²⁴⁵ and then promulgated by the President on 11 February 2010.²⁴⁶ After this, on 27 June 2012, the Government transmitted the instruments of ratification to the OHADA depository country,²⁴⁷ instruments which were finally registered on 13 July 2012.²⁴⁸ The Treaty came into force in the DRC on 12 September 2012,²⁴⁹ i.e. 60 days after depository in application of Article 53 al. 2 of the Treaty.²⁵⁰ The DRC then became the seventeenth OHADA member state.²⁵¹ The first DRC case applying OHADA law uniform acts was heard by the Commercial Tribunal of Lubumbashi on 21 January 2013 in an attachment procedure.²⁵²

A short overview on the situation of the OHADA Treaty demonstrates that its adoption is a sign of the abandonment of sovereignty for signatory countries. Confirmation of this is Article 10 according to which, Uniform Acts are directly applicable in, and binding on all member states, notwithstanding any conflicting

²⁴⁵ See Article 139 al. 2 of the Constitution; and CSJ 5 February 2010 Case No. R.Const 112/TSR (unreported decision).

²⁴⁶ See Law No. 10/2 of 11 February 2010 allowing the ratification of the OHADA Treaty (*JORDC* Special No. 3 March 2010). Following that promulgation, a special Commission was established with the task to consider the implementation of OHADA Uniform Acts in the DRC on the Government's behalf. See the OHADA National Commission Decree No. 10/13 of 23 March 2010 (*JORDC* 1 April 2010).

²⁴⁷ Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf>; Kuediasala <http://www.ohada.com/actualite/1599/la-rdc-transmet-au-senegal-les-instruments-d-adhesion-a-l-ohada.html>.

²⁴⁸ *Ibid.*

²⁴⁹ OHADA Newsletter (8 September 2012) <http://www.ohada.com/actualite/1659/ohada-rdc-le-traite-et-les-actes-uniformes-seront-d-application-effective-a-partir-du-12-septembre-2012.htm>; OHADA Newsletter (12 September 2012) <http://www.ohada.com/actualite/1663/12-septembre-2012-un-grand-jour-pour-la-rdcongo-un-grand-jour-pour-l-ohada-un-grand-jour-pour-l-afrique.html>.

²⁵⁰ As stated by Article 53 al. 2, "With regard to any contracting state, the (...) Treaty and the Uniform Acts approved before its admission shall come into force 60 days after the deposit of the instrument of admission."

²⁵¹ See Feneon Arbitration 53; Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf>; see also Status available at: <http://www.ohada.com/etats-membres.html> (last accessed 2-4-2013).

²⁵² Tricom L'shi 21 January 2013 RAC 924 *Mutiri Mutanda v Mulongo Nsongawisha* (unreported decision). This case has been followed by two other important cases in the same domain heard by the Lubumbashi Commercial Court and the Kinshasa/Gombe Commercial Court respectively. See Tricom L'shi 8 April 2013 RAC 986 *Friz Kremnitzer v Pedersen Monga J*; and Tricom Kin/Gombe 22 October 2013 RCE 3140 *Sunguzza Seli v Bile Schetter J* (unreported decisions).

provisions in existing or future national laws.²⁵³ Such supremacy has been confirmed in one of the CCJA Advisory Opinions, dated 30 April 2001. *A propos* of this, the CCJA ruled that “the effect of Article 10 of the Treaty is to abrogate and prohibit any national statute or regulatory provision which has the same purpose as the Uniform Acts and which conflicts with them.”²⁵⁴ Scholars are unanimous in their views that, in so ruling, the CCJA has clearly confirmed the *supranationalité* of OHADA Uniform Acts.²⁵⁵ Simply, the meaning of Article 10 is to repeal national laws in matters governed by the Uniform Acts.

As far as the DRC is concerned, on the one hand, the entry into force of OHADA laws implies a withdrawal of current domestic statutes business related²⁵⁶ and their replacement by OHADA Uniform Acts.²⁵⁷ To be precise, from 12 September 2012, the following Acts are in force in the DRC, the UAGCL, the Commercial Companies and Economic Interest Groups Act, the Securities Act, the Arbitration Act, the Carriage of Goods by Road Act, the Simplified Recovery

²⁵³ Diédhiou OHADA 223-238; Martor et al *Business* 20; Mancuso 2006 (5) 2 *Jl TR LP* 55 59; Ferrari OHADA 79 83; Abarchi 2000 (37) *Revue Bourkinabé de Droit* 21; Matipé History 7; Ba OHADA 413 415. Its interpretation, however, aroused many problems in respect of the content of such abrogation; this obliged the CCJA to express an opinion on the matter.

²⁵⁴ See CCJA Advisory Opinion No. 1/2001/EP of 30 April 2001 *Juriscopus* 2005 [<http://www.ohada.com/jurisprudence/ohadata/J-02-04.html>] (last accessed 2-4-2013).

²⁵⁵ See Abarchi 2000 (37) *Revue Bourkinabé de Droit* 21; Diédhiou 2007 (2) *Rev dr unif* 265; and Diédhiou OHADA 223-238.

²⁵⁶ For instances of Congolese Statutes and Regulations abrogated by OHADA Uniform Acts, see Tshibende 2011 *RCDA* 67 71-73; Masamba Modalités 81 Figure 22. These include the CCom Decree of 2 August 1913; the Trade register Decree of 31 July 1912, as amended by Law No. 10/9 of 27 April 2010; the Commercial Companies Decree of 27 February 1887, as amended and completed by Law No. 10/8 of 27 April 2010; the Cheque Decree of 10 December 1951; the Bankrupt Decree of 27 July 1934, as amended by Decrees of 19 December 1956 and of 26 August 1959; and the Publication of Official Acts Law No.10/7 of 27 April 2010 (*JORDC* Special No. 3 March 2010). There are, nevertheless, several other statutes which are not concerned with the abrogation entailed by the adoption of OHADA law though business-related. These include the Investments Code (Law No. 4/2002 of 21 February 2002 *JORDC* No. 6 of 15 March 2002); Mining Code (Law No. 7/2002 of 11 July 2002 *JORDC* Special No. of 15 July 2002); the Public Procurements Law (Law No.10/10 of 27 April 2010 *JORDC* Special No. of 30 April 2010); and the Transformation of Public Companies Law No. 8/7 of 7 July 2007 *JORDC* Special No. of 12 July 2008.

²⁵⁷ Lukombe *Contentieux* 227. Lukombe was opposed to the accession to OHADA law because he considers that OHADA law could erase Congolese legal history. Instead, the author suggested that the government should pick those OHADA rules it believes suited to its development rather than adopting the whole legal system.

Procedures and Enforcement Measures Act, the Collective Proceedings for the Clearing of Debts Act, the Accounting Law Act, and the Cooperative Corporations Act.

Concerning civil law provisions, on the other hand, OHADA law does not completely exclude them from the field of commercial transactions. In effect, Article 327 al. 1 of the Commercial Act defers commercial contracts to the general rules of the law of contract and sale,²⁵⁸ unless these rules are contrary to its spirit.²⁵⁹ In addition, Article 1 al. 3 of the Commercial Act provides that “(...) any tradesman or company remains subject to all laws non-conflicting with the present Uniform Act, which are applicable in the state where its place of business or head office is located.” It may be observed that the meaning of Article 327 al. 1 is not different from that of Article 7 CCO which determines the Code’s field of application. In conformity with the latter provision, contracts are regulated, firstly, by the contract law general principles, secondly, by specific rules relating to the alleged contract, and, thirdly, by the rules of the law of commerce, for commercial transactions.

From what has been explained so far, the CCO general rules remain applicable to commercial contracts provided they are not in conflict with the provisions of the UAGCL. As specified by case law, OHADA law combines both special rules of the law of sale with the common principles established by the civil code providing that the Uniform Act is silent on the issue.²⁶⁰ To exemplify this, as the Commercial Act does not provide a definition for the concept “sale”, Article 263 CCO intervenes to

²⁵⁸ Meaning, Articles 1 to 245 and Articles 263 to 551 CCO for the DRC. Masamba (Modalités 81) explains that the CCO will be partially abrogated, viz. merely with regards to the needs of commercial transactions. On general point of view, see Diallo *Vente* 58-59.

²⁵⁹ As stated by Article 327 al. 1 UAGCL, “Commercial sales are regulated by the general rules of the law of contract and sale which are not in conflict with the provisions of (Book VIII of the Commercial Act).”

²⁶⁰ See CCJA 31 May 2007 Case No. 24/2007 *Wague Bocar v SOCIMAT-CI* *Receuil de Jurisprudence* No. 9 January-June 2007 53 [<http://www.ohada.com/jurisprudence/ohadata/J-08-225.html>]; Cote d’Ivoire 6 February 2003 Supreme Court Case No. 57 *JC El Achkar Hadife v A Nawfla* [<http://www.ohada.com/jurisprudence/ohadata/J-03-233.html>] (both accessed 20-3-2013).

fill this gap.²⁶¹ Likewise, the requirements for the validity of contract as provided by Article 8 CCO govern commercial sales as well.

More specifically, from the coming into effect of OHADA Uniform Acts in the DRC, provisions of the civil code are not revoked, but rather complemented by the newer UAGCL rules. Legal concepts, such as “commercial contracts law” and “commercial sales contracts” which were known earlier in a civil law context, are, at the moment, regulated by specific provisions, namely Articles 234 to 302 of the Commercial Act. It is these provisions which currently form the main legal source for commercial sales contracts including international sale of goods agreements. But, because OHADA law is still recent in the DRC, it is early to assess its impact on courts.

2.2.8 Conclusion on the Historical Development of Congolese Civil Law

The DRC belongs to the civil law legal system family. Its law of contract and sale is closely linked to the French Napoleonic code brought into the country under the Belgian settlement influence. During the colonial period and about a half century after independence, commercial contract law and commercial sales contracts were governed by civil law rules. Before the implementation of OHADA law in the DRC, in effect, most of the legal concepts defined in the first legal system in a commercial context, were organised by the CCO in a civil law environment. Congolese commercial contract law was, in short, concealed behind civil law in which the earlier lawmaker had failed to make specific provisions for commercial sales contracts. Such a situation was not likely to ensure legal security and certainty. Furthermore, Congolese law was not any longer designed to support the country’s economic development.²⁶² These reasons guided the government to adopt the OHADA Treaty.

²⁶¹ According to Article 263 al. 1 CCO, a contract of sale is an agreement whereby one party commits to deliver a thing and another to pay for it. For application, see *Tricom Kin/Gombe* 28 February 2012 RCE 2183 *Kabala Katumba v Socimex* (unreported decision).

²⁶² See Tshibende 2011 *RCDA* 67 70.

Following its entry into effect in the DRC, from September 2012, within modern Congolese sales law, international sale of goods contracts are ruled primarily by the eighth Book of the OHADA Commercial Act complemented by non-conflicting principles of the CCO. It is these provisions that form the basis of Congolese sales law the fundamental principles of which follow.

2.3 Basic Principles of Congolese Sales Law

2.3.1 Introduction

The phrase “basic principles” is understood in the present section as abstractions from all the rules and as leading principles for the whole law of contract including sales contracts. As it is for many other legal systems, the Congolese law of contract contains a number of fundamental principles that represent underlying policies on the basis of which legislation is formulated and the law influenced. Those basic principles represent, according to Fu, not only the essence and spirit of the law, but also the guiding principles for drafting, interpreting, and studying the law.²⁶³

As stated by Article 7 al. 1 CCO, all contracts are subject to the same common general rules, regardless of whether they have or do not have a special designation. The second section of the same provision specifies that standard contracts comprising sales are additionally ruled by particular provisions. The result then is that sales contracts are subject to the common principles of contract law, unless its particular rules provide otherwise. Such are also the terms of Article 265 al. 3 CCO for which contractual general principles also govern the effects of sales contracts.²⁶⁴ Article 327 al. 1 UAGCL is of the same meaning. As mentioned above, Article 327 al. 1 recognises the legal effect of civil law rules with regard to commercial sales contracts, except when they contradict commercial law rules.

²⁶³ See Fu *Contract* 37.

²⁶⁴ Article 265 al. 3 CCO gives the impression to be redundant.

It should be kept in mind that the CCO owes a significant debt to the French legal system *via* Belgium. The same is true with regard to OHADA law.²⁶⁵ That is why, despite the advent of OHADA law, Congolese contractual provisions still reflect the philosophical and political approach of the French and Belgian civil codes of which the substance is the freedom of contract.²⁶⁶ Two key provisions giving effect to the consent of parties can be quoted in this respect: Article 1 CCO which defines the contract;²⁶⁷ and Article 33 CCO which determines the significance of lawful contracts.²⁶⁸ These provisions lay down the fundamental principles of the law of contract, which are also relevant for the law of sale. Five of these principles will be given special attention, namely freedom of contract, autonomy of the will, binding force of contractual obligations, consensualism, and good faith.

2.3.2 Freedom of Contract

The freedom of contract constitutes one of the fundamental principles of the Congolese contract law in general and its sales law in particular as is the case in other legal systems. As claimed by Nicholas, “the classical treatment of contract is in terms of free will” in almost all legal systems.²⁶⁹ The author goes on to argue that,

Just as legislation is a manifestation of the will of the state, so also a contract is a particular law made by the parties for themselves (...) by the conjunction of their wills. (...) the function of the general law is to give effect to this particular law, subject only to such restrictions as are necessary in the public interest.²⁷⁰

²⁶⁵ See Dickerson 2005 (44) *Colum J Transnat'l L* 17 20-21; Fontaine Avant-Projet 3.

²⁶⁶ Cf. Whittaker *Obligations* 296; De Bondt *Contracts* 222-223.

²⁶⁷ Article 1 states, “A contract is an agreement by which one or several persons bind themselves, towards one or more others to transfer, to do, or not to do something.” For Belgian and French Laws, see Articles 1101 and 1134 CC.

²⁶⁸ According Article 33 CCO,

Agreements lawfully entered into take the place of the law for parties who have made them.

They may be revoked only by mutual consent, or for causes authorised by the law.

They must be performed in good faith.

²⁶⁹ Nicholas Introduction 7 17.

²⁷⁰ *Ibid.*

Following on from the above statement, what is required for a contract to enter into force is primarily the consent of parties, associated with their capacity, an object, and “a cause”.²⁷¹ In that sense, the principle of freedom reflects the individual and liberal vision of the eighteenth century when the Napoleonic code was enacted.²⁷²

In its basic meaning, the principle of freedom of contract covers different aspects. It infers, firstly, that parties are free to decide to enter into a contract or not to enter into a contract.²⁷³ Article 249 al. 1 of the OHADA Commercial Act makes it clear that, “parties are free to enter into contract and cannot bear responsibility where they do not reach agreement,” except when they have acted in bad faith.²⁷⁴ Secondly, the principle means that parties are free to choose with whom to contract and to determine the content of the contract at their own discretion,²⁷⁵ subject only to restrictions necessary in the public interest.²⁷⁶ In other words, the freedom of contract means that there is no legal duty to enter into a contract; one can conclude a contract or refuse to conclude it without any legal consequence. In the same way, contracting parties are free to define their obligations, and only the stipulations accepted by all of the parties would be taken into account.²⁷⁷ The principle of freedom of contract implies, finally, the freedom of parties to choose the law which will govern their contract, particularly with regard to international agreements²⁷⁸ as is the case with international sale of goods contracts. To use comments on the 2010 UNIDROIT PICC,

²⁷¹ See Article 8 CCO which requires four elements for a contract to be valid, i.e. the consent of the parties, their capacity to contract, a definite object which forms the subject-matter of the contract, and a lawful “cause”. For the meaning of each of these concepts, see Section 2.3.5 below.

²⁷² See Gordley *Doctrine* 214.

²⁷³ See Munoz *Contracts* 25; Zweigert/Kötz *Comparative* 324; Ghestin *Formation* 35; Mubalama *Obligations* 113; De Bondt *Contracts* 223; Tallon *Contract* 205 211.

²⁷⁴ Cf. second and third paragraphs of Article 249 UAGCL whereby, breaking-off negotiations, entering into or continuing negotiations without real intention to reach agreement would constitute behaviour contrary to good faith that then amounts to bad faith.

²⁷⁵ Munoz *Contracts* 25; Zweigert/Kötz *Comparative* 327-328; Ghestin *Formation* 35; Mubalama *Obligations* 113; De Bondt *Contracts* 223.

²⁷⁶ Nicholas *Contract* 32; Zweigert/Kötz *Comparative* 328; see also Léo 8 January 1924 *Belg Jud* 1931 Col 118.

²⁷⁷ Mubalama *Obligations* 113; Ghestin *Formation* 35.

²⁷⁸ See Léo 8 January 1924 *Jur Col* 1924 278.

The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order.²⁷⁹

In support of the above explanation, one may deduce with Rouhette that,

[Freedom] is the heart of the contract. The obligation cannot arise unless it has been freely consented to – the law should not impede the freedom to contract or not to contract; and it arises within the framework which the contracting parties have construed. It is not for the legislator to substitute himself for the parties in prescribing the content of their contract. At the very most, and for their convenience, he can make them some suggestions (...) ²⁸⁰ but the parties may decide otherwise – the law, in questions of contract, is merely interpreting the will. Only public policy imposes an external limit on the free play of the wills.²⁸¹

It is evident that some rules regulate contracts even if such contracts are freely concluded by the parties. As one commentator has said,

The existence of these standard rules for the common contracts is reconciled with the principle that the parties are free, subject only to the restrictions in the public interest, to make any contract they wish, by recourse to the distinction between rules which apply only in the absence of contrary intention by the parties (*lois supplétives*) and those which concern the public interest and therefore cannot be excluded (*lois imperatives*).²⁸²

As regards the *lois supplétives*, known also as “default rules”, first, they play a supplementary, derogatory, or an interpretative role. They are provided to express the will of the parties and are capable, thus, of being set aside by the expression of a contrary will.²⁸³ Simply, default rules aim for the most reasonable solution for cases that parties may have failed to regularise. Legal provisions that fall within that category apply only if the parties did not provide otherwise.²⁸⁴

²⁷⁹ UNIDROIT 2010 Principles 8, Comments 1 under Article 1.1.

²⁸⁰ Such is the case for Titles III and following of the CCO dealing with special contracts among which is the contract of Sale (Articles 263-364), and for Book VIII of the OHADA Commercial Act (Articles 234-302) regulating commercial sales contracts.

²⁸¹ Rouhette Obligatory Force 38 40; see, for an illustration, Léo 8 January 1924 *Jur Col* 278.

²⁸² Nicholas Introduction 7 17; Nicholas *Contract* 32.

²⁸³ *Ibid.*

²⁸⁴ Nicholas *Contract* 32; Rouhette Obligatory Force 38 45.

A statute may itself specify those of its provisions which play the role of default rules by providing them with phrases such “unless there is an agreement to the contrary” or “unless otherwise stipulated”.²⁸⁵ In that sense, default rules are merely expected to fill the gaps left by the parties and to interpret their will. If the intention of parties is to exclude their application, those rules will not apply.²⁸⁶ Pursuant to the principle of freedom of contract, furthermore, parties can mutually exclude these default rules and give to the contract different content or different effects from those provided by the law. Such is the meaning given by the case law according to which, since most of civil code provisions relating to contracts are not binding, parties may depart from them by choosing their own legislation.²⁸⁷ As Kalongo has stated, most of contract law rules are default rules in the DRC as in France and Belgium.²⁸⁸

Regarding the *lois imperatives*, also known as “imperative norms” or “mandatory rules”, next, they are concerned with the public interest. They cannot, therefore, be excluded by contracting parties.²⁸⁹ With regard to them, courts have

²⁸⁵ For an illustration, see Article 234 al. 2 UAGCL which states, “‘Unless otherwise stipulated’, a commercial sales contract is subject to the provisions of the present Book (...)”; and Article 239 al. 2 which reads, “‘Unless otherwise agreed by the parties’, these are considered to have adhered to professional usages they were aware of or should have been aware of (...)”; see also Article 259 UAGCL (time limit for notification for lack of conformity). Compare these to Article 285 CCO *in fine* (costs of delivery or of taking delivery); Article 286 (place and time of delivery); and Article 304 CCO (right to modify the extent of the warranty against eviction obligation by particular agreements). The same rule applies to Article 11 al. 2 PILD which determine the law that govern international contracts in the DRC.

²⁸⁶ Nicholas Introduction 7 17; Nicholas *Contract* 32.

²⁸⁷ See Boma 29 September 1903 *Jur EIC* I 284; Cons Sup 28 January 1921 *Jur Congo* 4; Léo 8 January 1924 *Rev Doct Jur Col* 278.

²⁸⁸ Kalongo *Obligations* 37.

²⁸⁹ See Ghestin *Formation* 35. For an illustration, see Article 237 UAGCL, second and third sentences, which oblige contracting parties to comply with the requirements of good faith and forbids them from excluding or limiting the impact of the good faith obligation. See also Articles 250 UAGCL (delivery obligation); 252 al. 2 (conclusion of a contract of carriage); 253 (date of delivery); 255 (conformity obligation); 260 (guaranty against third party claims obligation); or Article 263 UAGCL (payment of the price). Compare these to Articles 279 al. 1 CCO; 280; 303; 318; and Article 327 CCO defining the obligations of the parties. Article 303 specifies, for example,

Although no stipulation as to warranty has been made at the time of the sale, *the seller is obliged de jure to warrant the purchaser* against a dispossession of the thing sold which he may suffer in whole or in part, or against encumbrances alleged on that thing, and not declared at the time of the sale (emphasis added).

always judged to be null and void any clause contrary to the public interest.²⁹⁰ Compared with the first group of provisions, the notion of public interest is practically protected by a minor number of provisions.²⁹¹ That is the case for rules governing the ability to contract²⁹² or the defects in consent.²⁹³ Any provision's imperative character will result from its words. To quote only Article 30 CCO, it specifies that "an obligation *without cause, or with a false cause, or with an illicit cause* 'may not have any effect' (emphasis added)."²⁹⁴

To sum this up, under Congolese law, most of the rules in the contractual sphere, including commercial sales contracts, fall into the category of supplementary rules. This has as a consequence that the freedom of contract really constitutes the heart of contract. Of course that principle is not unique to Congolese law. It is in force in other jurisdictions regardless of their legal system.²⁹⁵ Similarly, the freedom of contract is not the only principle governing the law of contract; it co-exists with several other principles, among which is party autonomy or the autonomy of the will.²⁹⁶

²⁹⁰ See Léo 8 January 1924 *Rev Doct Jur Col* 278.

²⁹¹ Cf. Nicholas *Contract* 33.

²⁹² See Articles 23-24 CCO, and Articles 211 to 329 CFC.

²⁹³ See Articles 9 to 22 CCO.

²⁹⁴ With regard to defects in consent, however, Article 18 CCO *in fine* indicates just that agreements contracted by error, violence, or deception are not automatically void; "They give rise to an action in nullity or in rescission."

²⁹⁵ On South African law, see Section 3.3.3 below; on the CISG, see Article 6 which reads: "The parties may exclude the application of the Convention or (...) derogate from or vary the effect of any of its provisions." For the relevance of the freedom of contract principle under the CISG, see, among others, Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 101; Schwenger/Hachem in Schlechtriem/Schwenger *CISG* 103-106.

²⁹⁶ The concepts of "party autonomy" and "autonomy of the will" will be used interchangeably.

2.3.3 Autonomy of the Will

2.3.3.1 Substance of the principle of the autonomy of the will

The principle of the autonomy of the will is neither explicitly expressed in the CCO nor in the OHADA Commercial Act as clearly as the freedom of contract is.²⁹⁷ It proceeds rather from a philosophical theory according to which the human will creates its own law and its own obligation.²⁹⁸ According to a number of scholars, the starting-point of the theory of the autonomy of the will “is the freedom of the individual, which can be curtailed only by free will, either in the original social contract or, within society, by individual acts of will.”²⁹⁹ Thus, an “autonomous will means a will which determines its rules for itself.”³⁰⁰ Specifically, “contractual obligation has its source in the will of the parties which alone and freely creates the contract and all its effects.”³⁰¹ It is, thus, acknowledged that, where the circumstances in which the contract was formed are silent as regards the intention of the parties, the court should read between the lines of the contract to find what the will of parties was.³⁰²

Compared to the freedom of contract, the autonomy of the will also reflects the individual and liberal vision of the Napoleonic era.³⁰³ It also constitutes one of the fundamental principles that govern the whole law of contracts. As some commentators have said, although the Code does not emphasise the word “will”, both

²⁹⁷ A similar situation is also observed under Belgian and French civil codes.

²⁹⁸ Khan-Freund/Lévy/Rudden *Source-book* 318; Kalongo *Obligations* 37; Mubalama *Obligations* 113.

²⁹⁹ Nicholas *Contract* 31; Herbots *Contract* 51.

³⁰⁰ Rouhette *Obligatory Force* 38 39; see also Elis 25 October 1913 *JDC* 1921 341 whereby, “under a contract, the will should tend to create a legal obligation.”

³⁰¹ *Ibid.*

³⁰² Comm Brux 19 March 1926 *Jur Col* 1927 36; Elis 11 March 1916 *Jur Col* 1926 334; Elis 10 April 1926 *Jur Kat II* 183.

³⁰³ See Gordley *Doctrine* 214; Khan-Freund/Lévy/Rudden *Source-book* 318. As Rouhette has said, although the principle of the autonomy of the will “was only formulated at a late date (in the last quarter of the nineteenth century), it had reigned as (...) albeit implicit sovereign since the Napoleonic Code, and that, even if it has undergone a crisis, that is now overcome.” See Rouhette *Obligatory Force* 38 39.

judicial decisions and scholarly writings insist on the fact that “the basis of the law of contract is *la volonté*.”³⁰⁴ Rouhette specifies this by stating that,

The will of parties is first of all the foundation of the contract. The making of the legal act is regulated by the principle of consensualism – the wills can be expressed in any manner and they are sufficient to create a contract. In addition, they must fully exist, be free, and be enlightened: where they are vitiated the basis of the institution is absent and there is no valid contract.

The will of the parties is, furthermore, the measure of the consequences of the contract. The contracting parties freely determine their respective rights and duties, and so, to establish the content of the contract, it is necessary to examine their will. Once this will is discovered, the contract has an absolute force. What was willed commands definitive recognition, and, in particular, the judge has no power to revise the contract if it seems to him to be unjust.³⁰⁵

Following from the above explanation, the principle of freedom of contract and the principle of autonomy of the will are basically close to one another. Without any need to debate which of the two principles has precedence,³⁰⁶ it is important to note that both principles are based on the idea that “a man may be bound only by his own will; he is the best judge of his own interests; and, therefore, the best rule is that freely agreed by free men.”³⁰⁷ Such is the meaning of Article 33 al. 1 CCO which confers on contracts formed lawfully the same effect as is given to a statute.³⁰⁸

³⁰⁴ Khan-Freund/Lévy/Rudden *Source-book* 318; Rouhette *Obligatory Force* 38; see, in the same sense, Elis 25 October 1913 *JDC* 1921 341; Léo 19 January 1926 *Jur Col* 1928 177; Cass B 14 June 1928 *RJCB* 1928 294.

³⁰⁵ Rouhette *Obligatory Force* 38.

³⁰⁶ On the subject, two approaches have sometimes been adopted as solutions. Firstly, individual autonomy is usually seen as a supreme social value and a central pre-condition for individual freedom of contract. Considered in this way, party autonomy will arguably precede the freedom of contract. Regarding freedom, it is a fundamental human right that includes, among others, the freedom to enter into contract. Thus, given that the contract constitutes the main source of obligations, the freedom of contract serves as a fundamental basis for party autonomy and, therefore, precedes it. As one can see both approaches seem reasonable. (For further comments, see *Fu Contract* 6-7).

³⁰⁷ Khan-Freund/Lévy/Rudden *Source-book* 318.

³⁰⁸ Article 33 al. 1 provides that contracts formed in the statutory manner have the force of law for contracting parties.

Pursuant to this provision, all contracts lawfully concluded shall be considered as law for the parties,³⁰⁹ regardless of whether or not they have a special designation.³¹⁰

The above makes it clear that the autonomy of the will should be understood as a key principle from which other principles, viz. the freedom of contract, the principle of consensualism, and the binding force of contracting obligations, are derived.³¹¹ This principle governs the contractual field as a whole, including sales contracts. Insofar as the law of sale is concerned, Article 237 al. 1 UAGCL and Article 265 al. 3 CCO defer their effects to the general principles of the law of contract, including the autonomy of the will.

As it is for its predecessor, the principle of the autonomy of the will is sometimes shown by statutory expressions such “as required by the contract”³¹², “in accordance with the contract”,³¹³ or “as agreed upon”³¹⁴ used in the provisions defining the obligations of the parties. It can also be expressed by concepts like “unless there is an agreement to the contrary” or “unless otherwise stipulated”.³¹⁵ The method of determining the will of contracting parties is defined by Article 238 al. 2 UAGCL. This provision requires courts to take into account some factual circumstances of the contract, for instance, previous negotiations reached between

³⁰⁹ For an illustration, see CSJ 3 April 1976 RC 100 BA 1977 65; Kin 28 February 1967 RJC 1968 No. 1 54; Cass B 14 June 1928 RJCB 1928 294.

³¹⁰ Read with Article 7 al. 1 CCO; and Cass B 14 June 1928 *Jur Col* 67.

³¹¹ See Ghestin *Formation* 35.

³¹² See Article 253 al. 1 UAGCL which asks the seller to deliver the goods at the date “set by the contract” or determined “according to its stipulations”. See also Article 254 UAGCL which obliges the seller to perform his/her delivery obligation at the time, place, and in the form “required in the contract”. Compare this with Article 327 CCO.

³¹³ See Article 250 UAGCL whereby, the seller is bound by “the conditions provided for in the contract” (...); and particularly Article 255 al. 1 which requires the seller to deliver the goods in the quantity, quality, specifications, and packaging “in accordance with the stipulations of the contract”.

³¹⁴ See Articles 263 al. 1 and 268 UAGCL for which the buyer must pay the “price agreed upon”, at the “date agreed upon”; see also Article 259 al. 2 UAGCL (time limit non-conformity notification). Compare these with Articles 287; 288; 293; 294 al.1; 295; 333; and Article 334 CCO.

³¹⁵ See authorities under Note 284 above.

the parties, practices established among them, or practices regularly observed in the sector of activities concerned.³¹⁶

It is important to note that, in the same way the party autonomy principle governs national contracts; it is also concerned with international transactions. In these kinds of contracts, the principle of the autonomy of the will aims to allow contracting parties to choose the law to which their contract is subject as they see fit. To give an example of this, the freedom of choice of the law governing the contract results from the phrase *unless when the parties provide otherwise* introducing Article 11 al. 2 PILD.³¹⁷ So, parties are allowed to depart from national law provisions by choosing their own legislation because, as mentioned in section 2.3.2, most of contractual legal provisions provide merely supplementary rules.³¹⁸ In other words, at the time the contract is concluded, or subsequently, the seller and buyer may freely agree upon the law which will govern their rights and obligations.³¹⁹ The choice of the applicable law may be expressly stated; it may derive from the terms of the contract too. As Munoz has stated, the election of a foreign law can be articulated either in a clause incorporated into the contract or as a later agreement after the conclusion of the contract.³²⁰ In accordance with Article 238 al. 2 UAGCL, in the absence of an express choice of law, this can be deduced from the behaviour and conduct of contracting parties.³²¹ Nevertheless, the opportunity for parties to choose

³¹⁶ See, in the same sense, Comm Brux 19 March 1926 *Jur Col* 1927 36; Elis 11 March 1916 *Jur Col* 1926 334; Elis 10 April 1926 *Jur Kat II* 183. It was ruled in Léo 29 September 1925 *Jur Col* 1929 84, however, that the intention of parties should be determined from factual circumstances on condition that contractual terms are ambiguous and likely to render the will uncertain.

³¹⁷ For application, see Léo 8 January 1924 *Jur Col* 278 and *Belg Jud* 1931 118; Cons Sup 19 July 1913 *Jur Congo* 343; Cons Sup 28 January 1921 *Jur Congo* 41; De Burlet *International* 283.

³¹⁸ Cf. Boma 29 September 1903 *Jur EIC I* 284; Cons Sup 28 January 1921 *Jur Congo* 4; Léo 8 January 1924 *Rev Doct Jur Col* 278.

³¹⁹ De Burlet *International* 283.

³²⁰ Munoz *Contracts* 28; see also Van Calster *Private Law* 132.

³²¹ Cf. Article 238 al. 2 UAGCL and cases quoted in Note 315 above. In one decision, dated 8 January 1924, the Appeal Court of Kinshasa ruled that contracting parties have the freedom to choose legislation different from the law of the place where the contract was concluded. Such option, according to the court, should be read, for instance, through the insertion into the contract of one clause prohibited by the law of the place of the contract. (See Léo 8 January 1924 *Belg Jud* 1931 118). Among other factors contributing to finding an implicit choice of the law governing the contract, one may mention “the indirect reference to a law in the contract, the choice of a particular

a foreign law is, in principle, limited to international contracts so that domestic contracts should normally be ruled by national law.³²²

In a few words, the principle of the autonomy of the will postulates that parties are free to negotiate and conclude the contract according to their liking. In spite of its importance, however, the liberty of parties is sometimes restricted.

2.3.3.2 Restrictions to the autonomy of the will

The autonomy of the will is particularly limited by mandatory rules, and public policy and morality requirements. With regard to public policy and morality considerations, Article 6 of the French and Belgian civil codes emphasises that “statutes relating to public policy and morals may not be derogated from by private agreements”. The Congolese legislator did not insert such an express provision in the civil code. A similar ruling may, however, be read from Article 15 PILD which denies legal effects to conventions and private agreements for what they contain which is contrary to public law or to laws that intend to protect social interest and public morality.³²³

In addition to this provision, restrictions to party autonomy have been ruled by one Appeal Court of Kinshasa earlier decision whereby, “the autonomy of the will is (...) subordinate to the observance of public policy or morality, as they are considered for the Congo by Congolese legislation.”³²⁴ In relation to the above ruling, as long as an agreement is suited to public policy requirements, it should prevail over a statute even if it is at variance with that regulation.³²⁵ The notion of “public policy and morals” is one of the important themes of the Congolese law that the 2006

law in previous contracts, the language of the contract or the election of a particular court to settle the dispute.” (See Munoz *Contracts* 28.)

³²² Held in Boma 29 September 1903 *Jur EIC* 284 that, a contract concluded in the DRC should be ruled by Congolese law unless contrary to the intention of the parties.

³²³ Article 15 PILD.

³²⁴ Léo 8 January 1924 *Jur Col* 278; see also Piron 53 & 101; Katuala *Code* 35 & 36; Mubalama *Obligations* 114.

³²⁵ See Léo 25 February 1930 *Jur Col* 1932 112.

Constitution quotes extensively. Although it mentions the phrase “public policy and morality” in eleven provisions,³²⁶ however, the Constitution does not provide any detailed content. In the context of the civil code, likewise, Article 32 CCO states merely that “A *cause*³²⁷ is unlawful where it is prohibited by legislation, where it is contrary to ‘public morals or to public policy’,” without any further comments.

With regard to the expression “public policy”, Battifol argues that a rule is concerned with public policy when individuals cannot derogate from its provisions by contract.³²⁸ In the same way, Durieux describes the concept “public policy” as a sum of requirements to which the legislator did not allow parties to make an exception because those requirements relate to an established moral, political, or economic order.³²⁹ From these explanations, one may broadly define the expression “public policy” as a set of rules that covers the essential interests of the state or the community. Such would be the case for the Constitution, criminal, administrative, and fiscal statutes, or for private law statutes considered essential for the protection of the individuals, the family, and property.³³⁰ It is authoritatively stated that the needs of public policy refer, in the field of private law, *inter alia*, to rules which regulate the legal bases on which the economic, social, and moral values of that society are constructed.³³¹

As regards the concept “morality”, it consists of a set of moral values considered indispensable for any community’s development. Like for public policy, the requirements of “morality” may vary from community to community and from time to time.³³² Usually, the notion “morality” is included in the concept of “public

³²⁶ Cf. Articles 6, 16, 20, 22, 23, 24, 25, 46, 153, 182, and Article 207 of the Constitution.

³²⁷ The “cause” is one of essential elements to the enforceability of a contract consisting of an adequately serious reason for a person to enter into a contract. It is parallel in function to “consideration” in Anglo-American contracts, and often similar in factual bases. See Glossary in Crabb *Constitution* 381 *v*° cause. Article 32 CCO duplicates Article 1133 FCC. The requirement as for cause has been abandoned by the OHADA DUACL.

³²⁸ Battifol *Privé* 409.

³²⁹ Durieux *Ordre Public* 7.

³³⁰ See Munoz *Contracts* 29 in Fn39.

³³¹ Cf. Cass B 9 December 1948 *JT* 1949 228.

³³² See Kalongo *Obligations* 38; Mubalama *Obligations* 115.

policy”. Thus, owing to the fact that the autonomy of parties is subject to public policy and morality requirements, the Appeal Court of Kinshasa has ruled, since 1924, that “all agreements in conflict with the needs of morality and public policy are valueless and void.”³³³

With regard to the meaning of the phrase “public interest”, one has to bear in mind the fact that most contractual norms are default rules aimed at filling gaps in the contract. Contracting parties can, therefore, legally depart from them without penalty. In contrast to this, other provisions are mandatory rules which cannot be excluded by parties. It is this last category of norms that covers what is known as “public interest”; private agreements that interfere with them should not have legal effect.³³⁴

In brief, as is for freedom of contracts, the autonomy of the will is one of the cornerstones of the law of sale. Pursuant to that principle, the seller and buyer freely regulate their respective rights and obligations; they establish the content of the contract so that it is always necessary to examine what their will was. The only restrictions to that freedom are the requirements of public policy, morality, and public interest. The autonomy of will, furthermore, appears to be the foundation of all other contract law principles, among which is the principle of consensualism.

2.3.4 The Principle of Consensualism

2.3.4.1 General remarks

This section intends to explain the different theories of contract before examining the specific approach to contract under Congolese law. Before doing so, it is necessary to note immediately that the issue of theories of contract seems to have attracted much less debate in the French, Belgian and Congolese academics. South African law literature will, thus, be useful in this regard.

³³³ See Léo 8 January 1924 *Jur Col* 278.

³³⁴ *Ibid*; see also *Fu Contract* 151.

At the outset, the basis of a contract is either consensus, viz. “an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contractants that there is consensus.”³³⁵ Article 54 CCO states in this regard that, when interpreting a contract, it is necessary to seek out what the “common intention” of the parties was rather than adhere to the literal meaning of their words. The ruling in Article 54 CCO is in conformity with the general belief that consensus forms the basis of the modern law of contract. Following on this statement, the principle of consensualism means that contracts are concluded by mutual consent.³³⁶ As Van der Merwe and others have said, “a contract comes into existence if the parties are agreed (...) on creating between themselves an obligation (...), as well as on all its particulars, such as its content and subsidiary features.”³³⁷ The way to determine the consent of parties has given place to a general theory known as the *will theory*. There is a rule, however, that the intention of contracting parties is not the only ground on which their responsibility should be based. Accordingly, the first theory has been complemented by further contractual theories, namely the *declaration theory* and the *reliance theory*.³³⁸

With regard to the *will theory*, also known as the “consensual theory,”³³⁹ “subjective theory” or “intention theory”³⁴⁰, it locates the foundation of any contract in the individual will. According to this theory, the enforceability of contracts is subject to the intentions of parties. Thus, contracting parties are bound by their agreement because they have intended to be bound in that way. Owing to the fact that the intention of the parties forms the basis of contract liability, any contract should be construed as to have validity.³⁴¹ To use the words of Joubert, “The parties

³³⁵ Van der Merwe et al *Contract* 17.

³³⁶ See Zimmerman *Obligations* 559; Van der Merwe et al *Contract* 19.

³³⁷ Van der Merwe et al *Contract* 19; see also Zweigert/Kötz *Comparative* 402; Herbots *Contract* 47.

³³⁸ See Hutchison in *Contract* 15; Christie/Bradfield *Contract* 1; Van der Merwe et al *Contract* 19.

³³⁹ See Joubert *Contract* 79.

³⁴⁰ Christie/Bradfield *Contract* 1; Kritzinger 1983 *SALJ* 47.

³⁴¹ Read Article 54 CCO with Article 55 CCO. Article 55 declares that, in circumstances where a clause is likely to admit a double reading, it should be understood in the sense with which it may have some effect, “rather than in the meaning with which it could not produce any.”

must not only intend to be bound by their statements but must also agree as regards the contents of the contract.”³⁴² Such being the principle, the purpose of the law of contract should then be to endorse the wills of the parties.³⁴³ In the case of doubt, any ambiguous clause should be interpreted in the way that best suits the subject matter of the contract.³⁴⁴ That is to say that, when seeking to determine whether a contract has been formed or not, the will theory requires finding out whether the minds of the parties actually met.³⁴⁵ This theory postulates, in other words,

(...) an extremely subjective approach to contract: consensus is the sole basis of contractual liability, with the result that if there is no genuine concurrence of wills, there can be no contract. Thus, whenever a party is mistaken about a material aspect of a proposed agreement, there is no binding contract.³⁴⁶

The intention theory has, however, been criticised on the grounds that it fails to protect the reasonable expectations of a party who has relied on the objective appearance of consensus created by the other party’s conduct.³⁴⁷ Hutchison remarks that this approach appears to be economically inappropriate for it disregards the need for legal certainty in business transactions.³⁴⁸ In order to overcome such disadvantages, additional theories, such that of the declaration or objective theory have been advocated.

In its general understanding, *the declaration theory* is perceived as the opposite of the intention theory. The declaration theory assumes that the wills of the parties alone are insufficient to determine their contractual liability. According to this rule, the assessment of an agreement rests on the concurrence of the declared

³⁴² See Joubert *Contract* 79.

³⁴³ Hutchison in *Contract* 15.

³⁴⁴ Cf. Article 56 CCO; see also Léo 29 September 1925 *Jur Col* 1929 84 and 19 January 1926 *Jur Col* 1928 177 whereby, one should seek out the intention of parties from the facts or the circumstances of the case on condition that the terms used are as ambiguous as to alter the content of the contract.

³⁴⁵ Hutchison in *Contract* 19; as Christie and Bradfield (*Contract* 1) have said, there must be a “consensus ad idem.”

³⁴⁶ Hutchison in *Contract* 15.

³⁴⁷ See Van der Merwe et al *Contract* 26.

³⁴⁸ Hutchison in *Contract* 15

intentions of the parties.³⁴⁹ To use Hutchison's words, "what is important for contract is not what the parties think, but what they say or do: the external manifestations of their wills. Thus, the true basis of contract is to be found in the concurring declarations of the parties."³⁵⁰

Further to the will and the objective theories, scholars have established a third theory of contract, the so-called *reliance theory*. By way of definition, Cockrell says, "To rely on someone is to alter one's position in the belief that another person's words or acts can be depended upon with confidence: it is to 'count on', or to 'trust', another person."³⁵¹ Thus, with regard to the reliance approach, the basis of a contract is to be found in the reasonable expectations of a party who has relied on the objective communication of consensus displayed by the other party's words or conduct.³⁵² According to the reliance theory, an agreement is not constituted by the consent of parties alone but rather by their external manifestation of consensus as well.³⁵³ In this respect, the method in view should be comprehended "as a supplement to the will theory, correcting its deficiencies, and affording an alternative basis for contract in circumstances where the minds of the parties have not truly met."³⁵⁴

The preceding development leaves one with the question of which of the subjective or the objective approach prevails under Congolese law.

³⁴⁹ Ibid.

³⁵⁰ Hutchison specifies,

In determining whether agreement has been reached, one should adopt a position of detached objectivity, as if one had been a neutral observer listening at the keyhole, or a fly on the wall, while the negotiations were taking place. If judged purely objectively, one party has made an offer that has been unambiguously accepted by the other party, there is a contract, irrespective of what either party actually had in mind at the time.

See Hutchison in *Contract* 15; quoting in fn29 Howarth "The meaning of objectivity in contract" (1984) 100 *LQR* 265; Vorster JP "A comment on the meaning of objectivity in contract" (1987) 103 *LQR* 274; see also Christie/Bradfield *Contract* 1.

³⁵¹ Cockrell 1993 (4) 1 *Stell LR* 41.

³⁵² See Christie/Bradfield *Contract* 1; Joubert *Contract* 80; Van der Merwe *Contract* 38; Kerr *Contract* 23; Kritzinger 1983 *SALJ* 47.

³⁵³ Cf. *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 715-716.

³⁵⁴ Hutchison in *Contract* 16.

2.3.4.2 The Congolese law approach to contract in detail

In dealing with the issue of the enforceability of contract under Congolese law, the OHADA Commercial Act, the CCO, and case law appear to have favoured the will theory also known as the subjective approach. In the DRC, the consensual principle is expressed by Article 54 CCO which speaks of the “common intention of the parties”, and by Article 240 UAGCL which states that commercial sales contracts “are not subject to any requirements as for form.”³⁵⁵ Consequently, these types of contracts may be proven by any means. It does not matter whether the contract be in writing or made orally; what is important is the meeting of the will of parties, viz. their *consensus ad idem*.³⁵⁶

It should be noted that the ruling in Article 240 UAGCL is greatly linked to the rules under civil law as stated by Articles 37 al.1 and 264 CCO. As regards the first provision, it formulates as a principle that any obligation which purports to delivery “is formed by the sole consent of contracting parties.”³⁵⁷ Thus, given that sales contracts impose upon the seller, among other obligations, to deliver the property sold and transfer ownership to the buyer,³⁵⁸ Article 264 CCO emphasises, “[The sale] is completed between the parties and ownership is automatically acquired by the buyer *as soon as they have agreed upon the thing sold and the price*, although that thing has not yet been delivered nor the price paid (highlights added).”³⁵⁹ Following from these provisions, the meeting of consents appears then to be a yardstick to determine whether or not a contract was concluded.

³⁵⁵ As stipulated by Article 240, “The Commercial sales contract may be in writing or oral; it is not subject to any requirement as to form. It may be proved by any means.” Compare this with Article 11 CISG.

³⁵⁶ For authorities requiring the “common intention” of the parties for the enforceability of any contract, see *Katuala Code* 46; and *Lukoo Droit Civil* 256-258.

³⁵⁷ According to Article 37 al. 1 CCO, “The obligation of delivering a thing is complete by the consent of contracting parties alone.” Compare with Article 1138 al. 1 FCC.

³⁵⁸ Read with Article 263 CCO which defines a sale as an agreement by which the seller is bound to deliver an item and the buyer to pay for it.

³⁵⁹ For application, see *Kisangani* 15 April 1980 RCA 487 *Jacques Alber v Malisawa Tshimbalanga*; and *Tricom Kin/Gombe* 28 February 2012 RCE 2183 *Kabala Katumba v Socimex* (unreported decisions).

Further to the Code, the requirement regarding the consent of the parties is also supported by the case law. On the subject, the former Appeal Court of Elisabethville,³⁶⁰ ruled for instance that three elements are essential for the validity of any contract of sale, the thing to be sold, the price, and “consent of the parties”.³⁶¹ According to the same Court, once parties have reached agreement on these fundamentals, the contract is immediately valid so that the buyer cannot revoke it unilaterally anymore without the acquiescence of the seller.³⁶² The Supreme Court is of the similar opinion too. In one of its decisions, dated 20 November 1976, the highest court of law held that the sale is fulfilled subsequent to consensus on the thing sold and the price.³⁶³ Hence, a clause whereby the transfer of ownership is delayed until payment of the entire price constitutes a mere conditional clause lacking effect in the enforceability of the contract.³⁶⁴

From the details above, it is clear that Congolese law has traditionally adopted the subjective approach to contract.³⁶⁵ Under that legal system, sales contracts enter into force by the single meeting of wills or the mutual consent of the parties. In other

³⁶⁰ This court will be referred to in this study as the Appeal Court of Lubumbashi.

³⁶¹ Elis 19 November 1932 *RJCB* 352.

³⁶² Elis 6 December 1913 *Jur Col* 1924 166.

³⁶³ CSJ 20 November 1976 *BA* 1977 188.

³⁶⁴ It was ruled in the case above that, “Par l’accord des parties sur la chose et le prix d’un contrat de vente, celui-ci est parfait de telle sorte que la stipulation par laquelle l’acheteur ne serait propriétaire qu’après paiement intégral du prix, s’analyse comme une simple condition suspensive de l’obligation de transfert de propriété.” (“By an agreement on the thing sold and the price, the contract of sale is perfect so that a clause by which the buyer would acquire ownership of the item bought after full payment of the price, is considered as a simple condition lacking effect on the transfer ownership obligation.”)

³⁶⁵ It may be assumed that provisions regulating the interpretation of contract supplement the “subjective theory” with an “objective approach” to contract. Confirmation of this is the fact that, while Article 54 CCO requires courts to seek out “the common intention” of parties, it implicitly directs judges to take into account objective factors, e.g. to interpret unclear terms as to bring them into line with the meaning of the contract or to confront them with usages admitted in commercial dealings. Cf. Articles 55 to 62 CCO; compare to Articles 1157 to 1164 Napoleonic civil code. In addition to interpretive provisions above, Article 34 CCO obliges contractual parties to perform their obligations resulting from the contract, not only as expressly promised, but also according the dictates of “equity, usage, and law” depending on the type of the contract. Simply, since it is not so easy to discern the intention of the parties, judges have “to focus on ‘objective’ considerations” for them to consider the means the terms of the contract should be understood by a reasonable man in a particular context. See Zweigert/Kötz *Comparative* 402.

words, the consent of the parties must be professed. It cannot, in principle, be derived from the conduct or silence of one party.³⁶⁶ To give an example of this, an offeror should know that the offeree has expressed his/her consent to the proposed contract only at the time that the letter of acceptance reaches him/her;³⁶⁷ otherwise, there is no validly concluded contract.³⁶⁸

As mentioned in the precedent section, the subjective approach gives the impression of not being economically suitable for it neglects the need for legal certainty in business transactions. Owing to such shortcomings, some legal systems have supplemented it by a more objective approach such as the reliance theory.³⁶⁹ According to the latter theory, the intention of parties is not necessarily communicated; it may well be deduced from their actions or conduct. Two provisions of the OHADA Commercial Act should be quoted in this regard: Article 242 al. 3 relating to the reliance on the offer in case of irrevocability;³⁷⁰ and particularly Article 244 al. 2 relating to the acceptance by conduct.

As far as Article 244 UAGCL is concerned, it starts off by saying that an acceptance becomes effective when it reaches the offeror. Its second section accompanies this general rule with an exception giving effect to acceptances by conduct. As stipulated by that section, if, by virtue of the provisions of the offer, the practices established between the parties, or usages,³⁷¹ the offeree may, *without notification to the offeror* (i.e. without communicating his/her consent expressly), “indicate assent by performing an act, acceptance is effective at the moment the act is

³⁶⁶ Kin 28 February 1967 *RJC* 1968 54. Silence may, however, in some particular circumstances amount into a means of expressing one party’s intent. That may happen only in circumstances which give rise to a duty to speak. See Elis 25 October 1913 *Jur Congo* 1921 341; Léo 26 March 1929 *Jur Col* 1930-1931 346.

³⁶⁷ App RU 5 July 1955 *RJCB* 371.

³⁶⁸ But, explanation in footnote 364.

³⁶⁹ For an illustration, see Article 16(2)(b) CISG (reliance on the offer) and Article 29(2) CISG (reliance-including conduct); see also development in Section 3.3.2.3 below.

³⁷⁰ Article 242 al. 3 stipulates: “(...) the offer cannot be revoked (...) if it was reasonable for the offeree to *rely on the offer* as being irrevocable, and the offeree *has acted in reliance of the offer* (highlights added).”

³⁷¹ On the significance of trade usages, see Tricom Kin/Gombe 28 February 2012 RCE 2183 *Kabala Katumba v Socimex*.

performed.”³⁷² As one may see, the ruling under Article 244 is a simple application of the last sentence of Article 240 UAGCL. This provision allows the conclusion of contract to be proved by any means, including conduct, silence, inaction,³⁷³ and legal presumptions.³⁷⁴ The same provision is also connected to Article 243 al. 2 UAGCL dealing with acceptance by any other conduct.³⁷⁵

To summarise this, under modern Congolese law the approach to defining the enforceability of a contract remains the consensual theory. In that sense, a contract is concluded when there is a meeting of minds of contracting parties. With OHADA law influence, however, it is now accepted that the basis of a contract may also be found in the conduct of a party if the other party was reasonable in relying on such behaviour. Specifically, in modern Congolese sales law, the subjective theory is now complemented by the reliance theory, particularly with regard to commercial transactions. So, a contract will bind the parties independently by the means it was formed.

2.3.5 Binding Force of Contractual Obligations

2.3.5.1 Introduction

The principle of the binding force of contractual obligations means that parties must perform the obligations into which they have entered.³⁷⁶ Thus, although parties are not obliged to take part in contract, once they have concluded one, they are bound by their commitments. This rule is expressly stated by Article 33 al. 1 CCO for which, “Agreements lawfully formed take the place of the law for the parties.” Two headings

³⁷² Compare this with Article 18(3) CISG which mentions the dispatch of goods or the payment of the price as conducts expressing the other party’s consent.

³⁷³ Cf. Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 186.

³⁷⁴ For an illustration, see Tricom Kin/Matete 22 June 2011 RCE 486 *Jack Kalanga v Cinat Sarl* (unreported decision); see also the *Kabala Katumba v Socimex* case.

³⁷⁵ According to Article 243 al. 2, “A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.” To this we will return in Section 5.3.3 dealing with the meaning and effectiveness of acceptances.

³⁷⁶ Hartkamp/Tillema *Contract* 34.

that may need further scrutiny under the provision above are “agreements lawfully formed” and “take the place of the law”.

2.3.5.2 Meaning of the phrase “Agreements lawfully formed”

First of all, an agreement lawfully made is one that meets the requirements for validity. Those requirements are provided by Article 8 CCO which envisages four conditions for a contract to be valid: (a) the consent of contracting parties; (b) their capacity to contract; (c) an object which forms the subject matter of the agreement; and (d) a lawful *cause*.³⁷⁷

The consent

It was mentioned in the previous section that consensus is the central substance in the existence of a contract. As a result of this, Article 8 CCO requires the existence of consent as a first condition for the validity of contract. The provision speaks, however, of the “consent of the party who commits himself”, viz. the party who is obligated. This phrase has been interpreted as referring to “the consent of each party having an intention to be legally bound.”³⁷⁸ Hence, a contract is formed when there is meeting of consent of both contracting parties.

Consent may exist, but it may be defective. Such is the meaning of Article 9 CCO according to which the requirement for valid consent is met only if there are no defects in its statement; otherwise it is damaged.³⁷⁹ The provision enumerates some events that may vitiate the intent, namely mistake, duress, and fraud. As specified by it, “a consent given by mistake or the one extorted by duress or fraud” cannot amount

³⁷⁷ Article 8 CCO stipulates,

Four conditions are essential for the validity of an agreement:

- The consent of the party who commits himself;
- His capacity to contract;
- A certain object which forms the subject matter of the commitment; and
- A lawful cause in the obligation.

³⁷⁸ See Tallon Contract 205 211; see also Elis 25 October 1913 *JDC* 1921 341.

³⁷⁹ Article 9 CCO stipulates: “There is no valid consent, where the consent was given (...) by error, or where it was extorted by duress or abused by deception.”

to valid consent. In effect, where the consent is vitiated, the contract is voidable; such circumstances give rise to an action in nullity.³⁸⁰ Alternatively, when there is no consent at all the contract is void.³⁸¹ In any case, the classical way for a party to express its consent will derive from the process of contracting by means of offer and acceptance as explained in Chapter 5 below.

Capacity

In general, everybody has legal capacity to enter into contract.³⁸² This principle is formulated by Article 23 CCO which recognises that any person is legally capable of contracting except where he/she has been declared incapable by a specific statute.³⁸³ Normally, the legal capacity issue is dealt with in the law of persons and family, viz. the 1987 Family Code.³⁸⁴ Article 215 CFC declares as “incapable” particularly non-emancipated minors and majors of unsound mind. These categories of people are deprived of their capacity to take part in contract unless they are assisted or represented.

A question occurs of whether people with restricted capability may be involved in commercial transactions. The answer is negative. In effect, Article 6 of the Commercial Act makes it clear that any person or corporation undertaking commercial transactions must have the legal capacity to do so. Article 7 compliments this by excluding minors from becoming commercial operators and from carrying

³⁸⁰ See Article 18 CCO which stipulates that agreements contracted by error, duress or deception are not automatically void; they give rise to an action in nullity or in rescission ruled by Article 196 al. 2 CCO.

³⁸¹ Tallon Contract 205 213; see also De Bondt Contracts 222 228.

³⁸² Legal capacity is heard as the aptitude of a person to bear a number of rights and duties or to participate as a legal subject in the life of the law. The principle established in this regard is that, “every legal subject (...) has the capacity to have rights and duties, although the extent of this capacity and the particular rights and duties possessed at a certain time by virtue of this capacity may vary from one person to another.” See Himonga Persons 145 146; see also Kuschke Capacity 149; Church/Hosten Persons 542 547; Zweigert/Kötz *Comparative* 348.

³⁸³ As stated by Article 23 CCO, “Any person may enter into a contract, unless it has been declared incapable of it by law.”

³⁸⁴ See Articles 211 to 315 CFC. The subject is, then, in principle, beyond the present discussion. For further developments on the legal capacity theme, see Kruger/Skelton *Persons* 60-65; Van Heerden/Cockrell/Keightley *Persons and Family* 65-75; Zweigert/Kötz *Comparative* 348-355.

out business.³⁸⁵ In the same way, Article 234 al. 1 UAGCL limits its field of operation to contracts of sales of goods between “traders, natural, or legal persons.”³⁸⁶ In other words, the key condition required to be subject to the Commercial Act is being a merchant,³⁸⁷ viz. a person whose regular occupation consists in carrying out commercial transactions.³⁸⁸ Only people with legal capability may acquire such a quality and then perform officially commercial contracts. With regard to legal persons, they obtain legal capacity from the day they are registered.³⁸⁹

Existence of an object

The third condition required by the civil code for a contract to be valid is the presence of “an object which forms the commitment subject matter.” This requirement is well explained by Article 25 CCO which describes the object of a contract as anything that one party promises to transfer, to do, or not to do.³⁹⁰ General rules relating to the contract subject-matter are established under Articles 25 to 29 CCO. Pursuant to these provisions, the object of a contract is essentially the answer to the question, “What is owed?”³⁹¹ In that sense, the object of a contract of sale will be the thing sold,³⁹² and, more recently, goods.³⁹³ As far as the property sold is concerned, Article 275 CCO formulates as general principle that any item subject to commercial exchange may be sold, except when its alienation has been prohibited by specific

³⁸⁵ For a list of incompatibilities between commercial dealings and other professions, see Articles 8 to 12 UAGCL.

³⁸⁶ For implementation, see Cote d’Ivoire First Instance Abidjan 25 April 2001 Case No. 327 *Sitbai v Cfd-CI* [<http://www.ohada.com/jurisprudence/ohadata/J-02-111.html>] (accessed 2-4-2013).

³⁸⁷ See Santos/Toe *Commercial* 339.

³⁸⁸ See Article 2 UAGCL.

³⁸⁹ See Burkina Faso 4 April 2004 Grande Instance Bobo-Dioulasso Case No. 74 *Société d’Affrètement et de Transport (SAT) v A Barro* [<http://www.ohada.com/jurisprudence/ohadata/J-05-234.html>] (accessed 2-4-2013); applying Article 98 of the Commercial Companies and Economic Interest Groups Uniform Act.

³⁹⁰ Article 25 CCO says: “Any contract has for object a thing which one party is obligated to transfer, or which one party commits to do, or not to do.”

³⁹¹ See Tallon Contract 205 216.

³⁹² See Article 263 CCO.

³⁹³ See Article 234 al. 1 UAGCL.

laws.³⁹⁴ The principle so stated is one of mandatory rules that “the sale of a thing prohibited is void albeit the buyer was aware of the defect.”³⁹⁵ Further to the prohibition of things out of commerce, the thing to be sold must also be in existence, determined or at least determinable,³⁹⁶ and belong to the seller.³⁹⁷ With regard to the concept “goods”, it is discussed in Section 2.4.3 below.

The cause

In contrast to the previous conditions, the concept of “cause” is not easily described. This is a contentious notion which has sometimes been referred to as “one of the most uncertain ideas of civil law”.³⁹⁸ Despite such difficulty, this concept may objectively be understood as “the reason for the making of the contract or the purpose pursued by the obligation.”³⁹⁹ To exemplify this, under a bilateral contract the cause of the first party’s obligation is represented by the other party’s obligation. In the case of sales contracts, “the cause of seller’s obligation to deliver the goods or to transfer their property is constituted by the buyer’s obligation to pay the price of the goods”⁴⁰⁰ and *vice versa*. The legal regime of “cause” is determined by Articles 30 to 32 CCO for which the cause must exist, be real, and licit;⁴⁰¹ otherwise the contract would not produce legal effect.⁴⁰² Simply, the requirement for “cause” has a double

³⁹⁴ Article 275 CCO is a simple application of Article 27 CCO for which only things subject to commercial dealings may form the object of individual transactions.

³⁹⁵ Cf. Cass F 28 January 1931 *DH* 1931 162; quoted by *Katuala Code* 169; and Piron 123.

³⁹⁶ See Article 28 CCO.

³⁹⁷ See Article 276 CCO.

³⁹⁸ See Youngs *Comparative* 511; see also Tallon *Contract* 205 217; Munoz *Contracts* 79. As mentioned in footnote 326 above, the concept “cause” is one of essential elements to the enforceability of a contract consisting of an adequately serious reason for a person to enter into contract. It is similar to the Anglo-American “consideration” requirement. The cause as well as consideration is not required for the validity of contracts under the CISG. See Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 71.

³⁹⁹ See Youngs *Comparative* 511. De Bondt (*Contracts* 222 229) describes it as “the concrete and decisive motives and objectives for the parties to enter into a contract.”

⁴⁰⁰ Munoz *Contracts* 80.

⁴⁰¹ Following from Article 32 CCO, a cause is unlawful where it is prohibited by legislation, or where it is in conflict with public policy and morality rules. There are authorities which state that an illicit cause renders the contract null and void. See L’shi 13 August 1971 *RJC* 1972 No. 1 64; Elis 17 September 1938 *RJCB* 1938 208; Léo 15 June 1926 *Jur Col* 1929 95.

⁴⁰² As stated by Article 30 CCO, “An obligation cannot have any effect if it is without cause, or based on a false cause or an illegal cause.”

purpose: denying validity to contracts which pursue an illegal or immoral purpose; and ensuring that in bilateral contracts the obligations of parties are interdependent.⁴⁰³

Associated with its equivalent conditions, it is only contracts which comply with the requirements for consent, capacity, object, and “cause”, meaning contracts formed in a statutory manner, that may qualify as agreements legally formed. These types of contracts bind contracting parties⁴⁰⁴ as it is for legislation. It should be said, however, that the OHADA Commercial Act looks as if it does not require any cause for the validity of commercial sales contracts. Within its ambit the common intention of parties resulting from an exchange of offer and acceptance⁴⁰⁵ suffices to generate the contract.

2.3.5.3 Agreements have force of law for the parties

The second phrase within Article 33 al. 1 CCO is that “agreements take the place of the law”. Asserting that contracts take the place of the law means that each of the contracting parties is bound by the contract as it would be by law. Each must perform its obligation at the risk of being forced to do so.⁴⁰⁶ The norm in question is supported by case law for which conventions legally or statutory formed take up a legal meaning independently of the means parties may have named them.⁴⁰⁷

It should be noted that the principle according to which agreements take the place of the law binds both parties and judges.⁴⁰⁸ With regard to parties, they are generally bound by what they have really agreed, i.e. the real content of the

⁴⁰³ Nicholas Introduction 7 19.

⁴⁰⁴ See CSJ 1 October 2005 RA 729 *Sonangolongo v Bosekota & DRC BA 2004-2009 TI 40*, whereby claims based on violation of Article 33 CCO relating to the law of parties were rejected for lack of substance of reasoning since the contract conformed to legal requirements.

⁴⁰⁵ See Articles 241 to 249 of the Commercial Act.

⁴⁰⁶ See Articles 44, 82, and 128 CCO; see also comments by Kalongo *Obligations* 117; Mubalama *Obligations* 117; Wéry *Sanctions* 287.

⁴⁰⁷ See Cass B 14 June 1928 *Jur Col* 67.

⁴⁰⁸ Nicholas *Contract* 146; Ghestin *Formation* 36.

contract.⁴⁰⁹ As between them, Article 33 al. 2 CCO specifies that “[contracts] may be revoked only by mutual consent or on grounds authorised by law.” The Supreme Court has ruled on the subject that, “as long as a contract has not yet been modified by a new agreement, it remains irrevocable for the parties.”⁴¹⁰ Applied to sales contracts, the principle under examination means that a buyer cannot terminate a sale without the consent of the seller.⁴¹¹

As to judges, they are also bound by the contract as they would be by the law. They must conform to the intent of the parties;⁴¹² they cannot modify a contract on the pretext of fairness, for instance.⁴¹³ Judges and arbitrators are as affected by the binding force of contracts as contracting parties themselves. *A propos* of this, the Supreme Court has stated, in a decision dated 3 April 1976, that because “the contract constitutes the law that governs the interpretation and performance of the obligations of the parties, a judgement that underestimates this principle (...) must be repealed in this respect.”⁴¹⁴ Such was also the case for a decision which approved a buyer’s conduct when he resorted to violence to suspend a contract.⁴¹⁵

To sum this up, in restricting its application to contracts legally formed, Article 33 al. 1 CCO indicates that the civil law attaches legal consequences only to

⁴⁰⁹ See CSJ 18 February 2008 RC 2593 BA 2004-2009 TI 77; see also Tricom Kin/Matete 28 November 2012 RCE 706 *Ngebo Ngebu Liwanga J v Fadi Mahmoud Sha’Ban F* (unreported decision). In this case the failure of seller to deliver the whole quantity of goods within six month from the conclusion of the contract was held to infringe the law of the parties. See, in the same sense, Tricom Kin/Matete 20 April 2011 RCE 438/469 *Association Sans but Lucratif - Les Témoins de Jéhovah (LTJ) v ITAL Motors Co* (unreported decision). If, for one reason or another, parties agree to conceal the true nature of their agreement behind the facade of a sham transaction, the hidden agreement is irrelevant for third parties. See, in this sense, Articles 34 and 203 CCO which reproduce Articles 1135 and 1321 FCC; see also Tricom Kin/Gombe 20 March 2007 RCE 13 *Family Holding Foundation Society v Blattner & Cinat Sarl* (unreported decision).

⁴¹⁰ CSJ 20 November 1976 BA 1977 189.

⁴¹¹ Elis 6 December 1913 *Jur Col* 1924 166; Elis 19 November 1932 *RJCB* 352; and Elis 3 April 1950 *JTO* 1957 77.

⁴¹² Elis 10 April 1926 *Jur Kat* II 183; Elis 11 March 1916 *Jur Col* 1926 334; see also Articles 54 to 62 CCO relating to the interpretation of contracts.

⁴¹³ Kin 28 February 1967 *RJC* 1968 No. 1 54. See also Kin 29 December 1966 *RJC* 1967 123 where it was ruled, with regard to a deposit contract that deposit fees must be evaluated in accordance with the tariff agreed by the parties. The judge could not for “fairness reasons” limit the remedy to the value of goods.

⁴¹⁴ CSJ 3 April 1976 BA 1977 64 65; confirmed in CSJ 20 January 1982 *RJZ* 1982.

⁴¹⁵ L’shi 21 April 1972 *RJZ* 1973 70.

agreements which it allows.⁴¹⁶ Thus, when it is prescribed that contracts legally formed have force, or take the place of law, a legal agreement cannot be a declaration simply recognising the autonomous effectiveness of individual wills. Instead, it must be an agreement which meets legal terms, i.e. a contract wherein consent was freely given by parties endowed with legal capacity, and where object and cause are legally admitted. Where these requirements are not met, the contract is void or at least avoidable; alternatively, when they are encountered, the contract so concluded must be performed in good faith.

2.3.6 Principle of Good Faith

2.3.6.1 Conceptualisation of the “Good Faith” duty

The concept “good faith” is considered to be one of the subjective legal concepts of which the content is not always easily circumscribed. On the whole, the duty of good faith can be defined as “an expectation and obligation to act honestly and fairly in the performance of one’s contractual duties.”⁴¹⁷ According to one commentator, the principle of good faith introduces into contractual dealings “a moral rule of an abstract nature that often covers other duties such those of trusty conduct, probity, cooperation, information, honesty, loyalty; and antonyms such as bad faith, incidental fraud, or negligence.”⁴¹⁸ This obligation has existed for a long time. During the development of Roman contract law, the concept of *bona fides* was associated with honest conduct and was then required in all commercial transactions.⁴¹⁹ As a number of scholars have said, the central role the expression *bona fides* occupied in the reform of Roman law is found in Cicero’s writings.⁴²⁰ In

⁴¹⁶ Cf. Rouhette *Obligatory Force* 38 46-47.

⁴¹⁷ Powers 1999 (18) *JL & Com* 333 334.

⁴¹⁸ See Munoz *Contracts* 269.

⁴¹⁹ See Zimmerman in *Southern Cross* 218; Zimmerman/Whittaker *Good Faith* 7 16; Fu *Contract* 61. For a comprehensive survey on the principle of *bona fides* in Roman contract law, see Schermaier *Bona Fides* 63.

⁴²⁰ See Powers 1999 (18) *JL & Com* 333 335; Fu *Contract* 61; Schermaier *Bona Fides* 63.

the words of Cicero, “good faith or *bona fides* expresses all the honest sentiments of a good conscience.”⁴²¹

Without a need to review the exhaustive development of the concept, suffice it to call to mind Domat’s position on the subject.⁴²² As Domat has stated, “by the law of nature (...), every contract is *bonae fidei*, because honesty and integrity hath and ought to have in all contracts the full extent that equity can demand.”⁴²³ It is, nevertheless, with the German philosopher Kant (1724-1804) that the requirement of good faith acquired a philosophical basis. Kant regarded the principle in view as “a categorical imperative wherein acts consistent with the status of people as free and rational beings are morally right and need to be carried out to inspire mutual confidence in society.”⁴²⁴ Since then, the principle of good faith has to date been granted such respect that it is known in almost all legal systems, though its meaning may differ in scope and application depending on which legal tradition governs the contract.⁴²⁵ To illustrate this, under the common law legal system, a contract is regarded from a single transactional perspective of parties without room for good faith,⁴²⁶ whereas in civil law it creates a duty which should be performed in good faith.⁴²⁷ In other words, the principle of good faith is well established in civil law

⁴²¹ Cicero *De Officiis* 3 66; quoted in Schermaier *Bona Fides* 63; Fu *Contract* 61; Powers 1999 (18) *JL & Com* 333 335.

⁴²² This is justified by the fact that Domat and Pothier’s ideas inspired the provisions of the civil code governing the general law of contract which was later exported to the DRC. See Note 26 in Section 2.2.3.

⁴²³ Domat *Les lois civiles dans leur ordre naturel*, Liv. I, Tit. 1, Sect. III, §XIV, 26, as translated by Strahan *The Civil Law in its Natural Order* Vol. I 45; quoted by Zimmerman/Whittaker *Good Faith* 7 32 Fn150; and Fu *Contract* 62 Fn324.

⁴²⁴ Quoted by Fu *Contract* 62 Fn325, referring himself to Lando 2007 (6) *European Review of Private Law* 842.

⁴²⁵ On a general overview of the concept in different legal systems, see MacQueen in MacQueen/Zimmermann *Contract* 43-73. As regards international sale of goods contracts, e.g. Article 7(1) CISG wants the Convention to be interpreted and applied in the way to promote the observance of “good faith in international trade”.

⁴²⁶ For an outline of the common law attitude in relation to the good faith obligation, see Section 3.3.4 below.

⁴²⁷ See Eiselen 2007 (19) *SA Merc LJ* 14 19; Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html> (last accessed 27-6-2012).

countries⁴²⁸ rather than in common law jurisdictions. Fu argues that the principle of good faith has been considered in many civil law countries “as the highest guiding principle for the law of obligations; (...) a vitally important ingredient in modern contract law.”⁴²⁹

In the DRC, in particular, the concept of good faith is one of the fundamental principles of the law of obligations in the same way as are the freedom of contract, party autonomy, consensualism, and the binding character of contracts. This expression is even abundantly referred to in both the CCO⁴³⁰ and the OHADA Commercial Act,⁴³¹ specifically with regard to commercial sales contracts. To give an example of these, Article 33 al. 3 CCO requires all contracts to be performed in good faith.⁴³² The requirement of good faith dealt with in connection with the performance of contracts played, in its first sense, a mere interpretative role.⁴³³ Contracts, therefore, had to be interpreted according to the common intention of the parties as required by Article 54 CCO.⁴³⁴ The field of application of the obligation of good faith has grown since the 1980s. The principle has so far acquired a much greater significance in that the good faith governs today both the formation and performance of contracts.

⁴²⁸ Cf. Article 1134 al. 3 FCC; Article 242 BGB; Article 6:2 Dutch civil code; Article 33 al. 3 CCO; and Articles 237 and 249 UAGCL.

⁴²⁹ Fu *Contract* 46&61.

⁴³⁰ See, among others, Article 33 al. 3 (performance in good faith); Article 39 (possession in good faith); Article 138 (payment in good faith); Article 256 (reception in good faith); Article 550 (third party acting in good faith); Article 648 (acquisition in good faith); Article 650 (presumption of good faith); and Article 651 (time of existence of good faith).

⁴³¹ See, *inter alia*, Article 8 al. 4 (third party acting in good faith); Article 12 al. 2 (presumption of good faith); Article 237 (compliance with good faith); and Article 249 al. 2 & 3 (bad faith).

⁴³² Compare Article 33 al. 3 CCO to Article 1134 al. 3 FCC; for application, see Tricom Kin/Gombe 28 February 2012 RCE 2183 *Kabala Katumba v Socimex*.

⁴³³ See De Bondt *Contracts* 233; Herbots *Contracts* 72.

⁴³⁴ See comments in Section 2.3.4.1 above; see also, for application, under OHADA law perspective, Burkina Faso 13 June 2007 Grande Instance Ouagadougou Case No. 83/2007 *Société de Gestion du Patrimoine Ferroviaire du Burkina v I Guigma & R Ouedraogo Sabane* [<http://www.ohada.com/jurisprudence/ohadata/J-06-39.html>] (accessed 20-3-2013).

2.3.6.2 Good faith duty during negotiations

With regard to the real meaning the good faith duty plays during the negotiation process stage, Munoz argues that, during this phase, the duty of good faith pursues a double objective.⁴³⁵ It requires, firstly, that the parties negotiate with clear and trusty voices, and, secondly, imposes on them the obligation not to abandon negotiations unexpectedly or arbitrarily.⁴³⁶

Parties are normally granted freedom to enter into contract and cannot bear responsibility if they do not reach agreement.⁴³⁷ Though parties are free to negotiate, however, and even to reach agreement, Article 249 al. 2 UAGCL holds liable for the losses caused to the other party “a party who negotiates or breaks off negotiations in bad faith.”⁴³⁸ In this sense, bad faith conduct includes, in addition to sudden and arbitrary breach of negotiations, the fact that one party enters into negotiations and continues with them without being committed to concluding a contract with the other party.⁴³⁹

Following from these provisions, it is clear that three attitudes may amount to bad faith during the formation of contract stage: breaking-off negotiations without warning; entering capriciously into negotiations; or continuing them by whim. The enumeration above seems to be illustrative as evidence of the use of the conjunction “or” in Article 249 al. 3 UAGCL. In addition, the requirement for good faith entails an information supplementary obligation, viz. the duty of always upholding the truth and revealing any fact susceptible to determining the other party’s decision.⁴⁴⁰ In other words, where a party does not intend to conclude a contract, it must

⁴³⁵ Munoz *Contracts* 224; see also Whittaker *Obligations* 333.

⁴³⁶ Munoz *Contracts* 224; see also Mubalama *Obligations* 47; Kalongo *Obligations* 55.

⁴³⁷ See Article 249 al. 1 UAGCL.

⁴³⁸ Article 249 al. 2 UAGCL is inspired by Article 2.1.15(2) PICC. Owing on the fact that during the negotiation process step the contract is not formed yet, party’s pre-contractual liability will be governed by torts liability rules, viz. Articles 258 to 260 CCO. For a similar reasoning under French law, see Ghestin *Droit Civil* 295; quoting Cass F Comm 20 March 1972 *JCP* 1973 II 17543 whereby, a sudden breach of negotiations was judged conduct contrary to good faith.

⁴³⁹ See Article 249 al. 3 UAGCL; compare to Article 2.1.15(3) PICC.

⁴⁴⁰ See Munoz *Contracts* 226.

immediately stop the negotiations and let the circumstances relevant to the case be known to the other party,⁴⁴¹ otherwise it may bear responsibility.

Good faith is always presumed in all contractual obligations.⁴⁴² It is thus sufficient to show that honesty existed at the time the contract was concluded for it to be acknowledged.⁴⁴³ Such being the principle, it follows that the party that alleges bad faith bears the burden of proving that irregular behaviour.⁴⁴⁴ In the same way, the duty of good faith governs the conclusion of contract; it is also required for its performance.

2.3.6.3 Good faith requirement during the carrying out of contract

The duty of good faith in the performance phase is specifically provided for by Article 33 al. 3 CCO whereby, all contracts must be performed in good faith. The same duty is also expressly contained in the second sentence of Article 237 UAGCL with regard to commercial sales contracts. This provision obliges contracting parties “to comply with the requirements of good faith” while carrying out their contractual obligations.

It must be remembered that the requirement for good faith as regulated by Articles 33 al. 3 CCO and 237 UAGCL with regard to the implementation of the obligations of parties played a simple interpretative role at the outset.⁴⁴⁵ Following that understanding, “as circumstances often change considerably in practice, and there are often some ambiguities in the contract, good faith (...) (was) thus regarded as a yardstick for the interpretation to protect the justified expectation of contractual parties.”⁴⁴⁶ On the subject, the effort was to discover what the common intention of contracting parties was at the time they concluded the contract⁴⁴⁷ because an

⁴⁴¹ Ibid.

⁴⁴² See first part of Article 650 CCO, and Article 12 al. 2 UAGCL.

⁴⁴³ Article 651 CCO.

⁴⁴⁴ Cf. second part of Article 650 CCO.

⁴⁴⁵ See De Bondt *Contracts* 233; Herbots *Contracts* 72.

⁴⁴⁶ See Fu *Contract* 63.

⁴⁴⁷ Cf. Article 54 CCO.

obligation of good faith was imposed on them. Further to its traditional interpretative role, the duty of good faith is today described as an objective standard that intends to supplement the content of the contract.⁴⁴⁸ In the same way, this principle may be mentioned as an objective standard, “regarding one party’s state of mind that may limit the liability or the effects of the unwinding of the contract.”⁴⁴⁹

As far as the supplementation character is concerned, one may note that many default obligations purporting to prevent unfair results are based on the principle of good faith. To illustrate this with some of the obligations of parties to a contract of sale, we can state that seller’s duty to package the goods in a manner adequate to preserve and protect them⁴⁵⁰ and to deliver them at the right time and place⁴⁵¹ is consistent with the requirement of good faith.⁴⁵² The same principle applies to a buyer’s obligation to notify the seller in good time if there is any non-conformity of goods.⁴⁵³ Moreover, pursuant to Article 138 CCO, a payment made in good faith is valid; it releases the buyer from his/her obligations.

With reference to the details above, it is clear that the principle of good faith is really a fundamental duty for parties carrying out a contract. This principle is concerned with both the seller and buyer’s rights and obligations that stem from the contract of sale. The principle is very important for commercial dealings in that

⁴⁴⁸ See Munoz *Contracts* 269.

⁴⁴⁹ As Munoz has said, “the debtor of the obligation in good faith is only liable for the damages and loss of profits that he foresaw or could have foreseen at the conclusion of the contract, while the debtor in bad faith is also liable for unforeseeable damages.” See Munoz *Contracts* 271; see, in the same sense, Article 312 CCO which holds the seller in bad faith liable for losses paid by the injured buyer. In addition, under Article 276 CCO, it is only a buyer in good faith, viz. one who was unaware of third party ownership in the goods that may claim remedies available for sale of third party’s goods.

⁴⁵⁰ Cf. Article 255 UAGCL; for comments, see Section 6.2.3.2.4 below.

⁴⁵¹ See Articles 251-254 UAGCL, and Articles 281-301 CCO; for comments, see Section 6.2.2 below.

⁴⁵² Thus, the fact that a seller refuses to deliver to the buyer 1 200 tons of machinery bought without legal reason constitutes proof of bad faith on his part. See *Tricom Kin/Gombe 7 June 2011 RCE 1618 Society Fonderie de Kinshasa Sprl (FDK) v Society Siderurgie de Maluku (SOSIDER)* (unreported decision). That is also the case for a seller who retains both the thing sold and the price paid by buyer. See *Tricom Kin/Matete 18 April 2012 RCE 569 Society Batiment Commerce (BACOM Sprl) v Society Bureau d’Analyse et d’Assistance Technique* (unreported decision).

⁴⁵³ See Articles 258-259 UAGCL, and Article 325 CCO. All of these provisions have as common feature that where the buyer fails to give a timely notice of lack of conformity of the goods, he/she loses his right to rely on non-conformity remedies. For further comments, see Section 6.2.3 below.

Article 237 UAGCL prevents parties from excluding or limiting the good faith duty significance in their business.⁴⁵⁴ In other words, provisions dealing with the principle of good faith are mandatory rules for which exclusion, limitation, or infringement entails the invalidity of the contract.

Succinctly, the requirement for good faith has been included at every stage of the contract, from formation till performance. During the conclusion phase, negotiations must be conducted consistent with good faith. As a result of this, breaking-off negotiations, entering into negotiations, and continuing them without the real intention of reaching a contract amount to bad faith conduct. Similarly, at the performance stage, parties are obliged to comply with the good faith requirement while fulfilling their obligations. The seller must deliver the goods in good faith, and the buyer pay for them and take delivery of them in good faith. Given that parties must collaborate for a good completion of the contract, they are not allowed to exclude the duty of good faith or to restrict its effects.

2.3.7 Conclusion on the Basic Principles of Congolese Sales Law

The Congolese law of obligations, in general, and its sales law, in particular, are guided, as in other legal systems, by some basic principles which represent the essence and spirit of the law, the guidelines for understanding, interpreting, and studying the laws. These principles include the freedom of contract, the autonomy of the will, the binding force of contractual obligations, the consensual principle, and the requirement of good faith.

Pursuant to the principles of freedom of contract and party autonomy, the seller and buyer freely regulate their respective rights and obligations, establish the content of their contract, or determine the law which will govern it. Parties are limited in their business only by the requirements of public policy, morality, and public

⁴⁵⁴ As stipulated by the second and third sentences of Article 237, “Parties are expected to comply with the requirements of good faith. They may not exclude, nor limit this duty.”

interest. Any contract contrary to these requirements is null and void. Concerning the consensual principle, it assumes a contract has been concluded only when there is a meeting of minds of contracting parties. Thus, it is only where there is lack of consent that the basis of a contract should be searched for in one party's conduct, especially if the other party was reasonable in relying on such conduct. This leads us to conclude that, in modern Congolese contract law, both the subjective and reliance theories govern commercial dealings. With regard to the binding force of contracts and good faith principles, they postulate that a contract is valid where it complies with legal conditions, which are consent, capacity, the existence of an object, and legal cause. Every contract which meets these requirements has the force of law for parties, who, in turn, must perform it in good faith. Parties cannot exclude or limit the effects of the good faith duty without the risk of bearing responsibility for losses caused to the misled party.

2.4 The Essential Elements of a Commercial Sales Contract

2.4.1 Introduction

As was said in Section 2.2.7.2 above, the UAGCL legislator did not find it necessary to describe a contract of sale. Pursuant to Article 263 al. 1 CCO, however, a sale is an agreement whereby the seller commits to deliver the goods and the buyer to pay for, and take delivery off.⁴⁵⁵ Compared to their equivalent civil code provisions,⁴⁵⁶ UAGCL Articles dealing with commercial sales contracts⁴⁵⁷ appear to have restricted the field of application of the notion of “commercial sales”. Such restriction results,

⁴⁵⁵ See Article 263 al. 1 CCO; read with Articles 250 and 262 UAGCL. It was ruled in Elis 21 September 1912 *Jur Congo* 1914-1919 260 that, no matter how parties may name their contract, any transfer of goods in exchange of money constitutes a sale, even if it is concealed under the appearances of rent (see Léo 21 January 1929 *Jur Col* 1930-1931 68). It should be remembered that, usually, a contract requires the presence of three elements, i.e. consent, thing sold, and price, for it to amount to a sale. Where parties have reached agreement upon the thing sold and the price, the contract is valid. (See Elis 19 November 1932 *RJCB* 352; Elis 6 December 1913 *Jur Col* 1924 166).

⁴⁵⁶ See Articles 263 to 349 CCO.

⁴⁵⁷ See Articles 234 to 302 UAGCL.

firstly, from the skills required to parties who may conclude the contract, viz. businessmen and commercial corporations, and, secondly, to the sales contract subject-matter which are the goods. Thus, after a few comments of the subject and the object of the contract, a word will be said about the way the price is determined.

2.4.2 The Aptitude of Parties in regard to Commercial Sales Contracts

The main point of departure from the Commercial Act and the CCO is based on the fact that the first of these confines its field of operation to contracts of sales of goods between “traders, individuals or companies.”⁴⁵⁸ In other words, the key condition required to acquire the aptitude to negotiate commercial sales contracts is to be a “commercial operator” or a merchant.⁴⁵⁹ The concept “merchant” is described by Article 2 UAGCL as a person whose regular profession consists in carrying out commercial transactions. Accordingly, commercial sales contracts’ parties may be individuals or corporate bodies provided that their place of business is established in one of the OHADA member countries.⁴⁶⁰ By restricting its applicability to “traders” or “commercial operators” only, provisions of the UAGCL intend to govern what are so-called “business to business sales” in contrast to consumer contracts entirely ruled by the CCO. A witness to this is Article 235(a) ruling which excludes from the Act’s sphere of application “sales of goods bought for personal, family or household use.”⁴⁶¹ Consumer transactions should amount to commercial sales contracts, and, therefore, be subject to the UAGCL, on condition that “the seller, at any time before

⁴⁵⁸ Article 234 al. 1 UAGCL reads, “The provisions of this Book (i.e. Book VIII) apply to contract of sale of goods between traders, individual or companies, as well as to contracts for supply of goods intended for manufacture and production of services.” See, for application, Cote d’Ivoire First Instance Abidjan 25 April 2001 Case No. 327 *Sitbai v Cfd-CI*.

⁴⁵⁹ See Santos/Toe *Commercial* 339; Martor et al *Business* 31. As it is explained in Section 4.3.5 below, this approach is different from the one adopted by Article 1(3) CISG whereby, “(...) the civil or commercial character of the parties or of the contract” is irrelevant in determining the Convention’s applicability.

⁴⁶⁰ See Article 234 al. 2 UAGCL, and Article 1 OHADA Treaty.

⁴⁶¹ Compare this with Article 2(a) CISG.

or at the conclusion of the contract, neither knew nor ought to have known” that the goods were bought for consumer purposes.⁴⁶²

As the parties’ commercial character is decisive in determining the applicability of the UAGCL, moreover, sales contracts between merchants and consumers are beyond the field of operation of the Commercial Act.⁴⁶³ That is also the case for sales contracts in which the preponderant obligations of the party furnishing “the goods consist in the supply of labour or other services”. There are, furthermore, no grounds for a security obligation required by the buyer because both parties are presumed to be professional dealers acting in full knowledge of their commitments.⁴⁶⁴ In spite of this, parties are bound by the requirements of good faith, and by trade practices and usages established between themselves.⁴⁶⁵

2.4.3 Main Features of the Thing Sold

It is a rule that every contract must have a certain object for it to be valid. The contract subject matter is generally described as whatever one party commits to transfer, to do, or not to do.⁴⁶⁶ Applied to sales, a number of conditions are required for an item to constitute a valid sales contract subject matter. Firstly, it is required that the thing

⁴⁶² Article 235(a) UAGCL.

⁴⁶³ But, Tricom Kin/Matete 20 April 2011 RCE 438/469 case, which was adjudicated by the Commercial court despite the plaintiff’s civil character. Cf. Article 17 al. 1 (4) of the Commercial Courts Law No. 2/2001 of 3 July 2001 (*JORDC* No. 14 of 15 July 2001 4) which allows the jurisdiction of commercial courts with regard to mixed issues whereby the defendant is a businessman. If not, the *LTJ* case should be ruled by the CCO though it was brought before a commercial court if that time the UAGCL was already in force in the DRC.

⁴⁶⁴ See Tricot 2011 (281) *Droit et Patrimoine* 75. In a civil law perspective, the seller’s obligations to deliver the thing sold, transfer ownership of it, and guarantee it against eviction and defects are preceded by a general *obligation of information* dealt with in Article 279 CCO which requires the seller *to explain in detail the content of the contract*. (highlights added) If the seller fails to do so, he/she will assume consequences subsequent to any obscure or ambiguous contractual clause contained in the contract.

⁴⁶⁵ See Article 238 al. 2 UAGCL for which, “In determining the intent of a party (...), due consideration is to be given to all relevant circumstances of the case including (...) any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”

⁴⁶⁶ See Article 25 CCO; see also comments in Section 2.3.5.2 above in relation to the existence of the object.

to be sold must be in existence, be merchantable, determined or at least determinable, and belong to the seller. Secondly, UAGCL provisions dealing with commercial contracts regulate things which may be involved in business transactions by excluding those which may not.

To start with the existence of the thing sold requirement, it results from general rules provided by Article 8 CCO. According to this provision, for a contract to be validly formed it must, *inter alia*, have “a definite object which forms the subject-matter of the agreement.”⁴⁶⁷ It follows then that where the thing sold does not exist, there would logically not be a valid contract of sale. This general principle is, however, assorted with an exception with regard to commercial contracts. In this regard, Article 234 UAGCL states expressly that the Commercial Act applies to contracts for the supply of goods intended for manufacture and production activities. In so stating, Article 234 makes it clear that contracts for which goods are still to be manufactured or produced should qualify as sales contracts.⁴⁶⁸ Similarly, the principle regarding avoidance of a sale because of the absence of the thing is softened if that item was in existence but perished later. If at the moment a contract of sale was concluded the thing sold was completely perished, it is obvious that there is no sale.⁴⁶⁹ But, where the material goods are partially perished, Article 278 al. 2 CCO grants the buyer the right to give up the contract or to claim the part saved and reduce the price accordingly. Likewise, pursuant to Article 29 al. 1 CCO, future things may be sold if there is a probability that they will come into existence. An eloquent illustration of sales of future things is the sale of goods to be manufactured or produced as announced above.

Secondly, the thing to be sold must be *in commercium*. The merchantability condition is contained in Article 275 CCO. This provision stipulates that anything

⁴⁶⁷ See the fourth sentence of Article 8 CCO; see also Articles 25 to 29 CCO.

⁴⁶⁸ Unlike the CISG, the Uniform Act does not exclude from its sphere of influence “contracts for the supply of goods to be manufactured or produced where the party ordering the goods ‘undertake to supply a substantial part of the materials’ necessary for such manufacture or production.” Cf. Article 234 *in fine* of the UAGCL *contra* Article 3(1) CISG; see also Ferrari OHADA 79 82.

⁴⁶⁹ See Article 278 al. 1 CCO.

subject to commercial exchange dealings may be sold, except where its alienation is legally prohibited.⁴⁷⁰ Thirdly, the thing sold must, in principle, belong to the seller. Article 276 CCO states with reference to the subject that “the sale of a third party thing is null and void.” As stated by the case law, the sale by non-owners is void because it supposes a transfer of other people’s rights.⁴⁷¹ Such avoidance, however, may occur only if the buyer believed wrongly that the seller had ownership of that thing. Hence, if the buyer did not know that the goods belonged to a third party the sale may give rise to damages.⁴⁷²

Lastly, the property sold must be determined, or at least be determinable. The requirement for the definiteness of the thing sold is the application of a general rule posited by Article 28 CCO whereby, “an obligation must have as object a thing determined in respect to its type.” Where the thing is individualised, the contract is valid subsequent to the meeting of the minds of parties. For some kinds of things the determination shall validly be made by reference to weight or to a measure unit without losing their legal effect.⁴⁷³

In general, parties must determine the quality and the quantity of the thing sold at the negotiation stage. It is possible, however, at that stage that the quantity is uncertain. If this is determinable, the contract is valid. If, alternatively, such uncertainty hides completely the intention of the parties, the obligation is void for lack of certainty of the object. To paraphrase Article 239 al. 1 UAGCL, if usages and practices established between the parties are expected to determine the quantity of the goods, then the sale is valid. Confirmation of this is the fact that “parties are considered to have implicitly made applicable to the formation of the contract usages

⁴⁷⁰ Article 275 CCO is a simple application of Article 27 CCO for which only things subject to commercial dealings may form objects of individual transactions.

⁴⁷¹ See Goma 12 September 2007 RCA 1586 *Katsuva Lubuno & Kambale Matumo v Kakule Byabu* (unreported decision) wherein, the sale was annulled by application of the maxim: *Nemo plus iuris as alium transferre potest, quam ipse habet*.

⁴⁷² Article 276 CCO, second part.

⁴⁷³ See Article 266 CCO.

that they knew or ought to have known and which are widely known in the trade sector in question.”⁴⁷⁴

It is important to note that, pursuant to Article 234 al. 1 UAGCL, the subject matter of commercial sales contracts is “goods”. The Act does not, however, define the concept “goods”. As will be explained in Section 4.3.2.3 below, that concept is not a technical legal word. Thus, with a view to covering all objects which form the subject matter of commercial sales contracts, it is admitted that that notion must be interpreted flexibly and widely.⁴⁷⁵ In this sense, anything which may be exchanged may qualify as goods.⁴⁷⁶ Nonetheless, though it is not indispensable that goods be corporeal, “they must be moveable at the time of delivery.”⁴⁷⁷

It is noteworthy that, despite the wide interpretation that the concept “goods” may have, Article 236 UAGCL excludes from the field of application of the Act some sales, such as those of stocks, shares,⁴⁷⁸ investment securities, negotiable instruments or money; and sales of ships, vessels, hovercraft or aircraft, and sales of electricity.⁴⁷⁹ As far as ships, hovercraft, and aircraft are concerned, they were certainly excluded from the scope of the Commercial Act because they are often subject to registration formalities. In the DRC, for example, no ship can be used in service⁴⁸⁰ and no aircraft can fly in national air space⁴⁸¹ if it is not registered. Thus,

⁴⁷⁴ See Article 239 al. 2 UAGCL; for a case of the application of trade usages, see *Tricom Kin/Gombe* 20 March 2007 RCE 13 *Family Holding Foundation Society v Blattner & Cinat Sarl.*

⁴⁷⁵ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 34; see also Mistelis in Kröll/Mistelis/ Viscasillas *UN Convention* 32; Germany 17 September 1993 Oberlandesgericht Koblenz, CLOUT case No. 281(Computer ship).

⁴⁷⁶ Compare this with Articles 1 and 2 CISG. For comments, see Section 4.3.2.3 below.

⁴⁷⁷ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 35; Ferrari OHADA 79 81.

⁴⁷⁸ For a case of sale of shares which would not be governed by the UAGCL, see *Tricom Kin/Gombe* 20 March 2007 RCE 13 *Family Holding Foundation Society v Blattner & Cinat Sarl.*

⁴⁷⁹ See Article 236 (c)-(f) UAGCL; compare with Article 2(c)-(f) CISG.

⁴⁸⁰ Articles 3 and 16 of the “Code de la Navigation Fluviale et Lacustre” Ordinance Law No. 66-96 of 14 March 1966 (*MC* 1966 902).

⁴⁸¹ Article 8 of the Code of Civil Aviation Law No.10/014 of 31 December 2010 (*JORDC Special* No.16 January 2011).

by excluding particularly registered property, the legislator intended to characterise it as intangible or immovable things rather than goods.⁴⁸²

Briefly, it is obvious that the UAGCL is largely inspired by the CISG on the matter relating to commercial sales contracts' subject-matter and items excluded from them as well. Subsequent to the exclusions above, likewise, it has become clear that sales contracts governed by the UAGCL are sales of corporeal, movable, tangible, and personal property between expert buyers and sellers.

Further to the property sold, another salient element for a sale to be valid is the determination of the price.

2.4.4 Determination of the Price

In general, the price consists of the sum of money that the buyer hands to the seller in exchange for the thing sold. As stated by Article 264 CCO, the contract is enforceable between the parties the moment they have agreed, *inter alia*, upon the price. It should be noted that, as it is for the item sold, the price also requires particular characteristics for it to have legal effect. *A propos* of this, Article 272 CCO specifies that the price must be determined and stated by the parties. Commentators have complemented this by stating that the price must be certain too.⁴⁸³

To require the price to be certain means that it must be real and serious.⁴⁸⁴ Because the double character of “realism and seriousness” is of the essence of sales contracts, the Commercial Act legislator did not find it necessary to reintroduce this obligation. In effect, it appears abnormal for parties to agree on a fictional or a derisory price as sales are concluded for valuable consideration. Thus, given that the price is the counter-obligation of the buyer, it must be in keeping with the object sold as delivered by the seller.

⁴⁸² Cf. Winship in Galston/Smit *Sales* 1-25, but Santos/Toe *Commercial* 345. Santos and Toe comments were made before the UAGCL be amended. The original Article 203 UAGCL does not expressly exclude these items from its ambit.

⁴⁸³ See Santos/Toe *Commercial* 382; Mweze Vente 22.

⁴⁸⁴ *Ibid.*

Additionally, the price must be determined or at least determinable.⁴⁸⁵ The requirement for the determination of the price in commercial sales contracts results from Article 241 al.2 *in fine* UAGCL, and the first sentence of Article 263 al. 1 of the Commercial Act. Article 241 al. 2 declares that a proposal for concluding a contract amounts to an offer on condition that, among others, it fixes the price or makes provision for determining it. With regard to the first sentence of Article 263 al. 1, it obliges the buyer to pay the price agreed upon, viz. the price determined in the contract. As can be observed, the provisions being invoked have, as a common feature, the proscription of sales without price. Consequently, where parties fail to reach agreement on the price, there is no sale. Likewise, an offer without price is irrelevant. There are authorities that state that, when parties have agreed on the price, the contract remains valid even though the price is paid in part.⁴⁸⁶

The principle according to which the price must be determined aligns with the civil law rule under Article 272 CCO which obliges the seller and buyer to determine the price and state it. In principle, the price is fixed upon perceptions of economic self-interest. The Appeal Court of Lubumbashi has ruled on the subject, however, that, “In commercial transactions for the price to be determined, it is sufficient that parties expressed the intention to make reference to a market price.”⁴⁸⁷ Such is also the meaning of Article 263 al. 2 UAGCL whereby, if the price is to be determined, parties may “make reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the same sector of activity.”⁴⁸⁸ The rule under the Appeal Court of Lubumbashi case

⁴⁸⁵ See Com Tournai 9 December 1947 *Pas* 1949 III 31; *Belg Col* 1950 79.

⁴⁸⁶ See First Inst RU 22 February 1946 *RJCB* 149.

⁴⁸⁷ Translated from, “En matière de vente commerciale, pour que le prix de la vente soit déterminé, il suffit que les parties aient exprimé l’intention de se référer aux cours pratiqués sur le marché.” See L’shi 13 December 1966 *RJC* No. 1 54. Thus, a buyer who receives without protestation invoices submitted to him recognises himself to be the debtor. See L’shi 1 December 1970 *RJC* 1971 No. 1 33.

⁴⁸⁸ Compare this with Article 55 CISG.

and Article 263 al. 2 UAGCL proves the acceptance of the so-called *open price terms* under modern Congolese law.⁴⁸⁹

Before concluding this section, it is important to note that the Commercial Court of Tournai has ruled that “the price must be determined or at least be determinable by a process agreed upon but which does not leave its fixing to the power of only one of the contracting parties.”⁴⁹⁰ Notwithstanding this principle, the first part of Article 273 CCO allows the price to be determined by a third party provided that the person appointed is able to fix it; otherwise there is no sale.⁴⁹¹

2.4.5 Conclusion on the Basics of Commercial Sales Contracts

Commercial sales contracts are important for any economic sector. Their performance depends, however, on some restrictions linked to the aptitude of parties admitted in the area, the characteristics of the contract subject matter, and the way the price might be fixed. With regard to the parties, they must be professional dealers, viz. people whose regular occupation consists of running a commercial business. As regards the thing sold, it must exist, be subject to exchange transactions, and be determined or at least determinable. That thing has to be regarded as goods and not fall into the list of items legally excluded from commercial transactions. Regarding the price, it must be certain, real, and serious, and be fixed, or at least be determinable.

⁴⁸⁹ It should be noted immediately that open-price terms are familiar to Common law legal system countries. In that legal family, where a contract is silent with respect to the price, an agreement to pay a reasonable price will be implied. See s 9 of the 1893 English Sale of Goods Act, and §2-305 UCC; see also comments by Ziegel/Samson <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>; Murray 1988 (8) *JL & Com* 11. For further comments, see Section 5.2.3.2 below.

⁴⁹⁰ See Com Tournai 9 December 1947 *Pas* 1949 III 31; *Belg Col* 1950 79.

⁴⁹¹ Article 273 CCO, second part. The Belgian *Cour de Cassation* ruled in this regard that, An agreement whereby a party declares to sell and the other to buy a thing at a price being fixed by experts, but that does not contain fundamental elements for the determination of the price or the elements by relation with which the price may be fixed, does not amount to a perfect sale and does not entail, consequently, transfer of property of the thing to the purchaser. Cass B 5 June 1953 *Pas* 769; quoted by Katuala *Code* 167; see also Cass F 1st Civ 24 November 1965 *JCP* 1966 II 14602 whereby, “when it is agreed that the price will be evaluated by experts designated by the parties, as long as the price is not determined there is no sale.”

2.5 Conclusion on Chapter Two

Congolese legal history is linked to the Belgian civil law which, in turn, originates from the French civil code. This influence has had as a consequence that the DRC belongs to the civil law legal family with a similarity of provisions between the CCO and Book III of the Belgian and French civil codes. For a long time, the Congolese law of obligations rules were governed by the 1888 CCO which provides, in addition to general principles, a number of particular rules regulating some classical contracts of which the contract of sale is one. The code as inherited from the colonial power continued to govern commercial contracts for about half a century after independence. Owing to a lack of modernisation, Congolese civil law rules were becoming out-dated and were no longer suitable for modern international trade requirements, and, consequently, required improvement. This occurred with the ratification of the OHADA Treaty which came into effect in the DRC in September 2012. Subsequently, the UAGCL has become the main source of law for commercial sales contracts including international sale of goods, in addition to non-conflicting CCO provisions.

A consideration of both the OHADA Commercial Act and CCO provisions reveals that the modern Congolese law of contract, in general, and its sales law, in particular, is governed by a number of basic principles that represent fundamental policies on the basis of which legislation is formulated. These principles include freedom of contract, autonomy of the will, the binding force of contractual obligations, consensualism, and good faith. Freedom of contract means that parties are at liberty to enter into a contract and to define their obligations; they are free to choose the law applicable to their contract as well. Most of the time, the principle of freedom goes together with the autonomy of the will. This allows parties to conclude any contract they wish and regulate its effects freely, provide that they comply with the needs of public policy, morality, and public interest. With regard to the consensual agreement rule, it entails that contracts are concluded by mutual consent.

Such a subjective approach has been completed by the reliance theory by which a contract may result from the conduct displayed by one party. In any event, though parties are not obliged to enter into contract, any regular contract concluded by them constitutes the law for their rights and the obligations that they are obliged to perform in good faith.

In conclusion, Article 7 al. 1 CCO and Article 237 al. 1 UAGCL specify that all contracts are subject to common general rules provided by the civil code, in addition to commercial law supplementary provisions, whether they have or do not have a special designation. This means that the common principles analysed above apply also to international sale of goods contracts. Considered in this sense, chapter two has set the background scene for the more specific comparative discussions in chapters five and six.

Chapter Three

THE HISTORICAL DEVELOPMENT OF SOUTH AFRICAN LAW AND THE ESSENTIAL PRINCIPLES OF THE SOUTH AFRICAN LAW OF CONTRACT

3.1 Introduction

The historical development of South African law is largely linked to the coming of the early Dutch settlers to the Cape and, to a certain extent, to the influence of English common law. This history has been exhaustively written by eminent scholars.¹ This chapter, therefore, does not aim to rewrite a comprehensive discussion of the historical development of South African law. Its goal rather is to give a succinct and rough idea of that evolution, before summarising the fundamental principles of South African contract law and the essential elements of its sales contracts. It is necessary to say immediately that the basic principles of the law of contract in South Africa include, *inter alia*, the need for an agreement, the freedom of contract, the requirement of good faith in contracts, and their consistency with public policy. Concerning the foundations of sales contracts, they consist of agreement on the thing sold and the payment of the price.

¹ See among others, Wessels *History*; Hahlo/Kahn *Legal System* 329-596; Hahlo/Kahn *Union*; Edwards *History*; Edwards *Outline* 268-375; Fagan *Historical Context* 33-64; Van der Merwe et al *South Africa Report* 95.

3.2 The Historical Development of South African Law

3.2.1 Introduction

This section deals successively with the reception of Roman-Dutch law into South Africa, the reasons for its preservation in spite of English colonisation, and the impact that colonisation has had on modern South African law. It also discusses the South African law legal family membership as a mixed jurisdiction, and the means by which South African law has acquired its independence under the direction of the Constitutional Court.

3.2.2 Reception of Roman-Dutch Law into South Africa

To start with, South African law “rested on Germanic custom, substantially modified and supplemented by the compilations of Justinian.”² This law was largely connected with the arrival of Dutch colonisers in the Cape. According to South African law historians, three ships of the East India Company, named the *Vereenigde Geoctryeerde Oost-Indische Compagnie* (VOC), arrived in Table Bay on 6 April 1652 to establish a refreshment station for ships on their way to the Indies.³ Shortly after this, Jan van Riebeeck, the first commandant of the Cape settlement, arrived and with him the Dutch India Company took possession of the Cape of Good Hope on behalf of the United Netherlands.⁴ When he arrived at the Cape, Jan van Riebeeck certainly did not find virgin territory.⁵ There were indigenous inhabitants in the Cape whose

² Schreiner *Contribution* 5; see also Joubert *Contract* 2; and Hahlo/Kahn *Legal System* 329-565.

³ Zimmerman *Roman Law* 41 46; Fagan *Historical Context* 33 35; Hahlo/Kahn *Union* 10; Edwards *History* 65; Edwards *Outline* 268 337; Van der Merwe/Du Plessis *Introduction* 9; Kleyn/Viljoen *Guide* 32; Van der Merwe et al *South Africa Report* 95.

⁴ See Kahn *Doctrine* 224; Fagan *Historical Context* 33 35; Hahlo/Kahn *Union* 2.

⁵ Fagan *Historical Context* 33 35, but Zimmerman 1985 (1) 1 *Lesotho LJ* 97 98 for whom, Dutch settlers occupied the Cape and established their communities as if the Cape was entirely uninhabited.

law was, unfortunately, never recognised as the law generally applicable in that area.⁶ So, Jan van Riebeeck and his Dutch companions “introduced the general principles and rules of law prevailing at that date in the Netherlands, whether in the shape of custom, legislation, treatises on law, or judicial decisions,”⁷ and transplanted them into the Cape.⁸ The legal system brought by them was soon known as the “*Roomsch-Hollandsche Recht*”,⁹ translated in English as the “Roman-Dutch law”.¹⁰

Initially, Roman-Dutch law was the product of the fusion of the law of Holland and Roman law.¹¹ As far as Roman law is concerned, it had begun to influence Dutch law in the thirteenth century. Its influence increased in the fifteenth and the sixteenth centuries. It is fair to say that during the seventeenth and eighteenth centuries Roman-Dutch law acquired a semblance of autonomy. This occurred *via* “the writings of practising lawyers and teachers of law and the decisions of the courts in Holland and its associated provinces of the United Netherlands.”¹² In spite of such apparent

⁶ See Kahn 1985 (1) 1 *Lesotho LJ* 69; Edwards Outline 268 338 in Fn11.

⁷ Hutchison *Principles* 27; see also Roos/Reitz *Principles* 2.

⁸ Zimmerman Roman Law 41 46; Zimmerman 1985 (1) 1 *Lesotho LJ* 97 98; Van Warmelo *Vicissitudes* 7; Van der Merwe/Du Plessis *Introduction* 9; Van der Merwe et al South Africa Report 95.

⁹ Schreiner *Contribution* 5; Kahn Doctrine 224-225; Kahn 1985 (1) 1 *Lesotho LJ* 69 74; Zimmerman Roman Law 41 46; Zimmerman 1985 (1) 1 *Lesotho LJ* 97 98. The expression *Roomsch-Hollandsche Recht* was inherited from Somon van Leeuwen in 1664. See Joubert *Contract* 2; Zimmerman Roman Law 41 46.

¹⁰ Schreiner *Contribution* 5; see also Du Bois *Principles* 67; Hutchison *Principles* 1; Lotz Sale 361; Eiselen <http://cisgw3.law.pace.edu/cisg/biblio/eiselen2.html> (last accessed 3-7-2012); Oosthuizen Rights 4; Kleyn/ Viljoen *Guide* 19. According to Kahn, the expression “Roman-Dutch law” “is not an accurate translation of the phrase “*Roomsch-Hollandsche Recht*”. The latter expression should be correctly translated as the “Roman-Hollands law” because there was no law of the Netherlands as a whole at that time. The author specifies that Roman-Dutch law refers rather to “the law of Holland that was taken over.” Kahn justifies his position by the fact that the Netherlands was a confederation of seven independent provinces. See Kahn Doctrine 224 225; Kahn 1985 (1) 1 *Lesotho LJ* 69 74; see also Wessels *History* 356-357; Hahlo/Kahn *Union* 10; Visser *Daedalus* 6; Zimmerman 1985 (1) 1 *Lesotho LJ* 97 98. It is necessary to say that under Southern African influence, Roman-Dutch law is also the legal system applicable in the countries that surround South Africa, namely Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe. Angola and Mozambique follow the civil law legal system, whereas Malawi and Zambia belong to the common law legal family. See Saurombe 2009 (21) *SA Merc LJ* 695 698; Hawthorne 2006 (12) 2 *Fundamina* 71; Eiselen 1999 (116) *SALJ* 323 324; Zimmerman Roman law 41 44-45; Edwards Outline 268 360; Hahlo/Kahn *Legal System* 578; Kleyn/Viljoen *Guide* 32.

¹¹ Kahn Doctrine 224 225; Hahlo/Kahn *Legal System* 483; Van Warmelo *Vicissitudes* 7.

¹² *Ibid.*

independence, Roman-Dutch law was, from the outset, civil in nature because of the effect of Roman law on Dutch law.¹³

It should be noted that during the seventeenth century, the Kingdom of the United Netherlands was very prosperous.¹⁴ The Kingdom was amongst the most economically important world powers and had some of the greater scientists and philosophers of that time, particularly Grotius, Voet, Vinnius, Ulrich Huber, Van Groenewegen, and Van Leeuwen.¹⁵ Owing to that proficiency, the United Netherlands became involved in the adventure of exploration. When Dutch settlers came to the Cape, they carried with them “their own native legal system.”¹⁶ From their arrival, the rules of law in force in Holland were recognised in the Cape as well, so that Roman-Dutch law was at times accepted to be “the common law of the Republic of South Africa.”¹⁷ Wessels has written on the subject that,

The common law of the province of Holland was accepted as the common law of the settlement of the Cape of Good Hope. All ordinances, therefore, of the States-General and of the States of Holland which were not of purely local application were recognised as law at the Cape of Good Hope. Of the ordinances passed either by the States-General or by the States of Holland, those which were enacted for the Dutch Republic and its dependencies or for the province of Holland undoubtedly applied to the Cape as well.¹⁸

The Netherlands was a confederacy of seven Provinces, each with its own laws. Thus, in order to introduce a measure of certainty in the colonies, it was important to designate, among those provinces, one whose law would govern the Cape. Given that Holland was the most influential member province of the VOC; its legal system was

¹³ Roos/Reitz *Principles* 2; Kahn *Doctrine* 224 225; Schreiner *Contribution* 5; Kahn 1985 (1) 1 *Lesotho LJ* 69 72; Joubert *Contract* 1; Hahlo/Kahn *Union* 42; Van der Merwe/Du Plessis *Introduction* 234; Wessels *Contract* xviii.

¹⁴ Zimmerman *Roman law* 41 45; Wessels *History* 249; Hahlo/Kahn *Union* 2; Edwards *History* 65; Edwards *Outline* 268 337; Kleyn/Viljoen *Guide* 32.

¹⁵ Zimmerman *Roman law* 41 45; Wessels *History* 249-350.

¹⁶ For a better understanding of the reception of Roman-Dutch law in South Africa, see Kahn 1985 (1) 1 *Lesotho LJ* 69-95; Zimmerman 1985 (1) 1 *Lesotho LJ* 97-120; Fagan *Historical Context* 33-64; Zimmerman *Roman Law* 41 46; Edwards *Outline* 268 338.

¹⁷ See Hahlo/Kahn *Legal System* 578; Wessels *History* 356; and Du Bois *Principles* 67. The phrase “common law” as used in this study refers to “a non-codified legal system” based on customary and judicial precedents.

¹⁸ Wessels *History* 356-357.

preferred.¹⁹ With regard to the law of contract, Roman-Dutch law brought to South Africa was, however, essentially Roman.²⁰ As Joubert has stated, Roman contract law received in Holland and carried to South Africa through the Roman-Dutch law label was the law set out in the Justinian “*Corpus Iuris Civilis* as accepted, explained, and modified by Glossators, Commentators and other writers”²¹ in different countries such as Germany, and Holland.

During the nineteenth century, the Netherlands was forced to adopt the French Code Napoleon.²² In 1838, the country adopted its own civil code linked to the French civil code model.²³ Concerning the Cape, it was occupied by the British during the course of Napoleonic wars in Europe. Roman-Dutch law, therefore, escaped from the codification movement of Western European countries.²⁴ As a result of this, the un-codified Roman-Dutch law survived and remains the foundation of South African common law.²⁵

¹⁹ This statement is formulated in *Spies v Lombard* 1950 (3) 469 (A) 481sq as follows:

If one considers the Constitution of the Netherlands at the time of the settlement of the Cape and during all relevant times thereafter, it must be obvious that enactments of the Estates of the province of Holland could have had no application *proprio vigore* to other provinces of the Netherlands or to the Dutch possession beyond the seas. It was always the conscious policy of the East India Company to avoid all suggestion that any particular province of the Netherlands or its laws enjoyed a kind of hegemony in the overseas possessions (...).

Excerpt reported in Fagan Historical Context 33 39; and Hahlo/Kahn *Union* 14. Van den Heever J A specified this in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 865-866 by stating that, since South Africa observes the law of Holland, the country “must exclude the Romanists of other countries as well as the pragmatists from neighbouring regions.”

²⁰ See Joubert *Contract* 2; Christie/Bradfield *Contract* 2-3; Hahlo/Kahn *Union* 444.

²¹ Joubert *Contract* 2; on the general development of Roman-Dutch law, see Wessels *History* 13ff. As has been said by Hahlo and Kahn (*Legal System* 581), “Roman-Dutch law is one of the few surviving legal systems (...) of which Roman law forms a living part (...).

²² See Hondius *Code Civil* 157; Wijffels *Contrats* 32; Lesaffer *History* 53; Van Caenegem *Introduction* 152; see also Zimmerman *Roman Law* 41 46; Kahn *Doctrine* 224 228; Hahlo/Kahn *Union* 18; and comments in Section 2.2.4 above.

²³ *Ibid.*

²⁴ According to the views of a number of commentators, the continuity of the *ius commune* in Southern Africa has not been disturbed by codification interference. See Zimmerman 1985 (1) 1 *Lesotho LJ* 97; Visser *Daedalus* 6; Van Warmelo *Vicissitudes* 8. The Roman-Dutch law codification was sometimes advocated by Wessels to save the legal system from the influence of English law. His recommendation was unsuccessful and today it seems that no one pleads for such an exercise. See Zimmerman 1985 (1) 1 *Lesotho LJ* 97 Fn2; Kahn 1985 (1) 1 *Lesotho LJ* 69 81.

²⁵ Fagan Historical Context 33 41; Du Bois *Principles* 67; Hutchison *Principles* 1; Schreiner *Contribution* 6; Wessels *History* 356-357; Visser *Daedalus* 2 and 6; Van Warmelo *Vicissitudes* 8; Edwards *History* 89. Kahn (*Doctrine* 224 231) believes that, up to the present time, there is still a

It is evident that any legal system is subject to change in conformity with the traditions and the needs of the community that it regulates.²⁶ That is to say that, modern South African law is obviously different from that which was introduced into the Cape in the seventeenth century. As is stated by case law, the “(...) country has reached a stage in its national development (...) (that) its existing law can better be described as South African than Roman-Dutch.”²⁷ That law has, however, been considerably influenced by English common law.²⁸

Succinctly, current South African law can be defined as a mixture of English common law and a “pre-codal civil law” found in Holland before the adoption of Napoleonic style codes in the earlier part of the nineteenth century.²⁹ One might be surprised by the preservation of Roman-Dutch law in South Africa despite the British settlement. The reasons for such survival do not lack legal justification.

3.2.3 The Conserving of Roman-Dutch Law in South Africa

The preservation of Roman-Dutch law in South Africa may be explained by events which occurred in the country at multiple steps. Firstly, the Articles of the Capitulation of 1795, giving effect to what is considered to be the first South African British Occupation, which ended in 1803, allowed the settlers to “retain all the privileges which they now enjoy.”³⁰ Three weeks after the occupation, General Craig instructed

general resistance to the codification of the entire South African law in the strict sense of being self-contained, not allowing for reference to earlier law.

²⁶ See Van Warmelo *Vicissitudes* 7; Edwards *History* 89.

²⁷ See *Ex parte De Winnaar* 1959 (1) SA 837 (N) 839; *R v Goseb* 1956 (2) SA 696 (SWA) 698; see also Du Bois *Principles* 67.

²⁸ See Schreiner *Contribution* 6; Edwards *History* 80&89; Wessels *History* 386ff; Van Warmelo *Vicissitudes* 8; Visser *Daedalus* 3; Kleyn/Viljoen *Guide* 32-33.

²⁹ See Ng’ong’ola 1992 (4) *RADIC* 835 836; Lotz Sale 361 362; Kahn 1985 (1) 1 *Lesotho LJ* 69; Zimmerman 1985 (1) 1 *Lesotho LJ* 97; Sanders 1981 (14) *CILSA* 328; Hahlo/Kahn *Union* 42. In the words of Kahn (Doctrines 224), South African law is a “cross-bred jurisdiction composed of civil and common law”, with the predominance of the civil law. But, Visser believes that the role fulfilled by both English law and Roman-Dutch law, in respect of South African law, is identical. See Visser *Daedalus* 2; see also Van der Merwe/Du Plessis *Introduction* 1&9.

³⁰ See Kahn 1985 (1) 1 *Lesotho LJ* 69 70; Edwards *History* 75; Van der Merwe/Du Plessis *Introduction* 10.

the former Court of Justice, to “administer justice (...) in the same manner as has been customary until now (...), and in accordance with existing laws, (including Roman-Dutch law), statutes and ordinances,”³¹ in both civil and criminal matters.

Secondly, though the Cape was retroceded to the Batavian Republic from 1803 to 1806, the ordinances of the Government of Batavia appear to have retained Roman-Dutch law as well.³² By the time the British took over the Cape, however, “the law showed few marks of its prolonged sojourn in South Africa. Such changes as there were (not many or very important ones) had been made in the Netherlands, not in South Africa or Batavia.”³³ Thirdly, when the second British permanent occupation took place in 1806, the Articles of Capitulation of 10 and 18 January 1806 once again allowed Roman-Dutch law to continue to have application.³⁴ This inference has been deduced from Article 8 of the 1806 Articles of Capitulation which authorised citizens to continue to enjoy their existing rights and privileges. There is unanimity that the preservation of Roman-Dutch law during the first and the second British occupations was the consequence of British constitutional practice laid down in the *Calvin*,³⁵ and *Campbell v Hall* cases.³⁶ In the *Campbell v Hall* case, for instance, Lord Mansfield ruled that, “in lands acquired by conquest or cession from a civilized power the existing law remains operative unless and until altered by the new sovereign.”³⁷ Insofar as South Africa is concerned, the King, and later the

³¹ Ibid; see also Van der Merwe et al South Africa Report 95 104.

³² In his book relating to Roman-Dutch law history, Wessels (*History* 358-359) doubts whether or not the Code of Batavian law was applicable in the Cape. If not, it is then implied that the law applicable at that period was Roman-Dutch law.

³³ Fagan Historical Context 33 40.

³⁴ See Hahlo/Kahn *Union* 17 Fn32 for a controversial point of view.

³⁵ See *Calvin* (1608) 7 Coke’s Reports 1 (ER 377 398); reported in Fagan Historical Context 33 56; Van Warmelo *Vicissitudes* 8. It was ruled in this case that, “for if a King come to a Christian Kingdom by conquest, seeing that he hath *vitae et necis protestatem*, he may at his pleasure alter and change the laws of that Kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain.”

³⁶ See *Campbell v Hall* (1774) 1 Cowper 204; 98 ER 1045 1047; reported in Zimmerman Roman Law 41 46; Kahn 1985 (1) 1 *Lesotho LJ* 69 70; Fagan Historical Context 33 55; Van Warmelo *Vicissitudes* 8; Van der Merwe/Du Plessis *Introduction* 10-11; Van der Merwe et al South Africa Report 95 109; Hahlo/Kahn *Legal System* 575; and Hawthorne 2006 (12) 2 *Fundamina* 71 72.

³⁷ *Compell v Hall* (1774) 1 Cowper 204; 98 ER 1045 1047. Such is also the modern public international law approach in respect of conquered territories. As Bouvier (*Dictionary* 213) has

Queen, did not alter the legal system in force in that region which was dominantly Roman-Dutch law. Thus, Roman-Dutch law again remained operational.

When Great Britain occupied the Cape following the general peace settlement concluded by the Convention of London of 13 August 1814, likewise, the existing Roman-Dutch law legal system stayed, once more, having application. The same situation prevailed following the First and the Second Charters of Justice in 1827 and 1832.³⁸ Furthermore, the 1857 Commission of Enquiry recognised the prevalence of Roman-Dutch law in its report, dated 10 November 1858.³⁹ The Commission reported, “(...) the Roman-Dutch law which consists of the Civil or Roman laws as modified by the law passed by the legislature of Holland, and by the customs of that country, forms the great bulk of the law of the colony.”⁴⁰ From the Cape, Roman-Dutch law was subsequently approved in the Transvaal, Orange Free State, and Natal.⁴¹

As Zimmermann summarises,

Within the next few decades the territorial sphere of influence of Roman-Dutch law grew considerably, for it was adopted in the three independent Republics, Natal, Orange Free State and Transvaal, created by the ‘Boers’ who emigrated from the Cape Colony; and as in the Cape, it remained in force even when these Republics became British territories. It is therefore not surprising that after the South Africa Act of 1909 had brought about the unification of the four colonies in 1910, Roman-Dutch law was generally taken to have become the common law of the new Union

said, “It is a general rule (of Public law) that where conquered countries, have laws of their own, these laws remain in force after the conquest, until they are abrogated (...),” or changed by the new sovereign.

³⁸ *A propos* of this, s 31 of the 1832 Second Charter of Justice allowed the Supreme Court of the Cape to administer justice in accordance with “the laws now in force within our said colony, and all such other laws as shall at any time hereafter be made (...).” See Hahlo/Kahn *Union* 17; Kahn 1985 (1) 1 *Lesotho LJ* 69 70.

³⁹ See Report of the Commission of Enquiry upon the state of the law in the Cape, published in the Preface to Statute Law of the Cape of Good Hope (1862) vi; known as the Colebrook-Bigge Commission.

⁴⁰ Excerpt quoted in Kahn 1985 (1) 1 *Lesotho LJ* 69 72; Hahlo/Kahn *Union* 17.

⁴¹ See Hahlo/Kahn *Legal System* 576; Van der Merwe et al South Africa Report 95 99-102.

of South Africa.⁴² This position was perpetuated under the Constitutions of the Republic of South Africa of 1961 and 1983.⁴³

The new South African Constitution Act No. 108 of 1996 did not derogate from that principle. Its Schedule 6, s 2, relating to the continuation of existing law, maintained all the laws that were in force at the time the Constitution took effect.⁴⁴ Pursuant to this provision, previous laws, which included Roman-Dutch law, had to remain in force until they were amended or repealed, or unless they were judged by the Constitutional Court to be in conflict with the Constitution.⁴⁵

It is clear then that Roman-Dutch law survived the British occupation. This does not mean, however, that colonisation was without impact on South African law.

3.2.4 The Effect of the English Settlement on South African Law

In 1821 the Deputy Colonial Secretary, Henry Ellis, compiled a circumstantial report on the means by which justice was administered in the Cape. Subsequent to this report, the need for a progressive “Anglicisation” of local law appeared to be ever more insistent. Accordingly, two Commissioners, namely Bigge and Colebrook, were given the task of thinking through the necessity “of a gradual assimilation of the forms and principles of English jurisprudence to the Roman-Dutch” law.⁴⁶ In their report, dated 6 September 1826, Bigge and Colebrook suggested that “South African legal procedure be based on that of England; that future enactments be

⁴² See s 135 of the South Africa Act (9 Edw. 7, c.9) in which, “Subject to the provisions of this Act, all laws in force in the several colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended (...).”

⁴³ Zimmerman Roman Law 41 47; on the Roman-Dutch law progressive insertion in provinces other than the Cape, see Kahn 1985 (1) 1 *Lesotho LJ* 69 71; Edwards *History* 84-87.

⁴⁴ See Constitution of the Republic of South Africa Act No. 108 of 1996, Sch. 6 amended by s 3 of Act No. 35 of 1997; by s 5 of Act No. 65 of 1998; and by s 20 of Act No. 34 of 2001. The first paragraph of the above provision specifies:

2. (1) All law that was in force when the new Constitution took effect, continues in force, subject to-

- a) any amendment or repeal; and
- b) consistency with the new Constitution.

⁴⁵ See Sch. 6, s 2 (1) (a) and (b) of the Constitution Act No. 108 of 1996.

⁴⁶ Kahn 1985 (1) 1 *Lesotho LJ* 69 72-74; see also Edwards *History* 79; Edwards *Outline* 268 352; Palmer *Mixed Jurisdictions* 32.

framed in the spirit of English jurisprudence; and that gradually the English common law be adopted”,⁴⁷ except for the Dutch law of property.⁴⁸ With regard to commercial matters, the Colebrook-Bigge Commission realised that Roman-Dutch law was singularly deficient,⁴⁹ so that it necessitated a thoughtful improvement.

On receipt of the Bigge report, Goderich, then Secretary of State for the colonies, sought how to avoid legal litigation in South Africa. In his guiding principle, dated 5 August 1827, to Major-General Bourke, acting Governor, Goderich warned British government against making any premature legal change. He said,

His Majesty’s Government have however found themselves constrained to dissent from the immediate adoption of a measure of so much importance and difficulty. I am fully prepared to admit the propriety and importance of gradually assimilating the Law of the Colony to the Law of England. But, still, it is obvious that the Roman-Dutch Law adequately provides for all the ordinaries exigencies of life in every form of Society. (...) An entire change in all the Rules of Law respecting Property, Contracts, Wills and descents, must unavoidably induce extreme confusion and distress; nor (...) is it very evident what compensatory advantage would be obtained.⁵⁰

Despite this precaution, English law started to gain access into South African law progressively. Its influence was either straightforward, through legislation, or incidental, through judicial decisions and legal practices. A number of commentators have compared the method by which English law influenced South African law to the way Roman law entered European law.⁵¹ To illustrate this with Hahlo and Kahn’s statement,

The process by which English doctrines and principles infiltrated into the law of the Cape resembles in many respects the reception of Roman law on the Continent during the fifteen and sixteenth centuries. Some English institutions marched into

⁴⁷ Ibid; see also Kahn Doctrine 224 226; Hahlo/Kahn *Union* 18; Christie/Bradfield *Contract* 8.

⁴⁸ Kahn 1985 (1) 1 *Lesotho LJ* 69 74. It was suggested that the law of property remained intact because that law was known “so simple and efficient.” See, in addition to Khan, Van der Merwe et al South Africa Report 95 105 *in fine*.

⁴⁹ As will be mentioned later, mercantile law is one of the fields where the direct influence of English Statutes was most obvious.

⁵⁰ Report extract quoted by Kahn 1985 (1) 1 *Lesotho LJ* 69 72; and Palmer *Mixed Jurisdictions* 32.

⁵¹ These commentators include Kahn 1985 (1) 1 *Lesotho LJ* 69 76; Hahlo/Kahn *Legal System* 576; Hahlo/Kahn *Union* 18; Zimmerman Roman law 41 48.

our law openly along the highway of legislative enactment, to the sound of the brass bands of royal commissions and public discussion. Others slipped into it quietly and unobtrusively alongside-roads and by-paths.⁵²

In general, English law had greatest influence where private Roman-Dutch law was least developed, unclear, or old-fashioned.⁵³ Its favourite domains included criminal law and criminal procedural law, constitutional law, and the law of evidence.⁵⁴ Another group of fields of English law with important influence, under the private law environment, included the law of domicile and aspects of choice of law in the conflict of laws, the law of the formation of contract, and the law of remedies for breach of contract.⁵⁵ Insofar as the formation of contract is concerned, numerous scholars admit that the contemporary South African law model of contracting by way of “offer and acceptance” is an approach that owes much to the English common law.⁵⁶

Additionally, other branches where the influence of English law was very noticeable included company law, merchant shipping, insurance, and negotiable instruments, and, in short, mercantile law.⁵⁷ In effect, by contrast to South African law, English law had already been influenced by the continental *jus mercatorum*. Thus, in matters regarding mercantile law, English statutes were merely adopted “with only such minor changes to suit local conditions or to fit into existing South African law.”⁵⁸ In practice, when applying those acts, the courts were of a mind to

⁵² Hahlo/Kahn *Union* 18; confirmed by Kahn 1985 (1) 1 *Lesotho LJ* 69 76; and Zimmerman Roman Law 41 48.

⁵³ Kahn *Doctrine* 224 229; Hahlo/Kahn *Union* 21.

⁵⁴ For an illustration, the Cape Constitution was framed in Britain. With regard to the law of evidence, there were provisions that, in the case of silence of the existing law, English law was to be applied. See Schreiner *Contribution* 10; Van Warmelo *Vicissitudes* 9; Kleyn/Viljoen *Guide* 33; Palmer *Mixed Jurisdictions* 79; Van der Merwe *South Africa Report* 95 108. For a series of statutes similar to English law enacted in different South African legal fields, see Hahlo/Kahn *Union* 18-19.

⁵⁵ See authorities quoted by Kahn *Doctrine* 224 229-230; Schreiner *Contribution* 10; but Wessels *Contract* xviii for whom South African contract law is nearer civil law countries than the English law of contract.

⁵⁶ Schreiner *Contribution* 41; Christie/Bradfield *Contract* 31.

⁵⁷ See Hahlo/Kahn *Legal System* 576; Edwards *History* 81; Hahlo/Kahn *Union* 19. Hahlo and Kahn describe mercantile law as the field where English influence was strongest because in that field, “Whole statutes were taken over, by reference or by re-promulgation as Cape statutes, from the law of England.”

⁵⁸ See Schreiner *Contribution* 10; Van Warmelo *Vicissitudes* 11-12; Edwards *History* 81; Palmer *Mixed Jurisdictions* 82. Amongst South African statutes based on their equivalent English law

rely on English authorities as a matter of course. As ruled in *Mutual and Federal Insurance Co Ltd v Municipality of Oudtshoorn*, for instance, “the reference to English decisions [was] usually justified on the basis of the similar wording of the acts, but just as often the English cases [were] quoted as if they were South African decisions.”⁵⁹

In contrast to the first group of legal fields above, English law did not have a noticeable influence in branches where Roman-Dutch law was clearly developed, such as the law of property, the law of succession, family law, and, above all, with regard to specific contracts like sales and lease.⁶⁰ Several of these legal fields had already been elaborated on by civil law principles borrowed from Roman law.

When it comes to the role of judicial decisions, the greatest contribution of English law is encountered in the adherence, by South Africa, to “the principle of precedent” known also as the doctrine of *stare decisis*.⁶¹ The *stare decisis* principle implies that regular previous judicial decisions are binding on the court which actually pronounced them, and also on lower courts which are subordinate to the one

regulations, mention should be made of the 1855 Merchant Shipping Act; the 1861 Cape Companies Limited Liability Act; and the 1893 Bills of Exchange Act. See all these acts as quoted by Kahn 1985 (1) 1 *Lesotho LJ* 69 76-77; Hahlo/Kahn *Union* 19-20; Van der Merwe South Africa Report 95 149-160. Nowadays, recent South African Acts dealing with commercial matters have been influenced by international instruments. That is the case for the Electronic Communications and Transactions Act 25 of 2002 (ECT Act), influenced by the 1996 UNCITRAL Model Law on Electronic Commerce (EC Model Law). Cf. Eiselen 2007 (10) 2 *PER/PELJ* 48; Coetzee 2006 (18) *SA Merc LJ* 245 258; Van der Merwe et al *Contract* 62. That is also the case for the Consumer Protection Act No. 68 of 2008 (CPA), influenced to a certain degree by the CISG. For an overview, see Van Eeden *Guide* 1ff.

⁵⁹ See *Mutual and Federal Insurance Co Ltd v Municipality of Oudtshoorn* 1985 (1) SA 419 (A).

⁶⁰ See Kahn *Doctrine* 224 230; Visser *Daedalus* 3; Van Warmelo *Vicissitudes* 12. This does not mean that these fields escaped the influence of English law at all. As a whole, the latter legal system influenced almost all the departments of South African law, of course, to different degrees. See Wessels *History* 236.

⁶¹ See Schreiner *Contribution* 11; Zimmerman *Roman Law* 41 48 & 52; Edwards *Outline* 268 355; Ng’ong’ola 1992 (4) *RADIC* 835 836; Hahlo/Kahn *Union* 20 & 29; Edwards *History* 82; Van Warmelo *Vicissitudes* 10; Van der Merwe/Du Plessis *Introduction* 11; Kleyn/Viljoen *Guide* 33; see also authorities quoted by Du Bois *Principles* 76 in Fn63. The *stare decisis* rule is generally defined as “the English doctrine of a rule established by the binding authority of a single case.” See Butte in Dainow *Decisions* 311.

which handed down the relevant judgements.⁶² To give an example of this, pursuant to s 166 of the Constitution, the South African judicial system comprises the Constitutional Court (CC), the Supreme Court of Appeal (SCA), High Courts, Magistrates' Courts, and other courts. Within this structure, the CC is the highest court in all matters, whether constitutional or not.⁶³

In the application of the doctrine of the precedent, the CC is bound by its own decisions. The highest court must at all times follow its own previous decisions on the same point of law, unless it is convinced that any such decision was wrong.⁶⁴ In the same way, the decisions of the CC bind the SCA and other lower courts in the classification which must follow their ruling.⁶⁵ The reason for such an approach is

⁶² See Hutchison *Principles* 31; Schreiner *Contribution* 11-12; Hahlo/Kahn *Union* 30; Du Bois *Principles* 76; and Van der Merwe et al South Africa Report 95 136.

⁶³ See Van der Merwe et al South Africa Report 95 120 & 173; see also s 167(3) (a) Constitution; and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10 [2011] ZACC 30 (17 November 2011) 2012 (1) SA 256 (CC). In the *Everfresh Market Virginia* case, for instance, the CC ruled on the enforceability of a contract of lease, though it is purely a civil matter. When the CC came into existence in the 1994s, it was the highest court for all constitutional issues, whereas the SCA (then Appellate Division –AD) enjoyed the same privilege for civil, commercial, penal, and all other matters (Cf. Second sentence of s 168(3) of the Constitution). As Van der Merwe and others have said,

From 1994 to 1997 (when the interim Constitution, Act 200 of 1993, was in effect), the Appellate Division was precluded from hearing any constitutional matter. Any appeal from a provincial division of the Supreme Court, (now called the High Court) on a constitutional question had to bypass the Appellate Division and go directly to the Constitutional Court. Since 1997 and the coming into effect of the “Final Constitution” (Act 108 of 1996) (...), the Supreme Court of Appeal (...) has been brought back into the constitutional loop, but its decisions on constitutional matters, unlike its decisions in all other cases, can still be appealed to the Constitutional Court.

See Van der Merwe et al South Africa Report 95 120. For one illustrative case, see *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) which was appealed before the CC in *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁶⁴ In *Habib Motan v Transvaal Government* 1904 T.S. 404 413, Innes CJ said, with regard to the former AD, that, “It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error.” For further authorities in respect of the same Court, see Hutchison *Principles* 31-32 in Fn39 to 43; Hahlo/Kahn *Union* 30 in Fn18 and 25. The doctrine of precedent distinguishes the common law from the civil law. Contrary to common law, under civil law, previous judgements play only an illustrative meaning to the way in which the latter case has to be decided. They are, in other words, merely taken into consideration in the interpretation of legal rules. As Carbonnier has said, previous judgements are in practice, “authorities given respect in fact, if not in law.” Carbonnier *Authorities* 91; see also Van Warmelo *Vicissitudes* 10.

⁶⁵ As ruled in *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA), [2001] 11 BCLR 1197 (CC), 2001 2 SACR 197 (SCA),

given in one of the CC's decisions in *Ministry v Interim Medical and Dental Council of South Africa and Others*.⁶⁶ In this case, the Court stated, "Each case that is decided, adds to the body of South African law, and establishes principles relevant to the decision of cases which may arise in the future."⁶⁷ Because case law create the law, it follows that judicial decisions "may only be departed from by courts higher than the court that gave the earlier decision, (...) or by the same or an equivalent court, when the second court must be satisfied that the earlier decision was wrong."⁶⁸ Moreover, s 173 of the Constitution mandates higher courts, viz. the CC, the SCA, and the High Courts "to develop the common law" by making it uniform throughout the country.⁶⁹ One of the ways suggested by the Fundamental Law is to devote attention to the interests of justice, particularly by giving effect to the rights contained in the Bill of Rights.⁷⁰

High Courts are obliged to follow legal interpretations of the Supreme Court of Appeal, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the Supreme Court of Appeal itself decides otherwise or [the Constitutional] Court does so in respect of a constitutional issue.

See also *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC), [2002] 7 BCLR 663 (CC); Kerr 2008 (125) SALJ 241 246; Hawthorne 2006 (12) 2 *Fundamina* 71 85-86.

⁶⁶ *Ministry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) §3 per Chaskalson P.

⁶⁷ See *Ministry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC); supported by Langa DP in *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) §9.

⁶⁸ See *National Chemsearch (SA) v Borrowman and Another* 1979 (3) SA 1092 (T) 1101; see also Schreiner *Contribution* 11; Hahlo/Kahn *Union* 32. But *Strydom v Afrox* 2001 4 All SA 618 (T) whereby, Mavundla AJ argued that High Courts could depart from pre-constitutional decisions of the AD when exercising their powers in terms of s 39(2) of the Constitution. Mavundla's decision was revoked on the grounds that, even in similar circumstances, High Courts are bound by all pre-constitutional AD decisions as long as these have not been amended by the CC or the SCA. See also *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC), [2002] 7 BCLR 663 (CC); Hawthorne 2006 (12) 2 *Fundamina* 71 79, 82, and 85.

⁶⁹ As stipulated by s 173 of the Constitution, the CC, SCA, and High Courts "have the inherent power to protect and regulate their own process, and 'to develop the common law', taking into account the interests of justice." See also sections 8(3), 39(2) and (3) of the Constitution which require the same courts to develop the common law when interpreting legislation, or when they are called to apply a constitutional right. For an illustration, see the *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* case. With regard to the role played by their predecessor AD in developing South African common law, see cases quoted by Edwards *History* 90-92; Kahn *Doctrine* 224 231 Fn16.

⁷⁰ See *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 326E-F; see also Hawthorne 2006 (12) 2 *Fundamina* 71 82; Hawthorne 2003 (15) *Merc LJ* 271.

Requiring supreme courts to develop the common law, or to take into account the wellbeing of justice, suffices to show the interests modern South African law attaches to the *stare decisis* principle.⁷¹ For that reason, one commentator was right to describe the recourse to the doctrine of precedent as “the most significant connection between South African law and Anglo-American law, and the most divergence from the Roman-Dutch law as well as the other legal systems that grew out the *ius commune*.”⁷² In application of the principle of the precedent, decisions of the CC make the law in the same way as statutes passed by the Parliament in civil law jurisdictions do.⁷³

Lastly, with regard to legal practice, the main English law influence seems to be the introduction of English as the language of the court.⁷⁴ Owing to the limited number of legal scholars in the Cape, the mother country was obliged to appoint English lawyers for South African courts. These had a little knowledge of the Dutch or Latin languages. Furthermore, translations into English of Roman-Dutch and Latin authorities appeared slowly, whereas English books and reports were easily accessible.⁷⁵ Owing to this situation, South African advocates and judges liked to refer to English law sources for inspiration. In addition, the preference for English material “was often justified with the specious argument that the Roman-Dutch law authorities were either silent on the point in question or advocated a solution identical to the one in English law.”⁷⁶ Thus, in order to make the work easier for lawyers trained largely in England; English was adopted as the official language of the court. As a result of this, English rules and concepts were gradually introduced into South

⁷¹ On the basis and practical field of operation of the doctrine of precedent, see Du Bois *Principles* 76-92.

⁷² See Du Bois *Principles* 76; finding support from Coetzee J in *Trade Fairs and Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W) 184.

⁷³ To use the words of Palmer at 44-45, “judges are simultaneously “law-creators and policy makers.” In connection with the earlier AD, see Visser *Daedalus* 2; Hutchison *Principles* 31.

⁷⁴ See Hahlo/Kahn *Union* 20; Kahn 1985 (1) 1 *Lesotho LJ* 69 78; Zimmerman *Mixed System* 41 49; Kahn *Doctrine* 224 229.

⁷⁵ See Kahn 1985 (1) 1 *Lesotho LJ* 69 78; Hahlo/Kahn *Legal System* 578; Edwards *Outline* 268 355; Zimmerman *Mixed System* 41 49; Hahlo/Kahn *Union* 20; Joubert *Contract* 3; Edwards *History* 82; Wessels *Contract* xix.

⁷⁶ Zimmerman *Mixed System* 41 49; see also Wessels *Contract* xviii - x.

African law so that, according to Hahlo and Kahn, Roman-Dutch law was assuming an anglicised aspect.⁷⁷

To conclude this with Wessels' words,

Roman-Dutch law has been influenced by English law far more than people think. Sometimes the influence has been open and overwhelming, as when (...) English law (...) was introduced by legislation, first at the Cape and afterwards throughout the whole of South Africa. At other times English legal ideas have crept in insidiously and, as it were, almost by accident.⁷⁸

The coexistence of Roman-Dutch law and English common law in South Africa has constituted the main characteristic in defining the modern South African law legal system membership as a mixed jurisdiction.

3.2.5 Modern South African Law Legal Family – a mixed legal system

As stated in the introductory chapter, each country in the world has its own law. For comparative purposes, however, scholars have tried to gather those different laws into legal families⁷⁹ among which two are preminent for this study, the civil law family and the common law family. Most of the countries belong to either one of these legal systems. South Africa, in particular, belongs to a legal system which is

⁷⁷ Hahlo/Kahn *Legal System* 575; supported by Zimmerman *Mixed System* 41 49. As Hahlo and Kahn have said at 585,

If one accepts (...) that the term 'Roman-Dutch law' originally denoted the whole of the legal system that prevailed in Holland during the seventeenth and eighteenth centuries, (...), it will be seen that the area within which Roman-Dutch law applies has been considerably narrowed down. Today Roman-Dutch law constitutes an important part of South African law, but it is not all of it. By legislation and otherwise, important areas of the law (...) have been either completely or partially refashioned on English lines. The same holds true of the organisation of our courts, the judiciary, and the profession.

⁷⁸ Wessels 1920 or 1929 (37) *SALJ* 265; cited in Hahlo/Kahn *Union* 18; see also Wessels *History* 386ff.

⁷⁹ Several classifications of legal families have been proposed depending on the criteria chosen by the author. Without a need to recall those criteria, it is necessary to note that the major modern legal families are the "Romano-Germanic family", generally referred to as the civil law legal family, the "Anglo-American family", also known as the common law family, the "Socialist legal family", and the "Religious legal family" which includes Islamic and Hindu laws. For a comprehensive classification of contemporary legal families in the world, see David/Brierley *Legal Systems* 1ff; Saidav *Comparative* 141-337; Zweigert/Kötz *Comparative* 63-319; see also Klimas *Contract* 1; Palmer *Mixed Jurisdictions* 1.

neither fully civil law nor Anglo-American common law. That system is known as “Roman-Dutch law”; it is a *mixed or hybrid legal system*.⁸⁰ In other words, because of the concurrent influence of English and Roman-Dutch law on South Africa, contemporary South African law incorporates both civil law legal system rules with Anglo-American common law legal family principles. As was mentioned above, as in Anglo-American common law countries, South African law has “a healthy respect for ‘case law’ and judicial precedent.”⁸¹ With regard to civil law nations, it shares the influence of principles and rules based on Roman civil law.⁸² As several commentators have said, South African law derives its origin from the civil law family.⁸³ But, given the political events of the 1806s between Holland and England, that legal system “acquired numerous features characteristic of common law systems.”⁸⁴ This situation is confirmed by Smith’s definition according to which a mixed jurisdiction is “a basically civilian system [that] has been under pressure from the Anglo-American common law and has in part been overlaid by that arrival system of jurisprudence.”⁸⁵

Insofar as South Africa is concerned, the Roman-Dutch law civilian character was earlier acknowledged by the Colebrook-Bigge Commission of Enquiry in the nineteenth century. That Commission demonstrated that Roman-Dutch law was predominantly formed by principles and rules generated from Civil and Roman

⁸⁰ See Hahlo/Kahn *Legal System* 585-586; Hahlo/Kahn *Union* 42; Zimmerman *Mixed System* 41 48; Quinot *Contract* 74-75; Van der Merwe/Du Plessis *Introduction* 2 and 243; Du Bois *Principles* 33. South Africa shares the “mixed legal system” status with countries and regions such as Scotland, Louisiana, Quebec, Philippines, and Israel. See Palmer *Mixed Jurisdictions* 5; Hawthorne 2006 (12) 2 *Fundamina* 71; Dainow *Decisions* 1; and Saidav *Comparative* 326-337.

⁸¹ Ng’ong’ola 1992 (4) *RADIC* 835 836; see also Schreiner *Contribution* 11; Zimmerman *Roman Law* 41 48; Hahlo/Kahn *Union* 20 and 29; Edwards *History* 82; Du Bois *Principles* 76-77.

⁸² *A propos* of this, Joubert recognises, for instance, Roman law as the main source of South African contract law. Joubert *Contract* 1; see, in the same sense, Hahlo/Kahn *Union* 42; Wessels *History* 566. Owing to the combination of both civil and common law rules, Hawthorne (2006 (12) 2 *Fundamina* 71-2) describes South African law as an “exceptional” legal system.

⁸³ Hahlo/Kahn *Union* 42; Wessels *Contract* xvii.

⁸⁴ *Ibid.*

⁸⁵ Smith T B “The Preservation of the Civilian Tradition in “Mixed Jurisdictions (sic)” in Yiannopoulos A N (ed) *Civil Law in the Modern World* (Louisiana State University Press 1965) 5; quoted by Palmer *Mixed Jurisdictions* 23.

laws.⁸⁶ The same idea was later confirmed by Joubert with regard to contract law. Joubert argues that, despite the English settlement, “in the field of (...) contract, the law retained its essentially Roman character but received some permanent glosses and embellishments from the English law.”⁸⁷ Thus, given that international sales form part of contract law, the same may be said with reference to South African international sales contracts.

However, though South African law is a “hybrid legal system”, it constitutes a legal system apart with its own peculiar traditions.⁸⁸ Compared with other civil law countries, on the one hand, South African law is not codified.⁸⁹ Even in fields where statutes have been enacted, the interpretation of those statutes is that of a common lawyer rather than of a civil lawyer.⁹⁰ On the other hand, though South African law has adopted the *stare decisis* principle, it applies it in a tempered form by contrast to how it is applied in England.⁹¹ Similarly, South African law has now and then adopted opposite views compared with those of the law of the fatherland.

⁸⁶ See Footnote 38 above.

⁸⁷ Joubert *Contract* 2. The author mentions as signs of English law, *inter alia*, the rules relating to implied terms, repudiation of a contract by the offeror, and the notice of rescission.

⁸⁸ See Van der Merwe/Du Plessis *Introduction* 13; Sanders 1981 (14) *CILSA* 328 329; Hahlo/Kahn *Legal System* 586.

⁸⁹ See Zimmerman 1985 (1) 1 *Lesotho LJ* 97; Visser *Daedalus* 6; Van Warmelo *Vicissitudes* 8; Hahlo/Kahn *Union* 42; Kahn *Doctrine* 224 231. Within the mixed legal family, Louisiana, Quebec, and Israel have codified their laws in contrast to South Africa and Scotland. See MacQueen *Good Faith* 43 48ff; Palmer *Mixed Jurisdictions* 55.

⁹⁰ See Hahlo/Kahn *Union* 42. Under civil law jurisdictions, “legislation is treated as a complete and coherent system and judges are less mechanistic in their approach to it.” See Youngs *Comparative* 68. Under South African law, in contrast, the courts would historically “have adopted either a literalist (...) or purposive approach to the interpretation of legislation.” Of course, the situation has currently changed with the coming into force of the Constitution. As said earlier, s 39(2) of the Constitution obliges courts to promote the spirit, purpose, and objectives of the Bill of Rights when interpreting any legislation. See Van der Merwe et al *South Africa Report* 95 144; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.

⁹¹ In South African law, courts have long been allowed to depart from their own decisions, particularly when they believe they are wrong, whereas in England the House of the Lords permitted that power only in 1966. As ruled by Centlivres CJ in *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) 529,

The rule *stare decisis* has been applied with great rigidity in England, the reason probably being that the English common law has been built up largely on decided cases: hence the reverence for judicial decisions. But with (...) (South African law) the position is different: our common law rests on principles enunciated by the old writers on Roman-Dutch law. Consequently there is no reason why we should apply the rule with same rigidity as it is applied in England.

To illustrate this, before 1919 the Cape Supreme Court, under the dominating influence of Lord De Villiers CJ, assimilated the Roman-Dutch law requirement of *justa causa* (*redelijke oorzaak*, i.e. a reasonable cause)⁹² to the common law requirement of “consideration”.⁹³ In *Alexander v Perry*, the Court ruled that the requirement for consideration in the English meaning of a *quid pro quo* was necessary for the enforceability of contracts under South African law.⁹⁴ In *Conradie v Rossouw*, however, the AD rejected the necessity of “consideration” as a requirement for valid contract.⁹⁵ Since then it has been admitted that the English law consideration rule is beyond South African contract law.⁹⁶ Currently, “any serious

See also *Trade Fairs and Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W) 184 186; *Hahlo/Kahn Union* 42; *Schreiner Contribution* 11; *Du Bois Principles* 77; and *Van der Merwe South Africa Report* 95 136. To use the words of Botha J, in the *National Chemsearch (SA) v Borrowman and Another* 1979 (3) SA 1092 (T) 1101 case, “In functioning under a ‘virile, living system of law,’ a judge must not be faint-hearted, and when he is morally convinced that justice requires a departure from a precedent he will not hesitate to do so.”

⁹² See *Wessels Contract* §71.

⁹³ See discussion by *Christie/Bradfield Contract* 9; *Zimmerman Obligations* 556-557 and authorities quoted by them. The consideration rule has been established under English law since *Payne v Cave* (1789) 3 Term Rep 148; quoted by *Owsia Contract* 442. The basic notion underlying that doctrine is that, in order to be entitled to enforce a promise as a contract, the promisee must have given “something of value in the eyes of the law” in exchange for the promise. (See *Thomas v Thomas* (1842) 2 QB 851 859; quoted by *Birks Contract* 16; and *Kadner Contrat* 135-136. See also s 1CPA which defines the concept “consideration” as “anything of value given and accepted in exchange for goods or services.”

⁹⁴ See *Alexander v Perry* (1874) 4 Buch 59; confirmed in *Malan and van der Merwe v Secretan Boon & Co* (1880) Foord 94; *Tradesmen’s Benefit Society v Du Preez* (1887) 5 SC 269; *Mtembu v Webster* (1904) 21 SC 323 337. See also *Christie/Bradfield Contract* 9; *Joubert Contract* 32; *Hutchison in Contract* 12; *Hutchison Formation* 165 167; *Van der Merwe et al Contract* 169; *Hutchison/Du Bois Contract* 733 753; *Zimmerman Obligations* 557; *Van der Merwe South African Report* 95 183. According to these authorities, a party was not compelled to perform a contract for which there was no “valuable consideration”, which means recompense by both parties.

⁹⁵ In the *Conradie v Rossouw* case, the AD made it clear that, “A good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established.” See *Conradie v Rossouw* 1919 AD 279; as commented on by *Christie/Bradfield Contract* 10; *Joubert Contract* 32; *Kahn Doctrine* 224 231; *Edwards History* 90; *Van der Merwe/Du Plessis Introduction* 245; *Van der Merwe et al Contract* 169; *Schreiner Contribution* 45; *Zimmerman Obligations* 557.

⁹⁶ See *Christie/Bradfield Contract* 10; *Hutchison in Contract* 7; *Van der Merwe South African Report* 95 183 and 200. It does not, however, mean that the doctrine has been definitively eliminated from South African law. The doctrine of consideration was revived in *Malilang v MV Houda Pearl* 1986 2 SA 714 (A), and through s 76(2)(b) CPA. As is the case under English law, the latter provision allows consumers “to recover money paid if the consideration for the payment of it has failed.” For a sceptical view of the reintroduction of the consideration doctrine in consumer contracts, see *Van Eeden Guide* 302.

and deliberate agreement made with intention of creating a legal obligation is a binding contract, provided only that the agreement is lawful and possible of performance, and that the parties have the requisite capacity to contract,”⁹⁷ without the need of any consideration at all.

Briefly, today’s “South African law has acquired its own identity which is neither purely Roman-Dutch law (nor civil law) nor purely English law.”⁹⁸ As Van der Merwe and Du Plessis have stated, “(...) a distinctly South African common law had emerged through the blending of Roman-Dutch and English law by the Courts and legislators.”⁹⁹ Contemporary South African common law derives its authority from the Constitution which is now the Republic’s supreme law.¹⁰⁰ Hawthorne remarks that South Africa is a unique situation where, though the legal system is not codified, the “Constitution instructs as to how the law should be developed and interpreted. All law, including common law, must be interpreted and developed to give effect to constitutional rights and values.”¹⁰¹ This is also Harms DP’s opinion, in *Bredenkamp v Standard Bank*, for whom modern South African common law “is

⁹⁷ As was said by De Villiers,

According to our law if two or more persons, of sound and mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius at 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius at 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is consensus, naturally within proper limits – it should be *in* or *de re licita honesta*.

See *Conradie v Rossouw* 1919 AD 279 320; see also *McCulloch v Fernwood Estate Ltd* 1920 AD 204 206.

⁹⁸ Zimmerman Roman Law 41 51; see also Hahlo/Kahn *Union* 444.

⁹⁹ Van der Merwe/Du Plessis *Introduction* 13; see also Du Bois *Principles* 33 and 64.

¹⁰⁰ In *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) §§46-49, Chaskalson P made it clear that, “There is only one system of law (in South Africa). It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.” See, in the same sense, *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) [15] [16]; Du Bois *Principles* 64 Fn1 and 65 Fn2; and Bhana/Pieterse 2005 (122) 4 SALJ 865.

¹⁰¹ See Hawthorne 2006 (12) 2 *Fundamina* 71 83; see also s 39(2) Constitution; and the *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* case.

only ‘valid’ to the extent that it complies or is congruent with the Constitution.”¹⁰² The common law of contract does not depart from the principle above either. As ruled by Ngcobo J in *Barkhuizen v Napier*,¹⁰³ all the aspects of South African law, including the law of contract, are currently subject to constitutional regulation.¹⁰⁴ Owing to the fact that contract law is subject to constitutional control, courts are obliged to “take account of fundamental constitutional values in carrying out their duty of developing a law of contract that reverberates with the spirit, purport and objects of the Constitution.”¹⁰⁵

3.2.6 Conclusion on the Historical Development of South African Law

Historically speaking, South African law originates from Dutch and English law. Nevertheless, though it was influenced by Roman-Dutch and English law earlier, South African common law has now acquired its individuality being led by the 1996 Constitution and the jurisprudence of the CC. Moreover, South Africa is a mixed legal jurisdiction which combines both civil law and common law principles. Its legal independence may be read, as far as this study is concerned, through the discussion of fundamentals governing the law of contract and the basics of sales contracts respectively.

¹⁰² See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA).

¹⁰³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) [15].

¹⁰⁴ It was ruled in the *Barkhuizen* case that,

All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.

See comments by Kerr 2008 (125) *SALJ* 241; Bhana/Pieterse 2005 (122) 4 *SALJ* 865. For a similar ruling, see *Brisley v Drotosky* 2002 4 SA 1 (SCA) 35G-H; and the *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* case.

¹⁰⁵ See *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [6] as commented on by Bhana 2007 (124) *SALJ* 269 271 and 273, together with s 39(2) of the Constitution. On the manner how the Constitution should apply to contractual relationship, see Rautenbach 2011 (74) *THRHR* 510 515.

3.3 Fundamental Principles of South African Contract Law

3.3.1 Introduction

A contract is generally considered to be an agreement between two or more parties which gives rise to a legal obligation.¹⁰⁶ As Christie and Bradfield have said, one must first look for the agreement between two or more parties to decide whether or not a contract exists.¹⁰⁷ It follows that, for a legal relationship to be called contract, the first condition required is the presence of two parties at least as the will of one party is insufficient to generate a contract.¹⁰⁸ All agreements are, however, not necessarily contracts.¹⁰⁹ An agreement acquires the quality of a contract only if it meets a number of essential elements prescribed by the law. As a rule, a contract leads to performance by one or both of the parties.¹¹⁰ In addition to the prospective implementation, other indispensable requirements include the intention of parties to

¹⁰⁶ See Wessels *Contract* §18; Hutchison/Du Bois *Contract* 733 736; Hutchison in *Contract* 4; Hutchison *Principles* 409; Joubert *Contract* 21-22; Van der Merwe et al *Contract* 7; Kritzinger 1983 SALJ 47. For case law, see *Portion 1 of 46 Wadeville (Pty) v Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A) 69; *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) 812; *Etkind and others v Hicor Trading Ltd* 1999 (1) SA 11 (W) 126.

¹⁰⁷ Christie/Bradfield *Contract* 23; see also Zimmerman *Obligations* 546 for whom: “A contract is based on the consent of the parties thereto.”

¹⁰⁸ See authorities quoted by Kerr *Contract* 4 in Fn16; Joubert *Contract* 21 and 36; Christie/Bradfield *Contract* 23; Wessels *Contract* §55. After he had admitted that “A contract includes a concurrence of intention in two parties”, Pothier specified that one of these parties “promises something to the other, who on his part accepts such promise.” See Pothier *Obligations* 4; quoted by Wessels *Contract* §58.

¹⁰⁹ Hutchison in *Contract* 6; Joubert *Contract* 22.

¹¹⁰ In principle, any contract is required to be physically possible of performance. If, when it is concluded, a contract is not able to be performed the agreement is null and void. Such is the application of an earlier Roman maxim which is still accepted in modern law: “*Impossibilium nulla obligatio est*”, translated as “A contract the performance of which is impossible is void”. See *Wilson v Smith* 1956 (1) SA 393 (W) 396; *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 434; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [75]. An instance of a contract impossible of implementation is the sale of goods already destroyed at the time a contract is concluded. For comments, see Du Plessis *Possibility* 205-210; Joubert *Contract* 124-128; Hutchison/Du Bois *Contract* 733 753-754; Zimmerman *Obligations* 686-697.

create an obligation,¹¹¹ their capacity¹¹² and freedom, certainty and legality, conformity with statute law, public policy or moral values of the society, and, if necessary, the meeting of prescribed formalities.¹¹³ Since it is not possible within the limited frame of this section to discuss each of these conditions, only some deserve attention, namely the need of an agreement, freedom, certainty, good faith, and public policy.

3.3.2 Necessity of an Agreement

3.3.2.1 Introduction

Generally speaking, almost all legal systems wish to found contractual liability on agreement.¹¹⁴ Despite such a global understanding, the enforceability of contract has

¹¹¹ Save the case of enforceability of contract based on reliance expectations as discussed in Section 3.3.2 below.

¹¹² See *Rood v Wallach* 1904 TS 187 201; *Conradie v Rossouw* 1919 AD 279 320; see also comments under Section 2.3.5.2 above.

¹¹³ See Wessels *Contract* §47; Hutchison/Du Bois *Contract* 733 737; Hutchison in *Contract* 6; Van der Merwe et al *Contract* 7; Lubbe/Du Plessis *Contract* 243 245. In conformity with the characteristics above, Hutchison defines a contract as “an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations.” See Hutchison in *Contract* 6. And together with Du Bois, the same author describes a contract as “an agreement for an ascertainable and possible future performance or non-performance made by persons capable of contracting seriously, sometimes with special formalities, and without any illegality.” See Hutchison/Du Bois *Contract* 733 736. It should immediately be noted that, under South African law, a contract needs not to conform to certain specific formalities for it to be valid and enforceable. The absence of formalities is the rule and their prescription the exception. See *Conradie v Rossouw* 1919 AD 279; *Christie/Bradfield Contract* 109; Eiselen E-Commerce 7. It was held in *Goldbatt v Fremantle* 1920 AD 123 128 that, “Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity.”

¹¹⁴ See Hutchison in *Contract* 17; Kritzinger 1983 *SALJ* 47; and a wealth of authority quoted by Christie/Bradfield *Contract* 24 in Fn7. English courts have had an opposite point of view. In *Smith v Hughes* (1871) LR 6 QB 597, after stating that “if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other”, Blackburn J said,

If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.

generated a number of methods gathered in both subjective and objective approaches. As explained in Section 2.3.4.1 above, the most usual of these approaches are the consensual theory, the declaration theory, and the reliance theory. This section aims to discover which of these theories has precedence in South African law.

Immediately, throughout the historical development of South African law, courts give the impression of not having applied any single theory of contract constantly. According to Hutchison, the legal system under view

(...) has since the earliest times vacillated between a subjective and an objective approach to contract. As late as 1958, the Appellate Division could say that our law follows a 'generally objective approach to the creation of contracts.'¹¹⁵ However, more recent pronouncements of that court suggest that our approach is fundamentally subjective, though tempered by objective considerations in cases of *dissensus*.¹¹⁶

This statement leads one to believe that the heart of a contract is either the consent of the parties, or the reasonable expectations by one of them that there is an agreement. Thus, after a discussion of each of these theories, it will be necessary to compare them to show how agreements emerge.

3.3.2.2 Agreement based on consensus

Consensus has been largely considered to be the main foundation of contract. When the earlier South African judges came to address the issue of contract liability, they admitted immediately that there could be no contract without consensus.¹¹⁷ Wessels has noted in this regard that, "Although the minds of the parties must come together, courts (...) can only judge from external facts whether this has or has not occurred.

Excerpt reported by Hutchison in *Contract* 17; Van der Merwe et al *Contract* 30 Fn88; Van der Merwe et al South Africa Report 95 181. As it will be seen later, this dictum has been quoted with approval in a number of contemporary South African cases.

¹¹⁵ See *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479E.

¹¹⁶ Hutchison in *Contract* 17.

¹¹⁷ See among others, *Rose-Innes Diamond Mining Co Ltd v Central Diamond Mining Co Ltd* (1883) 2 HCG 272 308; *Potgieter v New York Mutual Life Insurance Society* (1900) 17 SC 67 70; *Joubert v Enslin* 1910 AD 6 23.

In practice, therefore, it is the manifestation of (...) (parties') wills and not the unexpressed will which is of importance."¹¹⁸

The necessity of the intention of the parties for concluding a contract has also been supported by modern case law. In *Collen v Rietfontein Engineering Works*,¹¹⁹ for instance, Centlivres JA put it that, in order to resolve a question relating to the contract, one must first search for "what was the intention of the parties at the time they entered into the contract."¹²⁰ A similar ruling was given by Potgieter JA in *Jonnes v Anglo-African Shipping Co (1936) Ltd* with regard to the interpretation of contracts.¹²¹ Potgieter JA said on this subject that, "(...) in the interpretation of a contract the general rule is that the court should determine what the true intention of the parties was."¹²²

Subsequent to the details above, it is clear that the South African legal approach to contract is essentially subjective. Yet, the AD has already stated an opposite view in *Pieters & Co v Salomon*, in the 1911s.¹²³ At that time, the Court tried to adopt an objective method, relying on the English law approach in *Smith v Hughes*.¹²⁴ Usually, when it is perceptible that parties have reached consensus, there is no problem; contractual responsibility is based upon the will of the parties. If there is a doubt on the coincidence of their minds, however, then the second meaning of the concept "agreement" enters into account. There, the task will consist of seeking

¹¹⁸ Wessels *Contract* §62; see also Christie/Bradfield *Contract* 24.

¹¹⁹ *Collen v Rietfontein Engineering Woks* 1948 1 SA 413 (A) 435.

¹²⁰ *Ibid.*

¹²¹ *Jonnes v Anglo-African Shipping Co (1936) Ltd* 1972 2 SA 827 (A) 834 D.

¹²² *Ibid.*

¹²³ See *Pieters & Co v Salomon* 1911 AD 121 137 per Innes J.

¹²⁴ It was ruled in *Pieters & Co v Salomon* that,

When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware.

Excerpt reported by Hutchison in *Contract* 18.

whether, by his/her words or conduct; one party may have led the other party to believe that consensus had been reached.¹²⁵

Under this second approach, an agreement is not constituted by the consensus of the parties, but by the external manifestation of their consensus. A comparable ruling was adopted in the *South African Railways & Harbours* case.¹²⁶ In this case, Wessels JA stated that, “The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds.”¹²⁷ Such a ruling has been criticised, however, on the grounds that it looks as if it propels the declaration theory as the major basis of South African contract law instead of the consensual rule.¹²⁸ Hence, advice was given to take it with caution.¹²⁹ Moreover, suggestions that Wessels’ ruling should be taken with reservations were confirmed about a half century later in the *Saambou-Nasionale* case¹³⁰ which indirectly supported the reliance theory as a substitute to consensus.

3.3.2.3 Agreement based on reasonable reliance

To use the words of Kritzinger, the *Saambou-Nasionale* case seems to be the first instance where “(South African) courts have thought it necessary to express any sort

¹²⁵ Hutchison in *Contract* 19; Kritzinger 1983 *SALJ* 47.

¹²⁶ See *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 per Wessels JA.

¹²⁷ It was held, in details, that,

The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of that agreement.

This is the only practical way in which Courts of law can determine the terms of a contract.

See *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 715-16.

¹²⁸ See Christie/Bradfield *Contract* 25; Hutchison in *Contract* 18; Van der Merwe *Contract* 33.

¹²⁹ As one commentator has said, “A theory which disregards the mental attitude of every contracting party is insupportable.” See Kerr *Contract* 20; quoting Kahn *Contract* Vol. 1 17.

¹³⁰ See *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 991G per Jansen JA.

of view on the issue of contractual theory, and it is certainly the first time that the AD has done so in a reported decision.”¹³¹ In this case, Kritzinger continues,

Jansen JA expressed *obiter* the view that the consensual theory (*‘wilsteorie’*) is generally regarded in our law as the starting-point for an inquiry into the issue of formation of an agreement, and that only in the event of true (*‘werklike’*) *dissensus* (...) should another approach be applied, an approach which would be some form of the reliance theory (*‘vertrouensteorie’*) (...).¹³²

In *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer*,¹³³ likewise, the same Jansen JA disproved the significance of the declaration theory as a means of establishing contractual liability. The learned judge, in a dissenting opinion, again supported the consensual theory efficiency as the way to determine contractual liability. He admitted, by way of exception, that the effects of that theory should at times be tempered by recourse to the reliance theory.¹³⁴ More specifically, Jansen JA reiterated the fact that “the true basis of contractual liability in (...) (South African) law (...) is not the objective approach of the English law, but is – save in cases where the reliance theory is applied – the real consensus of the parties.”¹³⁵ It should be remembered that the reliance theory is an approach according to which the enforceability of contract may depend on the words or conduct displayed by the other party.¹³⁶ Pursuant to this principle, an agreement needs not necessarily to be expressed; it may implicitly result from one party’s conduct. In this regard, the *Saambou-Nasionale* decision has the merit of having invoked, for the first time, the relevance of the reliance theory under South African law.

¹³¹ See Kritzinger 1983 SALJ 47 50; see also Christie/Bradfield *Contract* 1; Hutchison in *Contract* 18.

¹³² Ibid.

¹³³ See *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A).

¹³⁴ In addition to the *Saambou-Nasionale* and the *Mondorp Eiendomsagentskap* cases, the issue of contract theories was also dealt with in *Deventer v Louw* 1980 (4) SA 105 (O) 110A-E, and in *Spes Bona Bank v Portals Water Treatment* 1981 (1) SA 618 (W) 631C-D; see comments by Kritzinger 1983 SALJ 47 50-51.

¹³⁵ See *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 991G; see also *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A); and *Société Commerciale de Moteurs v Ackermann* 1981 (3) SA 422 (A) 428.

¹³⁶ See Christie/Bradfield *Contract* 1; Joubert *Contract* 80; Van der Merwe *Contract* 33; Kerr *Contract* 23; Kritzinger 1983 SALJ 47.

Initially, the reliance theory was presented as “a fifth wheel” used in order to control the shortcomings of the consensual theory. Since then, it has been endorsed by recent decisions, particularly the so-called *Sonap Petroleum v Pappadogianis* case¹³⁷ and the *Steyn v LSA Motors* case,¹³⁸ and promoted as an independent approach to contract. In the *Sonap Petroleum v Pappadogianis* case,¹³⁹ Harms AJA actually approved the significance of the reliance theory by answering the following main question, “Did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?”¹⁴⁰

By way of response, the learned judge held that the key inquiry in matters of the kind of the *Sonap Petroleum* case requires a triple investigation: seeking first whether there is a misrepresentation as to one party’s intention; searching next to discover who the party is who made that representation; and finally trying to find whether the other party was misled thereby.¹⁴¹ Quoting with approval the rule in *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*,¹⁴² the learned judge

¹³⁷ See *Sonap Petroleum (South Africa) (Pty) Ltd (formerly known as Sonarep South Africa (Pty) Ltd) v Haralabos Pappadogianis* 1992 (3) SA 234 (A) per Harms AJA.

¹³⁸ See *Archibald Douw Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) per Botha JA.

¹³⁹ This case was concerned with a lease of a 20-year period limit formed in February 1975 in terms of a duly registered notarial deed. In 1987, an *addendum* to the principal contract was signed by Pappadogianis and Sonap’s managing director. Through an error of the former’s attorney, unfortunately, the initial term of 20 years appeared in the *addendum* as being reduced to 15 years. At the time the error was detected, Sonap sought rectification of that error, or if that was not possible, to declare the postscript void. Its claim was dismissed with costs on first instance, and the dismissal confirmed on appeal. *A propos* of this, the AD assumed that the respondent should have read the *addendum* carefully and was then supposed to have realised that the duration has been reduced. According to the court, “the respondent was not misled by the appellant to believe that it was its intention to amend the period, but, on the contrary, that he was alive to the real possibility of a mistake and that he had, in the circumstances, a duty to speak and to enquire.” So, given that it failed to meet these requirements, but preferred to “snatch the bargain”, the Court deduced that there was no consensus, actual or imputed in the case. It consequently annulled the statement of the *addendum* which was about to change the duration from 20 to 15 years. For a critical interpretation, see Steyn Critical Appraisal 11.

¹⁴⁰ *Sonap Petroleum v Pappadogianis* 239 I-J.

¹⁴¹ *Ibid* 239J-240B, whereby Harms AJA referred to *Du Toit v Atkinson’s Motors Bpk* 1985 (2) SA 893 (A) 906 C-G; and to *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) 316 I-317 B.

¹⁴² *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) 984 D-H; 985 G-H.

specified that the last sub-question postulated a double possibility, i.e. examining whether a party was actually misled, and whether a reasonable man would have been misled.¹⁴³ Applying this test to the case, Harms said, “If the respondent realised (or should have realised as a reasonable man) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and enquire whether the expressed offer was the intended offer. Only thereafter could he accept.”¹⁴⁴ The judge concluded, therefore, that, though the duty to speak may be relative, bringing a claim in the knowledge of a possible denunciation requirement is contrary to good faith considerations.¹⁴⁵

What is important from the case being considered is that the AD reached the conclusion that the requirement as for fault is irrelevant for cases of direct application of the reliance theory.¹⁴⁶ In addition, if the *Saambou-Nasionale* decision has initiated the reliance theory as an alternative to the consensual approach, the *Sonap Petroleum v Pappadogianis* ruling has introduced its direct application as a basis for contractual liability in cases of *dissensus*. This seems to be the reason for which its ruling was adopted by Botha JA two years later in the *Steyn v LSA Motors* case,¹⁴⁷ and, more

¹⁴³ *Sonap Petroleum v Pappadogianis* 239 I-240 B; see also *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) [17]; Van der Merwe et al *Contract* 34-37; Hutchison Formation 165 192-193.

¹⁴⁴ On the latter aspect, the learned judge relied on *Sherry v Moss* WLD 3 September 1952 (unreported case); and *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd* 1989 (1) SA 337 (W) 342 I-343 E.

¹⁴⁵ *Sonap Petroleum v Pappadogianis* 241 D.

¹⁴⁶ See Steyn Critical Appraisal 13.

¹⁴⁷ This case deals with a competition held in 1989, in Durban, whereby both amateurs and professional players participated. Steyn, an amateur golfer, also participated in that championship. On the seventeenth hole, a brand new motor car was on display and alongside it a board advertising: “Hole in one prize sponsored by LSA Motors Ltd (then Reeds Delta).” Steyn holed in one. Surprisingly, when he went to be awarded his prize, Steyn was refused the car on the grounds that only professional players qualified for the reward. Justification for such an attitude resulted from the explanation of the LSA Motors’ director that the advertising company had never intended to contract with people taking part in the competition by pleasure. The Court inferred from the evidence submitted before it that there was no consensus between the parties, but rather *dissensus*. Even though the lay-golfer tried to demonstrate that what was important in the case were not the intentions of the parties, but rather the content of the advertisement; his claim was dismissed. As a means of motivations, the AD stated at 61C - E that, “an argument which treats the other party’s subjective intention as irrelevant, and postulates the outward manifestation of his intention as the sole and

recently, in the *Constantia Insurance Co Ltd v Compusource* case,¹⁴⁸ and a number of other cases.¹⁴⁹ In the *Steyn v LSA Motors* case, when dealing once more with a

conclusive touchstone of the respondent's contractual liability is fundamentally fallacious and contrary to legal principle.”

¹⁴⁸ See *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) [17] to [23]. This case is a faithful illustration of Harms AJA's rule. *A propos* of this, Constantia, an insurance company, issued two post dispute insurance policies to Compusource through an agency broker. The policy was novel in South Africa. The contract contained, furthermore, two litigated clauses the insured claimed to having ignored at the time the contract was concluded. Its defence in the case was hence one of misrepresentation by the insurer's representatives in the form of an omission. At the beginning, the case led along an investigation into tort responsibility rules. Brand JA did not agree with that approach, arguing that the true issue in the case was not one of *misrepresentation by omission*, but rather one of *dissensus*. As observed by him, “Constantia's representatives thought that Rust had agreed to clause 3.5 read with clause 3.3.2, whereas in fact he had not. The reason for the misapprehension on the part of the former was that Rust created the impression that he did agree to clause 3.5 by accepting the quotations that were made subject to the provisions of a standard policy, including that clause.” Finding support in the *Sonap Petroleum v Pappadogianis* case, Brand borne in mind the fact that under similar circumstances the principle in South African law of contract is that,

Rust's principal would, despite this lack of actual consensus, be bound to the provisions of the clause if Constantia's representatives were reasonable in their reliance on the impression created by Rust. If a reasonable person in their position would have realised that Rust, despite his apparent expression of agreement, did not actually consent to be bound by the clause, this clause could not be said to be part of their agreement.

Finding advice in Harms' threefold inquiry; Brand found that the two first questions would be answered in favour of the Insurance Company, but not the last. According to him, the outcome of the case was dependent on the third question worded as follows: “Would a reasonable person in the position of (...) (the insurer's representative) also have laboured under the same misapprehension?” Answering this question, the judge gave seven instances which would deny to Constantia and its representative the status of reasonable person with regard to the issue in question. The learned judge concluded subsequently that,

In all the circumstances, I am therefore satisfied that the reasonable person in the position of (...) (the insurer's representative) would not have inferred simply from the fact of (...) (the insured's representative)'s acceptance of the quotations that his true intention was to bind (...) (the insured) to the provisions of clause 3.5. I believe that the reasonable person would thus have enquired from (the insured's representative) at the time whether he appreciated the meaning of the clause. If his answer was in the negative, as we now know it would have been, the reasonable person would have explained the clause to him. The legal consequence of the failure by (...) (the insurer's representative) to follow this approach is that (...) (the insured) cannot be held bound by the provisions of a clause to which its representative did not and could not reasonably have been thought to agree.

A brief comparison reveals that in the *Steyn* case, the reasonable person character was considered in the light of a layperson, whereas in the *Constantia Insurance* decision it was made with regard to the status of a professional businessman. It is believed then that, whether or not one party is a reasonable man is a matter of fact dealt with on a case-by-case basis.

¹⁴⁹ See among others, *Investec Bank Ltd v Lefkowitz* 1997 (3) SA 1 (A) 8-9; *HNR Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) 480-481; and *Dauids v ABSA Bank Bpk* 2005 (3) SA 361 (C).

matter of dissent, the AD found support in the English law dictum in *Smith v Hughes* as well as in the *Sonap Petroleum* decision; it ruled then,

Where it is shown that the offeror's true intention differed from his expressed intention, the outward appearance of agreement flowing from the offeree's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror (...). Only if this test is satisfied can the offeror be held contractually liable.¹⁵⁰

To summarise this, the reliance theory applies in the context of *dissensus*. With regard to the way it is applied under South African law, this theory assumes that “a contract is based on the intention of one party to an agreement and the reasonable impression or reliance on his part that the other party had the same intention.”¹⁵¹ Such being its general understanding, it is then logical that the reliance theory was at times observed as playing a supplementary role to the intention theory.¹⁵² With regard to the enthusiasm with which the reliance theory has recently been accepted, it should be advocated as an equivalent of consent so that modern South African contract law has a double basis.

3.3.2.4 Double source of contractual responsibility in current South African law

It is acknowledged that South African law recognises a twofold basis on which to found a contract, viz. consensus and reasonable reliance.¹⁵³ As several scholars have admitted, the primary basis of contract is consensus.¹⁵⁴ Thus, in order to decide whether or not a contract is enforceable, one must look first for the common intention

¹⁵⁰ See *Archibald Douw Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61 C-E.

¹⁵¹ Van der Merwe et al *Contract* 33; see also cases discussed above dealing with reasonable reliance protection.

¹⁵² See Hutchison in *Contract* 19; Van der Merwe et al *Contract* 33; Christie/Bradfield *Contract* 25.

¹⁵³ See Hutchison in *Contract* 19; Van der Merwe et al *Contract* 45 Fn182; Kerr *Contract* 23; see also, *Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) 2008 SA 441 (SCA).

¹⁵⁴ *Ibid*; see also Christie/Bradfield *Contract* 1 and 24-25.

of the parties. If it is inferred that contracting parties reached agreement, there is no need to enquire about any other reason for holding the parties bound by their commitments.¹⁵⁵ Where there is a lack of common intention, nonetheless, the second step will consist in investigating whether one party, by his/her conduct or words, may have, in a reasonable manner, led his/her partner to believe that consensus had been reached. If the answer is positive, the contract will then be based on the reliance theory.¹⁵⁶

To conclude this with the words of Hutchison in relation to South African law, “[the] will theory may be the point of departure, but, in cases of *dissensus*, it is tempered by an application of the reliance theory.”¹⁵⁷ The relevance of the latter approach is confirmed, in practice, by the fact that, if in each instance a spotless consent was required, it could be difficult for commercial dealings to prosper.¹⁵⁸ But, because parties form themselves their contractual legal pledge, their intention is vital.¹⁵⁹

3.3.2.5 Materialisation of agreements

Introduction

The agreement on which a contract is based may be actual or apparent. As a number of scholars have said,

¹⁵⁵ Hutchison in *Contract* 19; Van der Merwe et al *Contract* 33.

¹⁵⁶ See in addition to cases already referred to, *Ridon v Van der Spuy & Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) 135 138-139; *Pillay v Shaik* 2009 (4) SA 74 (SCA); *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) [9]. In the *Slip Knot Investments* case, Malan FR explained clearly that, “Contractual liability (...) arises not only in cases where there is consensus or a real meeting of the minds, but also by virtue of the doctrine of quasi mutual assent. Even where there is no consensus contractual liability may nevertheless ensue.”

¹⁵⁷ Hutchison in *Contract* 20.

¹⁵⁸ Cf. *Irvin and Johnson (SA) Ltd v Kaphan* 1940 CPD 647 651 per Davis J whereby, if “[all] kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty;” but, Christie/Bradfield *Contract* 26-30.

¹⁵⁹ Kerr *Contract* 3. Kerr relies on the classic doctrine of Roman law in Ulpian’s statement whereby, “In stipulations and other contracts we always follow that which the parties intended.” See Ulpian D. 50.17.34; Voet 23.2.85; see also Joubert *Contract* 81.

(The agreement) is (...) (real) when there is a true meeting of the minds of the parties on all material aspects of the contract. It is apparent when, despite the lack of subjective consensus between the parties, there is an objective appearance of agreement which the law will uphold as a binding contract.¹⁶⁰

On the one hand, the existence of a particular intention is, normally, a matter of fact. On the other hand, the conclusion of a contract requires some external facts from which the existence of the alleged intention may be inferred.¹⁶¹ Those attitudes may consist of words, writing, conduct, or, occasionally, silence,¹⁶² depending on the case. What is important is that the two declarations of intention accord with each other, so that in the absence of such a concurrence there is no agreement at all.¹⁶³

In addition to the manifestation of consensus, the duty to reach agreement also involves the idea of co-operation in order to achieve mutual goals.¹⁶⁴ To co-operate means that parties must work together while negotiating an agreement. In ordinary circumstances, one party will make some declaration of his/her intention; at the end the other party will express a coinciding intention in response. Frequently, the first statement is called an “offer”, and the second is known as the “acceptance of the offer”.¹⁶⁵ With regard to the person making the offer, he/she is called the “offeror”, and the one accepting the offer known as the “offeree”.

As stated by Watermeyer ACJ in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd*, “a binding contract is as a rule constituted by the acceptance of an offer.”¹⁶⁶ Van

¹⁶⁰ See *Hutchison/Du Bois Contract* 733 737; *Hutchison in Contract* 13; *Kerr Contract* 3-17 and 181.

¹⁶¹ See *Estate Fuchs v D’Assonville* 1935 OPD 85; *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232; *Joubert Contract* 36.

¹⁶² On the manifestation of intention by silence, see *Donaldson v Morris* 1912 CPD 339; *Parsons v Langemann* 1948 (4) SA 258 (C); *East Asiatic Co (SA) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954 (2) SA 387 (C); *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A); *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).

¹⁶³ *Joubert Contract* 36; *Zimmerman Obligations* 560.

¹⁶⁴ *Ibid*; see also *Hawthorne Contract Theory* 137 142.

¹⁶⁵ On the implementation of the offer and acceptance theory, see *Hawthorne/Hutchison Offer and Acceptance* 45; *Hutchison Formation* 165; *Van der Merwe et al Contract* 46-85; *Christie/Bradfield Contract* 31-74. The manifestation of intent by means of offer and acceptance is discussed in detail under Chapter 5 below dealing with the formation of contract.

¹⁶⁶ See *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241; see also *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479E. In the latter case, Schreiner JA said, “If the respondent had been a natural person who had accepted a tender

den Heever JA completed this opinion by saying that, “Consensus is normally evidenced by offer and acceptance.”¹⁶⁷ Subsequent to these cases, it became clear that South African law is largely forward-looking with regard to the offer and acceptance rule in determining consensus.¹⁶⁸ This does not, however, mean that every case of consensus has to be confined to an offer and a corresponding acceptance. In the *Estate Breet v Peri-Urban Areas Health Board* case, Van den Heever JA showed that in the same way every accepted offer does not necessarily constitute a contract, a valid contract can also be concluded independently of the offer and acceptance process.¹⁶⁹

The offer

An offer is simply defined as a proposal to contract.¹⁷⁰ For it to be valid, an offer requires, primarily, the “declaration of the will of one party which is of such a nature (...) that acceptance thereof will be sufficient to constitute an agreement.”¹⁷¹ The expression of intention will, nevertheless, be regarded as sufficient for the purposes of a legally binding offer on condition that it meets a certain number of requirements. These requirements include the fact that the offer must be firm, complete, clear, and certain.

Firstly, the offer must be firm. Requiring an offer to “be firm” means that it must be proposed with the intention of creating an obligation once it is accepted.¹⁷²

according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tender (...).” See, in the same sense, Kerr *Contract* 61.

¹⁶⁷ See Van den Heever JA in *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 532 (A) 532E; see also Christie/Bradfield *Contract* 30.

¹⁶⁸ For further comments, see Hawthorne/Hutchison Offer and Acceptance 45; Hutchison Formation 165.

¹⁶⁹ See *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 532 (A) 532E.

See also *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) 331; *Couve v Reddot International (Pty) Ltd* 2004 (6) SA 425 (W); *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 1 SA 639 (SCA); and comments by Van der Merwe et al *Contract* 54; Kerr *Contract* 65.

¹⁷⁰ See *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A) 218-19; Hutchison/Du Bois *Contract* 733 741.

¹⁷¹ See Joubert *Contract* 37; see also *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232.

¹⁷² It was held by Levy J in *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633D that, “It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is,

To recall one of the familiar expressions on the subject, the offer shall be made with *animus contrahendi*.¹⁷³ In other words, “An agreement becomes a contract only if the parties enter into it with the serious and deliberate intention of constituting an obligation binding on (...) them at law.”¹⁷⁴ In the particular case of sales contracts, Van Winsen J said, in *Hottentots Holland Motors (Pty) Ltd v R*, that, “a statement of the price by the dealer must be made with the intention of being bound by the offeree’s acceptance,”¹⁷⁵ for it to amount to an offer. Otherwise, the offer is said to lack *animus contrahendi* and is not, therefore, binding.

Further to firmness, the offer must, secondly, “be complete”.¹⁷⁶ Calling for the offer’s comprehensiveness means that in order to constitute a valid offer, a proposal must contain all the essentials and material terms which the party making the offer envisages to incorporate into the contract.¹⁷⁷ In other words, an offer must be

made with the intention that when it is accepted it will bind the offeror.” See also Christie/Bradfield *Contract* 32; Joubert *Contract* 39; Hawthorne/Hutchison Offer and Acceptance 45 48. There are authorities that contend that where “the offer is vague and indefinite, and the vagueness is not determinable, an acceptance of it does not constitute a contract.” See *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A); *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 574; *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C) 525-526; all these cases are referred to by Hutchison/Du Bois *Contract* 733 741. It was judged that the use of expressions such as, “the following general clauses can be discussed,” does not amount to a firm offer. See *Finestone v Hamburg* 1907 TS 629 632; *Cassimjee v Cassimjee* 1947 (3) SA 701 (N); *Roode v Morkel* 1976 (4) SA 989 (A); *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C) 525-526.

¹⁷³ See *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 991G per Jansen JA; see also Christie/Bradfield *Contract* 31.

¹⁷⁴ See Hutchison/Du Bois *Contract* 733 752; citing in Fn134: *Conradie v Rossouw* 1919 AD 279; *Tobacco Manufacturers Committee v Jacob Green & Sons* 1953 (3) SA 480 (A) 492-493; *De Jager v Grunder* 1964 (1) SA 446 (A) 463; *Froman v Robertson* 1971 (1) SA 115 (A) 121; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA); and *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA).

¹⁷⁵ See *Hottentots Holland Motors (Pty) Ltd v R* 1956 1 PH K22 (C); see also *Lamprecht v McNeillie* 1994 3 SA 665 (A) 670 C.

¹⁷⁶ See Joubert *Contract* 37-38; Hawthorne/Hutchison Offer and Acceptance 45 48; and authorities quoted by Van der Merwe et al *Contract* 49 in Fn19.

¹⁷⁷ But, *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) [12] whereby, a party is generally not bound to disclose to the other party all the terms of the proposed agreement, unless “there are terms that could not reasonably have been expected in the contract.” See, in the same sense, *Constantia Insurance Co Ltd v Compusource* [19]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [36].

“unequivocal” in the sense that an ambiguous proposal cannot qualify as a valid offer. In *Wasmuth v Jacobs*, Levy J stated clearly that,

The rules applicable to the interpretation of an offer, or, for that matter, of an acceptance of an offer, are not necessarily the same as the rules which are applicable in the interpretation of contracts. (...) Thus, although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer (or for that matter the offer itself) must be unequivocal, i.e. positive and unambiguous.¹⁷⁸

To illustrate this, an offer related to a contract of sale must at least mention the thing sold and the price in order to decide whether or not it is complete.

Thirdly, an offer must be “clear and certain”.¹⁷⁹ As Du Plessis says, “It is a general requirement for the creation of contractual obligations that their contents must be certain (...)”¹⁸⁰ To say that an offer must be clear and certain means that its content must be drafted in terms which express fluidly the significance and extent of the rights and duties of the parties.¹⁸¹ In other words, a proposal purporting to be an offer cannot be vague. An offer can be described as vague when, for instance, it aims to create a contract different from the one expressed in the terms of the proposal; the proposal uses a vague language; or it is full of gaps.¹⁸²

In summary, in order to amount into a valid offer, the offer should not be limited to an expression of the will of the parties; it has, rather, to be firm, complete, clear, and certain.¹⁸³ An offer which fails to meet each of these requirements is invalid.

¹⁷⁸ See *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633 E-G.

¹⁷⁹ See *Hawthorne/Hutchison Offer and Acceptance* 45 48; and *Joubert Contract* 38.

¹⁸⁰ Du Plessis *Possibility* 204 210.

¹⁸¹ See authorities quoted by *Joubert Contract* 38 in Fn19; but Note 176 above.

¹⁸² See Du Plessis *Possibility* 204.

¹⁸³ Sections 22(a) & (b) and 25 CPA introduce further conditions in respect of valid offers of consumer contracts. According to them, an offer must, *inter alia*, be “in plain and understandable language” and “disclose whether goods are reconditioned or gray market goods”. A comment of these provisions is, however, beyond this study. For further comments, see *Hawthorne/Hutchison Offer and Acceptance* 45 49; *Van Eeden Guide* 177.

The acceptance

The acceptance is basically described as a declaration of will, which indicates acquiescence to the proposal contained in the offer and which is communicated by the offeree to the offeror.¹⁸⁴ Hawthorne and Hutchison complement this by saying that “an acceptance is a clear and unambiguous declaration of intention by the offeree, unequivocally assenting to all the terms of the proposal embodied in the offer.”¹⁸⁵ From these definitions, it appears that, for the matter to end in the conclusion of a contract, an acceptance is also subject to some requirements like its corresponding offer. One of those requirements consists of the fact that acceptance must be given by the person to whom the offer was made.¹⁸⁶ It is obvious that, where the offer is addressed to the public, any member of that public should accept it. When the offer is addressed to a particular person, or to a group of persons, however, only that person or a member of the group can express acceptance.

Additionally, in the same way as applies to the offer, an enforceable acceptance must be “clear and unequivocal or unambiguous”;¹⁸⁷ and made by the offeree’s “intention to be bound” by his/her commitment.¹⁸⁸ As Van der Merwe and others have stated,¹⁸⁹

¹⁸⁴ See *Lowe v Commission for Gender Equality* 2002 (1) SA 750 (W); see also Van der Merwe et al *Contract* 52; Hutchison/Du Bois *Contract* 733 742.

¹⁸⁵ Hawthorne/Hutchison *Offer and Acceptance* 45 55.

¹⁸⁶ See *Levin v Drieprok Properties (Pty) Ltd* 1975 2 SA 397 (A) 407C-F per Corbett JA; *Blew v Snoxel* 1931 TPD 226; both cases are commented on by Christie/Bradfield *Contract* 61. See also cases quoted by Joubert *Contract* 43 in Fn62 or by Hutchison/Du Bois *Contract* 733 743 in Fn42 to 45; and comments by Van der Merwe *Contract* 53. As Corbett JA has said, the requirement for the offeree to accept in person is justified by the fact that “(...) everyone has the right to select and determine with whom he will contract and another cannot be thrust upon him without consent regardless of whether the offeror had special reasons for contracting with the offeree rather than someone else.” Excerpt reproduced in Christie/Bradfield *Contract* 61.

¹⁸⁷ See *Men’s Fair (Pty) Ltd v Bible Society of SA* 1976 (4) 12(T); *Ebrahim v Khan* 1979 (2) SA 498 (N); *Breytenbach v Stewart* 1985 (1) SA 149 (T); Joubert *Contract* 43. See also *Cunningham v C and S Estate Agency* 1945 TPD 440 443; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421-422; *Boerne v Harris* 1949 1 SA 793 (A); Christie/Bradfield *Contract* 64.

¹⁸⁸ See *Boerne v Harris* 1949 1 SA 793 (A); *Van Jaarsveld v Ackerman* 1974 (3) SA 664 (T) and 1975 (2) SA 753 (A); *Kuhn v Raatz* 1975 (4) SA 164 (C) and 1976 (4) SA 543 (A). Joubert specifies that the offeree’s need to commit intentionally is a mere application of the general principle that parties must act *animo contrahendi*. Joubert *Contract* 43; see also Hutchison/Du Bois *Contract* 733 752.

¹⁸⁹ See Van der Marwe et al *Contract* 53.

An intention to enter into obligations with the offeror is an essential element of the acceptance.¹⁹⁰ The consensual basis of contract implies that acceptance should be by way of conscious reaction to the offer¹⁹¹ and that for acceptance to be effective it should correspond with the terms set out in the offer.¹⁹² The acceptance must be unambiguous, so that it is clear to the recipient, using ordinary reason and knowledge that the agreement is complete.¹⁹³

The acceptance must, furthermore, be communicated to the offeror and until communication takes place there is no constituted contract.¹⁹⁴ The general rule, in this regard, is that contractual liability arises only when the offeror has had knowledge of the acceptance.¹⁹⁵ Thus, if the offeror has prescribed a form for acceptance in the offer, the acceptance must conform to that form,¹⁹⁶ unless there has been special dispensation.¹⁹⁷ If there is a doubt on the question of whether or not

¹⁹⁰ See *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) 331; *Roberts v Martin* 2005 (4) SA 163 (C); *Be Bop A Lula Manufacture & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA).

¹⁹¹ See *Bloom v The American Swiss Watch Company* 1915 AD 100; *Volkskas Spaarbank Bpk v Van Aswegen* 1990 (3) SA 978 (no acceptance where the party is unaware of the offer); *Kotze v Newmont South Africa Ltd* 1977 (3) SA 368 (NC) (no acceptance of an offer not yet made); but *Flashco (Pty) Ltd v Carney (Pty) Ltd* 1980 (1) SA 235 (ZRA) 238-239.

¹⁹² See *Legator McKenna v Shea* 2010 (1) SA 35 (SCA); *Erasmus v Santam Insurance Ltd* 1992 (1) SA 893 (W); *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W); and *Lee v American Swiss Watch Company* 1914 AD 121.

¹⁹³ See *Roberts v Martin* 2005 (4) SA 163 (C); *Simpson v Selfmed Medical Scheme* 1992 (1) SA 855 (C); *Ebrahim v Khan* 1979 (2) SA 498 (N); *Men's Fair (Pty) Ltd v Bible Society of SA* 1976 (4) 12 (T); *Kahn v Raatz* 1976 (4) SA 543 (A); and *Boerne v Harris* 1949 1 SA 793 (A).

¹⁹⁴ See *Fern Gold Mining v Tobias* (1890) 3 SAR 134; *Dietrichsen v Dietrichsen* 1911 TPD 486 494-495; *R v Dembovsky* 1918 CPD 230 240-241; *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) 597; *Ficksburg Transport (Edms) Bpk v Rautenbach* 1988 (1) SA 318 (A) 332; *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) 4.

¹⁹⁵ *Lubbe/Du Plessis Contract* 243 246; *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 2 SA 504 (SCA) [10]; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479E.

¹⁹⁶ *Inrybelange (Edms) Bpk v Pretorius* 1966 (2) SA 416 (A); *Laws v Rutherford* 1924 AD 261; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 573; *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) 4.

¹⁹⁷ See *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 22; *Ex parte Davis* 1950 SR 270; *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) 597; *Esack v Commission on Gender Equality* 2001 1 SA 1299 (W) 1308; *Seeff Commercial and Industrial Properties (Pty) Ltd v Siberma* 2001 (3) SA 952 (SCA) 958. In *R v Nel* 1921 AD 339, Solomon JA said: "(...) where an order is sent to a person at a distance to supply certain goods at a certain price, the offer is accepted not by the delivery but by the dispatch of the goods, and the offeror impliedly dispenses with the necessity of the acceptance being communicated to him." In the same sense, *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 3 SA 134 (C) 137D-G; *Seeff*

dispensation has been given, the communication of the acceptance is indispensable. In that case, there is a presumption that the contract will be completed once the acceptance of the offer is communicated to the offeror.¹⁹⁸

In short, for it to be effective, the acceptance is also subject to preliminary conditions as is the offer; it must be transmitted by the offeree, be clear and unequivocal, and be brought to the offeror's attention; otherwise it is unenforceable.

3.3.2.6 Conclusion on the necessity of an agreement

The agreement of the parties plays an important role in the field of the law of contract. The parties must reveal their intention to be bound by the content of the contract. Where consensus has not been reached, nevertheless, their agreement may be inferred from acts performed by one or another. Van der Merwe and others state, in this regard, that,

The South African law of contract seems to have reached the point where, on the basic assumption that a contract is primarily an expression of the actual intention of the participants, the objective considerations which serve to recognise and protect the reasonable expectations of those participants, and which have over many decades been expressed in various alternatives, are being assimilated into a unitary qualification of consensus.¹⁹⁹

As has been mentioned earlier, contractual liability is based, under contemporary South African jurisdiction, upon a double theory, the will theory and the reliance theory. Thus, though the requirement regarding the consent of the parties remains noteworthy, with the way in which the reliance theory has been welcomed in the case law, one might be attempted to consider it to be the modern leading approach to contract. In any case, the intention of the parties is usually made known by the offer

Commercial and Industrial Properties (Pty) Ltd v Sibermna 2001 (3) SA 952 (SCA) 958; *Ideal Fasteners Corporation CC v Book Vision (Pty) Ltd* [2002] 1 All SA 321 (D) 325; *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5(Pty) Ltd* 2009 2 SA 504 (SCA) [10]; and *Christie/Bradfield Contract* 72-73.

¹⁹⁸ See *Dietrichsen v Dietrichsen* 1911 TPD 486 494; *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597D-G; *Remini v Basson* 1993 3 SA 204 (N) 211G-212D.

¹⁹⁹ Van der Merwe et al *Contract* 45.

and acceptance method of contracting as will be discussed in detail in chapter 5. At present, it is necessary to analyse other fundamental principles of the law of contract, viz. freedom and the sanctity of contract, good faith, and public policy considerations.

3.3.3 Freedom and the Sanctity of Contract

Apart from consensus and reliance, the other ground rules of contract law include freedom and the sanctity of contracts. The freedom of contract rule is naturally linked to the individual and the liberal vision of the eighteenth century.²⁰⁰ In the context of South African law, the idea of freedom goes together with the notion of sanctity. This dual notion “reflects a concept of contract, and a body of legal doctrine, that English writers generally refer to as the classical law of contract.”²⁰¹ Hence, the case law and scholars admit that the law of contract, in South Africa, has as one of its central principles the freedom of contract.²⁰²

As a rule, the freedom of contract “entails a general freedom to choose whether or not to contract, with whom to contract, and on what terms to contract.”²⁰³ Freedom means, in other words, that the parties have the right to negotiate and discuss the content of the contract according to their aspirations without any external interference. In that sense, the principle of freedom is given meaning by means of the expression of “consensus to contract”. With regard to the concept “sanctity of contract”, it “entails holding the parties bound to their agreement, once it has been properly reached.”²⁰⁴

²⁰⁰ See explanation under Section 2.3.2 above; see also Bhana/Pieterse 2005 (122) 4 *SALJ* 865.

²⁰¹ See Hutchison in *Contract* 23.

²⁰² See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9E; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) §§94-95; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) §§12-13; Eiselen E-Commerce 7; Hutchison/Du Bois *Contract* 733 737; Hutchison in *Contract* 21; Kerr *Contract* 129; Bhana/Pieterse 2005 (122) 4 *SALJ* 865 866-867.

²⁰³ Hutchison/Du Bois *Contract* 733 737; Hutchison in *Contract* 23 & 24; Bhana/Pieterse 2005 (122) 4 *SALJ* 865 867; Van der Merwe et al *Contract* 9; Eiselen E-Commerce 7.

²⁰⁴ Hutchison/Du Bois *Contract* 733 737; Hutchison in *Contract* 21.

The interaction between the principles of freedom and sanctity is well described through an earlier dictum borrowed from Sir George Jessel MR in *Printing & Numerical Registering Company v Sampson* whereby it is stated that,

If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.²⁰⁵

The ruling in the *Printing & Numerical Registering Company v Sampson* case means that the fundamental assumptions of individual autonomy connected with the liberty to consent to a contract form the foundations of the principle of sanctity of contract. In other words, according to the freedom and sanctity principles, once it is clear that a contract has been freely negotiated and that its terms are not immoral, illegal, or contrary to the public interest, the contract should be enforced *pacta sunt servanda*.²⁰⁶ More specifically, owing to the fact that contracting parties are lawmakers for themselves, any judicial interference in their businesses must be viewed with scepticism.²⁰⁷ Such are also the approaches of the modern CC and SCA,²⁰⁸ for which the principle *pacta sunt servanda* is consistent with constitutional standards of autonomy and dignity.²⁰⁹

²⁰⁵ See *Printing & Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 465; quoted with approval in *Wells v South African Alumenite Company* 1927 AD 69 73 per Innes CJ; *Edourd v Administrator, Natal* 1989 (2) SA 368 (D) 379. For scholars, see Zimmerman in *Southern Cross* 217 240 Fn170; Bhana/Pieterse 2005 (122) 4 SALJ 865 867 Fn7.

²⁰⁶ See Hutchison in *Contract* 23; Hutchison/Du Bois *Contract* 733 737; Van der Merwe et al *Contract* 9.

²⁰⁷ Bhana/Pieterse 2005 (122) 4 SALJ 865 867.

²⁰⁸ See *Barkhuizen v Napier* 2007 5 SA 323 (CC) [57] - [87]; *Brisley v Drotosky* 2002 (4) SA 1 (SCA) §§90 and 94; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) §13; *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) [32]; see also comments by Hutchison/Du Bois *Contract* 733 737; Sutherland 2008 (3) *Stell LR* 390; and Sutherland 2009 (1) *Stell LR* 50.

²⁰⁹ See among others, *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) [21]; *Barkhuizen v Napier* 2007 5 SA 323 (CC) [57] - [87]; *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) [32] [33]; *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (ECM) [92]; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [37].

In *Barkhuizen v Napier*, the CC ruled, however, that the principle according to which a valid contract must be enforced *pacta sunt servanda* is not “a sacred cow that should trump all other considerations.”²¹⁰ That is to say that, the freedom of contract rule is not applied absolutely; rather it has some limits. As Zimmerman has demonstrated, in all modern legal systems, including South African contract law, “the freedom of the parties to determine the content of their transaction is limited not only by statutory prohibitions but also by certain extra-legal standards.”²¹¹ Insofar as extra-legal standards are concerned, they include concepts such those of public policy, public interest, morality, and good faith. Thus, if a contract is at variance with the needs of public policy as stipulated by the Constitution,²¹² or if it is judged contrary to the public interest, that contract should not be enforced.²¹³ The unenforceability, in this case, is justified by the fact that a contract which contravenes the rules of public policy, public interest, or morality is void.²¹⁴

Moreover, the freedom of contract may be limited by the use of “standard-form contracts” in business transactions. As Sachs J said, in *Barkhuizen v Napier*, standard form contracts are kinds of contracts that are drafted in advance in a “take-it-or-leave-it” nature and which thus remove the opportunity for hands on negotiations.²¹⁵ In these types of contracts, the negotiation of the terms of an agreement occurs only in a limited number of clauses related to basic matters such

²¹⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) [15].

²¹¹ Zimmerman *Obligations* 706; for instances of acts prohibited by statutes, see Joubert *Contract* 132.

²¹² See *Brisley v Drotosky* 2002 (4) SA 1 (SCA) §91; taking support on *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *De Beer v Keyser* 2002 1 SA 827 (SCA) [22]; see also comments by Hutchison/Du Bois *Contract* 733-737; Sutherland 2009 (1) *Stell LR* 50-53; Christie/Bradfield *Contract* 17; Kerr *Contract* 181-235.

²¹³ See *Basson v Chilwan and Others* 1993 (3) SA 742 (A); *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A).

²¹⁴ See *Brisley v Drotosky* 2002 (4) SA 1 (SCA) §91; *Ismail v Ismail* 1983 (1) SA 1006 (A); *Bezuidenhout v Strydom* (1884) 4 EDC 224 225-226; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 178 204; *Hurwitz v Taylor* 1926 TPD 81; *Couzyn v Laforce* 1955 (2) SA 289 (T); *Kraukamp v Buitendag* 1981 (1) SA 606 (W); *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

²¹⁵ See Sachs J’s minority judgement in *Barkhuizen v Napier* 2007 5 SA 323 (CC) [135]; see also Hutchison in *Contract* 24.

as the price, quality of the goods, and their delivery.²¹⁶ For any other issues, it simply refers to standard business conditions and terms which limit the freedom of the parties.²¹⁷ It has been estimated that around 95 per cent of all transactions are formed in this manner these days.²¹⁸

Briefly, although the law recognises the value of principles such those of freedom of contract, sanctity, and *pacta sunt servanda*, these theories are not absolute at all. They are, instead, limited either by legal prohibitions, the practice of business, or as discussed in detail below, by certain external ideals such public policy, public interest, and good faith.

3.3.4 Good Faith in Contracts

3.3.4.1 Introduction

The duty of good faith is generally understood as a hope and obligation that people act honestly and fairly in negotiating and carrying out contractual obligations. Hutchison specifies that, the norm of good faith has played, from the outset, “a significant role in the development of the Roman law of contract and helped breathe an equitable spirit into the body of the civil law throughout the course of the ensuing centuries.”²¹⁹ Recently, there has been much debate about the role it “might play in modern law of contract, as a counterweight to the dominant idea of freedom of contract.”²²⁰ Thus, a further aspect of consensus as the basis of contract is that all contracts must be executed in good faith.

One is reminded that the modern theory of contract derives from the consensual principle of Roman law. Under that legal system, contracts were

²¹⁶ Eiselen in Scott *Commerce* 144.

²¹⁷ See discussion in Sections 5.3.5.3 and 5.3.5.4 below relating to the inclusion of standard terms in contracts and the solutions to the question of battle of forms.

²¹⁸ See Hutchison in *Contract* 25.

²¹⁹ *Ibid* 27.

²²⁰ *Ibid*.

governed by the principle of *bona fides*.²²¹ But, because modern South African contract law is a mixed legal system,²²² it is important to look first at the role the good faith duty plays under Anglo-American common law countries before discussing its place in South Africa.

3.3.4.2 Good faith duty in Anglo-American jurisdictions

Historically speaking, the principle of good faith was not known in countries that belong to the common law legal system. With regard to English contract law, for instance, Goode said, in one of his addresses in Italy, that in England they find it difficult to adopt as general a concept as “good faith” the meaning of which, in addition, they do not know.²²³ In 1989, when establishing a comparison between English and civil law systems, Bingham LJ specified,

In many civil law systems, (...) the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. (...) English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.²²⁴

Lord Ackner put it, likewise, that,

[The] concept of a duty to carry negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his own interest, so long as he avoids making

²²¹ Zimmerman in *Southern Cross* 217; Zimmerman *Obligations* 667. Roman law recognised only a number of limited contracts which were categorised according to the procedural form of obligations arising from them in *stricti iuris* and *bonae fidei* contracts. Insofar as *stricti iuris* contracts were concerned, they were binding even though the contract has been formed by fraud.

²²² Cf. Section 3.2.5 above.

²²³ Goode “The concept of ‘Good Faith’ in English Law”; quoted in Farnsworth *Good Faith* 153.

²²⁴ See Bingham LJ in *Interfoto v Stiletto* [1989] QB 433 439; quoted by McCamus *Contracts* 780; Harrison *Good Faith* 4. Harrison is of opinion, however, that denying the existence of a requirement of good faith in English Law is contrary to popular belief in that jurisdiction. Relying on the same Bingham’s ruling in *Interfoto v Stiletto*, Harrison contends that the civil law principle of good faith which requires parties not to deceive each other is “a principle which any legal system (including English law) must recognise (brackets added).”

misrepresentations. A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of the negotiating parties.²²⁵

A similar situation is also observed in relation to the execution of the contract. As for negotiations, parties are entitled to exercise their contractual rights and obligations for whatever reason they choose during the implementation stage.²²⁶ Shortly, as Potter LJ pointed out in *James Spencer & Co Ltd v Tame Valley Padding Co Ltd*, “there is no general doctrine of good faith in the English law of contract. The plaintiffs are free to act as they wish provided that they do not act in breach of a term of the contract.”²²⁷

By contrast to English law, an eloquent illustration of the good faith requirement is found in §1-203 of the American Uniform Commercial Code (UCC) which reads, “Every contract or duty within the UCC imposes an obligation of good faith in its performance or enforcement.”²²⁸ In the perspective of American law, §1-201(11) UCC defines good faith as “honesty in fact in the conduct or transactions concerned.” This definition has been criticised as being narrow and making the UCC §1-203 very weak.²²⁹ To complete it, §1-201(11)²³⁰ and §2-103(1)(b) provide a

²²⁵ Lord Ackner; cited by Zimmerman/Whittaker Good Faith 40.

²²⁶ Ibid.

²²⁷ *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* 8 April 1998; quoted in Zimmerman/Whittaker Good Faith 40. Exceptionally, the obligation of good faith within the English law of contract has been deduced from individual cases through the term of “reasonable expectations of honest people” imposed on parties. See Farnsworth Good Faith 157; *Fu Contract* 63; and *Smith v Hughes* (1871) LR 6 QB 597.

²²⁸ As a rule, §1-203 UCC does not have the ambition of governing all kinds of contracts. It is concerned rather with contracts covered by the UCC, viz. sales of goods contracts, letters of credit, and security agreements. Nevertheless, the good faith duty has sometimes been extended to cases not specifically within §1-203 whether as a matter of common law, or by analogy to the Code, or both. Before the 1960s, American contract law did not acknowledge the duty of good faith at all. A real acknowledgement of a widespread general obligation of good faith came in the 1970s with the publication of the new Restatement of Contracts Second. Section 205 of this Restatement, entitled “Duty of Good Faith and Fair Dealing”, stipulates: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” It should be noted that a Restatement is a special type of law made by the American Law Institute to formulate with some precision the leading rules and principles in major fields of the American law. With regard to contract law, the first Restatement was promulgated in 1932 and the second entered into force in 1981. See Summers Good Faith 118.

²²⁹ See Farnsworth Good Faith 153; Powers 1999 (18) *JL & Com* 333.

²³⁰ This has become now §1-201(20) with, however, the same wording.

broader definition of good faith particularly with regard to the sale of goods. As stated by these provisions, good faith in the case of a merchant means, “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” With reference to this definition, one commentator has stated that the duty of good faith and fair dealing pursue among other purposes, “the faithfulness to an agreed common purpose, consistency with the justified expectations of the other party, and consistency with community standards of decency, fairness, or reasonableness.”²³¹ Such being its goal, it is then judicious that American sellers and buyers cannot expressly exclude the duty of good faith while negotiating or performing a contract.

The USA is not the only common law country to have adopted the principle of good faith. Australia and Canada have also done so. As regards Australia, many commentators, scholars, and judges, have suggested that Australian contract law is heading towards recognising good faith and fair dealing duties.²³² The first stage of approving the relevance of these values in the performance of contracts was made by Justice Priestley JA in *Renard Constructions v Minister for Public Works*.²³³ In the case, Priestley considered that a duty that parties act in good faith in running their contractual obligations should generally be implied into contracts.²³⁴ He stressed the opportunity for Australia to compel “in all contracts a duty upon the parties of good faith and fair dealing in its performance.”²³⁵ After referring to the development of the theory of good faith, particularly in the USA and Canada, Priestley considered that the recognition of such a duty is in line with existing community standards.²³⁶ Since

²³¹ Summers Good Faith 125.

²³² For a list of writings approving the existence of an obligation of good faith under Australian law, see Farnsworth Good Faith 157.

²³³ See *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSW LR 234 268F; commented on by Willmott/Christensen/Butler *Contract Law* 279; Farnsworth Good Faith 153; Powers 1999 (18) *JL & Com* 333.

²³⁴ *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSW LR 234 268F.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

then, other courts²³⁷ have often approved his position in acknowledging the existence and enforceability of express and implied obligations of good faith and fair dealing under Australian contract law.²³⁸ Furthermore, in a number of single Justice Supreme Court decisions, it has been assumed that a duty of good faith would be implied in all commercial contracts.²³⁹

With regard to Canada, it has also expressed its approval of the good faith principle. One Canadian lawyer has, besides this, described this standard as “a vital norm in contract law.”²⁴⁰ As Farnsworth argues, “the pervasiveness of good faith in contracts has important implications for theories of contract law, for the relationship between law and society, and for the law in its practical day-to-day operation.”²⁴¹ O’Byrne describes good faith as an improvement instrument of contract law because “it brings clarity and simplicity.”²⁴² In a few words, Canadian courts have also, these days, frequently made reference to the duty of good faith which is established there as a basic principle of contract law.²⁴³

²³⁷ For a list of decisions in which good faith was implied, see Willmott/Christensen/Butler *Contract* 280-283.

²³⁸ Peden 2003 (15) 2 *12 Bond Law Review* 186.

²³⁹ Willmott/Christensen/Butler *Contract* 285.

²⁴⁰ Reiter “Good faith in Contracts”; quoted in Farnsworth Good Faith 153. The interest of Canadian common law lawyers in the good faith obligation seems to have been influenced by two of the Ontario Law Reform Commission reports, namely the Report on Sale of Goods (Ottawa Ministry of the Attorney General 1979), and the Report on the Amendment of the Law of Contract (Toronto Ontario Law Reform Commission 1987); both reports referred to by McCamus *Contracts* 781 Fn8 & 9; and Farnsworth Good Faith 153 Fn27.

²⁴¹ Farnsworth Good Faith 153.

²⁴² O’Byrne 2007 (86) 2 *Canadian Bar Review (The)* 193. That seems to be the reason why Article 1375 of the Quebec Civil Code has provided an express obligation of good faith relevant to three distinct areas, the negotiation of contract, its performance or execution, and its enforcement. It has been ruled in this respect that, a seller who seeks to terminate a contract must exercise his/her right reasonably and in good faith as he/she would act for its performance and negotiation. See *Mason v Freedman* (1958) SCR 483 487; quoted by Grossman/Na <http://www.fmc-law.com/upload/en/publications/archive/Good Faith in Real Property Law Nov2001.pdf> 2.

²⁴³ For an analysis of the leading cases making reference to the good faith duty under Canadian law, see McCamus *Contracts* 784 to 803. The author distinguishes three categories of authorities in relation to good faith: those imposing a cooperation duty between the parties; those which limit the exercise of contractual discretionary powers; and authorities which prevent parties from evading contractual obligations.

Succinctly, though England is unreceptive to the good faith obligation, its value has been acknowledged in other leading common law legal family nations, including the USA, Australia, and Canada. There, the duty of good faith governs both the conclusion and performance of contracts as it does under South African law.

3.3.4.3 Good faith duty in the South African law of contract

Modern South African case law and writers agree with the general principle that the concept of *bona fides* or “good faith” was one of the most important ideals in the development of Roman contract law.²⁴⁴ The principle gained its influence in relation to the *iudicia stricti iuris* maxim “as a result of a specific standard clause, inserted into a procedural formula at the request of the defendant. That clause was known as the *exceptio doli*.”²⁴⁵ With time, the distinction between *stricti iuris* and *bonae fidei* contracts became meaningless.

With regard to Roman-Dutch law, it is only towards the eighteenth century that Roman-Dutch authors specified, for the first time, that all contracts were based on consent and that they were, therefore, *bonae fidei*.²⁴⁶ The latter expression meant that all kind of contracts were based on the principle of good faith so that contracting parties were required to conclude their contract in a way consistent to it. Modern South African law has adhered to this novel approach too. As stated by Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas*, “(...) contracting parties were bound to everything which good faith reasonably and equitably demanded.”²⁴⁷

²⁴⁴ Zimmerman in *Southern Cross* 218; Hutchison in *Contract* 26.

²⁴⁵ Roman law had established a distinction between the *exceptio doli specialis* which was concerned with contracts concluded by fraud, and the *exceptio doli generalis* which was invoked in circumstances of bad faith. The *exceptio* was, on the whole, a defence method to the plaintiff’s claim. See Kerr 2008 (125) *SALJ* 241 247; Zimmerman in *Southern Cross* 218.

²⁴⁶ While annotating Van Leeuwen’ *Het Rooms-Hollands-Regt*, Cornelis Willem Decker said, “(...) we may also conveniently dispense with the division of contracts into *stricti iuris* and *bonae fidei*, for, according to our customs, all contracts are considered to be *bonae fidei*, which necessarily follows, if we hold that with us all contracts are constituted by consent.” Excerpt reproduced by Zimmerman in *Southern Cross* 220; see also Hutchison in *Contract* 27; Bhana/Pieterse 2005 (122) 4 *SALJ* 865 867.

²⁴⁷ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601.

Accordingly, “the courts should have had wide powers to read into a contract any term that justice required.”²⁴⁸

It should be noted that one of the main instruments employed by South African courts to introduce the good faith requirement into the law of contract was the Roman-law defence of “bad faith” referred to before as the *exceptio doli*.²⁴⁹ In the words of Glover,

[The] *exceptio doli* [*generalis*] had been viewed as an equitable defence that allowed a defendant to resist a claim for performance under a contract when there was something unconscionable about the plaintiff’s seeking to enforce the contract (or a clause thereof) in the specific circumstances of that case.²⁵⁰

The *exceptio doli* doctrine has been used by the judiciary for a long time to improve South African contract law with new common law principles imported from English law and not necessarily known to Roman-Dutch law. Those policies include the fictional fulfilment of conditions, rectification, and *estoppel*.²⁵¹

As Hutchison has said, the AD was, on a number of occasions, prepared to assume that a defence based on the *exceptio doli* “was still possible in modern law, at any rate in circumstances where enforcement of the plaintiff’s remedy ‘would cause some great inequity and would amount to unconscionable conduct on his part’.”²⁵² The

²⁴⁸ See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652, per Jansen JA.

²⁴⁹ See Brand 2009 (126) SALJ 71; Bhana/Pieterse 2005 (122) 4 SALJ 865 867. One of the most important cases on the *exceptio doli* matter is *Rand Bank v Rubenstein* 1981 (2) SA 207 (W); see also *Rance v Philips and B Lazarus v Levy and the Glencairn GM Co* 1893 Hertzog 50; quoted by Zimmerman in *Southern Cross* 221 and 234.

²⁵⁰ Glover 2007 (124) 3 SALJ 449.

²⁵¹ For cases employing one or the other of these doctrines, see Zimmerman in *Southern Cross* 221-236. As far as *estoppel* is concerned, it is a legal fiction according to which a party who has been misled and who has acted in reliance of such a misrepresentation is allowed to prevent its co-contractant from relying on the correct state of affairs before the court. (See Van der Merwe et al *Contract* 28.) Of English origin, the doctrine of *estoppel* was welcomed in South Africa in the 1960s on the basis that it was similar to the Roman law *exceptio doli mali* rule. (See *Connock’s (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) 49.) Since then, it has been referred to in contracts as a corrective to fill shortcomings of the consensual theory in cases of *dissensus*. See Van der Merwe et al *Contract* 31; Van der Merwe et al *South Africa Report* 95 180-181.

²⁵² See Hutchison in *Contract* 27; citing *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) 537; *Weinerlen v Goch Buildings Ltd* 1925 AD 282 292-293; and *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 27-28.

question was only settled in the *Bank of Lisbon and South Africa Ltd v De Ornelas* case.²⁵³ On the subject, the majority of the AD, led by Joubert JA, came to the conclusion that “the *exceptio doli* had never been received into Roman-Dutch law and afforded no grounds for the recognition of a substantive defence based on equity in modern South African law.”²⁵⁴ Joubert was so sceptical about the *exceptio doli* clause that he came to lay it to rest. In the *Bank of Lisbon* case, when delivering the judgement of the majority, the learned judge stated that the time was ripe to bury, once and for all, “the *exceptio doli generalis* as a superfluous defunct anachronism.”²⁵⁵ He added, as if to confirm his decision, “*Requiescat in pace*”.²⁵⁶

The rule under the *Bank of Lisbon* case was then interpreted as bringing to an end the implementation of the good faith principle in South African law.²⁵⁷ Mr Justice Brand is of this opinion.²⁵⁸ He says, “the rules of our law of contract have become so firmly established that there is no room for any further development so as to give effect to *bona fides* (...) even when this were to be demanded by the changing needs or values of society.”²⁵⁹

According to Zimmerman, in contrast,

If the modern theory of contract descends from the consensual contracts of Roman law, there is no longer any room for a specific procedural device such as the *exceptio doli*. The substantive content of that *exceptio* had been absorbed into the requirement of good faith underlying the operation of all consensual contracts. Therefore, whenever the term ‘*exceptio doli*’ was used, it was a mere *façon de parler* – a

²⁵³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601.

²⁵⁴ Hutchison in *Contract* 27-28; Christie/Bradfield *Contract* 12; Glover 2007 (124) 3 SALJ 449 450. In other words, “Before [the] *Bank of Lisbon and South Africa* [case], it was generally assumed that the *exceptio doli generalis* provided a remedy against the enforcement of an unfair contract and against the unfair enforcement of contracts.” Enlightenment borrowed from *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC); see also Kerr 2008 (125) SALJ 241 248.

²⁵⁵ See *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601 607 (B); but minority judgment by Jansen JA.

²⁵⁶ *Ibid.* But, Kerr 2008 (125) SALJ 241, who considers that this case was wrongly decided.

²⁵⁷ On the vicissitudes of the principle of good faith, see Hawthorne 2003 (15) *Merc L J* 271.

²⁵⁸ Brand 2009 (126) SALJ 74.

²⁵⁹ *Ibid.*

convenient way for a defendant to allege that the plaintiff's behaviour constituted an infringement of the principle of *bona fides*.²⁶⁰

Zimmerman's point of view has currently been advocated either by writers or by courts. In *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman*, for instance, Olivier JA explained extensively the importance and value the principle of good faith plays in the South African law of contract.²⁶¹ He described its role as being "simply to actualise the convictions of the community with regard to decency, reasonableness, and fairness."²⁶² In the opinion of Olivier, "the function of good faith is to give expression to the community's sense of what is fair, just, and reasonable (...), (so that) the majority decision in *Bank of Lisbon* should not be read as denying it this role."²⁶³ In *NBS Boland Bank Ltd v One Berg River Drive CC*, likewise, the SCA expressed its approval for the role played by modern concepts such as those of "(...) *bona fides* (or good faith) and contractual equity" in contractual dealings.²⁶⁴ Regarding the CC, it has also recognised, in the *Barkhuizen v Napier* case, that the requirement of good faith underlies contractual relationships.²⁶⁵

Lower courts have interpreted the behaviour of the supreme courts as a means of giving "the green light in the direction of the development of a concept of good faith in (...) (South African) law of contract which would render the body of contract law congruent with the values of (...) (the South African) constitutional community."²⁶⁶ Since then, it has been admitted that, under modern South African

²⁶⁰ Zimmerman in *Southern Cross* 240.

²⁶¹ *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* 1997 (4) SA 302 (SCA); excerpt translated from original Afrikaans by Hutchison in *Contract* 28-29; see also Glover in *Essays* 112.

²⁶² *Ibid.*

²⁶³ *Ibid.* But, Hawthorne 2003 (15) *Merc LJ* 271 who believes that, though the good faith duty has become an important component of modern South African law (cf. *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652), it was denied such meaning in the *Bank of Lisbon* decision.

²⁶⁴ *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 (4) SA 928 (SCA) 937F-G.

²⁶⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) [80].

²⁶⁶ See, in particular, *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C) 475 per Davis J; *Miller v Dannecker* 2001 (1) SA 928 (C) 938-939; *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C); see also comments by Hutchison in *Contract* 29. Of course, in a triple decision introduced by *Brisley v Drotsky*, the SCA disagreed with the lower courts' understanding of the supreme courts' position *vis-à-vis* the good faith principle. See *Brisley v Drotsky*; *Afrox Healthcare Bpk v Strydom*

contract law, all contracts are *bonae fidei*.²⁶⁷ That is to say, contracting parties have a basic duty to negotiate and contract in good faith. And, as long as a contract is valid, each party is bound by its terms.²⁶⁸ To associate Harms' opinion in *Bredenkamp v Standard Bank*, with the ruling in *Bank of Lisbon*, both parties are bound to everything required by good faith and equity.²⁶⁹

It is important to note that, about 40 years before the cases cited above, Jansen J had already explained, in *Meskin NO v Anglo-American Corporation of SA Ltd and*

2002 (6) SA 21 (SCA); and *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA). Its opinion is summarised as follows:

Concepts such as good faith, reasonableness and fairness, while fundamental to the law of contract, were merely abstract values rather than independent, substantive rules that could be employed by a judge to intervene in contractual relationships. As abstract values, they underpinned and informed the substantive law of contract, shaping its rules and doctrines, and thereby performing a creative, controlling and legitimating function. However, they could not be acted upon directly to strike down or to refuse to enforce an otherwise valid contractual term. To give judges a discretionary power to disregard contractual provisions that offended their personal sense of what is fair and reasonable would give rise to legal and commercial uncertainty; and the same result would follow if the enforcement of contracts were made to depend on vague notions of *boni mores* or the legal convictions of the community.

See summary by Hutchison in *Contract* 29; see also Glover in *Essays* 110; Glover 2007 (124) 3 *SALJ* 449 451. In a separate concurring judgement in *Brisley v Drotsky* 35D-F, Cameron JA supplemented this by saying that,

Neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith. On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons (...) is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity. (...) The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.

Quoted with approval by Brand JA in *Afrox Healthcare Bpk v Strydom* 38C; see also *Barkhuizen v Napier* 2007 5 SA 323 (CC) [57]; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) [30] per Davis J; *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) [33] per Wallis AJ.

²⁶⁷ See *Meskin NO v Anglo-American Corporation of SA Ltd and another* 1968 (4) SA 793 (W) 802 A; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652; see also Christie/Bradfield *Contract* 281; Bhana/Pieterse 2005 (122) 4 *SALJ* 865 867; Glover in *Essays* 109; Zimmerman in *Southern Cross* 240.

²⁶⁸ *Bredenkamp v Standard Bank* 2010 ZASCA 75 (27 May 2010) 33.

²⁶⁹ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601.

another, the time when the duty of good faith is required.²⁷⁰ Jansen started by underlining the fact that all contracts are usually entered into in good faith. He continued then that by asserting all contracts to be concluded in good faith “(...) involves good faith (...) as a criterion in interpreting a contract (...) and in evaluating the conduct of the parties both in respect of its performance (...), and in its antecedent negotiation.”²⁷¹ With such an understanding, it follows that the duty of good faith constitutes one of the bases of South African contract law as it is in other modern legal systems.²⁷² At every stage of the contract, therefore, from negotiations to the performance of obligations, parties have to behave in a manner consistent with that value.²⁷³

With regard to the negotiation process, first, the South African historical position gives the impression of lining up with that of English law according to which a party may freely withdraw from negotiations at any stage up to the conclusion of the contract.²⁷⁴ Such a traditional approach, as illustrated by the *Murray v McLean* case,²⁷⁵ reflects the reluctance of English and, with its influence, South African courts to

²⁷⁰ *Meskin NO v Anglo-American Corporation of SA Ltd and another* 1968 (4) SA 793 (W) 802 A; commented on by Kerr *Contract* 301.

²⁷¹ *Ibid*; confirmed in *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* 1997 (4) SA 302 (SCA; [1997] 3 All SA 391 (A) 403d-415e; *Standard Bank of South Africa Ltd v Prinsloo and another* 2000 3 SA 576 (C) 584J-585D; and *Miller and another NNO v Dannecker* 2001 1 SA 928 (C) 938H-939A.

²⁷² See Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10 [2011] ZACC 30 (17 November 2011) 2012 (1) SA 256 (CC) [22] for whom, “Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance.”

²⁷³ See *Meskin NO v Anglo-American Corporation of SA Ltd and another* 1968 (4) SA 793 (W) 804D; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652; *Fourie NO en’ n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A) 927G-H; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601; *LTA Construction Bpk v Administrator, Transvaal* 1992 (1) SA 473 (A) 480; see also Zimmerman in *Southern Cross* 217; and Glover in *Essays* 109.

²⁷⁴ See *Christian v Ries* (1898) 13 EDC 8 15; *Gous v Van der Hoff* (1903) 20 SC 237 240; *Scott v Thieme* (1904) 11 SC 570 577; *R v Nel* 1921 AD 339 344; *Union Government v Wardle* 1945 EDL 177 181; *Hersch v Nel* 1948 3 SA 686 (A) 693; *Greenberg v Wheatcroft* 1950 2 PH A 56 (W); *Bird v Sumerville* 1960 4 SA 395 (N) 400; *Stewart v Zagreb Properties (Pty) Ltd* 1971 2 SA 346 (RA) 352. See also Christie/Bradfield *Contract* 54; Van der Merwe et al *Contract* 80; Lubbe/Du Plessis *Contract* 243 246; Hutchison/Du Bois *Contract* 733 744.

²⁷⁵ *Murray v McLean* 1970 (1) SA 133 (R).

apply the principle of good faith as a counterweight to one party's improper conduct. Similarly, the view in *Hamman v Moolman*²⁷⁶ reveals that each party to negotiations must safeguard his/her own interests. As regards South African law, particularly, this approach has happily been amended by the rule in *Bayer South Africa (Pty) Ltd v Frost*.²⁷⁷ It is specifically recognised in this case that "contractual negotiations between parties form part of the 'circumstantial matrix' that has to be considered in order to establish whether a party has acted wrongly" or not.²⁷⁸ As Stegmann J ruled in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd*,

The proposition that by our law all contracts are *bonae fidei* is not confined to matters that arise after *consensus* has been reached; it applies to the very process of reaching *consensus*. A party, who adopts an ambivalent posture with a view to manipulating the situation to his own advantage, when he can see more clearly where his best advantage lies, has a state of mind that falls short of the requirements of *bona fides*.²⁷⁹

To use the words of Bhana and Pieterse, "the presence of consensus coupled with the value of good faith renders (...) (the) law of contract inherently equitable."²⁸⁰ It is admitted that the principle of good faith governs all kinds of contracts including sales. To give an example of this, pursuant to the principle of good faith, the seller is under a duty to disclose any defect in the thing sold of which he/she is aware to the prospective buyer.²⁸¹ If not, the seller will bear responsibility for lack of conformity because, in that case, he/she is presumed to have acted in bad faith.

Regarding the duty of good faith when carrying out the contract, next, South African courts seem to have favoured the autonomy of the parties in contracts. Courts do not find it equitable to alter the agreements of the parties merely because they consider it reasonable to do so. In a dissenting opinion, delivered by Sachs J in the

²⁷⁶ *Hamman v Moolman* 1968 (4) SA 340 (A).

²⁷⁷ *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); quoted by Van der Merwe et al *Contract* 81-82.

²⁷⁸ *Ibid.*

²⁷⁹ See *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 198 A-B; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10 [2011] ZACC 30 (17 November 2011) 2012 (1) SA 256 (CC) [9] to [11] and [26].

²⁸⁰ Bhana/Pieterse 2005 (122) 4 SALJ 865 867-868.

²⁸¹ See *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A).

Barkhuizen v Napier case, the learned judge said, “The principle of freedom does (...) support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated.”²⁸² In a similar way, Brand FDJ said in *Maphango v Aengus Lifestyle Properties* that values, such as good faith, reasonableness, and fairness, are not freestanding requirements for the exercise of a contractual right.²⁸³

Five years before, Brand FDJ had already stated, in *South African Forestry Co Ltd v York Timbers Ltd*,²⁸⁴ that,

[Although] abstract values such as good faith, reasonableness and fairness are fundamental to [South African] law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.²⁸⁵

The duty of good faith, furthermore, does not give courts general power to refuse to enforce contractual obligations considered as inequitable.²⁸⁶ In *South African Forestry Co Ltd v York Timbers Ltd*, Brand FDJ, finding support in *Brisley v Drotsky*

²⁸² See *Barkhuizen v Napier* 2007 5 SA 323 (CC) [140]; taking support on *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) 474J-475F; and *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) §69.

²⁸³ *Maphango v Aengus Lifestyle Properties* 2011 ZASCA (1 June 2011) 100 23.

²⁸⁴ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 27. The case referred to is concerned with two contracts by which the Government of South Africa undertook to sell softwood saw logs. In 1982 York took over all the rights and obligations of the other party in terms of both contracts. In 1993 the government, in turn, transferred all its rights and obligations under the contracts to Safcol. Safcol introduced his action before the court for an order declaring that the contracts had been breached by the defendant. It was argued that the respondent had acted in breach of an implied term of the contracts. As for the said implied term, York had to act in accordance with the dictates of reasonableness, fairness, and good faith when Safcol exercised its rights in the terms of the contracts.

²⁸⁵ See also *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 21-25 and 93-95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 31-32; *Maphango v Aengus Lifestyle Properties* 2011 ZASCA 23; *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C) 475; *Miller v Dannecker* 2001 (1) SA 928 (C) 938-939; *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C); and comments by Hutchison in *Contract* 29; Glover in *Essays* 110; and Glover 2007 (124) 3 SALJ 449 451.

²⁸⁶ Zimmerman in *Southern Cross* 217.

and *Afrox Healthcare Bpk v Strydom*, explained the consequence that judicial control should produce for contractual performance and enforcement. According to him, constitutional values such as freedom of contract “require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.”²⁸⁷ Brand concluded, therefore, that a “palm-tree justice cannot serve as a substitute for the application of established principles of contract law,”²⁸⁸ i.e. freedom of contract, and the autonomy of the will.

3.3.4.4 Conclusion on the principle of good faith

An examination of the development described above creates the impression that the principle of good faith has produced a rich debate within the context of South African contract law. At the outset, this duty moved from acknowledgement to denial,²⁸⁹ and *vice versa*. Today, the principle has been well established. Consequently, as it is the case in other legal systems, in South African law, all contracts are expected to be negotiated and performed consistent with good faith. In practice, however, courts prefer not to intervene in contractual relationships allowing parties to take care of their contractual rights and obligations as they understand them. The reluctance of the courts may lead one to deduce that, under South African law, the principle of party autonomy and the principle of freedom of contracts take precedence over good faith.

The duty of good faith is not the only moral standard clause to which contracts are subject; another similar concept is the notion of public policy.

3.3.5 Contract Consistency with Public Policy

The expression “public policy” is understood as a set of rules that covers the essential interests of the state. These interests include the Constitution and other private law

²⁸⁷ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 27.

²⁸⁸ Brand 2009 (126) SALJ 90.

²⁸⁹ See Hawthorne 2003 (15) *Merc LJ* 271 272.

statutes considered indispensable for the protection of the individuals.²⁹⁰ According to Ngcobo J, the concept of “public policy” “represents the legal convictions of the community; (...) (means) those values that are held most dear by the society.”²⁹¹ Values of the kind include, in the words of Cameron J, “the constitutional values of human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism.”²⁹² The CC complements this with the notions of fairness, justice and reasonableness.²⁹³

In other words, the meaning of, and consistency with, the public policy requirement are determined by reference to the Constitution. As stated by s 2 of the 1996 Fundamental Law, the Constitution is the highest authority in the country. Thus, courts and the CC, in particular, have the power to declare any agreement invalid if it is in conflict with it. As stated in *Barkhuizen v Napier*, any contractual provision which is inconsistent “to the values enshrined in (...) the Constitution is contrary to public policy and is, therefore, unenforceable.”²⁹⁴ That is to say, although the law acknowledges the value of principles such as freedom and sanctity, “public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair.”²⁹⁵

As for its comparable good faith duty, the concept of public policy is also well established under South African contract law. Throughout the history, courts have

²⁹⁰ See discussion under Section 2.3.3.2 above.

²⁹¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) [28]; see also comments by Kerr 2008 (125) *SALJ* 241 244.

²⁹² *Brisley v Drotosky* 2002 (4) SA 1 (SCA) [91]; see also *Carmichele v Minister of Safety and Security (Centre of Applied Studies Intervening)* 2001 4 SA 938 (CC) [54-56]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [18]; *Price Waterhouse Coopers Inc. v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) [24]; *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) [11]; *Napier v Barkhuizen* 2006 1 SA 1 (SCA) [7]; *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (ECM) [76-77]; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [39]. For an explanation of some of these values, namely the values of freedom, equality, and dignity; see Bhana/Pieterse 2005 (122) 4 *SALJ* 865 876-883.

²⁹³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) 73; see also *Maphango v Aengus Lifestyle Properties* 2011 ZASCA (1 June 2011) 100 [88] per Zondo AJ. Because the notions listed above form part of some evasive clauses, they must be examined on a case-by-case basis. See Kerr 2008 (125) *SALJ* 241 244.

²⁹⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) [29].

²⁹⁵ *Ibid* [73].

reaffirmed their obedience to that concept “as the appropriate instrument for dealing with contractual unfairness that cannot satisfactorily be handled by existing rules.”²⁹⁶ The reason for this is that there is a wealth of authorities which accept the notion of public policy as an assessment tool to weigh the validity of contracts.²⁹⁷ In *Sasfin (Pty) Ltd v Beukes*, confirmed more recently in *Bredenkamp v Standard Bank of South Africa Ltd*, for instance, the SCA stated that South African “common law does not recognise agreements that are contrary to public policy.”²⁹⁸ According to the SCA, instead of giving effect to such conventions, “courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground.”²⁹⁹

It should be remembered that the party autonomy principle requires parties to honour in good faith contractual obligations that they have freely and voluntarily undertaken.³⁰⁰ Despite such a general rule, the needs of public policy allow courts to decline to enforce any unfair contractual terms even though parties may have consented to them. It follows then that the concept of public policy is the most important principle of the law of contract so that individual and public agreements must comply with it at the risk of being invalidated or rendered unenforceable.³⁰¹ Public policy considerations are not static; their weight may vary from time to time

²⁹⁶ See *Christie/Bradfield Contract 17*; quoting in Fn88, *Brisley v Drotzky* and *Sasfin (Pty) Ltd v Beukes*.

²⁹⁷ See, among others, Voet 2.14.16; Grotius 3 1 42; *Eastwood v Shepstone* 1902 TS 294 302 per Innes CJ; *Magna Alloys and Alloys and Research (SA) (Pty) Ltd v Elis* 1984 4 SA 874 (A); *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Botha v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *Carmichele v Minister of Safety and Security (Centre of Applied Studies Intervening)* 2001 4 SA 938 (CC).

²⁹⁸ See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7I-9H; and *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [38].

²⁹⁹ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [38]; citing *Hurwitz v Taylor* 1926 TPD 81; see also *Barkhuizen v Napier* 2007 5 SA 323 (CC) [11]; *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) [25]; *Reddy v Siemens Telecommunications (Pty) Ltd* [10] 493-494.

³⁰⁰ *Barkhuizen v Napier* [30]; quoted with approval in *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) [15]. In *Maphango v Aengus Lifestyle Properties* [124], Zondo AJ added to this that correspondingly, public policy requires that parties to contracts that have been freely and voluntarily concluded should respect the exercise by other parties of their contractual rights. Likewise, Yacoob J said, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)* [26], that “the issue of whether a duty to negotiate in good faith is imposed by a contract and whether that obligation has been imposed by a particular contract is (...), by necessary implication, issues of public policy.”

³⁰¹ Cf. s 2 of the Constitution; see also *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) [16].

depending on the circumstances.³⁰² As Joubert has said, opinions relating to public policy matters may differ from society to society both in place and time.³⁰³

In the same way, there is a close connection between the concept of public policy and the principle of good faith so that it is not always easy to differentiate between them. Without the need to engage in a greater discussion, it is merely highlighted that the duty of good faith “forms an element of the umbrella concept that is public policy.”³⁰⁴ Thus, the notion of public policy is the doctrine through which the fundamental principle of good faith will gain recognition and implementation. To recall the words of Olivier, in the *Eerste Nasionale Bank v Saayman* case, the courts should apply the notion of good faith to all contracts because public policy demands that this should be so.³⁰⁵

Briefly, the requirement for consistency with public policy needs is really one of the cornerstones on which the law of contract in South Africa is built. That concept gives the impression of being preeminent compared with other fundamental principles. Thus, values such as those of freedom of contract, sanctity, and good faith have meaning only if they comply with public policy considerations. Similarly, any contract which is in conflict with the needs of public policy cannot be enforced. This is the position of the 1996 Constitution, and consequently the view of modern South African contract law, as evidenced by numerous cases heard by both the SCA and CC.

3.3.6 Conclusion on the Fundamental Principles of the Law of Contract

A contract is an agreement which produces legal effects. It requires a number of conditions for its validity. Those requirements include, save circumstances of reasonable belief, the need of an agreement between the parties and their

³⁰² *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [38].

³⁰³ See Joubert *Contract* 133; see also *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) [38].

³⁰⁴ See *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* 1997 (4) SA 302 (SCA); see also Glover in *Essays* 112; Glover 2007 (124) 3 *SALJ* 449 457.

³⁰⁵ *Ibid.*

collaboration for it to be concluded. One of the methods used is the offer and acceptance means of conclusion. The offer and acceptance process does not, however, *per se* suffice to result in a valid contract. For them to produce effect, the offer must be firm, complete, clear and certain; and the acceptance must be communicated and show the intention of the offeree to be bound by the contract. Normally contracting parties are free to negotiate and conclude the contract according to their needs. A contract freely and voluntarily concluded will then be enforced by the courts. The benefit of the freedom of contract principle is not, however, unlimited. Instead, freedom is subject to other fundamental principles which include good faith and consistency with public policy. The latter requirement appears to be the most important, given that almost all other principles must meet its terms.

Having looked at the fundamental principles governing the law of contract as a whole, our attention now turns to sales contracts ground rules.

3.4 Ground Rules for Sales Contracts

3.4.1 The Nature and Definition of a Contract of Sale

Several definitions have been proposed in connection with the contract of sale, some very descriptive and others simple.³⁰⁶ One of the commonly-recognised definitions is that, “when parties who have the required intention agree together that one party will make something available to the other in return for payment of a price, the contract is a sale.”³⁰⁷

³⁰⁶ For a series of definitions devoted to the contract of sale, see Zulman/Kairinos *Sale 1*; Kahn *Contract 3*; and Belcher *Sale 1*.

³⁰⁷ See *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 400; *Commissioner of Inland Revenue v Wandrag Asbestos (Pty) Ltd* 1995 (2) SA 197 (A) 214J; see also Eiselen in *Scott Commerce* 133; Kerr *Sale 3*.

This definition has, however, been criticised on the grounds that it does not clearly distinguish between a contract of sale and a contract of lease. In effect, though, in the case of sales the property is made available on a permanent basis; in both instances one party makes a thing available to the other against payment of money.³⁰⁸ Owing to this reproach, De Wet and Van Wyk describe a sale of goods as “a reciprocal agreement by which one person, the seller, undertakes to deliver an object (*res*) to the other, the buyer, and the latter undertakes to pay the former a sum of money in exchange for that object.”³⁰⁹ Sharrock has also adopted a similar definition. According to him, a “Sale is a contract whereby one party (the seller or *vendor*) undertakes to transfer a thing (the *res vendita* or *merx*) or the possession thereof to the other party (the buyer or purchaser) in return for payment of a price by the latter.”³¹⁰

As is clear from the above, all these definitions insist on the fact that a contract of sale involves an agreement on the property sold, known as the *res vendita* or *merx*, and the payment of the price, also called *pretium*.³¹¹ In other words, the reaching of agreement on the thing sold and the payment of the price constitute the cornerstones of any contract of sale,³¹² so that, if parties fail to agree on them, there is no contract of sale at all.³¹³ Alternatively, once the consent, merchandise, and price are present, the sale is complete without need that the price be paid or the thing sold delivered.³¹⁴

³⁰⁸ Eiselen in Scott *Commerce* 133.

³⁰⁹ De Wet J C and van Wyk A H *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol I 5th ed 1992 313; quoted by Lotz *Sale* 361 362.

³¹⁰ Sharrock *Business* 271; see also Bradfield/Lehmann *Sale* 4.

³¹¹ See *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92 per Innes CJ whereby, “Now the requisites of a sale are well known *merx*, *pretium*, and consensus. There must be a merchantable article, an agreed price, and the consensus of both parties; the one to buy and the other to sell; or the one to acquire and the other to alienate.”

³¹² See *Kennedy v Botes* 1979 (3) SA 836 (A) 845F-846A; *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92; see also Kerr *Sale* 3; and Zulman/Kairinos *Sale* 2.

³¹³ See *Dawidowitz v van Drimmelen* 1913 TPD 672 676; approved in *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 707C; and supported by *Van der Walt v Stassen* 1979 (3) SA 810 (C) 814D-E; see also Kerr *Sale* 54. Voet said at 18.1.1 that three essential requirements are needed for the validity of a contract of sale: consent, merchandise, and price. If one of them is wanting, there is no purchase.

³¹⁴ *Kennedy v Botes* 1979 (3) 836 (A) 845F - 846A; see also Zulman/Kairinos *Sale* 2; Kerr *Sale* 4.

It should be borne in mind that under South African law all contracts, including sales, are consensual. Sales contracts “derive their binding force from the mere agreement between a buyer and a seller.”³¹⁵ Thus, under the legal system in view, it is not a key requirement that ownership be transferred to the buyer.³¹⁶ What is required is rather that the seller transfers an uninterrupted possession of the thing sold.³¹⁷ So, it is important to review some general rules relating to the agreement, the thing sold, the price, and the transfer of ownership.

3.4.2 The Need for Consent in a Sales Contract

Common rules governing all kinds of contracts in respect of the agreement requirement also apply to sales contracts.³¹⁸ What is specific to sales is that the parties must express their intention, the buyer to acquire the thing sold, and the seller to sell it.³¹⁹ In other words, there must be a meeting of minds of contracting parties with the intention of concluding a contract of sale but not any other contract. Pursuant to the reliance theory, however, the manifestation of intention may be inferred from one party’s conduct. This is also true for a contract of sale. In effect, given that an offer and a corresponding acceptance may both be communicated by conduct, it follows that a contract of sale may validly be concluded by conduct alone.³²⁰ Such may be the case for a buyer who takes delivery of an excess quantity of goods and keeps them,³²¹ or where goods are taken off without fixing the price. In the latter case, goods are presumed to be paid for at the usual price.³²²

³¹⁵ Lotz Sale 361 362.

³¹⁶ See *Bolan Bank Bpk v Joseph* 1977 (2) SA 82 (D) 88.

³¹⁷ See *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others* 1976 (4) SA 464A 490.

³¹⁸ Cf. Section 3.3.2 above.

³¹⁹ *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92 101; see also *Lehmann Sale* 888 889; *Volpe Sale* 2.

³²⁰ See *Tomoney and King v King* 1920 AD 133 141; *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241; *Collen v Reitfontein Engineering Works* 1948 1 SA 413 (A) 429-430. For instances of implied sales contracts, see also *Hackwill Sale* 7-8.

³²¹ See *Bellingham v Smith* 8 EDC 155; *Hart v Mils* (1846) 15 M & W 85, 153 ER 771.

³²² *Hackwill Sale* 8.

In any event, except for sales of land,³²³ sales by auctions,³²⁴ and credit agreements,³²⁵ all other kinds of sale are not subject to any formal requirements. They may be concluded either orally or by writing as the parties see fit provided that they determine accurately the subject-matter and the price of the contract.

3.4.3 Determination of the Subject-matter of the Sale

As a general rule, contracting parties must reach agreement on the identity and the nature of the object to be sold. As a number of scholars have stated, the identity and the nature of the thing sold must be determined or determinable when the contract is concluded.³²⁶ That is to say, there must be a “defined and ascertainable subject-matter”³²⁷ the moment a contract is formed.

On the question of how a thing is ascertained, Bradfield and Lehmann answer,

The property sold is ascertained if it is clear that the parties were in agreement about the specific item, or items, of property being sold. The property sold is ascertainable if it is described as being of a particular kind or class of property, or possessing particular qualities, or fit or suitable for a particular purpose (...), or the parties agree that the property sold shall correspond in quality to a specimen sample exhibited at the time of the sale (...).³²⁸ It is also ascertainable if what is sold is a quantity, expressed as a number, weight or measure, of a particular kind of thing (...).³²⁹

In principle, when a specific type of object is known, there is no problem. Although parties may have difficulties in specifying the object’s particular identity or nature, it is their duty “to describe the object, the quantity or the nature of the goods with as much precision as is reasonably (...) possible under the circumstances (concerned).”³³⁰ According to the case law, where goods are not determined or at

³²³ Cf. Alienation of Land Act 68 of 1981, s 2.

³²⁴ Cf. Alienation of Land Act 68 of 1981, s 3(1).

³²⁵ Cf. Credit Agreements Act 75 of 1980, s 1 as amended by the National Credit Act 34 of 2005.

³²⁶ See Eiselen in *Scott Commerce* 134; *Kerr Sale* 8; and *Bradfield/Lehmann Sale* 25.

³²⁷ See *Hamburg v Pickard* 1906 TS 1010; *Conlon and Fletcher v Donald* 1951 (3) SA 196 (C).

³²⁸ See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 683.

³²⁹ *Bradfield/Lehmann Sale* 28-29 and authorities cited by them in Fn176.

³³⁰ *Eiselen in Scott Commerce* 134.

least determinable, or if they are so vaguely described that it is not possible to ascertain exactly what has been sold, the contract is null.³³¹ With regard to the *merx*'s nature, it is admitted that it may be a corporeal or an incorporeal thing, a movable or an immovable one,³³² a specific or a generic article, an object currently in existence, or a future thing, and so on.³³³ The only exception is that the thing must be *intra commercium* or merchantable³³⁴ and not belong to the buyer at the time of the sale.³³⁵

Insofar as the sale of future things is concerned, one clear illustration is the sale of items which are still to be manufactured. To illustrate by using Kerr's example, "a customer may buy from a manufacturer machinery to be made to his (...) specifications, or something in such short supply that it has to be ordered a considerable time before the expected date of delivery."³³⁶ For the validity of sale of future things, however, materials must be supplied by the seller himself/herself.³³⁷ If they are provided by the buyer, the contract will be described more as a lease than as a sale.³³⁸ Though contracting parties are free from determining the object of the sale,

³³¹ *Hamburg v Pickard* 1906 TS 1010 1015; *Hilliard and Wenborne v Taborr Frost* 1938 SR 89 94; *Conlon and Fletcher v Donald* 1951 (3) SA 196 (C); *Clements v Simpson* 1971 (3) SA 1 (A) 7B-F; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A); *Mayfair South Townships (Pty) Ltd v Jhina* (1) SA 869 (T); *Richtown Development (Pty) Ltd v Dusterwald* 1981 (3) SA 691 (W) 698H-699D; see also *Bradfield/Lehmann Sale* 29 Fn178; *Kerr Sale* 22 and 60; *Hackwill Sale* 9; *Lehmann Sale* 888 891.

³³² Noted, immovable items are often excluded from international transactions; see Article 2 (d) and (e) CISG.

³³³ See *Kerr Sale* 8; *Sharrock Business* 271; *Eiselen in Scott Commerce* 134-135; *Bradfield/Lehmann Sale* 25. For a list of sales of future things organised in South African law, see *Lotz Sale* 361 364-365; *Kerr Sale* 25-26. There is unanimity that the sale of future things is subject to the condition that such goods come into existence. See *Sharrock Business* 271; *Eiselen in Scott Commerce* 135; *Lotz Sale* 361 365; and *Kerr Sale* 25.

³³⁴ See D 18.1.6; 18.1.34; Voet 18.1.13; *Wessels Contract* §395; *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92 101; and other authorities quoted by *Kerr Sale* 8 Fn3; and *Lehmann Sale* 888 890 Fn29.

³³⁵ See authorities quoted by *Kerr Sale* 8 Fn2; *Lehmann Sale* 888 891 Fn33; see also *Hackwill Sale* 13.

³³⁶ See *Kerr Sale* 25-26; for other instances of future things, see *Lotz Sale* 361 364-365.

³³⁷ See *Lotz Sale* 361 364; but *SA Wood Turning Mills (Pty) Ltd v Price Bros (Pty) Ltd* 1962 (4) SA 263 (T) whereby, though the printer was supplied with descriptive matter and photographs for catalogues, the contract was one of purchase and sale.

³³⁸ See *S v Progress Dental Laboratory (Pty) Ltd* 1965 (3) SA 192 (T).

special legislation may forbid or restrict the sale of specific objects.³³⁹ An agreement for the sale of prohibited goods is void owing to illegality.³⁴⁰

Before analysing the determination of the price, it is important to note that, under South African law, the seller does not necessarily need to own the goods to be sold for the sale to be valid. The sale of the property of third party is valid and binding.³⁴¹ As a number of commentators have argued, the sale of goods not belonging to the seller may be lawfully concluded in cases such as where the seller reasonably expects to obtain them from his/her regular suppliers or from the owner.³⁴² But, if goods have been delivered in violation of the owner's rights, the latter is allowed to claim them from the actual possessor with the commonly known precept, the *actio rei vindicatio*.³⁴³ In other cases, except for some specific statutory prohibitions, any merchantable thing may constitute sales subject-matter. It does not matter whether the thing exists or not, or whether it belongs to the seller or not. What is essential is that the parties reach agreement upon that item and determine the price.

³³⁹ For explanatory cases, see: s 18 and 35 Arms and Ammunition Act 75 of 1969; s 6(2) and s 12(1) Radio Act 3 of 1952; s 14, 18, 19, 22A Medicines and Related Substances Control Act 101 of 1965; s 2(1) and 3(1) Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; s 5 Drugs and Drugs Trafficking Act 140 of 1992; s 31 Firearms Control Act 60 of 2000. It should be noted that a number of other former common law restrictions have been removed a long time ago. See, in the same sense, *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 593; *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA & another* 1958 (4) SA 572 (A); and comments by Bradfield/Lehmann *Sale* 25; Lotz *Sale* 361 364.

³⁴⁰ See Eiselen in Scott *Commerce* 135, and authorities quoted by Bradfield/Lehmann *Sale* 25 Fn150. For comments on the illegality principle and its consequences on contracts, see Christie/Bradfield *Contract* 358-417; Van der Merwe et al *Contract* 165-191; Joubert *Contract* 129-153; Kerr *Contract* 18-199.

³⁴¹ See *Theron and Du Plessis v Schoombie* (1897) 14 SC 192 198; *Tshandu v City Council Johannesburg* 1947 (1) SA 494 (W) 497; *EBN Trading (Pty) Ltd v Commissioner of Customs and Excise* 2001 (2) SA 1210 (SCA) §23; see also Bradfield/Lehmann *Sale* 25-26.

³⁴² See Eiselen in Scott *Commerce* 136; Hackwill *Sale* 12.

³⁴³ In addition to authorities quoted in the previous footnote, see also Bradfield/Lehmann *Sale* 26. The *actio rei vindicatio* is a right recognised for the real owner to claim the property sold from the buyer in order to recover his/her possession.

3.4.4 Determination of the Price

The obligation for contracting parties to determine the price for the sale to be valid is explicitly formulated by Colman J in *Burroughs Ltd v Chenille of SA (Pty) Ltd* as follows:

[T]here can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They must either fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them.³⁴⁴

This ruling was repeated later by Corbett JA in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* in almost similar words.³⁴⁵ These cases show that the price is an essential term of any contract of sale. Thus, for a contract to amount to one of sale, parties must expressly, or by implication, agree upon the price.

With regard to its characteristics, the price must be serious, certain or ascertainable, and stipulated in money or partly in money.³⁴⁶ As far as the currency is concerned, it is admitted that the price must be in current money or in foreign money reducible in terms of current money.³⁴⁷ If parties agree to exchange objects instead of money, the contract is barter or an exchange contract. If, however, the price is partly in money and partly in goods, the intention of the parties will prevail in determining whether the contract is one of sale or a barter contract.³⁴⁸ The price

³⁴⁴ See *Burroughs Ltd v Chenille of SA (Pty) Ltd* 1964 (1) SA 669 (W) 670C-D, per Colman J taking council on Mackeurtan *Law of Sale* 3rd ed 18, and *Margate Estates Ltd v Moore* 1943 TPD 54.

³⁴⁵ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574D-C; see also cases quoted by Bradfield/Lehmann *Sale* 31 in Fn187 and 188.

³⁴⁶ See Bradfield/Lehmann *Sale* 31-32; Kerr *Sale* 30ff; Hackwill *Sale* 14; Eiselen in Scott *Commerce* 141; Sharrock *Business* 272; see also authorities quoted by Lotz *Sale* 361 366 Fn43.

³⁴⁷ The assessment of price is discussed in Section 6.3.3.2 below.

³⁴⁸ See *Rand Water Board v Receiver of Revenue* 1907 TH 215; *Pretoria Townships Ltd v Pretoria Municipality* 1913 TPD 362. See, in the same sense, Lotz *Sale* 361 366; Eiselen in Scott *Commerce* 141; Kerr *Sale* 30-32; Bradfield/Lehmann *Sale* 31; Hackwill *Sale* 19. In the words of Voet,

If partly money and partly something else is given for a thing, we must look to see what was in the mind of the contracting parties, whether purchase or barter. If that matter is not clear, the transaction must be classified according to the leading factor. Thus if there is more in money, and less in the value of other things given, the contract ought to be one of sale; but the contrary if there is more in the thing given than in the money.

must, in addition, be serious. Requiring the price to be serious entails that it be real and correspond to the value of the goods.³⁴⁹ Thus, where the price is illusory and does not bear any resemblance the value of the goods, the contract is not a sale but rather a donation.

Normally, the price must be determined by the parties, or they may agree on the method of its determination. As stated in the *Burroughs Ltd v Chenille of SA (Pty) Ltd* and *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* decisions above, the determination of the price might be expressed or be implied from the previous course of dealings between parties.³⁵⁰ With regard to the question of whether the price could be determined by one party or a person appointed by him/her, the answer is negative.³⁵¹ It is possible, however, that parties appoint a third

See Voet (n 6) 18.1.22 (trans. Gane); reproduced by Lotz Sale 361 366 Fn30. This approach was accepted in *Mountbatten Investments (Pty) Ltd v Mohamed* 1989 (1) SA 172 (D) (purchase price paid partly in cash and partly by 'trade in' of a motor car).

³⁴⁹ See *Commissioner for Inland Revenue v Saner* 1927 TPD 162.

³⁵⁰ In same sense, see *Singh v Hulett & Sons* 1924 NPD 117.

³⁵¹ See Colman J in *Burroughs Ltd v Chenille of SA (Pty) Ltd* 1964 (1) SA 669 (W) 670C-D; relying on Voet 18. 1.23 (trans. Gane); *Deary v Deputy Commissioner for Inland Revenue* 1920 CPD 541; *Dawidowitz v van Drimmelen* 1913 TPD 672; see also authorities quoted by Bradfield/Lehmann Sale 33 Fn200. In *Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514, Hoexter JA said,

It is no doubt a general principle of the law of obligations that, when it depends entirely on the will of a party to an alleged contract to determine the extent of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principles are afforded by the law of sale. If, for example, it is left to one of the parties to fix the price the contract is bad.

This ruling was recently confirmed in *NBS Boland Bank Ltd v One Berg River Drive CC & others CC* 1999 (4) SA 928 (SCA); and, particularly, in *Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA) [9] when Van Heerden DCJ reminded us that any contract which authorises one of the parties to fix, *inter alia*, the price "is void for vagueness". In *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700, Colman J recognised, however, that the avoidance of a sale on the grounds that the price being determined by one party was inconsistent with modern international instruments. Colman said at 670D-E, "(...) in our law, 'which does not conform in this regard with certain other systems', there can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them or by his nominee." As if to complete the idea of Colman, Van Heerden DCJ argued, in *NBS Boland Bank Ltd v One Berg River Drive* [16] that, keeping such a rule under modern South African law has appeared somewhat illogical. The learned judge stated in an *obiter* remark that, "a sale (...) containing a power to fix the price (...) is not only illogical but also sadly out of step with modern legal systems." According to him [at 9], it is "illogical in view of the recognition that the determination of the price may validly be left to a third party, and that either the seller or the buyer may be accorded a power to individualise the *merx* in

person with the task of determining the price on their behalf.³⁵² If that person refuses or is unable to fix the price, there is no contract. In contrast, if the person nominated fixes a price which is out of proportion to the object, this may be adjusted in accordance with the observance of good faith and fair dealing values in transactions.³⁵³

Though the price is relevant for every sales contract, it is not unusual that goods be ordered and acquired from a seller without any mention of the price. Such a type of situation poses the problem of what is known, under Anglo-American common law jurisdiction, as the *unstated* or *open-price term* issue.³⁵⁴ Usually, when parties go without determining the price, this does not mean that the agreement is automatically invalid. There is an authority that, in circumstances of this kind, contracting parties are presumed to contract to the usual, or the customary price.³⁵⁵ In other words, when the contract is silent as regards the amount to be paid, the price will be the one for which those types of goods are frequently sold, the price the seller regularly charges for them, or the current market price.³⁵⁶ It follows then that,

a generic sale". Van Heerden DCJ wondered at [16] whether modern South African law should still follow similar rules. He failed, however, to solve the issue.

³⁵² See Bradfield/Lehmann *Sale* 34 and authorities quoted by them in Fn210; Kerr *Sale* 36-38; Hackwill *Sale* 16; Sharrock *Business* 273.

³⁵³ See Friedman J's view in *Dave White Investments (Pty) Ltd* 1981 (2) SA 263 (D) as reproduced by Lotz *Sale* 361 368; and Kerr *Sale* 39. According to Friedman J,

Where parties to a contract make provision for the evaluation of the subject-matter of the contract by a third party, neither party can be held to that valuation if it is one that is so grossly excessive (or in suitable cases so grossly less than the true value) that it bears no reasonable relationship at all to the true value of the property. The party in whose favour the valuation would appear to be cannot compel the other party to the contract to perform it at that valuation or, to put it conversely, the party aggrieved by the valuation can refuse to pay a price (...) based on that valuation. In the event, however, that the aggrieved party resists performance based upon the excessive valuation, the non-aggrieved party has the right to elect whether to resign from the contract or to carry it out upon the basis the valuation found by the Court to be a true or fair valuation of the *res vendita*.

³⁵⁴ See Section 5.2.3.2 below for comments, and a brief mention in Section 2.4.4 above.

³⁵⁵ See *R v Pearson* 1942 EDL 117; *R v Berghaus* 1942 EDL 188; *R v Soller* 1945 TPD 75; *R v Levitas* 1946 TPD 631; see also Christie/Bradfield *Contract* 104; Sharrock *Business* 273.

³⁵⁶ See *Erasmus v Arcade Electric* 1962 (3) SA 418 T; *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T); *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D) 128A-C, confirmed on appeal 1963 (4) SA 860 (A); but *MV MSC Spain Tebe Trading (Pty) Ltd v Mediterranean Shipping Co (Pty) Ltd* 2006 (4) SA 495 (N). See also Eiselen in Scott *Commerce* 141; Sharrock *Business* 273; Bradfield/Lehmann *Sale* 34; Hackwill *Sale* 17.

although the fixing of the price is an essential requirement in the sales domain, South African law also tolerates sales with open price terms.

A question occurs, however, with regard to the validity of sales for a “reasonable price term” in the absence of a usual or a market price. *A propos* of this, there has been some controversy on the issue. According to several scholars and case law, these kinds of contracts are void on grounds of vagueness.³⁵⁷ On the other hand, there are other authorities in favour of reasonable price terms. In *Genac Properties JHB (Pty) Ltd v NBC Administrators CC*, for example, Nicholas AJA found it difficult “to see on what principle a sale for a reasonable price should be regarded as invalid.”³⁵⁸ The learned judge took advice from the fact that, “where there is an agreement to do work for remuneration and the amount thereof is not specified, the law itself provides that it should be reasonable.”³⁵⁹ To exemplify this, in *Compagnie Interafricaine des Travaux v South African Transport Services and Others*,³⁶⁰ the Appeal Court acknowledged the fact that in circumstances where parties do not agree on the price or a method to determine it, “the law implied a right to receive a reasonable remuneration.”³⁶¹ In addition, Macdonald JP argued, in *Elite Electrical Contractors v The Covered Wagon Restaurant*, that the position in the *Erasmus v Arcade Electric* and *Adcorp Spares* decisions was supported “not by the application

³⁵⁷ See *Erasmus v Arcade Electric* 1962 (3) SA 418 (T); *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3); Eiselen in *Scott Commerce* 141; Lotz Sale 361 368. In *Erasmus v Arcade Electric* at 420, Bresler J judged unacceptable the use of “reasonable price terms” in sales contracts, because there could not be a contract to buy at a reasonable price. Bresler’s ruling was confirmed ten years later in *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd*. It was held in the case that, “A market price or the usual price of an article is still an ascertainable price, but an agreement to pay merely ‘a fair and reasonable price’ ‘is too uncertain to give rise to a valid contract of sale’.”

³⁵⁸ *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* (previously *NBC Administrators (Pty) Ltd*) 1992 (1) SA 566 (A).

³⁵⁹ See *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) 649C-D; quoting *Middleton v Carr* 1949 2 SA 374 (A); see also *Inkin v Borehole Drillers* 1949 2 SA 366 (A). Nicholas AJA relied to the Anglo-American common law approach for which where parties fail to determine the price, the buyer must pay a reasonable price.

³⁶⁰ See *Compagnie Interafricaine des Travaux v South African Transport Services and Others* 1991 (4) SA 217 (A).

³⁶¹ *Ibid.* This view was already supported in *Erasmus v Arcade Electric* wherein, though a sale at a reasonable price might be considered as invalid, such did not mean that a contract to pay a reasonable sum in return for performance of services was also void.

of special rules relating to contracts of sale, but by the application of general principles of contract law.”³⁶² He concluded, therefore, that a contract with reasonable price terms should be regarded as valid and enforceable.³⁶³

It follows that, though courts have traditionally invalidated sales for a reasonable price for vagueness, these days the case law reveals that they do not have difficulty in enforcing contracts for services for reasonable remuneration. That is why Sharrock, who initially supported the vagueness of sale with reasonable price (see *Business Transactions Law* 7th ed 2007 233), has changed his view. This author believes that, nowadays, there is “no good reason why a sale for a reasonable price should automatically be regarded as too uncertain to be enforced.”³⁶⁴

If it is accepted, the implementation of reasonable price terms, nevertheless, poses a dual question relating to the person who must determine that price and the way it may be assessed. In response, Kerr argues that when parties do not expressly or by implication state the price, “[The] best approach would be to consider what the parties meant by the words they used and then to consider whether evidence is available to establish the amount of money in the circumstances of the case in question.”³⁶⁵ In other words, the issue of the enforceability of sales at a reasonable price would be adjudicated on a case-by-case basis. In the case of difficulty, the price usually charged, or the one used in the trade concerned, would prevail.

To summarise this, compared to the thing sold, the determination of the price also constitutes an important requirement for the validity of any contract of sale. With regard to its characteristics, the price must be serious, certain or ascertainable, and fixed by the parties. When parties refrain from determining one, they are assumed to be concluding the sale at the usual or current market price. As regards the validity of contracts concluded at the reasonable price, the debate is still open. It is suggested,

³⁶² *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 (1) SA 195 (RA) at 197A-D; based on *Machanick v Simon* 1920 CPD 333 338. Macdonald highlighted that terms to be implied in a particular contract depended upon circumstances surrounding that contract.

³⁶³ *Ibid* 197C-D.

³⁶⁴ Sharrock *Business* 272.

³⁶⁵ See Kerr *Sale* 35; supported by Bradfield/Lehmann *Sale* 33; read with *South African Railways and Harbour v National Bank of South Africa Ltd* 1924 AD 704 at 715-716.

however, that the rule applied to contracts for services could serve as a source of inspiration for sales contracts instead of calling them off for vagueness. Accordingly, what the reasonable price is will depend upon the circumstances of each particular case; where the difficulty persists, the market price will carry the contract.

3.4.5 The Transfer of Ownership in the Thing Sold

As announced in the introductory paragraph, under South African law, although parties do expect to transfer ownership in the property sold from the seller to the buyer, the transfer is not fundamental for the contract.³⁶⁶ In *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others*, Corbett JA put it that, “According to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods.”³⁶⁷ A justification for this is that, since the law allows the sale of other people’s property, a seller who does not own the thing sold is unable to transfer ownership of it to the buyer. So, therefore, instead of an essential duty of transmission of property, the seller is, instead, required to transfer to the buyer uninterrupted possession of the property sold. Such an approach has led some scholars to describe sales, as “a contract whereby one person agrees to deliver to another the *free possession* of a thing in return for a price in money (my italics).”³⁶⁸

Restricting the definition of sale to a reciprocal obligation where the seller undertakes to deliver the thing sold and the buyer to pay the stated price, however, says very little. According to Bradfield and Lehmann, attention should rather be given to the seller’s obligation to undertake to transfer his/her rights in the property

³⁶⁶ See *Bolan Bank Bpk v Joseph* 1977 (2) SA 82 (D) 88.

³⁶⁷ *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others* 1976 (4) SA 464A 490; see also Kerr *Sale* 6; Lotz *Sale* 361 362 & 363; Eiselen in *Scott Commerce* 137.

³⁶⁸ In other words, a sale is “a mutual contract for the transfer of possession of a thing in exchange for a price.” See Hackwill *Sale* 1; Lehmann *Sale* 888 889; both taking support from old authorities such as Donellus 13.1.3; Voet 18.1.1; Huber *HR* 3.2.2, G 3.14.1; Domat 1.1.2.1, P V 1; *Treasurer General v Lippert* 2 SC 172.

sold.³⁶⁹ The observation of Bradfield and Lehmann originates from the fact that, there is a rule that, “The making of a contract of sale does not per se pass the ownership in the thing sold. It passes when delivery is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it (...).”³⁷⁰

The principle according to which the seller is not necessarily obliged to transfer ownership of the thing sold seems, nevertheless, not to be unconditional. Pursuant to the freedom of contract rule, parties may expressly or impliedly agree upon the passing of ownership immediately after the transfer of possession. Likewise, the payment of the price may be referred to as the starting point for the transmission of property.³⁷¹ Frequently, unless otherwise stipulated, the passing of property does not happen until the buyer has paid the price or given credit for it.³⁷²

Before concluding this section, it is important to note that the law has established different default rules in relation to the moment when ownership passes to the buyer. That period depends upon whether the contract involves any carriage of goods, the sale is for cash or by cheque, or was on credit. With regard to contracts involving carriage, the delivery of goods to the carrier for transmission to the buyer generally entails the transport of ownership of them to the buyer.³⁷³ In relation to sales for cash, the seller is supposed to transmit ownership upon payment.³⁷⁴ The same rule governs sales by cheque as well. As said by Holmes JA in the *Eriksen Motors* case, “In general, payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on

³⁶⁹ Bradfield/Lehmann *Sale* 15-16.

³⁷⁰ See *Commissioner of Customs & Excise v Randles, Bros and Hudson* 1941 AD 369, *Eriksen Motors Ltd v Protea Motors* 1973 (3) SA 685 (A); *Lendlease Finance Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A); referred to by Hackwill *Sale* 23; see also Kerr *Sale* 181-182; Sharrock *Business* 282.

³⁷¹ See *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 4 SA 626 (E) 629D 630B-C and 632E-F.

³⁷² See authorities quoted by Kerr *Sale* 181 Fn189; see also Bradfield/Lehmann *Sale* 17-18.

³⁷³ See authorities quoted by Hackwill *Sale* 24 Fn10.

³⁷⁴ *Eriksen Motors Ltd v Protea Motors* 1973 (3) SA 685 (A); see also *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others* 1976 (4) SA 464A 490.

presentation (by the bank).”³⁷⁵ So, if the cheque is so endorsed, its approval produces the passing of ownership. Finally, with regard to sales on credit, ownership is expected to pass on the delivery of goods.³⁷⁶

3.4.6 Conclusion on the Essentials of a Contract of Sale

For a contract to be one of sale, it must at least meet as essential requirements: the agreement on the object of the sale, which matches with the transfer of ownership and the delivery of that item by the seller; and the payment of the price by the buyer. Nonetheless, it is still the rule that, under South African law, a seller who undertakes to deliver the goods to the buyer does not undertake to make the latter owner of them. For the passing of property to occur, it is required that there is an accurate delivery followed by the payment of the price.

3.5 Conclusion on Chapter Three

South African law development is largely connected to the arrival of the early Dutch settlers at the Cape and the influence of the English common law. When the Dutch colonisers came to the Cape, they brought with them their own native legal system, viz. Roman-Dutch law. This legal system was a combination of the law of Holland and Roman law developed in the seventeenth century; it was based on the civil law tradition. Roman-Dutch law stayed alive in South Africa as the applicable legal system notwithstanding English settlement. Its conservancy was justified, amongst other things, by the British constitutional practice of that time which advocated the maintenance of existing laws until they were amended or repealed. The new Constitution of 1996 renewed this approach; it also maintained all the laws that were in force the time it took effect, including Roman-Dutch law.

³⁷⁵ Ibid; see also *Bold v Cooper* 1949 (1) SA 1195 (WLD); *Pienaar v G North & Son Ltd* 1979 (4) SA 522 (O).

³⁷⁶ Ibid.

The preservation of Roman-Dutch law does not mean that South African law was not influenced by British law. English law has had an impact on several South African fields of law, both public and private law. In the private law domain, for instance, it had a great impact on mercantile law and on rules relating to the formation of contract. With regard to the formation of contract, there is unanimity that the current South African law model of contracting by means of offer and acceptance is an approach inspired by English common law. Likewise, the coexistence of Roman-Dutch law and English common law has resulted in the fact that modern South African law is a mixed legal system connected to both civil law and Anglo-American common law legal families.

To describe South African law as a mixed jurisdiction does not, however, imply that that legal system is at the mercy of other legal families. South African law constitutes an independent legal system with its own specific characteristics. To give an example of this, compared with other civil law countries, South African law is not code-based. In addition, although South Africa has adhered to the doctrine of precedent, its implementation is not as severe as it is in England. South African law has, likewise, rejected the doctrine of consideration which is dear to Anglo-American common law jurisdictions.

Following from what has been said thus, it appears that modern South African law has acquired its own originality which differentiates it from the earlier Roman-Dutch law, civil law, and English law. This legal system should simply be referred to as South African law; it draws its authority from the Constitution. In a number of their decisions, both the CC and the SCA have demonstrated that all the aspects of modern South African law, including contract and sales law, are subject to constitutional regulation. A contract of sale, therefore, is valid on condition that it is consistent with the Constitution, or with the principles provided for by it. Among those principles, the most important in connection with contract law are the need for consensus or a reasonable reliance, freedom of contract, good faith, and consistency with public policy. With regard to sales contracts, constitutional values include

agreement on the property sold and the payment of the price. If not, the sale is invalid and unenforceable. As it is the case for chapter two, chapter three has set the background scene in respect of South African law which will be considered in chapters five and six.

Chapter Four

THE ORIGIN, AMBIT, AND IMPACT OF THE CISG ON NATIONAL SALES LAWS

4.1 Introduction

The CISG is a typical illustration of international legal cooperation. As a number of scholars have said, this Convention is not only the result of hard work which took around 50 years to be drafted and brought into force,¹ but it is also “a product of more than two generations of international negotiations.”² Its rich legal history is influenced by two major international organisations, UNIDROIT and UNCITRAL.³ With regard to UNIDROIT, it led to the adoption of two uniform laws predecessors of the CISG, i.e. ULIS and ULF. Concerning UNCITRAL, it achieved the development of the CISG. Owing to the role it played in the Vienna Convention drafting process, the CISG is considered as the “child” of UNCITRAL which was set up to promote a “progressive harmonisation and unification of the law of international trade.”⁴ Since it entered into force in 1988, the UN Sales Convention is currently influencing the modernisation of numerous national laws around the world.⁵

By reference to this brief summary, this chapter intends to achieve a triple objective: to explain the relevance of a harmonised legal system; to demonstrate the

¹ Kröll/Mistelis/Viscasillas *UN Convention* 2; Blair 2011 (21) *Duke J Comp & Int'l L* 269; De Ly 2005 (25) 6 *JL & Com* 1; Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf> (accessed 19-6-2012); McNamara 2003 (32) *Colorado Lawyer* 11; Oosthuizen Rights 9.

² Krieger 1989 (106) *SALJ* 184.

³ Rosett 1988 (21) *Cornell Int'l LJ* 575; Williams 2000-2001 *Review of the CISG* 9; Zeller 2002 (14) *Pace Int'l LR* 163.

⁴ Nicholas 1989 (105) *L.Q.R.* 201.

⁵ These include Scandinavian, Estonian, Dutch, German, Russian, and Chinese laws. For the CISG's influence on national laws, see Section 4.4 below.

influence the CISG has had on national laws; and to explain the way the CISG should be applied in the DRC despite the country's lack of enthusiasm for it. To attain these objectives, the chapter consists of four key sections in addition to the introductory section. Section two outlines the origins of the Vienna Sales Convention, and section three offers a general overview of its field of application. Section four introduces the CISG as a pattern for the improvement of national sales law, and section five discusses the attitude of the DRC *vis-à-vis* the CISG.

4.2 Origins of the Vienna Sales Convention

4.2.1 Introduction

There have been many studies of the historical developments in international sales law.⁶ In the present study, only the most important highlights will be addressed. It must be said, at the outset, that the main question behind the harmonisation process was whether a uniform sales law was needed.⁷ In order to answer this question, this section looks briefly at the following issues: the needs of harmonising international sales law; the first attempts to harmonisation through the 1964 Hague Sales Conventions; and the CISG drafting process under UNCITRAL.

4.2.2 The Need for the Harmonisation of International Sales Law

4.2.2.1 Historical perspectives of harmonisation

Historically speaking, efforts to unify the law of international sale of goods began in the 1920s; they are due to the influence of Ernst Rabel.⁸ Rabel initiated the drafting

⁶ See, among others, Kröll/Mistelis/Viscasillas *UN Convention* 2-5; Schlechtriem/Schwenzer *Commentary* 1-3; Schlechtriem *Uniform Law* 17; Mendes 1988 (8) *JL & Com* 109 112ff.

⁷ See Bonell 2001 (106) *Dickinson LR* 87; Schlechtriem *Unification* 125.

⁸ Schlechtriem/Schwenzer *Commentary* 1; Schwenzer/Hachem http://ius.unibas.ch/uploads/publics/6248/201109131_64502_4e6f6c6e5b746.pdf; Cuniberti 2006 (39) 5 *Vand. J. Transnation'l L.* 1511; Coetzee *Incoterms* 158; Wethmar-Lemmer *PIL* 36. Ernst Rabel (1874-1955) was active in

of an international uniform sales law and proposed the foundations for the unification of the law of sale.⁹ He came up with the idea of investigating the possibility of creating a worldwide uniform sales law.¹⁰ There are, however, also some arguments that, during the middle ages, the *lex mercatoria* had already formed a uniform sales code.¹¹ At that time, in fact, the *lex mercatoria* was universally applied throughout Europe at the local fairs and markets.¹² As merchants increased their trade abroad, that special law for the merchant class reduced local practices into regulatory codes and thereby encouraged the adoption of a universal system of law in specific areas.¹³ Because of this, the idea of a unified international trade law seems not to be a new one.¹⁴

many areas. He was not only a university Professor and an institute Director, but also a Judge, an Arbitrator, and an Advisor to German business. With regard to his academic carrier, Rabel was Professor of Law at the Universities of Leipzig, Basel, Kiel, Göttingen, Munich, and Berlin in Germany and Switzerland until 1937. The political situation in Europe forced him, however, to immigrate to America. There, he became Professor at the Law Schools of Ann Arbor and Harvard. Rabel's academic interest covered a wide range of fields, including Roman law, Modern civil law, Conflict of laws and Comparative law. Rabel gained extensive international experience. He was among the first to recognise the significance of comparative law as groundwork for the unification law project. His treatise *Law of the Sale of Goods "Das Recht des Warenkaufs"* (first published in 1936) created a model for later endeavours in this field. It was a seminal work providing an analysis of sales law at that time on a broad comparative basis. The *Conflict of Laws: A Comparative Study* (1945) has become a standard work, and the *Journal for Foreign and International Private Law* (RabelsZ), which Rabel founded in 1927, is one of the most respected publications in this area. Thus, all modern efforts to unify private law, especially as regards the sale of goods, are greatly indebted to Rabel, who also served as a member of UNIDROIT in Rome. Rabel's "master mind behind the draft Uniform International Sales Law" is still very much in evidence today. See Schlechtriem/Schwenzer *Commentary* 1; Gerber *Comparative Law* 190. Rabel's *curriculum vitae* can be found online at: <http://www.globalsaleslaw.org/index.cfm?pageID=824> (accessed 18-6-2012).

⁹ See Schlechtriem *Uniform Law* 17.

¹⁰ In the Preface to his book *Das Recht des Warenkaufs*, Rabel wrote, "At the beginning of our work stood the question if and to what extent the law of sale is fit to be uniformly enacted in all countries of the world." Quoted by Van der Velden *Sales* 46 48.

¹¹ See Eiselen 1999 (116) *SALJ* 323; Coetzee *Incoterms* 26; and Wethmar-Lemmer *PIL* 20. For an historical perspective of the *lex mercatoria*, see Basile et al *Lex Mercatoria* 123ff. According to a broad point of view, the *lex mercatoria* is described as the law governing international trade created by private practice. That field of law is considered as "a set of general principles and customary rules referred to or elaborated in the framework of international trade, without reference to a particular system of law." See Goode *Lex Mercatoria* 73; Goldstajn *Lex Mercatoria* 241; De Ly 2005 (25) 6 *JL & Com* 1 5; and Berger *Merchant* 1.

¹² See Eiselen *Globalization* 97 99; Eiselen 1999 (116) *SALJ* 323.

¹³ Butler *Guide* 1-5.

¹⁴ Chronologically, international commercial law has developed in three stages. The first, called "Old Law Merchant", dated back to the middle ages. It consisted of a body of customary rules

Nevertheless, it is in the middle nineteenth century that the plan of harmonisation contributed to an interest in creating a uniform commercial law to govern global markets.¹⁵ During that period, efforts were made for the international unification of some important legal areas. Sales law occupied a preeminent position among different topics suggested in that respect.¹⁶ Numerous European codes were enacted then. In France, for instance, the 1807 *Code de Commerce*¹⁷ emphasised the principle of the freedom of contract and the primacy of the right to ownership.¹⁸ By its ruling, the French Commercial Code was expected to govern the whole European continent, but, shortly, this far too ambitious expectation showed itself to be unrealistic.¹⁹ Similarly, in Germany, most members of the German confederation had adopted a Uniform Commercial Code in 1861 which was described as “the legal reflection of the struggle for political unity.”²⁰ Unfortunately this objective was not achieved either.

governing a cosmopolitan community of international merchants who travelled throughout the civilised world from port to port and fair to fair. The second began when mercantile law was incorporated into national systems in the eighteenth and nineteenth centuries. The third stage, described as “New Lex Mercatoria”, aimed at unifying international trade law on an international level. It was characterised by the increased involvement of the United Nations (UN). See Felemegas 2000-2001 *Review of the CISG* 115 135-139; Felemegas in *Interpretation 2* Notes 3 and 4; Goldstajn *Lex Mercatoria* 241. Insofar as the Old Lex Mercatoria is concerned, it had five specificities that distinguished it from other sources of law and helped to preserve its uniformity. The *lex mercatoria* was transnational in nature; laws were based on mercantile customs; cases were adjudicated not by professional judges, but by merchants themselves; its universality was fostered by the activities of the Notary public; and its emphasis was placed on freedom of contract and the decision of cases passed *ex aequo et bono*. From these features, the most important is that, at that period of the evolution of mercantile law, laws required for commercial transactions were not enacted by lawyers or judges; it was rather determined by merchants. See Carr *Trade* 3; Butler *Guide* 1-5 to 6; Felemegas 2000-2001 *Review of the CISG* 115 136; Felemegas in *Interpretation 2*; Mendes 1988 (8) *JL & Com* 109; and Coetzee *Incoterms* 155.

¹⁵ See Eiselen *Globalization* 97 99; Eiselen 1999 (116) *SALJ* 323.

¹⁶ Bonell in Bianca/Bonell *Commentary* 3. Of course, several other areas of international interest have to date also been harmonised. These include the international transport of goods, international payment, electronic commerce, and international arbitration and conciliation. For subsequent conventions, see http://www.uncitral.org/uncitral/en/uncitral_texts.html (accessed 18-6-2012).

¹⁷ The French *Code de Commerce* is one of the five Napoleonic codes mentioned in Section 2.2.3 above.

¹⁸ See Felemegas 2000-2001 *Review of the CISG* 115 137.

¹⁹ Eiselen 1999 (116) *SALJ* 323.

²⁰ See Felemegas 2000-2001 *Review of the CISG* 115 138.

In England, conversely, commercial matters were considered as issues of fact. In *Pillans v Mierop*²¹, Lord Mansfield, Chief Justice of the King's Bench (1756-1788), had the honour of incorporating the *lex mercatoria* into the common law courts. He recognised that one of the main purposes of the law consists in promoting certainty in commercial transactions. “[He] reconciled (consequently) the conflicting interests of flexibility and certainty by incorporating into the common law the general principles of the law merchant while at the same time leaving a large number of subsidiary matters as questions of fact for the Jury.”²²

Considering mercantile law as being the same all over the world, Lord Mansfield said, “For from the same premises, the same conclusions of reason and justice must universally be the same.”²³ Thus, Mansfield “succinctly linked reason and justice to the attainment of a uniform, homogenous law, and understood, thereby, the requirements of a successful international law well ahead of its successful contemporary implementation.”²⁴

4.2.2.2 Reasons justifying legal harmonisation

In general, international transactions are largely concerned with sales contracts; they are then affected by all commercial and legal problems inherent in any sale of goods. The most important of these problems is the fact that the seller and the buyer are from different countries and, consequently, subject to different laws. Strictly speaking, sales contracts are governed by domestic law in different jurisdictions. Such a situation has led to many potential conflicts in international sales which needed to be coordinated by conflict rules.²⁵ Naturally, the existence of different national laws of sale creates an impediment to trade between sellers and buyers from

²¹ *Pillans v Mierop* [1663] 3 Burr, 97 Eng Rep 1035 (KB 1765); see also *Pelly v Royal Exchange Assurance Co* [1757] Burr 341 347; quoted by Butler *Guide* 1-6; and Felemegas 2000-2001 *Review of the CISG* 115 138.

²² Butler *Guide* 1-6.

²³ Quoted by Zeller 2006 (17) 3 *Stell LR* 466 468.

²⁴ *Ibid.*

²⁵ De Ly 2005 (25) 6 *JL & Com* 1; Viejobueno 1995 28 *CILSA* 201; Griffin *Trade* 1.

different legal systems,²⁶ which obstructs the smooth operation of international trade. Simply, the diversity of national laws produces conflict and legal uncertainty.²⁷

It should be borne in mind that, up to the present time, law remains territorial in nature and enforceable within a specified national territory. Consequently, other states are not obliged to acknowledge and apply foreign laws. Domestic laws, moreover, differ from one country to another or from one legal system to another. One case in point is to determine the exact moment when a contract between parties who are not in each other's presence is concluded. Countries with a civil law system consider that kind of contract to be formed when acceptance arrives at the offeror. With regard to those based on the common law, they assume the contract to be concluded immediately after the offeree has placed its letter of acceptance in the hands of the Post Office.²⁸

Because domestic laws vary from one legal system to another, either the seller or the buyer may be faced with the application of an unknown foreign legal system, unless there is a specific choice of the law applicable to the contract.²⁹ In order to prevent such uncertainty in international trade, the unification of international sales law became indispensable.³⁰ This mechanism was intended to simplify issues relating

²⁶ Lehmann 2006 (18) *SA Merc LJ* 317; Davis 2001 (106) *Commercial Law Journal* 457; D'Arcy/Murray/ Cleave *International Trade* 409.

²⁷ Felemegas 2000-2001 *Review of the CISG* 115 130-131; Van der Velden *Sales* 46; Ziegel *Harmonization* 131.

²⁸ For similar differences with regard to the notification of lack of conformity in goods, see Eiselen *Globalization* 97 98 referred to in Section 1.3 above.

²⁹ See Chuah *Trade* 10; Coetzee *Incoterms* 2.

³⁰ There are, of course, some sceptical voices with regard to the harmonisation process. According to Rosett, for example, the paths to unification, harmonisation, codification, and reform run in parallel directions, but this is not necessarily so. For the learned author, recent experience suggests that the unification of law does not always produce harmonisation; the codification can be "the enemy" of reform and substantive improvement in the quality of justice. (Rosett 1992 (40) *Am J Comp L* 683; Rosett 1984 (45) *Ohio St LJ* 265). In the same way, Stephan considers the unification and harmonisation of international commercial law as a "futility". According to him, "much of the effort directed at unifying international law is unnecessary, and some produces rules that hinder rather than promote international business". (Stephan 1999 (39) *Virginia Journal of International Law* 743; see also Chuah *Trade* 10). As Chuah has stated, given that traders and lawyers are slow to support the process of harmonisation, it could be argued in their favour that although the intention of harmonisation endeavours is usually most noble, the reality is that it is difficult to agree on the interpretation of terms in these international rules.

to international transactions by creating a unique applicable law for all contracts.³¹ To use the words of Bonell, “a true harmonisation of sales law was required in order to provide a framework within which diverse legal systems could work and grow together and within which all nations are encouraged to develop compatible rules through common experience.”³² The ambitious idea of creating a unified sales law was, moreover, becoming increasingly important owing to the steady growth in international trade.³³ While such a common legal framework was long considered to be no more than a dream, its realisation has more recently been advocated as a veritable necessity for establishing a uniform law.³⁴ Its first attempts led, in 1964, to the implementation of The Hague Sales Conventions.

4.2.3 The 1964 Hague Sales Conventions (ULIS and ULF)

When nations embarked, in the earlier 1920s, on the unification journey, it was to remedy deficiencies which were slowing down the smooth development of international trade. The real intention of unifying the law of sale was achieved in 1926 when the League of Nations established UNIDROIT in Rome. Throughout the 1920s, Ernst Rabel’s involvement was widely acknowledged. Owing to his prestige, Rabel suggested to the UNIDROIT President, Mr Scialoja, to concern himself with the unification of international sale of goods law.³⁵ At the first meeting of UNIDROIT, he proposed that a project limited to uniform sales law would be better than pretending to unify the whole commercial law.³⁶ His proposal was approved. Rabel was then assigned the task of composing a draft in this respect, together with

³¹ Eiselen 1999 (116) *SALJ* 323 328.

³² Bonell *Contract Law* 4; see, in the same sense, Ackerman 1988 (21) *Cornell Int’l LJ* 535.

³³ See Zeller 2006 (17) 3 *Stell LR* 466 468; Oosthuizen Rights 10.

³⁴ Bonell *Contract Law* 4; Rosett 1984 (45) *Ohio St LJ* 265.

³⁵ Schlechtriem/Schwenzer *Commentary* 1; Schwenzer/Hachem http://ius.unibas.ch/uploads/publics/6248/20_110913_164502_4e6f6c6e5b746.pdf.

³⁶ Quoted by Eiselen 1999 (116) *SALJ* 323 334; Oosthuizen Rights 9; see also Coetzee Incoterms 158 Fn125.

other distinguished European scholars of that time.³⁷ They started the first project in 1929.³⁸

In 1935, the drafting committee submitted a preliminary draft of international sales law based on the basic principles of private law through a comparison of national law rather than commercial practice.³⁹ After its approval by the UNIDROIT Governing Council,⁴⁰ that proposal was transmitted to the League of Nations in order to receive comments from member states.⁴¹ In 1939, the committee submitted a revised report for adoption. Unfortunately, tensions in Europe and World War II events interrupted the process.⁴²

The growth of international trade after the Second World War certainly impacted on the law governing international business. That is why, in 1951, the government of the Netherlands undertook the initiative of stimulating efforts that had been broken up by previous political events. It convened a diplomatic conference in The Hague on the international sale of goods aimed at reconsidering the draft prepared by UNIDROIT and settling on how the unification work could be led to a satisfactory completion.⁴³ Through the meeting, participants decided in favour of continuing the harmonisation work. They appointed a Special Commission with the task of amending the original Rabel draft.⁴⁴ Rabel, now living in USA, was again

³⁷ These include Cecil Hurst JB, Bragge A, Capitant H, Fehr M, Gutteridge HC, and Hamel J. See Felemegas 2000-2001 *Review of the CISG* 115 140; Farnsworth 1984 (18) 1 *Int'l Law* 17; Bonell in Bianca/Bonell *Commentary* 3; Eiselen *Globalization* 97 101; Flechtner *Honnold's Uniform Law* 5.

³⁸ Bonell in Bianca/Bonell *Commentary* 3; Eiselen *Globalization* 97 101.

³⁹ See Eörsi 1979 (27) *Am J Comp L* 311; Butler *Guide* 1-12; Zeller 2002 (14) *Pace Int'l LR* 163.

⁴⁰ For the structure of UNIDROIT, see Article 4 UNIDROIT Statute, available at: <http://www.unidroit.org/mm/statute-e.pdf> (accessed 18-6-2012).

⁴¹ Bonell in Bianca/Bonell *Commentary* 3; Rabel 1938 (5) 4 *The University of Chicago Law Review* 543.

⁴² Bonell in Bianca/Bonell *Commentary* 4; Eiselen *Globalization* 97 101; Eiselen 1999 (116) *SALJ* 323 334; Flechtner *Honnold's Uniform Law* 5; Coetzee *Incoterms* 158.

⁴³ See Goldstajn *Lex Mercatoria* 241 243; Ndulo 1987 (3) 2 *Lesotho LJ* 127. The 1951 Hague Conference was attended by representatives from 21 governments, mainly Western European, and some observers from Japan, the USA, and certain Latin American States. See Oosthuizen *Rights* 11.

⁴⁴ Bonell in Bianca/Bonell *Commentary* 4; Eiselen *Globalization* 97 101; Ndulo 1987 (3) 2 *Lesotho LJ* 127 132.

member of that commission and had a considerable influence on its work until his death in 1955.⁴⁵

In 1956, the commission presented a new Draft Uniform Sales Law which was finally published in 1958.⁴⁶ Since that time, work towards a unified law of sale has increased and more drafts have followed, one of which was published in 1963. In 1964, the Government of the Netherlands organised another diplomatic conference to which it submitted the last draft for approval.⁴⁷ In the meantime, UNIDROIT was preparing a separate draft dealing with the formation of international sales contracts.⁴⁸ This was also submitted at the 1964 Hague Conference.⁴⁹ Twenty-eight states attended that conference assisted by observers from four states and six international organisations.⁵⁰ Two conventions dealing with international sales contracts were adopted at the end of the meeting, namely ULIS and ULF.⁵¹ Both instruments, commonly referred to as The Hague (Sales) Conventions or Uniform Laws, were opened for signature on the first of July 1964 and came into effect in August 1972.⁵²

Unifying and codifying international sales law, as done by ULIS and ULF, raises numerous problems. Differences between various domestic sales law systems were enormous, both in principle and in technical elaboration. In addition, there was no unanimity or uniformity in international commerce.⁵³ Despite the number of states which attended the 1964 Hague conference, furthermore, ULIS and ULF were

⁴⁵ Huber Sales Law 937.

⁴⁶ Eiselen Globalization 97 101.

⁴⁷ Ndulo 1987 (3) 2 *Lesotho LJ* 127 132; Bonell in Bianca/Bonell *Commentary* 4; Felemegas 2000-2001 *Review of the CISG* 115 140.

⁴⁸ Eörsi 1979 (27) *Am J Comp L* 311 312; Ndulo 1987 (3) 2 *Lesotho LJ* 127 133; Bonell in Bianca/Bonell *Commentary* 4.

⁴⁹ Eiselen 1999 (116) *SALJ* 323 334; Bonell in Bianca/Bonell *Commentary* 4.

⁵⁰ Bonell in Bianca/Bonell *Commentary* 4.

⁵¹ For comments, see Butler *Guide* 1-12; Bonell in Bianca/Bonell *Commentary* 4; Eiselen Globalization 97 101; Flechtner *Honnold's Uniform Law* 5.

⁵² Van der Velden Sales 46; Honnold *Unification* 5. For the relevance of the Hague Sales Convention, see Schlechtriem *Unification* 126.

⁵³ Of course there were already some conventions concluded under UNIDROIT sponsorship dealing with international sale of goods issues.

ratified by only nine states,⁵⁴ seven of them being Western European countries.⁵⁵ Apart from Israel, moreover, all of the signatory countries made use of the reservations allowed by Articles III to V ULIS.⁵⁶

Subsequent to the limited number of contracting states, the number of reservations made against their implementation, and for several other reasons, the 1964 Hague Sales Conventions did not achieve the unification of international sales law project.⁵⁷ This failure has largely been attributed to the limited role played by Third World and Socialist countries in contributions towards those Conventions. Accordingly, ULIS and ULF were perceived to be too Eurocentric, and they were reproached for not having taken into account the interests of the countries above in

⁵⁴ These include: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom. See Kröll/Mistelis/Viscasillas *UN Convention* 3 F10; Felemegas 2000-2001 *Review of the CISG* 115 140, Eiselen *Globalization* 97 102; Butler *Guide* 1-12, and the UNIDROIT website at: <http://www.unidroit.org/english/implement/i-64ulis.pdf> (last accessed 18-6-2012). UK's ratification was enacted by the Uniform Laws on International Sales Act 1967 which entered into effect on 18 August 1968. http://www.legislation.gov.uk/ukpga/1967/45/pdfs/ukpga_19670045_en.pdf (last accessed 18-6-2012).

⁵⁵ Bonell in Bianca/Bonell *Commentary* 4; Schlechtriem in Schlechtriem/Schwenzer *Commentary* 1; Ndulo 1987 (3) 2 *Lesotho LJ* 127 133; Oosthuizen Rights 12; Eiselen 1999 (116) *SALJ* 323 334; Germain 1995 *Review of the CISG* 117; Lehmann 2006 (18) *SA Merc LJ* 317 318; Coetzee *Incoterms* 158.

⁵⁶ For instance, England subordinated the application of Uniform Laws to an express choice by parties. (See Williams 2000-2001 *Review of the CISG* 9 11; Bonell in Bianca/Bonell *Commentary* 4; Eiselen 1999 (116) *SALJ* 323 335. Owing to its Article V reservation, ULIS and ULF did not have an impact on English international sales law. In practice, there is no case law decided in England on their basis, and there were not sufficient motivation businessmen to alter their trading practices. Furthermore, little notice has been taken in the country on the Hague Conventions in legal literature. For the reasons above, Williams is of opinion that ULIS and ULF could be seen in the UK from the beginning as a "dead letter everywhere else". (See Williams 2000-2001 *Review of the CISG* 9 16; see also Nicholas 1989 (105) *LQR* 201; Winship in Galston/Smit *Sales* 1-12). In the same sense, Eiselen believes that England's attitude should be comprehended as a simple "gesture rather than a real commitment to the aims of the conventions." According to him, given that English reservation aimed to obstruct the smooth application of uniform laws in the country, its ratification was "ironical". (See Eiselen 1999 (116) *SALJ* 323 335; and Eiselen *Globalization* 97 102). Eiselen justifies his opinion by the UK current indifference towards the CISG, despite the "full and constructive role it played in the harmonisation process," and a positive recommendation made by its "Law Commission" to ratify the Vienna Convention as is discussed in Section 4.2.4.3 below. (See Goode 2001 (50) 4 *Int'l Comp. L. Q.* 551; Bridge *Bifocal World* 277; Carr *Trade* 58; D'Arcy/Murray/Cleave *Trade* 409).

⁵⁷ Kröll/Mistelis/Viscasillas *UN Convention* 3; Felemegas 2000-2001 *Review of the CISG* 115 140; Coetzee *Incoterms* 158; Wessiack <http://cisgw3.law.pace.edu/cisg/biblio/wessiack.html>.

the drafting process. Many emerging and socialist states believed that these Conventions favoured sellers of developed countries rather than buyers from developing countries.⁵⁸ They advocated, therefore, “the need for general conditions of sale and standard contracts in order to enable their countries to negotiate international sales transactions on a footing of parity with developed nations.”⁵⁹

Notwithstanding the criticism advanced against them, the ULIS and ULF basic structure provided a solid basis which influenced the drafting and contents of the CISG under UNCITRAL auspices⁶⁰ as discussed in the following section.

4.2.4 UNCITRAL and the Development of the CISG

4.2.4.1 A brief overview of UNCITRAL

The failure of the 1964 Hague Sales Conventions did not stop efforts being made to achieve a worldwide unification of international sales law. Even before they had received sufficient adoptions, efforts were already being made under UN sponsorship to produce their revised version that would be more widely acceptable.⁶¹ For that reason, the UN General Assembly (UNGA) established UNCITRAL on 17 December 1966,⁶² which entered in effect in 1968.

Section I of the Resolution 2205 states that UNCITRAL is a UN Permanent Commission, the essential task of which is “to promote a progressive harmonisation and unification of international trade law.” Scholars have specified this by saying that the role of UNCITRAL “consists in unifying and harmonising international trade

⁵⁸ See Kröll/Mistelis/Viscasillas *UN Convention* 4; MacNamara 2003 (32) *Colorado Lawyer* 11 12; Eiselen *Globalization* 97 102; Butler *Guide* 1-12; Coetzee *Incoterms* 158. Some scholars accuse also Western European’s civil tradition dominance of the ULIS and ULF drafting process as being amongst the main factors for its failure of ratification. See Wesiack <http://cisgw3.law.pace.edu/cisg/biblio/wesiack.html>.

⁵⁹ UNCITRAL 1971 (II) *YB* 5.

⁶⁰ Schlechtriem/Schwenzer *Commentary* 1-2; Kröll/Mistelis/Viscasillas *UN Convention* 4; Eiselen *Globalization* 97 103; Butler *Guide* 1-13.

⁶¹ Schlechtriem *Uniform Law* 18.

⁶² Cf. UNGA Resolution 2205 (XXI) of 17 December 1966 in UNCITRAL 1968-1970 (I) *YB* 65.

law” “in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis.”⁶³ Owing to this mission, Castellani put it that UNCITRAL is “the core body in the UN system for the modernisation and the harmonisation of international trade law.”⁶⁴ Its membership reflects, not only the principal economic and legal systems of the world, but also a coalition of developed and developing countries.⁶⁵ Regarding its representatives, they should be appointed by member states from persons endowed with as much experience in the field of international trade law as possible.⁶⁶ As Flechtner has said, UNCITRAL representatives prove to be, “in practice, a wholesome mix of academic specialists in commercial and comparative law, practising lawyers, and members of government ministries with years of experience in international law-making.”⁶⁷

Since its coming into force in 1968, UNCITRAL has accomplished concrete legislative work in several fields. It has produced a number of harmonised

⁶³ Faria 2009 *Unif L Rev* 5; Sollund 2007 (1) *NJCL* 1; Sono in Galston/Smit *Sales* 4-1; Butler *Guide* 1-13; Coetzee *Incoterms* 159.

⁶⁴ Castellani 2011 (3) *BLR* 28.

⁶⁵ Cf. Paragraphs 5 and 9 of the Preamble to the Resolution 2205. The composition of UNCITRAL is limited and members are “from all geographical regions of the world”. Pursuant to Section II, paragraph 1, UNCITRAL original membership of 21 countries was shared out as follows: seven African states, five Asian, four Eastern Europeans, four Latin American, and eight Western Europeans and others states (See Resolution 2205, Section II, paragraph 1, in UNCITRAL 1968-1970 (I) *YB* 65-66 with UNCITRAL 1974 (V) *YB* 5-6. See also, Schlechtriem/Schwenzer *Commentary* 2-3; Honnold *Uniform Law* 51; Honnold *Unification* 5-6; Sutton 1989 (50) *Ohio St LJ* 737; Farnsworth 1984 (18) 1 *International Lawyer* 18; Winship in Galston/Smit *Sales* 1-1. Initially extended to 36 members (Cf. UNGA *Report of the Sixth Committee (A/9408)* at the sixth session (1973) (26 October 1972-11 September 1973) in UNCITRAL 1974 (V) *YB* 5-6), it has now been expanded to 60 members appointed by the UNGA. As from 27 June 2011, the 60 UNCITRAL’s seats are shared out by continent as follows: Africa, fourteen seats; Asia eighteen; Europe fifteen; America eleven; and Oceania two seats. Members are elected for terms of six years, the terms of half of them expiring every three years. Further information on UNCITRAL composition can be found at: <http://www.uncitral.org/uncitral/en/about/origin.html> (last accessed 19-6-2012).

⁶⁶ See Resolution 2205, Section II, paragraph 4; see also Flechtner *Honnold’s Uniform Law* 7; Honnold *Uniform Law* 51; Eiselen 1999 (116) *SALJ* 323 337.

⁶⁷ Flechtner *Honnold’s Uniform Law* 7; see also Honnold *Uniform Law* 51.

Conventions and Model Laws in different areas with international sales interest.⁶⁸ As far as conventions are concerned, they are “the most obvious instrument or method for achieving (...) harmonisation.”⁶⁹ Their biggest advantage is that conventions become binding law in all member states.⁷⁰ Owing to the fact that conventions bind all contracting states and displace their domestic rules in the field concerned, the use of the convention is commonly referred to as “hard law”.⁷¹ Amongst conventions adopted under the patronage of UNCITRAL one may mention: the 1974 UN Convention on the Limitation Period in the International Sale of Goods;⁷² the 1978 UN Convention on the Carriage of Goods by Sea;⁷³ the 1980 CISG, object of the present chapter; and the 2005 UN Convention on the Use of Electronic Communications in International Contracts (UNECIC).⁷⁴

⁶⁸ For a number of Conventions and Model Laws concluded under UNCITRAL sponsorship, visit: http://www.uncitral.org/uncitral/en/uncitral_texts.html (last accessed 19-6-2012); see also Castellani 2011 (3) *BLR* 28 29.

⁶⁹ Eiselen *Globalization* 97 107.

⁷⁰ *Ibid* at 108.

⁷¹ *Ibid*.

⁷² UN Convention on the Limitation Period in International Sale of Goods, New York 14 June 1974, as amended in Vienna on April 1980, recorded U.N. Doc. A/CONF.63/15 1974. The official records of the 1974 conference are published in U.N. Doc. A/CONF.63/16 (Sales No.E.74.V.8). http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv.pdf (last accessed 19-6-2012). The Final Act of the conference and the text of the Convention are reproduced in UNCITRAL 1974 (V) *YB* 209-215. http://www.uncitral.org/pdf/english/YBs/yb-1974-e/yb_1974_e.pdf (last accessed 19-6-2012). For commentaries on the Limitation Convention, see <http://www.uncitral.org/pdf/english/YBs/yb-1979-e/vol10-p145-173-e.pdf> (last accessed 19-6-2012). For the Protocol amending the Limitation Convention, see (U.N. Doc. A/CONF.97/18, Annex II) reprinted in the Official records of the 1980 Vienna Conference (A/CONF.97/19; Sales. No. E.82.V.5). According to commentators, the Prescription Convention establishes unified rules for the operation of the limitation or prescription period in international sale of goods. It aims to avoid the sharp contrasts in approaches between common law and civil law countries in matters relating to the prescription. See Sono in Galston/Smit *Sales* 4-3; Butler *Guide* 9-14. The Limitation Convention as amended has been adopted by 21 States, see status available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Conventionstatus.html (last accessed 19-6-2012).

⁷³ Known as the Hamburg Rules, the UN Convention on the Carriage of Goods by Sea is recorded in U.N. Doc. A/CONF.89/13, Annex I; reprinted in the Official records of the 1978 Hamburg conference (A/CONF.89/14; Sales No.E.80.VIII.1). http://www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf (last accessed 19-6-2012).

⁷⁴ See UN Convention on the Use of Electronic Communications in International Contracts, General Assembly Resolution 60/21 of 23 November 2005. http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (last accessed 19-6-2012). For a summary of the scope of UNECIC as well as the principles underlying this Convention, see Eiselen *Principles of the UNECIC* 106-133; Eiselen 2007(10) 2 *PER/PELJ* 48.

With regard to Model Laws, they have as a goal “to indirectly harmonise the law in a particular area by providing a standard text which can be adopted or modified by individual countries as part of their domestic law.”⁷⁵ As commented on by UNCITRAL secretariat, Model Laws constitute “a sound basis for the desired harmonisation and improvement of national laws.”⁷⁶ They are well referred to as “soft law instruments” because of their non-binding character.⁷⁷ As for conventions, UNCITRAL has enacted several Model Laws, including the 1985 Model Law on International Commercial Arbitration.⁷⁸ Similarly, owing to the impact the implementation of new technologies of communication and information has had upon the international business sphere, UNCITRAL has created two important instruments:⁷⁹ the 1996 Model Law on Electronic Commerce,⁸⁰ and the 2001 Model Law on Electronic Signatures.⁸¹

⁷⁵ Eiselen Globalization 97 111; see also Faria 2009 *Unif L Rev* 5; Callies/Zumbansen *Consensus* 123-124.

⁷⁶ See Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last accessed 15-6-2012).

⁷⁷ Eiselen Globalization 97 111; Callies/Zumbansen *Consensus* 139.

⁷⁸ See UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments, as adopted in 2006, General Assembly Resolution 61/33 of 4 December 2006. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last accessed 15-6-2012).

⁷⁹ See Preamble of the UNGA Resolution 51/162 of 16 December 1996 relating to the Model Law on Electronic Commerce. http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last accessed 19-6-2012). For ample comments, see Eiselen 1999 (6) *EDI Law Review* 21; Eiselen 2002 (6) *VJ* 305.

⁸⁰ UNCITRAL Model Law on Electronic Commerce 1996 with additional article *5bis* as adopted in 1998, Recorded in U.N.Doc. A/51/628; Sales. No.E.99.V.4., hereafter EC-Model Law. http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (last accessed 19-6-2012). The EC Model Law is not directly applicable nor a convention to be adhered to by countries. It serves rather as a reference for use by national legislators on which to model their legislation as South Africa has done through the 2002 ECT Act. See Eiselen 2002 (6) *VJ* 305 306; Eiselen Globalization 97 112 Fn82; Christie Law of Contract 59 67; and Pillay DJ in *SB Jafta v Ezmvelo KZN Wildlife* 2008 10 BLLR 954 (LC) 71.

⁸¹ See UNCITRAL Model Law on Electronic Signatures, Resolution A/56/588, 56/80 adopted on 12 December 2001. <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf> (last accessed 19-6-2012). It is noted that there are also “soft law” instruments that may be adopted by individual commercial parties, or referred to in private agreements. For further comments, see Eiselen Globalization 97 111.

Given the range of instruments above, it is clear that UNCITRAL has accomplished an enormous amount of work for the harmonisation and unification of international trade law. Its work is reported in a series of *Yearbooks* that have appeared since 1971. Its most successful instrument, the drafting process of which is discussed below, is the Vienna Sales Convention.

4.2.4.2 The CISG drafting process under UNCITRAL

When UNCITRAL started its work in January 1968, there were already two main international organisations engaged in the unification of PIL, namely the Hague Conference on PIL and UNIDROIT. Neither of them had truly a global representation. UNCITRAL had, thus, a responsibility to promote wider participation in the existing international conventions and a wider acceptance of existing model and uniform laws.⁸² Its first session took place in New York, from 29 January to 26 February 1968.⁸³ Participants agreed on the rule that all decisions relating to the unification of international trade law should be reached, as far as possible, by way of consensus, and, exceptionally, by vote.⁸⁴ With regard to the choice of topics, priority was given, by common consent, to the international sale of goods.⁸⁵

Following the choice of topics, the next problem was whether UNCITRAL should promote a widespread adoption of ULIS and ULF or whether it should alternatively prepare new texts that would obtain consensual acceptance.⁸⁶ It should be remembered that Uniform Laws were ratified by a limited number of states. Objections to their acceptance were owing to several reasons, among which was the

⁸² Resolution 2205, Section II, paragraph 8. Some of those international instruments were: the 1955 Hague Convention on the Law Applicable to International Sales of Goods; the 1958 Hague Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods; the 1958 Hague Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and the 1964 Hague Sales Conventions.

⁸³ UNCITRAL 1968-1970 (I) YB 73.

⁸⁴ Ibid.

⁸⁵ Two other topics within the priority list were international payments and international arbitration.

⁸⁶ Kröll/Mistelis/Viscasillas *UN Convention* 4; Honnold 1979 (27) *Am J Comp L* 201 205; Flechtner *Honnold's Uniform Law* 9; UNCITRAL 1968-1970 (I) YB 79.

inadequate participation by representatives of different legal backgrounds in their preparation, and the use of standard and complex concepts drawn from civil law which could not easily be understood by common law lawyers and businessmen.⁸⁷

In order to avoid these objections, participants to UNCITRAL's first session considered it to be better to assess the attitude of states with regard to the Hague Sales Conventions.⁸⁸ Through the feedback of states, it became clear that only a small number of countries considered ULIS and ULF to be suitable instruments,⁸⁹ what meant that they would hardly receive adequate approval. On 4 March 1969, UNCITRAL appointed a fourteen-member Sales Working Group⁹⁰ to determine whether Uniform Laws could be modified to increase their acceptability or whether completely new texts were needed.⁹¹ The Working Group achieved its task in nine annual sessions by approving a "Draft Convention on the International Sale of Goods" in January 1976⁹² dealing with the rights and obligations of parties. The following year, it also submitted a new Draft Convention dealing with the formation

⁸⁷ See UNCITRAL 1971 (II) *YB* 5; Kröll/Mistelis/Viscasillas *UN Convention* 3-4; Flechtner *Honnold's Uniform Law* 9; Eiselen 1999 (116) *SALJ* 323 335; Bernasconi 1999 (46) *Netherlands International Law Review* 137; German 1995 *Review of the CISG* 117 119; Mendes 1988 (8) *JL & Com* 109 114; Ndulo 1987 (3) 2 *Lesotho LJ* 127 134-135; Réczei <http://cisgw3.law.pace.edu/cisg/biblio/reczei2.html#65>; Wesiack <http://cisgw3.law.pace.edu/cisg/biblio/wesiack.html>.

⁸⁸ Winship in Galston/Smit *Sales* 1-13.

⁸⁹ UNCITRAL 1968-1970 (I) *YB* 98-99; UNCITRAL 1971 (II) *YB* 5; see also Honnold 1979 (27) *Am J Comp L* 201 205; Flechtner *Honnold's Uniform Law* 9; Germain 1995 *Review of the CISG* 117 119.

⁹⁰ Its membership was established as follows: six states from Africa and Asia, two from Eastern Europe, two from Latin America, and four from Western Europe and other states. See UNCITRAL *Report on the second Session 1968-1970* (I) *YB* 81. The initial Working Group members were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, USSR, the UK, and the USA. Later, the Group was increased to fifteen members with the coming of Austria, Czechoslovakia, the Philippines, and Sierra Leone. See Flechtner *Honnold's Uniform Law* 10; Bonell in Bianca/Bonell *Commentary* 6.

⁹¹ Cf. Official Records of the General Assembly, 24th Session, Supplement No. 18 (A/1618), paragraph 38, subparagraph 3 (a) of the Resolution contained therein (*YB* 1968-1970 (I), part two, 11, A); UNCITRAL *Report on the Second Session 1968-1970* (I) *YB* 99-100; Winship in Galston/Smit *Sales* 1-13; Bonell in Bianca/Bonell *Commentary* 5; Farnsworth 1984 (18) 1 *International Lawyer* 17 18.

⁹² See UNCITRAL 1977 (VIII) *YB* 111; see also Report of the Working Group on the International Sale of Goods on the work of its seventh session (Geneva, 5-16 January 1976) (A/CN.9/116), in UNCITRAL 1976 (VII) *YB* 88-96 publishing the new Draft Convention on International Sale of Goods with commentary. See also Honnold 1979 (27) *Am J Comp L* 201 206; Flechtner *Honnold's Uniform Law* 10; Bonell in Bianca/Bonell *Commentary* 6.

of contracts.⁹³ In 1978, UNCITRAL decided to combine both Draft Sales Conventions into a single document.⁹⁴ One *ad hoc* drafting committee constituted in this respect produced a new “Draft Convention on Contracts for the International Sale of Goods”⁹⁵ which was, finally, considered at the 1980 Vienna Diplomatic Sales Conference.⁹⁶

The Vienna Sales Conference was attended by delegations from 62 nations, including all countries with significant commercial interests, and eight organisations.⁹⁷ The main work was accomplished there by two committees, the first charged with international sales law substantive provisions,⁹⁸ the second with final provisions.⁹⁹ The Conference worked intensively for five weeks. At the end, drafts

⁹³ Draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group at its eighteenth session U.N. Doc. A/CN.9/128, Annex I in UNCITRAL 1977 (VIII) YB 88.

⁹⁴ UNCITRAL 1978 (IX) YB 83; see also Kröll/Mistelis/Viscasillas *UN Convention* 5; Bonell in Bianca/Bonell *Commentary* 6.

⁹⁵ Honnold 1979 (27) *Am J Comp L* 201 206; Flechtner *Honnold's Uniform Law* 10; Bonell in Bianca/Bonell *Commentary* 6; Winship in Galston/Smit *Sales* 1-1.

⁹⁶ The UN Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980.

⁹⁷ The 62 Nations which attended the 1980 Vienna Diplomatic Conference were: Argentina, Australia, Austria, Belgium, Bolivia, Brasilia, Bulgaria, Burma, Byelo-Russian Soviet Socialist Republic, Canada, Chile, China, Czechoslovakia, Colombia, Congo Democratic Republic of (then Zaïre), Costa Rica, Cyprus, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, The Ukrainian Soviet Socialist Republic, The Union of Soviet Socialist Republics, The United Kingdom of Great Britain and North Ireland, The USA, Uruguay, and Yugoslavia. Venezuela was represented by an observer. International Organisations were as follows: The World Bank, Bank for International Settlements, Central Office for International Railway Transport, Council of Europe, European Economic Community, the Hague Conference on PIL, UNIDROIT, and ICC. See UNCITRAL 1980 (XI) YB 149; Flechtner *Honnold's Uniform Law* 11; Schlechtriem *Uniform Law* 19; Butler *Guide* 1-14; and the Pace Law School Institute website at: <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited 20-6-2012).

⁹⁸ Cf. Articles 1 to 88 CISG.

⁹⁹ Cf. Articles 89 to 101 CISG. The second committee also prepared a Protocol Amending the 1974 New York Convention on the Limitation Period. In addition to the two main committees, there were also a Drafting and a Credentials Committee. See Note by the Secretary-General: UN Conference on Contracts for the International Sale of Goods (A/CN.9/183) in UNCITRAL 1980 (XI) YB 37 and 151-152; see also Schlechtriem *Uniform Law* 19-20; Gichangi 2007 (1) *Kenya Law Review* 305.

prepared by committees were discussed article by article in a plenary session and the Convention as a whole submitted then to a roll-call vote.¹⁰⁰ In the final vote, 42 countries voted for the convention, while ten abstained.¹⁰¹ On 11 April 1980, the Conference adopted the Final Act of the CISG.¹⁰²

4.2.4.3 Current status of the CISG

In the terms of Article 99, the CISG had to enter into force twelve months after ten states had deposited their instruments of ratification or accession. This requirement was fulfilled on 11 December 1986 with the concurrent ratification by China, Italy, and the USA.¹⁰³ As a result of this, the Convention entered into effect on 1 January 1988 in eleven states.¹⁰⁴ Currently, the CISG contracting states represent every major legal, social, and economic systems of the world, so that the Convention is said to have gained worldwide acceptance.¹⁰⁵ As of July 2013, the CISG has been adopted

¹⁰⁰ Bonell in Bianca/Bonell *Commentary* 6; Schlechtriem *Uniform Law* 20.

¹⁰¹ These included the following: Burma, China, Columbia, the DRC, Iran, Kenya, Panama, Peru, Thailand, and Turkey. See Adoption of a Convention and other Instruments deemed appropriate, and the Final Act of the Conference (Agenda item 11) in UN Conference on the CISG *Official Records* 230; see also Schlechtriem/ Schwenger *Commentary* 3; Schlechtriem *Uniform Law* 20.

¹⁰² April 11, 1980, S. Treaty Doc.No.98-9 (1984), 1489 U.N.T.S.3, reproduced in UNCITRAL 1980 (XI) *YB* 151-162. The Convention was then opened for signature and accession until 30 September 1981, pursuant to Article 91.

¹⁰³ Bonell in Bianca/Bonell *Commentary* 7; Nicholas 1989 (105) *LQR* 201.

¹⁰⁴ The original eleven CISG contracting states are Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the USA, Yugoslavia, and Zambia. See Bonell in Bianca/Bonell *Commentary* 6; Flechtner *Honnold's Uniform Law* 11-12; Schlechtriem in Schlechtriem/Schwenger *Commentary* 1.

¹⁰⁵ Kröll/Mistelis/Viscasillas *UN Convention* 8; Schwenger/Hachem 2009 (57) 2 *Am J Comp L* 457; Schlechtriem/Schwenger *Commentary* 1; Eiselen 2011 (14) 1 *PER/PELJ* 1; Hofmann 2010 (22) 1 *Pace Int'l LR* 145 146; Castellani 2009 (13) 1 *VJ* 241 245. In particular, owing to the increasing number of contracting states, the CISG is considered to have grown steadily to become "one of the most successful instruments Uniform Commercial Law worldwide". (Grebler 2007 (101) *American Society of International Law* 407; supported by Kokoruda 2011 (6) *The Florida Bar Journal* 103; and Perovi 2011 (3) *BLR* 181; see also McNamara 2003 (32) *Colorado Lawyer* 11; Krieger 1989 (106) *SALJ* 184). Scholars are unanimous in their views on the fact that the Convention has, in its short life, already proved to be "a wonderfully effective instrument" so that it is regarded as "a great success story in the harmonisation of international trade." See Bridge 2003 (15) *Pace Int'l LR* 55; Eiselen *Globalization* 97 103; Bonnell 2001 (106) *Dickinson LR* 87; Lehmann 2006 (18) *SA Merc LJ* 319.

by 79 states,¹⁰⁶ comprising most important trading countries as the USA, China, Australia, Canada, Japan, Brazil, and most EU countries.¹⁰⁷ On the African continent, the CISG has been adopted in eleven countries,¹⁰⁸ excluding the DRC. Those countries are Benin, Burundi, Egypt, Gabon, Ghana, Lesotho, Liberia, Mauritania, Uganda, and Zambia.¹⁰⁹ Among the most important CISG non-contracting countries, one may mention the UK, India, and South Africa.¹¹⁰

As far as the UK is concerned, its reluctance to ratify the CISG has come in for criticism. According to a number of scholars, by distancing itself from the CISG, England “is becoming increasingly isolated within the international trading

¹⁰⁶ For an updated list of CISG contracting states, visit the UNCITRAL website at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, or the Pace Law School website at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited on 30-7-2013). The last state to adopt the Convention is Brazil where the CISG will become effective on 1 April 2014. Brazil accessed the Convention on 4 March 2013. Before this event, there were many voices from scholars calling for its ratification, because, according to them, there was nothing in the CISG that offended the fundamental principles of Brazilian contract law. See, among others, Castellani 2009 (13) 1 *VJ* 241; Grebler 2005-2006 (25) *JL & Com* 467; Vieira in Ferrari *CISG* 28; Kritzer/Eiselen *Contract* §80-1; Eiselen *Globalization* 97 103.

¹⁰⁷ See Kröll/Mistelis/Viscasillas *UN Convention* 1; Brunner *CVIM* 91 111; Gärtner 2000-2001 *Review of the CISG* 59; for the particular case of Japan, see Schwenzler/Hachem 2009 (57) 2 *Am J Comp L* 457.

¹⁰⁸ But, for Kritzer and Eiselen (*Contract* §80:1) there are ten African CISG countries, Egypt having been listed as a Middle East country together with Iraq, Israel, Lebanon, and Syria.

¹⁰⁹ Benin is the last African-acceded country; the CISG came into effect there on 1 August 2012. Other African countries are also invited by scholars to ratify or approve the Convention. See, in general, Date-Bah <http://www.acicol.com/temp/Prof.pdf> (accessed 8 October 2013); for the case of Ghana, see Laryea 2011 (19) *African Journal of International and Comparative Law* 1; for Kenya, see Gichangi 2007 (1) *Kenya Law Review* 305; and for Nigeria, see Anyamele <http://www.cisg.law.pace.edu/cisg/biblio/anyamele.html>. For Eastern and Southern African States, see Ng'ong'ola 1995 (7) *RADIC* 227 256; Ng'ong'ola 1992 (4) *RADIC* 835 853; Ndulo 1987 (3) 2 *Lesotho LJ* 127 151. For the particular case of South Africa, see the next footnote.

¹¹⁰ See Kritzer/Eiselen *Contract* §80-4; Kröll/Mistelis/Viscasillas *UN Convention* 1-2. For South African invitation to accede to the CISG, see Eiselen 2007 (19) *SA Merc LJ* 14 and 25; Eiselen 1999 116 *SALJ* 323 369; Hugo 1999 (11) 1 27; Van Niekerk/Schulze *Trade* 108; Oosthuizen Rights 182. Lehmann believes, however, that the CISG's apparent success is much exaggerated. She is, therefore, among those who discourage South Africa from ratifying the CISG, and advises the country to wait. See Lehmann 2006 (18) *SA Merc LJ* 317 328.

community”¹¹¹ and its “businessmen placed at a disadvantage in international commerce.”¹¹²

As Nicholas advises,

[There] are indeed grounds for an English lawyer to feel disquiet about the Convention and the way in which it is developing. But this is no longer a ground, if it ever was one, for refusing to ratify the Convention. On the contrary, it is a ground for ratifying quickly, so that the experience of English lawyers and of the English Commercial Court may influence the way in which the Convention is applied.¹¹³

As for meeting these suggestions, the Department of Trade and Industry published, in 1989 and 1997, two consultation documents with the view to inviting the UK to access the CISG owing to its popular acceptance internationally.¹¹⁴ Based on the responses it received, the government indicated, in February 1999, its commitment to bringing the Vienna Convention into national law when there is time available on the legislative agenda. Unfortunately, up till now, this is yet to happen.¹¹⁵ It seems, in addition, that the government does not any longer see the ratification of the CISG as a legislative priority.¹¹⁶ In order to avoid isolation, it is currently important for the UK to include a discussion of the CISG in its programme since it is likely to affect a great many international sales contracts concluded by English traders.

¹¹¹ See Azzouni <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html>; Goode 2001 (50) 4 *Int'l Comp. L. Q.* 571; Nicholas 1989 (105) *LQR* 201; Bridge *Bifocal World* 277-278; Williams 2000-2001 *Review of the CISG* 9 19.

¹¹² *Carr Trade* 59.

¹¹³ Nicholas <http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>.

¹¹⁴ Azzouni <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html>; *Carr Trade* 59; Williams 2000-2001 *Review of the CISG* 10-11.

¹¹⁵ For reasons or unreasons for the UK not ratifying the CISG, see, particularly, Hofmann 2010 (22) 1 *Pace Int'l LR* 145; Azzouni <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html>; Williams 2000-2001 *Review of the CISG* 9 19; Goode 2001 (50) 4 *Int'l Comp. L. Q.* 571; Forte 1997 (26) *University of Baltimore Law Review* 51; *Carr Trade* 58-60.

¹¹⁶ See Moss 2005 (25) 1 *JL & Com* 483.

4.2.5 Conclusion on the Origins of the CISG

The underlying policies behind the Vienna Sales Convention are that the Convention intended to improve uniform laws on the international sale of goods in order to give wider acceptance to international trade law.¹¹⁷ In effect, when establishing UNCITRAL in 1966, it was recognised that disparities in national laws created obstacles in international trade. The CISG was then considered to be an appropriate instrument to reduce or remove those obstacles.¹¹⁸ With regard to the number of member states, and the number of available judicial decisions dealing with the Convention, the CISG appears to have achieved that objective. This statement is supported by the views of some commentators for whom, the Vienna Convention is “arguably the greatest legislative achievement aimed at harmonising private commercial law.”¹¹⁹ Thus, as for other “hard law” instruments, when it is adopted, the CISG automatically forms part of the national law of the contracting state.¹²⁰ Its availability is facilitated by the number of languages in which it is published and the development of several databases dedicated to it.¹²¹

¹¹⁷ Cf. Resolution 2205, Section II, §8; see also Kröll/Mistelis/Viscasillas *UN Convention* 8; Bonell in Bianca/Bonell *Commentary* 7; Ndulo *Lesotho LJ* 127 135; and cases quoted in UNCITRAL *Digest XV* in connection with the goals of the CISG.

¹¹⁸ Cf. CISG Preamble, Paragraph 3; Preamble Resolution 2205, Paragraphs 5 and 9 in UNCITRAL 1971 (I) *YB* 65.

¹¹⁹ Lookofsky 1991 (39) *Am J Comp L* 403; Ferrari 2005 (25) *International Review of Law and Economics* 314.

¹²⁰ See Zeller 2002 (14) *Pace Int'l LR* 163; Eiselen *Globalization* 97 108; Chappuis *CVIM* 183 187.

¹²¹ Three most helpful databases may be mentioned in this respect, namely the UNILEX, UNCITRAL, and the Pace Law School databases. For UNILEX, see <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13352>; for UNCITRAL, see <http://www.uncitral.org>; and for the Pace Law School database, see <http://www.cisg.law.pace.edu> (last visited 20-6-2012). Insofar as the Pace Law School's Institute of International Commercial Law database is concerned, it is “the most comprehensive and ambitious collection of CISG case law” and related materials. See Eiselen *Globalization* 97 105; Eiselen 2007 (19) *SA Merc LJ* 14 22; Andersen 1998 (10) *Pace Int'l LR* 403 407; Kröll/Mistelis/Viscasillas *UN Convention* 17. It has currently compiled over 2 600 cases with 10 000 annotations, and 9 000 citations of international sales law bibliography, and has published more than 1 400 texts of scholarly writings in full text. This database is, moreover, very easy to use because case law is organised either by country, CISG articles, or by theme. Given the abundance of sources it provides, it seems to be the first site for any researcher attempting to deal with the CISG. See Eiselen *Globalization* 97 105; Eiselen 2007 (19) *SA Merc LJ* 14 23; Williams 2000-2001 *Review of the CISG* 9 21.

4.3 The Vienna Sales Convention's Sphere of Application

4.3.1 Introduction

When dealing with the sphere of application of the CISG, the initial question is whether the Convention governs the contract as a whole, or whether it regulates only some specific contractual issues. The answer to this question is provided by its first six articles which determine what is included or not in the ambit of the Convention.¹²² Article 1 occupies a preeminent place among these provisions.¹²³ It lays down general rules for determining the way the Convention contains substantive rules relating to international sales contracts and their formation.¹²⁴ More specifically, Article 1 stipulates that,

[The CISG] applies to contracts of sale of goods between parties whose places of business are in different States:

- a) when the States are Contracting States; or
- b) when the rules of private international law lead to the application of the law of a Contracting State.

As specified by one American Federal District Court, in *Innotex Precision Ltd v Horei Image Products, Inc.*, “the CISG applies to all contracts between parties from Contracting States. (...) It also governs contracts between parties from non-Contracting States if conflict-of-law rules lead to the application of the law of a

¹²² UNCITRAL Secretariat Explanatory Note; Felemegas 2000-2001 *Review of the CISG* 115 145; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 63; and Brunner CVIM 91 111. As the CISG governs only contracts for international sale of goods (Article 1), Article 2 identifies the kinds of contracts excluded from the field of application of the CISG. Article 3 provides a series of supplementary requirements relating to the Convention's applicability to contracts for goods to be manufactured and a number of mixed contracts. Articles 4 and 5 describe the legal nature of certain issues which may arise in connection with sales transactions, and Article 6 regulates the way parties may opt in or out of the provisions of the CISG. See UNCITRAL *Digest* 3; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 32; and Perovi 2011 (3) *BLR* 181 182.

¹²³ See Ng'ong'ola 1992 (4) *RADIC* 835 838; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 23-24.

¹²⁴ Secretariat Commentary, Official Records, Doc.A/CONF.97/5 in Honnold *Documentary* 405; see also Jayme in Bianca/Bonell *Commentary* 27.

Contracting State.”¹²⁵ It is important to note immediately that Article 95 allows a state, when ratifying, to exclude the application of the CISG by virtue of PIL rules.¹²⁶ Article 95 is given further comments in section 4.3.4.3 below.

Simply, Article 1 explains how a contract may acquire an international character, and what relation a transaction must have with a CISG member state before the Convention applies.¹²⁷ Article 1, in other words, describes the nature of transactions governed by the CISG, the means the Vienna Sales Convention may autonomously or indirectly apply, and it outlines the area of operation of the Convention. Each of these subjects is commented on further in the following sections. Because no legislator can pretend to be perfect, the issue of interpretation of the CISG is also addressed.

4.3.2 Nature of Transactions Governed by the CISG

4.3.2.1 Introduction

In accordance with Article 1, the first requirement to be satisfied is that the Vienna Sales Convention applies to contracts of sale of goods which are international in character. By reason of this requirement, it is important to discuss the types of contracts governed by the CISG, to explain the meaning of the concept “goods” in CISG understandings, and provide details about the international nature of an agreement.

¹²⁵ See USA 17 December 2009 Federal District Court Georgia *Innotex Precision Ltd v Horei Image Products, Inc., et al.* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/091217u1.html>] (last accessed 21-6-2012).

¹²⁶ For comments, see Section 4.3.4 below dealing with the Application of the CISG by virtue of PIL rules.

¹²⁷ See Winship in Galston/Smit *Sales* 1-20; Kadner 2011 (13) *YB of PIL* 165 166.

4.3.2.2 The contract must be a “contract of sale”

Meaning of a contract of sale under the CISG

The CISG does not expressly define what constitutes a contract of sale.¹²⁸ Despite such a shortcoming, courts and scholars admit that a definition may be implied from the provisions of Articles 30 and 53 dealing with the obligations of the seller and the buyer.¹²⁹ Article 30, on the one hand, obliges the seller to “deliver the goods, hand over any documents relating to them and transfer the property in the goods.” Article 53, on the other hand, requires the buyer to “pay the price for the goods and take delivery of them.” Accordingly, sales contracts covered by the CISG are contracts in which the seller is bound to deliver the goods sold and transfer the property in them, and the buyer obliged to pay the price and accept the goods.¹³⁰

¹²⁸ See Austria 10 November 1994 Oberster Gerichtshof (Supreme Court) *Chinchilla Furs case* [<http://cisgw3.law.pace.edu/cases/941110a3.html>] (last accessed 21-6-2012). See also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; Kritzer/Eiselen *Contract* §84:15; Huber/Mullis *CISG* 43; Ott/Matthey *Commerce* 22; Perovi 2011 (3) *BLR* 181 182; Hugo 1999 (11) *SA Merc LJ* 1 4; Ng’ong’ola 1992 (4) *RADIC* 835; Nicholas 1989 (105) *LQR* 201 206; Ziegel <http://www.cisg.law.pace.edu/cisg/biblio/4ziegel.html> (accessed 15-4-2013); Wethmar-Lemmer *PIL* 65; see also authorities quoted in *UNCITRAL Digest* 6 Fn66.

¹²⁹ See Italy 10 January 2006 District Court Padova *Merry-go-rounds case* [<http://cisgw3.law.pace.edu/cases/060110i3.html>] (last accessed 21-6-2012); Netherlands 1 November 2001 *Rechtbank Rotterdam Nederlands Internationaal Privaatrecht* 2002 No. 114; Switzerland 11 March 1996 *Kantonsgericht Wallis Clay*; Italy 26 November 2002 Tribunale di Rimini *Porcelain Tableware case*, *CISG-Online* 737 (Pace); in *UNCITRAL Digest* 6 Fn68. For scholars, see Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; Huber/Mullis *CISG* 43; Ott/Matthey *Commerce* 22; Wethmar-Lemmer *PIL* 65; Perovi 2011 (3) *BLR* 181182; Hugo 1999 (11) *SA Merc LJ* 1 4.

¹³⁰ See Italy 16 February 2009 Tribunale di Forlì *Cisterns and Accessories case*, *CLOUT* case No. 867 [<http://cisgw3.law.pace.edu/cases/090216i3.html>]; Italy 11 December 2008 Tribunale di Forlì, *CLOUT* case No. 916 [<http://cisgw3.law.pace.edu/cases/081211i3.html>]; Italy 11 January 2005 Tribunale di Padova *Ostroznik Savo v La Faraona soc coop arl* [<http://cisgw3.law.pace.edu/cases/050111i3.html>] (last accessed 28-6-2012); Italy 25 February 2004 Tribunale di Padova, *CLOUT* case No. 608 [<http://cisgw3.law.pace.edu/cases/040225i3.html>]; Italy 26 November 2002 Tribunale di Rimini *Al Palazzo Srl v Bernardaud di Limoges SA case* [<http://cisgw3.law.pace.edu/cases/021126i3.html>]; Switzerland 25 February 2002 *Kantonsgericht Schaffhausen* [<http://cisgw3.law.pace.edu/cases/020225s1.html>]; in *UNCITRAL Digest* 6 Fn68. See also Switzerland 11 March 1996 Appellate Court Vaud *Aluminum Granules*, Case No. 01930661 [<http://cisg3.law.pace.edu/cases/960311s1.html>]. See, in the same sense, Austria 10 November 1994 Oberster Gerichtshof *Chinchilla Furs case*; Belgium 2 May 1995 *Rechtbank Koophandel Hasselt Vital Berry Marketing v Dira-Frost* [<http://cisgw3.law.pace.edu/cases/950502i3.html>].

It follows with this inference that the CISG's concept of "sale" corresponds with that of South African¹³¹ and Congolese laws.¹³² In all of the three legal systems, a contract requires the delivery of goods, on the side of the seller, and payment, on the side of the buyer, to qualify as one of sale. In other words, the CISG covers that basic contracts for sale of goods mean goods delivered against payment.¹³³ This being the general principle, it follows that the legal nature of sales does not change though parties may have stipulated their duties differently as stated in the Convention. To give an example of this, contracts involving the carriage of the goods¹³⁴ or sales by sample or model¹³⁵ fall within the scope of application of the CISG. The same is also true for contracts modifying an initial contract,¹³⁶ or those providing for the delivery of the goods sold directly from the supplier to the seller's customer, i.e. the buyer,¹³⁷ and instalment contracts.

Legal aspects of sales by instalment

Instalment contracts are regulated in Article 73(1) CISG by reference to the phrase "a contract for delivery of goods by instalments". The Convention does not, however,

pace.edu/cases/950502b1.html] (last accessed 21-6-2012); and Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28.

¹³¹ Cf. Hugo 1999 (11) *SA Merc LJ* 1 4; Ng'ong'ola 1995 (7) *RADIC* 227 228; Ng'ong'ola 1992 (4) *RADIC* 835 839; and comments in Section 3.4.1 above.

¹³² See Article 263 al. 1 CCO for which a sale is a contract whereby one party undertakes to deliver a thing and another to pay for it, together with Article 250 al. 1 and Article 262 of the OHADA Commercial Act. See also Tricom Kin/Gombe 28 February 2012 RCE 2183 *Kabala Katumba v Socimex*; and comments under Section 2.4.1 above. As for the CISG, the OHADA Commercial Act does not also define a contract of sale.

¹³³ Schlechtriem/Butler *International Sales* 22; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; see also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28 who describes a contract for the sale of goods as "a contract where goods are exchanged for money."

¹³⁴ Cf. Articles 31(a) and 67 CISG.

¹³⁵ Cf. Articles 35(2) (c) CISG; see also Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 32.

¹³⁶ Cf. Article 29 CISG; see also Germany 21 January 1998 Appellate Court of München [<http://cisg3.law.pace.edu/cases/980121g1.html>]; ICC Arbitration Case No. 7331 of 1994 [<http://cisg3.law.pace.edu/cases/947331i1.html>], in UNCITRAL *Digest* 6 Fn73.

¹³⁷ See Article 3 CISG; Germany 12 February 1998 *Supreme Court (Bundesgerichtshof) Air Cleaning Installation case* [<http://cisg3.law.pace.edu/cases/980212g1.html>]; Switzerland 20 February 1997 District Court of Sanne [<http://cisg3.law.pace.edu/cases/970220s1.html>], in UNCITRAL *Digest* 6 Fn72; see also Mistelis in Kröll/Mistelis/ Viscasillas *UN Convention* 28 Fn32.

explain what instalment agreements are. According to several commentators and case law, an agreement amounts into an instalment contract if it “requires or authorises the delivery of goods in separate lots.”¹³⁸ That is to say, for a contract to qualify as an “instalment contract” there must be at least two separate deliveries at different points of time. With regard to their legal status, it is commonly admitted that the CISG applies to instalment contracts.¹³⁹ But, when it comes to instalment contracts, ownership in the goods does not pass to the buyer until he/she has paid the final instalment.¹⁴⁰

It is important to note that instalment contracts should not be confused with “framework” and “distribution agreements”. With regard to framework contracts, the predominant view is that they are beyond the sphere of application of the CISG,¹⁴¹ unless they oblige contracting parties to conclude a sale. That is the case when “the framework contains the main rights and duties without having to refer to them in the main contract.”¹⁴² Regarding distribution agreements, the prevailing opinion is also

¹³⁸ Saidov in Kröll/Mistelis/Viscasillas *UN Convention* 970-971; Fountoulakis in Schlechtriem/Schwenzer *Commentary* 936; see also a series of authorities quoted in UNCITRAL *Digest* 339 Fn6.

¹³⁹ See France 22 February 1995 Cour d’Appel Grenoble *BRI Production ‘Bonaventure’ v Pan African Export* [<http://cisgw3.law.pace.edu/cases/950222f1.html>]; Germany 18 November 2008 Appellate Court Brandenburg *Beer case* [<http://cisgw3.law.pace.edu/cases/081118g1.html>]; Netherlands 15 October 2002 Netherlands Arbitration Institute Case No. 2319 *Condensate Crude Oil Mix case* [<http://cisgw3.law.pace.edu/cases/021015n1.html>]; Denmark 17 October 2007 Supreme Court *Zweirad Technik v C Reinhardt A/S* [<http://cisgw3.law.pace.edu/cases/071017d1.html>]; China October 2007 CIETAC Arbitration *Proceeding CD-R and DVD-R Production Systems case* [<http://cisgw3.law.pace.edu/cases/071000c1.html>]; China August 2006 CIETAC Arbitration *Proceeding Chilling Press case* [<http://cisgw3.law.pace.edu/cases/060800c1.html>]; Belgium 26 April 2000 Appellate Court Gent *BV BA JP v S Ltd* [<http://cisgw3.law.pace.edu/cases/000426b1.html>]; Austria 1 February 2005 Appellate Court Innsbruck *Powdered Tantulum case* [<http://cisgw3.law.pace.edu/cases/050201a3.html>] (all of them last accessed 21-6-2012). See also cases quoted in UNCITRAL *Digest* 6 Fn71.

¹⁴⁰ See Schlechtriem/Butler *International Sales* 23; but Ziegel <http://www.cisg.law.pace.edu/cisg/biblio/4ziegel.html>.

¹⁴¹ See Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 34; Flechtner *Honnold’s Uniform Law* 58; and China 21 September 2005 Supreme Court of the PRC [<http://cisgw3.law.pace.edu/cases/050921c1.html>] in UNCITRAL *Digest* 6 Fn75.

¹⁴² See Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 29; see also France, ICC Court of Arbitration Arbitral award No. 12713, (holding that a framework agreement was governed by the CISG) [<http://cisgw3.law.pace.edu/cases/0412173i1.html>]; Switzerland July 1999 Court of Arbitration of the International Chamber of Commerce Zurich Arbitral award No. 9448, CLOUT

that they do not fall within the field of application of the CISG.¹⁴³ The exclusion of both framework contracts and distribution agreements is motivated by the fact that these types of contracts focus on “the organisation of the distribution”, which consists of the performance of a service, rather than the transfer of property and the delivery of goods.¹⁴⁴

As for framework and distribution contracts, the CISG does not also cover “barter agreements”.¹⁴⁵ Their exclusion is inspired by the fact that the Vienna Sales Convention requires sales contracts to be an exchange of goods against money,¹⁴⁶ whereas barter entails interchange of goods alone. Similarly, the application of the Convention should be seen as being doubtful for a number of contracts where the delivery of goods is associated with the supply of labour or other services. The legal

case No. 630 (holding that a framework agreement was governed by the CISG, because the contract provided for future sales and deliveries).

¹⁴³ See Perovi 2011 (3) *BLR* 181 187-188; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 30; Schwenger /Hachem in Schlechtriem/Schwenger *Commentary* 34; Flechtner *Honnold's Uniform Law* 58; Janssen in Ferrari *Quo Vadis CISG* 132; Magnus in Ferrari *Quo Vadis CISG* 214-215. For case law, see Germany 23 July 1997 Supreme Court [VIII ZR 130/96] Benetton I *Fashion Textiles* [<http://cisgw3.law.pace.edu/cases/970723g1.html>]; USA 29 August 2000 District Court Eastern District of Pennsylvania *Vina Vino Import v Farnese Vini* [<http://cisgw3.law.pace.edu/cisgw/wais/db/cases2/000829u1.html>]; USA 21 July 1997 District Court Southern District of New York *Helen Kminski (Pty) Ltd v Marketing Australian Products Inc.* [<http://cisgw3.law.pace.edu/cisgw/wais/dbcases2/970721u1.html>] (all of these cases last accessed 22-6-2012); Italy 14 December 1999 Supreme Court Giustizia Civile 2333 (2000), and similar cases quoted in UNCITRAL *Digest* 6 Notes 74 to 76.

¹⁴⁴ See Switzerland 8 January 1997 *Obergericht des Kantons Luzern*, CLOUT case No. 192 in UNCITRAL *Digest* 6 Fn76; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 30 Fn42; Perovi 2011 (3) *BLR* 181 187-189.

¹⁴⁵ Russia 26 May 2003 Arbitration Court (Appellate Court) for the Moscow Region [<http://cisgw3.law.pace.edu/cases/03052r1.html>] (last accessed 21-6-2012). See also, Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 29; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 32; Butler *Guide* 2-25; Schlechtriem *Uniform Law* 24; Hugo 1999 (11) *SA Merc LJ* 14; Perovi 2011 (3) *BLR* 181 191. But, Flechtner (*Honnold's Uniform Law* 57 §56.1) who believes that exchange of goods agreements should be governed by the CISG unless the parties so choose. Flechtner found support in the fact that the Convention does not state any restrictions as to the price (Cf. Articles 53, and 55 to 59); and it authorises parties to determine the form of their contract freely. Flechtner's approach is to be taken with reservations.

¹⁴⁶ See authorities quoted in footnote 132 above. In one of its Arbitral awards, the Russian Tribunal of International Commercial Arbitration made it clear that the CISG is not applicable to barter contracts which do not involve any monetary payments between the parties. See Russia 9 March 2004 Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry 91/2003, CISG-online 1184; referred to by Perovi 2011 (3) *BLR* 181 191 Note 47.

regime of those kinds of contracts is determined by Article 3 which regulates “contracts for the sale of goods to be manufactured or produced”, and the so-called “mixed contracts”.

Status of sale of goods to be manufactured or produced and mixed contracts

As stipulated by Article 3(1), contracts for the sale of goods to be manufactured or produced are to be considered as sales contracts, unless the buyer undertakes to supply “a substantial part” of the materials necessary for such manufacture or production.¹⁴⁷ Pursuant to this provision, contracts for goods to be manufactured or produced come, in principle, within the sphere of influence of the CISG as pure contracts for sale.¹⁴⁸ It is only cases where the buyer supplies a “substantial part” for the manufacture or production of the goods that are excluded from the area of the Convention. Under Article 3(2), likewise, where services and goods are supplied in the same transaction, the CISG does not apply if the “preponderant part” of the obligation of the seller consists of the supply of labour and services.¹⁴⁹ By so ruling, Article 3(2) excludes mixed contracts from the scope of the CISG.¹⁵⁰

One decision of the German Appellate Court in the *Window Production Plant* case is very remarkable on the issue of manufacture and mixed contracts. This case was concerned with both the sale of goods to be manufactured and the supply of

¹⁴⁷ For interpretation, see CISG-AC Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004 (hereafter CISG-AC Opinion No. 4). <http://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html> (accessed 15-4-2013). For leading cases on this subject, see Kritzer/Eiselen *Contract* §84:21 84-64 to 84-66; and for comments Brunner CVIM 91 111-112.

¹⁴⁸ See CISG-AC Opinion No. 4 §1.1; see also Magnus in Ferrari *Quo Vadis CISG* 211; Felemegas 2000-2001 *Review of the CISG* 115; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 62; Mistelis/Raymond in Kröll/Mistelis/Viscasillas *UN Convention* 54ff; Schlechtriem/Butler *International Sales* 23ff; Kritzer/Eiselen *Contract* §84:22; Huber/Mullis *CISG* 44; Perovi 2011 (3) *BLR* 181 182.

¹⁴⁹ See Switzerland 7 May 1993 District Court Laufen Canton Berne *Automatic Storage case* [<http://cisg3.law.pace.edu/cases/930507s1.html>] (last accessed 22-6-2012). In this case, the obligation of the Finnish seller to furnish a number of different services to a Swiss buyer was judged to be not preponderant; the CISG then applied.

¹⁵⁰ See CISG-AC Opinion No. 4 §3.1; see also Winship in Galston/Smit *Sales* 1-23; Schroeter 2001 (5) *VJ* 74; Mistelis/Raymond in Kröll/Mistelis/Viscasillas *UN Convention* 57; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 67; Perovi 2011 (3) *BLR* 181 183.

additional services by the seller.¹⁵¹ The Higher Regional Court of Munich stated that, where the parts for the unit to be provided by the buyer are not substantial in value or function, the contract is a contract for sale of goods governed by Article 3(1) CISG.¹⁵² According to the court,

The mere fact that the machine is to be assembled by seller's technicians at buyer's place of business does not constitute a preponderant part of seller's obligations if the value of the labour of installation only amounts to a small part of the total value of the contract, and the main interest of the buyer stills the machine itself and not its installation.¹⁵³

It appears from the case law that the main issue in Article 3 turns on the meaning of the expressions *substantial part* and *preponderant part*. By means of explanation, Schlechtriem and Butler put it that the Convention is applicable even where the seller has to manufacture or produce the goods out of his own materials.¹⁵⁴ But, if the buyer supplies a "substantial part" of the materials necessary to manufacture or produce the

¹⁵¹ Germany 3 December 1999 Appellate Court (Oberlandesgericht) München *Window Production Plant case* [<http://cisgw3.law.pace.edu/cases/991203g1.html>] (last accessed 22-6-2012). *A propos* of this,

A German manufacturer of windows ordered from an Italian seller a window manufacturing unit. It was agreed that some parts for the unit should be provided by the buyer. Moreover, the unit was to be modified according to buyer's specifications and to be delivered to the buyer's place of business, where it was to be assembled by seller's technicians. When the seller declared that it would not be able to deliver the manufacturing unit by the agreed time, the buyer fixed an additional period of time for delivery. After that time had lapsed, he declared the contract avoided.

See also, Netherlands Arbitration Institute, Partial Award of 17 May 2005 and Final Award of 5 July 2005 *Machines case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050517n1.html>] (last accessed 22-6-2012).

¹⁵² Germany 3 December 1999 *Window Production Plant case*; see also Schroeter 2001 (5) VJ 74 76.

¹⁵³ *Ibid.* In a similar case, a Finnish seller, producer of automatic storage systems, concluded with a Swiss buyer, a metal-works company, a number of agreements, such as those of non-disclosure agreement, license agreement, and various contracts "for the supply of goods to be manufactured". Later, the seller sued the buyer for the outstanding balance of the purchase price on several of those agreements. The court found that the parties had entered into contracts for the supply of goods to be manufactured and that they were to be considered sales under Article 3(1). In the view of the court, though the seller had to collaborate with services, his intervention was not preponderant. See Switzerland 7 May 1993 *Automatic Storage System case*; see also Italy 16 February 2009 Tribunale di Forli (District Court) *Cisterns and Accessories case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090216i3.html>] (last accessed 22-6-2012).

¹⁵⁴ Schlechtriem/Butler *International Sales* 23.

goods, such as “raw materials for processing into finished brushes and brooms,”¹⁵⁵ the CISG does not apply. In effect, in situations of the kind of the *Brushes and Brooms case*, “the seller is a provider of services rather than a seller of goods.”¹⁵⁶

It is noteworthy that the interpretation of the phrase “substantial part” has been controversial. This expression has, moreover, given rise to considerable discussions among scholars and courts as is the case of the term “materials”.¹⁵⁷ As regards the concept “materials contributed by contractual parties”, three factors are often suggested to decide whether or not they were *substantial* for the end-product. These criteria include the economic value,¹⁵⁸ the volume or the weight,¹⁵⁹ and the importance of the respective contribution.¹⁶⁰ The majority seems to favour the economic viewpoint by establishing a comparison between the economic value and the price of the respective materials.¹⁶¹

¹⁵⁵ See Austria 27 October 1994 Supreme Court *Brushes and Brooms case* <http://cisgw3.law.pace.edu/cases/941027a3.html> (last accessed 22-6-2012). In this case, an Austrian company entered into an agreement with a Yugoslav company and a Yugoslav State Agency. Under the contract, the Austrian company had to provide the Yugoslav company with raw materials for processing into finished brushes and brooms. Finished goods were then to be delivered back to the Austrian company by the Yugoslav State Agency. The court found, in this instance, that the CISG was not applicable because the party ordering the goods supplied a “substantial part of the materials necessary for the production of the goods.” It concluded that the obligation of furnishing the goods consisted mainly in the supply of labour and services than in a sale of goods.

¹⁵⁶ Ibid.

¹⁵⁷ For some terms such “major part” or “important part” being used to evade the problem, see Schwenger/ Hachem in Schlechtriem/Schwenger *Commentary* 56; Khoo in Bianca/Bonell *Commentary* 42; Hugo 1999 (11) *SA Merc LJ* 1 5; for a comprehensive interpretation, see CISG-AC Opinion No. 4 §2.1-10.

¹⁵⁸ In this sense, materials provided by the buyer compared to those provided by the seller ought to be higher in value in order to exclude the CISG. See CISG-AC Opinion No. 4 §2.3; *Window Production Plant case*; Butler *Guide* 2-29; Flechtner *Honnold’s Uniform Law* 65; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 64; Kritzer/ Eiselen *Contract* §84:24.

¹⁵⁹ This factor relies on the French expression ‘*part essentielle*’ which implies an interpretation based upon the essentiality or the quality of the materials provided. See Butler *Guide* 2-30; Mistelis/Raymond in Kröll/Mistelil/ Viscasillas *UN Convention* 55.

¹⁶⁰ Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 65.

¹⁶¹ Ibid; see also Schlechtriem/Butler *International Sales* 24; Mistelis/Raymond in Kröll/Mistelil/Viscasillas *UN Convention* 55; Kritzer/Eiselen *Contract* §84:24; Butler *Guide* 2-29; Hugo 1999 (11) *SA Merc LJ* 1 5. This is also the view of the CISG-AC Opinion No. 4 for which: “In interpreting the words ‘substantial part’ under Article 3(1) CISG, primarily an ‘economic value’ criterion should be used. An ‘essential’ criterion should only be considered where the ‘economic value’ is impossible or inappropriate to apply taking into account the circumstances of the case.”

Regarding their nature, there is unanimity that the term *materials* includes raw materials and semi-finished materials, fungible or non-fungible goods, and standard or custom-made goods.¹⁶² The French *Cour d'Appel de Chambéry* tried, in *AMD Electronique v Rosenberger*, to extend the term material to “plans and instructions that the buyer transmitted to the seller.”¹⁶³ Its decision was severely criticised.¹⁶⁴ The issue of the demarcation between sales and services arises, in fact, only if the buyer contributes to the manufacture or the production of the goods. Immaterial contributions such as “plans, designs, know-how, and licenses to use industrial property rights,”¹⁶⁵ therefore, are not considered as necessary materials within the meaning of Article 3(1),¹⁶⁶ except where they intend to enhance the value of the materials.¹⁶⁷ In modern transactions, in effect, a seller’s obligations are not confined to the delivery of goods only. The seller has often to perform some other services,

Thus, if, for instance, the value of the materials provided by the buyer is only about 10% of the total value of the goods, the CISG will apply. See Hungary 5 December 1995 Arbitration Court of the Chamber of Commerce and Industry of Budapest (VB/94131); see also cases quoted in CISG-AC Opinion No. 4 comments §2.3 Note 10.

¹⁶² See CISG-AC Opinion No. 4 §6; see also Mistelis/Raymond in Kröll/Mistelis/Viscasillas *UN Convention* 54§3.

¹⁶³ See France 25 May 1993 *Cour d'Appel de Chambéry AMD Electronique v Rosenberger (Adaptors case)* [<http://cisgw3.law.pace.edu/cases/930525f1.html>] (last accessed 22-6-2012). In the case, an Italian producer of electronic components ordered adaptors from a French company. According to the contract, the adaptors had to be produced following the buyer’s specifications and design. The Court held *wrongly* that the contract was not an international sale because the buyer had contributed substantially to the manufacturing of electronic components, and Article 3(1) CISG did not apply.

¹⁶⁴ The ruling in the *Adaptors case* was criticised as an instance of the CISG misapplication by the simple transposition of French domestic law rules relating to the distinction between sales contracts and contracts for services. For comments, see Perovi 2011 (3) *BLR* 181 184; Schlechtriem/Butler *International Sales* 24; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 66; Hugo 1999 (11) *SA Merc LJ* 1 5.

¹⁶⁵ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 66; see also Switzerland 10 February 1999 Handelsgericht des Kantons Zürich, CLOUT case No. 331, in UNCITRAL *Digest* 20 Fn8.

¹⁶⁶ See CISG-AC Opinion No. 4 §2:13; see also Switzerland, CLOUT case No. 331. But, Germany 17 September 1991 Oberlandesgericht Frankfurt am Main 1991 RIW 950, CLOUT case No. 2, where the CISG was applied to a contract for the supply of shoes according to buyer’s design. According to one commentator, since materials were not supplied by the buyer who provided only simple devices, the court ruled properly. See Karollus 1995 *Cornell Review of the CISG* 51 57.

¹⁶⁷ See Kritzer/Eiselen *Contract* §84:24 84-73; Butler *Guide* 2-21; see also Switzerland 17 October 2000 Federal Supreme Court Severin *Wagner AG v Günter Lieber* [<http://cisgw3.law.pace.edu/cases/001017s1.html>] (last accessed 22-6-2012).

such as installing the machine sold and instructing the buyer's personnel on its use. In such situations, Article 3(2) provides for the application of the CISG unless the "preponderant part" of the contract consists in supplying services.¹⁶⁸

As for its comparable notion of "substantial part", the Convention is silent as to the content of the concept "preponderant part". Thus, as stated by the CISG-AC Opinion No. 4 § 9, the same test used for the first expression will also apply to the "preponderant part" requirement, viz. the prevalence of the economic value criterion.¹⁶⁹ To illustrate this, the CISG will not apply to contracts where the obligation regarding the supply of labour or services amounts to more than 50% of the other party's obligations.¹⁷⁰ In the *Window Production Plant case*, by contrast, one German court concluded that assembling the machine by seller's technicians was not "a preponderant part of the contract," and applied the CISG. In a similar case, the Swiss Commercial Court of Zürich observed, in the *Computer Software and Hardware case*, that "neither the work carried out, nor the performance of other

¹⁶⁸ See Netherlands 27 April 1999 Appellate Court Arnhem *Mainzer Raumzellen v van Keulen Mobielbouw Nijverdal*, known as the *Movable Room Units case*, as commented on by Janssen in Ferrari *Quo Vadis CISG* 129 [<http://cisgw3.law.pace.edu/cases/990427n1.html>] (last accessed 22-6-2012). It was held in the case that, "though the contract contained elements of both work and sales contracts, it had to be considered as a sale under the CISG." See also Germany 18 April 2011 Oberlandesgericht Stuttgart *Fire Trucks case* [<http://cisgw3.law.pace.edu/cases/110418g1.html>]; Switzerland 14 December 2009 Kantonsgericht Zug [<http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>] (both last accessed 22-6-2012); and similar cases quoted in UNCITRAL *Digest* 20 Fn16.

¹⁶⁹ See, in the same sense, Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 71; Flechtner *Honnold's Uniform Law* 66-67; Schlechtriem/Butler *International Sales* 25; Mistelis/Raymond in Kröll/Mistelil/Viscasillas *UN Convention* 58; Schroeter 2001 (5) *VJ* 74 77-78; Hugo 1999 (11) *SA Merc LJ* 1 5.

¹⁷⁰ See Switzerland 14 December 2009 Kantonsgericht Zug [<http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>]; Russia Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award No. 5/1997 [<http://cisgw3.law.pace.edu/cases/980305r1.html>]; Switzerland 18 May 2009 Bundesgericht [<http://cisgw3.law.pace.edu/cases/090518s1.html>] (last accessed 22-6-2012). In the last case, the CISG applied to a contract of sale of "a packaging machine consisting of ten individual devices as well as several transportation and interconnection systems, which also imposed upon the seller the obligation to install the packaging machine and prepare its operation at the buyer's works"; quoted in UNCITRAL *Digest* 20 Fn14.

ancillary services, prevail in the (...) contract.”¹⁷¹ It inferred that the contract was not predominately one of service and applied the CISG.

Following from cases above, it follows that a comparison between the value of the services supplied and the goods delivered is essential in deciding whether the contract is substantially for sale or for services.¹⁷² In other words, the phrase “preponderant part” has to be appreciated on a case-by-case basis to determine whether or not the Vienna Sales Convention is applicable.

Before concluding this section, it is necessary to note that, further to Article 3, the field of application of the CISG is also restricted by Article 2 which excludes a number of different types of contracts, including consumer contracts, from the sphere of the Convention.

Exclusion of consumer sales

In principle, any sale of goods is covered by the CISG as long as the requirements of Article 1(1) are met, unless the parties exclude it. If the Convention has to govern all types of contracts, however, its application would be unreasonable in a number of circumstances.¹⁷³ Such is the meaning of Article 2 which was introduced in the Convention to exclude some kinds of contracts from its ambit. As Spohnheimer has stated, “The general underlying rationale of Article 2 is to limit the Convention’s sphere of application, and to remove those transactions that would otherwise – but unreasonably – be governed by the CISG.”¹⁷⁴ Spohnheimer goes on to specify:

¹⁷¹ See Switzerland 17 February 2000 Commercial Court Zürich *Computer Software and Hardware case* [<http://cisgw3.law.pace.edu/cases/000217s1.html>] (last accessed 22-6-2012).

¹⁷² Belgium 24 November 2004 Appellate Court Ghent *Srl Orintix v NV Fabelta Ninove case* [<http://cisgw3.law.pace.edu/cases/041124b1.html>] (last accessed 22-6-2012). Held in the same sense that, installing four sliding gates (Switzerland 30 June 1995 St Gallen Judicial Commission Oberrheintal *Sliding Doors case* [<http://cisgw3.law.pace.edu/cases/950630s1.html>]); one container (Switzerland 26 April 1995 Commercial Court Zürich *Saltwater Isolation Tank case* [<http://cisgw3.law.pace.edu/cases/950426s1.html>]); or assembling materials for a hotel (ICC Arbitration 1992 Case No. 7153, *Hotel Materials case* [<http://cisgw3.law.pace.edu/cases/927153i1.html>]) (last accessed 22-6-2012) are not preponderant to exclude the CISG.

¹⁷³ See Spohnheimer in Kröll/Mistelis/Viscasillas *UN Convention* 40; see also Brunner CVIM 91 111.

¹⁷⁴ *Ibid.*

Article 2, therefore, provides for several exceptions which should not be covered by the CISG, even if these transactions meet the requirements for the CISG to be applicable according to Article 1. These exceptions can be classified in three main groups (...): first, exceptions based on the purpose of the transactions for which the goods are sold (Article 2(a)); second, exceptions based on specific types of transactions (Article 2(b) and (c)); and third, exceptions based on the kinds of goods sold (Article 2(d) - (f)).¹⁷⁵

In accordance with Article 2(a), a specific sale should fall outside the CISG if goods are bought “for personal, family, or household use.”¹⁷⁶ It is only if the seller was unaware of such a use that the CISG would apply.¹⁷⁷ As one commentator has said, the exception to the exclusion of consumer sales “is only based on the intended purpose the goods are bought for and applies irrespectively of whether the buyer is businessman or not.”¹⁷⁸ Consequently, for a contract to be excluded from the CISG’s sphere of application of the CISG the intended personal use of the goods must be known to the seller; otherwise, the CISG will apply.¹⁷⁹ The seller, in addition, is not obliged to ask as to whether the goods are to be used for consumer purposes or

¹⁷⁵ Ibid. See also UNCITRAL *Digest* 17§2; and Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 49. Schwenger and Hachem attribute to Article 2 a dual function, restricting the scope of the CISG, and clarifying the notion of “goods”, which, as discussed in the following section, is not defined in the Convention.

¹⁷⁶ For an illustration, see Netherlands 27 May 1993 *District Court Arnhem Hunfeld v Vos* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930527n1.html>] (last accessed 22-6-2012). According to commentators, consumer sales are excluded from the coverage of the CISG because similar transactions are usually governed by mandatory national rules designed to protect consumers. Consumer sales, in addition, occur infrequently in international commerce. See Winship in Galston/Smit *Sales* 1-23; Kritzer/Eiselen *Contract* §84:12 84-51.

¹⁷⁷ Article 2(a) *in fine*.

¹⁷⁸ See Spohnheimer in Kröll/Mistelis/Viscasillas *UN Convention* 41.

¹⁷⁹ In illustration of this is Germany 31 March 2008 Appellate Court Stuttgart *Automobile case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/080331g1.html>] (last accessed 22-6-2012). In the case, a German professional car dealer advertised a car on the Internet. An employee of a Latvian corporation showed an interest in that car and negotiations took place *via* telephone. The parties concluded the contract *via* exchanging faxes without any prior inspection of the car and without giving notice to the seller that an employee intended to use it. The court concluded that, at the time the contract was formed, the seller was entitled to assume that the buyer intended to purchase the car for professional purposes. It then applied the CISG. Because the seller did not know the legal form of the buyer at this point in time, it was obvious that the latter acted as a business company.

commercially.¹⁸⁰ What is relevant is the intention on the buyer the moment the contract is formed.

Briefly, although the commercial character of the transaction is not directly required for its application,¹⁸¹ the practical consequence from Article 2(a) is that the CISG will mainly regulate commercial contracts.¹⁸² By the expression “commercial contracts”, one may understand contracts concluded by professional dealers for business purposes, in contrast to consumer contracts. It does not matter whether goods are delivered by instalments or whether they are already made or to be manufactured or produced, for the CISG to govern the contract. The only exceptions are where sales contracts are mixed with labour or other services, and those services occupy a substantial or preponderant part of the transaction.

4.3.2.3 The meaning of the concept “goods”

Article 1(1) states that the CISG applies in respect of contracts of “sale of goods”. Although Article 2 enumerates some varieties of goods excluded from the field of application of the CISG, the Convention does not define what the term “goods” means.¹⁸³ Despite such a failure, it is undisputed that CISG goods are essentially “moveable and tangible objects”.¹⁸⁴ Scholars and case law are, furthermore, unanimous that the term “goods” has to be interpreted autonomously in accordance with Article 7(1) CISG.¹⁸⁵ This provision requires, in the interpretation of the

¹⁸⁰ Germany 2 April 2009 Appellate Court Hamm [<http://cisgw3.law.pace.edu/cases/090402g1.html>]; Netherlands 17 February 2009 Gerechtshof Appellate Court Gravenhage *US party v Restauratiebedrijf BV* [<http://cisgw3.law.pace.edu/cases/090217n1.html>] (last accessed 22-6-2012).

¹⁸¹ Cf. Article 1(3) CISG.

¹⁸² See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 50; Kritzer/Eiselen *Contract* §84:12 84-50; Huber/Mullis *CISG* 48-49.

¹⁸³ See Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31; Kritzer/Eiselen *Contract* §84:6 84-26; Butler *Guide* 2-26, Flechtner *Honnold's Uniform Law* 55; Wethmar-Lemmer *PIL* 70; *UNCITRAL Digest* 6 §27.

¹⁸⁴ Cf. authorities cited in Fn189 below.

¹⁸⁵ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 34; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31; *UNCITRAL Digest* 6 §27; and Perovi 2011 (3) *BLR* 181 193.

Convention, that regard “be had to the international character of the CISG and the need to promote uniformity in its application,”¹⁸⁶ rather than referring to domestic law.¹⁸⁷ A German Court has ruled in the *Computer Ship case* that, in order to cover all objects which may form the subject matter of commercial sales contracts, the term “goods” must be flexibly and widely interpreted.¹⁸⁸ To illustrate this, examples from the case law include in goods defined by the CISG, “items that at the moment of delivery,¹⁸⁹ are ‘moveable and tangible’,¹⁹⁰ regardless of their shape and whether they are solid, used or new, inanimate or alive.”¹⁹¹ A German decision in the *Market Study case* is enlightening in the interpretation of what constitutes goods for the CISG. In this case, the Court held that, although it was envisaged that the report of a research market would be put on paper, this did not amount to a sale of goods “as the main concern of the parties was not the tangible piece of paper but the intangible contents.”¹⁹²

¹⁸⁶ Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 34; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31; Hugo 1999 (11) *SA Merc LJ* 1 5. On Article 7 interpretative role, see Section 4.3.6 below.

¹⁸⁷ See UNCITRAL *Digest* 6 §27.

¹⁸⁸ See Germany 17 September 1993 Oberlandesgericht Koblenz, CLOUT case No. 281(Computer ship); see also Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 34.

¹⁸⁹ See Italy 16 February 2009 Tribunale di Forli [<http://cisgw3.law.pace.edu/cases/090216i3.html>]; Italy 25 February 2004 Tribunale di Padova [<http://cisgw3.law.pace.edu/cases/040225i3.html>]; Italy 26 November 2002 Tribunale di Rimini *Porcelaine Tableware case*, CLOUT case No. 608; France 26 April 1995 Cour d’Appel de Grenoble *Marques Roque v Manin Reviere* (Second hand portable warehouse shed), CLOUT case No. 152; in UNCITRAL *Digest* 6 Fn84.

¹⁹⁰ Switzerland 21 October 1999 Kantonsgericht des Kantons Zug, CLOUT case No. 328; Italy 29 December 1999 Tribunale di Pavia, CLOUT case No. 380; Germany 21 March 1996 Oberlandesgericht Köln, CLOUT case No. 168; Austria 10 November 1994 Oberster Gerichtshof, CLOUT case No.106; Italy 26 November 2002 Tribunale di Rimini, CLOUT case No. 608; in UNCITRAL *Digest* 7 Fn85. See also Schwenzer/Hachem in Schlechtriem/ Schwenzer *Commentary* 35; Kritzer/Eiselen *Contract* §84:6 84-26; Wethmar-Lemmer PIL 70. But, even if oil and gas are not tangible, they are considered as CISG goods. See Spohnheimer in Kröll/Mistelis/Viscasillas *UN Convention* 52; Flechtner *Honnold’s Uniform Law* 55.

¹⁹¹ See cases quoted in UNCITRAL *Digest* 7 Notes 85 to 89; see also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31.

¹⁹² See Germany 26 August 1994 Appellate Court Köln *Market Study case* [<http://cisgw3.law.pace.edu/cases/940826g1.html>] (last accessed 22-6-2012). In the case, a German defendant contracted with a Swiss market research institute for a market analysis. The Court excluded the application of the CISG on the ground that the agreement was neither a contract for the sale of goods in the terms of Article 1(1), nor a contract for the production of goods as regulated by Article 3(1) because a sale is characterised by the transfer of property in an object. In

Despite the wide interpretation that the concept “goods” may have, Article 2(d) to (f) excludes from CISG goods assets such as: sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft; and sales of electricity. Without any need to comment on these items, it is necessary to note that national sales laws do not, for instance, classify ships, hovercraft or aircraft uniformly. In many jurisdictions, they may be characterised as intangibles or immovables rather than goods.¹⁹³ So, by excluding them from the control of the CISG, the underlying rationales were to avoid interference with national duties to register them and “to clarify that they are widely considered immovable goods.”¹⁹⁴

In determining CISG goods, one of the controversial issues remains computer software.¹⁹⁵ According to Lookofsky, “a computer program is a real and very functional thing. The fact that the software is protected by copyright does not change the nature of this invisible and intangible good.”¹⁹⁶ This statement was confirmed in the Swiss *Computer Software and Hardware* case as follows: “the purchase of software and the joint purchase of software and hardware as well constitute a sale of goods that falls within the ambit of the CISG.”¹⁹⁷ Similarly, the Austrian Supreme

a similar case, the Serbia Foreign Trade Court, in the *Beer case*, excluded the CISG to a part of the claim relating to the restitution of payment made for the purposes of “market research and advertising”, and not relating to sales of goods. See Serbia 28 April 2010 Foreign Trade Court attached to the Serbian Chamber of Commerce *Beer case* [<http://cisgw3.law.pace.edu/cases/100428sb.html>] (last accessed 22-6-2012).

¹⁹³ See Winship in Galston/Smit *Sales* 1-25.

¹⁹⁴ See Spohnheimer in Kröll/Mistelis/Viscasillas *UN Convention* 50; see also Flechtner *Honnold's Uniform Law* 56.

¹⁹⁵ Concerning computer hardware, it is acknowledged that it conforms to the criterion of goods covered by the CISG. See particularly Flechtner *Honnold's Uniform Law* 60; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 35. The problem is posed for computer software then. Lookofsky (2003 (13) 3 *Duke J Comp & Int'l L* 263) illustrates the problem as follows:

Suppose Merchant S in Germany supplies a computer programme to Merchant B in France. The programme, designed to facilitate the billing of customers, is properly installed in B's computer system, but the software performs badly. It shuts down repeatedly and unpredictably, arguably doing B's business more harm than good. Can this transaction be classified as a CISG “sale of goods”?

¹⁹⁶ *Ibid.*

¹⁹⁷ See Switzerland 17 February 2000 Commercial Court Zürich *Computer Software and Hardware case*; see also Netherlands 28 June 2006 District Court Arnhem *Silicon Biomedical Instruments BV v Erich Jaeger GmbH* [<http://cisgw3.law.pace.edu/cases/060628n1.html>]; Germany 8 February

Court in the *Software case* described “the supply of standard software programmes on data carriers against a single payment as a sale of moveable goods.”¹⁹⁸ This means that, in defining the legal aspect of software, it does not matter whether the software is standard, adjusted to the customer’s needs, or fully customised.¹⁹⁹ Neither does it matter whether it is delivered electronically or on a tangible object such as a drive, a CD or a DVD.²⁰⁰ Succinctly, all items not expressly excluded by the Convention, including software, would qualify as CISG goods irrespective of their nature.

4.3.2.4 The international character of CISG transactions

The international character obligation of contracts governed by the CISG is expressly posited by Article 1(1). According to this provision, the “Convention applies to contracts of sale of goods between parties whose *places of business are in different states*” at the conclusion of the contract.²⁰¹ Normally, the CISG does not deal with the law governing sales contracts concluded between parties whose places of business are within one and the same state. These forms of contracts are governed by domestic law.²⁰² It has been stated, however, that the phrase “place of business” does

1995 District Court München *Standard Software case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html>] (last accessed 22-6-2012).

¹⁹⁸ See Austria 21 June 2005 Supreme Court *Software case* [<http://cisgw3.law.pace.edu/cases/050621a3.html>] (last accessed 22-6-2012). There are, however, other cases which consider computer software as contracts for work and services rather than sales of goods. See, among others, USA 27 May 1998 Federal Appellate Court [2nd Circuit] *Evolution Online Sys v Koninklijke Nederland* [<http://cisgw3.law.pace.edu/cases/980527u1.html>] (last accessed 22-6-2012).

¹⁹⁹ Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 35.

²⁰⁰ Flechtner *Honnold’s Uniform Law* 60; Loofosky 2003 (13) 3 *Duke J Comp & Int’l L* 263.

²⁰¹ For illustrative cases, see USA 19 August 2010 Federal District Court Arkansas *Electrocraft Arkansas, Inc. v Super Electric Motors, Ltd and Raymond O’Gara, Individually and as Partner and Agent of Super Electric Motors, Ltd* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/100819u1.html>]; Canada 12 April 2011 Cour d’Appel de Québec *Frozen Lobster Tails case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/110412c4.html>]; Austria 17 December 2003 Supreme Court *Tantalum Powder case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/031217a3.html>] (last accessed 23-6-2012).

²⁰² As an example of this, a Chilean company bought suits from a company that had its place of business in the British Virgin Islands. The relevant contract was concluded not with the defendant, but with another company which, although allied with the defendant, had its place of business in the same state as the plaintiff, namely Chile. The court excluded the CISG by virtue of Article 1(1). See Switzerland 15 December 1998 Ticino Appellate Court *Lugano Fish case*

not constitute a technical legal concept. The Austrian Supreme Court specified, in *Graz Construction Equipment*, that this expression “simply refers to any place from which one participates in commercial transactions with third parties with a certain degree of autonomy.”²⁰³ For that reason, it is not necessary to have the epicentre of commercial activities or the seat of the company at any said place.²⁰⁴

As Schwenger and Hachem have said, nevertheless, a place of business exists only “if a party uses it openly to participate in trade and if it displays a certain degree of duration, stability, and independence.”²⁰⁵ Such is also the view of Honnold for whom a place of business must be constant, so that “a temporary place of sojourn during *ad hoc* negotiations,”²⁰⁶ or a place where a contract is merely signed does not constitute a relevant place of business in the eyes of the CISG. Honnold elucidates that the meaning of the concept “place of business” as a site of stable economic activities is evidenced by references to this notion in other CISG provisions, particularly, in Article 31(c) dealing with the delivery of goods.²⁰⁷ As stated by Article 31(c), where the contract does not involve carriage of the goods, or, if their location is not disclosed to the parties, the seller must place them “at the buyer’s disposal at the place where the seller had his place of business at the time of the

[<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981215s1.html>] (last accessed 23-6-2012). See also Germany 27 November 1991 Appellate Court Köln *Ticket for Soccer World Championship case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911127g1.html>] (last accessed 23-6-2012); Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 23. These kinds of contracts are ruled in the DRC by Articles 234 to 302 UAGCL in addition to the CCO non-conflicting provisions.

²⁰³ See Austria 29 July 2004 Oberlandesgericht Appellate Court *Graz Construction Equipment case* [<http://cisgw3.law.pace.edu/cases/040729a3.html>] (last accessed 23-6-2012); see also Bernasconi 1999 (46) *Netherlands International Law Review* 137 144.

²⁰⁴ Ibid.

²⁰⁵ Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 37; see also UNCITRAL *Digest* 4§5.

²⁰⁶ See Flechtner *Honnold’s Uniform Law* 34; see also Wethmar-Lemmer PIL 76.

²⁰⁷ Flechtner *Honnold’s Uniform Law* 34; supported by Bernasconi 1999 (46) *Netherlands International Law Review* 137 145.

conclusion of the contract.”²⁰⁸ One may realise that this method of delivery is possible only if the seller’s place of business is constant.²⁰⁹

The need of a “place of business” as a criterion to define the internationality of sales had already been required by the 1964 Hague Sales Conventions. Unlike these, which imposed additional requirements,²¹⁰ the CISG refers only to contracting parties.²¹¹ It does not make any reference to the purchased goods or to their location the time the contract is concluded, nor to the nationality of the parties.²¹² In so ruling, the drafters of the CISG wanted “to reduce the search for a forum with the most favourable law.”²¹³ So, even if the negotiations had taken place in a single state, the CISG will apply if the parties have their places of business in different states.

It is possible that a party has several places of business. In such a situation, Article 10(a) provides the branch with “the closest relationship to the contract and its performance” to be relevant.²¹⁴ The Serbian Foreign Trade Court of Arbitration

²⁰⁸ For comparable clauses, see, among others, Articles 24; 42(1)(b); 57(1)(a); and Article 69(2) CISG.

²⁰⁹ See Zeller in Ferrari *Quo Vadis CISG* 300 where the author put it that the “seller’s place of business is the place where the contract has its closest connection.”

²¹⁰ See Article 1(1) ULIS which states:

The present Law shall apply to contracts of sale of goods entered into by parties whose “places of business” are in the territories of different States, in each of the following cases:

- a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
- b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
- c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

²¹¹ Article 1(3) CISG is clear that, “Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application” of the CISG. For an illustration, see China 8 August 2000 Supreme Court of the People’s Republic of China *Lianhe Enterprise (US) Ltd v Yantai Branch of Shandong Foreign Trade Co* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000808c1.html>] (last accessed 22-6-2012).

²¹² See Austria 15 October 1998 Supreme Court *Timber case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981015a3.html>] (last accessed 22-6-2012); Bernasconi 1999 (46) *Netherlands International Law Review* 137 143-144. For criticisms of the Convention’s internationality requirement, see Wethmar-Lemmer PIL 75.

²¹³ UN General Secretary Commentary on the 1978 Draft CISG Doc A/CONF.97/5 14 March 1979, in Honnold *Documentary* 404-405.

²¹⁴ For comments, see Brekoulakis in Kröll/Mistelis/Viscasillas *UN Convention* 174; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 197; Flechtner *Honnold’s Uniform Law* 177. For

ruled, in the *Milk Packaging Equipment* case, that, since the seller had numerous places of business, “the branch where negotiations were conducted; the contract signed; the machine delivered; and the payment received was the most closely connected to the contract and its performance.”²¹⁵ Similarly, the Federal District Court of California decided, in *Asante Technologies v PMC-Sierra*, that, though the buyer was invoiced by the seller’s dealer, the branch with the closest relationship to the contract was that from which the goods were ordered and the delivery made.²¹⁶

From the cases cited above, it is apparent that the crucial test in determining a closely connected branch depends on the place from where orders about the product came. Consequently, if the court finds from the facts of the case and the evidence submitted by parties that instructions regarding the goods came largely from a same state, the CISG will not apply “even if the parties are supposed to have their places

judicial application, see among others, Russia 24 February 2004 Arbitration Proceeding 136/2003 [<http://cisgw3.law.pace.edu/cases/040224r1.html>]; and Belgium 13 May 2003 Commercial Court Hasselt *Vandenbrand v BVBA Textura Trading Company* [<http://cisgw3.law.pace.edu/cases/030513b1.html>] (last accessed 23-6-2012).

²¹⁵ Serbia 15 July 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Milk Packaging Equipment case* [<http://cisgw3.law.pace.edu/cases/080715sb.html>] (last accessed 23-6-2012). In the present case, a Swiss seller had more than one place of business; some were in Switzerland and others in Serbia. It was important to determine which of them was the most closely connected to the contract then. From the facts of the case, it appeared that the leading role in the conclusion and performance of the contract was played by the seller’s Swiss headquarters. It was at that place that negotiations were conducted and the contract signed. The machine was also delivered from Switzerland and the payment made to the Swiss seller’s account. The Serbian branch was involved only in the attempts to reach a settlement regarding an outstanding debt. The court held the Swiss branch to be the most relevant in the case. For similar decisions, see Australia 23 June 2010 Supreme Court of Western Australia *Attorney-General of Botswana v Aussie Diamond Products (Pty) Ltd*, No. 3 2010 WASC 141 §207 [<http://www.austlii.edu.au/au/cases/wa/WASC/2010/141.html>]; Switzerland 19 May 2008 Cour Supreme du Canton [Appellate Court] Berne [<http://cisgw3.law.pace.edu/cases/080519s1.html>] (last accessed 23-6-2012).

²¹⁶ USA 27 July 2001 Federal District Court California *Asante Technologies v PMC-Sierra* [<http://cisgw3.law.pace.edu/cases/010727u1.html>] (last accessed 23-6-2012). *A propos* of this, a buyer with principal place of business in California bought from a seller represented by a dealer established in California too. The seller had been incorporated in Delaware and had a branch in California. The administration and its design and engineering functions were, however, still situated for the most part in Burnaby, British Columbia (Canada). Although the buyer had been invoiced by the seller’s Californian dealer, he had ordered directly from the seller’s branch in Burnaby and the delivery of the goods had been made from there. The District Court decided that the “closest relationship was with the seller’s branch in Canada; the contacts to the dealer in California were lesser importance.”

of business in different states.”²¹⁷ In addition, the sale’s international character must be known to parties when they are contracting; otherwise the CISG will not apply.²¹⁸

The location of parties in different states is not, however, the unique criterion for the applicability of the Convention. Though the seller and the buyer may be located in different countries, the CISG applies on condition that their countries of incorporation are CISG member states, or if PIL rules point to the application of the law of a CISG member country as discussed in the two following sections.

4.3.3 Application of the CISG in Relation to Contracting States

It is stated in case law that the international character of a transaction does not suffice *per se* to make uniform international law applicable;²¹⁹ a specific link with member states is also required. As regards the Vienna Sales Convention, Article 1(1)(a) shows that the CISG does not govern all kinds of international sales of goods contracts.

²¹⁷ USA 2 November 2005 Federal District Court California *McDowell Valley Vineyards, Inc. v Sabaté USA Inc. et al* [<http://cisgw3.law.pace.edu/cases/051102u1.html>] (last accessed 23-6-2012). In the same sense, USA 6 January 2006 Federal District Court Pennsylvania *American Mint LLC v GOSoftware Inc.* [<http://cisgw3.law.pace.edu/cases/060106u1.html>]; USA 28 February 2005 Superior Court of Massachusetts *Vision Systems, Inc. v EMC Corporation* [<http://cisgw3.law.pace.edu/cases/050228u1.html>]; USA 18 July 2011 Federal District Court Maryland *MSS, Inc. v Maser Corporation* [<http://cisgw3.law.pace.edu/cases/110718u1.html>] (last accessed 23-6-2012). In the *MSS, Inc. v Maser Corporation* case, a seller whose principal place of business and headquarters were in Nashville (USA) entered into contract with a buyer whose company was incorporated in Delaware (USA) and did business through and in conjunction with Maser Canada Inc. located in Ontario. The agreement did not contain a choice of law provision, and the parties were disputing whether international or domestic contract law should govern the contract. According to the buyer, the CISG supplied the relevant law because principal places of business of the parties were in Canada and the USA, both CISG member states. The seller contended, on his part, that the CISG was not applicable because the execution of the agreement had occurred entirely in the USA between two companies incorporated in that country. The court excluded the CISG, regardless of the location of the place of businesses of the parties, because the sale was connected to one country.

²¹⁸ See Article 1(2) CISG; see also Germany 28 February 2000 Appellate Court Stuttgart *Floor Tiles case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000228g1.html>]; Bulgaria 16 February 1998 Arbitration Case 59/1995 *Ball Bearings case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980216bu.html>] (last accessed 23-6-2012).

²¹⁹ See Italy 11 December 2008 Tribunale di Forli, CLOUT case No. 867 [<http://cisgw3.law.pace.edu/cases/081211i3.html>]; Italy 12 July 2000 Tribunale di Vigevano, CLOUT case No. 378, in UNCITRAL *Digest* 5 Fn27.

Thus, even if parties may have their places of business in different states, the CISG will apply on condition that those “States are Contracting States” to the CISG at the time the contract is concluded.²²⁰

The requirement with respect to the location of the relevant place of business of the seller and buyer in two different contracting states for the Convention to apply is well formulated in one Belgian District court decision, dated 25 April 2001, as follows:

According to Article 1(1) (a) CISG, the Convention is applicable to contracts of sale of movable goods between parties whose places of business are in different States when these States are Contracting States; thus, the CISG determines directly the criteria of its territorial application so that no reference need be made to the otherwise applicable rules on the governing law.²²¹

It follows then that the question of whether a specific country is a “contracting state” according to the meaning of the CISG is of vital importance for the applicability of the Convention.

With regard to what a “contracting state” is, Article 91(2) (3) describes it as any state which has ratified, or acceded to the CISG and where the Convention has effectively entered into force as provided by Articles 99(2) and 91(4).²²² That is to say, if both states where the places of business of the parties are situated are

²²⁰ See Italy 14 January 1993 District Court Monza *Nuova Fucinati v Fondmetall International* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930114i3.html>] (last accessed 23-6-2012). In the case, the CISG was excluded because the time the contract was concluded, the Convention was then in force only in Italy but not in Sweden. See also Italy 19 April 1994 Florence Arbitration *Proceeding Leather/textile Wear case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940419i3.html>] (CISG not yet in force in Japan when contracting); and Netherlands 15 April 1993 District Court Arnhem *JA Harris & Sons v Nijmergsche Ijzergieterij* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930415n1.html>] (last accessed 23-6-2012). This case involves a contract between a seller from UK, a non-contracting state, and a buyer from the Netherlands, a state where the CISG was not yet in force at the time of the contract. For a number of similar cases, see UNCITRAL *Digest* 5 Fn33.

²²¹ See Belgium 25 April 2001 *Rechtbank van Koophandel (District Court) Veurne (BV BA G-2 v. AS C.B.)* [<http://cisgw3.law.pace.edu/cases/010425b1.html>]; see also Kritzer/Eiselen *Contract* §84:7 84-28.

²²² See, for comments, Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 39; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 36; Kritzer/Eiselen *Contract* §84:7 84-33 84-34.

contracting states, the CISG will apply without recourse to PIL rules.²²³ In other words, when a state has adhered to the CISG, even if its PIL rules would indicate the law of a third party, the CISG will apply.²²⁴ This situation is well-known as the CISG “automatic” or “autonomous” application.²²⁵ It is obvious that with the growing number of “Contracting States” (currently 79 members); the CISG’s autonomous application will increase in a number of judicial decisions and arbitral awards.

In accordance with Article 92 CISG, a state may declare not to be bound by Part II (formation of the contract) or Part III (provisions on the sale of goods) of the Convention. A state which uses such a reservation will, however, not any longer be considered to be a “Contracting State” with respect to matters governed by that respective part.²²⁶ Instead, it becomes a third party *vis-à-vis* the Part it has excluded.²²⁷ This means that, in circumstances of this kind, requirements for the CISG’s automatic application in Article 1(1)(a) are any longer met so that the law governing the Part left out is to be determined by conflict-of-law rules.²²⁸ Similarly, conditions for the

²²³ Kadner 2011 (13) *YB of PIL* 165 166-167; Huber/Mullis *CISG* 51; Schlechtriem/Butler *International Sales* 13; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 35; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 39; Wethmar-Lemmer *PIL* 79; Saf <http://www.cisg.law.pace.edu/cisg/text/saf96.html>. For an illustration, see Switzerland 12 September 2008 Amtgericht Sursee [<http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>]; Italy 20 September 2004 Corte di Cassazione (Supreme Court), CLOUT case No. 650; Germany 11 December 1996 Bundesgerichtshof, CLOUT case No. 268; in *UNCITRAL Digest* 5 Fn31.

²²⁴ Secretariat Commentary on the 1978 Draft CISG/Document A/CONF.97/5, 14 March 1979, in Honnold *Documentary* 405. It should be remembered that the CISG is one of “hard law” instruments which, once ratified, become an integrated part of sales law of that specific state.

²²⁵ Huber/Mullis *CISG* 51; Schlechtriem/Butler *International Sales* 13; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 35; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 39; Wethmar-Lemmer *PIL* 78; *UNCITRAL Digest* 5 §9.

²²⁶ To date, only Denmark, Finland, Norway, and Sweden, have made use of the Article 92 reservation upon ratifying the CISG. They declared not to be bound by CISG Part II relating to the formation of international sales. See *UNCITRAL Digest* 83 §3; Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1197; Lookofsky in Ferrari *CISG* 116; Wethmar-Lemmer *PIL* 80. Until now no state has excluded Part III because, as Hugo (1999 (11) *SA Merc LJ* 1 11) has said, without provisions regulating the rights and obligations of parties, “the CISG would be substantially meaningless”.

²²⁷ Cf. Article 92(2) CISG.

²²⁸ In addition to the Article 92 reservation, there are two other reservations relating to Article 1(1)(a); the so-called “federal reservation” (Article 93 CISG), and the “closely-related legal systems reservation” (Article 94 CISG). See, for comments, Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1202.

CISG's automatic application are not fulfilled when one of the parties has his/her place of business in a non-contracting state. The location of the parties in non-contracting countries should restrict the Convention's wide applicability. In order to prevent this situation, Article 1(1)(b) provides a second alternative for the implementation of the CISG; its application by virtue of PIL rules.

4.3.4 Application of the CISG by Virtue of Private International Law Rules

4.3.4.1 A short view on Article 1(1)(b) of the CISG

Pursuant to Article 1(1) (b), the Convention may apply even where only one or neither party has its relevant place of business in a CISG member state.²²⁹ By its ruling, Article 1(1) (b) extends the scope of application of the CISG to contracts formed between parties from non-contracting states if “the rules of private international law lead to the application of the law of a Contracting State.”²³⁰ It has been acknowledged that the introduction of this provision in the Vienna Convention “coordinates the rules resulting from the Convention and those of private

²²⁹ See Secretariat Commentary on the 1978 Draft CISG/Document A/CONF.97/5, 14 March 1979 in Honnold *Documentary* 405; UNCITRAL *Digest* 5 §14; Kritzer/Eiselen *Contract* §84:7 84-34; quoting Enderlein/Maskow *Commentary* 29; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 40; Kadner 2011 (13) *YB of PIL* 165 166. See also Germany 2 July 1993 Appellate Court Düsseldorf *Veneer Cutting Machine case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930702g1.html>] (last accessed 23-6-2012). In this case, when the contract was concluded, the CISG was not yet in effect in the buyer's country, Germany, contrary to seller's country, the USA. Applying Article 1(1)(b), the Court observed that PIL rules point to the USA, a contracting state, and applied the CISG. This case is to be taken, however, in reserve of Article 95 CISG.

²³⁰ For application, see among others: Greece 2009 Multi-Member Court of First Instance of Athens Decision 2282/2009 [<http://cisgw3.law.pace.edu/cases/092282gr.html>]; USA 20 June 2003 Federal Appellate Court [3rd Circuit] *Standard Bent Glass Corp v Glassrobots Oy* [http://www.cisg.law.pace.edu/cisg/wais/db/cases2/0306_20u1.html]; France 27 June 2002 Cour d'Appel de Versailles *Sté AMS v SARL Me et SARL Qu* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020627f1.html>]; Austria 20 February 1992 District Court for Commercial Matters of Vienna *Shoes case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920220a3.html>] (last accessed 23-6-2012). For further similar cases, see UNCITRAL *Digest* 5 Fn45. CISG's applicability by virtue of conflict-of-law rules is also called “indirect applicability”. See in this sense, Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 37; UNCITRAL *Digest* 5§14.

international law.”²³¹ The applicability of the CISG by the operation of conflict-of-laws rules is not as easy as its autonomous application. That is the reason why Article 95, allowing any state to exclude the indirect applicability of the CISG, was introduced into the Convention. Before examining the effect of that reservation, it is necessary to discuss, first, the appropriate law governing international transactions.

4.3.4.2 Proper law of international sales contracts

When dealing with the indirect application of the CISG, there appears a question in relation to the exact sales law governing the contract. By way of response, Huber and Mullis note that the process is to be performed in two successive steps.²³² During the first step, the court or the arbitration tribunal will apply the law of the forum. Since each legal system has its own system of private international law,²³³ throughout this step, the task to be undertaken is for the judge or the arbiter to apply its own PIL rules. Wethmar-Lemmer specifies this by saying that rules considered may be the domestic conflict of laws rules or PIL rules established by an international convention.²³⁴ To illustrate this, under most European countries, PIL rules are provided for by international treaties,²³⁵ such as the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,²³⁶ the 1980 Rome EC Convention on the Law Applicable to Contractual Obligations,²³⁷ and, more

²³¹ Wethmar-Lemmer PIL 84; citing in Fn135, Ferrari “The Sphere of Application of the Vienna Sales Convention” (1995) 15.

²³² Huber/Mullis *CISG* 52-53.

²³³ See Forsyth *International Law* 5; quoting Van den Heever JP in *Pretorius v Pretorius* 1948 (4) SA 144 (O) 149; see also Lord Murphy J in the Australian *Attorney-General of Botswana v Aussie Diamond Products (Pty) Ltd* case.

²³⁴ Wethmar-Lemmer PIL 90.

²³⁵ See Huber/Mullis *CISG* 52; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 37; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 41; Van Calster *Private Law* 3.

²³⁶ Convention on the Law Applicable to International Sales of Goods, the Hague 15 June 1955. <http://www.jus.uio.no/lm/hcpil.applicable.law.sog.convention.1955/portrait.pdf> (last accessed 23-6-2012).

²³⁷ Convention on the Law Applicable to Contractual Obligations, Rome 19 June 1980. [http://eur-lex.europa/LexUriServ/LexUriServ.do?uri=CELEX:419980126\(02\):EN:NOT](http://eur-lex.europa/LexUriServ/LexUriServ.do?uri=CELEX:419980126(02):EN:NOT) (last accessed 23-

recently, the EC Regulation 593/2008 on the Law Applicable to Contractual Obligations.²³⁸ As regards South African law, the heart of the relevant law is the common law,²³⁹ and in Congolese law the provisions of the 1891 PILD.

The implementation of each of the legal systems above will undoubtedly designate a particular state. The second step will then consist for the court to verify whether the state selected has ratified or acceded to the CISG. If the answer is positive, the CISG will govern the contract, except where the country has made use of the Article 95 reservation.²⁴⁰ Alternatively, if the answer is negative, domestic sales law will apply.²⁴¹

It is possible that international conventions or domestic conflict-of-laws rules provide the fundamental principle that international contracts should be governed by

6-2012). For a comparison between the 1955 Hague Convention, the 1980 Rome Convention, and the CISG, see Saf <http://www.cisg.law.pace.edu/cisg/text/saf96.html>.

²³⁸ Regulation (EC) No. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) *OJL* July 2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF> (last accessed 23-6-2012).

²³⁹ Forsyth *International Law* 316.

²⁴⁰ See Huber/Mullis *CISG* 52-53; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 41; Kadner 2011 (13) *YB of PIL* 165 170. For a case in point, see Germany 21 April 2004 Oberlandesgericht (Appellate Court) Düsseldorf [15 U 88/03] *Mobile phones case* [<http://cisgw3.law.pace.edu/cases/040421g3.html>]; in Kritzer/Eiselen *Contract* §84:7 84-34. In the case, the Vienna Sales Convention would not automatically apply because at the time the contract was concluded Israel was not yet a member state. The Appellate Court stated:

(...) Instead, applicability of the CISG is derived from Article 1(1)(b) because the rules of private international law lead to the application of German law and Germany is a Contracting State to the Convention.

It is not disputed by the parties that they had agreed upon application of German law and since Germany did not make any reservation under Article 95 CISG, Article 1(1)(b) is applicable.

For a similar ruling, see the Austria *Shoes case* above. In that case, a contract was concluded between an Italian seller and an Austrian buyer when the CISG was in effect only in Italy. Austrian PIL rules referred to Italian law, a CISG contracting state; the CISG was applied by operation of Article 1(1) (b).

²⁴¹ For an illustration, see China 24 March 1998 CIETAC Arbitration Proceeding *Shanghai Sub-Commission Hempseed case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980324c1.html>] (last accessed 24-6-2012). In the case, with a seller from China and buyer from UK, a non-contracting state, the Tribunal held that, according to international law norms and the domestic law of the UK, the CISG would not be the applicable substantive law. For the effect of the CISG before non-contracting states, see Kadner 2011 (13) *YB of PIL* 165-182; and for the meanings and methods of application of Article 1(1)(b), see Wethmar-Lemmer *PIL* 90 to 102.

the law chosen by the parties.²⁴² In terms of South African law, Van Niekerk and Schulze note, “The fundamental principle is that a contract is governed by the law which the parties intended should govern their contract.”²⁴³ Such is also the position of Congolese law in Article 33 al. 1 CCO which establishes contracting parties as law-givers for themselves.²⁴⁴ This ruling is confirmed, in the DRC, by case law which states that civil code provisions relating to individual conventions are default rules. Parties may, therefore, freely depart from them by choosing their own legislation.²⁴⁵

From a common law viewpoint, the law that creates and governs an international contract is well-known as the “proper law of the contract.”²⁴⁶ As Kutner

²⁴² For European countries, see Preamble §11 EC Regulation No. 593/2008 which stipulates: “Parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.” This principle is confirmed in Article 3(1) of the same Regulation as follows:

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

For similar provisions, see Article 2 of the 1955 Hague Convention which obliges the court to apply the law designated by the parties; and Article 3 of the 1980 Rome Convention which recognises the party autonomy principle.

²⁴³ Van Niekerk/Schulze *Trade* 60; see also Forsyth *International Law* 316.

²⁴⁴ See comments under Section 2.3.3 above. For cases applying Article 33 al. 1 CCO, see CSJ 3 April 1976 RC 100 BA 1977 65; Kin 28 February 1967 *RJC* 1968 No. 1 54; Trib App Boma 4 April 1901 *Jur Congo* 1890-1904 126; Cons Sup Congo 19 July 1913 *Jur Congo* 1913 343; Trib App Boma 30 December 1914 *Jur Col* 1925 298; Cons Sup Congo App 28 January 1921 *Jur Congo* 1921 41; First Inst Elis 8 July 1932 *RJCB* 1933 164.

²⁴⁵ See Boma 29 September 1903 *Jur EIC* 284; see also Cons Sup 28 January 1921 *Jur Congo* 4; Léo 8 January 1924 *Jur Col* 278; Léo 31 December 1956 *RJCB* 1957 110.

²⁴⁶ See Forsyth *International Law* 316; North/Fawcett *International Law* 533; Spiro *Conflict* 151; Van Calster *Private Law* 132; Fredericks 2006 (18) *SA Merc LJ* 75 76; Fredericks 2003 (15) *SA Merc LJ* 63 64. As stated by L Mpati AP in *Ekkehard Creutzburg and Emil Eich v Commercial Bank of Namibia Ltd* 1 December 2004 Case No. 29/04 [9], the expression “proper law of a contract” indicates “the appropriate legal system governing an international contract as a whole or a particular issue raised by the contract. (...) where parties have made an express choice of law to govern such contract their choice should be upheld.” Niekerk and Schulze specify this by stating that,

Generally, in terms of South African private international law, there is party autonomy and parties have a wide (...) freedom of choice of proper law. A South African court will as a rule give effect to parties’ choice of law, not only where they have chosen South African law but also where they have chosen the other party’s foreign law. Also, their choice of South African law will be given effect to even if the legal position under it differs from that pertaining under the other relevant legal system or systems.

See Van Niekerk/Schulze *Trade* 60; taking support on *Polysius (Pty) v Transvaal Alloys (Pty) Ltd & Another* 1983 (2) SA 630 (W). Within the CISG, *party autonomy* is formulated by Article 6 which allows parties to exclude, derogate, or to vary the effect of any of the provisions of the

has said, the principle according to which “the validity and interpretation of a contract is governed by its ‘proper law’ (...) (is) as fundamental in Southern Africa as it is in (other) common law countries (...).”²⁴⁷ Insofar as South African law is concerned, the doctrine of proper law is explained there, *inter alia*, in *Pretorius v Natal South Sea Investment Trust Ltd*,²⁴⁸ and in *Improvair (Cape) (Pty) Ltd v Establisements Neu*.²⁴⁹

As a civil law country, the DRC does not know the notion of “proper law”. In the context of Congolese law, however, the common law doctrine of “proper law” may be understood through the provisions of Article 33 al. 1 CCO for which contracts legally formed have the force of law for contracting parties.²⁵⁰ Article 33 al. 1 ruling is concerned with the contractual field as a whole, including sales contracts. In the particular case of international transactions, the freedom of choice of the law governing the contract results from the phrase “Unless when the parties have provided otherwise” contained in Article 11 al. 2 PILD.²⁵¹

Simply, parties to an international sale should normally determine, either expressly or tacitly,²⁵² the law governing their contract. Thus, as stated by Trollip J, in *Guggenheim v Rosebaum*, the law of the contract will be the law of the country which the parties have agreed or intended shall govern their contract.²⁵³ A similar

Convention. For Congolese law, see, in particular, Boma 29 September 1903 *Jur EIC* 284, which authorises contracting parties to derogate from civil code provisions, or De Burlet *Droit International* 283.

²⁴⁷ Kutner *Common Law* 72; see also Corbett JA in *Ex Parte Spinazze & another NNO* 1985 (3) SA 650 (A) 665F.

²⁴⁸ *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W).

²⁴⁹ In *Improvair (Cape) (Pty) Ltd v Establisements Neu* 1983 (2) SA 138 (C) 144, Grosskopf J describes the proper law of the contract as “the system of law which governs the interpretation, validity, and mode of performance of the contract.” See comments by Forsyth *International Law* 321 and 327-330; Kutner *Common Law* 70; Kiggundu *International Law* 269.

²⁵⁰ For an illustration, see Léo 25 February 1930 *Jur Col* 1932 112; and comments in Section 2.3.5.3 above.

²⁵¹ Article 11 al. 2 PILD *in limine* states, “Unless when the parties provide otherwise, agreements are governed, as for their substance, effects, and their evidence, by the law of the place where they are concluded.” See, for comments, De Burlet *Droit International* 283.

²⁵² See Forsyth *International Law* 325; Van Calster *Private Law* 132; Schwenger/Hachem in Schlechtriem/ Schwenger *Commentary* 41; and Article 3(1) EC Regulation Rome I.

²⁵³ See Trollip J in *Guggenheim v Rosebaum* (2) 1961 (4) SA 21 (W); see also *Laconian Maritime Entreprises Ltd v Agramar Lineas Ltd* 1986 (3) SA 509 525-530 (D); Ekkehard Creutzburg and

ruling is found, under Congolese law, in one Appellate Court of Kinshasa decision whereby, it is stated that, as long as it meets public policy requirements, “A contract shall prevail even if it contradicts a Parliament Act.”²⁵⁴

Frequently, however, parties fail to choose the law applicable to their contract, focusing on matters such as the price, quality, and quantity of the goods, and the time and place of delivery.²⁵⁵ This is how the problem of the applicable law emerges. One illustrative case, for the DRC, is the decision of the Commercial Tribunal of Lubumbashi in the *Finparco case*.²⁵⁶ This case deals with a contract of purchase, sale, and transport of asphalt concluded in Dubai (The United Arab Emirates) in April 2010 between Finparco, a buyer whose place of business is located in Delmont (Switzerland), and Armina Gnl Trading FZE UAE Co, a seller situated in Dubai. Carriage had to be performed by the Tanzanian branch of one Malaysian company named Blijoil, and goods delivered in Lubumbashi (the DRC) *via* Dar es Salam (Tanzania). In terms of the contract, the buyer had to pay 50% of the price on receiving the goods in Dar es Salam, and the outstanding balance on delivery in Lubumbashi. The seller promised to deliver the asphalt by May 2010. A few days after, instead of delivering the goods, the seller imposed a new tariff unilaterally. This gave rise to the dispute. The parties had not determined the law governing the contract. Unfortunately, the plaintiff did not honour the preliminary prescribed judicial costs so that his action was dismissed.²⁵⁷ In circumstances of the kind of the *Finparco case*, since contracting parties fail to determine the law relevant to the

Emil Eich v Commercial Bank of Namibia Ltd 1 December 2004 Case No. 29/04 [9] [10]; Forsyth *International Law* 321; and, for English Law, North/Fawcett *International Law* 552.

²⁵⁴ See Léo 25 February 1930 *Jur Col* 1932 112.

²⁵⁵ See Eiselen *Globalization* 97 98; Forsyth *International Law* 326; North/Fawcett *International Law* 534. As several scholars contend, in 90 or even more cases out of 100, this remains the only interest of the parties in the transaction. See Magnus Last Shot 185 187; Sukurs 2001 (34/35) *VJTL* 1481 1484; Viscasillas 1998 (10) *Pace Int'l LR* 97 106.

²⁵⁶ Tricom L'shi 30 March 2012 RAC 671 *Finparco Co v Amina Gnl Trading FZE UAE Co, Chakeer and Blijoil Co* (unreported decision).

²⁵⁷ Cf. Article 144 al. 1 and Article 145 of the Congolese Code of Civil Procedure as currently amended. In accordance with these provisions, when the claimant has provided the elements necessary for issuing a writ, he/she must hand over costs to the clerk of the court. No procedural act should be executed before the prescribed costs have been paid.

contract by themselves, the court must assign a proper law to it.²⁵⁸ Forsyth remarks, in this regard, that, “The best that can be done is to assign to the contract as governing law the law with which the contract is most closely connected. Usually, (...) this will be either the *lex loci contractus* or the *lex loci solutionis*.”²⁵⁹

To illustrate this by reference to South African legal principles, while assigning a law to the contract, the traditional position in *Standard Bank of South Africa Ltd v Efroiken and Newman* was for the court to “impute an intention to the parties.”²⁶⁰ This decision was criticised on the grounds that it was “artificial to refer to the parties’ presumed intention.”²⁶¹ The modern approach in *Benidai Trading Co Ltd v Gouws (Pty) & Ltd*;²⁶² *Ex Parte Spinazze & another NNO*;²⁶³ and in *Ekkehard Creutzburg and Emil Eich v Commercial Bank of Namibia Ltd*,²⁶⁴ “is to adopt an

²⁵⁸ Cf. *Kleinhans v Parmalat SA (Pty) Ltd* 2002 23 ILJ 1418 (LC) 29; *Ekkehard Creutzburg and Emil Eich v Commercial Bank of Namibia Ltd* 1 December 2004 Case No. 29/04 [10]; see also Van Niekerk/Schulze *Trade* 60; Forsyth *International Law* 326.

²⁵⁹ Forsyth *International Law* 326. The phrase *lex loci contractus* refers to the law of the place where the contract was concluded; and the expression *locus loci solutionis* to the law of the place where it is performed. It is acknowledged that, where contracting parties undertake to perform the contract in a place other than where it is concluded, they are supposed to opt for the law of that place. See authorities quoted by Forsyth *International Law* 329 Fn80.

²⁶⁰ See *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185. In the case, JA de Villiers ruled that,

[It] must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effects are to be governed. (...) Where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties.

The rule in the case above was in line with the English common law approach of that time. See *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224 (PC) 240; quoted by Forsyth *International Law* 330. That approach was soon abandoned in English law in favour of the “closest and most real connection theory”. See *Bonython v Commonwealth of Australia* [1951] AC 201 219; *Coast Lines Ltd v Hudig & Veder Charactering NV* [1972] 1 All ER 451 (CA); commented on by Kiggundu *International Law* 270; Fredericks 2006 (18) *SA Merc LJ* 75 77; Fredericks 2003 (15) *SA Merc LJ* 63 66; Kutner *Common Law* 73.

²⁶¹ See Fredericks 2006 (18) *SA Merc LJ* 75 77; Fredericks 2003 (15) *SA Merc LJ* 63 66. See also, Forsyth *International Law* 330; Van Niekerk/Schulze *Trade* 64; Kiggundu *International Law* 270; Kutner *Common Law* 71.

²⁶² See *Benidai Trading Co Ltd v Gouws (Pty) & Ltd* 1977 (3) SA 1020 (T) 147.

²⁶³ *Ex Parte Spinazze & another NNO* 1985 (3) SA 650 (A) 665F.

²⁶⁴ *Ekkehard Creutzburg and Emil Eich v Commercial Bank of Namibia Ltd* 1 December 2004 Case No. 29/04 [9].

objective approach to the determination of the proper law of a contract where the parties did not themselves (carry out) a choice.”²⁶⁵ Forsyth puts it that,

Recently, (...) South African courts have expressed their reluctance to follow the *dictum* in (*Standard Bank of South Africa Ltd v Efroiken and Newman*), and have indicated their preference for the alternative objective formulation,²⁶⁶ stripped of any reference to non-existent intentions, of the legal system with which the contract has its *closest and most real connection* (emphasis added).²⁶⁷

This new approach was quickly supported, among others, by Grosskopf J in the *Improvair (Cape) (Pty) Ltd v Etablissements Neu* case.²⁶⁸ In this case, as parties did not make an express choice of the law governing the contract, Grosskopf J held French law to be the proper law of the agreement.²⁶⁹ According to him, French law had “the closest and most real connection with the transaction,”²⁷⁰ so that the parties were taken to have intended it to apply. The contract and disputes arising under the contract were, therefore, governed by French law.

It is clear from cases cited above that each contract has a legal system to which it is closely connected and, consequently, one assigned proper law. Moreover, there are many connecting factors which may enter into play in determining the closest

²⁶⁵ See *Benidai Trading Co Ltd v Gouws (Pty) & Ltd* 1977 (3) SA 1020 (T) 147; see also Kiggundu *International Law* 270.

²⁶⁶ Based, *inter alia*, on the English *Bonython v Commonwealth of Australia* case above.

²⁶⁷ Forsyth *International Law* 330.

²⁶⁸ *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (C) 139 to 151. In the facts, A South African company, formally known as *Associated Air Conditioning and Refrigeration Corporation (Pty) Ltd* (plaintiff), entered into a written agreement on 6 December 1977 with the defendant, a French company, establishing an association between them. The association’s purpose was to submit tenders for and if successful provide air-conditioning and ventilation equipment for a nuclear power station in South Africa. The agreement provided for arbitration of disagreements concerning the interpretation and execution of the contract. The South African company nevertheless brought suit against the French company in South Africa. The only issue before the court was ‘whether the contract was governed by French law or by South African law’. By the way, if French law applies, the action cannot proceed and the parties’ disputes have to be settled by arbitration conducted in terms of French law. If, on the other hand, the contract is governed by South African law, the action would proceed. But the defendant did not wish to have arbitration if the contract was governed by South African law. This required the court to ascertain the contract’s proper law.

See, in the same sense, *Lacanian Maritime Entreprises Ltd v Agramar Lineas Ltd* 1986 (3) SA 509 525-530 (D); and *Kleinhans v Parmalat SA (Pty) Ltd* 2002 23 ILJ 1418 (LC) 29.

²⁶⁹ *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (C) 152.

²⁷⁰ *Ibid.*

link a contract has with a given legal system.²⁷¹ In a specific case, the place where the contract was concluded may be relevant, especially “if the contract has to be performed in the same place,”²⁷² or the place of performance.²⁷³ In Congolese law, Article 11 al. 2 PILD defers any international contract to the law of the place where it is concluded, unless when parties have chosen another legal system.²⁷⁴

As for the DRC, the place where the contract is made was also initially the most important factor under South African law. The rule in *Standard Bank of South Africa Ltd v Efroiken and Newman* was that “the law of the place where the contract was concluded governs, except where the contract is to be performed elsewhere,”²⁷⁵ in which case the law of the place of performance will prevail.²⁷⁶ This position was justified, according to one commentator, by the fact that it accords with the presumed intention of the parties.²⁷⁷ In the opinion of Fredericks, confirmed by Forsyth, “the most recent cases show a tendency not to use the presumption in favour of the *lex loci solutionis*, but, instead, to proceed to decide directly the legal system with which

²⁷¹ Those factors include the place where the contract was concluded or it is performed, the place of offer and acceptance, the place where parties carry on business, the language and terminology employed in the contract, the domicile and nationality of the parties, and the place of agreed arbitration. See Van Niekerk/Schulze *Trade* 64-65; Fredericks 2006 (18) *SA Merc LJ* 75 79 with cases quoted thereto.

²⁷² A semblable principle was formulated under Congolese law as follows:

When a Belgian citizen forms a contract in Belgium with a foreign national, if the foreigner chooses Belgium for any dispute to arise from the contract and accepts this dispute to be heard by an arbitral court constituted in Belgium or by a Belgian judge, the contract is governed by Belgian law.

See Com Brux 4 May 1928 *Jur Col* 1928 67; Boma 29 September 1903 *Jur Etat* I 284; and Cons Sup Congo App 28 January 1921 *Jur Congo* 1921 41 whereby, “A contract concluded in the Congo is governed by Congolese law unless parties’ contrary intention.” For South African law, see Van Niekerk/Schulze *Trade* 64.

²⁷³ See Trib App Elis 28 December 1915 *Jur Col* 1926 242.

²⁷⁴ De Burlet *Droit International* 283; see also Leo 8 January 1924 *Jur Col* 278; Trib App Boma 4 April 1901 *Jur Congo* 1890-1904 126; Cons Sup Congo 19 July 1913 *Jur Congo* 1913 343; Trib App Boma 30 December 1914 *Jur Col* 1925 298; Cons Sup Congo App 28 January 1921 *Jur Congo* 1921 41; First Inst Elis 8 July 1932 *RJCB* 1933 164.

²⁷⁵ As stated by JA De Villiers,

The rule to be applied is that the *lex loci contractus* governs the nature, the obligations, and the interpretation of the contract; the *locus contractus* being the place where the contract was entered into, except where the contract is to be performed elsewhere in which case the latter place is considered to be the *locus contractus*.

²⁷⁶ Van Niekerk/Schulze *Trade* 64; Forsyth *International Law* 331.

²⁷⁷ Forsyth *International Law* 331.

the contract is most closely connected.”²⁷⁸ This is the solution also adopted in Article 10 CISG as referred to above. Congolese law, by contrast to the CISG and South African law, seems silent on the use of the “closest and most real connection” theory in the absence of choice of the law governing the contract.²⁷⁹

Notwithstanding the explanations above, the principle remains that the system of conflict-of-law rules in matters of contractual obligations hinges on the freedom of the parties. In that sense, if the CISG is directly selected as the proper law of the contract, judges or arbitrators are treaty bound to apply the Convention.²⁸⁰ If parties choose the law of a CISG member state, however, the question is whether they intend to include the CISG or to exclude its application as endorsed by Article 6. This question has received much attention in case law and scholarly writings.²⁸¹ A major part of them believes that, since the Vienna Convention constitutes the international sales contract law in all member states, reference to national law of a “Contracting State” logically includes the CISG,²⁸² unless there is specific reference to the

²⁷⁸ Fredericks 2006 (18) SA Merc LJ 75 80; Forsyth *International Law* 331, both commenting the *Kleinhans v Parmalat SA (Pty) Ltd* case. See also, *Ekkehard Creutzburg and Emil Eich v Commercial Bank of Namibia Ltd* 1 December 2004 Case No. 29/04 [10].

²⁷⁹ The UAGCL also does not deal with that issue. But, in a domestic sales contract context, see the *Kabala Katumba v Socimex* case whereby, the branch of operation was preferred to the company’s head office place to determine the jurisdiction of the tribunal owing to the fact that it was at that branch that the contract was concluded and the price paid.

²⁸⁰ See Netherlands 15 October 2002 Arbitral Award Netherlands Arbitration Institute *Condensate Crude Oil Mix case*, CISG-Online 740 (Pace), CLOUT Case No. 720; in UNCITRAL *Digest* 6 Fn53; see also Mistelis in Kröll/ Mistelis/Viscasillas *UN Convention* 38; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 41.

²⁸¹ See Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 104 §18; Schwenger/Hachem in Schlechtriem/ Schwenger *Commentary* 108 §13; Schlechtriem/Butler *International Sales* 15; Chappuis CVIM 183 187; Brunner CVIM 91 111; see also cases quoted in UNCITRAL *Digest* 34 §11 where some authorities assume that such a choice amounts to an implicit exclusion of the CISG.

²⁸² See France 3 November 2009 Cour de Cassation *Société Anthon GmbH & Co v SA Tonnellerie Ludonnais* [<http://cisgw3.law.pace.edu/cases/091103f1.html>]; Serbia 17 August 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Vegetable fats case* [http://cisgw3.law.pace.edu/cases/0908_17sb.html]; Australia 20 May 2009 Federal Court of Australia *Olivaylle (Pty) Ltd v Flottweg GmbH & Co KGAA* [<http://cisgw3.law.pace.edu/cases/090520a2.html>]; Netherlands 15 April 2009 Rechtbank [District Court] Utrecht *Stainless Steel case* [<http://cisgw3.law.pace.edu/cases/090415n1.html>]; Netherlands 5 November 2008 District Court Rotterdam *Vigo-Pontevedra v Ibromar BV* [<http://cisgw3.law.pace.edu/cases/081105n2.html>]; Slovak Republic 10 October 2007 Regional Court in Bratislava *Spare Parts case* [<http://cisgw3.law.pace.edu/cases/071010k1.html>]; USA 28 September 2007 Federal District

domestic sales law of that state.²⁸³ Thus, by choosing a member state's sales law, parties are presumed to have chosen the CISG,²⁸⁴ even where commercial activities focus on different contracting states.²⁸⁵

It should be noted, however, that from the beginning of the drafting process, the implementation of Article 1(1) (b) was disapproved of. It was feared that the Convention's indirect applicability destabilises legal certainty that was the central goal of the CISG.²⁸⁶ In order to moderate the effect of its implementation, Article 95, which allows any state to declare not to be bound by Article 1(1) (b), was introduced into the Convention.

4.3.4.3 Effect of the Article 95 reservation

As announced above, in conformity with Article 95, any State may declare that it will not be bound by Article 1(1) (b) at the time it submits its instruments of

Court [Michigan] *Easom Automation Systems, Inc. v Thyssenkrupp Fabco, Corp* [<http://cisgw3.law.pace.edu/cases/070928u1.html>]; Serbia 31 July 2007 Foreign Trade Court attached to the Serbian Chamber of Commerce *Meat Products case* [<http://cisgw3.law.pace.edu/cases/070731sb.html>]; Serbia 10 July 2007 High Commercial Court *Crystal Sugar case* [<http://cisgw3.law.pace.edu/cases/070710sb.html>]; Austria 4 July 2007 Supreme Court *Auto case* [<http://cisgw3.law.pace.edu/cases/070704a3.html>]; China May 2006 CIETAC Arbitration Proceeding *Chemicals case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/060500c3.html>]; Austria 28 April 2000 Supreme Court *Jewelry case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html>]; France 17 December 1996 Cour de Cassation *Ceramique Culinaire v Musgrave* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/961217f1.html>] (all of these cases last accessed 27-6-2012).

²⁸³ Serbia 27 December 2010 Foreign Trade Court attached to the Serbian Chamber of Commerce *Ice-cream case* [<http://cisgw3.law.pace.edu/cases/101227sb.html>]; but Chile 22 September 2008 Supreme Court *Jorge Plaza Oviedo v Sociedad Agricola Sacor Limitada* [<http://cisgw3.law.pace.edu/cases/080922ch.html>] (last accessed 27-6-2012). In the last case, the court wrongly excluded the CISG because parties had their place of business in contracting states, i.e. Chile and Argentina, and did not expressly exclude the CISG; see Jorge Oviedo-Alban's comments of that decision.

²⁸⁴ See cases quoted in UNCITRAL *Digest* 34 Fn46; see also Kadner 2011 (13) *YB of PIL* 165 168.

²⁸⁵ Ruled under Russian Arbitration proceeding 54/1999 of 24 January 2000 ([<http://cisgw3.law.pace.edu/cases/000124r1.html>] (accessed 21-8-2012)) that,

The fact that the parties agreed on the applicability of a certain national law to their sales contract does not preclude the applicability of the CISG if the commercial activities of the parties focus on different Contracting States of the CISG and if the parties did not explicitly exclude the application of the CISG. The law chosen by the parties then applies subsidiarily.

²⁸⁶ See Flechtner *Honnold's Uniform Law* 36; Honnold *Documentary* 735; Bell 2005 (9) *Singapore YB of International Law* 55; Bernasconi 1999 (46) *Netherlands International Law Review* 137 157.

ratification.²⁸⁷ Using the Article 95 reservation may produce different consequences depending on the location of the forum. Three main scenarios can be envisaged in this regard.²⁸⁸ Firstly, if conflict-of-law rules lead to the law of a non-contracting state, the CISG cannot apply.²⁸⁹ Secondly, if they designate the law of a contracting state, requirements in Article 1(1)(b) are then met; the CISG will apply.²⁹⁰ Lastly, if PIL rules lead to the law of an Article 95 declaration state, the Convention will not apply.²⁹¹ In the *Veneer Cutting Machine* case, the German appellate court of Düsseldorf ignored the fact that the designated country (USA) made an Article 95 declaration and applied the CISG wrongly.²⁹² Since then, the dominant and better

²⁸⁷ The CISG's original Draft did not include what was to become Article 95. This provision was introduced later by the Czechoslovakian delegation during the 1980 Vienna Diplomatic Conference to facilitate ratification by Socialist countries. See Bell 2005 (9) *Singapore YB of International Law* 55; Schlechtriem/Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 1190; Honnold *Documentary* 237, 728 and 735. At present, countries that have made use of the Article 95 declaration include China, the Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia, and the USA. Upon accession, Canada also made use of the declaration with respect to British Columbia, but withdrew it a year later. With regard to Germany, it has declared not to apply Article 1 (1) (b) in respect of any State which has made use of the Article 95 declaration. See UNCITRAL *Digest* 6 Fn60 and 442 §2; Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1208 Fn2; Schlechtriem/Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 1190; Yang <http://cisgw3.law.pace.edu/cisg/biblio/yang2.html>. For further comments on the meaning and effects of Article 95, see Wethmar-Lemmer PIL 124-145.

²⁸⁸ For more different scenarios which can occur when exercising the Article 95 reservation and illustrations, see Winship in Galston/Smit *Sales* 1-26 32; Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1208; Wethmar-Lemmer PIL 124-145.

²⁸⁹ See China 24 March 1998 CIETAC Arbitration Proceeding *Shanghai Sub-Commission Hempseed case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980324c1.html>] (last accessed 24-6-2012). In this case, a seller whose place of business was located in China supplied hempseed to a buyer located in the UK. Parties failed to choose the law governing disputes under the contract. According to international law norms and English domestic law, on the one hand, and the fact that China has made the Article 95 reservation, on the other hand, the CISG would not apply in the case. The Arbitration Tribunal thereby held Chinese law as the applicable law. See also cases quoted in UNCITRAL *Digest* 442 Fn4.

²⁹⁰ See in this respect cases quoted in UNCITRAL *Digest* 6 §20 Fn64 where the CISG was applied by non-contracting states; see also Kadner 2011 (13) *YB of PIL* 165 170; and Wethmar-Lemmer PIL 137.

²⁹¹ See USA 18 July 2011 Federal District Court [Maryland] *MSS, Inc. v Maser Corporation* [<http://cisgw3.law.pace.edu/cases/110718u1.html>] (last accessed 23-6-2012); and USA 17 December 2009 Federal District Court [Georgia] *Innotex Precision Ltd v Horei Image Products, Inc., et al.*

²⁹² Germany 2 July 1993 Appellate Court Düsseldorf *Veneer Cutting Machine case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930702g1.html>] (last accessed 27-6-2012); also quoted in UNCITRAL *Digest* 442 §4 Fn6. *A propos* of this, when the contract was concluded, the CISG was in effect in USA but not in Germany. Pursuant to Article 1(1) (b), the German Court

position has been to consider states that have made use of the Article 95 declaration as third party *vis-à-vis* the CISG.²⁹³ Thus, when the PIL rules lead to the law of a declaration country, the CISG is not applicable;²⁹⁴ instead, courts will apply the domestic sales law of the designated state in its place.

In summary, the CISG applies in three different circumstances: automatically if both the parties are located in contracting states; indirectly by virtue of conflict-of-law rules, unless there has been an Article 95 declaration; or, by the operation of the party autonomy principle, if the parties select it as the proper law of their contract. With the growth of the number of CISG member states, its autonomous application has become the prevailing means of application.

After having discussed how the CISG should apply, the following section focuses on its area of operation.

4.3.5 The Area of Operation of the CISG

Normally, most of the questions that can arise in relation to contracts for the international sale of goods are addressed and answered by the CISG. The Convention does not, however, aim to solve all matters which may relate to a sales contract. There are some issues which it does not regulate, although they can be relevant with regard

observed that PIL rules point to the USA, a “Contracting State”, and held the CISG applicable, unfortunately without reference to the fact that USA had declared that it would not be bound by Article 1(1) (b) CISG.

²⁹³ See Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1208 Fn2; Schlechtriem/Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 1191; Kritzer/Eiselen *Contract* §84:7 84-39; Wethmar-Lemmer PIL 139-140; Hugo1999 (11) *SA Merc LJ* 1 10. This approach conforms, moreover, with the CISG’s option regarding reservations under Articles 92 and 93 CISG.

²⁹⁴ Simply, Article 95 declaration allows member countries to apply the CISG only if both parties are located in contracting states, or if parties have expressly chosen the CISG as the law governing the contract. See Japan 19 March 1998 Tokyo District Court *Nippon Systemware Kabushikigaisha v O* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980319j1.html>] (last accessed 27-6-2012); USA 17 December 2009 Federal District Court [Georgia] *Inotex Precision Ltd v Horei Image Products, Inc., et al*; see also Kadner 2011 (13) *YB of PIL* 165 170; Vieira in Ferrari *CISG* 12; and Wethmar-Lemmer PIL 137.

to the conclusion and performance of sales contracts.²⁹⁵ As specified by Article 4, the CISG “governs only” the formation of the contract of sale, and the rights and obligations of the parties arising from a contract for international sale of goods.²⁹⁶ By its ruling, Article 4 delineates the “legal scope of application”²⁹⁷ of the CISG; it defines issues to which the Convention applies, and consequently limits its “substantive ambit.”²⁹⁸ In detail, the drafters of the *UNCITRAL Digest* emphasise that,

The first sentence of Article 4 lists matters to which the Convention’s provisions prevail over those of domestic law, i.e., the formation of contract and the rights and obligations of the parties. The second sentence contains a non-exhaustive list of issues with which, except where expressly provided otherwise, the Convention is not concerned, namely, the validity of the contract or any of its provisions or any usage, as well as the effect which the contract may have on the property in the goods sold.²⁹⁹

Firstly, Article 4, sentence one, inventories matters where CISG provisions take precedence over those of domestic law, viz. the formation of contract and the rights and obligations of the seller and the buyer. According to Huber, the above-mentioned terms have to be understood as covering everything that the CISG actually deals with.³⁰⁰ In that sense, the first sentence of Article 4 has to be read in connection with Articles 14 to 24 relating to the formation of the contract;³⁰¹ and with Articles 25 to

²⁹⁵ See Huber 2006 (6) *IHR* 228 230; Lookofsky 1991 (39) 2 *Am J Comp L* 403 404; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 63.

²⁹⁶ Article 4 CISG states,

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- a) the validity of the contract or any of its provisions or of any usage;
- b) the effect which the contract may have on the property in the goods sold.

For a list of leading cases dealing with Article 4 CISG; see Kritzer/Eiselen *Contract* §84:30 84-87 to 84-91.

²⁹⁷ Huber 2006 (6) *IHR* 228 230; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 75; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 63; Kritzer/Eiselen *Contract* §84:32 84-94.

²⁹⁸ Schlechtriem/Butler *International Sales* 31; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 63.

²⁹⁹ *UNCITRAL Digest* 24 §1.

³⁰⁰ Huber 2006 (6) *IHR* 228 230.

³⁰¹ Provisions concerning form as ruled under Articles 11 to 13 CISG would also be regarded as a matter of “formation” in its widest meaning.

88 dealing with the rights and obligations of the parties, remedies for the breach of contract, and the passing of risk from seller to buyer.³⁰²

Secondly, Article 4, sentence two, lists issues which are outside the sphere of influence of the CISG, unless when they arise in conjunction with other CISG provisions. These include the validity of the contract³⁰³ and the transfer of ownership in the goods sold.³⁰⁴ The list of matters excluded from the field of application of the CISG as provided by Article 4, sentence two, seems not to be exhaustive as evidenced by the phrase “in particular”.³⁰⁵ This list may then be enriched by the provisions of Article 5 which specifically remove from the domain of the CISG “the liability of the seller for death or personal injury caused by the goods to any person.”³⁰⁶ As for validity requirements, each of the contractual matters excluded from the CISG’s sphere of application have to be ruled by the applicable domestic contract law of the forum.³⁰⁷

To give the example of transfer of ownership, the applicable domestic law will govern questions relating to the transfer of the property in the goods from seller to

³⁰² See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 77; Djordjevic in Kröll/Mistelis/ Viscasillas *UN Convention* 64-65; Kritzer/Eiselen *Contract* §84:33 84-94.

³⁰³ Of course, there is no universal definition of what the concept of “validity” means. A definition which may be given is that “a contract is ‘valid’ insofar as it has legal operation or meets requirements as for its enforceability, and ‘invalid’ insofar as it has not.” Simply, the concept of “validity” covers matters such as capacity to contract, consensus, mistake, cause, consideration, and fraud (Cf. Articles 8 to 32 CCO in the DRC). For validity in the CISG’s context, see Hartnell 1993 (18) *Yale Journal of International Law* 1 8; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 68-76; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 88-93; Kritzer/Eiselen *Contract* §84:34 84-107 to 84-142; Flechtner *Honnold’s Uniform Law* 78; Zeller *CISG* 68ff. Usually, all validity requirements are governed by the law determined by PIL rules of the forum. See comments in Sections 2.3.5.2 and 3.3.1 above.

³⁰⁴ See UNCITRAL *Digest* 24 §1; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 94; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 76; Kritzer/Eiselen *Contract* §84:35 84-143 to 84-145.

³⁰⁵ For additional issues not governed by the CISG, see Kritzer/Eiselen *Contract* §84:33 84-94 to 84-107; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 94-95; Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 67 and 76-88; Flechtner *Honnold’s Uniform Law* 84; and a series of authorities quoted in UNCITRAL *Digest* 25 §§14 to 17.

³⁰⁶ See Australia 23 June 2010 Supreme Court of Western Australia *Attorney-General of Botswana v Aussie Diamond Products (Pty) Ltd* case.

³⁰⁷ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 77 §6; Kritzer/Eiselen *Contract* §84:33 84-94; Brunner CVIM 91 112.

buyer. In such a case, the law generally applied is the *lex rei sitae*.³⁰⁸ A comparable principle is asserted, in Congolese law, by Article 9 PILD which states, “Rights on movables or immovable goods are governed by the law of the place where they are located.” More specifically, it is the applicable domestic property law which will determine whether the property in the goods had already been transferred to the buyer with the conclusion of the contract, or whether a separate agreement was needed.³⁰⁹ In systems based on the French Napoleonic civil code, as it is for the CCO, for instance, the obligation to deliver the property is achieved by the sole consent of the parties.³¹⁰ Contrary to the position of the civil code, Article 275 of the OHADA Commercial Act locates the transfer of ownership of the goods at the time of taking delivery. With regard to South African law, ownership is not transferred by the mere conclusion of the contract.³¹¹ In addition, “there must at least be proper delivery to the buyer coupled with the required intention on the part of the seller to transfer and on the part of the buyer to receive ownership in the goods.”³¹²

Briefly, matters that the Vienna Sales Convention is primarily concerned with include rules governing the formation of the contract of sale and the rights and obligations of the parties established in the contract. For all other matters, the CISG relies on domestic laws to regulate them.

³⁰⁸ See Forsyth (*International Law* 370) for whom, in South African law, corporeal immovable and movable properties are basically governed by the *lex rei sitae*, and movables, exceptionally, by the *lex domicilii*.

³⁰⁹ See Schlechtriem/Butler *International Sales* 36. On rules relating to ownership in the DRC, see Articles 14 to 30 of the Land Law.

³¹⁰ Article 37 al. 1 CCO states, in this respect, that “The obligation of delivering a thing is complete by the sole consent of the contracting parties.” Regarding sales contracts, Article 264 CCO specifies that, “The sale is perfected between the parties and ownership is automatically acquired by the buyer with regard to the seller as soon as they have agreed on the thing and the price, although the thing has not yet been delivered nor the price paid.” Compare this to Articles 1138 and 1583 FCC respectively. For an application, see Kisangani 15 April 1980 RCA 487 *Jacques Alber v Malisawa Tshimbalanga* (unreported decision).

³¹¹ As discussed in Section 3.4.5 above, at the time a contract is concluded, there is only a rebuttable presumption of transfer of property. See *Brewer v Berman* 26 SC 441 443; *Meyer v Retief & Co* OPD 3 9; see also Sharrock *Business* 282 and 875.

³¹² See *Lendlease Finance (Pty) Ltd v Corporacion de Marcadeo Agricola & Others* 1976 (4) SA 464 (A); *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd & Others* 1995 (3) SA 663 (A); see also Van Niekerk/Schulze *Trade* 83; Eiselen in *Scott Commerce* 137.

As stated in the introductory section, the Vienna Convention is not a faultless instrument.³¹³ Owing to the fact that its provisions had sometimes to take the form of a compromise between divergent positions of negotiating states,³¹⁴ it is possible that disputes can arise when they are applied. In such situation interpretation will be needed.

4.3.6 The Interpretation of the CISG and Gap-filling

4.3.6.1 Introduction

The interpretation of the CISG is dealt with in Article 7 which provides:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.³¹⁵

Article 7 has been described, all at once, as the “interpretation” and the “gap-filling”³¹⁶ provision of the CISG. It pursues a double objective, to provide assistance and standards for the interpretation of the CISG,³¹⁷ and to fill the gaps within the Convention.³¹⁸

³¹³ Sica 2006 (1) *NJCL* 1; Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=yes (accessed 15-4-2013); Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 137 §57; and authorities quoted by Wethmar-Lemmer *PIL* 188 in Fn3.

³¹⁴ According to Zeller (*CISG* 9-10), as the CISG is not a code, gaps should exist. Most of those gaps, however, are not the result of an oversight of the drafters or a lack of trying to comprehensively cover the subject matter, but rather the result of vested interests.

³¹⁵ See Article 7 CISG.

³¹⁶ Wethmar-Lemmer *PIL* 195 and 187.

³¹⁷ Article 7(1).

³¹⁸ Article 7(2).

4.3.6.2 Conditions for the interpretation of the CISG

In accordance with Article 7(1), three conditions are required for the interpreting of the UN Sales Convention: to have regard to the international character of the CISG; to promote uniformity; and to observe good faith in international trade.³¹⁹

Firstly, the requirement that regard be had to the international character of the Convention means that the interpretation of the CISG from domestic law terms and preconceptions should be avoided.³²⁰ According to Eiselen, the considerable merit of Article 7(1) lays in the fact that it “proclaims an up-to-date legal policy in harmony with the exigencies of world trade which postulates that ‘no recourse to national law should be admitted in interpretation’”.³²¹ In the learned author’s words, it would be meaningless to have a uniform or harmonised instrument “if there is significant divergence in the way it is interpreted or applied, or if courts interpret and argument it under the influence of their own legal system.”³²²

³¹⁹ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 122-123; Viscasillas in Kröll/Mistelis/ Viscasillas *UN Convention* 112; Kritzer/Eiselen *Contract* §85:7 85-17; and Wethmar-Lemmer PIL 195. Similar provisions can also be found in other international instruments such as Article 1.6 of the PICC (2010, 2004, and 1994); and Article 5:102(g) of the Principles of European Contract Law (PECL), Commission on European Contract Law 1998.

³²⁰ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 123 §8; Viscasillas in Kröll/Mistelis/ Viscasillas *UN Convention* 1127; Kritzer/Eiselen *Contract* §85:8 85-17 85-18; UNCITRAL *Digest* 42 §§2 and 4.

³²¹ Eiselen in Galston/Smit *Sales* 5; see also Eörsi in Galston/Smit *Sales* 2-5; UNCITRAL 1976 (VII) *Yb* 5. Koneru comments on that Article 7 CISG is arguably “the single most important provision in assuring the Convention’s future success.” Koneru 1997 (6) *MJ G Tr* 105; see also Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 112 §2; Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>. Pursuant to Article 7(1), the CISG is to be interpreted “autonomously”, but not in the light of domestic law. See Kritzer/Eiselen *Contract* §85:7 85-17; Ferrari 2009 (13) 1 *VJ* 15 16; Ferrari *Uniform Sales* 134 139; Wethmar-Lemmer PIL 195. In the words of Zeller, Article 7 defines the boundary between the CISG and domestic law. Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>; see also Rennert 2005 (2) *MqJBL* 119.

³²² Eiselen 2007 (19) *SA Merc LJ* 14 22; see, in the same sense, Ferrari 2009 (13) 1 *VJ* 15; Ferrari *Uniform Sales* 134; Ferrari 2003 (7) *VJ* 63; Ferrari 2001 (20) *JL & Com* 225; Ferrari 2001 (1) *Unif L Rev* 203. The UN Secretariat commentary on the 1978 Draft CISG was that,

National rules on the law of sales of goods are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum.

See Commentary on the Draft CISG, Prepared by the Secretariat Document A/CONF.97/5 under Article 6 in Honnold *Documentary* 407; and Kritzer/Eiselen *Contract* §85:7 85-15.

Secondly, with regard to the autonomous and uniform interpretation of the CISG, there is consensus that judges and arbitral tribunals should consider interpretations from other countries when applying the Convention.³²³ In practice, there are a number of cases in which courts have referred to CISG foreign judgements³²⁴ and scholarly commentaries³²⁵ in different member states. Compared

³²³ See among others, Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 117; Kritzer/Eiselen *Contract* §85:8 85-18; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 124; Ferrari *Uniform Sales* 134 149-150; Lookofsky 2005-2006 (25) *JL & Com* 87 90; Felemegas in *Interpretation* 11-12; Eiselen in Galston/Smit *Sales* 2-6; Ferrari 2001 (20) *JL & Com* 225 229; Koneru 1997 (6) *MJ G Tr* 105 107; Schlechtriem/Butler *International Sales* 49; Huber/Mullis *CISG* 8; Flechtner in Ferrari *Quo Vadis CISG* 93; Andersen 1998 (10) *Pace Int'l LR* 403; Honnold 1988 (8) *JL & Com* 207.

³²⁴ For an exhaustive list of cases referring to foreign decisions, see UNCITRAL *Digest* 42 Fn23. It should be noted that, until 2000, the most impressive case was the Italian Vigevano District Court decision in *Rheinland Versicherungen v Atlarex*. In this case, when dealing with some of typical issues governed by the CISG, such those of party autonomy, notice of goods for non-conformity, and burden of proof, the court quoted more than 40 foreign decisions and arbitral awards from Austria, France, Germany, the Netherlands, USA, and the ICC. (See Italy 12 July 2000 Tribunale di Vigevano *Rheinland Versicherungen v Atlarex* [<http://cisgw3.law.pace.edu/cases/000712i3.html>] (last accessed 28-6-2012). For comments, see Ferrari *Uniform Sales* 134 156; Ferrari in *CISG* 462; Eiselen 2007 (19) *SA Merc LJ* 24; Ferrari in *Quo Vadis CISG* 17; Torsello in Ferrari *CISG* 215; Ferrari 2001 (20) *JL & Com* 225 230-232; Ferrari 2001 (1) *Unif L Rev* 208 209. Shortly after, the Tribunale di Rimini followed the model in the *Al Palazzo Srl v Bernardaud di Limoges SA* case which quoted 35 foreign decisions and arbitral awards. (See Italy 26 November 2002 Tribunale di Rimini *Al Palazzo Srl v Bernardaud di Limoges SA* [<http://cisgw3.law.pace.edu/cases/021126i3.html>] (last accessed 28-6-2012). In 2004 and 2005, the Tribunale di Padova rendered three judgements quoting successively 40, 24, and 40 foreign decisions. (See Italy 25 February 2004 Tribunale di Padova *Agricultural Products case* (application of good faith standards) [<http://cisgw3.law.pace.edu/cases/040225i3.html>]; Italy 31 March 2004 Tribunale di Padova *Pizza Boxes case* (due date of payment) [<http://cisgw3.law.pace.edu/cases/040331i3.html>]; and Italy 11 January 2005 Tribunale di Padova *Ostroznik Savo v La Faraona soc coop arl* (supply of goods contract) [<http://cisgw3.law.pace.edu/cases/050111i3.html>] (last accessed 28-6-2012). In the same country, the Tribunale de Forli has also, more recently, taken into account the need of promoting uniformity in two important cases. See Italy 16 February 2009 Tribunale de Forli [<http://cisgw3.law.pace.edu/cases/090216i3.html>] (about 30 foreign decisions quoted); Italy 11 December 2008 Tribunale de Forli, CLOUT case No. 867 [<http://cisgw3.law.pace.edu/cases/081211i3.html>] (47 foreign decisions cited); both in UNCITRAL *Digest* 42 Fn23. Instances above confirm Ferrari's opinion that Italian decisions are careful to "show that courts increasingly apply the CISG in the way that is in line with the CISG's ultimate goal." See Ferrari in *CISG* 420; see also Torsello in Ferrari *CISG* 217; Ferrari 2003 (7) *VJ* 63 66; Ferrari 2001 (1) *Unif L Rev* 203 205.

³²⁵ See among others, New Zealand 22 July 2011 Court of Appeal of New Zealand *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* [<http://cisgw3.law.pace.edu/cases/110722n6.html>]; New Zealand 30 July 2010 High Court of New Zealand *RJ & AM Small Mon v Transport Sales Ltd and Grant Alan Miller*, [<http://cisgw3.law.pace.edu/cases/100730n6.html>] (last accessed 1-8-2012); USA 17 December 2009 Federal District Court [Georgia] *Innotex Precision Ltd v Horei Image Products, Inc., et al*; Greece 2009 Decision

to courts in other CISG countries, Italian courts hold the record of taking into account the uniform application of the CISG. Of course, the attitude is also slowly changing in countries like the USA,³²⁶ Germany,³²⁷ and other leading CISG countries,³²⁸ but not to the same extent as in Italian courts.³²⁹

The increasing application of the CISG by itself is not, however, sufficient for assessing the success of the Convention. As Ferrari has said,

4505/2009 of the Multi-Member Court of First Instance of Athens *Bullet-proof Vest case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/094505gr.html>]; USA 3 April 2009 Federal District Court [Washington State] *Barbara Berry, SA de CV v Ken M Spooner Farms, Inc.* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090403u1.html>]; Netherlands 21 January 2009 District Court Utrecht *Sesame Seed case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090121n1.html>]; Australia 24 October 2008 Federal Court of South Australia District *Hannaford v Australian Farmlink (Pty) Ltd* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/081024a2.html>]; USA 3 September 2008 Federal District Court [Illinois] *CNA Int'l, Inc. v Guangdong Kelon Electronical Holdings et al* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/080903u1.html>]; Australia 17 November 2000 Supreme Court of Queensland *Downs Investments v Perwaja Steel* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001117a2.html>] (last accessed 28-6-2012).

³²⁶ See, particularly, USA 17 December 2009 Federal District Court [Georgia] *Innotex Precision Ltd v Horei Image Products, Inc., et al* (two decisions quoted); USA 16 November 2007 *Barbara Berry, SA de CV v Ken M Spooner Farms* (five foreign decisions cited); and, particularly, USA 21 May 2004 District Court for the Northern District of Illinois (Eastern Division) *Chicago Prime Packers, Inc. v Northam Food Trading Co, et al* [<http://cisgw3.law.pace.edu/cases040521u1.html>] (last accessed 28-6-2012), which cited seven foreign decisions. The *Chicago Prime Packers* case has up now referred to more foreign decisions than any other American courts' decision. See Teiling 2004 *Unif L Rev* 431; Ferrari in *Quo Vadis CISG* 17. For further comments on the attitude of USA courts in acknowledging and obeying, or not, the Article 7(1) mandate, see Flechtner in Ferrari *Quo Vadis CISG* 91-102.

³²⁷ According to Magnus, "(German) courts and in particular the Federal Supreme Court try avoid any interpretation which merely imports the domestic solution into the CISG. This holds true even though the courts generally do not quote foreign case law on the CISG." See Magnus in Ferrari *CISG* 156. For illustrative cases, see Germany 2 April 2009 Supreme Court [www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf] (one decision); Germany 31 March 2008 Oberlandesgericht Stuttgart [<http://cisgw3.law.pace.edu/cases/080331g1.html>] (two decisions cited). See also Germany 30 June 2004 Supreme Court *Paprika case* [<http://cisgw3.law.pace.edu/cases/040630g1.html>] (last accessed 25-4-2013) (four foreign decisions and arbitral awards cited); and Germany 31 October 2001 Supreme Court, *Machinery case* [<http://cisgw3.law.pace.edu/cases/011031g1.html>] (last accessed 25-4-2013) (one decision).

³²⁸ For an overview on the attitude of other CISG contracting states in respect of foreign cases, see Ferrari in *CISG* 466-468; Ferrari in *Quo Vadis CISG* 18-19; Ferrari 2001 (1) *Unif L Rev* 203 207; Ferrari *Uniform Sales* 134 160; see also *UNCITRAL Digest* 42 Fn23; and Kritzer/Eiselen *Contract* §85:9.

³²⁹ Compliance with the uniformity requirement has been facilitated by the availability of CISG material mostly on the Internet as announced at the end of Section 4.2.5 above.

Instead, its success should be measured by the extent to which it is applied in compliance with the purpose of creating a uniform law “in action” (...). Thus, whether the CISG is a success depends – *inter alia* – on whether courts are taking into account the aforementioned mandate to interpret the CISG autonomously and in light of the need to promote uniformity in its application or whether they instead succumb to homeward trend, *i.e.*, the “natural” “tendency of those interpreting the CISG to project the domestic law (...) onto the international provisions of the Convention”.³³⁰

It is, of course, not easy for a court to transcend definitively its domestic viewpoint and become a new court that is no longer influenced by domestic law.³³¹ Though this may characterise some CISG nations,³³² the homeward trend influence is more noticeable in USA courts. In that country, the “backing home tendency” appears to have been established as a rule.³³³ One of the leading cases in this regard is the well-known *Delchi Carrier Sp A v Rotorex Corp* case.³³⁴ According to Flechtner, “The *Delchi Carrier* court’s statement (...) constitutes an open declaration that (American) court(s) (are) about to ignore the mandate of Article 7(1) CISG (...) and to fall victim

³³⁰ Ferrari in *CISG* 457; quoting Flechtner/Lookofsky “Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?” 2005 (9) *VJ* 199 203. See also Smits *CESL* 11; Ferrari 2009 (13) 1 *VJ* 15 22; Dimatteo et al *Sales* 2 and 174-176.

³³¹ Dimatteo et al *Sales* 3.

³³² For the case of Argentina and Israel, see, respectively, Taquela in Ferrari *CISG* 5 and Sharev in Ferrari *CISG* 185, for whom Argentinian and Israeli courts have shown a certain homeward trend in their rulings; and for the case of Switzerland, see Chappuis *CVIM* 183 188-189.

³³³ According to Flechtner,

CISG decisions from US courts have not exhibited a great deal of enthusiasm for consulting foreign authority, although acceptance of the technique appears to be increasing. (...) (Thus), the examples of laudable interpretative methodology in US case law on the CISG are the exceptions rather than the rule. (...) A disturbing number of US decisions that do not refer to foreign cases and commentary commit (not only) a methodological “sin on omission”, (...) but they are (also) guilty of an even more grievous “sin of commission”, (*i.e.*) the use of cases that apply US domestic sales and contract law in interpreting the Convention. (...) Worse yet, the courts asserting that UCC case law can guide them in interpreting the CISG actually put the idea in practice. (...) US decisions include flagrant and disturbing examples of the homeward trend in operation.

See Flechtner in Ferrari *Quo Vadis CISG* 93, 98, 103, 105 and 111; also supported by Levasseur in Ferrari *CISG* 313 and 314; Mazzacano *Reflections* 4 and 5. See also, Ferrari *CISG* 457-458; Ferrari 2009 (13) 1 *VJ* 15 26.

³³⁴ USA 6 December 1995 Court of Appeals for the Second Circuit *Delchi Carrier Sp A v Rotorex Corp* 71 F.2d 1024; commented on, *inter alia*, by Flechtner in Ferrari *Quo Vadis CISG* 103; Levasseur in Ferrari *CISG* 315; Ferrari in *CISG* 458. In the case, while discussing the Convention, the court held that “case law interpreting analogous provisions of Article 2 UCC, may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”

to the ‘homeward trend’”.³³⁵ Flechtner regrets that the *dictum* in the *Delchi Carrier* case has been repeatedly used in a number of subsequent American cases.³³⁶

Comparable to the USA, the coming into force of the CISG in Canada coincided with a number of legal reforms which caused the Convention to be held in low esteem. As result of this, instead of promoting the uniformity of the CISG, “Canadian courts typically invoked parochial common law language and concepts, and domestic case law.”³³⁷ Canadian courts also suffer from the “homeward trend sickness” in the same way as the American ones do. Similarly, in countries such as Australia, the advantage of using international sales law also appears not to be fully recognised.³³⁸ There, parties prefer “avoiding the CISG at the drafting stage by opting out within choice-of-law clauses”³³⁹ as provided by Article 6, which justifies the limited number of CISG cases decided in Australia.³⁴⁰ Notwithstanding the fact that

³³⁵ For that reason, Flechtner describes this ruling as a “grievous sin of commission”. See Flechtner in Ferrari *Quo Vadis CISG* 103.

³³⁶ For a list of cases that have relied to the *Delchi Carrier case*, see Levasseur in Ferrari *CISG* 315-318. But, USA *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova d'Agostino, Spa*, 144 F.3d 1384, 1388-1389 (11th Cir. 1998) which constitutes real progress under American jurisdiction. In this case, further to American jurisprudence, the eleventh circuit referred to CISG scholarly commentaries as well.

³³⁷ See Mazzacano Reflections 2; see also McEvoy in Ferrari *CISG* 37; Ferrari in *CISG* 415. In *Nova Tool & Mold v London Industries Inc.*, the first Canadian decision dealing with the CISG, for instance, the court ignored the Convention. See Canada 16 December 1998 Ontario Court (General Division) Case No. 5381; as commented on by McEvoy in Ferrari *CISG* 48, and Mazzacano Reflections 5. Ziegel describes this attitude as not being “a good precedent for the treatment of the Convention in future Canadian litigation,” which unfortunately seems continuing to happen.

³³⁸ An example of this is the *Castel Electronics case*, in which the claimant preferred to invoke the “warranties of fitness for purpose and merchantable quality implied by s 19(a) and (b) of the 1958 Sale of Goods Act,” instead of Article 35 CISG. See Australia 28 September 2010 Federal Court of Australia *Castel Electronics (Pty) Ltd v Toshiba Singapore (Pty) Ltd* [<http://cisgw3.law.pace.edu/cases/100928a2.html>] (accessed 1-8-2012). See also Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>; Zeller 2000 (12) 1 *Pace Int'l L Rev* 79 80.

³³⁹ See Spagnolo 2009 (10) *Melbourne Journal of International Law* 141 159-160; Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>; and Zeller 2000 (12) 1 *Pace Int'l L Rev* 79 80.

³⁴⁰ See Jacobs/Cutbush-Sabine /Bambagiotti 2002 (17) *Mealey's International Arbitration Report* 24 25; Zeller in Ferrari *Quo Vadis CISG* 303; Spagnolo 2009 (10) *Melbourne Journal of International Law* 141 160. For CISG Australian cases, see <http://www.cisg.law.pace.edu/cisg/text/casecit.html#australia> (last visited 9-7-2013), which lists 25 cases for Australia, eleven of them dating from 2008.

some courts lack enthusiasm for the CISG, the first criterion in Article 7(1) remains that its interpretation must be uniform, and avoids any reference to domestic law.

Lastly, Article 7(1) requires that the CISG is interpreted and applied in such a way that the observance of “good faith in international trade” is promoted.³⁴¹ The Convention does not, however, define what “good faith” is and that can pose a problem in achieving its ultimate goal. It should be remembered that the good faith duty is differently understood and perceived by different legal systems.³⁴² Many scholars contend that the inclusion of the good faith principle in the CISG was controversial in that its current version constitutes a compromise between civil law and Anglo-American common law families.³⁴³ But, considering its actual location in the Vienna Convention, it is clear that the principle of good faith has to be used by courts as an instrument to fill the gaps in the CISG.

Facing the absence of a specific explanation by the CISG, Viscasillas remarks that, “[According] to the dynamic approach of the CISG and its adaptation to present times, the observance of good faith in international trade ought to be considered a moral or ethical standard to be followed by businesspersons, projecting fundamental ethical values in international sales contracts.”³⁴⁴ Thus, for a Serbian court, in the *Mobile Sheer Baler* case, “the failure for seller to deliver the agreed machine to the buyer, while at the same time continuously promising that the delivery will occur and requesting further extensions of the time for delivery,”³⁴⁵ constitutes behaviour

³⁴¹ See Magnus in Felemegas *Interpretation* 45; Felemegas in *Interpretation* 13; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 127. For similar provision, see Article 1.7(1) PICC (2010).

³⁴² See comments in Section 2.3.6, and Section 3.3.4 above.

³⁴³ See Kritzer/Eiselen *Contract* §85:11 85-29; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 127; Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 119; Magnus <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> (accessed 15-4-2013).

³⁴⁴ Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 120. About the scope of the principle of good faith in the Vienna Convention, see Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html> chap 4.1.b.

³⁴⁵ Serbia 31 May 2010 Foreign Trade Court attached to the Serbian Chamber of Commerce *Mobile Sheer Baler case* [<http://cisgw3.law.pace.edu/cases/100531sb.html>] (last accessed 30-6-2012). See also Netherlands 25 February 2009 *District Court Rotterdam Fresh-Life International BV v Cobana Fruchtring GmbH & Co, KG* (failure to provide the text of general terms and conditions relating to the contract) [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090225n1.html>]; Italy

contrary to the principle of good faith. Similarly, the Italian Tribunale di Padova stated in the *Agricultural Products* case that,

[Filing] a claim in court just few days after the expiration of the deadline seeking the payment of the price, without having demanded of the buyer adequate explanations for the delay or having conceded him a period for “cure” by providing performance would be considered as contrary to the principle of good faith.³⁴⁶

According to the same court, however, the conduct of the seller cannot be regarded as unfair, “where the seller brings a claim before the judge after having waited at least six months for payment of the price, without the buyer having communicated any excuse in the meantime.”³⁴⁷

To sum this up, in the interpretation of the CISG any judge or arbitrator must be led by three standards: having respect to the Convention’s internationality; promoting its uniformity; and having regard to the observance of good faith.

4.3.6.3 CISG gap filling

The method of filling the gaps of the Vienna Sales Convention is defined by Article 7(2). In accordance with this provision, all matters not expressly settled in the Convention should be settled in conformity with the general principles on which the CISG is based. Subsequent to this rule, it is only in the absence of a general principle that judges and arbiters should resort to domestic contract law using conflict-of-law rules as tools.³⁴⁸

11 December 1998 Appellate Court Milan *Bielloni Castello v EGO Printer Device case* (failure of buyer to take delivery after additional times) [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981211i3.html>] (last accessed 30-6-2012).

³⁴⁶ See Italy 25 February 2004 Tribunale di Padova *Agricultural Products case*, (application of good faith standards).

³⁴⁷ Ibid.

³⁴⁸ See Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=1; Wethmar-Lemmer PIL 188; see also UNCITRAL *Digest* 43 §10. The ruling in the American *Forestral Guarani SA v Daros International, Inc. case* is very enlightening in this regard. In the case, in order to resolve parties’ dispute relating to the evidence of a contract between a party from a contracting state and another located in an Article 96 declaration country, the US Federal Appellate court turned first to the CISG itself. It found that the CISG does not “expressly settle” the question of whether a “breach-of-contract claim” is sustainable in the absence of a written

As Felemegas has said, “the aim of Article 7(2) is not different from that of the interpretation rules found in Article 7(1). (...) Article 7(2) and gap-filling is directly connected to Article 7(1) and its interpretation.”³⁴⁹ This is justified, on the words of Wethmar-Lemmer, by the fact that “The question of whether or not a gap exists in a certain instance is one of interpretation.”³⁵⁰ In particular, Article 7(2) requires that CISG provisions themselves constitute the primary source for interpretation. Thus, where the CISG is silent on one or another issue, the second step will consist in resorting to general principles on which the Convention is constructed.

Scholars have established a list of general principles considered as the foundation of the CISG.³⁵¹ These include principles with general applicability such as those of party autonomy,³⁵² good faith,³⁵³ freedom of form and evidence,³⁵⁴ and *pacta sunt servanda*,³⁵⁵ firstly; and, secondly, those resulting from some specific issues. Among principles related to particular CISG matters, one may mention, in Part II, the reception principle,³⁵⁶ and the duty to preserve the contract,³⁵⁷ and, in Part

contract. Afterwards, the court turned to Article 7(2) which requires considering the CISG “general principles” in filling the gaps, but these also failed to solve the matter. Given that neither the CISG nor its general principles were of certain help, the court, finally, resorted to American PIL rules. See USA 21 July 2010 Federal Appellate Court [3rd Circuit] *Forestal Guarani SA v Daros International, Inc.* [<http://cisgw3.law.pace.edu/cases/100721u1.html>] (last accessed 30-6-2012). See also, Italy 25 February 2004 Tribunale di Padova *Agricultural Products case* (regulation of problems related to set-offs).

³⁴⁹ Felemegas in *Interpretation* 13; see also Ferrari 2003 (7) *VJ* 79; Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=yes; and Magnus <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>.

³⁵⁰ Wethmar-Lemmer PIL 195.

³⁵¹ For an exhaustive list of CISG general principles, see Magnus <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> (26 general principles); Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=yes (thirteen general principles); see also Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 135-139; Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 137 §58; Kritzer/Eiselen *Contract* §85:14 85-50 to 85-64; Ferrari 2003 (7) *VJ* 63 82; Lookofsky 2005-2006 (25) *JL & Com* 87. On the hierarchy and the source of the Convention’s general principles, see Wethmar-Lemmer PIL 204-222.

³⁵² Cf. Article 6 CISG.

³⁵³ Cf. Article 7(1) CISG.

³⁵⁴ Cf. Articles 11 and 29 CISG.

³⁵⁵ Cf. Articles 30, 53, 71-73 and Article 79 CISG.

³⁵⁶ Cf. Article 24 CISG.

³⁵⁷ Cf. Article 19(2) and Article 21(2).

III, the principle of cooperation.³⁵⁸ It should be noted that gaps to which Article 7(2) refers are not concerned with matters excluded from the sphere of application of the CISG;³⁵⁹ rather it deals with issues governed by the CISG, but not expressly resolved by it.³⁶⁰

It is admitted, similarly, that other sources of law and comparative law may sometimes be useful in interpreting the CISG.³⁶¹ A comparative approach between the CISG and other international instruments, such as the PICC or PECL, could, moreover, be undertaken.³⁶² Insofar as the PICC are concerned, they offer that opportunity as they state, in the Preamble, that the Principles “may be used to interpret or supplement international uniform law instruments”. Their use should be relevant with respect to the Vienna Convention then.³⁶³ Ferrari says, however, that it would be wrong to confuse the PICC and PECL with the general principles as stated by the Convention.³⁶⁴ Article 7(2) CISG clearly refers to “the general principles on which the CISG is based”, but not to external principles.³⁶⁵ In this sense, external

³⁵⁸ Cf. Articles 32(3), 48(2), and 60. For further principles and cases in which they were applied, see UNCITRAL *Digest* 43 to 46 which count seventeen CISG general principles.

³⁵⁹ Cf. Articles 4 and 5 CISG; Lookofsky 2005-2006 (25) *JL & Com* 87 89; Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=yes.

³⁶⁰ For the distinction between *internal* and *external* gaps, see Ferrari 2003 (7) *VJ* 63 79; Sica 2006 (1) *NJCL* 1 3; Janssen/Kiene http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595989&download=yes. Concerning matters not governed by the CISG such as the validity of contract, personal injury, they can only be resolved by non-convention rules and principles. See Lookofsky 2005-2006 (25) *JL & Com* 87 90; Lookofsky 1991 (39) 2 *Am J Comp L* 403 and 407.

³⁶¹ See Eiselen 2005 (38) *CILSA* 32 33; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 139. In one case, as the CISG does not prescribe the interest rate, a Slovak court based a decision on Article 4 parts 1 and 2 of the 1980 Rome Convention. See Slovak Republic 11 October 2010 District Court in Michalovce [<http://cisgw3law.pace.edu/cases/101011k1.html>] (last accessed 30-6-2012); see also Italy 11 December 1998 Appellate Court Milan *Bielloni Castello v EGO Printer Device* case.

³⁶² See Eiselen 2005 (38) *CILSA* 32 33; Felemegas in *Interpretation* 31; Bonell *Contract Law* 228; UNCITRAL *Digest* 46 §§33-35.

³⁶³ PICC (2010), Preamble 5th Paragraph; see for comments, Sica 2006 (1) *NJCL* 1; Ferrari 2003 (7) *VJ* 63 82; Bonell *Contract Law* 231 and 317; Bonell *UNIDROIT* 30; Bonell *Commercial Contracts* 13; Wethmar-Lemmer *PIL* 210-214. For an illustration, see Belgium 19 June 2009 Court of Cassation [Supreme Court] *Scafom International BV v Lorraine Tubes SAS* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090619b1.html>] (last accessed 30-6-2012). See also cases quoted in UNCITRAL *Digest* 46 §§33-35; and Bonell 2010 (17) *Australian International Law Journal* 177.

³⁶⁴ Ferrari 2003 (7) *VJ* 63 89.

³⁶⁵ *Ibid.*

principles could be used only to corroborate a solution reached by applying the rules of the CISG.

4.3.7 Conclusion on the Ambit of the CISG

The sphere of influence of the Vienna Convention is dealt with in Articles 1 to 6 by which the CISG governs international sales contracts concluded between parties established in contracting states primarily. It also applies to contracts concluded between parties located in non-contracting states when PIL rules lead to the application of the law of a CISG member state. Despite its relevance in international law making, the CISG does not claim to solve all matters which may relate to a sales contract. Its operational scope is limited to the regulation of the formation of sales contracts and to parties' rights and obligations resulting from the sale. Concerning its interpretation, Article 7 directs courts and arbiters to be aware of the international character of the CISG; to promote uniformity in its application; and to observe good faith in international trade. In addition, when there is a matter not expressly resolved by the CISG, the same provision invites judges and arbitrators to consult first the general principles of the Convention. They could take recourse to domestic law only as a last resort when no general principle is identified.

In conclusion, with its ruling and uniform application, the CISG has gained such a prestige that to date it is used as a source of inspiration for modernising domestic contract laws as discussed in the following section.

4.4 The CISG as a Model for the Improvement of National or Regional Sales Laws

4.4.1 Introduction

Basically, there is unanimity about the value of CISG rules and principles. That is why the Convention is currently the most preferred instrument used to improve

contract laws, whether on a domestic, regional, or an international level.³⁶⁶ To illustrate this with the case of European countries, Troiano makes it clear that “the existing state of EU legislation shows that many EU enactments have been, to a greater or lesser extent, influenced by the CISG.”³⁶⁷ Though the CISG has had a strong influence upon European sales law and the harmonisation of business law in Africa through OHADA, its effect seems to be limited in Southern African countries and in the DRC as explained below.

4.4.2 Improvement within the European Union and Beyond

4.4.2.1 The CISG as an inspirational pattern for EU legislation

The influence of the Vienna Convention in Europe can be seen in two areas, viz. with regard to domestic laws of each country, and in relation to the European Union as an independent institution. It is acknowledged that the EU has made constant efforts to harmonise certain areas of contract law in the past few years. The most important area of intervention of the Community has been consumer protection law where several directives have been adopted, including the 1999 Consumer Sales Directive.³⁶⁸ As far as the latter is concerned, there is considerable consensus that it took its basic model from the CISG.³⁶⁹ The Vienna Convention was privileged, in

³⁶⁶ See Kröll/Mistelis/Viscasillas *UN Convention* 10; Schwenzler/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf; Ferrari in *CISG* 471; Magnus in *CISG vs.* 101.

³⁶⁷ Troiano in Ferrari *CISG* 345; see also Huber Sales Law 937 944-945. This large influence is certainly owing to the number of European States that have ratified the CISG; means 23 out of 27, excepted Ireland, Malta, Portugal, and the UK.

³⁶⁸ Those Directives include: the Council Directive 85/577/EEC of 20 December 1985 on the protection of the consumer in respect of contracts negotiated away from business premises (1985 *OJL* 372/31); the Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (1997 *OJL* 144/19), as amended by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (2005 *OJL* 149/22); the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; and the Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1999 *OJL* 171/12), hereafter the Consumer Sales Directive.

³⁶⁹ See, among others, Kröll/Mistelis/Viscasillas *UN Convention* 10 Fn40; Magnus in *CISG vs.* 101; Troiano in Ferrari *CISG* 348; Huber Sales Law 937 944; Lookofsky in Ferrari *CISG* 128;

the words of Troiano, “because it offered the model for a successful compromise between different European legal systems.”³⁷⁰ The author specifies that that choice was even more significant if one bears in mind the fact that the Consumer Sales Directive “is the most important European provision in the field of the law of contract, which affects the very heart (...) of the ‘classical’ law of contract and obligations.”³⁷¹

Similarly, the UN Sales Convention was certainly one of the sources of inspiration of the PICC. This is evidenced by the fact that these were enacted at the time that the CISG was already in effect.³⁷² In the opinion of Schwenger and Hachem, “when the first set of PICC was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the remedy mechanism.”³⁷³ Such is also Bonell’s view for whom “such an important and universally applied instrument as the CISG was (...) an obligatory point of reference”³⁷⁴ in the PICC’s drafting process. The same is true with regard to the PECL which were promulgated in 1999.³⁷⁵ Concerning them, Lando highlights that its working groups obviously drew on a wide range of legal material from all over the world. Regarding the CISG, in particular, it “has had a substantial influence on the terminology and the rules relating to the formation, contents, performance, and

Magnus in Ferrari *CISG* 158-159; Witz in Ferrari *CISG* 139; Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf>; and Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>.

³⁷⁰ Troiano in Ferrari *CISG* 349.

³⁷¹ Ibid.

³⁷² See Sica 2006 (1) *NJCL* 1 10; see also Kröll/Mistelis/Viscasillas *UN Convention* 10; Magnus in *CISG vs. 101*. The CISG entered into force in January 1988 while the first version of the PICC was published in 1994.

³⁷³ Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf>.

³⁷⁴ Bonell *Contract Law* 48 and 305; see also Kröll/Mistelis/Viscasillas *UN Convention* 11; and Zeller 2002 (14) *Pace Int’l LR* 163.

³⁷⁵ The PECL was drafted by the Commission on European Contract Law, known as the Lando Commission after President Ole Lando. Parts I and II of the PECL were published in 1999 and deal with the formation of contract, validity, performance, non-performance, and remedies. Part III, published in 2002, deals with assignment, assumption of debts, set off, prescriptions, and conditions. The PECL cover civil and commercial contracts within the EU. See Kröll/Mistelis/Viscasillas *UN Convention* 11.

non-performance of the PECL (...).³⁷⁶ Owing to such a close influence, it is, therefore, predictable that all of the CISG, PICC, and PECL provisions are similar. Nevertheless, the two newer instruments go further than the CISG as they are more detailed; they have tried to develop a number of CISG provisions, and have filled its gaps.³⁷⁷

During the most recent decade, the European Commission has initiated, in the field of contract law, a project leading to the preparation of a common frame of reference. That project was under way ever since the publication by the European Commission of an Action Plan in 2003. It was finally implemented in 2008 when “a large international network of legal scholars published an Interim Outline Edition of a Draft Common Frame of Reference (DCFR)³⁷⁸ which was followed (a few months after) by the final Common Frame of Reference (CFR).³⁷⁹ As in the case of its predecessors, the CFR is also closely connected to the CISG. Von Bar puts it that international instruments used in the drafting process of the CFR have included the 1980 Vienna Sales Convention in addition to the PECL and PICC.³⁸⁰

Almost all European instruments were perceived, at the outset, as being focused mostly on the harmonisation of consumer law. Recently, the EU firmly

³⁷⁶ Lando 2005 (53) 2 *Am J Comp L* 379 81; see also Schwenger/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e_5b746.pdf; Kröll/Mistelis/Viscasillas *UN Convention* 11; Magnus in *CISG vs.* 101; and Zeller <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

³⁷⁷ See Kröll/Mistelis/Viscasillas *UN Convention* 11.

³⁷⁸ According to Sagaert, the DCFR is a result of work done over a long period of time by two institutions, the Study Group on a European Civil Code (the Study Group), and the Research Group on Existing EC Private Law (the Acquis Group). Its Outline Edition constitutes a basis for the further development of European Private Law. See Preface to Sagaert/Storme/Terryn *DCFR v*; see also Kröll/Mistelis/Viscasillas *UN Convention* 11.

³⁷⁹ Hesselink 2009 (83) *Tul L Rev* 919; see also Von Bar et al *Principles* 3; Kröll/Mistelis/Viscasillas *UN Convention* 11. Hesselink explains that,

The reasons the Commission stated that the European Union needed a CFR on contract law were that such a document could contribute to making (...) the existing European Community private law in the area of contract law more coherent and that it could provide a basis for a possible optional European code of contract law. (...).

See Hesselink 2009 (83) *Tul L Rev* 919 955; see also House of Lords Report DCFR 19 §49. The CFR is a comprehensive instrument which covers almost the whole patrimonial law including contract law in general, and the law of sale in particular.

³⁸⁰ Von Bar et al *Principles* 11 Fn13 & 18 §25; see also Hesselink 2009 (83) *Tul L Rev* 919 955 & 959; Magnus in *CISG vs.* 101.

extended the scope of European contract law to cover also commercial sales contracts *via* a new instrument called the “Common European Sales Law” (CESL) also influenced by the CISG.³⁸¹ In the same way that the CISG has had an impact upon EU legislation, it has without doubt influenced European domestic sales legislation as well.

4.4.2.2 Impact of the CISG upon European national laws

In order to evaluate the effect of the CISG on European domestic sales law, it is not necessary for the Convention to have influenced the domestic legislation of every, or even most countries. A sample would be enlightening. In detail, since its coming into being, the CISG has been taken as a model by individual states, or groups of states, to reform their domestic sales laws.³⁸² On the European continent, one may mention, in particular, the Scandinavian states,³⁸³ Estonia,³⁸⁴ the Netherlands,³⁸⁵ and Germany.³⁸⁶

³⁸¹ See Magnus in *CISG vs.* 101; see also Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels October 2011, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF> (accessed 5-7-2012). For the relationship between the CESL and the CISG, see Kornet CESL 1; Smits CESL 4; and Magnus in *CISG vs* 1ff.

³⁸² See Ferrari in *CISG* 47; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>; Kröll/Mistelis/Viscasillas *UN Convention* 10-11.

³⁸³ After having adopted the CISG in 1980, almost all Scandinavian countries established a Working Group with the task of preparing proposals for new domestic Sales of Goods Acts. Subsequently, Finland adopted a new Sales of Goods Act in 1987, Norway its in 1988, and Sweden its in 1990. These Acts relied heavily on the CISG albeit without its Part II because of Scandinavian countries Article 92(1) declarations. See Lookofsky in Ferrari *CISG* 127; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>; and Schwenger/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf.

³⁸⁴ With the Law of Obligations Act of 28 September 2001 (entered into force on 1 July 2002), Estonia has been known as one of the most reform-inclined countries with reference to the CISG. See Kull <http://juridicainternational.eu/reform-of-contract-law-in-estonia-influences-of-european-private-law> (last accessed 2-7-2012); see also Ferrari in *CISG* 475; Zeller 2002 (14) *Pace Int'l LR* 163 177; and Schwenger/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf 125.

³⁸⁵ See New Dutch *Burgerlijk Wetboek* adopted in 1992; quoted by Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html> Fn13.

³⁸⁶ Concerning sales laws in other European countries, they have been indirectly influenced by the CISG *via* the implementation of the Consumer Sales Directive. For an overview of the CISG's

Insofar as Germany is concerned, the initiative to reform the German law of obligations was undertaken from 1978. It was, among other reasons, necessary to adapt the law of obligations to international Conventions such as the 1964 Hague Sales Laws. Instead, the Drafting Commission “regarded the general concept of the CISG as convincing and extended it, therefore, with few exceptions to the general law of obligations.”³⁸⁷ In Germany, the influence of the Convention was not limited to reform discussions only; it was rather extended to the final outcome of the code.³⁸⁸ Because of this impact, Bonell describes the CISG as a “fertile soil” on which the 2002 reform of the German BGB’s general law of obligations is planted.³⁸⁹

Beyond the European continent, the CISG has also impacted powerfully on the civil codes of countries such as Russia³⁹⁰ and China.³⁹¹ China’s great importance for international trade is indisputable. As one of the eleven original CISG contracting states, it also gave much attention to the Vienna Convention in its process of law reform. According to a commentator, drafters of the Chinese civil law “have

impact on other European countries legislators, see related reports in Ferrari *CISG*; see also Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>; and Schwenzer/Hachem http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf 124 *in fine*.

³⁸⁷ See Magnus in Ferrari *CISG* 158 and 159; Kröll/Mistelis/Viscasillas *UN Convention* 10; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>.

³⁸⁸ See New German sales law contained in the *Bürgerliches Gesetzbuch* (BGB) (German Civil Code), as amended by the *Gesetz zur Modernisierung des Schuldrechts* of 2002.

³⁸⁹ See Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html> 6 Fn14; see also Magnus in Ferrari *CISG* 159-160; Ferrari in *CISG* 476; and Magnus in *CISG vs.* 101. From an historical perspective, the 2002 reform is considered as the BGB’s most important revision since the 1900s when the German civil code entered into force. The new version of the BGB has adopted a number of CISG basic concepts and formulations. Changes introduced by it apply to both civil and commercial contracts.

³⁹⁰ As regards similarities between the CISG and the Russian Civil Code of 1994, see Talapina in Ferrari *CISG* 258 & 263; Ferrari in *CISG* 476. Commentators have argued that with the modern CISG’s impact on Russian civil code, the law now offers a stable legal environment to traders. See Simons *Russian Law* 7 and 83; Oda *Commercial* 281; and Orlov *Business* 138.

³⁹¹ When China ratified the CISG in 1986, there was no codified contract law or general civil law in China. Suddenly, before ratification, China promulgated three important laws (the PRC Economic Contract Law of 13 December 1981, the Foreign-Related Economic Contract Law of 21 March 1985, and the PRC General Principles of Civil Law of 12 April 1986, replaced in October 1999 by the Contract Law of PRC) to prepare the ratification. See Yang <http://cisgw3.law.pace.edu/cisg/biblio/yang2.html>; Huixing *Draft Code XVII-XIX* & 221; Zhang *Contract* 7; Li *Remedies* 3; Shaouhi 2008 *Unif L Rev* 3; and Guanjian/Muchi 2011 (7) 1 *Journal of Private International Law* 179.

consulted and absorbed rules of the CISG (...).”³⁹² The same tendency is to some extent also observed under OHADA law.

4.4.3 Harmonisation of Sales Law in Africa – the case of OHADA law

As was said in section 2.2.7.1, OHADA is a regional organisation founded in 1993 between fourteen West and Central African countries to harmonise their legal systems in the field of business law. From fourteen original members, the OHADA Treaty has currently been adopted by seventeen countries, the DRC being the last nation to adopt it.³⁹³ Only three of those countries, namely Benin, Gabon, and Guinea,³⁹⁴ are contracting states to the CISG. The indifference of the OHADA member states towards the CISG confirms Ferrari’s opinion according to which, “some countries simply favour a more regional – rather than the CISG’s global – approach to the unification of sales law, as they believe that this will benefit intra-regional commerce more.”³⁹⁵ Is the CISG hostile to regional uniform sales laws? The answer is obviously negative because there are specific CISG provisions which facilitate its peaceful cohabitation with regional uniform sales laws as discussed in section 4.5.5 below. For that reason, OHADA member states should not have to be afraid of their acceptance of the CISG.

With regard to the harmonisation issue, OHADA has adopted a number of Uniform Acts including the Commercial Act, first enacted in 1997 and revised in 2010. The Commercial Act is the most important statute in connection with commercial sales

³⁹² See Han in Ferrari *CISG* 71 and 84; see also Li *Remedies* 3 where the author argues that many articles of the Chinese Foreign-Related Economic Contract Law read like duplicates of the CISG.

³⁹³ See status on OHADA website available at: <http://www.ohada.com/etats-membres.html>; see also Feneon *Arbitration* 53; Magnus in *CISG vs 4*.

³⁹⁴ The CISG entered into force in Guinea on 1 February 1992; in Gabon on 1 January 2006; and is in effect in Benin from 1 August 2012. See CISG status at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, or at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>; see also Magnus in *CISG vs 4*; and Ferrari *OHADA* 79 81.

³⁹⁵ Ferrari in *CISG* 415, where the author deplores, in particular, the attitude of the OHADA member states against the CISG.

matters. Its Book VIII is based primarily on the CISG.³⁹⁶ On the words of Magnus, already evoked elsewhere,³⁹⁷ the Commercial Act provides for rules on commercial sales which widely copy the CISG. With the influence of that Commercial Act, a modified CISG has been made the sales law among and in the OHADA countries.³⁹⁸ The commercial act is described as a CISG-modified version because there are some variances between it and the provisions of the Vienna Sales Convention. To give a few examples of this, pursuant to Articles 258 and 259 UAGCL, the buyer's obligation to give notice of any non-conformity of the goods is stricter than it is in Articles 38 and 39 CISG. Where the CISG requires the buyer to give notice in a "reasonable time", the Act provides a monthly or yearly delay consistent with the time the lack of conformity was discovered. The same may be said in respect of the Commercial Act silence vis-à-vis the guarantee against intellectual property rights.³⁹⁹

It is noted that the UAGCL rules govern both national and international sales transactions. In order to focus on international sales contracts, the OHADA Council of Ministers, following its meeting convened in Brazzaville in February 2002, requested UNIDROIT to assist it in preparing a novel business contracts project based on the PICC. Fontaine was appointed in 2003 as the Expert responsible for that project.⁴⁰⁰ After consulting legal communities in nine OHADA member states, Fontaine conceived a preliminary draft on contracts law, the so-called *Avant-projet d'Acte Uniforme OHADA sur le Droit des Contrats*.⁴⁰¹ Fontaine confirms that very

³⁹⁶ Fontaine *Avant-Projet* 14; Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf>; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>; Castellani 2008 (1/2) *Rev dr unif* 115 119; Ferrari OHADA 79 81-82; Magnus in *CISG* vs. 101.

³⁹⁷ See Section 2.2.7.1 above.

³⁹⁸ Magnus in *CISG* vs 4.

³⁹⁹ Cf. Article 42 CISG which does not have equivalent in the UAGCL. For further conflicting provisions between Book VIII of the UAGCL and the CISG, see Coetzee/De Gama 2006 (10) 1 *VJ* 15 24.

⁴⁰⁰ Fontaine is Emeritus Professor, former Director of the Centre for the Law of Obligations, Law Faculty, Catholic University of Louvain (Belgium), and member of the UNIDROIT Study Group for the preparation of the PICC. See Fontaine 2008 (1/2) *Unif L Rev* 633; Fontaine 2008 (1/2) *Rev dr unif* 203; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>.

⁴⁰¹ See English version of the OHADA Draft Uniform Act on Contract Law of September 2004 (the Draft Contract Law Act); prepared by the UNIDROIT Secretariat in Collaboration with Prof

many of the provisions of the Draft Uniform Act on Contract Law are almost identical to their equivalent PICC provisions.⁴⁰² Because the PICC are built on the CISG, there is ground to assume the existence of a strong influence of the CISG on the DUACL.⁴⁰³

4.4.4 The CISG and Southern African Countries

The area known as “Southern Africa” includes countries such as Angola, Botswana, Lesotho, Malawi, Namibia, Mozambique, The Republic of South Africa, Swaziland, Zambia, and Zimbabwe. In most of these countries, the law of sale governing both national and international sales contracts has come down in a non-codified form from Roman law *via* Roman-Dutch law.⁴⁰⁴

Though most Southern African countries belong to the Roman-Dutch law legal system, there is, however, no unified sales law in that region.⁴⁰⁵ As several commentators have observed, each country has its own legal traditions, its own

Fontaine M, July 2007 in 2008 (13) 1/2 *Unif L Rev* 593-631. Translated as the “Draft Uniform Act on Contract Law”, hereafter DUACL, the *Avant-projet* contains 213 articles divided into thirteen chapters. It consists of a complete law of contracts that regulates the formation of contracts, parties’ rights and obligations, as well as remedies for breach of contracts. See Fontaine 2008 (13) (1/2) *Rev dr unif* 203 205; Sossa 2008 (13) (1/2) *Rev dr unif* 339 346; Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html> Fn105. The process of its enactment has been slowed down, but many of its provisions were incorporated in the revised version of the Commercial Act in 2010. See Fontaine Avant-Pojet 14 14; see also Articles 210 to 218 UGCL.

⁴⁰² Fontaine 2008 (13) (1/2) *Rev dr unif* 203 205; Fontaine 2008 (13) (1/2) *Unif L Rev* 633 644; Fontaine Avant-Pojet 12-14; see also Meyer 2008 (13) (1/2) *Unif L Rev* 393 394; and Date-Bah 2004 (2) *Rev dr unif* 269.

⁴⁰³ Fontaine Avant-Pojet 14; Castellani 2008 (13) (1/2) *Rev dr unif* 115 119; see also Bonell *Contract Law* 48 and 305; Sica 2006 (1) *NJCL* 1 10; Zeller 2002 (14) *Pace Int’l LR* 163; Schwenger/Hachem http://ius.unibas.ch/uploads/publics/6248/201109131_64502_4e6f6c6e5b746.pdf. An example of this is Article 208 of the Draft Uniform Act similar to Article 11 CISG.

⁴⁰⁴ See Section 3.2.2 above.

⁴⁰⁵ Eiselen 1999 (116) *SALJ* 323 324. It seems that the idea of harmonisation of law in the Southern African region was recently invoked at the “First African Conference on International Commercial Law” held in Doula (Cameroon) from 13 to 14 January 2011. For papers presented at that Conference, see <http://www.acicol.com/Downloads-85> (accessed 8 October 2013); see also Fontaine Avant-Pojet 14.

system of legal thought, and its own method of making laws.⁴⁰⁶ This situation led Ng'ong'ola to argue that the absence of codified rules in the Southern African region may contribute to disagreements over the precise scope and content of some of the key rules and principles of law.⁴⁰⁷ Owing to the absence of a harmonised body of law in the area, likewise, businesspersons involved in international contracts are faced with as many legal systems as they have trading partners.⁴⁰⁸ Such a situation creates legal insecurity and uncertainty that may slow down international transactions. As Ndulo has suggested, the ratification of the Vienna Sales Convention by Southern African countries “would (obviously) unify the law relating to the international sale of goods within the region and between the region and the rest of the world.”⁴⁰⁹

It is a good thing that two of those countries, namely Lesotho and Zambia,⁴¹⁰ have already consented to the CISG. When formulating comments about the accession of Lesotho, Lehmann said,

Lesotho, a least developed country, was, *somewhat ironically*, the first country to have ratified the Convention. (...) Lesotho's economy did not experience increased volumes of trade following the Convention's entry in force in January 1988. Instead, the pattern of fluctuating growth and decline which existed before the Convention's entry into force, continued thereafter.⁴¹¹

Lehmann's ironic comments are not surprising as she is one of those who advocate South African non-ratification of the CISG.⁴¹² In spite of Lehmann's discouraging opinion, given that Zambia and Lesotho are by this time CISG member states, the Vienna Convention may automatically or indirectly apply to contracts concluded between parties established in the Southern African zone.⁴¹³

⁴⁰⁶ Saurombe 2009 (21) *SA Merc LJ* 695 698; Ndulo 1987 (3) 2 *Lesotho LJ* 127 129; Sanders 1981 (14) *CILSA* 328.

⁴⁰⁷ Ng'ong'ola 1995 (7) *RADIC* 225 228.

⁴⁰⁸ Eiselen 1999 (116) *SALJ* 323 324; Ndulo 1987 (3) 2 *Lesotho LJ* 127 129.

⁴⁰⁹ Ndulo 1987 (3) 2 *Lesotho LJ* 127 129; see also Ng'ong'ola 1995 (7) *RADIC* 255 256; Ng'ong'ola 1992 (4) *RADIC* 835.

⁴¹⁰ Both Lesotho and Zambia are part of the eleven original CISG member nations in which the Convention entered into force on the 1st of January 1988.

⁴¹¹ Lehmann 2006 (18) *SA Merc LJ* 317 321-322.

⁴¹² *Ibid* 328.

⁴¹³ Cf. comments in Sections 4.3.3 and 4.3.4 above.

With regard to South Africa, in particular, it is notable that this country has not yet ratified the CISG despite an abundant call from the academic community for its adoption.⁴¹⁴ In effect, though the country did not participate in the CISG drafting process, early in 1984 the Department of Industries and Commerce requested the Association of Chambers of Commerce of South Africa to comment on the desirability of South African accession to the Convention.⁴¹⁵ The importance of such ratification became more pertinent in 1994 when South Africa recovered its place on the international scene. Then, the Department of Trade and Industry promoted the idea of adopting the CISG as a method of harmonising international trade. Unfortunately until now nothing has been finalised, and one is given the impression that the CISG project has lost priority.⁴¹⁶

Even so, the need for South Africa to adopt the CISG remains very strong.⁴¹⁷ This is most particularly justified by its leadership in the economic cohesion of Sub-African states through SADC. In passing, SADC is an intergovernmental organisation that aims to promote, among other things, the “economic growth and socio-economic development through efficient production systems (...) so that the region emerges as a competitive and effective player in international relations and the world economy.”⁴¹⁸ But, the existence of multiple laws in the SADC zone is not likely to achieve this purpose. Of course, two of its member states have ratified the Convention, which “not only helps to harmonise the region, but also brings these states in line with the majority of trading states abroad.”⁴¹⁹ Simply, as long as the SADC has not yet acquired a harmonised legal system similar to OHADA Uniform

⁴¹⁴ See, among others, Van Niekerk/Schulze *Trade* 108; Oosthuizen *Rights* 182; Eiselen 2007 (19) *SA Merc LJ* 14 and 25; Eiselen 1999 (116) *SALJ* 323 369; Hugo 1999 (11) *SA Merc LJ* 1 27; Krieger 1989 (106) *SA LJ* 184 190; but Lehmann 2006 (18) *SA Merc LJ* 317 328.

⁴¹⁵ See the Johannesburg *Chamber of Commerce Bulletin* of 13 February 1984 5, in Barton 1985 (1) *CILSA* 21.

⁴¹⁶ See Van Niekerk/Schulze *Trade* 108; Oosthuizen *Rights* 4; Eiselen 2007 (19) *SA Merc LJ* 14.

⁴¹⁷ See Castellani 2009 (13) 1 *VJ* 241 246 Fn27; Eiselen 2007 (19) *SA Merc LJ* 14 25; and Eiselen 1999 (116) *SALJ* 323 369.

⁴¹⁸ See Article 5.1 of the SADC Treaty of 17 August 1992, as amended on August 2001; see also Saurombe 2009 (21) *SA Merc LJ* 695 697; Oosthuizen *Rights* 4; and Eiselen 2007 (19) *SA Merc LJ* 14.

⁴¹⁹ Oosthuizen *Rights* 5.

Acts, there is a legal uncertainty between SADC countries which could be avoided if all of them were to ratify the CISG.

Moreover, the failure of South Africa to ratify the CISG not only compromises one of the SADC's aims, but it also causes certain gaps in South African law. So, as has been mentioned earlier, the case for its ratification persists. Key reasons supporting its ratification of the CISG include the following:

- a) the wide acceptance of the CISG around the world and the fact that states which have adopted the CISG represent South Africa's major trade partners;
- b) the growing rate of acceptance of the CISG, both internationally and in Africa;
- c) the fact that states which have ratified the CISG represent every continent, every major legal background, and the main political systems in the world; and
- d) the fact that the CISG may already be applicable to contracts entered into by South African entities by virtue of the principles of private international law.⁴²⁰

Amongst the above listed reasons, the last one is the most relevant. In fact, although South Africa has not yet ratified the CISG, it may now apply there through the operation of conflict-of-law rules pursuant to Article 1(1)(b). Thus, South African parties have to consider the CISG in their negotiations to prevent being surprised by its application to their contracts.

After having discussed the Vienna Convention's impact on OHADA law and Sub-African countries attitude *vis-à-vis* the CISG, the following section focuses on its proposal for the DRC.

4.5 The CISG – a Suggestion for the DRC

4.5.1 Introduction

This section firstly discusses the DRC's participation in the 1980 Vienna Sales Conference. It then briefly reviews the country's comments on the CISG, and

⁴²⁰ See Oosthuizen Rights 5; Hugo 1999 (11) *SA Merc LJ* 1 27, finding advice in the New Zealand Law Commission Report. <http://www.cisg.law.pace.edu/cisg/wais/db/Arts/newz2.html> (last accessed 9-11-2012). For an exhaustive list of reasons supporting South Africa's accession to the CISG, see Eiselen 1999 (116) *SALJ* 323 339-356; supported by Oosthuizen Rights 20-36.

outlines the means by which the CISG should be invoked in the DRC though the Congo has not yet ratified it. The last section tries to demonstrate that Congolese adherence to the OHADA community is not incompatible with probable adoption of the CISG.

4.5.2 Background to the Involvement of the DRC in the CISG Drafting Process

The DRC joined the UN on 20 September 1960.⁴²¹ It was elected a member of UNCITRAL on 30 October 1967.⁴²² So, the DRC participated actively in the CISG drafting process.⁴²³ Normally, the Congolese term of office in UNCITRAL would expire the day before the opening of the 1980 annual session.⁴²⁴ That event did not prevent the DRC from playing a major role during the Vienna Diplomatic Sales Conference. The Congolese representative, in fact, was elected as one of the twenty-two Vice-presidents of the Conference.⁴²⁵ In addition, the DRC was part of the Convention's Drafting Committee together with fourteen other UN member nations.⁴²⁶ At the end of the Vienna Diplomatic Conference, likewise, the country approved the Convention's final text and signed the Final Act of the Conference during its twelfth Plenary Session.⁴²⁷

⁴²¹ See http://www.uncitral.org/uncitral/about/origin_history.html (last visited 27-4-2013).

⁴²² See CISG Report on the work of its first session (1968), *Official Records of the General Assembly, Twenty-third Session, Supplement No.16 (A/7216)*, in UNCITRAL 1970 (I) YB 72.

⁴²³ Throughout sessions which lead to the adoption of the 1978 Draft CISG, the Congolese delegation was led by Mr Vincent Mutuale, First Secretary Permanent Mission, assisted by Mr Gérard Balanda as alternative Representative. See UNCITRAL 1970 (I) YB 84.

⁴²⁴ It should be remembered that UNCITRAL members are elected for terms of six years, the terms of half of them expiring every three years. See UNCITRAL 1977 (VIII) YB 11, and comments in Section 4.2.4.1 above.

⁴²⁵ See Final Act (A/CONF/97/18), in UNCITRAL 1980 (XI) YB 149.

⁴²⁶ These include the following: Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libya, Republic of Korea, Singapore, the Union of Soviet Socialist Republics, the UK, and the USA. See UNCITRAL 1980 (XI) YB 150; see also Flechtner *Honnold's Uniform Law* 11 Fn13.

⁴²⁷ See Signature of the Final Act of the Convention (Agenda item 12) (A/CONF.97/18), in UN Conference on the CISG, *Official Records* 234. <http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> (last visited 27-4-2013). That Final Act was signed by two Congolese representatives.

Despite the eloquent involvement of the DRC in the drafting process of the CISG, however, the country abstained from voting. Mr Tshitambwe, the leader of the Congolese delegation, declared that “if he had been on time, he would have abstained from voting on the Convention as a whole.”⁴²⁸ The country has, moreover, up to the present time not yet adopted the Convention for reasons that have remained unrevealed. Such an attitude is inconsistent with the Congolese acknowledgement of the value of the CISG project as explained in the following paragraph.

4.5.3 The Comments of the DRC with reference to the CISG Project

In its comments to the 1978 Draft CISG, the DRC was particularly interested in Articles 10 and 11 dealing with the freedom of form and evidence in international sales.⁴²⁹ Although the Congolese representative was worried about the flexibility of CISG provisions, he acknowledged their relevance for international trade. He then endorsed Article 5 which allows contracting parties to exclude any given provision because of differences in their legal systems.⁴³⁰

More specifically, with regard to the principle of informality of international sales, the Congolese delegation needed clauses such as those of “means appropriate in the circumstances,” and “proof by means of witnesses” contained in the former Articles 10 and 11 of the Draft CISG to be made more specific. According to that group, since there are as many means of communication as there are circumstances,

⁴²⁸ The DRC abstained from voting together with nine other countries, namely Burma, China, Columbia, Iran, Kenya, Panama, Peru, Thailand, and Turkey. See Adoption of a Convention and other Instruments deemed appropriate, and the Final Act of the Conference (Agenda item 11), in UN Conference on the CISG, *Official Records* 230; see also Schlechtriem *Uniform Law* 20 Fn17. Today, four of these nine abstainers, i.e., China, Columbia, Peru, and Turkey have ratified the CISG.

⁴²⁹ Articles 10 and 11 of the 1978 Draft CISG correspond to current Articles 11 and 12 CISG. See Honnold *Documentary* 9; Flechtner *Honnold’s Uniform Law* 186 Fn2; Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 194 Fn3. Article 11 states that “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

⁴³⁰ See Comments by Governments and International Organisations on the Draft CISG (A/CN.9/125 and A/CN.9/125/Add. 1 to 3), in UNCITRAL 1977 (VIII) *YB* 137. Article 5 of the Draft CISG corresponds to current Article 6 CISG.

the question arises as to whether it is sufficient to use any of them for a contract to be valid.⁴³¹ By way of response, CISG drafters posited the freedom of evidence as being one of the Convention's general principles. Concerning proof by means of witnesses, on the other hand, the fear of the DRC was whether witnesses would not come from non-contracting states.⁴³² Once again, the drafters of the Convention agreed with the informality of international sales, for countries whose law requires written agreements to make use of the Article 96 CISG declaration.

The DRC was not alone in disapproving of the principle of freedom of commercial contracts. As several CISG commentators have said, some other delegations, particularly from countries with a requirement that the conclusion and evidence of sales be in writing, were also opposed to that principle.⁴³³ Consequently, the freedom-of-form rule in Article 11 CISG was adopted by way of compromise, except for the Article 96 CISG reservation. Since then, it has been recognised that the provisions of Article 11 displace "any domestic requirements as to form irrespective of whether it constitutes a requirement for the validity of the contract or merely a means of prescribed evidence, relevant primarily in cases where the existence of the contract is challenged."⁴³⁴

It is possible that the reaction of the Congo against the freedom-of-form rule may have been motivated by the provisions of Article 217 al. 1 CCO which enshrine the supremacy of documentary evidence. Article 217 al. 1 CCO requires a written document for the making of any contract exceeding the sum of, or the value of, two thousand Congolese Francs (FC 2,000.00). This kind of agreement cannot be proved

⁴³¹ See Report of the Secretary-General *Analysis of Comments by Governments and International Organisations on the Draft CISG as adopted by the Working Group on the International Sale of Goods* (A/CN.9/126), 7 April 1977, in UNCITRAL 1977 (VIII) YB 149. Pursuant to the principle of freedom from requirements of form, parties may communicate freely by writing, orally, or by any other form.

⁴³² Ibid.

⁴³³ See Schlechtriem/Schmidt-Kessel in Schlechtriem/Schwenzer *Commentary* 203; Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1213; Kritzer/Eiselen *Contract* §85:65.

⁴³⁴ See Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 184; see also Flechtner *Honnold's Uniform Law* 180.

by means of witnesses.⁴³⁵ If this rule applies to all civil contracts, requirements as for form are not, however, applicable to commercial transactions such as international sale of goods contracts.⁴³⁶ Pursuant to Article 9 CCom and case law, commercial contracts may validly be proved by witnesses.⁴³⁷

One may suppose that the official requirements for concluding a contract by writing are the reasons which caused the Congolese government's antipathy to the CISG. Such reasons would be unjustified. In effect, there are a number of countries with similar forms or evidentiary requirements which do not have a problem about working with the CISG. One case in point is the USA where any contract for the sale of goods that amounts to USD 500.00 or more must be concluded by writing.⁴³⁸ This requirement does not prevent the USA from being one of the leading countries of the CISG. As in July 2013, the Pace Law School Institute website has reported 161 American cases applying the UN Sales Convention.⁴³⁹

Coming back to Congolese law, it is not long ago that commercial transactions were governed in the DRC by rules dating back to the colonial period. Those rules had become out-dated. Most of their sections were no longer adapted to business evolution, and this constituted a source of legal uncertainty.⁴⁴⁰ The Parliament was aware of that insecurity. It stated in the preamble to the law authorising adoption of OHADA law that, "The harmonisation of business law (...) will contribute to the reinforcement of legal and judicial security (...), essential conditions for the

⁴³⁵ For an application, see L'shi 11 August 1972 *RJZ* 1972 No. 2 & 3 188.

⁴³⁶ See Article 217 al. 2 CCO and Article 9 CCom which authorise commercial contracts to be proved by any means including witnesses where the Court approves the admission of such form of evidence.

⁴³⁷ For illustrations, see Léo 30 September 1930 *RJCB* 1931 24; First Inst Elis 22 December 1938 *RJCB* 1939 151; Cons Sup 1 March 1920 *Jur Congo* 1928 10.

⁴³⁸ See §2-201 (1) UCC, first sentence, which states:

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defence unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

⁴³⁹ See instances of American CISG cases at: <http://www.cisg.law.pace.edu/cisg/text/casecit.html#us>.

⁴⁴⁰ See Vanderstraete *Business* 16; Masamba *Modalités* 22; Voisin/Parrra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf> (accessed 5-8-2013).

improvement of business environment” in the DRC.⁴⁴¹ Subsequent to this expectation, Paragraph four of the same preamble concludes that the DRC’s membership of OHADA will increase the harmonisation of business law in the country.⁴⁴² Voisin and Parra add to this that the effective accession to OHADA law by the DRC intends to “enhance the attractiveness of DRC’s legal environment.”⁴⁴³ If such a value can be recognised in a regional instrument similar to the OHADA Treaty, there is greater reason for the recognition of a Convention which is accepted internationally as the CISG is.

A propos of this, despite its hesitation in recommending the CISG project, the Congolese delegate specified that CISG provisions are designed:

To discourage parties from seeking the jurisdiction in which the law is the most favourable;

To reduce the need for recourse to the rules of private international law; and

To provide a modern law of sale that will be suitable for international transactions.⁴⁴⁴

Given comments of this kind, the DRC would, logically, be among the first countries to ratify the Convention. Unfortunately this has not yet happened. The fact that the DRC has not yet acceded to the Vienna Sales Convention does not completely exclude the applicability of the CISG to sales contracts concluded with parties established in the country as discussed below.

⁴⁴¹ See Paragraph three of Preamble to Law No. 10/2 of 11 February 2010 which states: “*L’uniformisation du droit des affaires qui en résulte (i.e. which results from the OHADA Treaty) contribuera au renforcement de la sécurité juridique et judiciaire des activités économiques, condition essentielle de l’amélioration du climat des affaires (en RDC).*”

⁴⁴² For comments, see Balingene <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf> ; Kuediasala <http://www.ohada.com/actualite/1599/la-rdc-transmet-au-senegal-les-instruments-d-adhesion-a-l-ohada.html>.

⁴⁴³ Voisin/Parra <http://www.linklaters.com/pdfs/mkt/london/DRC-accession-OHADA.pdf>.

⁴⁴⁴ See DRC’s observations in UNCITRAL 1977 (VIII) YB 137.

4.5.4 Possibilities for the Applicability of the CISG in the Congo

4.5.4.1 Applicability by operation of the *lex loci contractus* principle

As was discussed in sections 4.3.3 and 4.3.4 above, circumstances in which the CISG may apply are dealt with in Article 1 of the Convention. This provision offers a double way the CISG should be implemented, namely through its autonomous and its indirect applications. As far as the second method is concerned, Article 1(1) (b) envisages the possibility of the CISG applying in non-contracting states when “the rules of private international law lead to the application of the law of a Contracting State.” It is obvious that the Convention does not bind non-contracting states. In spite of that principle, scholars and courts are unanimous in their views that the CISG may sometimes come into play in non-member countries if local conflict-of-law rules prescribe so.⁴⁴⁵

In the DRC, contractual obligations conflict-of-law rules are provided by Article 11 of the PILD which states,

Agreements are governed as for their form by the law of the place where they are made. Nevertheless, acts under private signature can be passed in the forms also admitted by national laws of all parties.

Unless when the parties provide otherwise, agreements are governed, as for their substance, effects, and their evidence, by the law of the place where they are concluded.

A reading of Article 11 PILD reveals that the DRC has opted for the *locus regit actum* rule in determining the law governing international contractual obligations.⁴⁴⁶ Thus, if a contract is concluded outside the DRC, the law of the place where it was formed

⁴⁴⁵ See Kadner 2011 (13) *YB of PIL* 165 168-169; Bernasconi 1999 (46) *Netherlands International Law Review* 137 168; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 37; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 40. For illustrative cases, see Greece 2009 Multi-Member Court of First Instance of Athens Decision 2282/2009; USA 20 June 2003 Federal Appellate Court [3rd Circuit] *Standard Bent Glass Corp v Glassrobots Oy*; France 27 June 2002 Cour d’Appel de Versailles *Sté AMS v SARL Me et SARL Qu*; Austria 20 February 1992 District Court for Commercial Matters of Vienna *Shoes case*, all of them quoted in Note 229 above; see also a wealthy of authorities quoted in UNCITRAL *Digest* 5 Fn45.

⁴⁴⁶ See Cons Sup 19 July 1913 *Jur Col* 1913 343, see also Kandolo *Privé* 85; Lukoo *Droit Civil* 90.

will govern the contract even if it should be implemented in the DRC.⁴⁴⁷ The principle so stated governs all of the formation, substance, effects, and the evidence of any international contract.⁴⁴⁸ If one compares the provisions of Article 11 PILD with those of Article 1(1) (b) CISG, it is clear that the Vienna Sales Convention might apply in the DRC by the operation of the *lex loci contractus* principle.

It is important to note that three of the countries that surround the DRC, i.e. Burundi, Uganda, and Zambia, are already CISG member states.⁴⁴⁹ Furthermore, the five main trading-partners of the DRC, China (48.1%), Zambia (21.3%), USA (9.5%), Belgium (5.9%), and France (4.7%)⁴⁵⁰ have already ratified the CISG. Assuming that a dispute arises between a businessman established in the Congo and another whose place of business is in one of the countries listed above in respect of their commercial transactions; the CISG will apply even though the DRC has not yet ratified it.⁴⁵¹

However, although Article 11 PILD submits international contracts to the law of the country where they are concluded, it is silent *vis-à-vis* a contract connected to

⁴⁴⁷ See Boma 4 April 1901 *Jur Etat* I 126 (validity of a contract concluded in Belgium determined by operation of Belgian law); confirmed in Elis 29 June 1912 *Jur Congo* 1914-1919 111.

⁴⁴⁸ Cf. first and third sentences of Article 11 PILD.

⁴⁴⁹ The CISG came into force in Burundi on 1 October 1999; in Uganda on 1 March 1993; and in Zambia since 1 January 1988.

⁴⁵⁰ With regard to the main import-partners of the DRC, they include South Africa (21.7%), China (16.2%), Belgium (8.5%), Zambia (7.1%), Zimbabwe (5.7%), Kenya (4.8%), and France (4.7%). See data relating to the DRC's Export and Import-partners for 2011, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last visited 29-4-2013). This link provides a rank ordering of the trading partners of every world country starting with the most important.

⁴⁵¹ A similar situation has already occurred in the UK, a non-contracting state. As in July 2013, the Pace Law School Institute website has reported four cases in which UK has faced the CISG. Those cases are, UK 17 February 2006 Court of Appeal (Civil Division) *ProForce Recruit Ltd v Rugby Group Ltd* [<http://cisgw3.law.pace.edu/cases/060217uk.html>]; UK 18 December 2006 Court of Appeal (Civil Division) *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [<http://cisgw3.law.pace.edu/cases/061218uk.html>]; UK 1 July 2009 House of Lords *Chartbrook Ltd v Persimmon Homes Ltd et al.* [<http://cisgw3.law.pace.edu/cases/090701uk.html>]; and UK 1 May 2012 The High Court of Justice, Queen's Bench Division [Commercial Court] *Kingspan Environmental Ltd, and others v Borealis A/S and Borealis UK Ltd* [<http://cisgw3.law.pace.edu/cases/120501uk.html>] (all of them accessed 25-4-2013). In the last case, the High Court applied, *inter alia*, Articles 8, 35, 36, 38, 39, and 40 of the CISG to establish rights and obligations of the parties resulting from the contract.

more than one legal system. One decision of the Appeal Court of Lubumbashi seems, in such a case, to support the law of the place where the contract is performed.⁴⁵² This case is concerned with a contract concluded in London between a Belgian citizen and a Congolese company. The contract had to be fulfilled in the Congo. The court held that the law of the place of performance, i.e. Congolese law, governed the contract.⁴⁵³

As has been said earlier, under the CISG and South African law, where a party has more than one place of business, or if the contract is to be performed elsewhere, the place which has “the closest relationship to the contract and its performance” will prevail.⁴⁵⁴ With regard to Congolese law, it is not clear about the use of the “closest and most real connection theory” in the case of the absence of the choice of the law governing the contract. To illustrate such a situation, one domestic sales contract case in the *Kabala Katumba v Socimex* decision seems pertinent on the question.⁴⁵⁵ In this case, the court preferred the place of business of a branch to the company’s headquarters to determine its jurisdiction. According to the court, though the power of the court of law with regard to a company depends on the location of its head office,⁴⁵⁶ the place where orders were given and payment performed is appropriate

⁴⁵² See *Elis* 28 December 1915 *Jur Col* 1926 242.

⁴⁵³ *Ibid.*

⁴⁵⁴ See Article 10 CISG; for South African law, see *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185; *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (C) 139-151; *Laconian Maritime Entreprises Ltd v Agramar Lineas Ltd* 1986 (3) SA 509 525-30 (D); and *Kleinhans v Parmalat SA (Pty) Ltd* 2002 23 ILJ 1418 (LC) 29; see also Forsyth *International Law* 330; Van Niekerk/Schulze *Trade* 64.

⁴⁵⁵ See *Tricom Kin/Gombe* 28 February 2012 RCE 2183 *Kabala Katumba v Socimex*. In this case, a party ordered, on 2 November 2011, successively, 149 sacks of rice of 50 Kg each and 701 sacks of semolina of 25 Kg each, and, on 16 November 2011, 980 boxes of Sardine Anny for USD 63,654.00. On 17 November 2011, he ordered 2,000 Oki oil cans of 25 litres each and 500 boxes of tomato Corona for USD 100,000.00 which was paid the same day. The seller’s company was located at No. A/64 Inzia Avenue, Commune of Kalamu in Kinshasa, but the orders were given at one of its branches situated at No. 14 Bokasa Avenue, Commune of Gombe in Kinshasa. The seller contested the jurisdiction of the commercial court of Gombe on the grounds that the head office of the company was located in the Matete commercial court area.

⁴⁵⁶ Ruled, “En droit, (...) la compétence territoriale pour assigner une personne morale est déterminée par le lieu où est situé le siège social, c’est-à-dire celui qui correspond effectivement au centre de la décision de la réalisation des activités de l’objet d’une société commerciale.” (“Jurisdiction to sue a company is determined by the place where it is headofficed, viz. the epicentre

to determine the court's jurisdiction with regard to third parties.⁴⁵⁷ It results from the *Kabala Katumba v Socimex* ruling that the branch where the contract was formed and payment received influenced the determination of the court's jurisdiction. That branch was, in other words, found more closely connected to the contract and its performance than was the company's main place of business.

As a result of this ruling one may assume that the "closest and most real connection theory" is also admitted by case law in the legal system under examination. Even if the case at hand involved a local sales contract, it is suggested that its ruling extends also to international sales contracts. But before this takes place, Article 10 CISG and the solution adopted under South African law are recommended.

4.5.4.2 Applicability by means of the party autonomy principle

Congolese law recognises the autonomy of the will as one of the fundamental principles of the law of contract.⁴⁵⁸ In the context of international sales contract, this principle is provided by the phrase "unless contrary intention of the parties" placed at the start of Article 11 al. 2 PILD. In reference to this clause, the *lex loci contractus*

of its commercial activities.") Tricom Kin/Gombe 28 February 2012 RCE 2183 *Kabala Katumba v Socimex* at 9 and 10 *in limine*.

⁴⁵⁷ It was ruled in detail that,

Dans le cas d'espèce cependant, le Tribunal a noté que pour le demandeur, la défenderesse dispose au No. 14, Avenue Bokasa, Commune de la Gombe d'un siège d'operations, mais que pour cette dernière, à cette adresse-là, il y a absence d'administration (...);

Or, le Tribunal a remarqué que les commandes de marchandises et le versement de la somme de 100.000,00\$US ont été effectués sur place à cette adresse entre les mains du gérant G et de la caissière E faisant partie de l'administration de la défenderesse; il se deduit de telles actes commerciaux posés par les agents de la défenderesse que l'adresse sus-indiquée constitue pour les tiers un siège d'opérations déterminant effectivement pour une action en justice le juge compétent territorialement, ici n'étant considéré que l'intérêt des tiers (créanciers, action en justice, Etat).

("The court has noted that the defendant owns a branch of operation in the Gombe area where, however, there is no administration. Goods were ordered from that address and payment carried out there in the hands of the manager and of the teller forming part of the administration of the defendant. It is inferred from such acts of trade performed by the agents of the defendant that the address so indicated is for third party a relevant place of operations likely to determine the jurisdiction of the court, only the interests of third parties (creditors, legal action, state) being taken into consideration in circumstances of this kind.")

⁴⁵⁸ Cf. Section 2.3.2 and Section 2.3.3 above.

principle, as explained above, applies only where “the parties have not agreed otherwise”, meaning where they have failed to designate, explicitly or implicitly, the law leading the contract.⁴⁵⁹ In other words, parties concluding a sale in the Congo are free to choose the law governing their contract or to exclude the law of the country where the contract was made.⁴⁶⁰ Parties may, in addition, during negotiations or afterward, choose the law which will govern their rights and obligations to the contract by mutual consent.⁴⁶¹ The choice of the applicable law may be either explicit⁴⁶² or implicit.⁴⁶³ With regard to the significance of the party autonomy principle, the Appeal court of Kinshasa has ruled that “the *lex loci contractus* rule will govern any matter not otherwise regulated by the contract or not covered by a specific statute.”⁴⁶⁴

⁴⁵⁹ See Léo 8 January 1924 *Jur Col* 278; Trib App Boma 4 April 1901 *Jur Congo* 1890-1904 126; Cons Sup Congo 19 July 1913 *Jur Congo* 1913 343; Trib App Boma 30 December 1914 *Jur Col* 1925 298; Cons Sup Congo App 28 January 1921 *Jur Congo* 1921 41; First Inst Elis 8 July 1932 *RJCB* 1933 164.

⁴⁶⁰ This rule was formulated in Léo 8 January 1924 *Jur Col* 1924 278 as follows:

Si, en principe, les conventions sont régies par la loi du lieu où elles sont conclues, cette règle ne consacre qu’une présomption *juris tantum*. Les parties sont libres de soumettre leurs conventions à toute autre législation qu’à la *lex loci contractus*. Quand (par exemple) elles ont inséré dans leur contrat passé en Belgique, une clause prohibée par la loi belge, elles ont ainsi manifesté leur volonté de soustraire leur convention à cette dernière. (brackets added)

(“Even if, conventions are generally governed by the law of the place where they are formed, this rule provides a mere rebuttable presumption. The parties are then free to submit their agreements to any other legislation than that law. When they have inserted in a contract made in Belgium, a clause prohibited by Belgian law, they have shown their willingness to exclude the application of Belgian law.”)

⁴⁶¹ See Elis 18 December 1956 *RJCB* 1957 43.

⁴⁶² As a rule, any contrary intention must be clearly stated; see Léo 31 December 1956 *RJCB* 1957 110.

⁴⁶³ Cf. Léo 8 January 1924 *Jur Col* 1924 278.

⁴⁶⁴ *Ibid.* It was ruled in this case that,

Si les parties sont libres de soumettre leur convention à la *lex loci contractus*, ou à toute autre législation, quelque soit leur nationalité, et si, à moins d’intention contraire elles sont censées se référer à la loi du lieu du contrat, celle-ci, ou toute autre législation adoptée, ne régira cependant leur convention que pour les points non autrement réglés dans leur contrat ou non stipulés en dehors de toute prévision légale.

(“Though the seller and the buyer may submit their convention to the *lex loci contractus*, or to any other legislation, regardless of their nationality, and if, unless otherwise stipulated they are supposed to have referred to the law of the place of the contract, this, or any other legislation adopted, will govern any matter not otherwise regulated by the contract or not covered by a specific statute.”) See in the same sense, *Katuala Code* 19; *Lukoo Droit Civil* 91; De Burlet *Droit International* 283.

From what has been said thus far, it follows that the CISG may apply in the DRC if it is explicitly or implicitly chosen by Congolese merchants as the law governing the contract.⁴⁶⁵ The Vienna Convention may also apply if parties chose the law of a contracting state because the CISG constitutes the international sales contract law in all of its member countries.⁴⁶⁶ As can be seen, Congolese law considers the common intention of the parties as the starting-point of the interpretation of any contract.⁴⁶⁷ One commentator has observed, however, that the common intention of the parties is often of “little assistance”⁴⁶⁸ in determining the law governing the contract. According to him, “(...) cases in which difficulty arises are precisely those in which the intention of the parties is not clear or in which they have simply failed to provide for the matter in issue at all.”⁴⁶⁹

As a result of this, the lack of ratification of the CISG by the DRC may give rise to complexity in determining the law governing international sales of goods contracts concluded with Congolese traders when it is not expressly chosen by parties, or where the contract is to be performed elsewhere. In order to exclude any risk of legal insecurity, accession to the CISG by the DRC is recommended. The accession of the DRC to the OHADA community seems to be compatible with this recommendation as explained below.

4.5.5 OHADA Law vs. the CISG in the DRC

Congolese accession to the OHADA zone does not conflict with a probable ratification of the Vienna Sales Convention by the DRC. In effect, there are a number

⁴⁶⁵ Cf. Article 6 CISG.

⁴⁶⁶ See Kadner 2011 (13) *YB of PIL* 165 167; Kornet CESL 6; Brunner CVIM 91 111; see also authorities quoted in Note 281 above. See, in the same sense, ICC Arbitration case No. 6653 of 26 March 1993 *Steel Bars case* [<http://cisgw3.law.pace.edu/cases/936653i1.html>] (accessed 10-8-2012). In the case, parties opted for “substantive laws of France”, i.e. French law to govern the contract. The ICC inferred that, even though sales contracts are governed in France by the Civil Code, since the entry into force of the CISG in that country, international sales of goods are ruled by the Vienna Convention there.

⁴⁶⁷ See Article 238 UAGCL and Article 54 CCO; see also CSJ 3 April 1976 *BA* 1977 64 65.

⁴⁶⁸ Nicholas *Contract* 47.

⁴⁶⁹ *Ibid.*

of provisions within the CISG which accord with its coexistence with other regional uniform sales laws as OHADA law is. These provisions include Articles 6, 90, 92, and, mainly, Article 94.⁴⁷⁰

With regard to Article 6, it recognises the freedom of contractual parties to opt in or out of any provision of the CISG.⁴⁷¹ It means that, even if the DRC comes to ratify the Vienna Sales Convention, traders established in this country will keep their freedom to choose the law governing their contract. They could, therefore, select the CISG freely or not do so. If they exclude the CISG from their transactions, the provisions of Book VIII of the UAGCL will apply because, by reference to Article 10 of the OHADA Treaty, all Uniform Acts are mandatory in every OHADA country.

Concerning Article 90, it relates to any conflict between conventions. Article 90 states that the CISG “does not prevail over any international agreement which has already been or may be entered into.” In so ruling, the provision under consideration entails that, where the seller and buyer have their respective place of business in member countries of a regional convention containing matters dealt with in the Vienna Sales Convention, the applicability of the CISG is displaced in favour of that regional sales instrument. The only condition required is for sellers and buyers to be established in states party to those regional agreements.⁴⁷² Commentators have said, in this respect, that the purpose of Article 90 is to avoid any conflicts between the CISG and, among others, regional sales instruments.⁴⁷³ As was mentioned earlier, the eighth Book of the UAGCL deals with commercial sales like the CISG. Thus, if the DRC was to adopt the Convention, this Book will continue to have force of law

⁴⁷⁰ See Coetzee/De Gama 2006 (10) 1 VJ 15 22; Ferrari OHADA 79 86-95, for further comments.

⁴⁷¹ OHADA law does not provide such an option. In the OHADA legal system, all Uniform Acts are directly applicable and binding in any member states pursuant to Article 10 of the OHADA Treaty, save for application of the party autonomy principle. Brunner believes that situation of exclusion of the CISG are rare in practice owing to its modernity and suitability for international contracts. See Brunner CVIM 91 112.

⁴⁷² Cf. Article 90 *in fine*.

⁴⁷³ See Ferrari OHADA 79 86; Schlechtriem/Schwenzer/Hachem in Schlechtriem/Schwenzer *Commentary* 1174; Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1191; Flechtner *Honnold's Uniform Law* 694.

for contracts concluded between traders located in the Congo and their probable OHADA community trade-partners. For those contracts negotiated with parties not established in the OHADA region, however, the CISG will apply.

Regarding Article 92(1), it authorises contracting states to exclude one or the other of the Convention's two main Parts, meaning Part II dealing with the "Formation of Contract", or Part III governing "The Rights and Obligations of the Parties". Consistent with this provision, a country, for instance the DRC, may declare, at the time of accession, that a regional instrument, such as the OHADA Commercial Act, will prevail over the CISG for matters relating either to the formation of contract, or to the rights and obligations of parties. Of course an Article 92(1) reservation may sometimes be insufficient to guarantee the application of a regional instrument as Article 92(2) contests the quality of CISG member states to countries which have made use of the reservation. Simply, because nations which have exercised the right provided by Article 92 are considered non-CISG contracting states, the CISG may still prevail over the UAGCL with regard to countries belonging to both OHADA and the CISG.⁴⁷⁴ Even though the CISG may govern the Part not excluded, nevertheless, where conflict-of-law rules lead to the application of the law of a reservation country, for example the DRC, Congolese commercial law, constituted by UAGCL provisions, will apply.

Finally, with regard to Article 94(1), it allows CISG member states with the same or closely related legal rules to declare that the Convention will not apply to contracts concluded between parties established in such countries.⁴⁷⁵ Applied to the OHADA area, Article 94(1) approves the exclusion of sales contracts governed by Book VIII of the UAGCL from the application of the CISG. As Castellani has said, Article 94(1) "is particularly important as it provides reassurance that under Treaty

⁴⁷⁴ Cf. Section 4.3.4.3 above.

⁴⁷⁵ See Ferrari OHADA 79 92; Coetzee/De Gama 2006 (10) 1 VJ 15 22-23; Castellani 2008 (1/2) *Rev dr unif* 115 121; see also Herre in Kröll/Mistelis/Viscasillas *UN Convention* 1204ff; Schlechtriem/Schwenzer/Hachem in Schlechtriem/ Schwenzer *Commentary* 1186ff. Article 94 declaration has, for instance, been exercised by Scandinavian states so that Denmark, Finland, Ireland, Norway, and Sweden apply the CISG only to sales contracts formed with parties from outside the Scandinavia region. See De Ly 2005 (25) 6 *JL & Com* 1 10.

law and the CISG provisions, OHADA Acts and the CISG are fully compatible and their interaction ensures maximum harmonisation both at the global and at the local level.”⁴⁷⁶ Ferrari adds to this by saying that Article 94(1) is “the most relevant CISG provision,” much more than Articles 90 and 92(1), because it allows the declaration to be made “at any time” during or after accession.⁴⁷⁷ Succinctly, in keeping with Article 94(1), the DRC and other OHADA countries may legally agree to prefer the Commercial Act among them, and apply the CISG only for contracts concluded with parties from outside the OHADA community.

From the provisions discussed above, it is clear that, though the DRC has adopted OHADA law, it does not have to fear any accession to the CISG. The two sources of law may peacefully coexist in the Congo. In that situation, gaps left in Congolese sales law, by the provisions of the OHADA Commercial Act, will be filled by the UN Sales Convention.

4.6 Conclusion on Chapter Four

A harmonised legal system is extremely beneficial to private dealers as it contributes to the removal of barriers and obstacles in international trade. Efforts in this regard started early in the 1930s when the UNIDROIT began preparing a uniform law on the sale of goods. As its products that are ULIS and ULF did not obtain widespread acceptance, the UN established UNCITRAL with the mandate to promote a “progressive harmonisation and unification of the law of international trade.”⁴⁷⁸ It is under its sponsorships that the CISG was adopted in Vienna on April 1980. UNCITRAL’s success in harmonising business law has been evidenced by the enthusiasm with which the CISG is currently adhered to. From eleven original contracting states, the CISG has now been accepted in 79 countries of which eleven are African, the DRC and South Africa excluded.

⁴⁷⁶ Castellani 2008 (1/2) *Rev dr unif* 115 121.

⁴⁷⁷ Ferrari OHADA 79 94.

⁴⁷⁸ Felemegas 2000-2001 *Review of the CISG* 115; Felemegas 2000-2001 *Review of the CISG* 115.

Normally, the CISG governs international sales contracts formed between parties established in contracting states. It may, however, also apply occasionally to contracts concluded between parties located outside contracting states if PIL rules so recommend. Similarly, the Convention does not have as its goal the solving of all matters related to international sale of goods contracts. Instead, its scope of operation is limited to rules related to the formation of contract and the rights and obligations of the sellers and buyers which originate from the contract. Despite such a limitation, the CISG is currently a very successful instrument, but not a perfect code. It may, from time to time, need interpretation. In this regard, Article 7 CISG demands that courts and arbitration tribunals favour the Convention's international character and uniformity rather than giving way to any "homeward trend". Italian courts have faithfully followed this requirement. Of course, American courts, German courts, and judges in other leading member states of the CISG have also tried to take into account foreign case law in their decisions, but not as extensively as the Italian courts have done.

In addition, the value of the CISG has to date become indisputable; the CISG has influenced legal reforms in many countries and regions. In Europe, the PICC, PECL, CFR, and the CESL are largely inspired by the CISG. National laws of countries, such as the Scandinavian states, Germany, Estonia, and China are, likewise, also founded on the Vienna Sales Convention. On the African continent, its influence is encountered in the OHADA Commercial Act. Outside the OHADA Region, the CISG's influence seems minimal in other African nations, particularly in Southern African countries and the DRC.

With regards to South Africa and the DRC, the CISG may already apply as far as contracts concluded between parties established in these countries are concerned although they have not yet ratified the CISG. In other words, if the places of business of parties are located either in the DRC or in South Africa, the CISG would not directly apply. If Congolese or South African courts are confronted by an international sales dispute, however, they might apply the CISG by virtue of conflict-

of-law rules if these rules point to the application of the law of a contracting state. This is evidenced by the fact that, although South African law has moved from the *lex loci contractus* principle to the proper law of the contract rule, the DRC still maintains the first rule in addition to the party autonomy principle. As a result of this, when Congolese parties fail to choose the law governing their contract, the law of the country where the contract was concluded will be preferred. This law should probably be the CISG because five of the main trading partners of the DRC and three of the countries that surround the Congo are CISG contracting states.

This situation puts Congolese traders in a position where they could be bound by a Convention to which their country has not yet acceded and which they are supposed not to know about. As is recommended at the end of this study, the DRC would do well to adopt the Vienna Sales Convention for more legal security. Its adoption of OHADA law will not be in conflict with such a decision.

Chapter Five

COMPARISON REGARDING THE FORMATION OF INTERNATIONAL SALES CONTRACTS

5.1 Introduction

The formation of contract stage refers to the technical process of concluding a contract.¹ On the subject, the fundamental basis in all of the CISG, South African law, and Congolese law is the agreement among contracting parties.² A contract is normally formed by an exchange of consents. This means that for concluding a contract, it is necessary that the will of each party be made clear to the other party. One of the contracting parties undertakes the initiative by proposing the contract to the other who, in response, expresses his/her agreement. The proposal made by the first party constitutes the “offer”, and the answer given by the second party forms the “acceptance”.³

¹ Kröll 2005 (6) 25 *JL & Com* 39 42.

² For the CISG, see Article 6 which allows parties to opt in or out the provisions of the Convention. For South African law, see *Saambou-Nasionale Bouverening v Friedman* 1979 3 SA 978 (A) 993F in which the consensualism theory is posited; see also Christie/Bradfield *Contract* 1; and Van der Merwe et al *Contract* 19. For Congolese law, see Article 249 al. 1 UAGCL which establishes the freedom of parties to enter into a contract; and Articles 1 and 8 CCO which define the contract and enumerate its validity requirements, as well as Article 263 CCO which provides the definition of sales.

³ Klimas *Contract* 19; quoting Pineau *Obligations*; see also Youngs *Comparative* 513.

Part II of the CISG⁴ and South African contract law⁵ regulate the offer and acceptance as essential elements of a valid international sales contract.⁶ In contrast to them, though Articles 1, 8, and Article 263 CCO state that all contracts, in general, and sales contracts, in particular, are based on the agreement; they do not indicate how such an agreement should be reached. The process of concluding a contract was developed, in the field of the application of the CCO, as matter of fact. For that reason the effect of OHADA law on Congolese law will be given particular attention in this chapter.

Where the sale is described as an international sale, there are factors which may impact on the general principles of the process of its formation. As Van Niekerk and Schulze have said, international sales result from complex negotiations involving technical implementation of the offer and acceptance rules.⁷ This situation is owing to the fact that international sales often involve “an arrangement between parties separated in time and space and communicating by way of anyone or more of a wide variety of means.”⁸ Because of that, the formation of international contract process may encounter difficulties.

⁴ Part II contains eleven provisions, i.e. Articles 14 to 24 of which, Articles 14 to 17 deal with the offer, and Articles 18 to 22 deal with the acceptance. The last two articles (Articles 23 and 24) are concerned with the time and place the contract is formed. It should immediately be noted that, although the CISG sets up a considerable scheme for determining the objective agreement of parties by means of offer and acceptance, the Convention does not deal with some important areas relating to the formation of the contract, for instance, the validity of a contract (Cf. Section 4.3.5 above). Other issues relating to the formation of the contract, but not expressly ruled by the CISG, include the conclusion of a contract by agency, and the inclusion of standard terms in the contract. (See Kröll 2005 (6) 25 *JL & Com* 39 42; Schwenger/Mohs 2006 (6) *IHR* 239; see also Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 88-95; and Djordjevic in Kröll/Mistelis/Viscasillas *UN Convention* 67-88). Under OHADA law perspectives, matters of this kind are deferred to civil code provisions. (Cf. Article 237 al. 1 UAGCL).

⁵ Cf. Christie/Bradfield *Contract* 23-108; Van der Merwe et al *Contract* 46-85; Kerr *Contract* 61-129; Van Niekerk/Schulze *Trade* 67; Quinot *Contract* 74. It is remembered that under South African law the same principles govern both domestic and international sales contracts.

⁶ See Eiselen 2011 (14) 1 *PER/PELJ* 233. But, Quinot (*Contract* 74 75) for whom, although the offer and acceptance model is regarded as the basic conceptual device in analysing the formation of contracts under South African law, such “is only a tool and not a prerequisite for determining whether (or not) a contract is formed.”

⁷ Van Niekerk/Schulze *Trade* 67.

⁸ *Ibid.*

In order to explain how to overcome those types of difficulties in Congolese law, it is primarily the CISG couple offer-acceptance rule that will guide us in the following discussion. In substance, the current chapter consists of three main sections dealing successively with the offer, the acceptance, and the time and place where an international sales contract is supposed to be formed. This chapter aims to investigate the extent to which UAGCL provisions may have improved Congolese sales law in order to align it with the CISG and South African law on the subject of the formation of contract. It intends also to examine the remaining shortcomings of Congolese contract law, and the means by which they can be filled using the Vienna Sales Convention and South African law as reference.

5.2 Offer in International Sales Contracts

5.2.1 Introduction

As has been said earlier, an offer may *a priori* be defined as “a manifestation of unilateral will whereby a person makes known his intention to contract and the essential conditions of the contract.”⁹ So, after a brief explanation of the general principles applicable to the offer, the following discussions will focus on the substantial requirements of the offer, its withdrawal, and revocability conditions under the CISG, South African law, and Congolese law. Each of these topics will end with comparative assessments of the current Congolese law situation.

5.2.2 General Principles

An offer is usually described as an express or tacit indication of the contractual intention to be legally bound if the other party accepts it as it stands.¹⁰ The general

⁹ See Ghestin *Droit Civil* 260. Simply, an offer is a draft contract proposed by one of the parties. See De Bondt in Bocken *Belgian Law* 227; Youngs *Comparative* 51.

¹⁰ See Owsia *Contract* 397 and 409 whereby, the author reproduces Weil and Terré’s definition according to which an offer is “a unilateral declaration of will addressed by a person to another,

definition so stated is, however, subject to some exceptions to be addressed in subheadings dealing with the three legal systems under examination. Within the CISG, the first sentence of Article 14(1) stipulates that, “a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is ‘sufficiently definite’ and indicates ‘the intention of the offeror to be bound’ in case of acceptance.”¹¹ Articles 15(2) and 16(1) complement this by allowing the offer to be withdrawn or revoked, as long as it has not yet reached the offeree.

In the perspective of South African law, an offer is also considered as a sufficiently precise proposition put forward as the basis of a proposed contract.¹² It is, in the words of Sharrock, “a proposal of certain terms of performance made with the intention of being agreed to by another person.”¹³ With regard to its origin, Christie and Bradfield have argued that, although its equivalent concept, that is *stipulatio*,¹⁴ was known to in Roman and the old Roman-Dutch law, the use of the specialised word “offer” comes to modern South African law by way of English law.¹⁵ Thus, “a person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance (...) a contract should be formed.”¹⁶ As for the CISG, in South African law an offer must reach the offeree in order to bind the

whereby the offeror proposes to the other the conclusion of the contract.” See also Ghestin *Droit Civil* 260; De Bondt in Bocken *Belgian Law* 227; Youngs *Comparative* 51.

¹¹ A similar definition is also provided by Article 2.1.2 PICC which is worded similarly as its equivalent CISG Article 14(1), and by Article 2:201 PECL for which a proposal constitutes an offer if, “(a) it is intended to result in a contract if the other party accepts it; and (b) it contains sufficiently definite terms to form a contract.” For comments, see Alban in Felemegas *Interpretation* 76; and Cvetkovic 2002 (14) 1 4 *Pace Int’l LR* 121 30 respectively. Article 31 CESL reproduces Article 2:201 PECL.

¹² See *Jurgens and others v Volkskas Bank and others Ltd* 1993 1 SA 214 (A) 218J-219A.

¹³ Sharrock *Business* 53.

¹⁴ The word *Stipulatio* means a question requiring a straight, affirmative answer in order to create a contract.

¹⁵ Christie/Bradfield *Contract* 31; see also Schreiner *Contribution* 41. Under English law, an offer is defined as “an expression of willingness to contract on the terms stated in it as soon as those terms are accepted by the party to whom the statement is made”. See Birks *Private Law* 6; taking support from *Storer v Manchester CC* [1974] 1 WLR 1403.

¹⁶ *Ibid.* See also *Jurgens and others v Volkskas Bank and others Ltd* 1993 1 SA 214 (A) 218J-219A.

author, which means that from the time being sent until it is accepted, the offer may be revoked unless there is an agreement to keep it open.¹⁷

With regard to Congolese law, Article 8 CCO, dealing with requirements for the validity of contracts, states that all contracts are based on agreements.¹⁸ Unfortunately, the provision does not provide the content of contractual agreements. Yet, Article 8 is the only broad provision of the civil code defining the requirements for a valid contract.¹⁹ Other provisions of Chapter II of the CCO dealing with essential conditions required for the enforceability of the contract are, instead, concerned with defects to consent.²⁰ While discussing a comparable situation under Belgian law, Wéry noted:

One of the weakest parts of the (civil) code is the one pertaining to the conclusion of the contract. (...) There are (...) no provisions about what the doctrine calls the ‘dynamic approach of the conclusion’, i.e. the negotiation of the contract and the process of its conclusion (offer and acceptance, precontractual duties, and so on).²¹

As Montero has stated, when the 1804 Napoleonic civil code, on which the CCO is based, was drafted, “the consensual agreement principle was so well-known in the Old Law that the civil code did not find it useful to regulate it expressly.”²² As regards the conclusion of sales contracts, likewise, Article 264 CCO also merely requires parties to reach agreement as to the thing sold and the price without any other

¹⁷ Van der Merwe et al *Contract* 67; Christie/Bradfield *Contract* 55-56; Kerr *Contract* 82.

¹⁸ As explained in Section 2.3.5.2 above, Article 8 CCO provides four conditions for the validity of any contract; the consent, capacity, an object, and the cause.

¹⁹ With regard to French law, see Nicholas *Contract* 61 and 62; Youngs *Comparative* 514. Article 8 CCO corresponds to Article 1108 FCC.

²⁰ See Articles 9 to 18 CCO, which correspond to Articles 1109 to 1133 FCC. Article 9, for instance, denies to consent given by mistake or extorted by duress or fraud the quality of valid consent.

²¹ Wéry *Contracts* 21-23. In the perspective of the Napoleonic civil code, see Montero *Contract* 61-78; Youngs *Comparative* 514. Of course, one can, here and there, under other Congolese regulations, find the use of the words *acceptation* or *offre* in relation to specific contracts. This is the case for donations (Articles 873 to 878 CFC, definition, and form of gifts, which correspond to Article 894 and Article 932ff Napoleonic civil code); and Agency (Article 526 al. 2 and Article 527 al. 2 CCO, comparable to Articles 1984 al. 2 and 1985 al. 2 FCC). With regard to the word “offer”, it is only referred to in relation to “offers of payment and consignment” or “tenders of payment and deposit” (Articles 155 to 162 CCO). For equivalent provisions, see Articles 1257 to 1264 FCC. These issues are not discussed in this study.

²² Montero *Contract* 61-67.

precision with reference to the offer and acceptance, which constitutes a gap.²³ Facing this situation, courts have tried to develop a formation of contract theory under the impulse of commercial transactions. More recently, case law solutions have been supplanted by the provisions of the OHADA Commercial Act. Influenced by the CISG, Articles 241 to 249 of the OHADA Commercial Act are based on the offer and acceptance model of contracting too.²⁴

Subsequent to these general comments, the following paragraphs look, as stated before, at the ground rules of the offer, its withdrawal, and its revocability rules.

5.2.3 Substantial Validity Requirements of the Offer

5.2.3.1 Introduction

For a proposal to qualify as an offer, says Article 14(1) CISG, it must be *sufficiently definite*, and indicate the *intention of the offeror to be bound* in the event that it is accepted by the offeree.²⁵ Article 241 al. 3 UAGCL is similarly worded. Both provisions state the minimum requirements for a valid offer. These consist in the identification of the goods, the determination of the price, and the intention of the offeror to be bound in the case the offeree accepts the offer. The requirements stated above meet, to some degree, standards formulated, under South African law, in the definition by Van der Merwe and others according to which, “An offer is an expression of will, *made with the intention of creating an obligatory relationship on certain or ascertainable terms* with another, and brought to the attention of the

²³ Article 264 CCO states that the sale is perfect as between the parties, and ownership passes *de facto* to the buyer from the seller as soon as the property sold and the price have been agreed upon, although that property has not yet been delivered nor the price paid.

²⁴ Article 241 al. 1 is clear that “A contract shall be concluded (...) by an acceptance of an offer (...).”

²⁵ For an application, see Belgium 25 January 2005 Commercial Court *Tongeren Scaform International BV & Orion Metal BVBA v Exma CPI SA* [<http://cisgw3.law.pace.edu/cases/050125b1.html>] (accessed 10-4-2012); see also Schroeter in Schlechtriem/Schwenzer *Commentary* 258; Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 224; Kritzer/Eiselen *Contract* §86:8 86-22; Ott/Matthey *Commerce* 24.

addressee, so as to enable him to establish a contract by accepting the offer as it was made.” (Italics added)²⁶ This introductory statement shows that a valid offer is established on a double basis: to be sufficiently definite; and to indicate the commitment of the offeror to be bound.

5.2.3.2 A proposal “sufficiently definite”

The CISG

The criteria for the definiteness of the proposal are enumerated by the second sentence of Article 14(1). As stated by it, a proposal is sufficiently definite if it “indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”²⁷ This ruling was explained by the Austrian Supreme Court in the *Chinchilla Furs* case as follows:

(...) the content of the proposal must be sufficiently definite. This is the case where a proposal indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. The condition is fulfilled where the *essentialia negotii* are expressly fixed in the offer; however, the second sentence of Article 14(1) CISG also allows for an “implicit determination”, i.e. [giving] criterions which allow for an interpretation that results in a definite price, definite goods or (and) their quantity.²⁸

As far as the *goods* are concerned,²⁹ Alban notes that the provision under examination does not expressly require that the offeror identify exactly the goods that are to be the object of the contract. Suffice it to indicate the nature and characteristics which

²⁶ See Van der Merwe et al *Contract* 47-48; taking support on *Bourbon-Leftley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C); *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd* [2002] 1 All SA 321 (D).

²⁷ For an illustration, see USA 21 January 2010 Federal District Court [California] *Golden Valley Grape Juice and Wine LLC v Centrisys Corporation et al* [<http://cisgw3.law.pace.edu/cases/100121u1.html>] (accessed 10-4-2012). In this case, the offer was contained in an e-mail identifying the goods for sale, the quantity of the goods, and their price.

²⁸ Austria 10 November 1994 Oberster Gerichtshof (Supreme Court) *Chinchilla Furs case*, CLOUT case No.106 [<http://cisgw3.law.pace.edu/cases/941110a3.html>] (last accessed 21-6-2012).

²⁹ For the meaning of the concept “goods”, see Section 4.3.2.3 above.

will allow the offeree to decide knowingly.³⁰ That is also the meaning of the last part of Article 14(1) where the quantity of the goods may be determined either “expressly or implicitly”. Simply, the degree of the specification required by the Convention will depend upon the type of goods which are the subject matter of the proposal.³¹

Although Article 14(1) refers to the quantity of the goods, it does not, however, expressly regulate the issue of their “quality”. Normally, the type of the goods should be determined by the parties freely in the contract. But, if the contract is silent on the matter regarding the quality of the goods, commentators believe that such deficiency should be filled by applying the provisions of Article 35 relating to the conformity duty. In effect, Article 35 obliges the seller to deliver goods that are of the quantity, quality, and description as required by the contract, and contained or packaged in the manner required by it.³²

Requiring the seller to deliver goods the quality of which conforms to those stipulated in the contract means that parties must have previously reached agreement upon that quality. Thus, features such as the quality of the goods have also to be indicated in the proposal in order to determine the approval of the offeree for the offer. Owing to the fact that the quality of the goods does not constitute an express substantial requirement for the proposal’s definiteness, however, parties are free to determine it as they see fit pursuant to the party autonomy principle. One German court, in the *Test Tubes* case, has ruled that, if one of the parties insists on a certain quality of the goods, and the offer does not express a clear agreement in that respect, there is no valid offer and acceptance, and, consequently, there is no contract.³³ The

³⁰ Alban in Felemegas *Interpretation* 77.

³¹ Huber/Mullis *CISG* 72.

³² For comments on the seller’s obligation of conformity of the goods, see Henschel *Conformity* 221; Kruisinga *Non-conformity* 30; Cvetkovic 2002 (14) 1 4 *Pace Int’l LR* 121 125; Alban in Felemegas *Interpretation* 78; and Section 6.2.4 below.

³³ Germany 31 March 1995 Appellate Court Frankfurt *Test Tubes case* [<http://cisgw3.law.pace.edu/cases/950331gl.html>] (accessed 16-4-2012). In this case, a German glass manufacturer agreed to manufacture and deliver a certain quantity of test-tubes to an Italian company. During negotiations, parties did not agree on the type of glass to be delivered. Finally the seller delivered test-tubes of “Fiolax” quality, while the buyer alleged to have ordered tubes of “Duran” quality. The buyer refused to pay the price billed by the seller. The Court held that, since the acceptance of the offer was missing as the parties had not reached agreement on the quality of tubes to be

Russian Supreme Arbitration Court has ruled in a similar recent decision that, if a letter from one party does not contain specific details which might identify the kind and quantity of the goods, there is no reason to consider such a letter as an offer. Accordingly, there is, in addition, no enforceable contract.³⁴

In addition to the goods, Article 14(1) requires the proposal to indicate *the price* or to make it determinable for it to be sufficiently definite. Through this provision, the Convention considers the price as one of the salient elements of the validity of a contract, which means that, for a sale to be valid, it must fix the price of the goods or at least make a provision determining it.³⁵ Article 14(1) provisions, however, give the impression of being contradicted by those of Article 55 relating to “open-price terms”.³⁶ Pursuant to this article, where parties to a “validly concluded” contract fail to determine the price, the price generally paid under comparable circumstances in the trade concerned will be implied.³⁷ As it can be understood from this, although Article 14(1) considers the price as one of substantial conditions for

delivered, there was no valid contract. It concluded, hence, that there was no valid offer and acceptance, and no validly concluded contract either.

³⁴ Russia 15 April 2011 Supreme Arbitration Court of the Russian Federation [<http://cisgw3.law.pace.edu/cases/110415r1.html>] (accessed 16-4-2012). In this case, an agreement was signed between a German seller and a Russian buyer for a supply of three household appliances consignments. Before the contract was signed, the buyer paid for a consignment. The buyer later sued the seller, claiming that the sale should be declared not concluded on the grounds that the parties had not agreed on its basic conditions. The court upheld the claim in full.

³⁵ Ruangvichathorn in Felemegas *Interpretation* 193; see also the Austrian *Chinchilla Furs* case.

³⁶ According to Article 55,

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.

³⁷ The historical drafting process of the CISG reveals that the adoption of Article 55 was controversial. Different groups of countries, particularly socialist, civil law, and developing countries, objected to open-price terms contracts. See in this sense, Garro 1989 (23) *Int'l L* 443 462; and Gabuardi <http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html> (accessed 16-4-2012). Unlike socialist and civil law countries, “open-price terms” are familiar to common law legal system countries. There, the common rule in s 9 of the 1893 Sale of Goods Act, and in §2-305 UCC is that “if the contract is silent with respect to the price, an agreement to pay a reasonable price will be implied.” See Ziegel/Samson <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>; Murray 1988 (8) *JL & Com* 11; Flechtner *Honnold's Uniform Law* 206; Farnsworth in Galston/Smit *Sales* 3-8; and Gabuardi <http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html>.

the formation of the contract, Article 55 envisages circumstances in which a sale should be “validly concluded” even without fixing the price. A Swiss court in the *Oven case* has approved this reasoning.³⁸ As stated by it, when the seller fails to indicate the price of the goods, parties are supposed to refer to the price normally charged.³⁹

The interaction between Article 14(1) and Article 55 has generated debate among scholars. The question generally asked on the subject is whether these two provisions would be read separately or together. In answer to the question, two leading points of view have been advocated, one of these led by Honnold, and the other one by Farnsworth. The position of Honnold is that they may be read together, whereas the opinion of Farnsworth is that they cannot be read together.⁴⁰

On the one hand, it is a rule that, “a contract *cannot* be concluded under the requirements of Article 14(1), *unless* there is a sufficiently definite price term.”⁴¹ *A propos* of this, the definiteness requirement means that a proposal to amount to an offer, it must at least, *inter alia*, fix their price. Farnsworth⁴² believes that Article 14(1) is not clear on the matter of whether proposals without price should or not constitute a sufficiently definite offer. According to him, “Although (Article 14(1))

³⁸ Switzerland 27 April 2007 Canton Appellate Court Valais *Oven case* [<http://cisgw3.law.pace.edu/cases/070427s1.html>] (accessed 16-4-2012).

³⁹ It was argued that when a buyer places an order for a new kind of product without any reference to the price, his order is regarded as an invitation to make an offer. The seller’s response constitutes an offer that the buyer approves by accepting, using, or reselling the goods. If such an offer is silent in regard to the price, the price normally charged will apply.

⁴⁰ See Amato 1993 (13) *JL & Com* 1 10; see also Ruanvichathorn in Felemegas *Interpretation* 194; Cvetkovic 2002 (14) 1 4 *Pace Int’l LR* 121 127; Gabuardi <http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html>. Farnsworth mentions the “unstated prices issue” among four “troublesome problems” within Part II of the CISG. Those problems include firm offers, mailbox rules, battle of form problems, and open-price terms. See Farnsworth in Galston/Smit *Sales* §3-8 to 3-16; see also Murray 1988 (8) *JL & Com* 11. The list of unresolved problems within Part II of the CISG is lengthened by the law of agency, and the conclusion of an arbitration agreement. For comments, see Kröll 2005 (6) 25 *JL & Com* 39 42.

⁴¹ Amato 1993 (13) *JL & Com* 1 10; see also Gabuardi <http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html> Fn22. This is also the position of a Swiss court in the *Chemical Product* case whereby, a proposal lacking the purchase price fails to fulfil the requirements of a definite offer. See Switzerland 11 October 2004 Canton Court Freiburg *Chemical Product case* [<http://cisgw3.law.pace.edu/cases/041011s1.html>] (accessed 16-4-2012).

⁴² Farnsworth in Galston/Smit *Sales* 3-9; supported by Amato 1993 (13) *JL & Com* 1 8.

states only that a proposal “is sufficiently definite if it (...) expressly or implicitly fixes or makes provision for determining (...) the price,” there is an unfortunate implication is (*sic*) that it is not sufficiently definite unless it does this.”⁴³ For this reason, Farnsworth does not find in Article 55 a favourable solution to the solving of the difficult issue of open-price terms. The author is disappointed that “article 55 only operates if a contract has been ‘validly concluded’.”⁴⁴ He concludes, therefore, that by its wording, Article 55 does not intend to fill gaps in the formation section of CISG Part II.⁴⁵

A number of scholars hold the opposite view. According to them, Article 55 has an ambition to fill the gap for open-price terms well and truly.⁴⁶ Thus, by expressly providing for its applicability to “validly concluded contracts”, the contract must have already been formed for the price term to be supplied.⁴⁷ Yet, normally a contract cannot be validly concluded without a sufficiently definite price term. Thus, as Vincze has observed, following the interpretation of Articles 14(1) and 55, “a vicious circle” is present in the text of the CISG.⁴⁸

With regard to the second opinion, on the other hand, Articles 14(1) and 55 complement each other. The first of these “might be read as stating that a proposal with the three stated elements, (i.e. the type of the goods, their quantity, and price) is

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See Farnsworth’s view as commented on by Reitz in Flechtner 1999 (18) *JL & Com* 191 204.

⁴⁶ See, among others, Koneru (1997 (6) *M J G Tr* 105 147) for whom, where a contract has been validly concluded, the applicable price is the “market price” at the moment the contract is concluded. Koneru believes that, by separating Articles 14(1) and 55, Farnsworth should have made a literal interpretation of Article 55.

⁴⁷ Vincze in Felemegas *Interpretation* 420; see also Amato 1993 (13) *JL & Com* 1 8; and Czech Republic 25 June 2008 Supreme Court *Manufactured Paint case* [<http://cisgw3.law.pace.edu/cases/080625cz.html>] (accessed 16-4-2012).

⁴⁸ Vincze in Felemegas *Interpretation* 420. To elude this “vicious circle”, a number of commentators explain that Article 55 would be relevant in the case where the CISG is to be applied without Part II, e.g. when a contracting state made use of the Article 92 declaration, and the applicable domestic law authorises a contract to enter into effect without a price being determined. See, among others, Murray 1988 (8) *JL & Com* 11 Fn26; Koneru 1997 (6) *M J G Tr* 105 148; Amato 1993 (13) *JL & Com* 1 8; Schroeter in Schlechtriem/Schwenzer *Commentary* 268; Ruanvichathorn in Felemegas *Interpretation* 193; and Vincze in Felemegas *Interpretation* 420-421.

sufficiently definite, without implying that the lack of one of the elements is fatal”⁴⁹ for the contract. According to Honnold, “a contract may be ‘validly concluded’ even though it ‘does not expressly or implicitly fix or make provision for determining the price’.”⁵⁰ This argument is evidenced by the fact that “the term ‘validity’ in Article 55 relates only to requirements of validity other than the determination of the price upon which an offer indefinite with respect to the price can be interpreted in the light of Article 55.”⁵¹ Simply, according to Honnold, Article 55 serves to fill the gaps of an unstated price. In recent editions of his book, updated by Flechtner, Honnold seems to have revised his initial interpretation. According to him, the CISG Drafting “Committee decided to introduce an express statement into Article 55 to make it clear that it only applied to agreements which are considered *valid by the applicable law*”, i.e. the applicable law by virtue of PIL rules.”⁵² Simply, if a contract is invalid with regard to domestic law, Article 55 will also not apply.

⁴⁹ Flechtner *Honnold’s Uniform Law* 207; see also Kelso 1982/1983 (21) *Colum J Trans L* 529 537; Koneru 1997 (6) *M J G Tr* 105 148.

⁵⁰ Honnold *Uniform Law* (1982 and 1987 eds) 163-164; (1999 ed) 199-200; Flechtner *Honnold’s Uniform Law* 207. Honnold’s view is also quoted by Farnsworth in Galston/Smit *Sales* 3-9; Amato 1993 (13) *JL & Com* 1 8; Murray 1988 (8) *JL & Com* 11 Fn24.

⁵¹ Vincze in Felemegas *Interpretation* 421. This is also the opinion of Sono according to which, for an offer to be valid, one needs only “a serious intent to be bound, and definiteness so that a court can enforce it if it becomes necessary.” See Sono’s view in Flechtner 1999 (18) *JL & Com* 191 205. Of course, Honnold is aware of the controversial character of the issue relating to open-price terms. While explaining the process which led to Articles 14(1) and 55, Honnold remarks,

The language that became article 14 of the Convention, from the outset, was framed in terms of whether a communication ‘constitutes an offer’. Many of the delegates discussed the issue in these terms, while others felt that the issue posed by this language was whether the parties had the power to make a valid agreement when the agreement did not fix (or make provisions for fixing) the price. There is little indication in the discussions that this divergence in premises resulted from differences in commercial experience or in value choices. Instead, the problem seemed to reflect different patterns of thought derived from concepts of domestic law. In one legal universe it is thought that a contract of sale, in the nature of things, must provide for the price; in another legal universe the possibilities of contracting are conceived more broadly.

See Honnold *Uniform Law* (1982 and 1987 eds) 163-164; (1999 ed) 199-200; Flechtner *Honnold’s Uniform Law* 207; see also Gabuardi <http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html>.

⁵² Flechtner *Honnold’s Uniform Law* 209-210; see also Vincze in Felemegas *Interpretation* 421.

Parenthetically, it is not unusual for the price not to be determined in an international sale.⁵³ Owing to its importance to economic success, however, it is only irregularly that parties will

[Intend] to enter into a binding contract without at least an ‘implicit’ understanding on the price or a means ‘for determining’ the price. Hence, rarely will it be necessary to face the question whether the Convention bears the parties from making a contract that neither ‘expressly’ nor ‘implicitly fixes or makes provision for determining (...) the price.’⁵⁴

In the same way that scholars disagree, there is also no unanimity in the case law on the “open-price terms” issue. One of the leading cases in this regard is the Hungarian Supreme Court *Malev case*.⁵⁵ In this case, the Supreme Court recognised the price as a substantial requirement of the proposal’s definiteness. It ruled, therefore, that if the price cannot be determined from the contract, the latter is void.⁵⁶ As a means of motivation, the Court relied mainly on the provisions of Article 14(1) for which a proposal must be sufficiently definite for it to constitute an offer, viz. it must expressly or implicitly indicate, *inter alia*, the price, or make it determinable. As for Article 55, the Court stated that this provision could not supply the missing price because the goods in issue, i.e. jet engine systems, did not yet have a market price at

⁵³ See Spain 27 November 2003 Appellate Court Barcelona *Ski Equipment Rental case* [<http://cisgw3.law.pace.edu/cases/031127s4.html>] (accessed 16-4-2012).

⁵⁴ Flechtner *Honnold’s Uniform Law* 210.

⁵⁵ Hungary 25 September 1992 Supreme Court *Pratt & Whitney v Malev, The Hungarian Airlines*; translated in 1993 (13) *JL & Com* 31; also available online at: [<http://cisgw3.law.pace.edu/cases/920925h1.html>] (accessed 25-4-2012).

⁵⁶ In the case, an American seller, a manufacturer of aircraft engines, made two alternative offers of different types of aircraft engines to a Hungarian buyer, without stating the price. The buyer chose one of the engine types proposed and placed an order. On the issue whether a valid contract had been concluded, the first judge agreed. For him, because the goods were indicated, and their quantity, and the price determinable, there was a validly concluded contract. On appeal, the Supreme Court found that the offer and acceptance were vague and, consequently, ineffective since they failed to determine the price of the goods ordered or make provision for determining it. It repealed the decision of the first judge and concluded that there was no valid contract between the parties. For comments, see Amato 1993 (13) *JL & Com* 1 11; Koneru 1997 (6) *M J G Tr* 105 149; Flechtner 1998 (17) *JL & Com* 187 21; Witz 1995 (15) *JL & Com* 175 187-191.

that time.⁵⁷ From the discussion above, it appears that the correlation between Articles 14(1) and 55 is truly one of the most difficult problems raised in the CISG.⁵⁸

To summarise this, in the view of the drafters of the UNCITRAL *Digest*, despite their relative contradiction, provisions being studied provide interpretative guidance which depends on the intention of the parties.⁵⁹ Thus, “in determining the applicability of the CISG Article 55, (*vis-à-vis* other provisions), one must refer first and foremost to the intention of the parties.”⁶⁰ If it can be proved that parties intended to form a contract despite the open-price, their intent should prevail.⁶¹ A valid offer may, likewise, still be presumed to exist if the price can be determined by reference to the circumstances that surround the case. A German court in the *Auto case* has brought to mind that usually “an offer is only able to be accepted if the proposal expressly or implicitly sets forth the price or enables the determination of the price.”⁶² A price should, therefore, be determined by reference to a listed price on the condition that such a list is considered as having been silently agreed on by the parties.⁶³

⁵⁷ The decision in the *Malev case* has been subject to several criticisms. It is reproached for having failed to interpret the concept “validity”, taking into account the intention of parties, and to have forgotten the CISG international character by favouring the national party. See Flechtner 1998 (17) *JL & Com* 187 211; Koneru 1997 (6) *M J G Tr* 105 149; Amato 1993 (13) *JL & Com* 1 16-17. For a list of leading cases applying Article 55, see Kritzer/Eiselen *Contract* §91:24 91-35 91-36; Ruangvichathorn in Felemegas *Interpretation* 196; and for a list of cases, in which courts declined to apply it, see UNCITRAL *Digest* 92 Fn48.

⁵⁸ On the question of whether the PICC or the PECL should be used to interpret or supplement CISG provisions on “open-price terms matters”, see Alban in Felemegas *Interpretation* 76-84; Ruangvichathorn in Felemegas *Interpretation* 192-197; Cvetkovik in Felemegas *Interpretation* 295-301; Cvetkovic 2002 (14) 1 4 *Pace Int'l LR* 121-131; Vinceze in Felemegas *Interpretation* 419-429.

⁵⁹ See UNCITRAL *Digest* 268.

⁶⁰ It is recognised that Article 55 does not empower a judge or an arbitrator to establish a price when this has already been determined by the parties, or made determinable by them. See Germany 9 May 2000 Landgericht Darmstadt, CLOUT case No. 343; France 26 February 1995 Cour d' Appel Grenoble, CLOUT case No. 151, and other similar cases in UNCITRAL *Digest* 268 Fn4.

⁶¹ See Karollus 1995 *Cornell Review of the CISG* 51 60; Gabuardi http://cisgw3.law.pace.edu/cisg/biblio/gabu_ardi.html.

⁶² Germany 19 October 2006 Appellate Court München *Auto case* [<http://cisgw3.law.pace.edu/cases/061019g1.html>] (accessed 10-4-2012).

⁶³ *Ibid.*

As is the case for the price, it is also possible that the quantity or other features of the goods be left open for future determination, either by one of the parties or by a third person. In such a situation, practices established “between the parties may supply the details of quality, quantity, and price left unspecified in a proposal to conclude a contract.”⁶⁴ What is advised, however, is that the proposal states each and all of the essential elements legally required for it to amount to a definite offer.

South African law

One of the requirements for validity of the offer, in South African law, is that it must be unequivocal, viz. clear on the contract subject-matter. This condition was formulated by Levy J in *Wasmuth v Jacobs* as follows:

The rules applicable to the interpretation of an offer, or, for that matter, of an acceptance of an offer, are not necessarily the same as the rules which are applicable in the interpretation of contracts. In *Boerne v Harris* 1949 1 SA 793 (A) at 799, after stating the aforesaid position, Greenberg JA added: ‘Thus, although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer (or for that matter the offer itself) must be unequivocal, i.e. positive and unambiguous.’⁶⁵ (...)

If an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract. Where there is an ‘offer’ which provides that certain terms are to be ‘reviewed’ or to be ‘negotiated’ or ‘to stand over’ for decision at a later stage, then pending agreement on such outstanding terms neither party has any rights against the other.⁶⁶

It results from Levy’s statement that, for it to amount to an offer, a declaration of intention must as much as possible set out the essential and material terms of the proposed contract, i.e. it must be adequately definite. Where it comes to sales, for instance, the offer must mention the thing to be sold and the price.⁶⁷ The justification

⁶⁴ See UNCITRAL *Digest* 92 Fn19; see also Article 65(1) CISG; and Schwenger/Mohs 2006 (6) *IHR* 239 240.

⁶⁵ As addendum, Levis J appropriated words in brackets, added with respect to the original Judge’s statement.

⁶⁶ See Levy J in *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633 E-H; taking support on *OK Bazaars v Bloch* 1929 WLD 37; *Wilson Bros Garage v Texas Co (SA) Ltd* 1936 NPD 386; *Scheepers v Vermeulen* 1948 (4) SA 884 (O); *Potchefstroom Municipal Council v Boucher* NO 1958 (4) SA 382 (T).

⁶⁷ See Section 3.4 above for appropriate comments.

for this requirement is that the *merx* and the *pretium* constitute the basics of any contract of sale.⁶⁸

As is claimed in section 3.4 above, for a contract to qualify as one of sale, the characteristics and nature of the *merx* must be determined or at least be determinable at the time the contract is concluded.⁶⁹ Simply, there must be a defined and ascertainable subject-matter in the proposed contract for it to lead to a sale.⁷⁰ As ruled in *Lafrenz (Pty) Ltd v Dempers*, where the contract subject matter is both in existence and identified at the conclusion of the contract phase, then the contract amounts to a sale of ascertained goods.⁷¹ It does not matter that goods are corporeal, manufactured, sued for, or generic.⁷² What is important is that parties reach agreement on them. Where the goods, though agreed upon, are not in existence or are not identified at the formation stage, the sale is one of unascertained goods devoid of legal effect.⁷³ To paraphrase Bradfield and Lehmann, if the goods are so vaguely described that it is impossible to ascertain their nature and quantity, the offer is void.⁷⁴

With regard to the price, it must be serious, certain, or ascertainable, and stipulated in legal tender.⁷⁵ Such being the general rule, it is logical that, for it to be sufficiently definite, the offer must mention the price. Parties are, however, not obliged always to determine an exact amount of the price to be paid during negotiations. If they agree on the method of its determination without further recourse to them, the offer, and consequently the contract, is valid.⁷⁶ It follows then

⁶⁸ Cf. *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92.

⁶⁹ See Eiselen in *Scott Commerce* 134; see also *Kerr Sale* 8; *Zulman/Kairinos Sale* 21; *Hackwill Sale* 9; *Bradfield/Lehmann Sale* 25.

⁷⁰ See *Hamburg v Pickard* 1906 TS 1010; *Conlon and Fletcher v Donald* 1951 (3) SA 196 (C).

⁷¹ *Lafrenz (Pty) Ltd v Dempers* 1962 (3) SA 492 (A).

⁷² *Kerr Sale* 8; *Sharrock Business* 271; Eiselen in *Scott Commerce* 134-135; *Bradfield/Lehmann Sales* 25.

⁷³ See *Kriel and another v Le Roux* [2000] 2 All SA 65 (SCA). But, *Hackwill (Sale 9 Note 3)* for whom the distinction between sales of specific goods and sales of unascertained goods is not rigid.

⁷⁴ Cf. *Bradfield/Lehmann Sale* 29; taking support from *Botes & others v Toti Investment Co (Pty) Ltd* 1978 (1) SA 205 (T).

⁷⁵ See *Bradfield/Lehmann Sale* 31-32; *Kerr Sale* 30ff; *Hackwill Sale* 14; Eiselen in *Scott Commerce* 141; *Sharrock Business* 272; *Lotz Sale* 361 36.

⁷⁶ This is the meaning of the maxim *id certum est quod certum reddi potest* (D 12 1 6; 45 1 74). As Colman J said in the *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* case, no valid

that, as long as the price is determinable by reference to standards outside the parties, an offer with a usual or a market price or the so-called open-price, is satisfactorily definite.⁷⁷ As regards the issue of sales to a reasonable price, it still remains controversial.⁷⁸

In summary, because reaching consent about the goods and the price constitute the foundation of any contract of sale, where parties fail to do so there is no validly concluded sale.⁷⁹ The requirement as regards reference to the goods and the price at the formation stage is justified by the fact that a regular offer needs only a corresponding acceptance to form a contract. As declarations contained in advertisements rarely meet this requirement; they, therefore, lose the status of binding offers.⁸⁰

Congolese law

As said earlier, except for provisions defining failure in consent, the CCO does not deal with the process of concluding a contract. Despite that absence, scholars and

contract would exist unless the parties had agreed, expressly or by implication, on a purchase price. Colman specified that the requirement regarding a serious and ascertained price “could be achieved by fixing an amount in the contract or by agreeing upon an external standard by the application whereof it would be possible to determine the price without further reference to the parties.” See also: *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 574B-C; *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) 576I-577A; *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 (4) SA 141 (A) 158F-159A.

⁷⁷ Oosthuizen points out that, “The market price may be set as the purchase price either by express agreement or impliedly *via* conduct. This case often arises in the event of goods being ordered at a shop without the buyer first enquiring after the price. (...) In such cases a tacit agreement has been reached that the usual or market price will be charged.” See Oosthuizen Rights 96 Fn435; see also *Machanick v Simon* 1920 CPD 333 338; *R v Pearson* 1942 EDL 117 121-122; *R v Soller* 1945 TPD 75; *Rustenburg Platinum Mines Ltd v Breedts* 1997 (2) SA 337 (A); but *Stead v Conradie en Andere* 1995 (2) SA 111 (A) for sale of land.

⁷⁸ See comments in Section 3.4.4 above.

⁷⁹ Cf. *Dawidowitz v van Drimmelen* 1913 TPD 672 676; *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 707C; *Kennedy v Botes* 1979 (3) SA 836 (A) 845F-846A; and *Van der Walt v Stassen* 1979 (3) SA 810 (C) 814D-E.

⁸⁰ See *Crawley v Rex* 1909 TS 1105 whereby, an advertisement for the sale of tobacco specifying the price was judged incomplete because it failed to indicate the quantity of goods involved in each sale; see also Van der Merwe et al *Contract* 49 and authorities quoted by them in Fn20. For a comparative analysis of the effect of advertisements in other legal systems, see Kadner *Contrat* 67-111.

case law have developed a number of characteristics that a regular offer should meet for it to have legal effect. As Kalongo has argued, for instance, contrary to a simple invitation to contract, an offer must be firm, unequivocal, precise, and complete.⁸¹ As far as the comprehensiveness and accuracy characteristics are concerned, they mean that an offer must cover all fundamental elements of the purported contract so that a mere acceptance of it suffices to generate a contract.⁸² To give an example of this, where the contract consists of a sale of goods, mention must be made upon the thing sold and the price, as required by Article 264 CCO.⁸³

It is important to note that the requirement for the draft of the contract to be satisfactorily definite is now expressly formulated by Article 241 al. 3 UAGCL. As stated by this provision, “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer only if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.”⁸⁴ Standards for a sufficiently definite offer are delineated by Article 241 al. 2 UAGCL which declares, “An offer is sufficiently definite if it indicates the goods and, expressly or implicitly, fixes or makes provision for determining the quantity and the price.”⁸⁵ As it can be observed, the last provision reproduces literally the second sentence of

⁸¹ Kalongo *Obligations* 55; see also Mubalama *Obligations* 45. For comments on each of these characteristics in the context of French law, see Owsia *Contract* 410-411; Ghestin *Droit Civil* 261-265.

⁸² It was ruled that a “proposal must be sufficiently definite to permit the conclusion of the contract by mere acceptance of the other party.” Cass B 23 September 1969 *Arr Cass* 1970 84; referred to by De Bondt in Bocken *Belgian Law* 227.

⁸³ For commercial sales essential requirements, see Section 2.4 above. With regard to consumer contracts, Article 1(1) and (2) of the Consumer Protection Decree of 1 April 1959 (*BO* 1959 1284) allows the Government “to determine the composition, quality, and components that goods must comply with for them to be sold, offered or exposed for sale.” If it is possible that specific conditions be imposed in connection with the composition, quality, and substance of consumer goods, there is a greater reason for commercial transactions. For that reason there is ground to believe that, if a number of requirements are needed in commercial sales with regard to the description and quantity of the goods, any offer must conform to them for it to be valid.

⁸⁴ Compare this with the first sentence of Article 14(1) CISG.

⁸⁵ For an illustration, see Senegal 15 January 2002 Tribunal Regional hors Class de Dakar, Case No. 117 *Mehsen A v Saleh J* [<http://www.ohada.com/jurisprudence/ohadata/J-05-90.html>] (accessed 6-4-2013).

Article 14(1) CISG, the only difference being that the first replaces the word “proposal” by “offer”.

It is vital that the proposal mentions the goods and the price, or lets them be determined, because these form the basics of any sale upon which agreement shall be reached. Owing to the similarity between Article 241 al. 2 UAGCL and Article 14(1) CISG, comments made above in connection with the last provision apply *mutatis mutandis* with regard to modern Congolese law. The Commercial Act departs, however, from the Vienna Convention on the basis that it does not have a provision similar to Article 55 CISG. This protects Congolese law from the debate about the validity of contracts without price. In situations where there is a need to determine the price, Article 263 al. 2 UAGCL allows parties to refer to the market price, meaning the price generally charged at the time of formation of the contract for similar goods and in comparable circumstances.

Comments

Congolese law did not traditionally provide a definition for the offer. The situation has changed today with the influence of Article 241 UAGCL which reproduces Article 14(1) CISG. As to the latter, Article 241 states clearly the criteria for a valid offer among which is its definiteness. Thus, as for the CISG and South African law, in modern Congolese law a proposal regarding sale must also be definite, viz. indicating the nature and the quantity of the goods and the price in order to produce legal effect. Though fixing the price is important for the contract, the fact that the parties may abstain from determining it does not automatically invalidate the agreement. It is acknowledged, in all of the three legal systems under consideration, that, where parties who are in a regular course of business fail to determine the price, they are supposed to apply the price habitually paid in the trade concerned or the market price. Briefly, the CISG requirements as for a definite offer correspond to the ones in force under domestic laws.

South African law and Congolese law, by contrast to the CISG, do not, however, envisage the case of a “contract validly concluded” without the

determination of the price. This is justified by the fact that, under domestic laws, the price is one of the essential elements of a sale so that its omission entails the nullity of the contract. The result, then, is that domestic laws seem clearer than the CISG on the question of open-price terms.

Further to the certainty, an additional requirement for a proposal to constitute an offer is that it expresses the intention of the party making the offer to be bound by the offer.

5.2.3.3 “Intention of the offeror to be bound”

The CISG

As stated by Article 14(1), a proposal for concluding a contract constitutes an offer on condition that it, *inter alia*, “indicates the intention of the offeror to be bound” in the event that his/her proposition is accepted by the other party. At first, the requirement for the will of the offeror to be bound in the case of acceptance aims to distinguish an offer from a simple invitation to submit offers. Such an intention is known as “*the animus contrahendi*”.⁸⁶ As Alban has stated,

The available doctrine distinguishes between the offer, in a strict sense, and a preliminary invitation to conclude a contract, holding that in the first case the offeror has the intention to be bound in the case his proposal is accepted by the offeree, whereas such an intention does not exist in an invitation to consider entering into a contract.⁸⁷

In general, the intention of the offeror to be bound can be ascertained from the language used by him/her. There is an authority that the use of phrases such as “we order for immediate delivery” or “we offer for sale” can be considered as evidencing a clear intent of the offeror to be bound.⁸⁸ But, as it was ruled by an American court,

⁸⁶ Cvetkovic in Felemegas *Interpretation* 295; Cvetkovic 2002 (14) 1 4 *Pace Int'l LR* 121 122.

⁸⁷ Alban in Felemegas *Interpretation* 81; see also Schroeter in Schlechtriem/Schwenzer *Commentary* 270.

⁸⁸ See Huber/Mullis *CISG* 71; UNCITRAL *Digest* 91; both quoting Switzerland 5 December 1995 Handelsgericht des Kantons St Gallen *IHR* 2001 44, CISG Online No. 245.

in *Hanwha Corporation v Cedar Petrochemicals Inc.*, the use of expressions such as “no contract would enter into force unless (seller) countersigns the documentation as is” shows one party’s intention not to be bound.⁸⁹ When there is strong purpose for a party to be bound once its proposal is accepted, there is no need for a proposal to contain too much detail. If the intent is unclear, however, the issue of whether the offeror was willing to be bound if the proposal was accepted will depend on statements and practices of parties as stated by Article 8 CISG.⁹⁰

Article 8(1) states that, “statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.”⁹¹ Additionally, Article 8(2) announces that, if

⁸⁹ USA 18 January 2011 Federal District Court [New York] *Hanwha Corporation v Cedar Petrochemicals Inc.* [<http://cisgw3.law.pace.edu/cases/110118u1.html>] (accessed 10-4-2012). In this case,

[A] Korean buyer (plaintiff) and an American seller (defendant) engaged in several transactions for the sale of petrochemicals products. Their course of dealing had not been smooth. But in past transactions they agreed, either explicitly or impliedly, on all contractual terms and met obligations accordingly. In the disputed transaction, the defendant acknowledged plaintiff’s bid to purchase 1,000 metric tons of Toluene at the then current market price of USD 640 per metric ton. In order to conclude this market, the defendant dispatched signed documentation to the plaintiff, including a clause selecting New York law, the UCC, and INCOTERMS 2000 as the applicable law. The plaintiff did not respond, but engaged with the defendant in preparing a bill of lading and nominating a vessel for the ocean carriage. Later, the plaintiff sent back the amended documentation, with Singapore law and INCOTERMS 2000 as the proper law of the contract. Upon sending back the documentation, he wrote that “no contract would enter into force unless defendant countersigns the documentation as is.” Defendant refused to take plaintiff’s terms. Instead he asked him to sign and return per defendant’s terms.

The Federal District Court deduced from the buyer’s attitude the intention not to be bound by his proposal and concluded to the inexistence of the contract between the parties.

⁹⁰ Kelso1982/1983 (21) *Colum J Trans L* 529 533; Switzerland 3 July 1997 Bezirksgericht St. Gallen, CLOUT case No. 215; in UNCITRAL *Digest* 91 Fn10. Perillo (in Felemegas *Interpretation* 49) says that the provisions of Article 8 have “special significance for agreements that have not resulted from detailed negotiations.”

⁹¹ For an application of this, see USA 8 February 2011 Federal District Court [Maryland] *CSS Antenna Inc. v Amphenol-Tuchel Electronics GMBH* [<http://cisgw3.law.pace.edu/cases/110208u1.html>] (last accessed 27-6-2012). It was ruled, in this case, that a phrase such as “May we point out” is neither clear nor specific regarding seller’s intent that general conditions should control the term of the sale between the parties. See, in the same sense: New Zealand 22 July 2011 Court of Appeal of New Zealand *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* §36 and 62 (buyer’s responsibility) [<http://cisgw3.law.pace.edu/cases/110722n6.html>]; Germany 14 January 2009 Appellate Court München *Metal Ceiling Materials case* (application of standard terms and conditions) [<http://cisgw3.law.pace.edu/cases/090114g1.html>]; Netherlands 21 January 2009 District Court Utrecht *Sesame Seed case* [<http://cisgw3.law.pace.edu/cases/090121n1.html>] (cases last accessed 28-6-2012).

the intent of one party remains obscure notwithstanding the terms of Article 8(1), his/her statements and conduct should be interpreted “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”⁹² To exemplify this, in the *Alain Veyon case*, a French buyer pleaded with the Court to reduce the debt claimed by an Italian seller on the basis that his successor had benefited from lower prices. The Grenoble Appeal Court dismissed his request. According to the Court, since the buyer “had taken delivery of the goods without specifically questioning their purchase price, his behaviour has to be interpreted as acceptance of the price charged, pursuant to article 8(2) and (3) CISG.”⁹³ The same rule was formulated by the Austrian Supreme Court in the *Chinchilla Furs case* as follows:

For the validity of the offer [i.e., whether it can be validly accepted], it also suffices that the required minimum content can be understood as being sufficiently definite by “a reasonable person of the same kind” as the other party (offeree) would have “in the same circumstances” (...). According to Article 8(3) CISG, in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to 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.⁹⁴

As has been summarised by several scholars, Article 8 provisions recognise that ‘usages’ suggesting the desire to trade can be given an interpretive meaning with regard to the will of the parties.⁹⁵

The CISG recognises, furthermore, in usages and the practices of parties a normative value through Article 9. As stated by this provision, “parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.”⁹⁶ In addition, the Convention binds parties under

⁹² See, for application, ICC Court of Arbitration 1999 Arbitral Award No. 9187 [<http://www.unilex.info/case.cfm?id=466>] (last accessed 27-6-2013).

⁹³ France 26 April 1995 Appellate Court Grenoble *Entreprise Alain Veyon v Société Ambrosio* [<http://cisgw3.law.pace.edu/cases/950426f1.html>] (accessed 25-4-2012); see also Perillo in Felemegas *Interpretation* 49.

⁹⁴ Austria 10 November 1994 Supreme Court *Chinchilla Furs Case*, CLOUT case No.106.

⁹⁵ See Pamboukis 2005-2006 (25) 1/2 *JL & Com* 107 108; Schmidt-Kessel in Schlechtriem/Schwenzer *Commentary* 146; DiMatteo 2011 (3) *Belgrade LR* 67 72.

⁹⁶ Article 9(1) CISG; see Walker 2005 (24) 2 *JL & Com* 263 269, for comments.

Article 9(2) to usages widely known and observed internationally in the same trade. More specifically, Article 9(2) presumes the parties to have indirectly made applicable to the formation of the contract “usage(s) of which they knew or ought to have known and which in international trade (are) widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned,” unless otherwise agreed. Simply, through Article 9(2), trade usages are considered as part of the contract so that their knowledge will be presumed even if there is no real knowledge. This means, therefore, that a party could be bound to a usage to which he has no real knowledge if that usage is internationally known and generally followed by merchants in that trade.⁹⁷

Thus, when determining the intent of a party to be bound by his/her proposal or, likewise, the understanding of a reasonable person, “due consideration must be given”, *inter alia*, to practices and usages. Circumstances to consider in the case include, but are not limited to, previous negotiations, any practices which the parties have established between themselves, and usages. The American *Hanwha Corporation* case constitutes an excellent illustration on the subject.⁹⁸

It should be remembered that requiring an express intention to be bound aims to distinguish an offer from a simple invitation to do business. This practice, also known as the *invitatio ad offerendum*,⁹⁹ does not bind his/her author. Such is the essence of Article 14(3) which denies the status of an offer to proposals addressed to the public. In accordance with this provision, a proposal not addressed “to one or

⁹⁷ See Pamboukis 2005-2006 (25) 1/2 *JL & Com* 107; Walker 2005 (24) 2 *JL & Com* 263.

⁹⁸ In the *Hanwha Corporation v Cedar Petrochemicals Inc.* case, the Court applied Article 8 in all of its three paragraphs. After it had observed that the intent of the parties as required by Article 8(1) was missing, it performed an objective analysis of their declarations under Article 8(2). As this exercise was also unsuccessful, the Court analysed the course of dealing pursuant to Article 8(3) and found that the plaintiff did not show intent to be bound by his offer. It concluded then that a validly formed contract did not exist. See, in the same sense, USA 9 May 2008 Federal District Court [Delaware] *Solae LLC v Hershey Canada Inc.* [<http://cisgw3.law.pace.edu/cases/080509u1.html>] (accessed 10-4-2012).

⁹⁹ See Schroeter in Schlechtriem/Schwenzer *Commentary* 272; Schwenger/Mohs 2006 (6) *IHR* 239 240; Schlechtriem/Butler *International Sales* 69; Cvetkovic 2002 (14) 1 4 *Pace Int'l LR* 121 130.

more specific persons”, is “considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.”¹⁰⁰

South African law

South African law obliges the person making an offer to declare his/her intention expressly or impliedly to be bound by the offer if it is accepted. Calling for the offeror’s express or implied intention to be bound, if the other party accepts the proposal, has the purpose to distinguish an offer from an invitation to deal.¹⁰¹ This is what is known in Roman-Dutch law as the *animus contrahendi* as it is articulated in the *Saambou-Nasionale Bouvereniging v Friedman* case.¹⁰² As Van Winsen J said, in *Hottentots Holland Motors (Pty) Ltd v R*, a statement made by a tradesperson must be made with the intention of being bound by the offeree’s acceptance for it to constitute an offer.¹⁰³ Levy J specified, in the *Wasmuth v Jacobs* case, that, “It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, which means made with the intention that when it is accepted it will bind the offeror.”¹⁰⁴ Thus, if it is proved that the offeror did not intend to be bound by the acceptance of the other party, the offer should be described as lacking *animus contrahendi*.¹⁰⁵

The absence or not of the intention of the person making the offer to be bound by the proposal may be deduced from the wording or the circumstances surrounding the case.¹⁰⁶ For instance, despite its appearance of being a record of a concluded contract, a note of a broker starting with the words “We hereby confirm having sold

¹⁰⁰ But, Article 2:201(2) PECL whereby, an offer may be addressed to the public and produce legal effects. As provided by Article 2:201(3), “A proposal to supply goods (...) at stated prices made (...) in a public advertisement or a catalogue (...) is presumed to be an offer to sell (...) at that price until the stock of goods (...) is exhausted.” *Contra* Article 31(3) CESL which is in conformity with Article 14(3) CISG.

¹⁰¹ Ng’ong’ola 1992 (4) *RADIC* 835 847; *Christie/Bradfield Contract* 35; *Kerr Contract* 64.

¹⁰² *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 991 G.

¹⁰³ *Hottentots Holland Motors (Pty) Ltd v R* 1956 1 PH K22 (C); see also *Roberts and Another v Martin* 2005 (4) SA 163 (C); and *Christie/Bradfield Contract* 31.

¹⁰⁴ See *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633 D; finding advice in *Efroiken v Simon* 1921 CPD 367 370; and *Finestone v Hamburg* 1907 TS 629 632.

¹⁰⁵ *Christie/Bradfield Contract* 32.

¹⁰⁶ For an illustration, see *Robinson v Randfontin Estates Gold Mining Co Ltd* 1921 AD 168.

to you the goods specified below” was held to be an offer because of the surrounding circumstances.¹⁰⁷

A question of whether proposals for partial, incomplete or provisional agreements are sufficient to show one party’s intention was asked and answered by Corbett JA, in *Pitout v North Cape Livestock Co-op Ltd*, as follows:

Was the understanding the offer made *animo contrahendi*, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made ... while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case.¹⁰⁸

Such is also the meaning in *CGEE Alsthom Equipments et Entreprises, South African Division v GKN Sankey (Pty) Ltd* in which Corbett JA stated that, “whether in a particular case initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement, and the surrounding circumstances.”¹⁰⁹

Congolese law

It has already been said that, despite the absence of specific provisions in the CCO dealing with the offer, proposals, in contrast to simple invitations to contract, must include all the elements of the proposed contract. They must, among other things, be firm and show the intention of a party to be bound.¹¹⁰ An earlier decision of the Belgian *Cour de Cassation*, applicable then in the DRC, ruled on this subject that “in order to have a contract it is necessary that parties give their consent with intention

¹⁰⁷ See *East Asiatic Co (SA) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954 2 SA 387 (C) 390F-391A; but *Ferguson v Merrensky* 1903 TS 657, whereby the expression “You may write to him if you like to follow up the matter” was described as an invitation to do business deprived of legal effect.

¹⁰⁸ *Pitout v North Cape Livestock Co-op Ltd* 1977 4 SA 842 (A) 850D.

¹⁰⁹ *CGEE Alsthom Equipments et Entreprises, South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA (A) 92E.

¹¹⁰ *Kalongo Obligations* 55; *Mubalama Obligations* 45; *Youngs Comparative* 514. See, for French law, Cass F 3rd Civ 28 November 1968 *Bull Civ* III No. 507 *Gaz Pal* 1969 1 195. For comments on the characteristics of the offer under civil law jurisdictions, see Owsia *Contract* 410-411; Ghestin *Droit Civil* 261-265.

to be legally bound *animo contrahendae obligationis*.”¹¹¹ As the ruling in the decision above evokes “parties” without any distinction, it is assumed that it refers to both the offeror and offeree. Accordingly, when a Congolese law offeror makes an offer, he/she must do it with the intention of being bound should the addressee accept. These are currently the terms of Article 241 al. 3 of the OHADA Commercial Act which institutes openly the offeror’s intention to be bound in case of acceptance as one of the characteristics of a valid offer.¹¹²

Inspired by sentence one of Article 14(1) CISG, Article 241 al. 3 UAGCL denies legal effect to public offers. As stated by it, an offer must be addressed to “one or more specific person” for it to constitute an offer; otherwise it is considered as a mere invitation to make offers.¹¹³ A proposal made to the public may, however, sometimes bind the offeror depending on the circumstances of the case, or if such is the way previous negotiations were conducted. Such is the meaning of Article 238 al. 2 UAGCL which gives effect to practices and usages established between the parties.¹¹⁴ In addition, Article 239 al. 1¹¹⁵ binds contractual parties by any usage to which they have agreed and by any practices that they have established in their commercial relationship.

From what has been explained so far, it appears that, under OHADA law, and consequently in Congolese law, practices established between the parties become

¹¹¹ Cass B 2 December 1875 *Pas* 1876 I 37; translated by Herbots *Contract* 38, also reproduced in *Katuala Code* 16; and Piron 99.

¹¹² According to Article 241 al. 3 UAGCL, “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it, *inter alia*, (...) indicates the intention of the offeror to be bound in case of acceptance.” It was ruled that a proposal with retention of the title clause is inoperative if that clause is not publically brought to the knowledge of the offeree. See Senegal 15 January 2002, *Mehsen A v Saleh J* case.

¹¹³ Cf. Article 241 al. 4 UAGCL which states, “A proposal addressed to undetermined persons is to be considered merely as invitation to make offers, unless the contrary is clearly indicated by the party making the proposal.” The OHADA Draft Uniform Act on Contract does not have similar provision (Cf. Article 2/2).

¹¹⁴ Article 238 al. 2 stipulates, “In determining the intent of a party, due consideration is to be given to the circumstances of fact, including the negotiations and any practices which the parties have established between themselves, or even usages in force in the line of work concerned.” Compare to Article 4/3 of the Draft above.

¹¹⁵ Article 239 al. 1 UAGCL reproduces Article 9(1) CISG.

part of the contract as they do in the CISG. Parties are presumed, unless otherwise stipulated, “(...) to have adhered to professional usages of which they knew or ought to have known and that, in the commerce, are widely known to, and regularly observed by the parties to contracts of the same nature in the branch of activity concerned.”¹¹⁶

Comments

Offers, in all of the three legal systems under comparison, must be firm, which means stating expressly or by implication the willingness of the offeror to be bound. Traditionally, neither the CCO nor the case law explained the content of the firmness condition in the DRC, which constituted a gap. This gap has been filled in by the provisions of Article 241 al. 3 UAGCL which are modelled on their equivalent Article 14(1) CISG. Likewise, all of the three legal systems attribute to the intention and usages of parties an important meaning in determining whether or not a party intended to contract. In the perspective of Congolese law, Article 239 al. 2 UAGCL bears a resemblance to Article 9(2) CISG in this regard.

Though Article 239 al. 2 UAGCL appears to have reproduced the Convention on the matter of dealing with commercial practices and usages, however, there are two slight differences between the two provisions. Firstly, unlike Article 9(2) CISG, Article 239 al. 2 does not expressly extend the application of professional usages to the formation of contract process. Secondly, it speaks of commerce in general without specifying that it is concerned with international trade. Of course, in doing so, the provision would limit the field of application of the Commercial Act which, contrary to the CISG, includes both domestic and international commercial transactions. As far as the extension is concerned, although Article 239 al. 2 is silent as to the applicability of professional usages to the formation of the contract, their application at this stage is not denied elsewhere in the Commercial Act. It is then expected that, in the same way that trade usages and practices should govern the

¹¹⁶ Article 239 al. 2 UAGCL; compared to Article 9(2) CISG.

rights and obligations of the parties deriving from the sale, they may also apply to the conclusion of the contract and the offer in particular.

5.2.3.4 Conclusion on the substantial requirements of a valid offer

In the case of the CISG, South African law, and modern Congolese law, a proposal for concluding a contract becomes a valid offer on the completion of a triple condition. Firstly, the offer must be addressed to one or more specific persons. Secondly, it must be sufficiently definite, i.e. indicating the goods, or making their quantity, and price clearly determined or determinable. Lastly, the intent of the offeror to be bound must be apparent from the proposal. If these requirements are missing, the proposal will consist of a mere invitation to contract devoid of all legal effects, unless trade usages and practices show the contrary.

It should be noted, however, that for an offer to become effective, it must reach the offeree, viz. it must not have been withdrawn or revoked in the meantime.

5.2.4 Offer Withdrawal and Revocation

The CISG

Generally speaking, an offer becomes effective from the time it reaches the offeree.¹¹⁷ As stated by Article 24, an offer reaches the offeree “when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address, or if he does not have a place of business or a mailing address, to his habitual residence.”¹¹⁸ In order to produce legal effect, an offer must,

¹¹⁷ See Article 15(1) CISG; for comments, see Schwenger/Mohs 2006 (6) *IHR* 239; and for comparative purposes, see Article 2.1.3 PICC which reproduces literally the same rule.

¹¹⁸ With regard to electronic communications, the CISG-AC No. 1 of 15 August 2003 indicates that “the term ‘reaches’ is to be interpreted as corresponding to the point in time when an electronic communication has entered the offeree’s server.” See CISG-AC Opinion No. 1, Electronic Communications under CISG, 15 August 2003. <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html> (accessed 08-5-2012); see also Article 10 UNEDIC.

from the moment it is issued up to the time it reaches the offeree, have not been terminated.¹¹⁹ Insofar as the termination issue is concerned, the CISG distinguishes between the withdrawal and the revocation of the offer. If the withdrawal takes place before, or at the same time as the offer reaches the offeree, the revocation intervenes after the offer has reached him/her.¹²⁰

With regard to the withdrawal, Article 15(2) states that, “an offer can be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.” The withdrawal right is recognised even though “the offer is irrevocable”.¹²¹ According to one commentator,

[The] drafters of the Convention contemplated the traditional case of where the offer is sent by international mail, and the withdrawal takes place by fax or phone call. In times of electronic communication, things have changed. (In) the case of an offer by electronic message, a withdrawal would never be possible under the plain wording of Article 15(2) CISG because, technically, it always enters the information system and can be retrieved before the withdrawal reaches the addressee, and this fact can always be traced and proven.¹²²

Notwithstanding the above reading, the *ratio legis* underlying Article 15(2) is that a withdrawal may “be possible as long as the addressee acquires knowledge of the withdrawal no later than knowledge of the offer.”¹²³ But, after he/she has known of it, the offer cannot be withdrawn any longer. The only remaining termination possibility in the offeror’s hands is the revocation of the offer, unless the offeree has rejected the proposal.¹²⁴

As regards the revocation of the offer, it is dealt with in Article 16 which states that, “Until a contract is concluded an offer may be revoked if the revocation reaches

¹¹⁹ Huber/Mulis *CISG* 80.

¹²⁰ Ibid; see also Schwenger/Mohs 2006 (6) *IHR* 239 241. Article 15(2) and Article 16(1) provide respectively that: “An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.” “Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.”

¹²¹ Regarding electronic communications, it is the time when the withdrawal enters the offeree’s server that will be decisive (See *CISG-AC Opinion No. 1* under Article 15).

¹²² See Schwenger/Mohs 2006 (6) *IHR* 239 241; see also comments in the *CISG-AC No. 1*.

¹²³ Ibid.

¹²⁴ See Article 17 which considers that “an offer is terminated when a rejection reaches the offeror,” even if the offer was irrevocable.

the offeree before he has dispatched an acceptance.”¹²⁵ According to several scholars, Article 16 was one of the main controversial provisions of the CISG.¹²⁶ The crucial point of discord was the opposite attitude adopted by legal systems with regard to the question of “whether an offer is binding and whether it may be revoked.”¹²⁷ Within the common law legal system, on the one hand, the offeror is generally granted the freedom to revoke the offer at any time before the contract is concluded.¹²⁸ In this legal family, the right to revoke the offer is recognised even if the offer is expressly reputed to be firm or irrevocable.¹²⁹ Under the civil law legal system, on the other hand, the offer is normally irrevocable. Of course, in this legal system a contract is also concluded if the acceptance reaches the offeree. But, before that time, the offeror is presumed to give “the offeree a reasonable time to consider, time during which the offer is irrevocable unless otherwise indicated by the offeror.”¹³⁰

¹²⁵ Article 16(1) CISG.

¹²⁶ See Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 245; Schroeter in Schlechtriem/Schwenzer *Commentary* 302; Schlechtriem/Butler *International Sales* 73; Huber/Mulis *CISG* 80; Vincze in Felemegas *Interpretation* 85.

¹²⁷ Schroeter in Schlechtriem/Schwenzer *Commentary* 302.

¹²⁸ See, in this sense, Zimmerman (*Obligations* 560) for whom the revocability principle, under English common law, is justified by the doctrine of consideration. Zimmerman elucidates that, “No consideration is normally given for the offer, and hence the latter cannot bind the offeror.”

¹²⁹ See Farnsworth in Galston/Smit *Sales* 3-10; Vincze in Felemegas *Interpretation* 85; Akseli in Felemegas *Interpretation* 301; Garro 1989 (23) *Int'l L* 443 455; Huber/Mulis *CISG* 81; Murray 1988 (8) *JL & Com* 11; Kadner *Contrat* 185-189. See also §2-205 UCC for which an offer made by a merchant “in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time.”

¹³⁰ See Vincze in Felemegas *Interpretation* 85; see also Akseli in Felemegas *Interpretation* 302; Garro 1989 (23) *Int'l L* 443 455. But, Ferrari considers it wrong to paste the irrevocability principle to the civil law legal system, and the revocability rule to the common law. As stated by him, “In France and Italy, for instance, two countries which undoubtedly belong to the civil law tradition; the rule is that an offer is generally revocable.” See Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 246; see also Klimas *Contract* 32; Youngs *Comparative* 516. As far as Italy is concerned, Article 1328 of the *Codice Civile* declares that, “the offer may be revoked before the time when the contract is concluded.” Article 1329 of the same code specifies, “If the offeror has undertaken to keep the offer open for a certain time; revocation will be ineffective.” (Translation by Beltramo and others). Contrary to Italian law, under French law the revocability principle is not codified; it is rather established by judicial decisions and doctrinal views. (See Cass F Civ 3 February 1919 DP 1923 I 126; commented on by Owsia *Contract* 448; Youngs *Comparative* 516; Malaurie/Aynes/Stoffel-Munck *Obligations* 237§470; Benabent *Obligations* 47§59; Terre/Simler/Lequette *Obligations* 128 §117; and Kadner *Contrat* 179).

Given these differences, the CISG drafters tried to reach a compromise between the two aforesaid trends through Article 16(1).¹³¹ According to this provision, from the time an offer is made up to the moment it is received, the offeror may revoke the offer provide that the revocation reaches the offeree before he/she has dispatched an acceptance.¹³² As ruled by a Slovenian court, “since the seller received the revocation of the offer after he had dispatched his acceptance (...), the statement of the buyer that he revoked his order could not produce any legal effect.”¹³³

From its words, Article 16 is obviously based on the common law principle that offers are revocable.¹³⁴ This principle is accompanied, however, by an exception, according to which “an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.”¹³⁵ Also, offers on which “the offeree has acted in reliance” are irrevocable.¹³⁶ Such are the terms of Article 16(2)(b) whereby, even if an offer does not expressly indicate that it is irrevocable, it becomes irrevocable, “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.” Vincze remarks that Article 16 mixes the civil law and common law approaches with regard to the

¹³¹ Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 246.

¹³² By so ruling, Article 16(1) relies on the common law mailbox theory, so that the right to revoke the offer ends with an effective acceptance. Cf. Article 18(2); see also Farnsworth in Galston/Smit *Sales* 3-12.

¹³³ Slovenia 9 April 2008 Higher Court [Appellate Court] in Ljubljana [<http://cisgw3.law.pace.edu/cases/080409sv.html>] (last accessed 7-6-2013). In this case, a Slovenian buyer offered to buy goods from a German seller. The latter accepted the offer by notice to the former and dispatched the goods as well. Surprisingly, the seller was notified by the buyer that he had revoked the offer although the seller has already handed the goods over to the carrier. The Court denied effect to that revocation “because the seller had already entirely performed his obligations under the contract by handing over the goods to the carrier.” By July 2013, the Slovenian case was the only decision recorded dealing specifically with Article 16(1); also reported in the UNCITRAL *Digest* 97 Fn1.

¹³⁴ Schroeter in Schlechtriem/Schwenzer *Commentary* 303; Akseli in Felemegas *Interpretation* 302; Farnsworth in Galston/Smit *Sales* 3-10; Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 247; Ng’ong’ola 1992 (4) *RADIC* 835 848.

¹³⁵ Article 16(2) (a) CISG.

¹³⁶ Garro 1989 (23) *Int’l L* 443 456; supported by Akseli in Felemegas *Interpretation* 304. According to Eörsi, the two revocability exceptions above are one of civil law and the other of common law nature. See Eörsi 1979 (27) *Am J Comp L* 311 318.

irrevocability and revocability subject.¹³⁷ Because of that combination, Akseli believes that the provision “lacks definitional clarity”.¹³⁸ For this author, “CISG Article 16(2)(a) has not eliminated the controversy as to whether the mere fixing of a time for acceptance makes the offer irrevocable,” or not.¹³⁹

Following from this debate, Garro inferred that the so-called “compromise solution of article 16(2)(a) does not bridge the gap between common law and civil law conceptions on the irrevocability of offers that state a fixed time for acceptance: the compromise only covers it up.”¹⁴⁰ Faced with this ambiguity, numerous scholars are desirous of suggesting the corresponding PICC or PECL provisions¹⁴¹ to supplement the CISG on the revocability theme.

¹³⁷ Vincze in Felemegas *Interpretation* 85.

¹³⁸ Akseli in Felemegas *Interpretation* 301; see also Schroeter in Schlechtriem/Schwenzer *Commentary* 303.

¹³⁹ Under civil law, if there is a fixed time for the acceptance of the offer, the offer will remain irrevocable until the expiration of the stated period. In common law countries, on the contrary, the time fixed for acceptance means only that an answer has to be given within that period, otherwise the offer is revocable any time. See Akseli in Felemegas *Interpretation* 301; Youngs *Comparative* 516-517; Malaurie/Aynes/Stoffel-Munck *Obligations* 237§470; Benabent *Obligations* 47§59; Terre/Simler/Lequette *Obligations* 129 §118.

¹⁴⁰ Garro 1989 (23) *Int'l L* 443 456. Another commentator says, however, that the rarity of case law relating to the revocability matter “gives grounds for hoping that far-reaching differences between the legal systems on fundamental points and the copious learned debate on the subject do not reflect practical needs.” See Schroeter in Schlechtriem/Schwenzer *Commentary* 303.

¹⁴¹ Cf. Article 2.1.4 PICC and Article 2:202 PECL. With regard to the PICC, they regulate the revocation of the offer in the same words as the CISG. Because of that similarity, Vincze (in Felemegas *Interpretation* 90) believes that it should not be suitable to use the PICC in the interpretation of provisions of the CISG on revocability matters. According to him, as the former are duplicated from the latter, they are not likely to eliminate difficulties appearing in the CISG. Regarding the PECL, Article 2:202(1) has also adopted a similar approach to the one established by Article 16(1) of the CISG on the revocation issue. Here, the offer is, in general, revocable except in some circumstances where it should be irrevocable. In accordance with Article 2:205 (3) PECL, the revocation is ineffective in three hypotheses: 1) if the offer expressly indicates that it is irrevocable; 2) if it states a fixed time for its acceptance; or 3) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Akseli (in Felemegas *Interpretation* 304) explains that, by its analytical approach, the provision of the PECL “clears any doubt in CISG Article 16(2) (a) by stating that a revocation of an offer is ‘ineffective’ even if it merely states a fixed time for its acceptance.” The author suggests it then to supplement the CISG on the revocability issue. Article 32(3) CESL reproduces Article 2:205 (3) PECL.

South African law

It is acknowledged, in South African law, that an offer may well be withdrawn or revoked at any time before acceptance,¹⁴² because it does not have an obligatory effect. As Van der Merwe and others have said, “(The) revocation is possible until the moment upon which the contract is concluded and is not precluded by a time limit set for acceptance.”¹⁴³ Thus, the offer, once made, survives until it has been revoked or lapsed. Compared with the CISG, South African law looks as if it does not expressly differentiate between the withdrawal and revocation of the offer.¹⁴⁴ It should be remembered that the withdrawal refers to the retraction of an offer before it reaches the addressee, whereas the revocation refers to a communicated offer.

With regard to its meaning, the concept “revocation” is described in *Markram v Scholtz and another* as the manifestation of an intention not to contract.¹⁴⁵ In order to produce effect, the revocation has to be communicated before the offer is accepted. That is to say, an offeree who receives a revocation at any time before acceptance loses his/her opportunity to accept.¹⁴⁶ But, if the offeree agrees to the offer before the offeror notifies him/her of the revocation, there is an enforceable contract.¹⁴⁷ There

¹⁴² See *Christian v Ries* (1898) 13 EDC 8 15; *Gous v Van der Hoff* (1903) 20 SC 237 240; *Scott v Thieme* (1904) 11 SC 570 577; *R v Nel* 1921 AD 339 344; *Union Government v Wardle* 1945 EDL 177 181; *Hersch v Nel* 1948 3 SA 686 (A) 693; *Greenberg v Wheatcroft* 1950 2 PH A 56 (W); *Bird v Sumerville* 1960 4 SA 395 (N) 400; *Stewart v Zagreb Properties (Pty) Ltd* 1971 2 SA 346 (RA) 352; see also *Christie/Bradfield Contract* 54; *Van der Merwe et al Contract* 51. South African law considers the principle that offers are generally revocable even though it has rejected the English doctrine of consideration long time ago. See *Conradie v Rossouw* 1919 AD 279 discussed under Section 3.2.4 above.

¹⁴³ *Van der Merwe et al Contract* 51; finding support from *Oos-Vrystaat Kaap Bedryf Bp v Van Aswegen* 2005 (4) SA 417 (O); *The Fern Gold Mining Company v Tobias* (1890) 3 SAR 134; *Gous v Van der Hoff* (1903) 20 SC 237.

¹⁴⁴ See Ng’ong’ola 1992 (4) *RADIC* 835 848. In the *Yates v Dalton* 1938 EDL 177 case, for instance, the two words are used interchangeably; see also *Kerr Contract* 73 who explains withdrawal by revocation, and *vice versa*.

¹⁴⁵ See *Markram v Scholtz and another* 2000 4 All SA 452 (NC).

¹⁴⁶ See *Drifwood Properties (Pty) Ltd v McLean* 1971 1 SA 287 (E); see also *Greenberg v Wheatcroft* 1950 2 PH A56 (W); *Wissekerke and another v Wissekerke* 1970 2 SA 550 (A) 557E; *Phillips v Aida Real Estate (Pty) Ltd* 1975 3 SA 198 (A) 207H. For comments, see *Kerr Contract* 73; *Christie/Bradfield Contract* 55; and *Sharrock Business* 60-61.

¹⁴⁷ See *Odendaal v Norbert* 1973 2 SA 749 (R); *Wessels v De Jager* [2000] 4 All SA 440(A). In *Yates v Dalton* 1938 EDL 177, Y made a telegraphic offer to let a café to D. The next day, D sent a telegram accepting the offer. An hour and a half after this, D received a telegram from Y

is no particular way to revoke an offer; it is sufficient to bring it to the offeree's attention.¹⁴⁸

Despite the general principle according to which offers are revocable under South African law, a party making an offer may expressly or by implication make the offer irrevocable for a fixed period of time. It is asked, however, whether a unilateral irrevocability declaration is binding. Under Anglo-American law jurisdiction, the answer is negative owing to the doctrine of consideration. Consistent with this doctrine, an offer has no binding force even if it is stated to be a firm offer because the offeree is supposed not to have given consideration to the offeror's unilateral declaration or promise.¹⁴⁹ A comparable solution was adopted in the Cape when the doctrine of consideration was considered to form part of South African law.¹⁵⁰ Such an approach has been abandoned following the rejection of the doctrine of consideration in the *Conradie v Rossouw* case.¹⁵¹ Since the 1919s, "it has been acknowledged that there can be a 'unilateral obligation' on the part of the offeror to keep his offer open for a given period."¹⁵² As stated by Coetzee J in *Anglo Carpets (Pty) Ltd v Snyman*, "It is trite law that an offer can at any time before acceptance thereof be revoked and that the mere statement that it is irrevocable or not revocable for a certain period is ineffective. The only way in which this result can be achieved is if there is indeed a binding agreement on this respect."¹⁵³ Briefly, South African

withdrawing the offer. The court implied that the telegram by D was sufficient to create a contract. It held, therefore, that, as the withdrawal of the offer was not communicated prior to the dispatch of the telegram, a contract between Y and D had come into existence.

¹⁴⁸ *Wissekerke and another v Wissekerke* 1970 2 SA 550 (A) 557F-H; *Meyer v Kirner* 1974 4 SA 90 (N) 93B-D.

¹⁴⁹ Cf. *Dickinson v Dodds* (1876) 2 Ch 463; and § 2-205 UCC.

¹⁵⁰ See *Gous v Van der Hoff* (1903) 20 SC 237 240; see also comments in Section 3.2.5 above.

¹⁵¹ See *Conradie v Rossouw* 1919 AD 279; see also Joubert *Contract* 32; Kahn *Doctrine* 224 231; Edwards *History* 90; Van der Merwe/Du Plessis *Introduction* 245; Van der Merwe et al *Contract* 169; Zimmerman *Obligations* 557; Van der Merwe et al South Africa Report 95 183; Ng'ong'ola 1992 (4) *RADIC* 835 849.

¹⁵² See *Rose and Rose v Alpha Secretaries Ltd* 1948 (1) SA 454.

¹⁵³ *Anglo Carpets (Pty) Ltd v Snyman* 1978 3 SA 582 (T) 585 H. In this case, Coetzee J, taking support on *Boyd v Nel* 1922 AD 414; *Hersch v Nel* 1948 (3) SA 686 (A), described an agreement of this kind as an "option" or a *pactum de contrahendo*. An option is defined as a contract by which, the offeror undertakes to keep the offer open for a certain period on the behalf of the offeree. But,

law has adopted the same revocability principle as other common law legal family countries. In South Africa, an offer is usually revocable.¹⁵⁴ By a means of exception, however, the right of the offeror to revoke is restrained if he/she has granted the offeree an “option” to keep the offer open in which event it is irrevocable.

There are some voices that the law is ambiguous on the irrevocability subject. Practically speaking, “there is a line of cases expressly or impliedly accepting that an offer stated to be irrevocable is irrevocable from the outset,¹⁵⁵ and another line of cases maintaining that an offer can become irrevocable only by agreement.”¹⁵⁶ In the last group of cases, the contract is supposed to expire on a particular date or after the given period.¹⁵⁷ It is believed that, by establishing a distinction between revocable and irrevocable offers, South African law aligns with the CISG in which the revocability is the principle, and the irrevocability the exception. Such being the position of South African law, the following discussion focusses on Congolese law.

Congolese law

Article 8 CCO, which contains requirements for the validity of a contract, requires “the consent of the obligator”, viz. the debtor or the offeror, for a contract to be valid. The phrasing of Article 8 has been criticised as being incorrect. As Kalongo has said, for instance, an enforceable contract requires the consent of both contracting parties, i.e. the party making the offer and the party accepting the offer.¹⁵⁸ A problem occurs,

see *Building Material Manufacturers Ltd v Marais* 1990 1 SA 243 (O) 248-249 in which, an offer was held irrevocable owing to the intent of the parties.

¹⁵⁴ *Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen* 2005 (4) SA 417 (O) 419H.

¹⁵⁵ See *Rose and Rose v Alpha Secretaries Ltd* 1948 1 SA 454 (A) 460; *Reich v Stone* 1949 SR 178; *Ahrend v Winter* 1950 2 SA 682 (T) 686; *Phillips v Aida Real Estate (Pty) Ltd* 1975 3 SA 198 (A) 207 G; *Dhanalutchmee v Naidoo* 1975 1 PH A30 (D); *Musa v Fischat* 1980 2 SA 167 (SE) 171B-D; *Building Material Manufacturers Ltd v Marais* 1990 1 SA 243 (O) 248-249.

¹⁵⁶ See *Kotze v Newmont SA Ltd* 1977 3 SA 368 (NC) 374E; *Anglo Carpets (Pty) Ltd v Snyman* 1978 3 SA 582 (T) 585 H; *Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen* 2005 (4) SA 417 (O). Cases quoted by Christie Law of Contract 59 65.

¹⁵⁷ It was held, in *Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen* 2005 (4) SA 417 (O), that, The normal rule is that an offer may be revoked at any time before it is accepted, and an offer stipulating that it shall lapse on a certain day is not irrevocable until that date. (However), the view that an obligation to keep an offer open, or not to revoke it, may arise only through agreement is preferable to the view that it may also arise by unilateral declaration or undertaking.

¹⁵⁸ Kalongo *Obligations* 49.

however, in respect of the binding force of an offer. The question raised by the subject is whether or not the offer is revocable, and, if it is revocable, what should the legal basis for such a right be.

In answering these questions, the CCO, as well as its parent legal systems, the French and Belgian civil codes, are silent on the matter. Within a civil law environment, the rule formulated by §145 *BGB*,¹⁵⁹ and by Articles 1328 and 1329 of the Italian civil code,¹⁶⁰ approves the principle of the binding effect, or the irrevocability, of the offer.¹⁶¹ Unlike the German and Italian views, the traditional approach in French and Belgian case law, which had long tried to influence the former Congolese law, supported an opposite view. In these systems, the offeror was allowed to revoke his/her offer at any time until it had been accepted.¹⁶² The revocability general approach was based on Article 932 of the Napoleonic civil code relating to the revocability of donations. This provision then applied to all other kinds of contracts as a general principle of law.¹⁶³ That provision was reproduced in the

¹⁵⁹ According to the German §145 *BGB*, “Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it.” (Translation by Musset).

¹⁶⁰ Article 1328 states that, “the offer may be revoked before the time when the contract is concluded.” Article 1329 compliments this by stipulating that, “if the offeror has undertaken to keep the offer open for a certain time; revocation will be ineffective.”

¹⁶¹ See Klimas *Contract* 31 and 34; Kalongo *Obligations* 56. As Owsia has said, the irrevocability of an offer has trodden a long path in the history of modern legal systems so that newer civil codes of countries such as Germany and Italy have codified it.

¹⁶² For French law, see Klimas *Contract* 31 and 34; Youngs *Comparative* 516; Malaurie/Aynes/Stoffel-Munck *Obligations* 237§470; Benabent *Obligations* 47§59; Terre/Simler/Lequette *Obligations* 128 §117; for Belgian Law, see Cass B 1st Chamber 9 May 1980 Pas 1980 I 1127; quote by Kadner *Contrat* 182; for Congolese, see Kalongo *Obligations* 56. But, see also Elis 22 January 1957 *RJCB* 1957 116; in Katuala *Code* 165, and Piron 122-123 whereby, “A promise, perfect contract in itself, although unilateral, is different from a mere offer for sale susceptible to be retracted until acceptance. Unless a specific stipulation with regard to its duration, the promise must be kept intact, during a period of time determined in accordance with the intention of the parties. Withdrawing the promise one day after it is made is not valid.” Translated version of, La promesse de vente, contrat en lui-même parfait, encore qu’unilatéral, ne peut être confondue avec une simple offre de vente susceptible d’être rétractée tant qu’elle n’est pas encore acceptée (emphasis added). La promesse doit être maintenue, à défaut de stipulation expresse quant à sa durée, pendant un temps à déterminer suivant l’intention des parties. Sa rétractation le surlendemain du jour où elle a été faite (...) n’est pas valable.

¹⁶³ As is stated by Article 932 CC, “An inter vivos donation is binding upon the donator and produces effect only from the day when it is accepted in express terms.”

DRC by means of Article 875 CFC.¹⁶⁴ Article 932 of the civil code, and indirectly an analogical interpretation of Article 875 CFC, was afterwards criticised on the grounds that donations do not have the same legal nature as sales.¹⁶⁵

Though there is no specific provision in the civil code concerning the duration of an offer, nevertheless, modern French judicial decisions and doctrinal views have remedied this shortcoming to a certain extent. French case law and scholarly writings have distinguished between an offer accompanied by a fixed delay in which acceptance is to be made and an offer not accompanied by such a delay in order to determine whether or not an offer is revocable.¹⁶⁶ As stated in the case law, where the offeror has fixed a period for acceptance of the offer, he/she is not allowed to revoke it before the expiration of that period; he/she must keep it open for that period.¹⁶⁷ Such was the position of the *Cour de Cassation* in a decision, dated 10 May 1968. *A propos* of this, it was stated that, “while an offer for sale may in principle be revoked as long as it has not been accepted, the position is different where the offeror has expressly undertaken not to revoke it before a certain period of time.”¹⁶⁸

With regard to Congolese law, in particular, the principle is that offers are binding, viz. they are irrevocable. One decision of the Appeal Court of Lubumbashi deals with the subject very well. As stated by the Court, under sales contracts the

¹⁶⁴ Article 875 al. 1 CFC provides that donations bind the donator from the day he/she is notified of the acceptance. This means that, before the date he/she is given notice of acceptance, the donator is free to revoke the gift.

¹⁶⁵ Donations are unilateral, while a sale is a bilateral contract. Because donations bind only one party who is then free to release from its promise, sales contracts generate obligations for both the seller and the buyer; they may then be revoked only by mutual consent. Cf. Article 33 al. 2 CCO; and *Elis* 3 April 1950 *JTO* 1957 77.

¹⁶⁶ *Owsia Contract* 447; *Youngs Comparative* 516; *Klimas Contract* 32; *Malaurie/Aynes/Stoffel-Munck Obligations* 237§470; *Benabent Obligations* 47§59; *Terre/Simler/Lequette Obligations* 129 §118; see also Ferrari in Kröll/ Mistelis/Viscasillas *UN Convention* 246. In current French law, as developed, a party making an offer may revoke it at any time until it is accepted. Cf. *Cass F* 3rd *Civ* 7 May 2008 *Bull Civ* III No. 79; *RTD civ* 2008 474.

¹⁶⁷ *Owsia Contract* 448.

¹⁶⁸ *Cass F* 3rd *Civ* 10 May 1968 *Bull Civ* III No. 209 161; also *Cass F* 1^{ère} *Civ* 17 December 1958 *D* 1959 33; quoted by Ghestin *Droit Civil* 273; and *Nicholas Contract* 67 for the first case.

offer is usually binding, otherwise commercial transactions would not prosper.¹⁶⁹ The same Court recognised that a merchant may occasionally reserve the right to resell the goods, i.e. to withdraw or revoke the offer. According to the Court, actions of that kind cannot have effect unless they are undertaken before acceptance.¹⁷⁰ The same rule applies to a notice modifying the content of the original offer. A telegraphic communication modifying an offer should, therefore, be effective only if it reaches the offeree before the acceptance reaches the offeror.¹⁷¹

From the development above, it emerges that, under Congolese law, the offer is generally irrevocable. In other words, if the offeror states a period of time during which the offer will remain open, that offer will still be regarded as irrevocable for the stated period.¹⁷² Nonetheless, in the absence of a specified period, “the offer is binding during a period normally necessary for acceptance, having regard to the circumstances of the case, *inter alia*, the nature of the offer and the rapidity of the means of communication employed by the offeror.”¹⁷³ Such is the meaning of an earlier decision of the Appeal Court of Kinshasa for which “a telegraphic offer has effect if accepted within a reasonable time necessary for the dispatch of the offer and communication of the acceptance.”¹⁷⁴ So, therefore, with the passage of a stipulated time or a reasonable delay, the offer will normally lapse. What now is the UAGCL influence on Congolese law in relation to the subject of revocability?

The right of the offeror to withdraw or revoke the offer is delimited by Article 242 al. 1 UAGCL which declares that, “the offer becomes effective when it reaches the offeree.”¹⁷⁵ Pursuant to Article 242 al. 2 UAGCL, however, until it reaches the

¹⁶⁹ Elis 31 October 1942 *Rev Jur* 1943 6; in Bours *Répertoire* 134; *Katuala Code* 160; and Piron 122.

¹⁷⁰ *Ibid.*

¹⁷¹ See Léo 29 September 1925 *Jur Col* 1929 84; see also Kalongo *Obligations* 59; Mubalama *Obligations* 58.

¹⁷² Compared this to Article 16(2)(a) CISG. For a similar situation under Belgian and French law, see De Bondt in Bocken *Belgian Law* 227; Klimas *Contract* 35 respectively.

¹⁷³ Léo 29 September 1925 *Jur Col* 1929 84; see also First Inst Elis 28 April 1913 *Jur Congo* 1921 112 in which: “If the offeror did not state a delay for acceptance, it may withdraw its offer before acceptance reaches him”.

¹⁷⁴ See Léo 29 September 1925 *Jur Col* 1926 293.

¹⁷⁵ Article 242 al.1 UAGCL; compared to Article 15(1) CISG.

addressee, “the offer may be revoked if the revocation reaches the offeree before he has communicated his acceptance.”¹⁷⁶ The third section of the same provision supplies the general principle of revocability with some exceptions as in Article 16(2) CISG. According to its terms, “an offer cannot be revoked, whether by stating a fixed time for acceptance, that it is irrevocable, or if the offeree was reasonably liable to believe that the offer was irrevocable and has acted in reliance on the offer.” It results from the above provision that, under the current Congolese law, only a delay or the communication of the acceptance would have an effect on the revocability of the offer instead of the dispatch as is the case under the CISG.

Comments

Traditionally, under Congolese law, the offer was in principle binding and, therefore, irrevocable. In contrast to the CISG and South African law, original Congolese law adhered to the irrevocability principle as had other civil law legal system countries. In the DRC, an offer was irrevocable unless there was a contrary intention that it would be revocable. The offer was considered irrevocable, because, even in the event of a promise to contract, parties were supposed to be practically committed, the entry into force of the contract only being postponed to a later date.¹⁷⁷ With the coming into force of the OHADA law, the DRC now mixes the dual concept of “revocability-irrevocability” as it is under the CISG. Similarly to the CISG and South African law, the revocability of the offer, which was the exception, has become the rule, and the irrevocability, which was the general rule, is now the exception. This is a good development because the revocability principle, as provided by the Commercial Act, is accompanied by an exception. To use the words of Schroeter, compliance with the revocability exception “not only the conclusion of the contract, but even the (...)”

¹⁷⁶ Article 242 al. 2 UAGCL; compared to Article 16(1) CISG. Contrary to its equivalent Article 211 al. 1 UAGCL (1997 version), Article 242 al. 2 UAGCL replaces the verb “dispatch” by “express”.

¹⁷⁷ Cf. Article 270 CCO which assimilates a promise of sale to a full contract of sale since there is reciprocal consent on the property sold and the price. See also L’shi 28 March 1967 *RJC* 1967 No. 2 140.

(communication) of an acceptance precludes the revocation of an offer.”¹⁷⁸ Moreover, the revocation is not self-operating. To use the words of Ferrari, “it must be designed in a way to allow a ‘reasonable person of the same kind’ as the offeree ‘in the same circumstances’ (...) to understand that it refers to the offer and is intended to prevent it from becoming effective.”¹⁷⁹ Accordingly, if the offeree was reasonable in relying on “the offer as being irrevocable and (...) has acted in reliance on the offer”, the latter is irrevocable.¹⁸⁰

Succinctly, the CISG, South African law, and modern Congolese law have currently adopted a similar principle that offers are generally revocable. An offer should be irrevocable if such is the intention of the parties who have fixed a period for acceptance or if the offeree has relied on the irrevocability of the offer. But, if it is accepted, the offer becomes binding even though it was supposed to be revocable before acceptance.

5.2.5 Conclusion on the Offer

Congolese law did not initially rule about the offer and the way it is articulated. In the first stage courts struggled to fill that gap in respect of commercial transactions. These days, the situation has changed with the influence of the OHADA Commercial Act the provisions of which have duplicated those of the CISG in dealing with the criteria of a valid offer and its effects. Consequently, under contemporary Congolese sales law, for it to have effect, an offer must be sufficiently defined, which means indicating the goods, and determining the price or making it determinable, and expressing the intention of creating a binding obligation. Unlike the CISG, however, Congolese law and South African law do not visualise a situation of a regular contract without price. Because the price is one of the basics of sales contracts, its omission nullifies the offer unless the intention of the parties is clearly otherwise. In the same

¹⁷⁸ Cf. Schroeter in Schlechtriem/Schwenzer *Commentary* 303 §2.

¹⁷⁹ Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 247§4.

¹⁸⁰ Compare Article 242 al. 2 UAGCL *in fine*, to Article 16(2) (b) CISG.

way, the offer which was, in the DRC, irrevocable has, once again through the influence of the UAGCL, become revocable. Thus Congolese law today combines the revocability rules with the irrevocability principle. Offers which were previously irrevocable and occasionally revocable are now generally revocable. There is an inversion of the rule; what the general principle was has become the exception, and *vice versa*. This is considerable because the application of the new rule is not automatic.

5.3 Acceptance of the Offer for the International Sale of Goods

5.3.1 Introduction

As a rule, a contract is finalised by the acceptance of the offer. In this sense, the acceptance is understood as a positive response to the offer communicated to the offeror with intention of concluding the planned contract.¹⁸¹ For it to have effect, however, an acceptance must reflect the terms of the offer and be communicated in time. So, after a brief overview of what constitutes acceptance in the Vienna Convention, South African law, and Congolese law, it will be necessary to explore the requirements for a valid acceptance, the deadline for acceptance, and the legal regime of additional terms in the three legal systems above. As it was the case under the precedent section, a comparative appraisal of what contemporary Congolese law states with regard to the acceptance subject will conclude each of these issues.

5.3.2 General Principles

It is acknowledged that parties form a contract by their mutual expressions of assent.¹⁸² All three of the CISG, South African law, and Congolese law admit, whether expressly or by implication, that, after the offer, the following step for a

¹⁸¹ Van der Merwe et al *Contract* 52; Hawthorne/Hutchison in Hutchison/Pretorius *Contract* 55.

¹⁸² Klimas *Contract* 27.

contract to be regularly concluded is its acceptance. Despite this broad resemblance, each system has its specificities with regard to the acceptance topic, details which are considered below.

Concerning the Vienna Sales Convention, firstly, its Article 23 states that, “a contract is concluded at the moment when an acceptance of the offer becomes effective”, i.e. when there is a coincidence between the offer and the acceptance. Under South African law, secondly, there is also authority that no regular contract can exist if the offer is not accepted.¹⁸³ With regard to Congolese law, finally, although there is no specific provision dealing with the acceptance in the CCO, the intention of creating legal relations was also considered to be an accepted component of the Congolese conception of contract. Currently, the theory of acceptance has become code-based through the provisions of the OHADA Commercial Act.

In effect, Articles 243 to 247 of the Commercial Act, dealing with the acceptance, give the impression of having duplicated Articles 18 to 22 CISG. Compared to the CISG, these provisions define the acceptance; determine the mode of its communication; and deal with the time and the effectiveness of the acceptance. In addition, the same provisions insist on the fact that an acceptance must resemble the offer; otherwise it will amount to a counter-offer. In practice, however, it is not unusual that an acceptance is accompanied by additional terms which may sometimes modify the original proposal mostly when parties use standard forms. Such additional terms have brought about the so-called “battle of forms” issue.

Following this brief overview, this section first explains the concept of acceptance. In the second step, it recalls the time limit for acceptance, and, finally, discusses the issue of additional terms and the “battle of forms” problem. The time and place for the conclusion of the contract is discussed in Section 5.4.

¹⁸³ See *Lowe v Commission for Gender Equality* 2002 (1) SA 750 (W); *Bloom v American Swiss Watch Co* 1915 AD 100; see also Van der Merwe et al *Contract* 52; Sharrok *Business* 58; and authorities quoted by Christie/Bradfield *Contract* 60 in Fn207.

5.3.3 The Meaning and Effectiveness

5.3.3.1 Significance of an acceptance

The CISG

Article 18(1) describes the acceptance as “a statement made by or other conduct of the offeree indicating assent to an offer.” Since silence cannot be considered as a manifestation of assent, it is, therefore, true that mere silence may not constitute acceptance. Such is the meaning of the second sentence of Article 18(1), whereby “silence or inactivity does not in itself amount to acceptance.”¹⁸⁴

The phrase *in itself* used in Article 18(1) looks as if it indicates that silence may, in some circumstances, be interpreted as acceptance. Such is the case with regard to previous agreements between the parties, their conduct, or the usages and practices established between them or in the trade concerned.¹⁸⁵ Accordingly, the French *Cour d’Appel de Grenoble* denied to a seller the right “to invoke the rule laid down in Article 18 (providing that silence does not by itself amount to acceptance) because, according to practices previously established between parties, the seller (had been) performing the orders without expressly accepting them.”¹⁸⁶ In the

¹⁸⁴ See Germany 26 June 2006 Appellate Court Frankfurt *Printed Goods case* [<http://cisgw3.law.pace.edu/cases/060626g1.html>] (accessed 10-4-2012). In the case, the Court ruled that the “silence of the buyer to the seller’s order confirmations is not to be considered as an affirmation of seller’s standard terms referred to.” See also France 27 January 1998 Cour de Cassation, CLOUT case No. 224 [<http://cisgw3.law.pace.edu/cases/980127f1.html>] in which, though without quoting the CISG, the French Supreme Court found that the Appeal Court did not ignore the rule that silence does not amount to an acceptance. Almost all international commercial contracts instruments are unanimous that silence or inactivity *per se* should not be interpreted as acceptance; see sentence two of Article 2.1.6 PICC; Article 2:204 (2) PECL; and Article 34(2) CESL. But §69 of the US Restatement (2nd) of Contracts dealing with Acceptance by Silence or Exercise of Dominion which recognises legal effect to the offeree’s silence or inaction.

¹⁸⁵ Cf. Articles 8 and 9 CISG; see also Schwenger/Mohs 2006 (6) *IHR* 239 241; Kelso 1982/1983 (21) *Colum J Trans L* 529 538; Valiotti <http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html>.

¹⁸⁶ France 21 October 1999 Appeal Court [Grenoble], CLOUT case No. 313; referred to by Pamboukis 2005-2006 (25) 1/2 *JL & Com* 107 108; also reported in the UNCITRAL *Digest* 99 Fn30. See also Netherlands 10 February 2005 Netherlands Arbitration Institute (interim award) [<http://cisgw3.law.pace.edu/cases/050210n1.html>] (accessed 10-4-2012). In this case, general conditions were applied to the contract despite the silence of the buyer because of the practices established between the parties.

Chemical Products case, the Swiss Supreme Court ruled that “every declaration or other act that expresses acceptance of an offer is deemed an acceptance, but not, however, mere silence or inactivity alone, unless such a practice existed between the parties.”¹⁸⁷

South African law

An acceptance is considered, in *Bloom v American Swiss Watch Co*, as a positive answer to the proposed offer.¹⁸⁸ In principle, an acceptance has to be manifested as required by the offer for it to produce legal effect.¹⁸⁹ Van der Merwe and others¹⁹⁰ note, in this respect, that, because a contract requires a reciprocal agreement between the parties¹⁹¹ in order to be effective,¹⁹² an acceptance ought to be expressed by way of conscious reaction to the offer and correspond with it.

A question occurs as to whether the silence of the offeree may be interpreted as acceptance. As response, it is generally admitted that silence *per se* does not amount to an acceptance.¹⁹³ Reasons advanced in this regard are that “it would be

¹⁸⁷ Switzerland 5 April 2005 *Bundesgericht* [Supreme Court] *Chemical Products case* [<http://cisgw3.law.pace.edu/cases/050405s1.html>] (accessed 10-4-2012). But, a German court ruled in the *Marble Panel case* that, “the fact that goods were packaged in the same way for previous deliveries does not constitute a tacit agreement on the type and way of packaging.” See Germany 17 January 2007 Appellate Court Saarbrücken *Marble Panel case* [<http://cisgw3.law.pace.edu/cases/070117g1.html>] (accessed 10-4-2012).

¹⁸⁸ See *Bloom v American Swiss Watch Co* 1915 AD 100.

¹⁸⁹ As ruled by Blerk JA, in *Drifwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597D, “It is trite that an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created, and he can do so expressly or impliedly.” See comments by Papadopoulos 2010 (1) *Obiter* 188; see also *Westinghouse Brake & Equipment (Pty) Ltd v Bilger (Pty) Ltd* 1986 2 SA 555 (A) 573F.

¹⁹⁰ See Van der Merwe et al *Contract* 53; taking support from *Bloom v American Swiss Watch Co* 1915 AD 100; *Volkscas Spaarbank Bpk v Van Aswegen* 1990 (3) SA 978 (A); and *Legator McKenna v Shea* 2010 (1) SA 35 (SCA).

¹⁹¹ Cf. Section 3.3.2 above.

¹⁹² The time when and the place where an acceptance is effective are dealt with in Section 5.4 below.

¹⁹³ This rule was formulated by Watermeyer CJ in *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 422 as follows: “Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect.” See also Christie/Bradfield *Contract* 69; Sharrock *Business* 65. Christie and Bradfield illustrate the case by “the sending of unsolicited goods through the post, followed by an invoice and statement.” According to them, such a “pernicious method of salesmanship has attracted the attention of the English legislature, (which through) the Unsolicited Goods and Services Act 1971, limits the

undesirable to put the offeree who did not wish to accept the offer to the trouble and expense of rejecting it.”¹⁹⁴ By way of exception, however, silence may amount to acceptance if circumstances compel the addressee to show his/her disapproval in the case he/she is not prepared to accept the offer. This is Wessels’ understanding according to which, “(...) If a merchant writes to his constant correspondent that he will forward to him certain goods at a certain price unless he hears from him to the contrary, and the addressee receives the letter but neglects to reply, the Court may well consider that silence in such a case gives consent (...).”¹⁹⁵

The policy behind this exception is that parties are bound by usages or practices established between themselves. In *McWilliams v First Consolidated Holdings (Pty) Ltd*, Miller JA agreed that silence does not constitute acceptance by itself.¹⁹⁶ The learned judge specified, however, that “when according to ordinary commercial practice and human expectation firm repudiation (...) would be the norm if it was not accepted as correct, such party’s silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him (...).”¹⁹⁷ The rule according to which silence does not bind the offeree does not, nevertheless, mean that an offeree’s acceptance must at all times be expressly made. A regular

recipient of such goods to treat them as gift, and makes the demanding of payment for them a criminal offence.” Similar trade practice, named as “Negative option marketing”, is also prohibited under South African law by the National Credit Act 34 of 2005 in respect of credit agreements (see s 74(1)-(4) with s 89, 90(2)(d), and 90(4)). The 2008 CPA has adopted a similar ruling in respect of consumer contracts (see s 31 relating to negative option marketing; s 20 dealing with consumers’ rights to return non-conforming goods; and s 21 relating to unsolicited goods). With regard to unsolicited goods, however, if the recipient fails to return them, his/her inactivity should be interpreted as acceptance so that he/she will have to pay for them. Cf. *Charles Velkes Mail Order 1973 (Pty) Ltd v CIR* 1987 3 SA 345 (A) 358F-G; in the same sense *Christie/Bradfield Contract* 86; *Bradfield/Lehmann Sales* 96-97.

¹⁹⁴ Cf. *Birks Contract* 10; taking support from *Felthouse v Bindley* (1862) 11 CBNS 869, and *The Leonidas D* [1985] 1 WLR 925 927.

¹⁹⁵ See Wessels *Contract* §270-271. Wessels’ argument has been extensively used by Courts in cases such those of: *East Asiatic Co (SA) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954 2 SA 387 (C) 391-392; *Sun Radio and Furnishers v Republic Timber and Hardware (Pty) Ltd* 1969 4 SA 378 (T) 382; *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland* 1987 (3) SA 345(A) 346G.

¹⁹⁶ *McWilliams v First Consolidated Holdings (Pty)* 1982 2 SA 1 (A) 10.

¹⁹⁷ *Ibid.*

acceptance may result from the conduct of a buyer who pays for the goods¹⁹⁸ or retains them after delivery.¹⁹⁹ Similarly, a contract of sale should regularly be deduced from the conduct of a seller who accepts payment²⁰⁰ or starts dispatching the goods.²⁰¹

Congolese law

Acceptance is considered in the DRC as a definite response to the offer intended to conclude the contract as is the case under the CISG and South African law.²⁰² One Arbitral Award stated on the subject that “whatever progress made in preliminary negotiations between parties, a contract cannot be definitively formed until the offeree brought his assent to the offeror’s attention, either by himself or by someone else.”²⁰³ It is clear, from this decision that, although the CCO does not contain specific provisions dealing with the acceptance, the intention to create legal relationship by means of mutual assent is also accepted in Congolese contract law. One should remember the decision of the Belgian Supreme Court, previously quoted, which requires parties to give their consent with the intention of being legally bound in order to have a valid contract.²⁰⁴ In other words, under the legal system in view, an acceptance must, among other things, show the offeree’s intention to be bound by

¹⁹⁸ *Ex Acrow Engineers (Pty) Ltd* 1953 1 SA 622 (T) 625E, on appeal 1953 2 SA 319 (A).

¹⁹⁹ See *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland* 1987 (3) SA 345(A) 358E-F. It was ruled in the *Charles Velkes Mail Order* case that:

Where (...) (prior business relationship between the parties) is absent (...), the failure *per se* to return (unsolicited goods) would not normally found a sufficient inference that they had been accepted. (...) On the other hand, were (*sic*) the offeree to make beneficial use of the goods or otherwise exercise ownership over them, an acceptance may and probably would be inferred.

²⁰⁰ *Menashe v Georgiadis* 1936 SR 59.

²⁰¹ Cf. *Jonas & Co v Meyerthal* 1912 AD 286 296-297. As stated in *R v Nel* 1921 AD 339-351, for sales in which an order is sent to a person at a distance to supply certain goods at a certain price, the contract is concluded by appropriation of the goods.

²⁰² Cf. Article 8 CCO which lists the consent of the parties among contract validity requirements.

²⁰³ Arbitral Award 22 January 1932 *Jur Col* 1932-1933 23.

²⁰⁴ Cass B 2 December 1875 *Pas* 1876 I 37.

its acceptance. Further to the intention of the person accepting the offer, a regular acceptance must also be expressed definitively and unequivocally.²⁰⁵

With regard to its mode of communication, an acceptance can be made by an express statement or result from the offeree's conduct such as reselling the goods delivered.²⁰⁶ Article 241 al. 1 UAGCL states, in this regard, that a contract may be concluded "either by the acceptance of an offer, or by the conduct of the parties that is sufficient to show their agreement." The first sentence of Article 243 al. 2 UAGCL elaborates that, "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance."²⁰⁷ Concerning silence, however, it cannot amount to acceptance unless the offeree was obliged to manifest his/her disagreement expressly.²⁰⁸

Comments

Even before the adoption of OHADA law, Congolese law had already adopted similar rules to those of the CISG and South African law on the contents of the matter of acceptance. So, as for the offer, acceptance in all three of the legal systems may be expressed or implied. In the DRC this means that a proper acquiescence must be given to the offer so that silence is taken to mean a rejection of the offer unless this is contrary to the intention of the parties. Further to the meaning of acceptance, another close issue dealt with in the CISG is the time when an acceptance becomes binding.

²⁰⁵ Cf. Owsia (*Contract* 491) for whom, "the offeree should have the real will of accepting and should outwardly manifest his will, in the same way as the offeror has (...) and manifest, expressly or tacitly, a definite contractual intention."

²⁰⁶ Léo 30 December 1943 *Rev Jur* 1944 141, in Bours *Répertoire* 134.

²⁰⁷ Compare this to Article 18(1) CISG.

²⁰⁸ Second sentence of Article 243 al. 2 UAGCL; compared to the second sentence of Article 18(1) CISG. The Appeal Court of Lubumbashi has ruled, in this regard, that silence should amount to acceptance if the party accepting the offer was obliged to speak. See Elis 25 October 1913 *Jur Congo* 1921 341; see also Léo 26 March 1929 *Jur Col* 1930-1931 346; and similar cases quoted by Lukoo *Droit Civil* 88.

5.3.3.2 Acceptance efficiency

The CISG

The time when an acceptance becomes effective is regulated by Article 18(2). According to the first sentence of this provision, an acceptance of an offer becomes effective when the indication of assent reaches the offeror.²⁰⁹ Consequently, as long as “the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time,”²¹⁰ the acceptance will be ineffective. This rule applies to both oral declarations and conduct indicating assent which must reach the offeror to produce effect.²¹¹

Legal systems in the world have adopted opposite approaches on the issue of whether or not an acceptance is effective. The classical civil law approach is that an acceptance is not effective until it reaches the offeror. Under the Anglo-American common law legal system, by contrast, the acceptance is completed the moment the offeree dispatches his/her acceptance.²¹² This method is known as “the expedition” or “mailbox rule”.²¹³ Within the Vienna Sales Convention, Article 18(2) seems to have rejected “the mailbox principle as a means of establishing when an acceptance becomes effective.”²¹⁴ It relies rather on the civil law approach on the acceptance effectiveness issue. Where offers are made orally, however, the Convention treats them differently from ordinary offers. In conformity with sentence three of Article 18(2), oral offers must be accepted “immediately” unless the circumstances indicate

²⁰⁹ On the way an acceptance may reach the offeree, see Article 24 CISG.

²¹⁰ Article 18(2) CISG, second sentence.

²¹¹ See Schroeter in Schlechtriem/Schwenzer *Commentary* 325 §24; Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 269 §13.

²¹² See Garro 1989 (23) *Int'l L* 443 453.

²¹³ For a better understanding of the mailbox rule, and other theories relating to the time of formation of the contract, see Section 5.4 below.

²¹⁴ Carrara/Kuckenburg in Felemegas *Interpretation* 312; see also Murray 1988 (8) *JL & Com* 11 Fn81.

otherwise. In the view of the CISG-AC No.1, the expression “oral offer” includes sound transmitted electronically.²¹⁵

As Alban has stated, in addition to acceptance by assent, Article 18 CISG recognises the legal effect of acceptance by conduct, provided that such conduct “is accompanied by acts that indicate assent.”²¹⁶ Such a way of acceptance is allowed as an exception to the general rule that an acceptance must be properly communicated as evidenced by the adverb “however” introducing Article 18(3). Concerning the time when acceptance by conduct becomes effective, Article 18(3) specifies,

[If], by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed (...).²¹⁷

It is observed that Article 18(3) illustrates the acceptance by conduct by two instances that can be assumed to be effective signs of contractual performance. These illustrations include acts relating to the dispatch of the goods by the seller, and acts relating to the payment of the price by the buyer. Courts have to date extended its applicability to conduct such as the delivery of the goods by the seller,²¹⁸ acceptance

²¹⁵ See CISG-AC Opinion No.1 which states, “An offer that is transmitted electronically in real time communication must be accepted immediately unless the circumstances indicate otherwise.” This opinion indicates that the term ‘reaches’ “corresponds to the point in time when an electronic communication has entered the addressee’s server, provided that the addressee expressly or impliedly has consented to receiving electronic communications for that type, in that format, and to that address.” See CISG-AC Opinion No. 1, Electronic Communications under CISG.

²¹⁶ See Alban in Felemegas *Interpretation* 99.

²¹⁷ See Article 18(3) as commented on in UNCITRAL *Digest* 99 §6 and 100 §11.

²¹⁸ Germany 10 November 2006 Appellate Court Dresden *Meat case* [<http://cisgw3.law.pace.edu/cases/061110g1.html>] (accessed 10-4-2012).

of goods by the buyer,²¹⁹ a third party's taking delivery of goods,²²⁰ and the issuance of a letter of credit.²²¹

South African law

In South African law, an acceptance has to meet a number of requirements to produce legal effect. Under a general common law perspective, four conditions are required for an acceptance to be valid. Firstly, as it is for the offer, an acceptance must "be clear, unequivocal, and unambiguous."²²² Secondly, it must correspond with the offer.²²³ Thirdly, the acceptance must be made in the mode prescribed by the

²¹⁹ Switzerland 27 April 2007 Canton Appellate Court Valais *Oven case* [<http://cisgw3.law.pace.edu/cases/070427s1.html>] (accessed 16-4-2012). In this case, it was held that the buyer assented to the offer by accepting the goods, either by using or reselling them. See also, Russia 2 November 2010 Supreme Arbitration Court of the Russian Federation [<http://cisgw3.law.pace.edu/cases/101102r1.html>] (accessed 10-4-2012); Germany 13 January 1993 *Oberlandesgericht Saarbrücken*, CLOUT case No. 292 (buyer's acceptance of goods indicated assent to offer, including standard terms in letter of confirmation); reproduced in UNCITRAL *Digest* 99 Fn14.

²²⁰ Switzerland 10 July 1996 *Handelsgericht des Kantons Zürich*, CLOUT case No. 193 (third party taking delivery was act accepting increased quantity of goods sent by seller); in UNCITRAL *Digest* 99 Fn16.

²²¹ USA 7 December 1999 Federal District Court Northern District of Illinois, CLOUT case No. 417; pleading stated cause of action by alleging facts showing parties concluded contract of sale; in UNCITRAL *Digest* 99 Fn19; also referred to by Schwenzer/Mohs 2006 (6) *IHR* 239 241. Other similar instances include: signing invoices to be sent to a financial institution with a request that it finances the purchase (Argentina 14 October 1993 *Cámara Nacional de Apelaciones en 10 Comercial* CISG-online 87); sending a reference letter to an administrative agency (USA 10 May 2002 Federal Southern District Court of New York *Federal Supplement* (2nd Series) 201, 236 ff, CLOUT case No. 579; in UNCITRAL *Digest* 99 Fn20 and 21); or preparing a bill of lading and nominating a vessel for ocean carriage (USA *Hanwha Corporation v Cedar Petrochemicals Inc. case*).

²²² See Levy J in *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633 E-H in which, "(...) although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer (...) must be unequivocal, i.e. positive and unambiguous." See also Christie/Bradfield *Contract* 65; finding advice in *Van Jaarsveld v Ackerman* 1975 2 SA 753 (A); *Cunningham v C and S Estate Agency* 1945 TPD 440 443; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421-422; and *Boerne v Harris* 1949 SA 793 (A).

²²³ See *Christian v Ries* (1898) 13 EDC 8 15; *Joubert v Enslin* 1910 AD 6 29; *Davis and Lewis v Chadwick & Co* 1911 WLD 12 16; *Treadwell v Roberts* 1913 WLD 54 59-60; *Whittle v Henley* 1924 AD 138 148; *JRM Furniture Holdings v Cowlin* 1983 4 SA 541 (W) 544A-C; and *Watermeyer v Murray* 1911 AD 616. See also *Legator McKenna v Shea* 2010 (1) SA 35 (SCA).

offeror.²²⁴ Lastly, acceptance must be communicated to the offeror and must show the offeree's intention to be bound by the agreement.²²⁵

Christie and Bradfield remark that, "As a general rule, a contract is not concluded until the offeree has not only decided in his own mind to accept the offer, but has communicated his acceptance to the offeror."²²⁶ Communication of the acceptance is required because, as long as the party making the offer is aware that his/her offer has been accepted, the parties do not have proper *consensus*.²²⁷ In this sense, the communication requirement is built on the fact that the South African law of contract is based on agreement, so that there can be a validly concluded contract providing the offeror knows that it is *ad idem* with the offeree.²²⁸ As explained in section 3.3.2.3 above, pursuant to the reliance theory, it is admitted that a regular acceptance may also result from one party's conduct if the other party was reasonable in relying on such behaviour.²²⁹

Congolese law

As for its comparable legal systems, Congolese contract law is also mainly based on agreement.²³⁰ There, acceptance must be certain and unequivocal for it to be effective. The Appeal Court of Kinshasa has ruled on the subject that "a contract is

²²⁴ Cf. Blerk JA's rule in *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597D. That is to say, where the offeror requires, for instance, that acceptance be communicated by "registered letter" or by a "written notice", acceptance must comply with that requirement to be effective. See *Laws v Rutherford* 1924 AD 261; *Ficksburg Transport (Edms) Bpk v Rautenbach* 1988 1 SA 318 (A); *Amcoal Collieries Ltd v Truter* 1990 1 SA 1 (A). But, *Pillay v Shaik* 2009 (4) SA 74 (SCA) in which the SCA has ruled that, even if an offeror has prescribed a particular form for acceptance, a contract may be enforceable by reference to the reliance theory if there is a reasonable belief on the part of the party making the offer that that requirement has been complied with.

²²⁵ See authorities quoted by Kerr *Contract* 111 Fn380; see also Sharrock *Business* 68.

²²⁶ Christie/Bradfield *Contact* 71-72.

²²⁷ Sharrock *Business* 68.

²²⁸ See Christie/Bradfield *Contact* 72; and cases quoted by them in Fn279 and 280. The specific moment when an acceptance becomes effective to generate a contract depends on the means of communication employed as discussed in Section 5.4.3 below.

²²⁹ Cf. *Sonap Petroleum (South Africa) (Pty) Ltd v Haralabos Pappadogianis* 1992 (3) SA 234 (A); *Archibald Douw Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A); and *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA). See, in the same sense, *Pillay v Shaik* 2009 (4) SA 74 (SCA).

²³⁰ The principle is of course sometimes tempered by the reliance rule. Compare Articles 1, 8, and Article 263 CCO with Article 240 UAGCL, and comments in Section 2.3.4 above.

formed only when the intents of parties match on all the essentials that constitute the contract subject-matter.”²³¹ The rule in the decision above has been supplemented by Article 244 al. 1 UAGCL. Inspired by Article 18(1) CISG, this provision retains the moment the indication of assent reaches the offeror as the key-time for the effectiveness of an acceptance.²³² It follows then that, where the indication of assent fails to reach the offeror, acceptance is ineffective, and there is, in addition, no valid contract. With regard to acceptance by conduct, on the other hand, it is when the act is performed that the acceptance will have effect.²³³ By contrast to Article 18(3) CISG, Article 244 al. 2 UAGCL does not list acts for which performance amounts to acceptance by assent. The DUACL does not also help the situation.

Comments

An acceptance, whether explicit or implicit, must be communicated to the offeror as for it to be effective. In all of the three legal systems under consideration, acceptance by conduct is accepted merely as an extraordinary means of contracting, which must be accompanied by a real act of performance to have effect. Unlike the CISG and South African law, the Commercial Act and the DUACL are silent as regards what conduct may amount to legal conduct of acceptance. Despite their silence, it is evident that such acts might include acts relating to the dispatch of goods on the part of the seller, and those relative to the payment of the price on the part of the buyer because these attitudes constitute the key obligations of the parties to a contract. For more certainty, the adoption of a provision similar to Article 18(3) CISG and the South African common law, which expressly mentions some of the obligations of the parties as valuable conduct of acceptance, should be suggested to the Congolese legislator.

²³¹ See Léo 2 October 1962 *RJC* 1964 No. 3 147.

²³² Article 2/6(2) of the DUACL is also similarly worded.

²³³ See Article 244 al. 2 UAGCL which is similar to Article 18(3) CISG. As stipulated by Article 244 al. 2, if by virtue of the provisions of the offer and practices established between the parties or usages the offeree can, without notice to the offeror, indicate assent by conduct, acceptance takes effect when the act is carried out. Compare to Article 2/6(3) of the DUACL.

It is necessary to note that for an acceptance to produce legal effect, it must have been communicated before the offer expires as explained below.

5.3.4 Deadline for Acceptance

The CISG

As has been mentioned above, in order to become effective, an acceptance must reach the offeror.²³⁴ The requirement for an acceptance to reach the offeror applies to all kinds of acceptance, whether made in words or by conduct. Furthermore, where the offeror has fixed a time for acceptance, acceptance must comply with the time indicated in the offer. If the parties did not determine a specific period for acceptance, this must, alternatively, be expressed within a reasonable time.²³⁵ The time limit for acceptance appears, however, not to be authoritative. Article 21(1) agrees with the efficacy of a late acceptance if the party making the offer informs the offeree orally or dispatches a notice to that effect without delay. This rule also applies if the lateness is due to circumstances beyond the control of the party accepting the offer.²³⁶

South African law

Similar to the CISG, the most natural way for an offer to come to completion and no longer be open for acceptance is when it has stated a time limit. As ruled by Innes CJ in *Laws v Rutherford*, “when the acceptance of an offer is conditioned to be made within a time or in a manner prescribed by the offeror, the prescribed time limit and

²³⁴ Article 18(2) is clear in this respect as it states:

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

²³⁵ Article 18(2), second sentence.

²³⁶ As stated by Article 21(2), “If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror, in due time, the late acceptance is effective as acceptance.”

manner should be adhered to.”²³⁷ It follows then that if the addressee purports to accept the offer after the deadline for acceptance, the offeror is not bound to the contract. But, if no time limit was initially fixed, it is deemed that the offer will still open for acceptance for a reasonable time beyond which the acceptance lapses.²³⁸ The addressee is not, however, obliged to accept the offer. It may abstain from or reject the offeror’s proposal. The principle that the offer must end by the offeree’s rejection is explained by Wessels as follows:

An offer continues only until the offeree has replied to it, and directly he replies (to it) the offer ceases to be addressed to him. Unless this were so an offeror would never know when a refusal might be turned into an acceptance, and so he would be precluded from seeking other parties with whom to contract.²³⁹

Congolese law

In Congolese law, a buyer accepting an offer must send his/her acceptance within a period of time required. If the offeror has fixed a time for acceptance, the addressee must comply with that time for the acceptance to have legal effect. In a decision, dated 29 September 1925, the Appeal Court of Kinshasa required the offeree to notify his/her acceptance within “a period of time normally necessary for the dispatch of the offer and the communication of the acceptance.”²⁴⁰ If one considers, however, Article 264 CCO which claims that a sale is enforceable once parties have agreed upon the thing sold and the price, though the property sold has not yet been delivered nor the price paid, it is deemed that the period for acceptance should be very short in the DRC. Two reasons might be put forward in this regard. Firstly, the CCO ruled with regard to transactions between persons dealing in a face-to-face situation that an offer should be accepted immediately. Secondly, under the former Congolese law, the offer was generally binding or irrevocable. Consequently, in order to benefit from

²³⁷ *Laws v Rutherford* 1924 AD 261 262, see also Christie/Bradfield *Contract* 50.

²³⁸ See Wessels J in *Dietrichsen v Dietrichsen* 1911 TPD 486 496; Ng’ong’ola 1992 (4) *RADIC* 835 852.

²³⁹ Wessels *Contract* §175.

²⁴⁰ See Léo 29 September 1925 *Jur Col* 1926 293 whereby, a telegraphic offer has effect if accepted within a normal delay necessary for the dispatch of the offer and the communication of the acceptance.

the offer the addressee was presumed to communicate his/her acceptance as soon as possible, otherwise the offer would lapse with the passage of time.²⁴¹ The principle of a timely acceptance is also required by the OHADA Commercial Act. In the terms of Article 243 al. 1 UAGCL, an offer must be accepted within the time stipulated by the party making the offer. If the offer is silent with regards to the period for acceptance, the offeree must reply within a reasonable time, considering the circumstances of the offer and the mode of communication used by the offeror.²⁴²

Comments

All of the three legal systems in comparison accord with the principle that, an acceptance has no effect until it is communicated to the offeror. The point of departure lies in the fact that, under Congolese law, an acceptance was historically supposed to be given at the same time as the offer, or at least allowing for only normal delay. In other words, under the previous Congolese law, the duration of an acceptance should be shorter than it is under the CISG and South African law. One of the reasons in this regard was that, within the CCO, an offer was primarily irrevocable, whereas in the CISG and South African law it is normally revocable. Under the influence of Article 243 al. 1 UAGCL, undeniably inspired by Article 18(2) CISG, modern Congolese law has now integrated the “reasonable time” rule for acceptance. Thus, the current Congolese legal system has similar principles to its comparable legal systems with regard to the cut-off time for acceptance.

As has been expressed above, an acceptance must, in principle, meet each of the terms of the offer for it to produce legal effect. In the modern course of dealings, nonetheless, parties used to run their business by employing their standard conditions during the formation of contract stage. Those kinds of additional terms may occasionally vary the terms of the initial offer and generate the well-known problem of the “battle of forms” as discussed in the following section.

²⁴¹ Cf. Léo 2 October 1962 *RJC* 1964 No. 3 147.

²⁴² Article 243 al. 1 UAGCL; compared to Article 2/7 DUACL, and Article 18(2) CISG.

5.3.5 Additional Terms and the Issue of the “Battle of Forms”

This section deals with the “mirror image” rule, the legal regime of counter-offers, the status of standard contracts, and the solutions suggested in resolving the “battle of forms” issue under the CISG, South African law, and Congolese law.

5.3.5.1 Commentaries on the “mirror image” rule

The CISG

An acceptance must normally correspond with the terms stated in the offer. Despite this principle, from time to time parties supplement their acceptances with additional terms which may affect the first proposal. In order to preserve the original offer from external changes, the Vienna Sales Convention has opted for the widespread principle known as the *mirror image rule*.²⁴³ In conformity with the mirror image principle, “an acceptance must coincide with each and every term of an offer in order to conclude a contract.”²⁴⁴ Such is the meaning of Article 19(1) which denies legal effect to additional terms, unless they are accepted by the offeror. Clearly, Article 19(1) states that a reply to an offer purported to be an acceptance that contains additional terms is a rejection of the offer. This type of reply is no longer a regular acceptance; instead, it constitutes a *counter-offer* which requires further acceptance to convert it into a contract.²⁴⁵ As one commentator has said, the “mirror-image rule”

²⁴³ See USA *Magellan Intern Corp v Salzgitter Handel GmbH*, 76 F Supp 2nd 919 927 53 Fed R Evid Serv. 563, 40 UCC Rep Serv. 2nd 321 (ND Ill 1999); quoted by Kritzer/Eiselen *Contract* §86-68 86-126 86-17. See also Eiselen/Bergenthal 2006 (39) *CILSA* 214 217; taking support from Article 19(1). Article 19(1) reads: “A reply to an offer which purports to be an acceptance but which contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.” See also CISG-AC Opinion No. 13, available online at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html> (accessed 12-06-2013).

²⁴⁴ Viscasillas in Felemegas *Interpretation* 316; see also Magnus Last Shot 185 189.

²⁴⁵ See the American *Hanwha Corporation v Cedar Petrochemicals Inc.* case. In this case, while dispatching his acceptance, the buyer wrote that no contract would enter into force unless the seller countersigned his documentation as it stood. The seller refused to adopt the buyer’s terms. Instead, he also asked him to approve his initial terms as stated in the offer. The court implied from that controversial attitude that valid contract did not exist.

is consistent with both civil and common law legal systems and that, by opting for it, the CISG is in line with the legal systems it attempted to accommodate.²⁴⁶

It is important to note that the mirror image rule becomes delicate when parties would like their standard terms of business to be part of the contract. One of the most difficult questions posed in this regard is whether or not those kinds of standard terms and conditions, which are not usually discussed jointly, ought to be included in the contract. The drafters of the CISG-AC Opinion No. 13 has considered the problem and formulated ten rules dealing with the legal effect of standard terms in the view of the CISG. Those rules are given further consideration in section 5.3.5.3 below.

South African law

As a rule, any acceptance must reflect the offer, viz. it cannot contain additional or conflicting terms or conditions.²⁴⁷ A South African law offeree in receipt of an offer may wish to accept a contract but not on the terms contained in the offer. By requiring the acceptance to correspond unequivocally to the offer, it appears evident that South African law has adopted the “mirror-image rule”.²⁴⁸ The mirror-image rule, in effect, is one of the general principles of the common law,²⁴⁹ according to which an acceptance must exactly match the offer regardless of its style of communication.²⁵⁰ It was decided, in this regard, that, if a reply which intends to be an acceptance does

²⁴⁶ See Sukurs 2001 (34/35) *VJTL* 1481.

²⁴⁷ Eiselen E-Commerce 141 148.

²⁴⁸ See cases quoted in Fn250 and 251 below; see also Van der Merwe et al *Contract* 54.

²⁴⁹ Cf. English ruling in *Tinn v Hoffman & Co* (1873) 29 LT 271.

²⁵⁰ See Vergne 1985 (33) *Am J Comp L* 233; Tepper *Contracts* 64 and 293. Tepper explains that, the Common law is very strict in the interpretation of the mirror image rule so that any alteration invalidates the offer unless there is further ratification. With regard to American law, however, case law and almost all scholars are unanimous in their views that the rule in §2-207(1) UCC has modified the mirror-image rule. As stated by §2-207(1) UCC, “An acceptance operates as an acceptance even though it states terms additional to or different from those offered or agreed upon.” Under American law, then, additional terms become part of the contract “unless acceptance is expressly made conditional on assent to the additional or different terms.” According to commentators, the ruling in the UCC intended not only to change the mirror-image common law rule, but also to reflect the way buyers and sellers actually function in the marketplace. See, for application, the USA *Magellan Intern Corp v Salzgitter Handel GmbH* case above; see also Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fejos.html>; Murray 1988 (8) *JL & Com* 11; Sukurs 2001 (34/35) *VJTL* 1481; Farnsworth in Galston/Smit *Sales* 3-15; Forte in MacQueen/Zimmermann *Contract* 112.

contain additional terms or conditions, it is no longer a real acceptance, but rather a counter-offer.²⁵¹ As said by Maya AJ, in *First National Bank Ltd v Avtjoglou*, however, if the offeree “expresses his concern on some (added) aspects of the agreement,” the expression is not a counter-offer.²⁵² Simply, the mirror image rule wants the acceptance to equal the offer.

Congolese law

In the same way that the CISG and South African law require, Congolese law also calls for the acceptance to correspond to the offer for it to produce effect. One of the leading cases on the subject is the Appeal Court of Kinshasa decision, dated 2 October 1962, which locates the conclusion of a contract at the time when the will of the parties meets on all the essentials of the contract subject-matter.²⁵³ From this approach, it follows that Congolese contract law has also adopted the mirror-image rule. Accordingly, an acceptance with reservations or conditions is a counter-offer in this legal system, which, in turn, constitutes a rejection of the offer. This is the meaning of one of the earlier decisions of the Appeal Court of Kinshasa in which an acceptance under condition of a lower price was judged as a rejection of the offer that discharges the offeror.²⁵⁴ OHADA law has also adopted a similar ruling. As stated by Article 245 al. 1 UAGCL, “The acceptance of an offer, including additions, limitations or other modifications, is a rejection of the offer and constitutes a counter-proposal.”²⁵⁵ It is clear that Article 245 al. 1 is a faithful copy of Article 19(1) CISG. This provision has opted for the mirror image principle as has the equivalent CISG article.

²⁵¹ See *Jones v Reynolds* 1913 AD 366 370-371; *Houston v Bletchly* 1926 EDL 305 309-310; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 148G-150B; see also *Christie/Bradfield Contract* 66 Fn238.

²⁵² *First National Bank Ltd v Avtjoglou* 2000 1 SA 989 (C) 995C.

²⁵³ Léo 2 October 1962 *RJC* 1964 No. 3 147.

²⁵⁴ Léo 20 July 1926 *Jur Col* 1928 100.

²⁵⁵ Compare this to Article 2/11 DUACL and Article 19(1) CISG.

Comments

The mirror image norm is approved of by the CISG, South African law, and Congolese law. According to it, an acceptance must bear a resemblance to the offer. The mirror image rule, which previously originated in the DRC from case law, is now statutorily based. Article 245 al. 1 of the OHADA Commercial Act, which was without doubt inspired by Article 19(1) CISG, also describes an acceptance with additional terms as a rejection of the original offer which, as a result, amounts to a counter-offer.

5.3.5.2 The legal regime of counter-offers

The CISG

In the Vienna Sales Convention, Article 19(2) deals with additional terms differently depending on whether they materially vary the content of the offer or not. By a means of exception to the mirror image rule, this provision acknowledges the introduction of new terms into the acceptance provided they do not significantly modify the offer. More specifically, Article 19(2) states that an acceptance with “additional or different terms which do not materially alter the terms of the offer constitutes an acceptance.” In other words, where a party includes minor terms in the offer, the contract is concluded on receipt of the acceptance, and its content consists of the initial offer in addition to non-conflicting terms added by the offeree.²⁵⁶ One case in point is the American decision in the *Magellan Intern Corp v Salzgitter Handel GmbH* case. In this case, the Court relied on the conduct of the offeree to issue a letter of credit to draw the conclusion that there was a valid contract formed between the parties.²⁵⁷

²⁵⁶ See last sentence of Article 19(2); see also Kritzer/Eiselen *Contract* §86:67 86-125.

²⁵⁷ In the *Magellan Intern Corp v Salzgitter Handel GmbH* case, the offeree proposed a change of the price which normally constitutes a counter-offer in terms of Article 19(1) and (2). Taking support from Article 18, the Court ruled,

(...) Article 18(a) requires an indication of assent to an offer (or counter-offer) to constitute its acceptance. Such an “indication” may occur through “a statement made by or other conducts of the offeree” (...). And at the very least, a jury could find consistently with Magellan’s allegations

It is acknowledged that where the offeree adds new terms in the acceptance, the initial offeror has an alternative of either approving or rejecting them. In the circumstances where an offeror would like to prevent such unimportant additions from becoming part of the contract, he/she must object orally or by dispatching a notice without delay to that effect.²⁵⁸ This rule was strictly followed in the German *Automobile case* where it is stated that,

An acceptance that contains alterations is generally regarded as a counter-offer that constitutes a rejection of the offer (Article 19(1) CISG). However, this reply did not materially alter the terms of the offer, especially since it did not regard the goods sold. It would therefore have been up to the [buyer] to object to the reply (Article 19(2) CISG). Such an objection has undisputedly not taken place here. The alteration has thus become part of the contract.²⁵⁹

With regard to material alterations, they certainly amount to counter-offers. Article 19(3) provides a list of actions which may be described as fundamental changes. These include the terms relating to price and payment, the quality and quantity of the goods, the place and time of delivery, the extent of one party's liability to the other, and the settlement of disputes. To illustrate this with the price, the Austrian Supreme Court ruled, in the *Roofing Material case*, that, changing the price of the goods from 28 Austrian Schillings *per kilo* to 40 Austrian Schillings *per kilo* is a relevant modification which nullifies the original offer.²⁶⁰

that the required indication of complete (mirrored) assent occurred when Magellan issued its LC on March 26. So much, then, for the first element of a contract: offer and acceptance. See, in the same sense, France 4 January 1995 Supreme Court *Fauba v Fujitsu case* [<http://cisgw3.law.pace.edu/cases/950104f1.html>] (accessed 25-4-2012). In the case, the French Supreme Court decided that a statement according to which the initial price would be adjusted in accordance with the increase or decrease in market price, or in relation to alterations made to goods, does not materially alter the offer.

²⁵⁸ See the Second part of Article 19(2) CISG. The CISG-AC Opinion No. 1 comments on that the concept "notice" includes electronic communications. As explained by this Opinion, Article 19(2) aims to regularise an ineffective acceptance to an effective one unless the offeror reacts it promptly, even electronically.

²⁵⁹ Germany 27 April 1999 Oberlandesgericht (Appellate Court) Naumburg *Automobile case* [<http://cisgw3.law.pace.edu/cases/990427g1.html>] (last accessed 16-6-2013).

²⁶⁰ Austria 9 March 2000 Oberster Gerichtshof (Supreme Court) *Roofing Material case* [<http://cisgw3.law.pace.edu/cases/000309a3.html>] (last accessed 16-6-2013). See also the Swiss *Chemical Products case* whereby, deviations in the amount and the determination of the price were considered to be fundamental changes; and a wealth of authorities quoted by Kritzer/Eiselen *Contract* §86-69 86-130 in Note 2. But, see also, the French *Fauba v Fujitsu case* in which, a

It should be noted that the list in Article 19(3) above is not exhaustive as is evidenced by the phrase “among other things” used by the drafters of the Convention. In this regard, an American Court, in the *Belcher-Robinson v Linamar Corporation* case,²⁶¹ and a German Court, in the *Printed Goods* case,²⁶² were right to extend the listing of material alterations to forum-selection and arbitration clauses respectively. The prohibition of modifications of the kinds of those enumerated above is justified by the fact that comparable changes lead to an acceptance constituting a new offer.

It is believed that other matters, not expressly listed by Article 19(3) as substantial alterations, should normally be adjudicated on a case by case basis, depending on the circumstances of the case and the importance of the alterations to the offer,²⁶³ to conclude whether they are material or not.

South African law

As claimed in the previous section, an acceptance which modifies the original offer is considered as a counter-offer. In the context of South African law, an acceptance by which the offeree modifies the proposed offer produces two legal consequences. Firstly, it consists of a rejection of the original offer so that the principal offeror may no longer accept it. This rule was formulated by Watermeyer CJ, in *Collen v Rietfontein Engineering Works*, as follows: “It must (...) be remembered that a counter-offer is in general equivalent to a refusal of an offer and that thereafter *the original offer is dead and cannot be accepted until revived* (emphasis added).”²⁶⁴ Secondly, the counter-offer amounts to a new offer which the offeror can accept or

purchase order that altered the price and delivery terms was considered not to have altered the offer materially. Read with interest Witz’s comments on this where the commentator regrets that the French Supreme Court failed to discuss the fact that the price and delivery terms were expressly quoted by Article 19(3) as material alterations.

²⁶¹ USA 31 March 2010 Federal District Court [Alabama] *Belcher-Robinson, LLC v Linamar Corporation et al* [<http://cisgw3.law.pace.edu/cases/100331u1.html>] (accessed 10-4-2012).

²⁶² See Germany 26 June 2006 Appellate Court Frankfurt *Printed Goods* case in which, an arbitration clause was considered to be a settlement of disputes and, thus, assimilated to material alteration terms.

²⁶³ Schroeter in Schlechtriem/Schwenzer *Commentary* 341 §17.

²⁶⁴ *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 420; see also Van der Merwe et al *Contract* 53.

reject.²⁶⁵ To exemplify this, in the *Parow Lands (Pty) Ltd v Schneider* case, the Court considered an acceptance whereby the offeree proposed a lower price than that proposed as valid because the seller had agreed on it.²⁶⁶ In the Court's understanding, because the seller accepted the lower price offered by the offeree, there was no prejudice to either party.²⁶⁷

It is admitted, however, that, where a party in dispatching an acceptance refers to terms not expressly mentioned in the offer but which will form part of the contract by virtue of law, his/her acceptance is valid.²⁶⁸ As stated by Corbett JA, in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*, likewise, an incomplete acceptance does not necessarily constitute a counter-offer requiring a further acceptance by the original offeror.²⁶⁹ That kind of acceptance should be finalised afterwards and lead to the conclusion of a contract.²⁷⁰ As has been observed, the available authorities do not differentiate between substantial and minor

²⁶⁵ Eiselen E-Commerce 141 146; Eiselen/Bergenthal 2006 (39) *CILSA* 214 215.

²⁶⁶ *Parow Lands (Pty) Ltd v Scheider* 1951 3 SA 183 (SWA).

²⁶⁷ *Ibid.*

²⁶⁸ See Van der Merwe et al *Contract* 53; taking support on *Seef Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA); and *Section Three Dolphin Coast Medical Centre CC v Cowar Investments (Pty) Ltd* 2006 (2) SA 15 (D); see also Eiselen in *Scott Commerce* 145.

²⁶⁹ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 569.

²⁷⁰ In the *Westinghouse Brake & Equipment* case, B made an offer by telex to buy certain equipment from W. The offer set out various terms, one of which was that the order was 'subject to relevant Armscor inspection, quality requirements and general conditions.' The next day, W sent a telex to B specifically accepting each of the terms of the offer except the term relating to Armscor, which the other party did not mention. A week later, W advised B telephonically that it accepted the Armscor term and took the attitude that a contract had then come into existence. B argued that W's telex amounted to a counter-offer, which it had not accepted and, therefore, no contract had been concluded. The Trial Judge upheld B's contention but the Appeal Court rejected it. Corbett JA ruled on appeal that,

The trial Judge's characterisation of appellant's telex as a counter-offer is, with respect, incorrect. In this telex appellant did not introduce any new terms or in any way modify the terms of the offer. It accepted all the terms proposed in the offer, save that it reserved its approval of the Armscor conditions. It was certainly an incomplete acceptance, in the respect that I have indicated, and as such did not bring about a concluded contract, but it did not constitute a counter-offer necessitating a further acceptance by the respondent. Once appellant notified respondent of its approval of the Armscor conditions, then, provided that the offer had not in the meantime lapsed or been withdrawn, the acceptance would be complete and a contract concluded.

alterations. It is then up to the addressee to decide on the importance of the change by rejecting or approving it.

Congolese law

Historically speaking, there are not many comments on the legal effect of counter-offers in Congolese law. The only rule which could be mentioned on the subject is the abovementioned Appeal Court of Kinshasa decision, dated 20 July 1926. According to that decision, an acceptance depending on a lower price was judged to be a rejection of the original offer and, therefore, released the offeror.²⁷¹ It should be borne in mind that the CCO does not deal with the process of the formation of the contract. Under its ambience, the formation of contract by means of offer and acceptance was left to the will of the parties. It was, thus, logical that parties were free to consider whether the terms added should be accepted or not.

Currently, however, the intention of the parties has been supplemented by the provisions of Article 245 UAGCL which are similar to Article 19(2) CISG. As for the last provision, Article 245 al. 1 of the Commercial Act describes a reply to an offer which intends to be an acceptance, but which contains additional terms, limitations, or any other modifications, as a rejection of the offer, or a counter-offer.²⁷² As ruled by the Appeal Court of Ouagadougou, in *Société Telecel Faso v Société Hortel Project*, requiring the seller to attach the original of the order form, invoices, and ship's delivery orders, to the call for payment amounts into a counter-offer.²⁷³ Article 245 al. 2 establishes a distinction between "material additional terms" and "immaterial additional terms". As for the CISG, additional terms which alter the terms of the offer materially are devoid of legal effect. With regard to those

²⁷¹ See Léo 20 July 1926, *Jur Col* 1928 100 in Fn266.

²⁷² Article 2/11 DUACL duplicates Article 245 of the Commercial Act.

²⁷³ Burkina Faso 20 January 2006 Appeal Court [Ouagadougou] (Civil and Commercial Chamber) Case No. 15 *Société Telecel Faso v Société Hortel Project* [<http://www.ohada.com/jurisprudence/ohadata/J-09-22.html>] (accessed 6-4-2013); applying Article 214 al. 2 of the former 1997 OHADA Commercial Act. This decision has to be taken with reservation of Articles 219 and 223 of the same Act, which correspond to Articles 250 and 254 of the current Act regulating the seller's obligation to deliver documents relating to the goods.

which do not modify the initial offer substantially, for example, reminding the other his obligations provided by the law such as delivering documents relating to the goods, they amount to acceptance, unless the other party objects to them promptly.²⁷⁴ Consequently, if the original offeror abstains from reacting immediately to the newly-added terms by the offeree, the contents of the contract will consist of the initial terms plus the modifications contained in the acceptance.²⁷⁵ It is clear that the key-question underlying Article 245 al. 2 resides in an understanding of what constitutes substantial alterations and modifications and what does not.

Comments

In all of the three legal systems being studied, an acceptance must be unconditional, which means it must not constitute a counter-proposal. In other words, the acceptance must correspond as closely as possible with the offer; otherwise it is considered to be a rejection of the initial offer. Unlike South African law, the CISG and modern Congolese law establish a neat distinction between substantial and immaterial alterations. In the latter legal systems, if secondary modifications amount to acceptance, unless they are rejected forthwith, material alterations do not. Despite this similarity, there is, however, an interesting difference between the Vienna Convention and modern Congolese law with regard to material changes. The CISG seems clearer on the subject and for that reason it should be recommended as a model.

In effect, in contrast to the CISG, the OHADA Commercial Act, and consequently modern Congolese sales law, does not contain a provision similar to Article 19(3) CISG which enumerates expressly the terms that would qualify as material modifications. The DUACL is also silent on the matter. One should remember that the expression “substantial alterations” include, in the CISG environment, terms relating to the price and its payment, the quality and quantity of

²⁷⁴ In the *Société Telecel Faso v Société Hortel Project* above, the Court failed to draw the distinction between material and minor alterations; it amended wrongly the decision of the first juge.

²⁷⁵ Cf. Last sentence of Article 245 al. 2 UAGCL; similar to Article Article 2/11(2) DUACL; compare with sentence two of Article 19(2) CISG.

the goods, the place and time of delivery, briefly, the obligations of the parties. Faced with the *silence* of the Commercial Act, one may refer to the standards of a sufficiently definite offer as they are delineated by Article 241 al. 2 UAGCL to decide what, in the DRC, material or immaterial modifications are.

As required by Article 241 al. 2, an offer is adequately definite on condition that it identifies the goods, determines the price, or makes provision for determining them. Because these elements constitute the criteria of any sufficiently definite offer, it is deemed that modifications of the kind of those affecting the nature or quality and quantity of the goods, or those related to the purchase price, would qualify as material alterations in Congolese sales law perfectly well. This thinking is, moreover, justified by the fact that the quality and the quantity of the goods, on the one hand, and the determination of the price, on the other hand, form the basics of any regular offer. Without provisions regulating one or another of these requirements, therefore, the offer would be substantially meaningless. Similarly, the delivery of the goods and the payment of the price constitute the cornerstones of any sales contract so that, as long as parties have not reached agreement upon them, there is no valid sale.

Succinctly, though Congolese law does not provide a list of additional terms considered as substantial alterations, this shortcoming may indirectly be filled by recourse to the requirements of a sufficiently definite offer, as defined by Article 241 al. 2 UAGCL. Additional terms which affect the definiteness of the offer requirement would qualify as substantial alterations. With regard to changes other than those related to the goods and the price, they could independently be assessed by the Court on a case-by-case basis taking into account the circumstances of the case and the usages established between the parties to decide whether or not they are material or immaterial alterations. For more clarity, however, the adoption of a provision similar to Article 19(3) CISG is recommended in order to avoid difficulties subsequent to the differentiation between substantial and minor changes.

5.3.5.3 Inclusion of standard terms in contracts

A short view on standard terms

As it has already been mentioned, in current commercial transactions parties use to send their offer and acceptance in a form that incorporate the terms of their standard business conditions in the contract.²⁷⁶ These terms consist of pre-printed forms prepared either by the seller or the buyer. Since standard terms are, in principle, intended to favour only the party who has submitted them,²⁷⁷ it is not likely that they coincide. On the contrary, they regularly lead to a conflict between the provisions of the general conditions exchanged. Such a situation is usually referred to as “the battle of forms” problem.²⁷⁸

Eiselen remarks that “the use of standard terms and conditions in sales contracts is a widespread and legally recognised practice.”²⁷⁹ Such a right is exercised either by sellers or by buyers through a mechanism referred to as the

²⁷⁶ Standard conditions are defined in Comment 2 to Article 2.19 PICC as follows:

“Standard terms” are to be understood as those contract provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party (...). What is decisive is not their formal presentation (...) (but rather) the fact that they are drafted in advance for general and repeated use and that they are actually used in a given case by one of the parties without negotiation with the other party.

See 1994 PICC, Comments under Article 2.19 <http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/landscape.pdf> 41§480; see also comments by Eiselen on the CISG-AC Opinion No. 13 Note 15.

²⁷⁷ See Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fejos.html>; Farnsworth in Galston/Smit *Sales* 3-14; Kritzer/ Eiselen *Contract* §86:70 86-132; Eiselen/Bergenthal 2006 (39) *CILSA* 214 215.

²⁷⁸ See Kadner 2012/2013 *YB of PIL* 71 73; Schwenger/Mohs 2006 (6) *IHR* 239 243; Valiotti <http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html>; Vergne 1985 (33) *Am J Comp L* 233. There is no battle of forms, however, “where both parties are referring to the same standard terms and conditions issued by a trade association or other institution, or where one party’s standard terms explicitly state to apply only to questions that are not addressed in the other party’s terms.” See Schroeter in Schlechtriem/Schwenger *Commentary* 347§32.

²⁷⁹ See Eiselen in Scott *Commerce* 144; Eiselen’s comments to the CISG-AC Opinion No. 13 §2.12; see also Kritzer/Eiselen *Contract* §86:70 86-131; Eiselen/Bergenthal 2006 (39) *CILSA* 214. According to the author, reasons for which parties insert standards terms in contracts include, among others, the need for parties to:

- ensure that they tailor their sales agreements to their own needs;
- standardise their contractual obligations and business practices and procedures; and
- exclude or modify their common-law obligations which would normally flow from the sales contract, such as the liability for latent defects; etc.

“incorporation by reference”.²⁸⁰ The question generally posed in this regard is to know whether or not those terms and conditions are contained within the contract because they have not been discussed mutually. By way of response, the CISG-AC Opinion No.13 addresses the issue extensively by distinguishing between situations where the inclusion is admitted from those in which it is not. South African law has also tried to rule on the matter. With regard to Congolese law, conversely, it appears that it has not dealt with the subject. With the exception of provisions regulating the formation of contract, in general, even the advent of OHADA law seems not to have provided a satisfactory solution.

The CISG

The Vienna Convention does not specifically regulate the problem of the inclusion of standard terms in contracts.²⁸¹ In this context, the inclusion of the standard terms issue was drawn to the attention of the CISG-AC so that, following its seventeenth meeting, the Council formulated in the thirteenth Opinion ten rules relating to the legal regime of standard terms. As stated by the two first rules, for instance,

The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts under the CISG.

Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the conclusion of the contract and the other party had a reasonable opportunity to take notice of the terms.²⁸²

It is recognised that, despite the CISG’s silence with regard to standard terms, their legal regime may be dealt with by an interpretation of the provisions regulating the formation of contract. These provisions include, in particular, Article 8 relating to

²⁸⁰ Eiselen in Scott *Commerce* 144; see also Coetzee 2004 (3) *Stell LR* 501 516.

²⁸¹ See Austria 6 February 1996 Supreme Court *Propane case* [<http://cisgw3.law.pace.edu/cases/960206a3.html>] (last accessed 17-6-2013).

²⁸² See CISG-AC Opinion No. 13, as commented on by Eiselen at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html>.

statement and conduct,²⁸³ and Articles 18 and 19 dealing with the acceptance and its modification.

Normally, standard conditions must be incorporated in the offer and brought to the knowledge of the other party to produce effect. Where standard conditions are explicitly referred to in the offer, and the offeree accepts them without objection, there is no conflict. The French Appeal Court of Paris, in the *ISEA Industry v Lu* case, has ruled on an inverse situation where the order forms contained standard terms written on the back but were not referred to on the front of the document. The Court stated that,

Bearing in mind the absence, on the reverse side of that form, of an express reference to the general terms of sale appearing on the back, the [Seller] cannot be considered to have accepted the latter. The confirmation of the order (...), which contains the general terms of sale, being subsequent to the date of contract formation, cannot be analysed as a counter-offer within the meaning of Article 19(1) of the [CISG]; consequently, [Buyer]'s silence is stripped of its import.²⁸⁴

This decision was criticised on the basis that it was very severe with regard to standard conditions not clearly integrated into the offer by denying them legal effect. Its ruling was recently contradicted by the American *Golden Valley Grape Juice* case wherein, though not specifically mentioned, all documents attached to an e-mail, including standard terms, were considered relevant to the formation of the

²⁸³ See Schmidt-Kessel in Schlechtriem/Schwenzer *Commentary* 173 §55-56; see also comments on the CISG-AC Opinion No. 13. It was ruled by the German Supreme Court in the *Machinery case* that,

(...) through an interpretation according to Article 8 CISG, it must be determined whether the general terms and conditions are part of the offer, which can already follow from the negotiations between the parties, the existing practices between the parties, or international customs (...). As for the rest, it must be analysed how a “reasonable person of the same kind as the other party” would have understood the offer (...).

See Germany 31 October 2001 (Supreme Court) *Machinery case* [<http://cisgw3.law.pace.edu/cases/011031g1.html>] (last accessed 25-4-2013); see also USA 16 November 2007 *Barbara Berry, SA de CV v Ken M Spooner Farms*.

²⁸⁴ See France 13 December 1995 Appellate Court Paris *ISEA Industry v Lu* [<http://cisgw3.law.pace.edu/cases/951213f1.html>] (last accessed 17-6-2013); for comments, see Eiselen in CISG-AC Opinion No. 13 §2.10.

contract.²⁸⁵ The implications of the *Golden Valley Grape Juice* case are that it formulates as a general rule that, if standard conditions are written on the back of an offer or an acceptance, whether they are explicitly referred to or not, the other party must take notice of them; otherwise he/she would suffer the consequences of his/her negligence when these standard conditions are invoked by their author.

With regard to the time when standard conditions must be incorporated to be effective, it is required that they are included before, or simultaneously with, the formation of the contract, except where the contract is modified.²⁸⁶ Thus, conditions alluded to after the contract has been concluded are irrelevant. Furthermore, the incorporation “must be clear to a reasonable person of the same kind as the other party and in the same circumstances”²⁸⁷ as that party. There is legal authority that to satisfy the requirement above, standard terms and conditions must be stipulated in the same language as is used in the principal contract, or at least worded in a language the other party understands.²⁸⁸

In a few words, despite the absence of a specific provision relating to standard terms and conditions, case law and the CISG-AC Opinion No. 13 have filled the gap so that currently there is no doubt that standard terms and conditions fall within the Convention’s field of operation.

South African law

As mentioned in the introductory subsection, it is not surprising that, in the course of dealings,

(...) the buyer submits a purchase order with his general terms and conditions (often set forth in fine print on the reverse of the purchase order) and with information on

²⁸⁵ USA 21 January 2010 Federal District Court California *Golden Valley Grape Juice and Wine, LLC v Centriys Corporation et al* [<http://cisgw3.law.pace.edu/cases/100121u1.html>] (last accessed 21-6-2012).

²⁸⁶ CISG-AC Opinion No. 13 §4; but USA 16 November 2007 *Barbara Berry, SA de CV v Ken M Spooner Farms*; USA 21 January 2010 Federal District Court California *Golden Valley Grape Juice and Wine, LLC v Centriys Corporation et al*.

²⁸⁷ CISG-AC Opinion No. 13 §5.

²⁸⁸ See Germany 6 October 1995 Lower Court Kehl *Knitware case* [<http://cisgw3.law.pace.edu/cases/951006g1.html>] (last accessed 17-6-2013), in which standard terms and conditions written in Italian into a contract negotiated in German were rejected.

such matters as product, price, quantity, and delivery typed on the face of the purchase order; and seller responds with an acknowledgement containing his general terms and conditions (also often set forth in fine print on the reverse of the document) and with a typed response to the typed information recited on the face of the purchase order.²⁸⁹

Standard forms contracts of the kind of the ones described in the statement above may even be offered by one party to the extent that the other party is obliged to accept or reject the terms as proposed without discussion. That is the case regarding the well-known “contracts of adhesion”.²⁹⁰ With regard to the importance of standardised contracts in contemporary commercial dealings, Hutchison argues that:

It has been estimated that probably 95 per cent of all transactions today are concluded (...) (by recourse to standard terms and conditions). The individual negotiation of contracts is expensive in terms of both time and money, and so most businesses operate on the basis of documents drawn up for them by their legal advisers and are not prepared to consider any variation of their standard terms. Systems are set up so that transactions can be concluded quickly and efficiently (...).²⁹¹

It was claimed earlier that using standard terms and conditions is a lawful practice. In commercial transactions, indeed, parties used to submit pre-printed forms where most of the terms of the contract, other than those related to the price, quantity, quality, and date of delivery which will be negotiated individually, “are pre-determined and apparently not open to negotiation.”²⁹² For them to have effect, however, it is recommended that a party using standard terms and conditions “must either expressly make the other party aware of the inclusion of the terms or place the reference to their inclusion in such a conspicuous place and manner that a reasonable party would have noticed the inclusion notice.”²⁹³

²⁸⁹ Kritzer/Eiselen *Contract* §86:70 86-132; see also Eiselen in *Scott Commerce* 144.

²⁹⁰ Van der Merwe et al *Contract* 269; see also Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) [135]; and Hutchison in *Contract* 24 for whom standard form contracts are characterised by their “take-it-or-leave-it” nature.

²⁹¹ Hutchison in *Contract* 24.

²⁹² Eiselen in *Scott Commerce* 144; see also comments in Section 3.3.3 above.

²⁹³ *Ibid* 145.

It is important to note that, if the use of standardised contracts becomes more free and unregulated it may end in the abuse of rights, mostly in consumer contracts. This feeling led McNally JA to rule about them in the *Transport and Crane Hire case*.²⁹⁴ Generally, this case discloses the kinds of documents where standard clauses are found, viz. invoices, catalogues, and timetables. It also shows that, when a party includes his/her standard terms in the contract, if the other party does not want them to form part of the contract, he/she must object immediately. In other words, when a person entering a contract discovers that documents submitted to him/her contain standard terms, he/she must read them carefully, or it is presumed that he/she has approved of them.²⁹⁵ Nevertheless, for standard terms to produce effect they must be reasonable and brought to the attention of the other party or they are ineffective.

Congolese law

The inclusion of standard terms seems not to have formed the basis of many disputes in Congolese law. There is only one isolated case dealing with the burden of proof of conditions of sale which uses terms like those of “conditions of contract of sale”, and “general printed clauses”.²⁹⁶ The UAGCL also does not include specific

²⁹⁴ As stated by McNally JA,

None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemptions clauses. They were printed in small print on the back of tickets and other forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of ‘freedom of contract’. But, the freedom was all on the side of the big concern which had the use of the printing press (...). Faced with this abuse of power (...) by the use of the small print of the conditions, the Judges did what they could to put a curb on it.

See *Transport and Crane Hire Ltd v Hubert Davies & Co (Pty) Ltd* 1991 (4) SA 150 (ZS) 160-161; quoting with approval *George Mitchell (Chesterhall) v Finney Lock Seeds Ltd* [1983] QB 284 296-297, [1983] 1 All ER 108 (CA) 113.

²⁹⁵ Cf. *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 569 (presumption of adoption of clauses not highlighted).

²⁹⁶ Words drawn from: “En matière commerciale, les factures acceptées peuvent servir de preuve des conditions du contrat de vente. Les clauses manuscrites ou spéciales dérogent aux clauses générales imprimées, du contrat des factures (italics added).” (“For commercial transactions, invoices accepted by the other party may serve as a means of evidence of the conditions of the contract of sale. Handwritten or special clauses derogate from printed general clauses of the invoiced contract.”) See First Inst Elis 26 November 1942 *Rev Jur* 1943 74; in *Bours Répertoire* 136.

provisions devoted to the inclusion of standard forms in the contract. Article 2/19(1) of the OHADA DUACL provides for an explicit solution by stating that, where one party or both use standard terms in concluding the contract, the general rules on the formation of the contract, i.e. the exchange of offer and acceptance, apply.²⁹⁷ In the OHADA law region, the phrase “general conditions of sale specified on the back of the invoices” was invoked by the Appeal Court of Ouagadougou in the *Sitaci v Misetal SA case* without any other comment.²⁹⁸ In this case, the contract contained a dispute settlement clause selecting French courts for arbitration on the reverse of seller’s standard form. Its effect was not discussed at all. Matters in question rather included issues such as those of partial and late delivery, lack of conformity, handing over of goods to a carrier, and passing of risk, in one word, the obligations of the parties.

Comments

The available literature and case law do not make it easy to know the consequence of the inclusion of standard terms in contracts in the DRC. Thus, the CISG and South African law are more detailed on the subject than is Congolese law and that would be recommended. Because the inclusion of standard terms topic is closely linked to the formation of contract, however, it is deemed that articles regulating the formation of contract on the whole would govern standard terms as well.²⁹⁹ Alternatively, should the inclusion of the standard terms issue appears controversial, the CCJA might be asked to interpret it. This prerogative is provided for by Article 14 al. 2 of the OHADA Treaty which allows the CCJA to be consulted on any matters falling within the Treaty or the field of application of other Uniform Acts for their

²⁹⁷ The second paragraph of the same provision defines standard terms as “provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.” Compare to Article 2.1.19(2) PICC 2010.

²⁹⁸ See Burkina Faso 15 May 2009 Appeal Court of Ouagadougou (Commercial Chamber) Case No. 25 *Société Industrielle des Tubes d’Arcier (SITACI) v Société Française d’Importation et d’Exportation des Produits Métalliques (MISÉTAL-SA)* [<http://www.ohada.com/jurisprudence/ohadata/J-10-211.html>] (accessed 6-4-2013).

²⁹⁹ Such is the solution suggested by Article 2/19 DUACL.

interpretation and enforcement.³⁰⁰ In the meantime, it is assumed that standard terms should produce legal effect in the DRC provided they do not materially modify the main contract.³⁰¹ Thus, in circumstances where one party would intend to reject standard terms and conditions alluded to by his/her counterparty, he/she must object to them immediately.³⁰² If one party starts carrying out the contract notwithstanding the presence of those standards, for instance, by delivering the goods or paying the price, he/she is then presumed to have approved them.

In any rate, the topic of the inclusion of standard terms in the contract becomes subtle where both parties refer to their standard conditions of business. Such a situation may generate a battle of forms problem which needs solution as discussed below.

5.3.5.4 Solutions to the “battle of forms” issue

Introduction

Rules relating to the modification of the offer are particularly important in the principle known as “the battle of forms” where each party would like its standard terms to govern the contract. As many scholars have observed, the battle arises when a reply to an offer, identified itself as an acceptance, contains provisions that clearly contradict those in the offer.³⁰³ The question asked in this respect relates to whose general conditions would prevail in any conflicting case. By means of answer,

³⁰⁰ As stated by Article 14 of the Treaty,

The Common Court of Justice and Arbitration will rule on (...) the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts.

The Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court (...) is recognised to the national courts hearing the case (...).

For further comments on the powers of the CCJA, see Mouloul Understanding 40-46.

³⁰¹ Cf. Article 245 al. 1 UAGCL.

³⁰² Cf. Article 245 al. 2 UAGCL.

³⁰³ See Kadner 2012/2013 *YB of PIL* 71 72-73; Eiselen/Bergenthal 2006 (39) *CILSA* 214 216; Sukurs 2001 (34/35) *VJTL* 1481; Forte in MacQueen/Zimmermann *Contract* 98; Christie *Law of Contract* 59 67.

whereas South African and modern Congolese sales laws prefer the terms submitted last, modern CISG case law looks as if it has adopted a solution which is at variance with the literal reading of the Convention's provisions.

The CISG

The issue of the battle of forms has been intensively debated within the Convention.³⁰⁴ It is often listed among the most controversial problems of the CISG.³⁰⁵ This subject is complex; it entails *per se* three more questions. The one is to know whether, where parties refer to their standard terms; there is a validly concluded contract. The second is clearly whether the terms of the seller or those of the buyer will prevail, and, lastly, whether the CISG deals with the problem of the battle of forms.

As regards the question relating to the existence of a contract when parties refer to standard terms, the answer is positive. *A propos* of this, a number of judicial decisions have implied from "parties' performance notwithstanding partial contradiction between their standard terms (...) an enforceable contract."³⁰⁶ In support of this, Viscasillas contends that it has been proved that, "usually parties go ahead with the contract although each has referred to its general conditions."³⁰⁷ Thus,

³⁰⁴ See, among others, Viscasillas in Felemegas *Interpretation* 316-320; Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97-155; Viscasillas <http://www.cisg.law.pace.edu/cisg/text/cross19.html>; Kadner 2012/2013 *YB of PIL* 71-101; Eiselen/ Bergenthal 2006 (39) *CILSA* 214-240; Sukurs 2001 (34/35) *VJTL* 1481; Magnus Last Shot 185-200; Vergne 1985 (33) *Am J Comp L* 233-258; Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fejos.html>; Farnsworth in Galston/Smit *Sales* §3:04; Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 280-295; Schroeter in Schlechtriem/Schwenzer *Commentary* 347-355; Forte in MacQueen/Zimmermann *Contract* 98-122.

³⁰⁵ Cf. Note 39 above; see also Viscasillas in Felemegas *Interpretation* 318; Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; Viscasillas <http://www.cisg.law.pace.edu/cisg/text/cross19.html>; Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fejos.html>; Kritzer/Eiselen *Contract* §86:68 86-127.

³⁰⁶ See Germany 9 January 2002 BGH [Federal Supreme Court] CISG-online 651, NJW 2002, 1651 *et seq* *Powdered Milk case* [<http://cisgw3.law.pace.edu/cases/020109g1.html>] (last accessed 7-6-2013); Germany 6 October 1995 Landgericht Kehl Unilex (parties' performance established that parties either derogated from Article 19 or waived enforcement of conflicting standard terms); Germany 11 March 1998 Oberlandesgericht München, CLOUT case No. 232 (buyer accepted standard terms that differed from its offer by performing contract); cases reproduced in *UNCITRAL Digest* 103 Fn26.

³⁰⁷ Viscasillas in Felemegas *Interpretation* 318.

the most difficult question is the one dealing with the exact content of the contract when parties mention their standard terms, and the applicable law in the case.

It should be said immediately that the Vienna Sales Convention lacks a specific provision dealing with the subject of the battle of forms.³⁰⁸ The only provision which could be invoked in this regard is Article 19 regulating the effect of acceptances with modifications. Unfortunately, Article 19 does not also provide a clear rule on the question under discussion.³⁰⁹ The absence of a specific provision does not mean, however, that the battle of forms issue is governed by domestic law.³¹⁰ In conformity with Article 7(2), the battle of forms subject should be considered as one of the gaps which have to be closed by applying the general principles on which the CISG is based, namely the principles of good faith and party autonomy.

³⁰⁸ See UNCITRAL *Digest* 103 §6 *in limine*; see also Schroeter in Schlechtriem/Schwenzer *Commentary* 348; Butler *Practical Guide* 3-23; Kritzer/Eiselen *Contract* §86:68 86-127; Eiselen 2011 (14) 1 *PER/PELJ* 5/233; Eiselen/Bergenthal 2006 (39) *CILSA* 214 217; but CISG-AC Opinion No. 13. Unlike the CISG, the PICC regulate the issue of standard terms in four successive provisions, viz. Article 2.1.19 to Article 2.1.22, of which the last is specifically concerned with the issue of the battle of forms. With regard to the PECL and the CESL they provide also for explicit rules dealing with conflicting standard conditions. See Article 2:209 PECL and Article 39 CESL. As regards the CISG, scholars are divided on the relationship between the battle of forms issue and the Convention itself. According to a group of them, this subject is beyond the scope of application of the CISG as provided by Article 4(a); matters relating to it would hence be solved by applying the rule of domestic law. For another group, the question should be solved under the CISG, but they disagree on the appropriate provision in the Convention. For further comments, see Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; Viscasillas <http://www.cisg.law.pace.edu/cisg/text/cross19.html>; Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fejos.html>; Valioti <http://www.cisg.law.pace.edu/cisg/biblio/valioti.html>; Ferrari in Kröll/Mistelis/ Viscasillas *UN Convention* 288 and 289; and Eiselen/Bergenthal 2006 (39) *CILSA* 214-240.

³⁰⁹ The second sentence of Article 19(2) states that if one party does not react immediately against additional terms formulated by the other party, “the terms of the contract are the terms of the offer with the modifications contained in the acceptance.” It is argued that, though the question was discussed at the Vienna Sales Conference, participants left it open because of lack of compromise. See Schroeter in Schlechtriem/Schwenzer *Commentary* 336 §4; Eiselen/Bergenthal 2006 (39) *CILSA* 214 217. Faced by the silence of the Convention, some scholars believe that helpful guidance is provided in the rules on the autonomy of the will (Article 6), parties’ intent (Article 8), and the rules on the significance of usages and practices (Article 9). See Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; Magnus Last Shot 185 192; but, cases and authorities quoted by Schroeter in Schlechtriem/Schwenzer *Commentary* 348 Fn1 14 which promote the use of Article 19 in resolving the problem of conflicting standard terms.

³¹⁰ Cf. CISG-AC Opinion No. 13 §10.4 for which, the battle of forms question falls directly within the scope of the Convention.

A dual trend of positions has appeared amongst scholars in relation to the kind of solution suitable to the battle of forms problem. Most scholars believe that the appropriate solution to the matter could be found by applying the so-called “last-shot rule”,³¹¹ while others advocate the application of the well-known “knock-out rule”.³¹² As far as the *last-shot rule* is concerned, its followers consider that “the last person to send its form is considered to control the terms of the contract and (is), therefore, the one who wins the battle.”³¹³ To exemplify this, the last shot theory was applied by the German Appeal Court of Köln in the *Shock-cushioning Seat* case, in the following words,

Pursuant to the provisions of the CISG (...), the interpretation of contracts with conflicting terms leads to the application of at least those provisions which do not

³¹¹ Viscasillas in Felemegas *Interpretation* 318; Valioti <http://www.cisg.law.pace.edu/cisg/biblio/valioti.html>; Kritzer/Eiselen *Contract* §86:68 86-129 *in fine*; Eiselen/Bergenthal 2006 (39) *CILSA* 214 220. According to some commentators and case law, CISG Article 19 is also mainly based on the “last shot rule”. See Magnus Last Shot 185 192 and 199; Kadner 2012/2013 *YB of PIL* 71 76; see also Editorial remarks on the *Hanwha Corporation v Cedar Petrochemicals Inc. case*.

³¹² The *knock-out rule* is, for example, formulated by §2-207(3) UCC which states that, “Conduct by both parties which recognises the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree (...).” A similar ruling is also reproduced in Article 2.1.22 PICC for which,

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

The PECL have also adopted the *knock-out rule* by virtue of Article 2:209(1) which states, “If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.” The second paragraph continues that there is no contract if one of the parties: (a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or (b) without delay, informs the other party that it does not intend to be bound by such contract. Article 39 CESL has adopted similar detailed ruling as well.

³¹³ See Viscasillas in Felemegas *Interpretation* 318; see also Kadner 2012/2013 *YB of PIL* 71 76; Schwenger/ Mohs 2006 (6) *IHR* 239 243; Forte in MacQueen/Zimmermann *Contract* 115; Eiselen/Bergenthal 2006 (39) *CILSA* 214 220; Kritzer/Eiselen *Contract* §86:68 86-128; CISG-AC Opinion No. 13 §10.5 a). The last shot rule has also been followed by courts in some of the CISG member states. See, in particular, Netherlands 21 January 2009 District Court Utrecht *Sesame Seed case*. It was said, in this case, that general conditions can be considered as part of the contract if the application thereof was stipulated by the seller and accepted by the buyer. See also cases quoted by Schroeter in Schlechtriem/Schwenger *Commentary* 349 Fn119; and in UNCITRAL *Digest* 103 Fn28.

differ. Beyond this, the so-called “last-shot” doctrine applies, according to which the governing terms are those which were exchanged last.³¹⁴

Consistent with the last-shot approach, if the original offeror performs the contract notwithstanding the presence of the offeree’s standard terms, he/she is supposed to have ratified them.³¹⁵ In that case, the terms of the contract will be the standard terms contained in the acceptance in addition to the terms of the initial offer.³¹⁶ One commentator contends, however, that such “is quite simply not an acceptable solution to the problem”³¹⁷ under consideration; in practice things do not happen so easily.

With regard to the *knock-out rule*, its supporters believe that where parties refer to their standard terms and conditions, parties are in agreement on common clauses of the contract and on those non-conflicting standardised clauses.³¹⁸ According to them, the principle of good faith should play an important role in resolving the battle of forms problem.³¹⁹ Simply, in the thinking of the knock-out rule, parties would certainly enforce the terms and conditions exchanged with which they both concur. The German Supreme Court has adopted a similar reasoning in the *Powdered Milk* case in which it is expressly ruled that,

Certainly under the point of view of good faith and fair dealing (...) (the) seller should not have assumed that the question whether certain provisions of the opposing terms and conditions contradicted its own (even insofar as it served its Terms and Conditions last) could be answered in isolation for individual clauses

³¹⁴ Germany 24 May 2006 Oberlandesgericht [Appellate Court] Köln *Shock-cushioning seat case* [<http://cisgw3.law.pace.edu/cases/060524g1.html>] (last accessed 7-6-2013); also referred to by Kritzer/Eiselen *Contract* §86:70 86-139 86-140.

³¹⁵ Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 290; Fejos <http://www.cisg.law.pace.edu/cisg/biblio/fej os.html> ; Forte in MacQueen/Zimmermann *Contract* 115.

³¹⁶ Cf. Article 19(2) CISG, second sentence.

³¹⁷ Forte in MacQueen/Zimmermann *Contract* 115; see, in the same sense, Kadner 2012/2013 *YB of PIL* 71 76; for further criticisms about the last-shot rule, see Kritzer/Eiselen *Contract* §86:70 86-1444 to 86-147.

³¹⁸ CISG-AC Opinion No. 13 §10.5 b); Kritzer/Eiselen *Contract* §86:68 86-128; Eiselen/Bergenthal 2006 (39) *CILSA* 214 216.

³¹⁹ Viscasillas in Felemegas *Interpretation* 318.

with the consequence that the individual provisions that were beneficial to it would apply.³²⁰

Subsequent to this case, it is clear that, within the knock-out rule, the terms of the contract would include primarily those terms upon which parties have reached agreement. Regarding the terms that remain in conflict, they would be replaced by the default rules of the Convention.³²¹ As some commentators have said,

Recent developments in CISG contract formation place decreasing importance on a disagreement of the parties where such disagreement refers only to standard terms and conditions. These developments point to the application of the knock-out rule to those cases, as opposed to the last shot rule, which is in line with the plain wording of Article 19.³²²

What is more, a comparable mode of resolving the battle of forms issue is the principle promoted by recent international commercial instruments, namely the

³²⁰ Germany 9 January 2002 BGH [Federal Supreme Court], CISG-online 651, NJW 2002, 1651 *et seq Powdered Milk case* [<http://cisgw3.law.pace.edu/cases/020109g1.html>]; see also Kritzer/Eiselen *Contract* §86:70 86-140; Eiselen/Bergenthal 2006 (39) *CILSA* 214 226. See, in the same sense, France 16 July 1998 Cour de Cassation First Civil Chamber, CISG-online 344 D 1998 222, *Les Verreries de Saint Gobain v Martinswerk case* [<http://cisgw3.law.pace.edu/cases/980716f1.html>] (accessed 7-6-2013); also referred to by Schroeter in Schlechtriem/Schwenzer *Commentary* 349 Fn122 & 123; and reproduced in UNCITRAL *Digest* 103 Fn27. In this case, the French Court of Cassation applied the knock-out rule in connection with conflicting jurisdiction clauses. The facts of the case were that a French company ordered a series of products from a German seller to be used in glass manufacturing. Goods were to be carried to the buyer by tanker lorry rented by him. After delivery, he sued the seller for a lack of conformity in the goods. Consulted at last resort, the Supreme Court quoted Articles 18 and 19 CISG and stated: “A reply to an offer which purported to be an acceptance but which contained different terms that materially altered the terms of the offer, such as a different stipulation regarding the settlement of disputes, as provided for in article 19(3), did not amount to acceptance.” It then approved the irrelevancy of a jurisdiction clause invoked by the plaintiff.

³²¹ See UNCITRAL *Digest* 103 §6; Kritzer/Eiselen *Contract* §86:68 86-128; Eiselen/Bergenthal 2006 (39) *CILSA* 214 216; CISG-AC Opinion No. 13 §10.5 b).

³²² See Editorial remarks on the American *Hanwha Corporation v Cedar Petrochemicals Inc. case*. In consistence with the knock-out rule, if parties have agreed on the essential features of the contract, such as the nature and quantity of the goods, the purchase price, the place, and time for delivery, their failure to come to terms as regards general conditions should not be understood as a failure to enter into the contract. See Magnus Last Shot 185 198; and particularly Kritzer/Eiselen *Contract* §86:70 86-141 to 86-144. Other solutions suggested in solving the battle of forms problem include the “first-shot rule” and “hybrid solutions”. See Kadner 2012/2013 *YB of PIL* 71 76-80, for comments.

PICC, PECL, and CESL,³²³ and some modern national laws.³²⁴ All of these legal instruments admit that standard terms form part of the contract, provided that they are common in substance.

South African law

As in other legal systems, a counter-proposal generated by the use of standard terms may produce a battle of forms problem in South African law. The issue of battle of forms was recently addressed in *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic*.³²⁵ In this case, a buyer placed an order for goods to which the seller responded by referring to his conditions of sale. In dealing with the case, Kondile J experienced little difficulty in resolving the dispute by applying the normal rules of offer and acceptance.³²⁶ The learned judge implied from the buyer's behaviour shown by returning the "(...) seller's form after deliberately omitting to

³²³ See Article 2.1.22 PICC; Article 2:209(1) PECL; and Article 39 CESL.

³²⁴ See USA §2-207(3) UCC; BGB §§150(2) and 154(1). For comparative overviews on the application of the *knock-out rule* in different jurisdictions, see Kadner 2012/2013 *YB of PIL* 71 77-79; and Eiselen/Bergenthal 2006 (39) *CILSA* 214 227 to 240.

³²⁵ *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* 2001 (3) SA 1028 (D), 2002 1 All SA 321 D. The facts of this case are as follows:

B placed an order for goods with IF. B's order form stated that delivery was required 'on/by end of October' and that payment would be made only if the goods were supplied in accordance with this instruction. On receipt of the order, IF sent B a five-page form for completion. The form contained an application for credit facilities, a surety ship undertaking, *conditions of sale*, and a debit order instruction. One of the conditions of sale stated that '[t]he seller does not guarantee delivery on any specific date and cannot be held liable for late delivery for any reason ...' B filled in the first page of the application form and drew lines through the second and fifth pages (concerning the surety ship and debit order), but *left untouched the third and fourth pages containing the conditions of sale*. He then returned the form to IF. B later contended that IF was obliged, in terms of their contract, to deliver the goods before the end of October and, consequently, that, by delivering in November, he had breached the contract. The Court rejected the argument. It held that IF had not accepted B's offer to buy without more. By sending B different conditions of sale, it had made a counter-offer which had caused B's offer to lapse. B's returning the form after deliberately omitting to draw lines through the conditions of sale constituted acceptance of the counter-offer. It followed that the contract was on IF's terms, and delivery in November complied with these terms.

See also *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 569; *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA); and comments by Christie/Bradfield *Contract* 53; Christie *Law of Contract* 59 67; Sharrock *Business* 175.

³²⁶ Christie *Law of Contract* 59 67.

draw lines through the conditions of sale (...) an acceptance of the counter-offer.”³²⁷ He concluded, therefore, that the contract had been concluded on the terms of the seller.

The result of the ruling in the *Ideal Fastener Corporation* decision is that South African law has opted for the “last-shot rule” as a solution to the battle of forms problem.³²⁸ It seems, however, that the issue of battle of forms has not received much attention in South African law. Christie specifies this by saying that South Africa ignores any “other way of resolving a battle of forms than by applying the rules of offer and acceptance, leading in a proper (...) application of the last shot doctrine.”³²⁹ This is also the dominant position in English law.³³⁰ In the UK, if any contract is concluded without agreement on the standard terms evoked by the parties, the contract is governed by the terms last dispatched, unless the offeree assents to the offeror’s terms.

Congolese law

Immediately, an examination of the available case law gives the idea that no typical case of battle of forms has been settled by Congolese courts. We have already mentioned one of the Lower court of Lubumbashi’s decisions³³¹ and, under the

³²⁷ *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* 2001 (3) SA 1028 (D).

³²⁸ See also Christie/Bradfield *Contract* 53; Christie *Law of Contract* 59 67; Van der Merwe et al *Contract* 55; Sharrock *Business* 175; and For comparative overviews of the application of the knock-out rule in different jurisdictions, see Kadner 2012/2013 *YB of PIL* 71 75. Christie and Bradfield (*Contract* 54) teach that the application of the last shot method in South African law is subject to a triple condition. Firstly, the seller referring to its standard terms must present them in such a way that a reasonable person in the position of the buyer would observe them. Secondly, the buyer must present its standard terms in the same way. Lastly, the seller’s actions after receiving the buyer’s terms must reflect the impression that the seller is committed to the latter. Consequently, the contract is concluded on the buyer’s terms by “quasi-mutual assent”.

³²⁹ Christie *Law of Contract* 59 68; see also Kadner 2012/2013 *YB of PIL* 71 75 in Fn11.

³³⁰ See Birks *Private Law* 7; taking support from *BRS v Arthur V Crutchley Ltd* [1967] 2 All ER 285; and *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401; see also Eiselen/Bergenthal 2006 (39) *CILSA* 214 220.

³³¹ See First Inst Elis 26 November 1942 *Rev Jur* 1943 74; in Bours *Répertoire* 136. Up to 1998, the problem was also rare before French courts. (See Vergne 1985 (33) *Am J Comp L* 233). Recently, the French Supreme Court has addressed the battle of forms problem in the previously quoted *Les Verreries de Saint Gobain v Martinswerk* case in which, the Court applied the knock-out doctrine. Before this, the knock-out rule was also applied in a decision dated 20 November

OHADA law environment, the Ouagadougou Appeal Court *Sitaci v Misetal SA* case.³³² These decisions made reference to expressions such as those of “conditions of contract of sale”, and “general printed clauses”. As was claimed then, concepts like these are frequently referred to under the inclusion of standard terms in contracts and the battle of forms framework. The shortage of cases relating to the battle of forms may be due to the fact that Congolese law did not initially rule about the offer and acceptance technique, or to the tendency of the courts to solve comparable issues with reference to rules applicable to lack of consent.³³³ In this context, a contract in which parties failed to reach agreement on pre-printed terms would be considered to be null and void.

Comments

Both the CISG and South African law are principally based on the last-shot rule in solving the battle of forms problem. In line with the said principle, standards terms submitted at the last stage are preferred to those contained in the initial offer. With regard to Congolese law, in contrast, faced with the rarity of case law in this legal system, the present researcher is unable to determine whether the DRC is in favour of the last-shot rule or the knock out principle, or any other solution. Nevertheless, the solution adopted by Article 245 al. 2 UAGCL is indirectly consistent with the last-shot rule. As for its equivalent, Article 19(2) CISG, Article 245 al. 2 of the Commercial Act states that where one party refers to standard terms without these being subsequently objected to by the other party, “(...) the terms of the contract are

1984. See Cass F Comm 20 November 1984 *Société des Constructions Navales et Industrielles de la Méditerranée v Société Freudenberg* Bull 1984 IV No. 313; commented on by Terre/Simler/Lequette *Obligations* 137 §122; Kadner 2012/2013 *YB of PIL* 71 77 in Fn18. Terre and others states, on its subject, that, “En cas de contradiction entre les clauses contenues dans les conditions générales de chacune des parties – par exemple entre les conditions générales de vente et les conditions générales d’achat – les deux stipulations s’annulent.” (“In case of conflict between standard conditions of each of the parties, the two provisions cancel each other.”)

³³² See Burkina Faso 15 May 2009 Appeal Court of Ouagadougou (Commercial Chamber), Case No. 25 *Société Industrielle des Tubes d’Arcier (SITACI) v Société Française d’Importation et d’Exportation des Produits Métalliques* (MISÉTAL-SA).

³³³ Cf. Articles 9 to 18 CCO which deny legal effect to consent abused by deception. Deception is understood, in this context, as the intention of one party knowingly to vary the terms of the offer especially in order to get an advantage. Cf. First Inst Léo 11 March 1925 *RJCB* 1932 57.

the terms of the offer with the modifications stated in the acceptance.”³³⁴ From this ruling, one is tempted to conclude that modern Congolese law also follows the last-shot rule.

The last-shot method does not, however, occupy a good position.³³⁵ It is, among other things, reproached on the basis of being an arbitrary solution that tends to favour the last person to send the form, particularly the seller.³³⁶ Accordingly, recent contractual law instruments³³⁷ have opted for the “knock-out rule” considered as the most reasonable and equitable solution because it is based on the actual consensus of the parties.³³⁸ The knock-out rule is also the solution suggested by Article 2/22 DUACL. This technique has the merit of seeking to enforce terms and conditions on which parties have had an agreement. The knock-out approach, in other words, “avoids an arbitrary choice between the two sets of competing standard terms, instead using only those elements which are common to both sets, (...) which accords with the actual intention of both parties.”³³⁹

Since the knock-out method of resolving the battle of form issue is in conformity with the intention of the parties to enforce the contract notwithstanding the existence of conflicting clauses, it might be favoured to its opposite, the last-shot principle. Without minimising the importance of the first doctrine, it is also useful to quote the approval given by PICC Comment 3 to the last-shot solution. As stated by this comment, “The ‘last shot’ doctrine may be appropriate if the parties clearly

³³⁴ Article 245 al. 2, second sentence, UAGCL. The second sentence of Article 2/11(2) DUACL has provided similar ruling.

³³⁵ See Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; see also Forte in MacQueen/Zimmermann *Contract* 111 Fn286; Christie *Law of Contract* 59 68.

³³⁶ Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; for an overview of different scholars criticisms against the last-shot solution, see Kritzer/Eiselen *Contract* §86:70 86-144 to 86-147; see also Eiselen/Bergenthal 2006 (39) *CILSA* 214 221 to 222.

³³⁷ Cf. Article 2.1.22 PICC; Article 2:209(1) PECL; and Article 39 CESL. Currently, many scholars recommend the knock-out rule to the CISG. See Kadner 2012/2013 *YB of PIL* 71 78 Fn27.

³³⁸ See Kritzer/Eiselen *Contract* §86:70 86-146, commenting the German *Powdered Milk* case; see also Eiselen/ Bergenthal 2006 (39) *CILSA* 214 227; Forte in MacQueen/Zimmermann *Contract* 111.

³³⁹ CISG-AC Opinion No. 13 §10.6.

indicate that the adoption of their standard terms is an essential condition for the conclusion of the contract.”³⁴⁰

Following from this statement, it is clear that the appropriate solution in resolving the problem under discussion can be found in the collaboration of the parties. Of course, where the offer and acceptance diverge considerably, i.e. if they differ materially, there is no valid contract. Where the knock-out rule applies, however, it is possible for a party to obviate such disagreement.³⁴¹ One of the ways is to notify the other party of the intention not to be bound by the contract. *A propos* of this, the CISG and modern Congolese law³⁴² depart from South African law as they expressly require the notification to be given immediately subsequent to the formation of the contract, or prior to its conclusion.

5.3.6 Conclusion on the Acceptance

It is commonly admitted that the addressee must communicate his/her acceptance to the offeror for it to have effect. On this subject, the historical approach under Congolese law was to be totally silent about the acceptance process. Currently, the UAGCL has improved the situation. Inspired by the Vienna Convention, the OHADA Commercial Act, and indirectly Congolese law, now requires an acceptance to resemble the terms of the offer strictly; otherwise it constitutes a counter-offer. Moreover, both the CISG and modern Congolese sales law distinguish between material and immaterial alterations. If minor modifications amount to acceptance unless they are rejected at once, material alterations do not. Nonetheless, though the Commercial Act appears to have duplicated CISG provisions, there are some particularities which differentiate them. Specifically, Congolese law departs from the CISG on the grounds that it does not provide a list of conducts that are likely to be

³⁴⁰ UNIDROIT 2010 Principles 72; Comments 3 under Article 2.1.21; see also Viscasillas 1998 (10) *Pace Int'l L. Rev.* 97; Christie *Law of Contract* 59 68; and authorities quoted in CISG-AC Opinion No. 13 §10.6 Note 94.

³⁴¹ Klimas *Contract* 60.

³⁴² Cf. Article 19(2) CISG, and first sentence of Article 245 al. 2 UAGCL.

converted into acceptance nor does it provide for material alterations. Of course the last type of shortcoming may indirectly be filled by the interpretation of the criteria of a sufficiently definite offer. For more certainty, the Convention is recommended as the pattern to improve Congolese sales law in this respect.

In addition, the common feature between the CISG, South African law, and modern Congolese law on the subject of the insertion of additional terms in the contract resides in the adoption of the mirror image rule. The implementation of this resemblance obligation is sometimes contradicted in the course of dealings when parties conduct business by means of standardised contract terms. Situations of this kind may produce a battle of forms problem. Though several solutions have been advocated to resolve the matter, among which the last-shot and the knock-out rules are, the recourse to the mutual collaboration of the parties appears to be the best solution. As Eiselen and Bergenthal have said, the acceptance of a modified consensual approach, that is the knock-out method of resolving the battle of forms issue, is not without importance.³⁴³ But, given that, owing to the rarity of case law it is not possible to show, at this stage, preference to neither solution in the DRC, before the entry into force of the DUACL, the introduction of the knock-out rule into modern Congolese law is recommended in order to harmonise it with the most recent favourite solution of commercial instruments and contemporary CISG case law.

To sum this up, no valid contract is concluded unless the offer and acceptance coincide. It should be noted, however, that international sales usually involve engagements between parties separated in time and place. This entails the problem regarding the exact moment and the place where the contract is concluded.

³⁴³ Eiselen/Bergenthal 2006 (39) *CILSA* 214 240.

5.4 The Moment and Place of Contracting

5.4.1 Introduction

In general, the time when the period for acceptance begins to run and, subsequently, the time of contracting depends on the mode of communication used. As Hutchison has said, one of the most interesting and fundamental questions with regard to the conclusion of a contract is the time and place of the formation of a contract concluded *inter absentes*.³⁴⁴ With regard to these categories of contracts, scholars have developed a number of approaches so that each legal system aligns behind one or another theory. The following discussion seeks to know which of the competing theories prevail under the CISG, South African law, and Congolese law. In detail, this section discusses different theories developed on the moment of the formation of contract subject, applies them to the legal systems under comparison, and examines the legal nature of a contract concluded electronically. A comparative assessment of what contemporary Congolese law is will follow step by step.

5.4.2 General Remarks

When parties are face-to-face, there is not as complicated a problem as where they are not. In such a case, the contract is concluded at the exact moment when, and the place where, parties become conscious that their wills correspond.³⁴⁵ Concretely, while contracting parties are physically present, in the same place, when acceptance is communicated to the offeror, the time of formation of the contract coincides with the time of communication. With regard to contracts concluded by correspondence, telegram or other means of communication, the moment of their effectiveness has

³⁴⁴ Hutchison Formation 165 174.

³⁴⁵ See Owsia *Contract* 549; Malaurie/Aynes/Stoffel-Munck *Obligations* 242; De Bondt in Bocken *Belgian Law* 227.

aroused controversy. Many theories have been developed in this respect, of which there are the declaration, information, expedition, and the reception theories.³⁴⁶

As far as the “declaration theory” is concerned, it assumes that an acceptance is effective and the contract concluded as soon as there is a meeting of wills. The declaration theory is also known as the “emission theory”. By contrast to this theory, the “information theory” requires the acceptance of an offer to develop into a contract only when it has come to the actual knowledge of the offeror, i.e. when the offeror is informed of the letter of acceptance. This principle applies regardless of the time when the offeror receives the letter of acceptance.³⁴⁷ In this regard, there is an assumption that the person making an offer may have known of the acceptance once the notice thereof has been placed at his/her disposal.³⁴⁸ The basis of the information theory consists, in other words, of “the perfect concordance of the exchanged wills.”³⁴⁹ This approach is sometimes assimilated to the “communication theory” which locates the moment of the contract at the time the offeror has physically received the communication of the acceptance.

With regard to the “expedition theory”, it is closely linked to postal acceptances. Theoretically, an acceptance sent by post may take effect at a variety of points which are the time the letter is posted and the moment it is received by the offeror.³⁵⁰ On the basis of commercial convenience, the English House of Lords has favoured the first option by ruling that a contract negotiated through the post is concluded as soon as the letter of acceptance is placed in the hands of the post

³⁴⁶ Overall, the declaration theory states that a contract is concluded when the addressee expresses an intention for acceptance, whereas the information theory subordinates the conclusion of the contract to the actual knowledge of the acceptance by the offeror. For the expedition theory, the conclusion of the contract goes together with the posting time of the letter of acceptance. With regard to the reception theory, it focuses on the delivery of the acceptance so that a contract is concluded when the acceptance is delivered to the offeror’s address regardless of its receipt. See Quinot *Contract* 74 79; Eiselen 1999 (6) *EDI Law Review* 21 24; Eiselen 2002 (6) *VJ* 305 309-310; Owsia *Contract* 551-562; Malaurie/Aynes/Stoffel-Munck *Obligations* 243 §478.

³⁴⁷ Owsia *Contract* 553.

³⁴⁸ See App RU 5 July 1955 *RJCB* 1955 371.

³⁴⁹ Owsia *Contract* 553.

³⁵⁰ Birks *Contract* 8.

office.³⁵¹ The expedition theory is known in the context of Anglo-American law as “the postal rule”, “mailbox rule,” or “dispatch rule”.³⁵² Compliant with the mailbox rule, an acceptance is effective upon the dispatch if it is properly sent through an implicitly authorised mode of communication.³⁵³

As regards the “reception theory”, it assumes that an acceptance produces effect at the moment when it reaches the offeror, meaning when the letter arrives from the post office.³⁵⁴ After these general comments, let us discuss the special features of each legal system.

5.4.3 Moment and Place of the Contract in Detail

The CISG

Usually, an offer made between persons in each other’s presence, without stating a period for acceptance, must be accepted immediately. Sentence three of Article 18(2) states in this regard that an offer is deemed to take place between people present when it is made orally.³⁵⁵ The situation differs when negotiations involve non-present parties. In effect, where contracting parties are absent from one another, both the

³⁵¹ See *Adams v Lindsell* (1818) 1 B & Ald 681; approved in *Dunlop v Higgins* (1848) 1 HLC 381; also referred to by Christie/Bradfield *Contract* 74; Birks *Contract* 8; Hutchison *Formation* 165 175. It was ruled in *Henthorn v Fraser* [1892] 2 Ch 27 33 that, “Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.”

³⁵² See Murray 1988 (8) *JL & Com* 11; Quinot *Contract* 74 75; Christie *Law of Contract* 59 66.

³⁵³ See Birks *Contract* 8; quoting *The Household Fire and Carriage Accident etc Assurance Co Ltd v Grant* (1879) 4 Ex d 216; *Potter v Sanders* (1846) 6 Hare 1; and *Dunlop v Higgins* (1848) 1 HLC 381; see also §63 (a) US Restatement (2nd) *Contracts*. Under the expedition theory, and its equivalents postal, mailbox, or dispatch rules, the risk of transmission reposes on the offeror. Its logical consequence is that there may be a validly concluded contract even though the acceptance is lost or delayed in the post. As commentators have said, the expedition rule appears to have been established to protect the offeree against dishonest offerors. Thus, once he/she has dispatched the letter of acceptance, an offeree may safely start the performance of the contract without worrying about knowing whether it has been received or not. See Sharrock *Business* 69; Quinot *Contract* 74 88.

³⁵⁴ See Owsia *Contract* 552-553; Nicholas *Contract* 72.

³⁵⁵ As stated by Article 18(2), sentence three, “An oral offer must be accepted immediately unless the circumstances indicate otherwise.”

conclusion of the contract and the time of its conclusion depend on the time an acceptance becomes effective; this means at the moment the indication of assent reaches the offeror.³⁵⁶ Owing to the fact that an acceptance must reach the offeror for a contract to come into being, where the indication of assent fails to do so; acceptance is ineffective and there is also no contract.³⁵⁷

It is noted, however, that the period during which an acceptance reaches the offeror, and, consequently, the time of conclusion of the contract, differs depending on whether the offer was made by telegram, letter, or by means of instantaneous communication.³⁵⁸ To illustrate this, where the period is fixed in a telegram, or a letter, the time for acceptance begins to run from the moment the telegram is handed in for dispatch, or from the date shown on the letter or, when the first date is not available, from the date shown on the envelope. In addition to non-instantaneous methods of communication, the second sentence of Article 20(1) regulates the delay for acceptance of an offer sent by means of instantaneous communication. As stated by this provision, if the offer was communicated by telephone, telex or other means of instantaneous communication, the period starts to run from the moment the offer reaches the offeree.³⁵⁹

³⁵⁶ See Sentence one of Article 18(2), and Article 23; see also Schroeter in Schlechtriem/Schwenzer *Commentary* 324 §22; Ferrari in Kröll/Mistelis/Viscasillas *UN Convention* 269 §13.

³⁵⁷ Article 18(2), sentence two.

³⁵⁸ Article 20(1) states, in this respect, that,

A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication begins to run from the moment that the offer reaches the offeree.

³⁵⁹ For the determination of that moment, see Article 24. It is necessary to underline the fact that the CISG was drafted when today's means of communication, i.e. e-mails and electronic communications were not yet developed. In order to fill this gap, the CISG-AC Opinion No.1 includes e-mails and electronic communications under Article 24's provisions. See also Felemegas in *Interpretation* 106 108; Hahnkamper 2005 (25) 6 *JL & Com* 147 149-150. On the time and place of dispatch and receipt of electronic communications, see Article 10 UNECIC in which, for an e-mail to reach the addressee, it is sufficient that it enters the offeree's server without the need for him to have read it.

From the explanation above, it follows that the CISG has adopted the reception theory as the mode of determination of the time a contract is concluded.³⁶⁰ Accordingly, as long as an acceptance has not yet reached the offeror there is no validly concluded contract, except when acceptance is expressed by conduct, in which case the contract is formed at the time the performance begins.³⁶¹ As Garro says, the fact that the Vienna Convention prefers the reception theory has resolved “a classic instance of theoretical conflict between common law and civil law approaches.”³⁶² Under the civil law legal system, an acceptance is, as a rule, not effective until it reaches the offeror, whereas in common law jurisdiction a contract is completed the moment the offeree has dispatched his/her acceptance.

South African law

In general, a contract is concluded when and where the offeror is informed of the acceptance, viz. when and where acceptance is communicated.³⁶³ As explained earlier, the principle according to which a contract is concluded at the time and the place an acceptance is expressed is named the “information theory”, by contrast to the “expedition theory” for which an acceptance may be given merely by posting. South African law posits the information theory as the general mode for acceptance.³⁶⁴ This principle goes along, however, with the reception theory as being an exceptional mode of contracting where parties have chosen the Post Office as mode of communication.³⁶⁵

The information theory was first formulated by Kotzé CJ, in *Fern Gold Mining Co v Tobias*, as follows: “[A]n offer made by letter, although accepted by the person

³⁶⁰ See Butler *Practical Guide* §3.07(A); Munoz *Contracts* 106; Ng’ong’ola 1992 (4) *RADIC* 835 8351.

³⁶¹ Cf. Articles 23 and 18(2).

³⁶² Garro 1989 (23) *Int’l L* 443 454.

³⁶³ See Van Niekerk/Schulze *Trade* 67 and 69; Sharrock *Business* 68; Hutchison *Formation* 165 180; Coetzee 2004 (3) *Stell LR* 501 516.

³⁶⁴ See, in this regard, Van Niekerk/Schulze *Trade* 70; Quinot *Contract* 74 79; Eiselen 1999 (6) *EDI Law Review* 21 24; Eiselen 2002 (6) *VJ* 305 309.

³⁶⁵ See Van der Merwe et al *South Africa Report* 95 184; Sharrock *Business* 69; Ng’ong’ola 1992 (4) *RADIC* 835 851.

to whom it is made, does not establish a contract until the acceptance has come to the knowledge of the offeror, or at any rate until an answer by means of posted letter has been sent to the offeror.”³⁶⁶ This was confirmed a long time later by Wessels J in the following words, “As a general rule, South African law requires not only that an offer should be accepted, but that that acceptance should be communicated to the offeror within a reasonable time.”³⁶⁷ The author goes on to say that the information rule should exceptionally be departed from, such as in circumstances where acceptance by post was tacitly authorised.³⁶⁸

The information doctrine was, moreover, approved by Flemming J in the *Hawkins v Contract Design* decision.³⁶⁹ In this case, after hesitation on whether the *Kergeulen* case³⁷⁰ had concerned a postal contract, the learned judge indicated that the case was difficult to reconcile with the *Driftwood Properties* ruling in which the AD had reaffirmed the pre-eminence of the information theory.³⁷¹ In line with the latter decision, Flemming ruled, “It must be taken that communication of acceptance is necessary for the conclusion of a contract unless and until a sufficient factual basis for reaching the conclusion that a contrary intention should prevail is established.”³⁷²

³⁶⁶ *Fern Gold Mining Co, The v Tobias* (1890) 3 SAR 134 138. On this subject,

In a letter, dated 6 February 1889, T had applied for 500 shares in the F’s company, and on 18 February the directors of the company allotted the shares to him. The next day, before he had learned of this acceptance of his offer and even before the letter of acceptance had been posted to him, T sought to withdraw his application by written notice to the local agent of the company. In an action brought by the company it was held by the Supreme Court of the old South African Republic (Transvaal) that on the facts no contract had been concluded. Kotzé CJ referred to the conflicting opinions of the Roman-Dutch and other European writers, and to the various theories advanced by them. He noted also that the English courts had opted for the expedition theory, but expressed his own preference for the *far more logical and scientific information theory saying that it was unclear to him why so much importance was attached to the posting of the letter of acceptance since this was at most simply evidence of the juristic fact of acceptance and could not take the place of that fact itself* (emphasis added).

For comments, see Christie/Bradfield *Contract* 74; Hutchison *Formation* 165 175.

³⁶⁷ Wessels *Contract* 495. For English law, see *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 157.

³⁶⁸ *Ibid.*

³⁶⁹ *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) 300sq (offer submitted by means of messenger chosen by the offeror or a private carrier).

³⁷⁰ *Kergeulen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487.

³⁷¹ *Driftwood Properties (Pty) Ltd v Mclean* 1971 (3) SA 591 (A).

³⁷² *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) 301.

With regard to the expedition theory, the leading case in this regard is the *Cape Explosives Works v South African Oil and Fat Industries Ltd* case.³⁷³ In this case, Kotzé CJ, who had already manifested a preference for the information theory in the *Tobias* case,³⁷⁴ changed his mind by opting for its opposite. As stated by him, in a normal situation, if the Post Office is used as mode of communication, a written offer made through the post becomes a contract at the time and place the letter of acceptance is posted.³⁷⁵ Kotzé said,

I think that as those of our Roman-Dutch jurists, who have written on the subject, differ in opinion,³⁷⁶ we should now lay down that, where in the ordinary course the Post Office is used as the channel of communication, and a written offer is made, the offer becomes a contract on the posting of the letter of acceptance. This is the principle of the English, Scotch and American systems of jurisprudence, and appears to me also, apart from its practical convenience, to be in accordance with the learning of our courts (...).³⁷⁷

It is an impression that, in so ruling, Kotzé inserted the Anglo-American expedition or mail box rule under South African law. This principle was approved eighteen years later by the AD in *Kergeulen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue*.³⁷⁸ It was held in this case that, if a party makes an offer by post, he/she

³⁷³ This case deals with goods bought from sellers registered outside the Cape. The contract was concluded by mail, the offeror mailing his offer from the Transvaal and Natal Provinces, and the offeree mailing his acceptance from the Cape. The question was whether the sale was concluded in the Cape, where letters of acceptance were posted, or in the Transvaal and Natal, where they were received by offerors. After having ruled that an offer sent by post becomes, in the absence of anything to indicate the contrary, a contract as soon as it is posted, the Court concluded that the disputed contract was formed in the Cape. See *Cape Explosives Works v South African Oil and Fat Industries Ltd* 1921 CPD 244; commented on by Christie/Bradfield *Contract* 74; Christie *Law of Contract* 59 66; Van Niekerk/Schulze *Trade* 70; Hutchison *Formation* 165 177; Quinot *Contract* 74 84; Van der Merwe et al *South Africa Report* 95 183.

³⁷⁴ See *Fern Gold Mining Co v Tobias* (1890) 3 SAR 134 138.

³⁷⁵ *Cape Explosives Works v South African Oil and Fat Industries Ltd* 1921 CPD 266.

³⁷⁶ As Quinot has said, Grotius advocated the information theory, subject, however, to the intention of parties; Huber the declaration theory; and Voet the reception or the information theory. See Quinot *Contract* 74 79 with notes.

³⁷⁷ *Cape Explosives Works v South African Oil and Fat Industries Ltd* 1921 CPD 266; confirmed in *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) 302A.

³⁷⁸ *Kergeulen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487. A *propos* of this, a number of contracts of sale of whale oil were signed in London by the offeror and sent to Cape Town for signature by the offeree's company, which then posted the signed copies to London. Income derived from the contracts was held to be 'deemed to have been derived from a

tacitly authorises his/her counterparty to accept simply by posting a letter of acceptance, unless otherwise stipulated.³⁷⁹ It should be borne in mind that pursuant to the expedition theory, a contract is deemed to be accurately concluded at the place and the time the letter of acceptance is posted even before it is received by the offeror. To use Van Niekerk's example, if a South African seller in Johannesburg makes a postal offer to sell certain goods to a German buyer in Hamburg which the latter accepts by way of a letter of acceptance, the contract of sale between them is concluded in Hamburg at the time that the letter was posted there.³⁸⁰

The rule according to which a mere posting of the letter of acceptance concludes the contract seems not to be obligatory in nature. In accordance with the principle of freedom of contract, parties may opt out from it by requiring the delivery of the letter of acceptance as a starting point of the binding force of the contract.³⁸¹ Simply, the expedition theory will apply only when no other intention appears from the agreement,³⁸² so that in the contrary case the wills of the parties shall prevail.³⁸³

A question occurs, however, of whether the expedition theory may prevent an offeree who has dispatched the letter of acceptance from cancelling it by way of another method of rapid communication. In response, Van Heerden J answered negatively in *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*.³⁸⁴ This decision was

source within the Union by virtue of a contract made within the Union" under the relevant income tax legislation.

³⁷⁹ Ibid. The expedition theory also applies to acceptance sent by telegram. Thus, if one party makes an offer by telegram, he/she tacitly authorises the other party to accept in the same way. In such circumstances, the contract is concluded "when and where the offeree hands over his telegraphic acceptance for transmission by the Post Office." See *Yates v Dalton* 1938 EDL 177 179-180; see also Christie/Bradfield *Contract* 83; and Sharrock *Business* 69.

³⁸⁰ Van Niekerk/Schulze *Trade* 70.

³⁸¹ See *Coloured Development Corporation Ltd v Sahabodien* 1981 1 SA 868 (C) 873A-C; see also Christie/Bradfield *Contract* 75.

³⁸² See *SA Yster en Staal Industriële Korporasie Beperk v Koschade* 1983 4 SA 837 (T) 842-843.

³⁸³ *Kergeulen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 503. Christie suggests that the SCA ruled expressly on the question by explaining the supremacy of the reception theory, unless there was a contrary intention of the parties. By so doing, Christie believes, South African law "would become more logical and less surprising in most of the countries with which South Africa does business." See Christie *Law of Contract* 59 67; see also Van der Merwe et al *South Africa Report* 95 184.

³⁸⁴ *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1974 4 SA 392 (C); 1975 3 SA 468 (A). It was ruled in the present case that, "when a letter of acceptance has been posted, the acceptance

criticised as considering the expedition theory as binding. In effect, because the theory in consideration was established in favour of the offeree, it is, therefore, reasonable that he/she may withdraw his/her acceptance by means of another, faster mode of communication, provided the withdrawal reaches the offeror before or simultaneously with the initial letter of acceptance.³⁸⁵

Congolese law

The historical Congolese law gives the impression of lacking a decided option on the appropriate mode for acceptance. It is not necessary to be reminded that the CCO does not rule on the exchange of offer and acceptance topic. Faced with the silence of the Code on the matter of the moment and place a contract between persons not in each other's presence is concluded, the Appeal Court of Kinshasa recommended Judges to consult practices in force in the Belgian law for establishing the intention of the parties.³⁸⁶ Influenced by French and Belgian jurisprudence, the DRC has vacillated between the declaration theory, the information theory, and the reception theory.

To start with the declaration theory, texts which have been mentioned in support of it, in a Napoleonic civil code environment, are Article 1121 dealing with the stipulation for a third party and Article 1985 al. 2 relating to the conclusion of contract by agency. These provisions were literally reproduced under Congolese law *via* Article 21 and Article 527 al. 2 CCO respectively.³⁸⁷ As regards the second sentence of Article 21 CCO, it establishes the irrevocability of a stipulation for a third party as a rule. According to it, the stipulation can no longer be revoked once the

cannot thereafter be withdrawn by telegram, even if the telegram reaches the offeror before the letter.”

³⁸⁵ See Christie/Bradfield *Contract* 78; Hutchison *Formation* 165 179; compare this to Article 22 CISG.

³⁸⁶ Léo 28 October 1941 *RJCB* 1942 68; see also Bours *Répertoire* 134; Katuala *Code* 160; Piron 122.

³⁸⁷ According to Article 21 CCO,

One can likewise stipulate for the benefit of a third party when such is the condition of the stipulation that one makes for oneself or of a gift which one makes to another. A person who has made that stipulation *cannot revoke it if the third party has declared that he wants to benefit from it* (emphasis added).

With regard to Article 527 al. 2 CCO, it provides that, “The acceptance of an agency may be only tacit and result from performance carried out by the agent.”

third party has declared that he/she is willing to benefit from it. The principle stated in this way applies without the need of the party making the stipulation knowing of the declaration or not.³⁸⁸ Similarly, Article 527 al. 2 CCO announces that an acceptance of a mandate may implicitly result from the conduct of the agent at which point the contract will be completed without any further steps being undertaken.³⁸⁹ As has been observed, the two provisions being explained have, as common features, the fact that an acceptance is immediately effective following the time it is made without any necessity for the offeror to learn of it.³⁹⁰ The declaration theory is not supported by case law.

Coming to the information theory, authorities suggested in its favour include Article 932 of the Napoleonic civil code relating to forms of donations. This provision was duplicated by Article 875 CFC with merely some differences.³⁹¹ As far as Article 875 al. 1 CFC is concerned, it declares donations *inter vivos* effective from the day they are accepted in express terms. Despite such a general rule, the third section of the same provision releases the donor until he/she takes notice of the acceptance. In other words, before he/she knows of the acceptance, the benefactor is not legally bound. That is to say, as under the information theory field of influence, the effectiveness of donations, and, subsequently, the conclusion of the contract, will depend on the offeror's knowledge of the acceptance. Nevertheless, as for its predecessor, the declaration theory, the information rule has also been criticised on

³⁸⁸ See Kalongo *Obligations* 51; for French law, see Malaurie/Aynes/Stoffel-Munck *Obligations* 424§815; Terre/Simler/Lequette *Obligations* 541§528.

³⁸⁹ Cf. Owsia *Contract* 555.

³⁹⁰ Provisions evoked in support to the declaration theory are not beyond criticism. In a French law context, for instance, it has been argued that,

[In] a contract of agency covered by Article 1985(2), the principal is more “interested in the performance as quickly as possible” and thus it may be “presumed” that he had the intention of the contract being formed by mere acceptance even before he learned of it. (...) (With regard to Article 1121, it has been argued that) the stipulation is not an offer, nor is the expression of willingness by a third party an acceptance in the technical sense. Since the right at issue came into existence between the parties to the contract, the case does not involve contractual creation of a right by the third party, but a confirmation by him of the right already created. See Owsia *Contract* 556.

³⁹¹ Article 932 CC is drafted into two sections, whereas Article 875 CFC has three sections.

the basis that a donation is a gratuitous contract whose rules cannot be generalised.³⁹² Contrary to the first theory, however, there are some cases which argue that an offeror is deemed to have known of the acceptance since notification.³⁹³

Finally, turning to the reception theory, it supposes an acceptance to be effective from when it reaches the offeror. On the subject, the ruling of Belgian courts which has influenced Congolese case law appears to have favoured the theory of reception to determine both the time when and the place where a contract is formed.³⁹⁴ As De Bondt put it, “between *absentes* the contract is regarded as made at the time and the place - as a rule the place of business of the offeror - where the acceptance is received.”³⁹⁵ Similar reasoning was formulated in the DRC by the Lower Court of Lubumbashi as follows: “Il est nécessaire pour la formation d’un contrat consensuel que l’acceptation émise hors de la présence de l’offrant lui soit signifiée; la volonté transmise au loin ne produit son effet que lorsqu’elle parvient à la connaissance du destinataire.”³⁹⁶

In addition, the Appeal Court of Kinshasa ruled, on 28 October 1941, by reference to Belgian case law, that “mail orders become effective only by the acceptance of the addressee.”³⁹⁷ The Court of First Instance of Lubumbashi complemented this by ruling that, even if the finalisation of negotiations may sometimes depend upon their approval by the mother company, the contract is

³⁹² Owsia *Contract* 556.

³⁹³ App RU 5 July 1955 *RJCB* 1955 371.

³⁹⁴ See Répertoire Pratique de Droit Belge, v° Contrat No. 200ff; Gand 21 November 1921 *Pas* 1922 II 61; quoted by Kalongo *Obligations* 59. See also Cass B 16 June 1960 *RW* 1960-1961 750 *RCJB* 1962 303, note J Heenen; Cass B 25 May 1990 *Pas* 1990 I 1087 *RW* 1990-1991 149; quoted by Mubalama *Obligations* 57. Belgian law departs from the position of the French *Cour* the *cassation* which favours the reception theory in determining the time of acceptance and the expedition theory for the place of acceptance. See Owsia *Contract* 559-561; Kalongo *Obligations* 59; Nicholas *Contract* 73.

³⁹⁵ De Bondt in Bocken *Belgian Law* 227; finding advice in Cass B 16 June 1960 *Arr Cass* 1960 932.

³⁹⁶ (“For the formation of a contract, an acceptance made in the absence of the offeror must be notified him. An intention transmitted far from the recipient produces effect at the time it reaches the addressee.”) See First Inst Elis 28 April 1913 *Jur Congo* 1921 112.

³⁹⁷ Léo 28 October 1941 *RJCB* 1942 68.

presumed to have been concluded not when and where the sale is ratified, but at the time when and the place where the middleman dealt with the buyer.³⁹⁸

It follows from case law that, under Congolese law, a mailing contract is completed on the receipt of the letter evidencing the agreement of the parties, but not at *its posting time* as it is under South African law. This principle applies, according to case law, on condition that there is no ambiguity relative to the goods *when the letter is received*.³⁹⁹ With regard to the support it has obtained from case law, the reception theory appears to be the most convenient rule on the conclusion of the contract topic in Congolese contract law. This principle was also favoured by the OHADA legislator *via* Article 244 al. 1 UAGCL.⁴⁰⁰ In conformity with this provision, an acceptance becomes effective the moment it is received by the offeror. It is then logical that, though the OHADA Commercial Act does not state it expressly, where the indication of assent fails to reach the offeror the contract is ineffective.⁴⁰¹

On the question of whether a Congolese law buyer may withdraw his/her acceptance, the CCO lacked an explicit rule allowing such a right as for other matters relating to the process of the formation of contracts. Such a prerogative would, however, be deduced from an earlier decision of the Appeal Court of Kinshasa.⁴⁰² It was ruled, in this case, with regard to mail contracts, that the contract is concluded the moment acceptance reaches the offeror, so that a later notice withdrawing the contract is unsuccessful.⁴⁰³ Considering a non-timely withdrawal as imperfect implies that, if the withdrawal or revocation notice comes to the offeror's knowledge

³⁹⁸ Translated form of the French original, "Le contrat de vente passé par commis voyageur sous réserve de ratification de la maison qu'il représente, doit être considéré comme ayant été passé *au lieu où le commis voyageur a traité avec l'acheteur et non pas au lieu où la vente a été ratifié.*" First Inst Elis 26 November 1942 *Rev Jur* 1943 74.

³⁹⁹ Elis 31 October 1942 *RJCB* 1943 6; see also Bours *Répertoire* 134; Katuala *Code* 160, and Piron 122.

⁴⁰⁰ See comments by Santos/Toe *Commercial* 379.

⁴⁰¹ Compare this with sentences one and two of Article 18(2) CISG.

⁴⁰² See Léo 29 September 1925 *Jur Col* 1929 84; see also Kalongo *Obligations* 59; Mubalama *Obligations* 58.

⁴⁰³ *Ibid.*

before or concomitantly with the main acceptance, there is no binding acceptance. With such a deductive rationale, it is then assumed that a Congolese law party accepting the offer may, like his/her comparable CISG and South African law offerees, withdraw or revoke the acceptance provided it does so before the acceptance is received. These days the withdrawal and revocation rule has been expressly recognised by Article 247 UAGCL. Accordingly, an acceptance may be withdrawn or revoked subject to the condition that the withdrawal or revocation reaches the offeror prior to the time the first acceptance would have effect.⁴⁰⁴

Comments

The previous approach to the conclusion of contract in Congolese law has seen a competition between three different theories, namely the declaration theory, the information theory, and the reception theory. Given that the first two theories were not adequately supported by case law, it is presumed that the most suitable approach to contract was the reception theory. By opting for the reception theory, Congolese law aligns itself with the CISG. Both legal systems depart from South African law where the acceptance time and place happen together with the time and place of the contract.

It is generally acknowledged that, the party making an offer is presumed to have known of the acceptance since a notice is placed at his/her disposal. The intention of the parties and the circumstances surrounding the contract may sometimes play a significant role in determining the moment and place of the contract. Where such intention is absent, then the reception theory appears more appropriate for contracts *inter absentes* because it ensures “an objective proof which is easier to produce.”⁴⁰⁵ In addition, applying the reception theory guarantees the meeting of assents for persons not in each other’s presence. This seems to be the reason for which the OHADA Commercial Act has also preferred it as a suitable

⁴⁰⁴ Article 247 UAGCL; compared to Article 22 CISG.

⁴⁰⁵ Owsia *Contract* 553.

method to determine the time and place of contracting in the same way as the CISG and Congolese courts. As one scholar has commented on,

The reason for the adoption of the “receipt” principle (by the CISG particularly) in preference to the “dispatch” principle is that the risk of transmission is better placed on the offeree than on the offeror, since it is the former who chooses the means of communication, who knows whether the chosen means of communication is subject to special risks or delay, and who is consequently best able to take measures to ensure that the acceptance reaches its destination.⁴⁰⁶

Briefly, the main approach to the time of the formation of contracts in the DRC is the reception theory. This approach is now code-based with the influence of the OHADA Commercial Act.

It should be noted, however, that commercial transactions are not any longer conducted frequently by using the post. This method has been substituted by other more modern means of communication, viz. telephone, telex, fax, e-mail, and other equivalent means of immediate communication commonly referred to as “electronic communications”. The following section seeks to know the significance of electronic contracts in the CISG, South African law, and Congolese law.

5.4.4 The Legal Value of Electronic Communications

The CISG

It has already been mentioned that the Vienna Convention was drafted when today’s means of communication, namely e-mails and electronic communications, had not yet been developed. In order to fill the gap, the CISG-AC Opinion No.1 introduces the legal value of e-mails and other electronic communications.⁴⁰⁷ Furthermore, three

⁴⁰⁶ Comments quoted by Christie Law of Contract 59 66.

⁴⁰⁷ The expression “electronic communications” was, for the first time, described in Article 2(a) of the 1996 EC Model Law. According to this provision, that concept refers to “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.” From 2005, this definition has been specified by Article 4(b) and (c) of the UNEDIC for which, the phrase “electronic communication” refers to any communication that parties may make by means of “data

other instruments have been enacted under UNCITRAL sponsorship, namely the 1996 EC Model law,⁴⁰⁸ the 2001 Model law on Electronic Signatures, and the 2005 UNECIC.⁴⁰⁹ All of these instruments agree that an offer and its acceptance may be communicated electronically. Thus, when electronic communications are used during the formation stage, the contract is as valid and enforceable as other ordinary contracts.⁴¹⁰ With regard to the moment such a contract is concluded, the principle adopted is the possibility that the communication be “retrieved and processed by the addressee”,⁴¹¹ without the need to acknowledge that he/she has knowledge of the message.

Simply, electronic contracts are governed by the reception theory. In this regard, the UNECIC is important for the Vienna Sales Convention as it purports to fill any gap relating to the use of electronic communications in connection with the formation and the performance of contracts which fall, *inter alia*, within the ambit of the CISG.⁴¹² That is to say, if a country has adhered to both the CISG and the UNECIC, gaps left by the first in connection with e-communications will be filled by the second.

It is possible that formalities such as writing or signature are needed in international transactions. As for the CISG, the position is that no formalities are

message”. The phrase “data message” is defined in the same terms as Article 2(a) of the EC Model Law above.

⁴⁰⁸ According to Eiselen (2002 (6) VJ 305), the EC Model Law

[is] intended to facilitate the use of modern means of communications and storage of information, such as electronic data interchange (EDI), electronic mail and telecopy, with or without the use of such support as the Internet. It is based on the establishment of a functional equivalent for paper-based concepts such as “writing”, “signature” and “original.” By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication.

⁴⁰⁹ For comments on the UNECIC’s scope and content, and the efficiency of electronic contracts, see Coetzee 2006 (18) SA Merc LJ 245.

⁴¹⁰ See Articles 5, 5bis, and 11 EC-Model Law; and Article 8(1) UNECIC.

⁴¹¹ Cf. Article 10(1) UNECIC; see, for comments, Quinot Contract 74 79; Eiselen 1999 (6) EDI Law Review 21 24; Eiselen 2002 (6) VJ 305 309-310; Coetzee 2006 (18) SA Merc LJ 245 254; Owsia Contract 551-562.

⁴¹² See Article 20(1) UNECIC; see also Wethmar-Lemmer PIL 121.

required for contract validity and evidence.⁴¹³ Consequently, international sales contracts can be freely concluded in any manner, including any electronic communications.⁴¹⁴

South African law

The legal value of electronic communications, at the stage of the formation of contracts, depends on the means of the instrument used. As Eiselen remarks, “For legal purposes telefaxes, faxes, e-mails, SMSs and interaction with Internet websites must be regarded as *indirect* communications, (...) (while) telephonic communications (...) are regarded as *direct* communications.”⁴¹⁵ Electronic communications are regulated by the ECT Act 25 of 2002.

The question of the legal effect of contracts concluded *via* telephone rose first in *Wolmer v Rees*.⁴¹⁶ In this case, the court was asked whether the posting rule should also govern telephonic contracts; Greenberg J agreed.⁴¹⁷ Greenberg’s ruling was criticised on the ground that, as an instantaneous method of communication, a telephone differs from the post because of the prompt rectification possibility that it offers.⁴¹⁸ That is why it was rejected in the *Tel Peda Investigation Bureau v Van Zyl* case in favour of the information approach.⁴¹⁹ A similar ruling was adopted a few

⁴¹³ See Article 11 CISG; for exceptions, see Articles 12 and 96 CISG. Article 240 UAGCL reproduces authentically Article 11 CISG.

⁴¹⁴ See Article 13 CISG and CISG-AC Opinion No. 1 comments under Article 11 in which: “A contract may be concluded or evidenced by electronic communications.” See also Eiselen 2002 (6) VJ 305 312; Viscasillas in Kröll/Mistelis/Viscasillas *UN Convention* 202-203.

⁴¹⁵ Eiselen E-Commerce 141 148; see also Coetzee 2004 (3) *Stell LR* 501 517.

⁴¹⁶ *Wolmer v Rees* 1935 TPD 319.

⁴¹⁷ As stated by Greenberg J, “When a person makes an offer over the telephone he authorises the use of the same instrument for an acceptance, and as soon as the acceptance is uttered into the telephone, whether he hears it or not, there is an acceptance.” Greenberg specified at 324, “When the offeree accepts the offer in the manner invited by the offeror, that is an acceptance whether it reaches the offeror or not.”

⁴¹⁸ Christie/Bradfield *Contract* 81; Van der Merwe et al *Contract* 60.

⁴¹⁹ *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 4 SA 475 (E). It was ruled in the case that, “Parties in telephonic communication with each other are virtually in the same position as if they are *inter praesentes*. In order to speak to each other they make use of an instrument that enables them to do so. The very object of their using such instrument is to gain the direct communication that it affords.” With regard to the suitability of the information theory to direct communications such as telephones, see Eiselen E-Commerce 141 151.

years later in the *Odendaal v Norbert*,⁴²⁰ and the *S v Henckert* cases.⁴²¹ This amendment was justified by the fact that,

When one is dealing with direct communications (...), the general rule of the law of contract applies, namely that the offer or acceptances becomes valid and effective in law when it comes to the subjective notice of the addressee. Thus, the offer becomes effective when the offeree comes to know of it, and acceptance becomes effective when it is communicated to the offeror. The contract becomes final and binding when the offeror obtains subjective knowledge of the acceptance.⁴²²

With regard to the legal value of contracts concluded by indirect means of communication such as those made by telex and telefax, the question relating to them appeared in *Ex Parte Jamieson; In re Jamieson v Sabingo*.⁴²³ In this case, the buyer contended that the contract was concluded at the place where the telefax was received, while the seller preferred the place from where it was sent. Willis J said at 593 that, “(...) principles relating to letters sent by post rather than agreements concluded by telephone should more appropriately apply to determine the place where the agreement was concluded.” The learned judge inferred, by virtue of the

⁴²⁰ *Odendaal v Norbert* 1973 2 SA 749 (R).

⁴²¹ *S v Henckert* 1981 3 SA 445 (A) 451B. In the case,

The respondent had been found guilty in a regional court of a contravention of s 4 of the Tiger’s Eye Control Act 77 of 1977 in that he was in possession of, and had traded in tiger’s eye, a semi-precious stone, without a permit. In an appeal the conviction was set aside on the ground that the delivery of the tiger’s eye had taken place in South West Africa (currently Namibia) where the Act did not apply. The State appealed, (among others), on the grounds (...) whether the agreement which was concluded in this case had been concluded in the Republic of South Africa or in Namibia where the Act did not apply.

After it was found that the buyer ordered goods telephonically from Namibia and that he heard the seller’s acceptance over the telephone in the same country, the Court held that the contract had been concluded in Namibia instead of South Africa. It then applied to telephonic communications the information theory as general default rule. See Quinot *Contract* 74 85; see also Van der Merwe et al *Contract* 60 and authorities quoted by them in Fn108.

⁴²² Eiselen *E-Commerce* 141 148-149; see also *Jamieson v Sabingo* 2002 (4) SA 49 (SCA).

⁴²³ *Ex Parte Jamieson; In re Jamieson v Sabingo* 2000 4 All SA 591 (W). In the present case, a seller, located in Johannesburg, agreed to sell and install, at the buyer’s hotel in Luanda, a “water purification system, a power generator, and a vibrating compact roller”. The contract was formed by the seller sending a quotation by telefax transmission to the buyer in Angola, and his sending a telefax accepting the quotation to the seller in South Africa. The buyer submitted that the contract was concluded not in Luanda, but in Johannesburg where the telefax was received. The Court held that the posting theory was applicable in the case, so that Luanda was kept as the place of conclusion of the contract.

“expedition theory” that the contract was made, not in South Africa, but in Angola.⁴²⁴ On appeal, though, the decision ended in an identical result as the first judge, Farlam JA, took an opposite reasoning. He adopted the “information theory” for telexes and telefaxes contracts, as is the case for telephonic communications.⁴²⁵

It should be noted, however, that the *Jamieson* case ruling was given before the advent of the ECT Act.⁴²⁶ In fact, if it is right that people communicating over the telephone are equated to persons being present,⁴²⁷ it is not so for those using telexes, faxes, and e-mails.⁴²⁸ Evidence of this is the fact that all of these methods fall within the definition of “data messages” as provided by s 1 ECT Act and are, therefore, considered as indirect forms of communications. As part of data messages, they are governed by s 22(2) ECT Act for which “an agreement concluded between parties by means of data messages is concluded at the time when and the place where the acceptance of the offer was received by the offeror.”⁴²⁹ As is clear, the provision

⁴²⁴ According to one commentator, Willis decided “unfortunately without any exposition of the precise circumstances of the case and without giving detailed reasons” supporting the decision. See Van Niekerk/Schulze *Trade* 71. It is assumed that he did so because Luanda was the place where the acceptance telefax was sent.

⁴²⁵ *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) ; finding advice, *inter alia*, in the *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* ; and the *S v Henckert* decisions. Specifically, after referring to the English *Entores Ltd v Miles Far East Corporation* case, Farlam held that people communicating by telephone, telex, and fax are compared to those who are in each other’s presence.

⁴²⁶ According to s 1 ECT Act, electronic communications are perceived as communications made by data messages, viz. electronic representations of information in any form sent, received or stored by electronic means. Section 1 of the 2008 CPA includes in electronic communications, telephone, fax, sms, wireless computer access, e-mail, and any similar technology or device. See South African Gazette Vol. 526 18 §40. Both definitions are similar to the one in Article 2(a) of the 1996 EC Model Law as supplemented by Article 4(b) and (c) UNECIC.

⁴²⁷ See Eiselen E-Commerce 141 150; Christie/Bradfield *Contract* 82; Sharrock *Business* 70; Van Niekerk/ Schulze *Trade* 71.

⁴²⁸ With regard to e-mail and SMS contracts, the question of whether an acceptance of an offer sent by these methods result in a valid contract was recently asked in *SB Jafta v Ezmvelo KZN Wildlife* before the Durban Labour Court. See *SB Jafta v Ezmvelo KZN Wildlife* 2008 10 BLLR 954 (LC). In this case, among other issues, was the legality of an acceptance of the offer made by e-Mail or SMS and the moment and place of conclusion of such a contract. By means of response, the Court addressed the issue in the light of the Common law rules relating to the communication of acceptance and the ECT Act. For comments, see Papadopoulos 2010 (1) *Obiter* 188; Stoop 2009 (21) *SA Merc LJ* 110; and Collier 2008 (16) 1 *JBL* 20.

⁴²⁹ See also s 22(1) ECT Act in which no one can deny legal effect to a contract solely because it is concluded electronically; compare this to Articles 5, 5bis, and 11(1) EC Model Law, and to Article 8(1) UNECIC.

above locates the formation of electronic agreements at the time and place the acceptance reaches the offeror.⁴³⁰ By so ruling, the ECT Act has adopted the reception theory as the default rule for electronic contracts.⁴³¹ Thus, what is important for electronic communications is not that the offeror knows of the message, but rather that he/she is able to recover and handle it.⁴³² There is a general presumption, in this respect, that an offeror is able to repossess a message when this enters his/her electronic address.⁴³³

In other words, in deciding on the time and place that electronic contracts are formed,

[T]he deciding moment is dependent upon the communication being available to the recipient in the sense that it has been placed at its disposal in a place in which it would expect to receive communications in the normal course of business and in a manner which is comprehensible to it.⁴³⁴

If this requirement is met, the contract will enter into force irrespective of whether or not the offeror has taken notice of the message. Quinot concludes that the adoption

⁴³⁰ The time and place of communication, dispatch, and receipt of electronic communications are dealt with in s 23 ECT Act which states:

A data message,

- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
- (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
- (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

⁴³¹ As ruled by Pillay DJ in *SB Jafta v Ezmvelo KZN Wildlife* 2008 10 BLLR 954 (LC) 79-82, The assumption that postal contracts are concluded when a letter or telegram of acceptance is handed at the post office cannot apply to acceptance by email or SMS because the forms of communication differ substantially. Whereas the expedition theory applies to postal contracts and the information theory to telephone contracts, (...) section 23 of the ECT Act (...) adopt(s) the reception theory for receipt of electronic communication.

See, in the same sense, Eiselen E-Commerce 141 150-151; Van der Merwe et al *Contract* 62; Coetzee 2004 (3) *Stell LR* 501 517; Papadopoulos 2010 (1) *Obiter* 188 194; Sharrock *Business* 71; Collier 2008 (16) 1 *JBL* 20 21; Stoop 2009 (21) *SA Merc LJ* 110 119; Christie *Law of Contract* 59 67.

⁴³² See Quinot *Contract* 74 79; Eiselen 1999 (6) *EDI Law Review* 21 24; Eiselen 2002 (6) *VJ* 305 309-310; Owsia *Contract* 551-562; Butler *Practical Guide* §3.07 3-19.

⁴³³ Cf. First sentence of Article 10(2) UNECIC.

⁴³⁴ Eiselen 1999 (6) *EDI Law Review* 21 24; Eiselen 2002 (6) *VJ* 305 310.

of the reception theory for electronic communications “seems to be much more in line with the reality of modern (international) trade than the allocation under the postal rule and information theory.”⁴³⁵ It follows then that its adoption improves South African law on the subject of the time and place of contract. Henceforth, although the *Jafta case* dealt with labour contracts, it is desirable that its influence goes beyond and reaches even international sales contracts concluded *via* electronic communications with businessmen established in South Africa and abroad.

Congolese law

It is obvious that the CCO was drafted in a period when more sophisticated methods of communication were not yet known. Under its field of application, parties were supposed to contract in person so that any sale of goods which amounts to, or the value of which exceeded FC 2,000.00 had to be evidenced by an “entirely handwritten and signed document, except for commercial agreements.”⁴³⁶ Requiring an offeree’s entirely handwritten document presupposes physical contact between the parties, an attitude not in line with electronic communications. With the development of new communication technology, indeed, there is no need for face-to-face communication for negotiation between the seller and the buyer.⁴³⁷ Commercial transactions are, these days, conducted either by telephone, telex, e-mail, SMS, EDI, or other means of electronic communication without losing their legal effect.

With regard to the time and place of electronic contracts, the available case law looks as if the courts in the DRC rarely face this issue. The only mention made

⁴³⁵ See Quinot Contract 74 93; see, in the same sense, Coetzee 2004 (3) *Stell LR* 501 517-518; Eiselen E-Commerce 141 152. Read together with Article 10(2) UNECIC; Articles 5, *5bis*, and 11 EC Model Law; Article 24 CISG; Article 1.10 PICC; and Articles 1:303(3) and (6) with Article 2:205(1) PECL.

⁴³⁶ See Article 217 al. 2 CCO and Article 9 CCom; see also L’shi 11 August 1972 *RJZ* 1972 No. 2 & 3 188. Article 9 CCom deals with the freedom of evidence of commercial transactions. Article 240 of the OHADA Commercial Act has adopted a similar principle.

⁴³⁷ Eiselen 1999 (6) *EDI Law Review* 21 22.

on the subject alludes to “telegram” as a quick communicating means.⁴³⁸ Of course, the problem of electronic communications was, recently, heard before the commercial court of Kinshasa/Gombe in the *Family Holding Foundation v Blattner & Cinat Sarl* case.⁴³⁹ The case, however, was not concerned with the enforceability of the contract, but rather with the admissibility of e-communications as means of proof.⁴⁴⁰ In addition the UAGCL does not address the issue. Its Article 243 al. 1, which would fill the gap, requires merely the acceptance to be made bearing in mind, *inter alia*, “the rapidity of the means of communication employed by the offeror” without specifying what those means are.⁴⁴¹ It is evident that Article 5 al. 1 of the OHADA Commercial Act has taken into account the new developments in modern means of communication by authorising commercial transactions to be proved by any means even “electronically” between merchants. On the other hand, Book V, which makes reference to the expression “electronic communications”, regulates it in the framework of the computerisation of the trade register,⁴⁴² rather than in the

⁴³⁸ See Léo 29 September 1925 *Jur Col* 1929 84 (withdrawal or modification of an offer before it reaches the offeree); Léo 29 September 1925 *Jur Col* 1926 293 (reasonable time for acceptance).

⁴³⁹ Tricom Kin/Gombe 20 March 2007 RCE 13 *Family Holding Foundation Society v Blattner & Cinat Sarl* (unreported decision).

⁴⁴⁰ Electronic communications were admitted, in the case, as “a beginning of written proof” by virtue of Article 223 al. 1 CCO. Compliance with this provision, rules relating to evidence by witnesses are departed from in circumstances where there exists “a beginning of written proof”. The latter expression is described in the second paragraph of Article 223 CCO as, “any written act emanating from the person against whom a claim is brought, (e.g. the buyer) (...) and which makes probable that the fact alleged (for instance the enforceability of contract of sale) is true.” The question of whether or not there is a beginning of written evidence is independently considered by the court. See Elis 1 April 1916 *Jur Col* 1927 43; Elis 20 October 1923 *Kat* II 211; Léo 27 August 1929 *Jur Congo* 1930-1931 230.

⁴⁴¹ The Commercial Act does not contain a provision similar to Article 13 CISG which includes in the concept “writing” the quick modes of communication of the time the Convention was drafted, namely the telegram and telex. Article 209 UAGCL, initial version, which had already introduced telegram, telex, and telefax into writing has been repealed. Article 2/7 first sentence DUACL does not ameliorate the situation.

⁴⁴² See Articles 79 to 100 UAGCL. It should be noted, however, that the SADC has, in November 2012, produced a Model Law on Electronic Transactions and Commerce which could act as a model for developing rules on electronic contracts in the DRC. (See text of that Model Law at http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf (last accessed 20 January 2014). What is more, the DRC has signed the Declaration of Blantyre of 14 August 2001 recognising the importance of e-commerce in a modern country. See Declaration on Information and Communications Technology (ICT),

context of the conclusion of contracts. Moreover, this Book does not enumerate the different types of electronic communications in a similar way as Article 4(b) and (c) UNECIC does. The absence of preparatory works makes it difficult to determine what the intention of the OHADA law legislator was. It also puts the researcher in trouble with regard to defining the theory governing the conclusion of e-contracts in the DRC.

Comments

South African law appears to be more developed than the initial CISG and Congolese law on the topic of the conclusion of contracts by electronic communication. That legal system departs from the other two because it has established a neat distinction between direct ways of communications which refer mostly to telephones, and indirect means of communications which include telex, telefax, e-mail, SMS, and other means of communication with regard to the exact moment of the contract. In South Africa, if contracts concluded *via* telephones are considered as being formed between parties in the presence of each other, they are then governed by the information theory; other means of communication are subject to the reception theory. The contract is concluded once the acceptance is retrievable or able to be processed by the addressee without the need to demonstrate whether he/she has been read it or not.

With regard to the CISG, the most recent UNECIC might be used to fill the gap in the Vienna Convention. Article 20 UNECIC offers that opportunity by extending its field of application to CISG provisions relating to the use of e-communications during the formation or the performance of contracts stage provided that a State ratifies both Conventions. Thus, under modern CISG dealings, as long as the information contained in electronic communications “is accessible as to be usable for subsequent reference”,⁴⁴³ the contract is formed the moment the message enters

available online at: <http://www.misa.org/downloads/SADC%20Declaration%20on%20Information%20and%20Communications%20Technology.pdf> (last accessed 20 January 2014). Unfortunately, the DRC has not yet integrated the SADC EC Model Law in its legal system.

⁴⁴³ Cf. Article 9(2) UNECIC.

the addressee's information system. This means that CISG e-contracts are also currently ruled by the reception theory.

As regards Congolese law, the lack of specific provisions dealing with the legal value of more recent instantaneous means of communication constitutes an enormous gap. Though this shortcoming may be filled by an interpretation of Articles 5 al. 1 and 243 al. 1 UAGCL which make reference to electronic communications, the advanced approaches of South African law and the CISG would be recommended as reference. More specifically, the adoption in the DRC of a law similar to the South African ECT Act would appreciably improve the Congolese law of international sales contracts. This recommendation is justified by the fact that international transactions are now increasingly concluded *via* electronic communications rather than in person or by post. Likewise, a ruling of the kind of the ECT Act will put Congolese law in line with the reality of modern international commerce whereby e-contracts are governed by the reception theory.

5.4.5 Conclusion on the Time and Place of Contracting

Several theories have been advocated to determine the right time and place that a contract is concluded. These principles include the declaration, information, reception, and the expedition theories. Among them, the reception theory has been preferred for contracts concluded between parties not in each other presence and electronic contracts. Congolese law has always favoured the reception theory. The most grievous gap in respect of the conclusion of a contract subject to the latter legal system consists in its silence on the matter of electronic contracts. In order to fill this gap, and consequently to line up with modern international commercial practices, South African law and contemporary CISG tendency are recommended.

5.5 Conclusion on Chapter Five

Establishing a comparison between the CISG, South African law, and Congolese law on the formation of the contract rules has had the intention of achieving a triple objective. It has aimed, firstly, to investigate the influence that UAGCL provisions have had on modern Congolese sales law in order to enable it to conform to the CISG and South African law. Secondly, it has intended to examine the gaps that are still present in Congolese sales law, and, finally, to suggest the means by which they can be overcome. After this discussion, it has been discovered that the CISG and South African law are based on the traditional principle that a contract is formed by means of a meeting of an offer and an acceptance.

With regard to Congolese law, however, its initial approach to the making of a contract lacked specific provisions dealing with the offer and acceptance. This situation was the consequence of the influence of the legal tradition of its mother country resulting in the fact that the CCO is silent on the process of contracting. The conclusion of contract chapter has sometimes been described as the weakest civil code chapter. Faced with this situation, it was necessary to resort to the party autonomy principle by an interpretation of Article 9 CCO dealing with consensus obtained improperly. From that reading, it became clear that, for a contract to be validly concluded, it was also necessary that two wills met. And, since one will was insufficient to generate a contract, an offer not accepted was deemed to be revoked. But, once the offer had been accepted, there was immediately a valid contract that could not be revoked, save by the mutual consent of the parties.

In other words, the process of the formation of contract was developed in the DRC by judicial decisions as a matter of fact. Resorting to the case law as the main source of law was not without technical hitches for parties as the DRC belongs to the civil law legal system where statutes prevail over case law. The advent of the OHADA Commercial Act has filled some of the gaps. So, comparably to the CISG and South African law, in modern Congolese law, the formation of contract process

is currently based on the offer and acceptance model of contracting. As for its comparable legal systems, modern Congolese contract law has provided a number of requirements for the conclusion of contracts, among which is the agreement between contractual parties, or, more specifically, the meeting of an offer and an acceptance.

In spite of this improvement, there are still a number of variances between the initial Congolese law, on the one hand, and the CISG and South African law, on the other hand, which require attention. To start with the offer, there is no notable difference between the CISG, South African law, and modern Congolese law. In all of the three legal systems, a regular offer must be sufficiently definite, i.e. indicating the goods, fixing the price or making them be determined or determinable, and showing the offeror's intention to be bound. What is noteworthy on the subject of the offer is that, offers which were irrevocable by nature in the DRC have become revocable as it is under the CISG and South African law.

With regard to the acceptance, likewise, all of the three legal systems have adopted the same principle that an acceptance must be similar to the offer; if not, it amounts to a counter-offer devoid of legal effect. On this point, Congolese law departs, however, from the CISG and South African law on the basis that it does not provide a list of conducts which may qualify as acceptance. In addition, though Congolese conforms to the CISG by ruling about material alterations of the offer, in contrast to South African law, it does not document about those material alterations. The Vienna Convention is then recommended as guidance to both legal systems. It was observed, on the other hand, that the inclusion of additional terms in the contract may turn into a battle of forms, particularly when parties use standard contracts. Congolese law and South African law have opted for the criticised last-shot solution, but it is recommended that they adopt the knock-out rule in order to conform to most recent commercial instruments and the preferred solution of contemporary CISG case law.

As regards the moment a contract is formed, the most notable shortcoming in the DRC relates to the absence of any regulation on electronic contracts. In this

respect, South African law is more suitable as it applies the information theory to telephonic communications, and the reception theory to contracts concluded by telex, telefax, e-mail, SMS, and other means of electronic communication. Its ECT Act is, therefore, recommended to bring Congolese law into line with modern international commercial practices.

In conclusion, there are not many differences between the CISG, South African law, and modern Congolese sales law with regard to the subject of the formation of contract. Congolese provisions which were previously based on case law have become code-based as a result of the OHADA Commercial Act influence. So, therefore, given that the Commercial Act is largely inspired by the CISG, it has appreciably improved Congolese law and aligns it with the CISG and South African law on rules relating to the formation of the contract, except for electronic contracts. This aspect would be considerably improved by reference to South African law.

Chapter Six

COMPARISON WITH REGARD TO THE OBLIGATIONS OF THE SELLER AND THE BUYER

6.1 Introduction

Once a contract has been legally established, the next step consists understanding what the obligations of the parties are. In conformity with the party autonomy principle, the obligations of the parties are governed most of the time by the terms they have approved in the contract.¹ In the CISG, the obligations of the parties are dealt with in Part III entitled “Sale of Goods”.² As far as the main obligations of the seller and the buyer are concerned, they are summarised in Articles 30 and 53 CISG. Pursuant to these provisions, the seller is obliged to “deliver the goods (...) and transfer the property” in them to the buyer,³ and the buyer to “pay the price for the goods and take delivery of them”.⁴

The obligations of the parties, as summarised by the CISG, bear a resemblance to those provided by Article 263 CCO. The latter defines a contract of sale as an agreement whereby, the seller agrees to deliver a thing and the buyer to pay for it. Article 263 CCO is currently specified by Articles 250 and 262 of the OHADA Commercial Act which define the obligations of contracting parties as consisting of

¹ See Lando in Hartkamp et al *Civil Code* 201; Morrissey/Graves *Sales* 147.

² Part III consists of five chapters dealing successively with general provisions (Articles 25 to 29); the obligations of the seller (Articles 30 to 52); the obligations of the buyer (Articles 53 to 70); and provisions common to the obligations of the seller and the buyer (Articles 71 to 88). As was said in Section 4.3.4 above, Article 92 CISG allows any state to exclude the CISG’s Part III and to consider only its Part II relating to the formation of contracts, and *vice versa*. Currently, no state has made such exclusion because, without the provisions regulating the rights and obligations of the parties, the CISG would lose sense. See UNCITRAL *Digest* 115; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 392; Hugo 1999 (11) *SA Merc LJ* 1 11.

³ Article 30 CISG.

⁴ Article 53 CISG.

delivering the goods and guaranteeing them, for the seller, and paying the price and taking delivery of the goods, for the buyer.⁵ A similar ruling is found, in South African law, in the *Treasurer-General v Lippert* case in which De Villiers CJ said, “Under our law (...) a sale may be defined as a contract in which one person promises to deliver a thing to another, who on his part promises to pay a certain price.”⁶

A contract of sale is usually considered as a “bilateral legal transaction”⁷ which produces reciprocal obligations for both contracting parties. Under it, the seller commits to a performance with the purpose of obtaining compliance with the commitment of the buyer, and *vice versa*.⁸ Thus, “a seller cannot demand payment unless he tenders delivery, nor can the buyer claim delivery of the goods unless he tenders payment.”⁹

In general, under all of the CISG, South African law, and Congolese law, provisions regulating sales contracts state, in principle, only the obligations of the parties. But, given that the obligations of each party constitute the rights of the other party, one finds the rights of the buyer implied in the obligations of the seller, and the rights of the seller enclosed with the obligations of the buyer.¹⁰ It should be said,

⁵ Compare these with Articles 280 and 327CCO respectively.

⁶ See *The Treasurer-General v Lippert* 2 SC 172. In the words of Hackwill (*Sale* 65), where there is no special agreement to the contrary, “delivery and payment are concurrent conditions” for the existence of a contract of sale. So, the buyer demanding delivery must offer the price, and the seller requesting payment must have delivered the goods. See also comments in Section 3.4 above.

⁷ Butler *Guide* 4-3; quoting Spain 29 March 2005 Court of First Instance of Tudela; see also Van Niekerk/ Schulze *Trade* 71.

⁸ As stated by Greenberg JA, in *Crispette & Candy Co Ltd v Oscar Michaelis NO & Leopold Alexander NO*1947 (4) SA 521 (A) 537,

Where a plaintiff sues on a contract between him and a defendant and claims performance of the defendant’s obligation to him under the contract (...); he is only entitled to judgement against performance by him of his obligation. A typical case of this kind is (...) a contract of sale in which the term of payment is cash against delivery (...).

Ruled followed in *Etkind and Others v Hicor and Another Trading Ltd* 1999 (1) SA 111 (W) 127C; and *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) 270C.

⁹ See *Sampson v Rhodesia Wholesale Ltd (In Liquidation)* 1929 AD 468; see also Zulman/Kairinos *Sale* 101; Christie/Bradfield *Contract* 419.

¹⁰ In other words, the rights of each party are provided as remedies for breach of the other party’s obligations. For the CISG, see Articles 30-44 (obligations of the seller) and Articles 53-60 (obligations of the buyer), see also comments by Enderlein Rights 133 134; Oosthuizen Rights 78 Fn319. For Congolese law, read Articles 250 to 261 UAGCL with Articles 279 to 326 CCO regulating the obligations of the seller; and Articles 262 to 268 UAGCL with Articles 327 to 334

immediately, that, unless otherwise stipulated, contracting parties are bound by existing practices and usages¹¹ as well as by the provisions of the CISG, common law, and the Commercial Act, depending on the legal system.

In the following sections, consideration will be given to the obligations of the seller first, and to those of the buyer next. As it was the case with the preceding chapter, this chapter aims to assess critically the current state of Congolese sales law. Thus, where Congolese law diverges from the CISG and/or South African law, critical discussion will be undertaken to determine how such a discrepancy could be overcome.

6.2 The Obligations of the Seller

6.2.1 Introduction

In any contract of sale, the seller is generally obliged to deliver the goods; to deliver goods in conformity with the contract; and guarantee those goods against a third person's rights. This general rule is, however, subject to particularities depending on the legal system concerned. Thus, after a brief overview of what the main obligations of the seller are, further consideration will be given to each of the three legal systems under examination. A comparative appraisal of the position of modern Congolese law will follow at every stage.

6.2.2 General Principles

Article 30 CISG, which abridges the obligations of the seller, requires the seller to deliver the goods, together with any documents relating to them, and transfer the

CCO, for the obligations of the buyer. For the South African law, see Kerr *Sale* 159; Bradfield/Lehmann *Sale* 38; Zulman/Kairinos *Sale* 95; Hackwill *Sale* 65. As was mentioned in Chapter one, remedies for breach of contract are beyond the scope of this study.

¹¹ Cf. Article 9 CISG, and Article 239 UAGCL.

property in those goods, as required by the contract and the CISG.¹² As Honnold has stated, Article 30 “is significant for its explicit statement of the central and unitary role that the Convention gives to the contract.”¹³ In accordance with the party autonomy principle, in fact, “the substance of seller’s obligations is determined by what the parties have agreed upon.”¹⁴ Article 6 CISG declares, in this regard, that parties may depart from the application of the CISG or “derogate from or vary the effect of any of its provisions.” The supremacy of the autonomy of the parties is confirmed, with regard to seller’s obligations, by the use of expressions such “as required by the contract”,¹⁵ “in accordance with the contract”,¹⁶ or “required by the contract”¹⁷ in provisions regulating his/her duties. In addition to the delivery and transfer of property in the goods, Articles 35 to 44 CISG impose on the seller the delivery of goods which conform to the ones agreed in the contract, and which are free from any third party claims.

As regards South African law, there is also the authority that “each party to a sale is bound by those obligations expressly or tacitly undertaken.”¹⁸ These obligations include the duty to take care of the thing sold until delivery; to make it available and transfer ownership of it to the buyer; the duty to guarantee the buyer against eviction by third party; and the duty to guarantee the property sold against

¹² Article 30 CISG has the merit of outlining the main obligations of the seller. A number of subsidiary obligations may, however, arise from the contract or other specific legal provisions.

¹³ Flechtner *Honnold’s Uniform Law* 309.

¹⁴ Schlechtriem in Galston/Smit *Sales* 6-2; see also Widmer in Schlechtriem/Schwenzer *Commentary* 490; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 393; Lookofsky CISG 85; Enderlein *Rights* 133 135; Schwenger/ Fountoulakis *Sales* 203. As ruled by one American court, “the CISG does not pre-empt a private contract between the parties; instead, it provides a statutory authority from which contract provisions are interpreted, fills gap in contract language, and governs issues not addressed by the contract.” See USA 29 January 2003 Federal District Court [Illinois] *Ajax Tool Works Inc. v CanEng Manufacturing Ltd* 2003 US Dist LEXIS 1306, 2003 WL 22187 (ND III 2003) [<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030129ul.html>] (last accessed 10 October 2013).

¹⁵ Cf. Article 30 CISG *in fine*.

¹⁶ Cf. Article 32(1) CISG.

¹⁷ Cf. Article 35(1) CISG; see also Schlechtriem in Galston/Smit *Sales* 6-2.

¹⁸ Bradfield/Lehmann *Sale* 64; Kerr *Sale* 159; see also Sharrock *Business* 205; Lotz *Sale* 361 383.

latent defects.¹⁹ Of course some other obligations may also be imposed on the parties by common law. Common law provisions apply, however, “only if the parties have not expressly or tacitly agreed to exclude or to vary them.”²⁰

With regard to Congolese law, the obligations of the seller are dealt with in Book VIII Title III Chapter I of the OHADA Commercial Act.²¹ This Chapter is divided into three sections dealing successively with the delivery of the goods,²² the conformity obligation,²³ and the obligation of guarantee.²⁴ As far as the main obligations of the seller are concerned, they are summarised in Article 250 UAGCL which reproduces Article 30 CISG.²⁵ In contrast to the latter provision, Article 250 al. 2 UAGCL obliges explicitly the seller to ensure that goods comply with the ones ordered before delivery, and offer his/her guarantee at the risk of bearing responsibility. As for the preceding legal systems, the seller in Congolese law has, in addition, to perform his/her obligations in accordance with the provisions of the contract as provided for by Article 33 al. 1 CCO and a number of the provisions of

¹⁹ See Sharrock *Business* 286; Van Niekerk/Schulze *Trade* 72; Kerr *Sale* 160; Bradfield/Lehmann *Sale* 38; Lotz *Sale* 361 373; and Volpe *Sale* 69. In addition to the common law rules, the 2008 CPA has also established a veritable legal regime of parties’ obligations with regards to consumer contracts; see particularly Sections 18 to 21. Its comment is outside the ambit of this study.

²⁰ Bradfield/Lehmann *Sale* 37-38; Eiselen in Scott *Commerce* 137. In other words, the provisions of the common law have to be regarded as default or residual terms, applying only if parties did not provide otherwise. In this context, consensual obligations are called *incidentalia* while those provided by the common law, considered here as “residual obligations”, are named *naturalia*. See Van Niekerk/Schulze *Trade* 71; Bradfield/ Lehmann *Sale* 37 and 64; Kerr *Sale* 159. See also comments in Sections 3.3.2 and 3.3.3 above dealing with the principles of consensualism and freedom of contracts.

²¹ See Articles 250 to 261 UAGCL; compare with Articles 279 to 326 CCO which form Title III, Chapter III of the CCO.

²² Articles 251 to 254 UAGCL; compare with Articles 279 to 301 CCO; see also Goma 28 November 2005 RCA 1359 *Kamaliro Paluku J v Kisambio Kambale*; Kin/Gombe 7 April 2011 RCA 27 575/27 714 *Luwanda Lubuata v Moke Molobini N* (unreported decisions).

²³ Articles 255 to 259 UAGCL; compare with Articles 318 to 336 CCO.

²⁴ Articles 260 and 261 UAGCL; compare with Articles 303 to 317 CCO.

²⁵ As stated by Article 250 UAGCL, “The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and (...) Book (VIII).” Previously, the seller’s obligations were regulated by Article 280 CCO which imposed on the seller two main obligations, viz. delivering the property sold, and guaranteeing it against third party claims or defects. See Tricom Kin/Matete 18 April 2012 RCE 569 *Batiment Commerce Sprl v Bureau d’Analyse et d’Assistance Technique*; Tricom Kin/Gombe 18 October 2011 RCE 2012 *LT Cimpex Sprl v Biz Africa Sprl* (unreported decisions).

the OHADA Commercial Act.²⁶ On 3 April 1976, the Supreme Court stated that the agreement constitutes the law which governs the performance of the obligations of parties so that a judgment which contradicts this principle must be repealed in this respect.²⁷

From the outline above, it is clear that, in all of the three legal systems under consideration, the seller is not only bound to deliver the goods, he/she is also obliged to deliver goods which are free from any defects, and goods which are free from any third party claims. These three main obligations are discussed in the following sections.

6.2.3 The Delivery of the Goods

6.2.3.1 General remarks

Within the context of the CISG, the seller's delivery obligation covers a triple domain: delivering the goods sold; handing over any documents relating to them; and transporting the property in the goods to the buyer. It is evident that the delivery of the goods and the transfer of ownership are not typical of the CISG.²⁸ These obligations are essential in all legal systems, including South African and Congolese

²⁶ See Article 253 al. 1 (delivery of the goods at the date "set by the contract" or determined according to its stipulations); Article 254 (delivery at the time, place, and in the form "required in the contract"); compare this with Article 327 CCO. See also Article 250 UAGCL whereby, the seller must conform to the requirements provided for "in the contract"; and, particularly, Article 255 al. 1 UAGCL which requires the seller to perform his/her delivery obligation "in accordance with the stipulations of the contract", or "as agreed upon" between parties. Compare these with Articles 287, 288, 293, 294 al. 1, and Article 295 CCO. See also Article 54 CCO which considers the common intention of parties as the starting-point of the interpretation of any contract, and comments in Section 2.3.2 and Section 2.3.3 above dealing with the freedom of contract and autonomy of the will principles.

²⁷ See CSJ 3 April 1976 BA 1977 64 65.

²⁸ But, Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 392 for who considers the transfer of property in the goods as typical and characteristic of a contract of sale of goods governed by the CISG.

laws, even if “what is done to ‘deliver’ the goods and how the transfer of property occurs may be different.”²⁹

Although the Vienna Sales Convention obliges the seller to transfer ownership in the goods sold to the buyer, it is however silent on the way this obligation may be fulfilled. This is undoubtedly justified by the fact that the CISG does not deal with the influence that the contract has on the property in the goods sold.³⁰ Thus, the issue of how and when the property is transferred from the seller to the buyer has to be resolved by reference to the law designated by local conflict-of-laws rules.³¹ In this regard, it is the domestic property law that will determine whether the property passed at the moment the contract was concluded or afterward, and which documents or formalities were required for the transfer of property.³² To give an example of this, under South African law, the conclusion of the contract does not entail an automatic transfer of ownership. Instead, it creates a simple presumption of the transfer of property which needs to be confirmed by the conclusion of an additional and separate transaction for it to produce legal effect.³³ Unlike South African law, in the CCO’s scope of application, the transfer of ownership occurred immediately after parties have agreed on the thing sold and the price, irrespective of whether or not delivery and payment have happened.³⁴ In a decision heard on 20 November 1976, the Supreme Court held,

²⁹ Enderlein Rights 133 143 -144; see also Kerr *Sale* 159. In one word, there is no sale without delivery and transfer of property.

³⁰ Cf. Second sentence of Article 4(b) whereby, the CISG “is not concerned (*inter alia*) with the effect which the contract may have on *the property in the goods sold*”, except when the transfer of property occurs in connection with other provisions of the CISG (my emphasis).

³¹ See UNCITRAL *Digest* 130; Widmer in Schlechtriem/Schwenzer *Commentary* 492.

³² Schlechtriem in Galston/Smit *Sales* 6-7; Widmer in Schlechtriem/Schwenzer *Commentary* 492.

³³ See *Brewer v Berman* 26 SC 441 443; *Meyer v Retief & Co* OPD 3 9; *Lendlease Finance (Pty) Ltd v Corporacion de Marcadeo Agricola & Others* 1976 (4) SA 464 (A); *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd & Others* 1995 (3) SA 663 (A); see also Van Niekerk/Schulze *Trade* 83; *Sharrock Business* 875; *Belcher Sale* 3; Eiselen in *Scott Commerce* 137; and comments in Section 3.4.5 above.

³⁴ Article 264 CCO; see also Léo 15 June 1926 *Jur Col* 1929 95; Léo 28 October 1930 *Jur Col* 1930-1931 108; Kisangani 15 April 1980 RCA 487 *Jacques Alber v Malisawa Tshimbalanga* (unreported decision).

A contract of sale is complete when parties have agreed on the thing sold and the price. A clause according to which the buyer would not acquire ownership until payment of the last instalment has to be analysed as a mere ‘suspensive condition’ of the transfer of ownership in the thing sold.³⁵

With regard to the OHADA Commercial Act, it locates the transfer of ownership at the time of the taking of delivery of the goods.³⁶

The implementation of the delivery duty in the DRC is currently governed by Articles 251 to 254 UAGCL.³⁷ The first three Articles define the place and time for delivery while the final provision regulates the documentation obligation.

6.2.3.2 Place of delivery

Introduction

As a general rule, the place of delivery is the place contractually determined by the parties.³⁸ Such a rule is consistent with the principle of the freedom of contract. In addition to contractual clauses, parties may also address the place of delivery issue by stipulating Incoterms,³⁹ of which the most usual are CIF and FOB.⁴⁰ As for other

³⁵ CSJ 20 November 1976 BA 1977 188; see also CSJ 20 January 1976 RC 117 (unreported decision, quoted in Katuala *Code* 161).

³⁶ See Article 275 and Article 277 al. 1 UAGCL.

³⁷ For the CISG, see Articles 31 to 34; and for South African law, see D 19.1.11.2; Kerr *Sale* 161; Bradfield/ Lehmann *Sale* 23; Zulman/Kairinos *Sale* 96; Oosthuizen Rights 83; Sharrock *Business* 287.

³⁸ For the CISG, see Article 31; for the DRC, Articles 251 and 252 UAGCL; and for South African law, *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377.

³⁹ “Incoterms” is the acronym of the phrase “International Commercial Terms”. Incoterms are a series of standardised acronyms used in international trade to determine the obligations of both the seller and the buyer in respect to the place, time, and manner of delivery. They consist of a number of “commercial terms that represent a set of agreements regarding the place of delivery, responsibility for carriage and insurance, and the transfer of risk of goods subject to an international sale.” Sponsored by the ICC, Incoterms were first published in 1936, and most recently edited in 2010. See Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 400; Coetzee Incoterms 10 and 191; Klotz/Barrett *Sales* 63; Morrissey/Graves *Sales* 148; Lookofsky CISG 85; and Romein <http://cisgw3.law.pace.edu/cisg/biblio/romein.html> (accessed 11-7-2012).

⁴⁰ FOB means “Free on Board”; and CIF means “Freight, Insurance, and Coast”. For more detail, see authorities quoted by Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 400 Fn59; see also Widmer in Schlechtriem/Schwenzer *Commentary* 491. Under South African law, CIF sales are ruled in *Lendlease Finance (Pty) Ltd v Corporacion de Marcadeo Agricola & Others* 1976 (4) SA 464 (A) 491H-492D wherein Corbett JA said, “Under the c.i.f. contract, in its usual form, the

contractual matters, however, parties often fail to address the place of delivery issue accurately, nor to determine the Incoterms governing the contract. In such circumstances, the provisions established by the CISG, South African common law, or by the OHADA Commercial Act, as discussed below, will intervene as default rules to fill the gaps created by the contract.⁴¹

The CISG

The place of delivery matter is addressed by Article 31. This provision specifies the place where the seller has to carry out his/her delivery duty, meaning where the delivery of the goods occurs and what kinds of acts are performed for that purpose.⁴²

seller is obliged to ship and insure the contract goods and to invoice them to the purchaser for an amount payable under the contract of affreightment.” Concerning FOB sales, they are ruled in *Murray & Co v Stephan Bros* 1917 AD 243 250 where Solomon JA stated that, “If the vendor agrees to deliver on board the purchaser’s ship as soon as the latter is ready to receive the goods, the purchaser must name the ship and give notice of his readiness to receive the goods on board before he can complain of non-delivery.” In the DRC, for CIF sales, see *Brux* 14 July 1952 *Belg Col* 1956 9; and for FOB sales, see *Elis* 29 March 1947 *RJCB* 93; in *Piron* 123, and *Katuala Code* 173-174.

⁴¹ In the context of the CISG, see *Austria* 1 June 2004 Appellate Court Wein [<http://cisgw3.law.pace.edu/cases/040601a3.html>]; *Switzerland* 11 December 2003 District Court Zug [<http://cisgw3.law.pace.edu/cases/031211s1.html>]; *Germany* 16 July 2001 Appellate Court Köln [<http://cisgw3.law.pace.edu/cases/010716g1.html>]; *Germany* 3 December 1999 Oberlandesgericht München, CLOUT case No. 430; in *UNCITRAL Digest* 132 Fn7. See also, *Klotz/Barrett Sales* 159; *Enderlein Rights* 133 144; *Flechtner Honnold’s Uniform Law* 310; *Widmer in Schlechtriem/Schwenzer Commentary* 495; *Piltz in Kröll/Mistel/Viscasillas UN Convention* 409; *Morrissey/Graves Sales* 147. For South African law, see *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377; *Adler v Taylor* 1948 (3) SA 322 (T); *Conradie v Greyling Implemente Fabriek* 1955 (1) SA 433 (T); *Bradfield/ Lehmann Sale* 23; *Volpe Sale* 71. For Congolese law, see Articles 251 and 252 UAGCL; compared with Article 286 CCO.

⁴² As stated by Article 31,

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer;
- b) if, in cases not within the preceding subparagraph, the contract related to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place – in placing the goods at the buyer’s disposal at that place;
- c) in other cases – in placing the goods at the buyer’s disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

See also *UNCITRAL Digest* 132; *Kritzer/Eiselen Contract* §88:18; *Slechtriem in Galston/Smit Sales* 6-9.

Article 31 provides three possibilities in this respect. More specifically, the CISG distinguishes between contracts involving carriage,⁴³ those where the seller has to place the goods at the buyer's disposal at a particular place,⁴⁴ and contracts in which he/she has to place the goods at the buyer's disposal at his/her own place of business.⁴⁵ As Piltz says,

The subsections of Article 31 correlate to each other in order of priority. Article 31(c) governs all "other cases" and therefore constitutes a subordinate gap rule. Article 31(b) is applicable only to cases not within the scope of Article 31(a). Consequently, Article 31(a) is authoritative in the first place. However, this provision requires that the contract of sale involves carriage of goods.⁴⁶

International sales contracts generally involve the carriage of goods. Thus, where carriage is required, delivery consists of handing the goods to a carrier for transportation to the buyer.⁴⁷ If several successive carriers are involved, a seller who hands over the goods to the first carrier has fulfilled his/her delivery obligation.⁴⁸ It is acknowledged, however, that for it to constitute delivery in the spirit of the CISG, goods must have been handed over to an "independent" carrier,⁴⁹ viz. "a third party

⁴³ Article 31(a) CISG.

⁴⁴ Article 31(b) CISG.

⁴⁵ Article 31(c) CISG. It was held that, "Unless the place of performance can be inferred from the contract, the place of performance has been deemed to be 'where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction'." See Luxembourg 25 February 2010 European Court of Justice (C-381/08) *IHR* 2010 170; Germany 23 June 2010 Bundesgerichtshof *IHR* 2010 217; Italy 5 October 2009 Corte di Cassazione, CISG-online No. 2105; in *UNCITRAL Digest* 132 Fn6.

⁴⁶ Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 411-412; see also Widmer in Schlechtriem/Schwenzer *Commentary* 495; Liu in Felemegas *Interpretation* 346.

⁴⁷ Article 32 specifies that the seller is obliged to hand over goods to a carrier if the contract or the CISG requires it. Furthermore, where goods are not marked or provided with shipping documents, the seller must notify the buyer of the consignment specifying the goods. And where it is his/her duty to arrange for the carriage of the goods, the seller must do whatever is necessary to dispatch goods to the place agreed on, complying with the circumstances and usual terms for such transportation.

⁴⁸ Cf. Article 31(a); see also *UNCITRAL Digest* 132 §6; Kritzer/Eiselen *Contract* §88:18 88-32. Article 31(a) corresponds to Article 67(1) in relation with the transfer of risk from the seller to the buyer.

⁴⁹ See Widmer in Schlechtriem/Schwenzer *Commentary* 500; Enderlein *Rights* 133 147; Butler *Guide* 4-9; Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc (accessed 10-7-2012).

not under seller's or the buyer's direct control."⁵⁰ In other words, if the seller himself/herself or one of his/her employee operates a truck, he/she will not be considered as a carrier because, in this sense, he/she is not an independent party.⁵¹

It is important to note that Article 31(a) is concerned only with contracts involving the carriage of goods. Contracts not requiring carriage, and ones in which "the seller is not bound to deliver the goods at any particular place" are ruled by Article 31 subsections (b) and (c) respectively. As the drafters of the UNCITRAL Digest have reported, Article 31(b) requires three conditions for it to apply:

[First], delivery as per the contract must not involve carriage of the goods in the sense of article 31(a) - so that it is the buyer's task to get possession of the goods; second, the goods sold must be specific goods, goods of a specific stock, or goods to be manufactured or produced; third, both parties must have known when the contract was concluded that the goods were located at (or were to be manufactured or produced at) a particular place.⁵²

Where these requirements are met, the seller fulfils his/her delivery obligation by "placing the goods at *the buyer's disposal* (italics added) at the place" where they are located at that moment or at the place of manufacture or production. As Enderlein has specified, the place designated by Article 31(b) "could be (...) a factory, a mill, a plantation, or a warehouse."⁵³ The phrase "placing the goods at the buyer's disposal" should be understood as making the goods available to the buyer so that he/she needs only to take possession of them.⁵⁴

With regard to cases where the contract does not involve carriage,⁵⁵ or those in which goods are situated at an unidentified place, the delivery obligation is fulfilled by placing the goods at the buyer's disposal at the place where the seller has

⁵⁰ Lookofsky CISG 86.

⁵¹ Enderlein Rights 133 147; Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Nai_yana_Guerin.doc; Widmer in Schlechtriem/Schwenzer *Commentary* 500-501.

⁵² UNCITRAL *Digest* 133 §8.

⁵³ Enderlein Rights 133 148; supported by Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Nai_yana_Guerin.doc.

⁵⁴ See Oosthuizen Rights 81; Widmer in Schlechtriem/Schwenzer *Commentary* 511; Schlechtriem in Gaston/ Smit *Sales* 6-10.

⁵⁵ It seems, however, that sales not involving carriage of goods occur in a limited number compared to other kinds of international transactions. Flechtner *Honnold's Uniform Law* 313 §209.

his/her place of business⁵⁶ the moment the contract was formed. Through its wording, Article 31(c) establishes the seller's place of business as the default place of delivery.⁵⁷ Thus, where the contract does not require either any transportation or where the place of delivery is not specified in the contract, the place where the seller runs his/her business will prevail.

South African law

According to South African common law, any seller has, among other main obligations, to take care of the item sold and make it available.⁵⁸ As Kerr has said, making the thing sold available to the buyer is justified by the fact that the latter concludes the contract in order to acquire ownership of it.⁵⁹ It is then the seller's duty to deliver its possession to him/her.⁶⁰ It should immediately be noted that the obligation of the seller to make the thing sold available to the buyer is multidimensional. This duty has been exhaustively codified by the 2008 CPA with regard to consumer sales contracts.⁶¹ The provisions of the CPA have consequently supplemented the common law rules so that they may be found useful for

⁵⁶ For what the "place of business" is, see Article 10 CISG.

⁵⁷ See UNCITRAL *Digest* 132 §§1 and 10; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 423; Widmer in Schlechtriem/Schwenzer *Commentary* 511; Schlechtriem in Gaston/Smit *Sales* 6-11.

⁵⁸ See Kerr *Sale* 161; Lehmann *Sale* 888 895; Bradfield/Lehmann *Sale* 64; Zulman/Kairinos *Sale* 96; Oosthuizen *Rights* 83; Sharrock *Business* 287; Hackwill *Sale* 65. Authority relating to the seller's duty to deliver the thing sold to the buyer may be found in Ulpian's statement in D 19.1.11.2 whereby, "The primary obligation on the seller is to make the thing itself available, that is, to deliver it" (Mackintosh's translation); quoted by Kerr *Sale* 161 Fn25; and Oosthuizen *Rights* 83 Fn341.

⁵⁹ Kerr *Sale* 161; supported by Bradfield/Lehmann *Sale* 71.

⁶⁰ Volpe has stated in this respect that, "Delivery may be effectuated by any voluntary act of the seller by which the thing sold is put into the possession of the buyer, or the buyer is enabled to obtain possession (...)." See Volpe *Sale* 71; for the different methods of delivery, see Hackwill *Sale* 67-72.

⁶¹ According to s 19(2) CPA,

Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods (italics added) (...) that -

(a) the supplier is responsible to deliver the goods (...) -

(i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;

(ii) at the agreed place of delivery or performance; and

(iii) at the cost of the supplier, in the case of delivery of goods; or

(b) the agreed place of delivery of goods (...) is the supplier's place of business, if the supplier has one, and if not, the supplier's residence; (...).

international sales contracts. Such a suggestion is supported by s 5(1)(a) which extends the provisions of the Act over “every transaction occurring within the Republic, unless it is (expressly) exempted” by a specific provision of the CPA.⁶² This opinion is confirmed by s 5(8)(a) which extends the field of influence of the CPA to all commercial transactions “irrespective of whether the supplier *resides or has its principal office within or outside*” South Africa (italics added).

In addition, the seller’s duty to supply the thing sold involves that “the seller must deliver the thing sold at the time (and place) stipulated in the contract.”⁶³ As far as the place of delivery is concerned, it is well established that where the place of delivery has been agreed on, the seller is obliged to deliver at that place.⁶⁴ If parties have not reached agreement on a specific place, and “if there is no custom or trade usage to the contrary,”⁶⁵ where goods are specified they must be supplied at the place where they were at the time of the sale.⁶⁶ Alternatively, with regard to unascertained goods, they have to be delivered at the seller’s place of business or at his/her residence in the absence of a place of business.⁶⁷ Concerning goods to be manufactured, they have to be supplied at their place of manufacture.⁶⁸

The idea underlining the above principles is that the seller must place the goods in a deliverable state allowing the buyer to take free possession of them. Thus, if any

⁶² For a list of sales excluded from the field of application of the CPA, see s 5(2) to (5) which does not mention international sales.

⁶³ See *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377; *Adler v Taylor* 1948 (3) SA 322 (T); *Conradie v Greyling Implemente Fabriek* 1955 (1) SA 433 (T); see also *Volpe Sale* 71; *Bradfield/Lehmann Sale* 72; *Lehmann Sale* 888 895; and s 19(2) (a) (i) and (ii) CPA.

⁶⁴ See *Zulman/Kairinos Sale* 101; quoting *Pothier Vente* 51 (Cushing’s translation 30); see also *Hackwill Sale* 77; *Oosthuizen Rights* 83; and s 19(2) (a) (ii) CPA.

⁶⁵ See *Goldblatt v Merwe* 1902 19 SC 373 375; *Bradfield/Lehmann Sale* 72; *Kerr Sale* 97; *Zulman/Kairinos Sale* 101; and *Volpe Sale* 73. See also *Kahn* 1985 (1) 1 *Lesotho LJ* 69 83 explaining the role of trade usage in the absence of legislation in general.

⁶⁶ *Gilson v Payn* (1899) 16 SC 286 289; *Hackwill Sale* 77; *Bradfield/Lehmann Sale* 72; *Zulman/Kairinos Sale* 101; *Volpe Sale* 74; *Oosthuizen Rights* 83; see also s 19(2) (a) (ii) CPA.

⁶⁷ *Hackwill Sale* 77; under the CPA regime, seller’s place of business or his/her residence, depending on the case, is presumed to be the default place of delivery; see s 19(2) (b) CPA.

⁶⁸ *Richards, Slater and Co v Fuller and Co* (1880) 1 EDC 1 4; *Goldblatt v Merwe* (1902) 19 SC 373 375; *Bradfield/Lehmann Sale* 72; *Volpe Sale* 74; *Kerr Sale* 97; *Zulman/Kairinos Sale* 101; *Oosthuizen Rights* 83.

transport is required during the delivery stage, it is the buyer's responsibility to provide it,⁶⁹ except for FOB sales.⁷⁰ As has already been noted in the introduction to section 6.2.3.2, the specificity of FOB clauses consists of the fact that the seller is responsible for the main transportation of the goods to the place of destination.⁷¹

It should be remembered that international transactions frequently involve carriage. In *Stephen Fraser v Clydesdale Transvaal Collieries*, Solomon J said that, "Where goods are delivered to a carrier for transmission to the buyer, the general rule is that delivery to the carrier is delivery to the purchaser, the carrier being regarded as his agent and not the seller's."⁷² This rule does not apply, however, where the seller undertakes to make the delivery himself/herself. In comparable circumstances, the person to whom the seller hands the goods for delivery is his/her agent so that goods are delivered only when they are received by the buyer at the destination.⁷³ By contrast, if the carrier is the buyer's agent, delivery is fulfilled as soon as goods are handed over to the transporter.

The development above makes it clear that, as for the CISG, South African law establishes several places of delivery depending on whether the goods are specified or not, whether they are already manufactured or not, and whether they involve transportation or not, in addition to the place conjointly determined by parties in the contract.

⁶⁹ See Sharrock *Business* 287; Bradfield/Lehmann *Sale* 72. It is not excluded that parties agree that the seller must, at his/her own expense, transport the thing sold to the buyer's address. Such is the rule for consumer transactions wherein the seller is obliged to cover the costs entailed by the delivery. See s 19(2) (a) (iii) CPA.

⁷⁰ See *Chong Sun Wood Products Pte Ltd v K & T Trading Ltd & another* 2001 (2) SA 651 (D).

⁷¹ It was ruled, in the *Chong Sun Wood Products Pte Ltd v K & T Trading Ltd & another* case that, "A seller who undertakes to deliver goods free on board is responsible for the cost of transporting the goods to the ship, and putting them on board (...)." See also, Coetzee *Incoterms* 98-99; Bradfield/Lehmann *Sale* 131.

⁷² *Stephen Fraser and Co v Clydesdale Transvaal Collieries Ltd* 1903 TH 121 125; see also Hackwill *Sale* 24 and 74; Van Niekerk/Schulze *Trade* 84; Zulman/Kairinos *Sale* 94 and 126-127; Volpe *Sale* 83; Oosthuizen *Rights* 83.

⁷³ *Ibid.*

Congolese law

Seller's delivery obligation, initially delimited by Articles 281 to 302 CCO, is currently regulated by Articles 251 to 254 UAGCL. This duty is defined by Article 281 CCO as the "transfer of the thing sold to the control and the possession of the buyer."⁷⁴ Generally, the delivery of movable effects is executed by simple *traditio*. It may even occur by the sole consent of the parties, where transfer cannot take place immediately, or where the buyer had already acquired the goods on another basis.⁷⁵ Because it is the seller's duty to deliver goods to the buyer, the Appeal court of Kinshasa ruled that, the seller bears the burden of proof that he/she has fulfilled his/her delivery obligation and, if necessary, that the goods delivered were of authentic and marketable quality.⁷⁶

With regard to the place of delivery, it is expressly regulated by Articles 251 and 252 of the OHADA Commercial Act which have adopted solutions similar to those established by the CISG, though inverted in the order of presentation.⁷⁷ As was mentioned in the introductory subsection, it is generally admitted that the seller fulfils his/her delivery obligation at the place contractually agreed upon.⁷⁸ Congolese economic operators should, likewise, "commonly designate the place of delivery of the goods by inserting within their contract a selected national or international term

⁷⁴ Under OHADA law perspective, see CCJA (1st chamber) 24 April 2008, Case No. 18 *Dr A v Distribution Pharmaceutique de Cote d'Ivoire SA*, *Recueil de la Jurisprudence* No. 11 January-June 2008 51.

⁷⁵ Cf. Article 283 CCO with Article 264 CCO.

⁷⁶ Léo 18 August 1953 *RJCB* 290; confirmed in Léo 12 July 1955 *JTO* 1956 62; see also *Katuala Code* 171, and *Piron* 123 (for the first case).

⁷⁷ Where the CISG regulates the place of delivery in one article, the Commercial Act provides two. Within the ambit of the Commercial Act, delivery to a carrier comes in the fourth position (Article 252 al. 1), after delivery at a stipulated place (Article 251, first part), delivery at a particular place (Article 251, second part), and delivery at seller's place of business (Article 251, third part).

⁷⁸ Cf. The first part of Article 251 UAGCL which states, "When the seller is not bound to supply the goods in a specific place (...)" ; compare this to Article 286 CCO *in fine* which reads, "Delivery has to be made at the place where the thing sold was located at the time the sale was formed, *unless otherwise agreed* (italics added)"

of commerce,”⁷⁹ or the ICC’s Incoterms.⁸⁰ It is only where parties did not determine a specific place of delivery nor selected any Incoterms that the default rules provided by the Uniform Act will apply.

Insofar as default places of delivery are concerned, it is assumed that the buyer must himself/herself come to the seller for the goods. In that condition, the seller achieves his/her delivery obligation by placing the goods at the buyer’s disposal either at the place where they were manufactured or stored, or at the seller’s own place of business.⁸¹ Since, for commercial sales, the place selected for delivery is seller’s domicile and not the buyer’s, one Cameroonian court ruled, on 4 March 2002, that, “a buyer who fails to take delivery at that place cannot later sue the seller for lack of delivery.”⁸²

The delivery duty does not entail automatically an obligation with regard to the carriage of goods. Such an obligation may at times be imposed by a court when it is required by trade usages.⁸³ *A propos* of this, Article 252 al. 1 UAGCL states that in circumstances where the contract provides for carriage, the seller accomplishes his/her delivery obligation solely by the handing of goods to the carrier.⁸⁴

In the context of the OHADA Commercial Act, the obligation of carriage carries an additional obligation. As stipulated by the second paragraph of Article 252

⁷⁹ For similar situation under Latin American, Spanish, and Portuguese laws, see Munoz *Contracts* 287.

⁸⁰ Cf. Brux 14 July 1952 *Belg Col* 1956 9, for CIF sales; and Elis 29 March 1947 *RJCB* 93, for FOB sales.

⁸¹ Article 251, second part, UAGCL; compared with Article 31(b) and (c) CISG.

⁸² See Cameroun 4 March 2002 Gde Inst Mfoundi, Case No. 246 *Mejo M’obam M v LABOREX Cameroun SA* [<http://www.ohada.com/jurisprudence/ohadata/J-04-216.html>] (accessed 6-4-2013).

⁸³ See Cass B 8 January 1852 *Pas I* 1853 178; see also Katuala *Code* 171. There is an authority that argues that “unascertained goods handed over for carriage remain to the seller’s risk until delivery. With regard to those kinds of goods, delivery results in general of their being handed to the carrier, unless when either according to the convention or the usages, delivery must occur at the place of destination.” See Léo 25 February 1930 *RJCB* 1930 262.

⁸⁴ Article 252 al. 1 UAGCL; compared with Article 31(a) CISG. It was ruled in this regard that when goods are handed to the first carrier, the risk of loss passes to the buyer who must pay the price although the goods are lost or destroyed later, unless the seller has failed to take care of them. See Elis 29 March 1949 *RJCB* 1949 93; see also Cote d’Ivoire First Inst Abidjan 25 April 2001, Case No. 327 *Sitbai v Cfd-ci*; and Cote d’Ivoire 14 June 2001 Appellate Court Abidjan, Case No. 677 *Lotus Import Co v Skalli Fortant de France* [<http://www.ohada.com/jurisprudence/ohadata/J-04-102.html>] (accessed 6-4-2013).

UAGCL, when transport is required, the seller must conclude all contracts necessary bearing in mind the appropriateness of the means of transportation to the circumstances and the usual terms of such carriage.⁸⁵ It is obvious that the seller is not bound to take out any carriage insurance. But, if it is so required by the buyer, the seller must provide the buyer with all useful information to enable him/her to arrange carriage insurance.⁸⁶

Comments

The CISG, South African law, and Congolese law all agree on the general principle that the place of delivery is commonly determined by the parties in the contract. They also agree on the fact that seller's place of business constitutes the main default place for delivery. That place is, however, complemented by other designated places depending on whether the contract deals with the delivery of specific goods, unidentified goods, or goods to be manufactured or produced. In addition, where goods are located at a particular place, the three legal systems provide for their delivery either at the place where they are or at the place of manufacture, or storage, or at the place of production. Similarly, all of them address the issue of contracts involving carriage and agree that, in contracts of these kinds, the handing over of goods to a carrier amounts to delivery.

Before the coming into force of OHADA law in the DRC, however, Congolese law provided a single default place of delivery irrespective of whether or not the sale involved the carriage of goods, whether goods were specified or unidentified, or whether goods were to be manufactured or produced. In conformity with Article 286 CCO, except contrary convention, the seller, in the DRC, had to fulfil his duty of delivery at the place where goods sold were situated at the time the sale was made. Such a restrictive legal regime might have been justified by the fact that, previously,

⁸⁵ Compare this with Article 32 (2) CISG; see also Spain 12 February 2002 Appellate Court Barcelona [<http://cisgw3.law.pace.edu/cases/020212s4.html>]; China 18 July 2001 Zhejiang Cixi People's Court [District Court] *Carl Hill v Cixi Old Furniture Trade Co Ltd* [<http://cisgw3.law.pace.edu/cases/010718c1.html>] (last accessed 11 October 2013).

⁸⁶ Article 252 al. 3 UAGCL. This provision does not have equivalent in the CISG.

the transfer of possession was supposed to take place concomitantly with the transfer of ownership when there is exchange of consent.⁸⁷ In effect, the CCO was, like the French and Belgian civil codes, drafted considering situations of direct and immediate delivery.⁸⁸ The buyer was then obliged to collect the goods himself/herself the moment following the conclusion of the contract at the seller's place of domicile. As has been observed, nowadays situations in which the buyer himself/herself collects goods from the seller are rare in international transactions. The most frequent ones are those where the seller is obliged to organise the conveyance by independent carriers.⁸⁹

It is evident that the limited option taken by the former Congolese legislator had become inconsistent with the complexity of current international transactions. As was said earlier, modern commercial international instruments have opted for several possibilities in determining the place of delivery depending on the type of goods and the means of delivery. For instance, where the seller has to hand over goods to a carrier, he/she must identify them as agreed in the contract, or by marking them, or by shipping documents.⁹⁰ Similarly, if goods are not properly identified, the seller must provide the buyer with a notification of the consignment labelling the goods. Moreover, where the seller is bound to arrange for the carriage of the goods, such a contract necessary for the carriage to the place agreed must be concluded.⁹¹ The seller is even required to assist the buyer in arranging insurance for goods.

Thus, by selecting many places where the seller should deliver the goods, the OHADA Commercial Act has improved Congolese law with regard to the determination of default places of delivery and it, therefore, aligns it with the CISG and South African law.

⁸⁷ Cf. L'shi 14 April 1981 RC 6237 (unreported decision) with Article 264 CCO.

⁸⁸ Compare Article 264 CCO to Article 1583 Napoleonic civil code; for a similar situation under Latin American, Spain and Portuguese laws, see Munoz *Contracts* 290.

⁸⁹ Cf. Schlechtriem in Gaston/Smit *Sales* 6-10 and 11; Flechtner *Honnold's Uniform Law* 313.

⁹⁰ Cf. Article 32(1) CISG.

⁹¹ See Article 252 al. 2 UAGCL; compare to Article 32(2) CISG.

6.2.3.3 Time for delivery

The CISG

Within the Convention, the time for delivery is provided by Article 33⁹² which obliges the seller to deliver the goods at the date jointly agreed on, or at the date fixed by, or determinable from the contract.⁹³ In the same way as for the place of delivery, parties are at the liberty to determine the time for the performance of their contractual obligations. This rule is consistent with the principle of party autonomy which constitutes one of the general principles on which the CISG is based.⁹⁴

In addition to a fixed or determinable date, Article 33(b) regulates the case of delivery within a fixed period. Consistent with this provision, where a period is contractually determined, or where it is determinable, the seller must deliver the goods at any time within that period. Nevertheless, where, depending on circumstances, the buyer is interested in fixing an exact date for receipt of the goods he/she might reserve the right to choose a suitable date for delivery.⁹⁵ If no time for delivery is stipulated in the contract, however, the seller is obliged to deliver the goods “within a reasonable time” after the conclusion of the contract. The concept “reasonable time” is to be understood, in this context, as adequate time depending on the circumstances of the case.⁹⁶ It results from Article 33(c) that the notion of “reasonable time” is the default time for delivery.

⁹² As stated by Article 33,

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

⁹³ Article 33 (a) and (b) CISG.

⁹⁴ Cf. Articles 6 and 7(2) CISG; see also Widmer in Schlechtriem/Schwenzer *Commentary* 549; Piltz in Kröll/ Mistelis/Viscasillas *UN Convention* 460; UNCITRAL *Digest* 137 §1; and comments in Section 4.3.6.3 above.

⁹⁵ Article 33(b) *in fine*; see also Enderlein Rights 133 152.

⁹⁶ See UNCITRAL *Digest* 137. That is to say, the compilation of the “reasonable time” should be assessed on a case by case basis depending, for instance, on the kind of the goods to be delivered. It was acknowledged, hence, that delivering a bulldozer two weeks after the seller receives the first instalment on the price is reasonable. See Switzerland 28 October 1997 Tribunal Cantonal Valais,

Owing to the fact that the seller is bound to deliver goods on time, late delivery constitutes, in principle, a breach of the contract. Furthermore, if the stipulation of time was of the essence of the contract, the failure of the seller to deliver in time may amount to a fundamental breach.⁹⁷ In a similar way, an early delivery would produce the same effects as a late delivery. In contrast to a late delivery, however, premature deliveries appear to be tolerated. In cases of early delivery, indeed, the seller has the right, up to the date of delivery, to deliver any missing part or repair any non-conforming goods provided that the exercise of such a right spares the buyer unreasonable inconvenience or expense.⁹⁸

South African law

The time for delivery is governed by the *Broderick Properties Ltd v Rood* case. The rule in the *Broderick Properties Ltd v Rood* case is that the seller must deliver the thing sold at the time stipulated in the contract.⁹⁹ Where no specific time for delivery has been stated, and, if that time cannot be inferred from other elements of the contract, the seller must perform whatever is necessary in order to deliver within a “reasonable time” after concluding the transaction.¹⁰⁰ As ruled by Colman J in *St Martin’s Trust v Willowdene Landowners Ltd*, “In deciding what would have been a reasonable time, the Court must have regard to the nature of the performance which

CLOUT case No. 219; and similar cases in UNCITRAL *Digest* 137-138 §7; Kritzer/Eiselen *Contract* §88:42 88-75 to 88-79; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 467; Widmer in Schlechtriem/Schwenzer *Commentary* 557.

⁹⁷ Cf. Articles 45 and 49; see also UNCITRAL *Digest* 138 §9.

⁹⁸ Cf. Article 37 CISG.

⁹⁹ See *Broderick Properties Ltd v Rood* 1962 (4) SA 447 (T) 453; see also *Louw v Trust Administrateurs Bpk* 1971 (1) SA 896 (W) 903; and comments by Hackwill *Sale* 77; Zulman/Kairinos *Sale* 98; Bradfield/Lehmann *Sale* 72; Kerr *Sale* 100; Volpe *Sale* 71; see, in the same sense, s 19(2) (a) (i) CPA.

¹⁰⁰ See *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377 in which it is stated: “In the absence of an agreed date for the commencement of delivery, delivery must occur within a ‘reasonable period’.” See also *Mitchell v Howard, Farrar & Co* 5 EDC 131 140; Hackwill *Sale* 77; Volpe *Sale* 71 and 73; and, particularly, s 19(2) (a) (i) *in fine* and (3) of the CPA. This provision is clear that, if no specific date or time for delivery was agreed in the contract, the seller cannot require the buyer to accept delivery at “an unreasonable time”.

was due by the party who is alleged to have been in default, and to the difficulties, obstacles, and delays attendant upon such performance.”¹⁰¹

Because a timely delivery is fundamental to the sale, a seller who fails to fulfil his/her delivery obligation at the day agreed, or within a reasonable time, is in breach of contract. Similarly, if the seller makes the property sold available on time, but the buyer fails to remove it at the appropriate time, the latter is also in breach of contract.¹⁰² Simply, if the seller delivers goods at a date or a day other than the one agreed upon, the buyer is free to accept the goods, or to require delivery at the agreed time, if it has not yet expired, or to cancel the contract for lack of delivery.¹⁰³

Congolese law

Article 253 of the OHADA Commercial Act which, currently, regulates the time for delivery, in the DRC, has adopted the principle of freedom of contract according to which parties are free to determine the date of delivery at will.¹⁰⁴ As stipulated by it, the seller must deliver the goods by the date fixed in the contract or determinable according to the terms of the contract. The second paragraph of the same provision adds to this that, where delivery is intended during a given period of time, the seller should deliver at any time within that period. With regard to the last paragraph, it states that, in the absence of a determined date of delivery, the delivery should take place within a reasonable time running from the date the contract was formed. Further to Article 253, Article 257 UAGCL rules about anticipatory delivery; it literally reproduces Article 37 CISG.

¹⁰¹ *St Martin's Trust v Willowdene Landowners Ltd* 1970 (3) SA 132 (W) 135F-136G.

¹⁰² See *Bradfield/Lehmann Sale* 72; and *Sharrock Business* 712. In the general context of breach of contracts, see *Kerr Contract* 615; *Christie/Bradfield Contract* 515; *Van der Merwe Contract* 307-323. See, in the same sense, *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA).

¹⁰³ Cf. s 19(6) CPA.

¹⁰⁴ Compare Article 253 al. 1 UAGCL to Article 287 CCO *in limine*; see also Goma 28 November 2005 RCA 1359 *Kamaliro Paluku J v Kisambio Kambale*; Kin/Gombe 7 April 2011 RCA 27 575/27 714 *Luwanda Lubuata v Moke Molobini N* (unreported decisions).

Comments

The CISG, South African law, and Congolese law all defer the time for delivery to wills of the parties first. It is only in cases where parties fail to determine the date in the contract that a reasonable time applies. All of the legal systems being discussed, similarly, allow the seller to deliver anticipatively provided that the buyer has the right to refuse or accept the goods delivered beforehand.

If the contractual time for delivery is familiar to Congolese law, the notion of “reasonable time” and the concept of “early delivery” appear, however, to be new. As far as the reasonableness rule is concerned, its novelty is due to the fact that, as was said in section 6.2.3.2 above, the CCO was drafted considering situations of prompt performance. The seller was then supposed to make the thing sold available immediately after the conclusion of the contract¹⁰⁵ or at least at the time approved jointly.¹⁰⁶ Additionally, in the absence of a stated period for delivery, the judge was allowed to provide parties with a normal period, instead of recourse to reasonable time.¹⁰⁷ That principle was formulated in case law as follows: “Where the contract is silent with regard to the date of delivery, the time of delivery is a normal delay that the judge determines autonomously considering the opinion of the buyer.”¹⁰⁸ From such a general rule it was evident that a seller who failed to deliver the item sold within the period agreed upon or within the one judicially fixed was in breach of the contract.¹⁰⁹

¹⁰⁵ Cf. Article 264 CCO; compared to South African law authorities such D 50.17.14; Grotius 3.3.51; Pothier *Sale* pra 50; Van der Linden 1.15.9.62 *Inst* 3.15.5; quoted by Kerr *Sale* 166.

¹⁰⁶ Cf. Article 287 CCO *in limine*. It was ruled in this regard that, “for the sale of fungible items, subject to fast and important fluctuations, the stipulation of a period for delivery is of the essence of the contract. The seller is on formal notice by the mere expiration of the term and parties’ will is that the contract is automatically resolved if the seller does not deliver the goods by the fixed period.” See Ru-Ur App 14 March 1944 *Rev Jur* 1944 184; in *Répertoire* 135.

¹⁰⁷ See Elis 30 January 1915 *Jur Col* 1925 319 (need of a declaration in pleading).

¹⁰⁸ Cf. Comm Brux 10 January 1949 *Belg Col* 1950 80.

¹⁰⁹ See Articles 287 and 288 CCO which state on the whole that “where the seller fails to deliver the thing sold within the time agreed between the parties, it may be ordered to pay damages if the buyer has suffered a loss because of seller’s failure to deliver at the agreed time.” For an application, in the context OHADA law, see Burkina Faso 7 December 2001 Appellate Court of Ouagadougou (civil and commercial chamber), Case No. 99 *Dremont F v Ouagraoua Tikouilga P* [<http://www.ohada.com/jurisprudence/ohadata/J-09-06.html>] (accessed 6-4-2013). It was held in

From this explanation, it is clear that, in contrast to the CISG¹¹⁰ and South African law,¹¹¹ the CCO did not provide any residual time for delivery. Yet, the possibility of immediate delivery is not appropriate for international sales contracts. Nor does the sovereign judicial determination of the period of delivery give much certainty as to the time of performance of international sales. That is the reason why the OHADA Commercial Act has adopted, through Article 253 al. 3 UAGCL, a solution similar to the one stated in the CISG and South African law. This article states expressly that, in the absence of any stipulation in the contract, delivery should be made within a reasonable period after the conclusion of the contract. It consequently introduces the “reasonable time rule” in the DRC and improves modern Congolese sales law in compliance with contracts lacking an agreed period for delivery as the CISG and South African law do.

6.2.3.4 Handing over documents relating to the goods

The CISG

Further to the delivery of goods, the CISG seller is also inquired to hand over any documents relating to the goods.¹¹² This additional duty is regulated by Article 34 which obliges the seller to deliver documents relating to the goods “at the time and place and in the form required by the contract.”¹¹³ As commentators have stated, Article 34 has the merit of attesting that “international sales are very often documentary sales, where the delivery of the documents is very closely linked to the

this case that, Article 254 UAGCL (1997 version) (equivalent to modern Article 282 UAGCL) is applicable only in cases of late delivery or of breach other than late delivery.

¹¹⁰ See Article 33(c) CISG; compared with Article 253 al. 3 UAGCL.

¹¹¹ See *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377; *Mitchell v Howard, Farrar & Co* 5 EDC 131; and *Stapleford Estates (Pty) Ltd & another v Wright* 1968 (1) SA 1 (E) at 4A-C; see also *Zulman/Kairinos Sale* 98; *Bradfield/Lehmann Sale* 72; *Volpe Sale* 71 and 73.

¹¹² See Articles 30 and 34; see also CISG-AC Opinion No. 11 [<http://www.cisg.law.pace.edu/cisg/CISG-AC-op11.html>] (accessed 30-4-2013).

¹¹³ See the first sentence of Article 34 CISG.

delivery of the goods and forms a substantial and important part of the obligations of the seller.”¹¹⁴ Contrary to the delivery of goods, the duty of the handing over of documents seems not to be common. It occurs only in circumstances where the contract, practices established between the parties, or trade usages required it.¹¹⁵

As regards its wording, Article 34 is normally concerned with all kinds of documents relating to the goods. Although the CISG is silent on what those documents are, the CISG-AC Opinion No. 11, scholars, and the case law have inferred that the documentary obligation covers documents that confer to the buyer the title in the goods, such as bills of lading, as well as other all kinds of documents, namely warehouse receipts, insurance policies, invoices, certificates of origin, certificates of control or quality, and so on.¹¹⁶ According to Article 34, where the seller is bound to hand over any of the above documents, he/she must do so at the time, place, and in the manner agreed on.¹¹⁷ It is deemed, likewise, that if parties have agreed on payment by letter of credit, this letter must list the documents needed before payment.

It should be noted, however, that if parties did not reach agreement on the categories of documents to be handed over, the buyer is not bound to pay the price until the seller places either the goods or documents controlling their disposition at

¹¹⁴ Kritzer/Eiselen *Contract* §88:51 88-87; finding counsel in Russia 6 June 2003 Arbitration proceeding 97/2002 [<http://cisgw3.law.pace.edu/cases/030606r1.html>]; and Spain 12 February 2002 Audiencia Provincial [Appellate Court] Barcelona (*Comercial San Antonio, SA v Grupo Blocnesa, SL*) [<http://cisgw3.law.pace.edu/cases/020212s4.html>].

¹¹⁵ See UNCITRAL *Digest* 140; Widmer in Schlechtriem/Schwenzer *Commentary* 560; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 475; Davies Comments to CISG-AC Opinion No. 11 §3.

¹¹⁶ For an exhaustive list of documents relating to the goods, see CISG-AC Opinion No. 11 §§1 to 6; Widmer in Schlechtriem/Schwenzer *Commentary* 561; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 476; Enderlein Rights 133 152-153; Butler *Guide* 4-11 12; Fiser-Sobot 2011 (3) *BLR* 196 199. See also authorities quoted in UNCITRAL *Digest* 140 Fn2 & 3; and in Kritzer/Eiselen *Contract* §88:52. On the supply of certificates of origin and of quality, for instance, see Germany 3 April 1996 Bundesgerichtshof *Cobalt Sulphate case* [<http://cisgw3.law.pace.edu/cases/960403g1.html>] (accessed 10-8-2012).

¹¹⁷ For an application, see Russia 6 June 2003 Arbitration proceeding 97/2002 [<http://cisgw3.law.pace.edu/cases/030606r1.html>]; Spain 12 February 2002 Appellate Court Barcelona [<http://cisgw3.law.pace.edu/cases/020212s4.html>]; Russia 11 May 1997 Arbitration proceeding 2/1995 [<http://cisgw3.law.pace.edu/cases/970511r1.html>]; and France March 1995 Court of Arbitration of the ICC (Arbitral award No. 7645), *ICC International Court of Arbitration Bulletin* 2000 34; in UNCITRAL *Digest* 140 Fn5.

his/her disposal.¹¹⁸ In addition, if the seller has handed over non-conforming documents before the due date, he/she may cure any lack of conformity until the agreed delivery period. The exercise of this right is, however, subject to the condition that it “does not cause the buyer unreasonable inconvenience or unreasonable expense.”¹¹⁹ Thus, as the delivery of non-conforming documents may constitute a breach of the contract,¹²⁰ the buyer reserves the right to claim damages in respect of such loss.

South African law

The duty regarding the delivery of documents is organised under South African law mainly in relation to CIF sales. As was alluded to in section 6.2.3.2 above, CIF sales are types of contracts where “the seller is obliged to ship at the port of shipment goods of the description contained in the contract; procure a contract of affreightment; insure the contract goods; and invoice them to the purchaser.”¹²¹ As Corbett JA stated in the *Lendlease Finance* case,

Under the c.i.f. contract, (...) [a]s soon as reasonably possible after shipment, the seller must tender to the buyer or his agent, in proper form, the bill of lading, evidencing the contract of affreightment, the policy of insurance and the invoice, these being collectively referred to as ‘the shipping documents’.¹²²

¹¹⁸ Cf. Article 58 CISG and CISG-AC Opinion No. 11 §§4&5.

¹¹⁹ See Second sentence of Article 34 CISG; compared to Article 37 for repair of non-conforming goods. For implementation, see France March 1995 ICC Arbitral award No. 7645.

¹²⁰ Cf. Article 34, last sentence; *contra* the *Cobalt Sulphate case* whereby, the delivery of wrong documents did not amount to a breach of the contract since the buyer could obtain correct documents from other sources.

¹²¹ A CIF seller has five main obligations: (1) to ship the goods to the port of shipment in accordance with the contract; (2) to procure a contract of affreightment for delivery of the goods at the agreed destination; (3) to arrange insurance for the goods; (4) to invoice the goods to the buyer; and (5) to tender to the buyer as soon as is reasonably possible after shipment, the documents in a valid and effective condition. See Coetzee Incoterms 44 and 101-102; Sharrock *Business* 305-306; Bradfield/Lehmann *Sale* 130; Hackwill *Sale* 256-257.

¹²² *Lendlease Finance (Pty) Ltd v Corporacion de Marcadeo Agricola & Others* 491H-192D; quoted with approval in *Golden Meats and Seafood Supplies CC v Best Seafood Import CC and Another* (A167/10) [2010] ZAKZDHC 73; 2011 (2) SA 491 (KZD) (9 December 2010) [14]. See in the same sense *Frank Wright (Pty) Ltd v Corticas ‘BCM’ Ltd* 1948 (4) SA 456 (C) 463-464; *Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd* 1974 (2) SA 10 (E) 15; Kerr *Sale* 232.

It results from the case above that the main documents relating to the goods, under the jurisdiction of South African law, include the bill of lading, the policy of insurance and commercial invoices. After he/she has handed over these documents, though he/she may not yet have delivered the actual goods, the seller is discharged from the delivery obligation.¹²³

Congolese law

Compliance with Articles 250 and 254 UAGCL, the seller must deliver the goods together with “any documents relating to them, and all accessories¹²⁴ necessary to their usage”. The last Article specifies that, where the seller is bound to hand over any documents and accessories relating to the goods, he/she must carry out that obligation at the time and place and in the form provided for in the contract or required by the practices established in the sector of trade concerned. Given that the Uniform Act does not enumerate the kinds of those compulsory documents, it is assumed that the documents mentioned in the preceding paragraphs should be issued *mutatis mutandis* in the DRC.¹²⁵ In Congolese law, in particular, it was ruled that the bill of lading does not constitute an absolute title of ownership of the goods. Its handing over does not, therefore, fulfil the duty of the delivery of goods.¹²⁶ In addition to the bill of lading, the seller must perform a proper delivery for him/her definitively to be released from the obligation regarding the delivery of the goods.

Comments

The duty of the delivery of documents relating to goods is mentioned in all of the three legal systems being studied. If this obligation is established under South

¹²³ It was ruled, in the *Lendlease Finance* decision that, unless otherwise stipulated, in CIF contracts the only thing the buyer waits for from the seller are “shipping documents,” so that, once they have been tendered, the buyer is obliged to pay for the goods.

¹²⁴ Accessories are understood, in this context, as those things which form an integral part of the principal item, and which are indispensable for its normal use, e.g., a wheel for a car.

¹²⁵ For an illustration, one should mention the Burkina Faso *Soci  t   Telecel Faso v Soci  t   Hortel Project* case which alludes to mailing orders, invoices and ship’s delivery orders as documents required for payment of the price.

¹²⁶ L  o 25 February 1930 *Jur Col* 1932 50; *RJCB* 1930 262.

African law mostly with regard to CIF contracts, in the other two jurisdictions the delivery of documents is needed in all kinds of overseas sales provided that the contract or mercantile usages require it. Unlike the CISG, however, Articles 250 and 254 UAGCL,¹²⁷ which introduced the documentary duty in the DRC, do not envisage any possibility of replacing non-conforming documents with correct ones. Instead, they impose an additional obligation relating to the delivery of the accessories of goods. This extra duty seems to be an allegiance to the Napoleonic civil code from which OHADA law is, to some extent, generated. One should remember that the civil code, which was applicable in almost of former French colonies before the advent of OHADA law, demands that the property sold should be delivered with its “accessories and appurtenances,” and with everything necessary for its permanent use.¹²⁸ Thus, the Congolese law documentary obligation appears to be more demanding than the CISG’s obligation of delivery of documents relating to the goods.

6.2.3.5 Conclusion on the delivery obligation

With regard to the delivery obligation, there are many innovations introduced under Congolese law by the OHADA Commercial Act. Because the latter was influenced by the CISG, a number of solutions adopted by the Vienna Convention, and also in force in South African law, in connection with the delivery of goods apply now also in the DRC. These include the triple default place of delivery, the reasonable time rule for delivery; the right to repair non-conforming goods, in case of premature delivery,¹²⁹ and the obligation for the seller to hand over documents relating to the goods. The only major difference is that Congolese law and South African law do

¹²⁷ Articles 250 and 254 UAGCL depart from the CISG by stating expressly that the duty of the delivery of documents must be performed, among other things, in accordance with commercial usages.

¹²⁸ See Article 292 CCO which corresponds to Article 1695 Napoleonic civil code. Compare, under South African law, with old authorities quoted by Kerr *Sale* 9 in Fn11 and 163 in Fn45.

¹²⁹ This prerogative is not organised in South African law.

not rule about the replacement of non-conforming documents for early delivery. Instead, modern Congolese law substitutes that obligation by the delivery of accessories relating to the goods so that the documentary obligation seems more severe in the DRC than under the CISG. The same tendency may be found in South African law too.

6.2.4 Conformity of the Goods

6.2.4.1 General principles

The obligations of the seller with respect to the conformity of the goods are regulated, under the CISG, in Articles 35 to 40,¹³⁰ and, under modern Congolese law, in Articles 255 to 259 UAGCL.¹³¹ All of these provisions are common with regard to the fact that the seller must deliver the goods which comply with the requirements of the contract or those laid down by the law. The norm so stated resembles the South African common law principle in *American Cotton Products Corporation v Felt and Tweds Ltd* whereby, the goods delivered must conform in terms of description, quality, and quantity with those agreed upon.¹³²

As Lookofsky has said, the main duties of the seller in any sales law consist in delivering the “goods at the right place and at the right time.”¹³³ In addition to the

¹³⁰ Articles 35 and 36 define the obligations of the seller with regard to the quality of the goods; Articles 38 and 39 deal with buyer’s obligation to examine the goods and notify the seller of any lack of conformity; and Article 40 regulates the case of a seller knowing of the existence of the defects in the goods. These provisions are “amongst the most important and heavily-litigated” in the Convention. See Flechtner http://untreaty.un.org/cod/avl/pdf/ls/Flechtner_outline2.pdf (accessed 10-7-2012); Kröll 2011 (3) *BLR* 162; Kröll in Kröll/Mistelis/ Viscasillas *UN Convention* 484; Krusinga *Non-Conformity* 24; Henschel *Creation of Rules* 177 178; Schlechtriem <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html> (accessed 10-8-2012). As in July 2013, the Pace Law database has reported 313 cases dealing with the conformity of goods and of documents.

¹³¹ Articles 255 to 259 UAGCL bear a resemblance to their equivalent CISG provisions on the difference that, under the Commercial Act, the examination of goods duty is regulated under buyer’s obligations (Cf. Article 270 UAGCL).

¹³² See *American Cotton Products Corporation v Felt and Tweds Ltd* 1953 (2) SA 753 (N) 756C-H.

¹³³ See Lookofsky CISG 85; also confirmed by Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc.

delivery at the right place and time, the seller must also deliver the “right goods”.¹³⁴ This requirement is justified by the fact that, frequently, the buyer purchases the goods for a particular purpose, e.g. to consume, use, or to resell them.¹³⁵ The buyer’s intentions with respect to the goods would, therefore, be frustrated if the goods do not conform to the goods he/she intended to acquire. So, the obligation of the seller with respect to the conformity of the goods includes the requirement that the goods must satisfy “in order for the buyer to have had his rights under the contract duly fulfilled.”¹³⁶

As was mentioned earlier, the seller’s duty to deliver the right goods is expressly regulated, within the CISG, in Article 35.¹³⁷ The first section of this provision obliges the seller to “deliver goods which are of the quantity, quality and description required by the contract, and which are contained or packaged in the manner required by the contract.”¹³⁸ Article 255 al. 1 of the OHADA Commercial Act has reproduced the same ruling.¹³⁹ As is clear, the seller’s duty with regard to

¹³⁴ Lookofsky CISG 85; Henschel *Conformity* 23.

¹³⁵ Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligation_s_by%20Naiyana_Guerin.doc.

¹³⁶ Henschel *Conformity* 23; see also Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 484; Kritzer/Eiselen *Contract* §89:1 89-7.

¹³⁷ According to Article 35,

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract, and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
 - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement;
 - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

¹³⁸ As an illustration, see Italy 16 February 2009 *Tribunale di Forlì* [District Court] *Cisterns and Accessories case*, CLOUT case No. 867 [<http://cisgw3.law.pace.edu/cases/090216i3.html>]

¹³⁹ As stated by Article 255 al. 1 UAGCL, “The seller shall deliver the goods in the quantity, quality, and specifications and packaging in accordance with the stipulations of the contract.”

conforming goods, as regulated by both Article 35 CISG and Article 255 al. 1 UAGCL, bears a resemblance to seller's guarantee against latent or hidden defects¹⁴⁰ as provided in South African law¹⁴¹ and the CCO.¹⁴²

In other words, the CISG conformity obligation, as well as the domestic law guarantee against latent defects, oblige the seller to deliver goods the quality of which corresponds to the goods agreed on. If they are not, the seller bears legal responsibility for breach of contract. For him/her to rely on the provisions relative to the non-conformity of goods, nevertheless, the buyer is also obliged to examine the goods and notify the seller of any lack of conformity in the required period. Since the duties of examination and notification depend on the buyer, they are discussed in section 6.3 below dealing with the obligations of the buyer.

Concretely, the following sections deal respectively with seller's obligation in respect of the delivery of conforming goods, and his/her responsibility for lack of conformity in the goods delivered.

6.2.4.2 The obligations of the seller with regard to the conformity of the goods

Introduction

The topic of the conformity of goods has been much discussed within the CISG.¹⁴³ At present, suffice it to outline its principal rules and compare them with those laid

¹⁴⁰ For the similarities between the CISG conformity obligation and the domestic law warranty against latent defects, see Winship 1995 (29) *International Lawyer* 525; but exceptions in the next Section.

¹⁴¹ See *Van Wijk v Curry* NO 1907 TS 1109; *Fruher v Maitland* 1954 (3) SA 840 (A); *Cedarmont Store v Webster & Co* 1922 TPD 106 108; *Mannix & Co v Osbord* 1921 OPD 138; and *American Cotton Products Corporation v Felt and Tweds Ltd* 1953 (2) SA 753 (N) 756C-H. See also Kerr *Sale* 107-155; Zulman/Kairinos *Sale* 97; Bradfield/ Lehmann *Sale* 73.

¹⁴² See Article 291 al. 1 and Article 318 CCO which state respectively that, "The thing sold must be delivered in the condition in which it was at the time of the sale". "A seller is bound to a warranty against latent defects which render the thing sold unfit for the use for which it was intended, or so impair this use that the buyer would not have bought it, or would only have paid a lower price if he had known of them."

¹⁴³ For an exhaustive development of the subject, see, among others, Flechtner 2007 (64) *Bepress* 1; Flechtner *Funky Mussels*; Henschel *Conformity* 1; Henschel 2004 (1) *NJCL*; Henschel <http://www.cisg.law.pace.edu/cisg/biblio/henschel.html>; Henschel in Felemegas *Interpretation*

down under domestic law, especially in Congolese sales law, in order to discover the particularities of the latter legal system. The discussion will turn successively on contractual conformity principles, the requirements as for fitness for ordinary purposes, and conformity with regard to particular purposes, sample, and model.

Contractual conformity criteria

The CISG

It has already been claimed that the duty of the seller with reference to the conformity of the goods is ruled under Article 35. As summarised by Henschel,

[Article 35] is in three sections, of which the first, the conformity of the goods to the terms of the contract, consists of the *primary rule* for assessing lack of conformity. Only where the parties have not agreed otherwise will the *secondary rule* in Article 35(2) apply, laying down a number of positively expressed assumptions about the contractual requirements for the goods. Finally, Article 35(3) contains an exception to the seller's liability for some lack of conformity of goods, where the buyer knew or could not have been unaware of the lack of conformity.¹⁴⁴

In detail, Article 35(1) posits the basic principle that goods must conform to the contract. According to that principle, the goods conform to the contract on condition that they correspond to the “quantity, quality and description” conjointly approved, and when they are packaged as required by the contract.¹⁴⁵ With regard to its meaning, a number of scholars¹⁴⁶ and the case law¹⁴⁷ have inferred that Article 35

166-174; Henschel *Creation of Rules* 177-202; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 484-634; Schwenzer in Schlechtriem/Schwenzer *Commentary* 568-647; Kruisinga *Non-Conformity* 1; Vincze *Conformity* 552; Poikela 2003 (1) *NJCL*; and Hyland <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html> (accessed 1-8-2012).

¹⁴⁴ Henschel *Conformity* 19; Henschel <http://www.cisg.law.pace.edu/cisg/biblio/henschel.html> §a; Henschel in Felemegas *Interpretation* 166; see also Kritzer/Eiselen *Contract* §89:5 89-15 89-16.

¹⁴⁵ For application, see Australia 6 August 2010 Supreme Court of Victoria *Delphic Wholesalers (Aust) (Pty) Ltd v Agrilex Co Ltd* [<http://cisgw3.law.pace.edu/cases/100806a2.html>] (accessed 1-8-2012); Italy 11 December 2008 *Tribunale di Forlì* [District Court] *Mitias v Solidea Srl* [<http://cisgw3.law.pace.edu/cases/081211i3.html>] (accessed 10-7-2012).

¹⁴⁶ See Schwenzer in Schlechtriem/Schwenzer *Commentary* 570; Henschel *Conformity* 149; Kruisinga *Non-Conformity* 26-27.

¹⁴⁷ See Spain 17 January 2008 Tribunal Supremo, CLOUT case No. 802; Switzerland 29 June 1998 Tribunal Cantonal du Valais, CLOUT case No. 256; Switzerland 28 October 1997 Tribunal Cantonal Valais, CLOUT case No. 219; in UNCITRAL *Digest* 144 Fn1. See also cases quoted by Kruisinga *Non-Conformity* 26-27; and by Kritzer/Eiselen *Contract* §89:4 89-10 89-14.

provisions are based on a standardised concept of “lack of conformity” which displaces comparable concepts under domestic laws.¹⁴⁸

It follows that, while establishing the lack of conformity obligation, the primary test is to understand “what characteristics of the goods are laid down in the contract by means of quantitative and qualitative descriptions.”¹⁴⁹ One of the leading cases in this regard is the so-called *Mussels* case.¹⁵⁰ *A propos* of this, the German Supreme Court held that the treatment of the conformity obligation under Article 35 is based on the subjective understanding of a defect.¹⁵¹ Thus, even though the goods delivered, viz. New Zealand mussels, contained a higher cadmium concentration, they were judged to be in conformity to the contract because “the seller could not be

¹⁴⁸ More specifically, the CISG does not distinguish between the French law and related legal systems’ “hidden defects” (*vices cachés*) and “apparent defects” (*vices apparentes*); the English sales law “conditions” and “warranties”; the American law “express” and “implied warranties”; the German or Australian law *peius* (non-conforming goods) and *aliud* (totally different goods). (See Schwenger in Schlechtriem/Schwenger *Commentary* 570; Henschel *Conformity* 149; Kruisinga *Non-Conformity* 26-27). In the context of the CISG, the delivery of goods of a different type from those required by the contract, called in domestic law “*aliud*”, amounts to a delivery of nonconforming goods. See Spain 17 January 2008 Tribunal Supremo, CLOUT case No. 802; Germany 4 June 2002 Landgericht Stuttgart [<http://cisgw3.law.pace.edu/cases/020604g1.html>]; Germany 11 April 2002 Amtsgericht Viechtach [<http://cisgw3.law.pace.edu/cases/020411g1.html>]; in UNCITRAL *Digest* 144 Fn2. In the Spanish *Lathe Machine case*, the Trial Court of Barcelona deemed that it should apply benchmarks for fairness that would avoid the need to endorse the absolute authority of the *aliud pro alio* principle. It held that a good benchmark could be found in the references to conformity with ordinary use or a particular purpose, as set out in Article 35 CISG. Spain 27 January 2010 Trial Court Barcelona *Lathe Machine case* [<http://cisgw3.law.pace.edu/cases/100127s4.html>] (accessed 1-8-2012).

¹⁴⁹ Schwenger in Schlechtriem/Schwenger *Commentary* 571; see also Flechtner 2007 (64) *Bepress* 2-3; Flechtner *Funky Mussels* 4; Neumann 2007 (11) 1 *VJ* 81; Hyland <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html>; Henschel *Conformity* 147; Kruisinga *Non-Conformity* 29.

¹⁵⁰ In this case, a Swiss company sold “New Zealand mussels” to a German importer. “The buyer claimed that a certain level of cadmium in the mussels violated German food regulations. That cadmium level was, however, acceptable under Swiss regulations. He declared the contract void owing to lack of conformity of the goods while the seller sued for the sales price. The Court found the goods conformed to the contract.” Germany 8 March 1995 Supreme Court *New Zealand Mussels case* [<http://cisgw3.law.pace.edu/cases/950308g3.html>] (accessed 1-8-2012); confirmed in Germany 2 March 2005 Bundesgerichtshof Federal Court of Justice [<http://cisgw3.law.pace.edu/cases/050302g1.html>] (accessed 5-9-2012). See, for comments, Flechtner 2007 (64) *Bepress* 1; Flechtner *Funky Mussels* 7; Schlechtriem <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html>.

¹⁵¹ See Editorial Remarks to the *Mussels case* [<http://cisgw3.law.pace.edu/cases/050302g1.html>]; see also Schwenger in Schlechtriem/Schwenger *Commentary* 571; and Schlechtriem <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html>.

expected to know the special public law regulations on product safety, public health in the destination state, Germany.”¹⁵²

As is for the delivery, parties are free to determine the quantity, quality of the goods, and the way they should be packaged. The concept “quantity” is understood in this context as implying the number, volume, or weight of goods. In this case, the seller must deliver neither more nor less than the quantity determined in the agreement. Delivering a greater quantity than the quantity agreed could then constitute a failure to comply with the contract which confers on the buyer the right to accept or refuse the excess quantity.¹⁵³ Similarly, if the seller delivers only a part of the goods, or if only a part of them conforms to the contract, the buyer is free to exercise the remedies provided by Articles 46 to 50 CISG for breach of the contract,¹⁵⁴ unless he/she accepted the goods without complaint.¹⁵⁵

As regard the concept “quality”, it covers the physical conditions of the goods including factual and legal factors which are relevant to the goods and their circumstances.¹⁵⁶ Comparable to the regulation with regard to quantity, the quality of the goods must also be determined by the parties. In that sense, goods that do not correspond to the criteria agreed on are deficient even if they are of a higher quality than that stipulated in the contract.¹⁵⁷ Nevertheless, though the seller is bound to

¹⁵² Henschel <http://www.cisg.law.pace.edu/cisg/biblio/henschel.html>. It was ruled in the New Zealand *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* case that “a seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if it knows the destination of the goods,” unless the same regulations exist in his own country.
¹⁵³ See Article 52(2) according to which, “If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity.” If the buyer decides to take delivery of all or a portion of the excess quantity, he/she must pay for it at the contract rate. See Germany 5 December 2006 District Court Köln *Plastic Faceplates for Mobile Telephones case* [<http://cisgw3.law.pace.edu/cases/061205g1.html>] (accessed 21-8-2012).

¹⁵⁴ See Article 51(1) CISG.

¹⁵⁵ See Belgium 24 April 2006 Hof van Beroep Antwerpen, Unilex; in UNCITRAL *Digest* 144 Fn11.

¹⁵⁶ Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 495; Schwenger in Schlechtriem/Schwenger *Commentary* 572-573; Henschel *Conformity* 156. For instances of cases relating to different variances of quality of goods, see Henschel *Conformity* 156-158.

¹⁵⁷ See Butler Guide 4-20; taking support from Switzerland 27 January 2004 District Court Schaffhausen [<http://cisgw3.law.pace.edu/cases/040127s1.html>]

deliver conforming goods in respect of quality, deviations can only be taken into account if “the defects reach a certain level of seriousness.”¹⁵⁸ Mere nonconformities are not sufficient to vitiate the sale.

With regard to the “description”, the delivery of goods different from those labelled in the contract also constitutes a delivery of nonconforming goods. As said above, unlike national laws, the CISG does not differentiate between “nonconforming goods” and “different goods.” Such a rule was formulated in the *Cobalt Sulphate case* as follows: “the delivery of cobalt sulphate of South African origin did not constitute a non-delivery of the English Cobalt Sulphate contracted for, but merely, *a delivery of non-conforming cobalt sulphate* (emphasis added).”¹⁵⁹

Finally, Article 35(1) considers “containers and packaging” as being an integral part of the goods. Thus, if parties have reached agreement on the kind of containers and packaging to be used, goods differently wrapped constitute nonconforming goods in respect of Article 35(2)(d).¹⁶⁰ Article 35(2)(d) is clear that the goods do not conform to the contract, unless they are contained or packaged in the manner usual for such goods, or at least in an adequate manner to preserve and protect them.

South African law

South African law has also expressly adopted the principle that “the thing sold must be delivered according to any agreement as to size, quantity, quality, condition, or other qualification.”¹⁶¹ In *Cedarmont Store v Webster*, Wessels JP said, “According

¹⁵⁸ Cf. Germany 8 March 1995 Supreme Court *New Zealand Mussels case*.

¹⁵⁹ In this case, the disputed contract involved a Dutch company, which sold four different quantities of cobalt sulphate to a German company. The contracts were concluded when South Africa was under economic embargo. It was agreed that the goods should be of British origin and that the plaintiff should supply certificates of origin and of quality. After the receipt of the documents, the buyer declared the contracts to be void since the cobalt sulphate was made in South Africa and the certificate of origin supplied was wrong. The German Supreme Court held that the delivery of goods of different origin from those agreed upon did not constitute non-delivery, but a delivery of non-conforming goods.

¹⁶⁰ See Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 498; Henschel *Conformity* 182. The CISG differs from some legal systems which consider packaging as an accessory obligation. See illustrations by Schwenger in Schlechtriem/Schwenger *Commentary* 574 and 575.

¹⁶¹ Volpe *Sale* 75; Bradfield/Lehmann *Sale* 73; Ng’ong’ola 1995 (7) *RADIC* 227 232.

to our law (...) a contract to deliver at one and at the same time a number of articles of a particular quality is *prima facie* an entire contract and the seller has no right to alter the nature of the contract (...).”¹⁶² Ward J amplified this in *Mannix v Osbord* by stating that the buyer is not obliged to select conforming goods from defective ones as he/she may reject the whole load.¹⁶³ Thus, if the seller delivers goods which differ from those provided in the agreement, the buyer is entitled to cancel the contract for failure of delivery¹⁶⁴ even though the goods supplied bear some resemblance to the ones agreed upon.¹⁶⁵ With regard to their quantity, there are authorities that state that where the amount of goods is approximately determined, the qualification is immaterial. When it comes to unspecified goods, however, the quantity must necessarily be determined.¹⁶⁶ In the same way, where a number of goods are sold together, the seller cannot deliver them by instalments, unless it is otherwise stipulated in the contract.¹⁶⁷

Except for consumer contracts,¹⁶⁸ South African law seems to be silent with regard to the packaging duty in international sales contracts.¹⁶⁹ Such a duty may, however, be implied from the phrase “or other qualification” used in the definition of the seller’s obligations which shows that the enumeration is not exhaustive. Likewise, it may be put forward that the lack of a specific packaging provision is

¹⁶² *Cedarmont Store v Webster & Co* 1922 TPD 106 108; see also *American Cotton Products Corporation v Felt and Tweds Ltd* 1953 (2) SA 753 (N) 756C-H.

¹⁶³ That is to say, where the seller delivers goods of a grade inferior to the ones agreed, or if goods delivered are mixed, “the purchaser may accept such of the goods as are according to the contract and reject those that are not, but the seller cannot compel him to make such selection, as he may reject the whole.” See *Mannix & Co v Osbord* 1921 OPD 138.

¹⁶⁴ See *Marais v Commercial General Agency Ltd* 1922 TPD 440.

¹⁶⁵ See *Ayob and Co v Clouts* 1925 WLD 199; referred to by Zulman/Kairinos *Sale* 74.

¹⁶⁶ See *Young v Thomas and another* 1950 SR 45; *De Villiers v Nichollas & Co* (1907) 24 SC 208; *Elliot v McKillop* (1902) 19 SC 350.

¹⁶⁷ See *Moosa v Robert Shaw & Co Ltd* 1948 (4) SA 914(T).

¹⁶⁸ The CPA has established a real packaging legal regime with regard to consumer contracts. Concepts such as “packaged”, “packages” or “packaging” are used there 21 times under sections dealing, *inter alia*, with: Protection against discriminatory marketing (s 8(2)(e)); Consumer’s right to return goods (s 20(6)(b) and (s 20(6)(c)(ii)); Products labelling and trade description (s 24(1)(a)); Warning concerning fact and nature of right (s 58 (2)); Recovery and safe disposal of designated products or components (s 59); and Deposits in respect of containers, pallets or similar objects (s 66).

¹⁶⁹ View also supported by Ng’ong’ola 1995 (7) *RADIC* 227 232.

supplemented by the provisions of the CPA dealing with the subject. This inference is justified by the fact that a reseller cannot be required to provide packages that he/she did not himself/herself receive from the manufacturer while acquiring the goods.

In brief, the common understanding of Article 35(2) CISG is not so different from the South African law seller's duty to deliver what he/she has guaranteed to sell. For more certainty, however, the present study approves Ng'ong'ola's view by which, "The suggestion that conformity must also be assessed in reference to packaging (in international sales) would in (South African) law amount to a welcome clarification of the seller's responsibility."¹⁷⁰

Congolese law

Historically speaking, the obligation of the seller with regard to the delivery of conforming goods could be implied from Article 291 al. 1 and Article 318 CCO relating to seller's guarantee against defects. The first of these provisions required the seller to deliver the item sold "in the condition in which it was at the time of the sale". With regard to the second provision, it asked the seller to guarantee the buyer "against latent defects which render the thing sold unfit for the use for which it was intended, or so impair this use that the buyer would not have bought it, or would only have paid a lower price if he had known of them."

It should be noted that the CCO did not originally contain an express provision dealing with the quantity, quality, and nature of the goods. Of course, a similar obligation could be implied from Article 291 al. 1 CCO which obliged the seller to deliver the thing sold "in the condition in which it was at the time of the sale." Requiring the seller to deliver the property in comparable conditions as it was stipulated means, in other words, that it required him/her to deliver goods of the same quantity, quality, and nature as determined in the contract. Insofar as the quality and quantity of goods are concerned, this implication was substituted by two earlier

¹⁷⁰ Ng'ong'ola 1995 (7) *RADIC* 227 232.

cases, dated 10 April 1926 and 4 December 1951. These decisions stated expressly that the seller was bound to deliver goods the “quality”¹⁷¹ and “quantity”¹⁷² of which match with those approved by the contract. With the coming of the OHADA Commercial Act, and its requirement for quantity and quality of the goods, the obligation of conformity has now been explicitly codified.

In modern Congolese sales law, in fact, the obligation of the seller with regard to the conformity of goods is currently governed by Article 255 al.1 UAGCL which reproduces Article 35(1) CISG literally. As for the latter, Article 255 al.1 declares that goods conform to the contract on condition that they are of the quantity, quality, description, and packaging required by the contract. Such a similarity is in conformity with the words of Henschel in respect of the concurrence of Article 255 UAGCL with Article 35 CISG.¹⁷³

Through the provision above, it is clear that the requirement for conformity constitutes, within the Commercial Act, an independent obligation different from the delivery duty.¹⁷⁴ In the sphere of application of the former Article 280 CCO, the seller was supposed to have two main obligations, to deliver the thing sold, first, and to guarantee it, then,¹⁷⁵ so that conformity was considered as a supplementary obligation. As Santos and Toe have said, by providing a specific conformity obligation, the UAGCL intended to modernise the former civil law, probably in order to escape from French law criticisms regarding the distinction between “lack of conformity” and “hidden defects”.¹⁷⁶ In other words, the Vienna Sales Convention that inspired the OHADA Commercial Act has opted for a single concept of conformity which covers all kinds of defects regardless of their nature.¹⁷⁷ Unlike the

¹⁷¹ Elis 10 April 1926 *Kat II* 183; see also Piron 124; *Katuala Code* 175.

¹⁷² Léo 4 December 1951 *RJCB* 1952 98.

¹⁷³ See Henschel *Creation of Rules* Fn27.

¹⁷⁴ Compare this with Article 280 CCO.

¹⁷⁵ The guarantee obligation covered a double domain, the guarantee against latent defects, and the guarantee against eviction.

¹⁷⁶ See Santos/Toe *Commercial* 392; see also Note 146 above.

¹⁷⁷ See Kruisinga *Non-Conformity* 26; Schwenger in Schlechtriem/Schwenger *Commentary* 570; Henschel *Conformity* 149; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 492.

CISG, however, though the Uniform Act has also adopted a unitary concept of “conformity”, it has maintained the distinction between hidden and latent defects as well.¹⁷⁸ Such an ambiguity creates difficulties in understanding the duty of conformity as it encroaches on the guarantee against hidden defects. To this we will return in section 6.2.4.3 below.

Without needing to engage in a greater debate, it is necessary to say that, as for the CISG, the conformity requirement must be analysed, in modern Congolese law, in terms of quantity, quality, description, and packaging¹⁷⁹ as explained above. With regard to the description, for instance, the Commercial court of Kinshasa/Matete ruled in the *LTJ v Ital Motors* case that the goods delivered must conform to the conditions stipulated in the contract.¹⁸⁰ In the same way, Article 6(a) of the Packaging Regulation No. 409/CAB/MIN/ TC/0082/2006 provides that, where parties have reached agreement on the conditions of packaging, the seller must package the goods in such a manner that they are protected from normal shocks and ordinary storage conditions.¹⁸¹

Comments

There is a common understanding that the goods delivered must conform to the ones stipulated in the contract. The main rule retained by all of the three legal systems under comparison is that goods are conforming on condition that they correspond in

¹⁷⁸ See Articles 258 and 259 UAGCL for which, any latent defect must be denounced within a month of the day of delivery, and any hidden defect revealed a year after the discovery of the defect.

¹⁷⁹ See Article 255 al. 1 UAGCL; see also the Packaging Regulation No. 409/CAB/MIN/TC/0082/2006 of 18 July 2006 (*JORDC* No. 18 of 15 September 2006). Article one of this Regulation defines packaging as any object intended to contain and to protect the goods, and to allow their handling from the producer to the user.

¹⁸⁰ Cf. *Tricom Kin/Matete* 20 April 2011 RCE 438/469 *LTJ v Ital Motors Co* (unreported decision). In this case, LTG placed an order for three motorcars on 17 January 2009. At the delivery time, the buyer found that the vehicles delivered did not meet the requirements stipulated in the contract because they were different from the ones ordered and it retracted the transaction. The court approved its action, and sued the seller for a refund of the instalment paid.

¹⁸¹ Compare this with the second sentence of Article 255 al. 2 UAGCL which obliges the seller to deliver the goods in the packaging usually used for those kinds of goods. As long as the Packaging Regulation does not conflict with the UAGCL, it is assumed that it is still in force. It could, besides, be considered as a measure of enforcement of the Commercial Act insofar as the obligation of packaging is concerned.

terms of quantity, quality, and description and, if possible, of packaging as contractually accepted. Compared to South African and Congolese laws, the CISG appears to have established a clearer conformity rule by opting for a single concept regardless of the kind of the defect. Regarding Congolese law, in particular, though the UAGCL has been influenced by the Vienna Sales Convention, it has complicated its conformity solutions by mixing conformity requirements with those of guarantee against hidden defects. This situation constitutes a gap which needs to be dealt with, mostly in respect of international sales contracts. In spite of such a shortcoming, however, Article 255 UAGCL appears to have modernised Congolese law, to a certain degree, in compliance with the duty of conformity, because, previously, there was no specific obligation in this regard. Additionally, Article 255 of the OHADA Commercial Act has established in Congolese law an independent conformity obligation which, until recently, was considered to be an accessory of the obligation of delivery.

As for other contractual issues, it is possible that the parties fail to define the standards that goods should have or that contractual clauses are incomplete. In such circumstances, default principles of conformity, as those discussed in the following paragraphs, will carry the contract.

Fitness for ordinary purposes

The CISG

It is acknowledged that contractual clauses constitute the principal source of the seller's conformity obligation. It is not uncommon, however, that goods are ordered without any indication to the seller as to their final purpose. In that case, Article 35(2) provides a number of objective standards to be used in order to describe the conformity of the goods. As stated by Article 35(2) (a), in the absence of any indications to the contrary, goods are satisfactory where they "are fit for the purposes

for which goods of the same description would ordinarily be used.”¹⁸² In a High Court of New Zealand ruling, for instance, “trucks are ordinarily used for carting goods on the road.”¹⁸³ If not, they do not meet the requirements under Article 35(2) (a) and, therefore, lack conformity. In the same sense, ceramic ovenware which cannot be used in ovens with high temperatures is not fit for ordinary baking purposes.¹⁸⁴

Usually, international transactions involve professional factory owners.¹⁸⁵ Because commercial operators buy goods for commercial purposes, in the view of the Secretariat Commentary, goods are fit for ordinary purposes where “they must be honestly resalable in the ordinary course of business.”¹⁸⁶ The Netherlands Arbitration Institute stated, in the *Condensate Crude Oil Mix* case, that, even though goods may not necessarily be purchased for resell, goods are not fit for ordinary purposes if they do not meet the reasonable quality norms required of them.¹⁸⁷ The

¹⁸² The Federal Court of Australia ruled, in the *Cortem v Controlmatic* case that, a product fits for ordinary purposes “if it is in the same condition as it would have been supplied to any other wholesaler everywhere in the world.” See Australia 13 August 2010 Federal Court of Australia *Cortem SpA v Controlmatic Pty Ltd* [<http://cisgw3.law.pace.edu/cases/100813a2.html>] (accessed 1-8-2012).

¹⁸³ New Zealand 30 July 2010, *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* case.

¹⁸⁴ France 17 December 1996 Supreme Court *Ceramique Culinaire v Musgrave* [<http://cisgw3.law.pace.edu/cases/961217f1.html>] (accessed 21-8-2012).

¹⁸⁵ See Article 2(a) which excludes consumer sales, viz. sales of goods bought for personal, family or household use, from the CISG’s field of application.

¹⁸⁶ Thus, “if the goods available to the seller are fit for only some of the purposes for which such goods are ordinary used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order, if necessary.” See Secretariat Commentary on the 1978 Draft CISG, in Honnold *Documentary* 422; see also Kruisinga *Non-Conformity* 30.

¹⁸⁷ Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319 *Condensate Crude Oil Mix* case. In the case,

Because the contract contained no quality specifications, the Arbitral Tribunal found that the issue of conformity should be decided based on Article 35(2)(a) CISG, which requires that the goods are fit for the purposes for which goods of the same description would ordinarily be used. The Arbitral Tribunal explained that three possible interpretations in this respect exist. The first interpretation requires the goods to be of a merchantable quality. In this view, which is favoured in English common law legal systems; goods are in conformity with the contract if a reasonable buyer would have concluded contracts for the goods at similar prices if the buyer had known the quality of the goods. A second line of thought, derived from civil law, calls for goods of average quality. A third interpretation rejects the merchantable and average quality standard, stating those do not fit in the CISG system, and suggests a reasonable quality criterion. Interpretations based on the merchantable and average quality norms led to different conclusions in this case.

Arbitration tribunal, therefore, upheld the buyer's contention that the price the parties determined would not be paid for condensate with increased levels of mercury.¹⁸⁸

As Henschel has repeatedly remarked, fitness for ordinary purposes as required by Article 35(2) (a) is one of the most important rules in practice.¹⁸⁹ According to him, this requirement expresses “one of the clearest and most fundamental rules about the seller's obligation to provide goods which conform to the contract.”¹⁹⁰ Gillette and Ferrari specify this by saying that the obligation under examination carries out a double function which facilitates international transactions:

First, it reduces the risk that sellers will engage in fraud by intentionally substituting an inferior good for the one that buyers expected. (...) Second, (...) it allocates to sellers the risk of non-conforming deliveries, even when no negligence or fraud is involved, and to provide prospective purchasers with information about products that they could otherwise easily obtain.¹⁹¹

Seller's duty to deliver goods which are fit to the normal purposes for which they are sold is widely accepted even under domestic sales laws.¹⁹² It is now necessary to examine its implications in South African and Congolese laws.

Therefore, the Arbitral Tribunal decided that Article 35(2)(a) CISG should be interpreted according to ‘the reasonable quality criterion’.

The Arbitral Tribunal concluded then that the buyer was right to suspend the contract. See Abstract by Voogd, at: <http://cisgw3.law.pace.edu/cases/021015n1.html>.

¹⁸⁸ Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319 *Condensate Crude Oil Mix case*.

¹⁸⁹ Henschel *Conformity* 190; Henschel *Creation of Rules* 185; Henschel <http://www.cisg.law.pace.edu/cisg/biblio/henschel.html> §e; Henschel in Felemegas *Interpretation* 168 §e. Henschel argues that with the default rule contained in Article 35(2)(a), as long as goods are acquired for their habitual usage, parties do not need to specify the purpose for which they are sold.

¹⁹⁰ *Ibid*.

¹⁹¹ Gillette/Ferrari 2010 (1) *IHR* 2 3.

¹⁹² Countries which have imposed the requirement as for fitness of goods for ordinary purposes include: Germany: § 434(1) BGB; Switzerland: Article 197(1), Sentence 1 OR; Austria: § 922 ABGB; France and Belgium: Article 1641 CC; England: SGA, s 14(2B) (a); USA: § 2-314(2) UCC; see Henschel *Conformity* 190-191; Schwenger in Schlechtriem/Schwenger *Commentary* 575 Fn63. According to Henschel, in view of the number of countries which have adopted the rule, the fitness of goods for ordinary purposes can be considered “as a codification of a basic principle of international sales law.” See Henschel in Felemegas *Interpretation* 168 §e *in fine*.

South African law

The duty on the part of the seller to deliver goods suitable for their ordinary purposes is implicitly ruled in *Minister van Landbou-tegniese Dienste v Scholtz*.¹⁹³ Kerr argues, in this regard that, in any contract of sale, international or not, there “will often be an expressed or implied warranty that the thing sold is fit for the purpose for which it is sold.”¹⁹⁴ Zulman and Kairinos add to this that the principle of South African law “is that everyone selling an article is bound, though nothing is said as to the quality, to supply a good article without defect which would render it useless (...) for the purpose for which it was sold.”¹⁹⁵

The concept “defect” is defined by Corbett JA in *Holmdene Brickworks v Roberts Construction* as “an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which *it is commonly used* (emphasis added).”¹⁹⁶ Thus, where the article delivered suffers from a latent defect which renders it unfit for its normal use, the seller might be sued for legal liability.¹⁹⁷

¹⁹³ See *Minister van Landbou-tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); for comments, see Kerr *Sale* 205; Koop *Sale* 173; Bradfield/Lehmann *Sale* 78.

¹⁹⁴ Kerr *Sale* 205; on the distinction between “implied” and “express warranties”, see Christie/Bradfield *Contract* 162-164; Van der Merwe *Contract* 301-306; Kerr *Contract* 458-461.

¹⁹⁵ Zulman/Kairinos *Sale* 163; see also Sharrock *Business* 294. In *Ornelas v Andrew’s Café and Another* 1980 (1) SA 378 (W), however, a seller who delivered a restaurant without licence was considered to have breached the duty of delivery instead of the duty to assume liability for defects. As is for the delivery, common law rules relating to the fitness of goods for their ordinary purposes have been supplemented, with regard to consumer contracts, by the CPA. See s 18(3) and (4); s 55; and, specially, s 56 dealing with implied warranty of quality.

¹⁹⁶ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) (E-F).

¹⁹⁷ As stated by Corbett JA, in the *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* case, “(...) a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any *latent defect* in the goods. Ignorance of the defect does not excuse the seller. (...)” See also Koop *Sale* 108; Lotz in Zimmermann/Visser *Southern Cross* 377; Volpe *Sale* 115. See, in the same sense, *Sarembock v Medical Leasing Services (Pty) Ltd and Another* 1991 (1) SA 344 (A). This case involved a car whose entire front had been cut off and replaced with the front of another car of the same type at the time the contract was formed. It was not proved that the front-end graft rendered the car less safe to drive, which amounted to a latent defect.

The guarantee against defect, however, only covers defects that are “latent” the moment the contract is made.¹⁹⁸ As specified in the *Holmdene Brickworks* case, “a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*,”¹⁹⁹ by an ordinary prudent person.²⁰⁰ By contrast, if it is easily discoverable, the defect is said “patent” and is accordingly not covered by the guarantee.

Congolese law

Under the first sentence of Article 255 al. 2 UAGCL, if the contract is silent on the issue of conformity, the seller must deliver goods which, among other things, are “fit to the purposes for which they are usually used.”²⁰¹ This means that goods will not be judged as conforming unless they are fit for their ordinary purposes. The requirement regarding conformity as for ordinary purposes is somewhat similar to the guarantee against defects in the property sold as ruled in Articles 318 to 326 CCO. In detail, Article 318 CCO obliged the seller to insure the buyer against “latent defects which make the thing sold *unfit for the use for which it was intended*, (emphasis added) or which so impairs that use that the buyer, if he had known of the defects, would not have bought the thing, or would have paid a lower price.” The concept “defect” is described, in this context, as any anomaly or a change that harms the functioning of the goods, their solidity or their appearance.²⁰² In other words, all

¹⁹⁸ See *Lakier v Hager* 1958 (4) SA 180 (T); see also *Bradfield/Lehmann Sale* 78.

¹⁹⁹ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) (E-F); see also *Gardiner J in Zieve v Verster & Co* 1918 CPD 296.

²⁰⁰ See *Lakier v Hager* 1958 (4) SA 180 (T) 184. In this case, a buyer bought a second-hand motor car and sought to rescind the price on the basis of latent defects of which he had been unaware. One of those defects was the crack in the chassis of the vehicle. *Ramsbottom J* denied to the crack in the chassis the status of latent defect. He stated,

The man is buying a very old car, and he must give it a proper inspection. If he wishes to rely on defects existing at the time of the sale which are latent then, (...) he must show that he gave the car a proper inspection, and a proper inspection involves examining, at any rate, the external part of the car, whether that is underneath or on top. (...) One of the things that a person buying an old second-hand car of this kind might be expected to look for would be a cracked chassis, and if that had been done in this case it would immediately have been discovered.

²⁰¹ Compare this to Article 35(2) (a).

²⁰² See *Santos/Toe Commercial* 297; see also *Tricom Kin/Matete* 18 April 2012 RCE 569 above. This case deals with a transformer found defective at the moment of use.

failure likely to reduce the way goods are usually used amounts to non-conformity in the terms of Article 255 al. 2 UAGCL and Article 318 CCO.

In principle, the defect must be “hidden” for it to entail the seller’s responsibility.²⁰³ In this sense, the seller would normally be discharged from “apparent defects” that the buyer could have discovered himself/herself.²⁰⁴ Insofar as latent defects are concerned, they are defined as defects which are not discoverable at the time of taking delivery, but which come to light in the future.²⁰⁵ As stated by case law,

A defect can also be described as latent even though it is discovered later while using the thing sold. Such can be the case following an expert inspection, or a chemical analysis, or when the immediate and complete verification was impossible when the contract was formed (or the goods delivered), either because the goods were sold by big quantities, or packaged in cases or in bales; or because they risked to be spoiled if the packaging was opened or because they had to be resold as packaged.²⁰⁶

Yet, Article 258 UAGCL appears to hold the seller liable for patent defects too. As stated by this provision, where the buyer wishes to take advantage of “any apparent

²⁰³ See *Tricom Kin/Gombe* 8 August 2007 RCE 136/IV *Afritec Sprl v Tala Sprl* (unreported decision). In this case, the buyer purchased a vibrating compact system to be used on a building site. When he tried it, the vibrator failed to work owing to a latent defect. The court sued the seller for breach of the contract because he was obliged to deliver an item free from defect. Under the context of consumer contracts, the guarantee against latent defects is one of the main obligations of the seller that the seller is liable for any hidden defects in the thing sold, “even though he did not know of them,” unless, in such case, he had excluded his warranty. See Article 320 CCO; and cases quoted by both *Katuala Code* and *Piron* under Article 320 CCO.

²⁰⁴ Cf. Article 319 CCO; as ruled by the Appeal Court of Lubumbashi, “apparent defects” are those defects that the purchaser can discover himself at the time of the delivery by an attentive examination. Such being the principle, a buyer who omits to inspect the goods before taking delivery must pay the consequences of his/her negligence. See *Elis* 6 December 1913 *Jur Col* 1924 166.

²⁰⁵ Cf. Article 259 UAGCL *contra* Article 258 UAGCL dealing with apparent defects. There is authority that states that defects must affect the usefulness of the thing sold for them to produce legal effects. See *Cass B* 20 April 1959 *Pas I* 773; referred to by *Katuala Code* 186.

²⁰⁶ *Ibid.* Translated form of the original French version stated as follows :

Le vice peut être considéré comme caché lorsqu’il ne se révèle qu’à l’usage, à la suite d’une expertise, d’une analyse chimique, ou lorsque la vérification immédiate et complète est impossible, soit parce qu’il s’agit d’une marchandise vendue par grandes quantités, emballée en caisses ou en balles, et qui risque de s’avarier si l’on ouvre les emballages ou qui doit se revendre emballée, etc.

See also *Tricom Kin/Gombe* 11 January 2012 RCE 1967 *Dijimba Sprl v Tractafric Congo Sprl* (unreported decision), in which a defect discovered in an engine 358 hours after delivery was judged latent.

lack of conformity”, he/she must notify that non-conformity within a month following the day of delivery. Such a ruling does not go without consequences for the behaviour of commercial operators. The logic should be that, if the buyer knew, or is presumed to have known, of the defect and took delivery notwithstanding the existence of the defect, his/her conduct discharges the seller.²⁰⁷ In any event, the test of whether a defect is latent or patent is a matter of fact which must be adjudicated according to the circumstances of the case.²⁰⁸ With regard to the place and time the obligation should be performed, the Appeal Court of Lubumbashi ruled that, unless otherwise stipulated, the seller’s duty to guarantee against latent defects must be fulfilled at the place where the thing that constitutes its object was located when the obligation was made.²⁰⁹

Comments

All of the three legal systems under view require the seller to deliver goods which are fit for their ordinary purposes. The point of departure for them is located in the fact that, the CISG has adopted a single concept which governs both the issue of conformity and the issue of latent defects, whereas domestic laws acknowledge a double kind of guarantee. The OHADA Commercial Act, which was supposed to improve Congolese law on this matter, has also indirectly maintained the same distinction. Unlike Congolese law, French and Belgian laws, which inspired the original CCO, have espoused the CISG unitary concept in connection with international sale of goods. To illustrate this with the ICC *Steel Bars* case,

(...) in the context of the obligations of the seller, the French internal law of the sale of goods distinguishes between a warranty of conformity and a warranty against defects, whereas the French international law of the sale of goods - the Vienna

²⁰⁷ To this we will return in Section 6.2.4.3 below.

²⁰⁸ See First Inst Léo 10 December 1952 *RJCB* 1953 261; and Cass B 14 January 1841 *Pas* I 135; see also Katuala *Code* 184; Piron 125.

²⁰⁹ See Elis 21 April 1945 *RJCB* 205.

Convention - sticks to a uniform term, which is that of an obligation of conformity covering both warranties of the French internal law.²¹⁰

The unitary conformity rule was confirmed three years later by the French Appeal Court of Grenoble in *Thermo King v. Cigna Insurance* whereby, the Court specified that the CISG “ignores the notion of hidden defects.”²¹¹ To use the ruling of the Swiss Appeal Court of Valais in the *Second-hand Bulldozer* case, the Convention has favoured a “new and common concept of non-conformity”²¹² instead of local law expressions. As a result of this, CISG goods delivered must conform to the contract, “regardless of the distinction between the warranty of conformity and the warranty against hidden defects.”²¹³ The only requirement is that those goods must be adequate for their ordinary purposes.

It should be borne in mind that, before the DRC adhered to the OHADA law; Congolese commercial contract law was hidden behind civil law rules.²¹⁴ The CCO, which employs the double concept being discussed, had to apply to both domestic and international sales contracts.²¹⁵ Of course Article 255 al. 2 UAGCL, which now governs commercial sales in the DRC, requires the seller, as is under the CISG, “to deliver goods which are fit for purposes to which they are habitually intended,” without any distinction between the warranty of conformity and the warranty against

²¹⁰ See ICC Arbitration Case No. 6653 of 26 March 1993 *Steel bars case* [<http://cisgw3.law.pace.edu/cases/936653i1.html>] (accessed 10-8-2012). In this case, parties opted for the “substantive laws of France”, i.e. the French law to govern the contract. The ICC inferred that, even though the French sale of goods law is governed by the Civil Code, since the entry into force of the CISG in the country in January 1, 1988, international sales are ruled, in France, by the Vienna Sales Convention. It concluded, therefore, that the obligations of the seller had to be considered in the light of Article 35(2)(a) CISG, instead of Article 1641 FCC.

²¹¹ See France 15 May 1996 Appellate Court Grenoble *Thermo King v Cigna Insurance* case [<http://cisgw3.law.pace.edu/cases/960515f1.html>] (accessed 10-8-2012). In this case, the court stated that the Vienna Convention disregards the notion of “hidden defects”. Evidence of this is the fact that the CISG specifies that goods are in conformity with the contract only when they are fit for the purposes for which goods of the same nature would ordinarily be used.

²¹² Switzerland 28 October 1997 Appellate Court Valais *Second-hand Bulldozer* case [<http://cisgw3.law.pace.edu/cases/971028s1.html>] (accessed 10-8-2012).

²¹³ See Belgium 8 March 2001 Appellate Court Mons *Vetimo v Aubert* case [<http://cisgw3.law.pace.edu/cases/010308b1.html>] (accessed 10-8-2012).

²¹⁴ See Masamba *Modalités* 22; Vanderstraete *Business* 16; Mutenda *Apport* 13.

²¹⁵ Cf. Articles 7 and 265 al. 3 CCO for which, contractual general rules apply to sales contracts irrespective of their nature.

hidden defects. This statement is, however, confused by Articles 258 and 259 of the same Commercial Act which allude to patent and hidden defects. By their wording, the Commercial Act, and consequently modern Congolese law, has, as far as international sale of goods contracts are concerned, gone back to square one. Thus, the distinction between guarantee of conformity and guarantee against latent defects is still intact in the DRC, as it is under South African law, so that the CISG is recommended for both legal systems.

Conformity with regard to particular purposes, sample, and model

The CISG

Further to the requirements regarding the fitness for ordinary purposes, Article 35(2)(b) requires the seller to deliver, where necessary, goods which are fit for a particular purpose other than their ordinary one. The requirement as for fitness to particular purposes enters, however, into consideration only if that specific use was expressly or implicitly made known to the seller at the time of the contract.²¹⁶ It was said in the *RJ & AM Smallmon v Transport Sales* case that specifying the country of use of the goods is a particular purpose that the seller should take into consideration.²¹⁷ The German Supreme Court, in the *New Zealand Mussels* case, denied the status of particular purpose in the meaning of the CISG to public regulations in the importing country because they were different from those in force in the exporting state.²¹⁸ The requirement for particular purpose can, nevertheless, be

²¹⁶ It was held in the Australian *Cortem SpA v Controlmatic (Pty) Ltd* case that, where a contract is concluded after the products had received certification; it is implicit that those products are purported for resell.

²¹⁷ See New Zealand 30 July 2010 *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* case. See also instances given by Schlechtriem in Galston/Smit *Sale* §6:03 2-21 relating to the use of building equipment made in German for the Antarctic region.

²¹⁸ See Germany 8 March 1995 *New Zealand Mussels case*; see also the New Zealand *RJ & AM Smallmon v Transport Sales Ltd and Grant Alan Miller* case. As Schlechtriem has summarised, Decisive is the particular purpose for the goods; thus, first of all whether the goods are to be used or resold in the importing country or whether they are to be further exported to a third country. If the seller knows where the goods are intended to be used, then he will usually be expected to have taken the factors that influence the possibility of their use in that country into consideration.

derogated from, “if the circumstances show that the buyer did not rely on, or that it was unreasonable for him to rely on, the seller’s skill and judgment.”²¹⁹ Under Article 35(2) (c), furthermore, where the contract is concluded on the basis of sample or model, the seller must deliver goods which possess the qualities of goods which it has shown to the buyer as a sample and model.

South African law

The requirement for the fitness of goods for particular purposes is also recognised in South African law. Lotz makes it clear that, “(...) where a buyer buys an object for a special purpose known to the seller, the latter may normally be assumed to have guaranteed (or depending on the circumstances, to have represented) that the object was fit for that specific purpose.”²²⁰ In the *Minister van Landbou-tegniese Dienste v Scholtz* case, for example, the seller was found to be liable for the express or implied warranty against the existence of latent defects because he has guaranteed the fitness of the thing sold for the purpose for which it was bought.²²¹

See Schlechtriem <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html>; but Karollus 1995 *Cornell Review of the CISG* 51 66.

²¹⁹ Cf. Article 35(2) (b), second part. It is recognised that, Article 35(2) (b) was inspired by s 14(3) of the English Sale of Goods Act 1979, and § 2-315 UCC. See Schwenzer in Schlechtriem/Schwenzer *Commentary* 580; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 518; Hyland <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html>; and Krieger 1989 (106) *SALJ* 184 188. Krieger says, “The articles governing the (...) conformity of goods (Articles 35-44) closely resemble the rules of the Uniform Commercial Code (...). Warranties as established under the UCC §§ 2-313 to 2-315 are combined in article 35 of the Convention (...).”

²²⁰ See Lotz *Sale* 361 377; finding advice in *Kroomer v Hess & Co* 1919 AD 204; *Bower v Sparks, Young and Farmers’ Meat Industries Ltd* 1936 NPD 1; and esp. *Minister van Landbou-tegniese Dienste v Scholtz* 1971 (3) SA 188 (A). Oosthuizen (Rights 89 Fn386) is, however, uncertain as to the period for which the goods are warranted to be fit for the purposes for which they were purchased. The learned author quotes with approval *Lexmead (Basingstoke) Ltd v Lewis and others* [1981] 2 WLR 713 (HL) 720C-G where the court referred to the position under English law to determine when the obligation is fulfilled. Lord Diplock stated, in the *Lexmead (Basingstoke)* case, that “the warranty of fitness for a particular purpose relates to the goods at the time of delivery and continues for a reasonable time thereafter.” Quoted by Oosthuizen Rights 89 Fn386.

²²¹ *Minister van Landbou-tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) (sale of bull for stud purposes) for the full case, see Koop *Sale* 173-197; and for an excerpt see Volpe *Sale* 113-114. Some of other leading cases on the subject include *Wheeler v Woodhouse* (1902) 21 NLR 162; *Hugo v Henwood* 1905 TS 578; and *Kroomer v Hess & Co* 1919 AD 204. In the first of these cases, it was justifiably expected that a cow bought for milk must give milk; in the second that a mare sold for racing purposes must race; and, in the last case, that when goods are sold for human consumption, it is an implied condition of the contract that they shall be reasonably fit for that

With regard to sales by sample, it is required that the goods delivered must conform to the sample exposed as a model when the contract was concluded.²²² Similarly, where the sale is by description, the seller is bound to deliver goods corresponding to the agreed description, otherwise the goods delivered will be considered as non-conforming goods.²²³

Congolese law

The CCO does not prescribe a specific duty in respect of the particular use of the thing sold. Article 255 al. 2 UAGCL which deals with the fitness of goods, likewise, alludes only to their suitability with regard to their habitual usage. Article 224 al. 2 2°) of the former 1997 version of the OHADA Commercial Act²²⁴ which could include such an express objective standard under modern Congolese international sale of goods was repealed in 2011 by Article 255 al. 2 UAGCL.²²⁵ Owing to the absence of the *travaux préparatoires*, the present researcher has difficulty in offering a reason for such an omission.²²⁶ The absence of an express residual duty on the part of the seller to deliver goods which fit a specific purpose does not, however, mean that parties cannot stipulate one in the contract. Confirmation of this is the phrase “when no provision is made in the contract” introducing Article 255 al. 2 UAGCL.

purpose. For further comments, see *Kerr Sale* 205-215; *Volpe Sale* 111-112. See in the same sense, *Bower v Sparks, Young and Farmers' Meat Industries Ltd* 1936 NPD 1; *Evans and Plows v Willis & Co* 1923 CPD 496.

²²² See, specially, *Bouwer v Ferguson* 4 EDC 90, and authorities quoted by *Zulman/Kairinos Sale* 214-417; and by *Volpe Sale* 158-159. South African common law rules relating to sales by sample has been supplemented by s 24 CPA dealing with product labelling and trade description.

²²³ See *Zulman/Kairinos Sale* 427; taking support from *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400. According to *Volpe (Sale 159)*, a sale by description is a kind of sale in which parties agree that the goods sold will be of a particular type and of the same quality as the sample. Thus, as stated in the *SA Oil and Fat Industries Ltd* case, “Where the sample and description differ, the seller must deliver in terms of the description and will not fulfil his obligation by supplying goods of the same quality as the sample.”

²²⁴ As was stated by Article 224 al. 2 2°), “Except where there is an agreement to the contrary, the goods shall not conform to the contract unless: (...) 2°) they are fit for any special purpose which was brought to the knowledge of the seller at the time of conclusion of the contract.”

²²⁵ Cf. Article 306 of the 2011 version of the Commercial Act. Article 224 al. 2 2°) UAGCL 1997 version was virtually a duplicate of Article 35(2) (b) CISG.

²²⁶ It is possible that the obligation under discussion has been omitted because most of OHADA member-states belong to the French legal system, while the requirement for particular purpose is Anglo-American in origin. See Note 217 above and Section 2.2.7.1 on OHADA countries.

If the buyer, therefore, can prove that the seller was aware of the particular purpose for which the goods were bought, conformity requirements would be established with regard to that aspect as well.

Finally, with regard to the requirement of conformity in terms of sample and model, it is expressly regulated by the first sentence of Article 255 al. 2 UAGCL *in fine*. Pursuant to this, the seller must deliver goods which, *inter alia*, possess the qualities of goods it has presented as samples or models. If not, the goods delivered lack conformity.

Comments

By contrast to the fitness for ordinary purposes, the duty of the seller to deliver goods which fit a particular usage is a non-compulsory requirement. It is required provided that the seller has knowledge of the particular use for which goods will be used or when parties have required it in the contract. On this particular aspect, Congolese law departs from the CISG and South African law as it does not provide such a specific requirement. The OHADA Commercial Act which would introduce the obligation is also silent on the matter, which constitutes a gap in Congolese law. In order to fill it, the adoption of a provision similar to that of Article 35(2)(b) CISG, and South African law is recommended for the improvement of Congolese law on the specification of the subject of the seller's obligations.

Succinctly, from what has been said so far, it is clear that the conformity duty is really one of the main obligations of the seller. Reason why, where the goods delivered do not meet the conformity requirements being discussed, the seller is liable for lack of conformity.

6.2.4.3 The seller's liability for lack of conformity

The CISG

As in almost all other legal systems, the CISG seller is legally responsible for any lack of conformity with regard to the goods delivered,²²⁷ which may amount to a fundamental breach.²²⁸ Exceptionally, however, the seller should be released from his/her responsibility if “the buyer knew or could not have been unaware of such lack of conformity”²²⁹ at the time the contract was formed. The idea behind the exemption of the seller's responsibility under Article 35(3) is that, where the buyer knows of the defects, he/she is supposed to accept the goods as they are.²³⁰ It would, thus, be abnormal for him/her to ask for goods of a better quality or in better condition than the ones delivered later.²³¹

The most important question in respect of the seller's liability for lack of conformity relates to the right moment that it should be implemented. By means of response, Article 36(1) held the seller responsible for any non-conforming goods existing at the time the risk passes to the buyer,²³² even though the defect becomes

²²⁷ As stated by Article 36,

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

²²⁸ See Article 49 CISG; see also CISG-AC Opinion No. 5 [<http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html>] (accessed 30-4-2013).

²²⁹ Cf. Article 35(3) CISG; for an illustration, see France Arbitration Chamber of Paris, Case No. 9926 of 2007 *Chemical Compound case* [<http://cisgw3.law.pace.edu/cases/079926f1.html>] (accessed 21-8-2012). In this case, the seller was not found liable because the buyer knew of the non-standard quality of the cargo and could have been aware of the cargo's condition by carrying out inspections; see also UNCITRAL *Digest* 147 Fn74.

²³⁰ See Kruisinga *Non-Conformity* 52-56; Henschel *Conformity* 280ff.

²³¹ Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 527; Schlechtriem in Galston/Smit *Sales* 6-23; Enderlein *Rights* 133 160.

²³² The passing of risk is ruled under Articles 66 to 70 CISG. For comments, see Schmidt-Kessel in Schlechtriem/Schwenzer *Commentary* 921-947; Erauw in Kröll/Mistelis/Viscasillas *UN Convention* 878-911; Honnold in Galston/Smit *Sales Chapter* 8; Bollée 1999-2000 *Pace Review of*

apparent afterwards. In the view of many scholars, the relevance of this provision is that it is in conformity with the principle adopted by several domestic laws.²³³ Usually, conforming qualities of goods are required when goods are handed over for carriage, unless it is otherwise stipulated in the contract.²³⁴ If such qualities are absent at that time, the seller is liable, regardless of when the lack of conformity becomes apparent.²³⁵ Moreover, Article 36(2) extends the seller's liability with regard to the lack of conformity occurring after the time of passing of risk subsequent to the breach of his/her obligations, "including a breach of a guarantee of the future performance or qualities of the goods."²³⁶

South African law

The seller must deliver goods free from any defect, whether latent or patent. Where the seller delivers goods which suffer from any defect, the buyer may take legal action for breach of the contract. Despite such a general principle, the seller does not bear responsibility for defects that the buyer knows about, or ought to have known about, at the time of contracting.²³⁷ As Kerr has explained, "A normally intelligent individual' buying something in front of him and acting with the usual degree of care, sees obvious defects."²³⁸ Thus, where the buyer was negligent in not seeing those defects, the seller is freed from his/her responsibility. The rule in *Kroomer v Hess & Co*, however, moderates the consequences of this principle in the case of a seller's being aware of the defects or where goods are bought for a particular purpose.²³⁹ A *propos* of this, where specific goods are "mentally identified" or non-specific goods

the CISG 245-290; Romein <http://cisgw3.law.pace.edu/cisg/biblio/romein.html>; Roth 1979 (27) *Am J Comp L* 291-310.

²³³ See Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 543; Schwenzer in Schlechtriem/Schwenzer *Commentary* 596 Fn9; Schlechtriem in Galston/Smit *Sales* §6-03 6-24; Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc.

²³⁴ Cf. Article 67(1) regulating the passing of risk time.

²³⁵ Schlechtriem in Galston/Smit *Sales* 6-24; Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc.

²³⁶ UNCITRAL *Digest* 155 §1.

²³⁷ For a series of reasons advanced in support of the immunity of the seller against patent defects and Roman Dutch-Law authorities on the subject, see Kerr *Sale* 136-137.

²³⁸ *Ibid* 137.

²³⁹ See *Kroomer v Hess & Co* 1919 AD 204.

are added by the seller to the contract, and the goods suffer from patent defects, the buyer might go to court for a breach of contract as a result of defective performance.²⁴⁰ In any event, the seller is held liable for any latent defects that exist at the time the contract was concluded.²⁴¹

Congolese law

Pursuant to Article 250 al. 2 UAGCL, the seller must ensure that goods delivered comply with the order placed and offer his/her guarantee. So, if goods do not encounter the instruction given, the seller should be sued for being responsible for a lack of conformity. With regard to the time when that liability applies, Article 256 of the OHADA Commercial Act tries to imitate Article 36(1) CISG. In fact, if the latter locates the liability for non-conformity at the time of the passing of risk, the first provision requires compliance with conformity conditions to be established at the date of taking delivery even though the fault appears much later.²⁴² Because the seller's liability for non-conforming goods is assessed at the time of delivery, a buyer who fails to inspect the goods, for example, a car at that time, but takes it and starts using it, cannot, in the future, claim a new car on the grounds that the first was

²⁴⁰ In the *Kroomer v Hess & Co* case, a party sold monkey nuts knowing that they were “for human consumption”. The buyer rejected the nuts on delivery and sued for damages; his evidence showed that *the nuts were mouldy, weevily and smelt and were not fit for human consumption* (emphasis added). His action was upheld.

²⁴¹ See *Lakier v Hager* 1958 (4) SA 180 (T); see also *Sharrock Business* 284 & 293; *Van Niekerk/Schulze Trade* 71; *Lehmann Sale* 888 897. See also cases reproduced by *Volpe Sale* 119-120; *Zulman/Kairinos Sale* 171-172. The common law rule relating to liability for latent defects has been supplemented by s 55 and 56 CPA which implies a warranty to obtain safe, suitable, and good quality goods for the consumer.

²⁴² The difference from the two legal systems in this respect is due to the fact that, unlike the UAGCL (Articles 275 and 276), the CISG does not deal with the matter of the transfer of property in the goods (Cf. Article 4(b)). Nevertheless, the legal consequence is identical for both because, through Article 277 al. 1 UAGCL, the transfer of ownership coincides with the time of the passing of risk,

defective.²⁴³ Simply, “a buyer who fails to examine the goods before taking delivery is liable of negligence.”²⁴⁴

A thorough examination of the OHADA Commercial Act gives the impression that this Act lacks a provision excluding the seller’s liability for non-conforming goods where the buyer have knowledge or could not have been aware of the defect.²⁴⁵ A reading of Articles 258 and 259 UAGCL reveals that a seller in OHADA law, and consequently also in modern Congolese commercial law, is liable for both latent and apparent defects provided the buyer gives notice of the defect in time.²⁴⁶ Acknowledging the seller’s liability even for patent defects has the consequence of creating careless dealers; it puts the seller into an uncomfortable situation. Yet, Article 319 CCO purported to discharge the seller from “patent defects” (*vices apparents*) which the buyer could have discovered for himself/herself.²⁴⁷ Patent defects are defined, in this context, as “inadequacies that the buyer is able to discover at the time of delivery by an attentive inspection.”²⁴⁸ Consequently, a buyer who failed to examine the goods before taking delivery was liable of his/her own negligence.²⁴⁹ But, because Article 319 CCO and its subsequent cases appear to be at variance with Article 258 of the OHADA Commercial Act, it is assumed that the

²⁴³ Translated form of the original French worded as follows: (...) L’acheteur, ayant accepté la livraison du véhicule et l’ayant même déjà exploité, ne peut aujourd’hui revendiquer la propriété d’un autre véhicule quoique cité au contrat. C’est à la livraison qu’il devait vérifier la conformité ou non du véhicule.” See Burkina Faso 18 August 2006 Appeal Court of Ouagadougou (Civil and commercial chamber), Case No. 133/06 *Sankara N M v SOBFI & SCIMI* [<http://www.ohada.com/jurisprudence/ohadata/J-09-49.html>] (accessed 6-4-2013).

²⁴⁴ See Elis 6 December 1913 *Jur Col* 1924 166.

²⁴⁵ See Article 258 UAGCL, *contra* Article 319 CCO and Article 35(3) CISG.

²⁴⁶ The time for notification of the non-conformity is discussed in Section 6.3.5 below.

²⁴⁷ Within the CCO sphere of application, where the seller had informed the buyer of the defect or where the buyer should have discovered that defect by a careful examination, the seller was no longer responsible. For similar reasoning under French law, see Hyland <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html> for whom,

The seller is liable neither for apparent defects nor for those that the buyer is able to discover. (...) French courts require buyers to use reasonable diligence in examining the goods. The diligence required is determined in light of several factors, including the buyer’s technical competence, the nature of the defect, the circumstances surrounding the inspection, and the nature of the goods, etc.

²⁴⁸ See Elis 6 December 1913 *Jur Col* 1924 166; see also Katuala *Code* 185, and Piron 125.

²⁴⁹ See Léo 20 May 1930 *Jur Col* 1932 100.

first has been excluded from the sphere of influence of commercial transactions,²⁵⁰ a situation which is not beneficial to the seller.

Comments

Despite some small differences, the CISG provisions express many of the concepts of non-conformity found in both South African and Congolese laws. All three of the legal systems admit that, where the goods delivered differ with those determined in the contract, there is lack of conformity which results in the seller's liability. The point of departure between them would then be found in the precise moment that responsibility takes legal effect. Under the CISG, it starts at the time when the risk passes from the seller to the buyer. In Congolese law, the starting point is located at the time of taking delivery; whereas under South African law the seller is liable for defects that were in existence at the time the contract was concluded. With regard to the constraints attendant on the international sale of goods, the time of delivery which coincides with the passing of risk seems the most reasonable.

In addition, the CISG and South African law require the non-conformity to be hidden from the buyer; otherwise the seller is released from his/her liability. In contrast to these two legal systems, the seller, in Congolese law, is liable for both latent and patent defects, the only difference being their discovery in time. To recognise that the seller is liable even for a disclosed lack of conformity appears abnormal. In effect, taking delivery of the goods notwithstanding their lack of conformity would be interpreted as their acceptance. If it was otherwise, the buyer should reject them immediately at the time of delivery. In this context, Article 258 UAGCL ruling has introduced a gap in Congolese law, which would be filled by bring Article 319 CCO into effect again, or by adopting a provision similar to Article 35(3) CISG, or a principle closer to South African common law.

²⁵⁰ Cf. Article 10 of the OHADA Treaty relative to the Uniform Acts' mandatory character. Owing to the absence of *travaux préparatoires*, the researcher is in difficulty to provide any justification for such ruling.

Before concluding this section, it is necessary to note that, whether under the CISG or under domestic laws, the issue of the seller's liability for lack of conformity appears mostly to be a question of the burden of proof. In accordance with the well-known general principle of law, i.e. *actori incumbit probatio*, the onus is on the buyer to prove that defects were in existence at the time of taking delivery.²⁵¹ In other words, where defects arose after the risk has fallen to the buyer, the latter must bear the loss. But, if they are discovered shortly afterwards this should constitute a presumption that defects were in existence at the time of sale or of delivery depending on the legal system.²⁵² In such circumstances, the seller will remain liable unless he/she had furnished the real cause of the defects pursuant to the principle *reus in exceptione fit actor*.²⁵³

From this explanation, the burden of proving lack of conformity in the goods appears to be a “vicious circle” which places the buyer in an uncomfortable situation, especially when the time of transfer of risk corresponds to the time of contracting. A

²⁵¹ For the CISG, see France Arbitration Chamber of Paris, Case No. 9926 of 2007 *Chemical Compound case* (the burden of proof is on the party making an allegation); Belgium 16 December 2002 Appellate Court Antwerpen *Steel Plates case* (proof that the non-conformity of goods existed at the moment of delivery) [<http://cisgw3.law.pace.edu/cases/021216b1.html>] (accessed 1-8-2012). See also Bollée 1999-2000 *Pace Review of the CISG* 245 260; Romein <http://cisgw3.law.pace.edu/cisg/biblio/romein.html> §14; Linne 2008 (20) *Pace Int'l L. Rev.* 31-42. For South African law, see *Seboko v Soll* 1949 337 (T); see also Ng'ong'ola 1995 (7) *RADIC* 227 233; *Zulman/Kairinos Sale* 171; *Volpe Sale* 119; *Kerr Sale* 115; *Bradfield/Lehmann Sale* 79. For Congolese law, read Article 197 al. 1 CCO in which a party making an allegation must prove it, with Article 237 al. 1 UAGCL, and Article 265 al. 3 CCO extending the general principles of the law of contract to commercial sales.

²⁵² For the CISG, see Italy 11 December 2008 *Tribunale di Forli* [District Court] *Mitias v Solidea Srl* (defects discovered seven days after delivery); France 5 January 1999 [Supreme Court] *Thermo King v Cigna Insurance* (non-conformity discovered about fifteen days after). But, Germany 11 April 2005 *Landgericht* [District Court] Frankfurt *Ugandan Used Shoes case* (three weeks judged not reasonable) [<http://cisgw3.law.pace.edu/cases/050411g1.html>] (accessed 1-8-2012). For South African law, see *Seboko v Soll* 1949 337(T); *Norton v Johnston* 1930 SR 93; and other similar cases quoted by *Zulman/Kairinos Sale* 171-172; *Kerr Sale* 115. For Congolese law, see *Tricom Kin/Gombe* 11 January 2012 RCE 1967 *Dijimba Sprl v Tractafric Congo Sprl* (defect discovered 358 hours after delivery); see also Cass B 20 April 1959 *Pas I* 773.

²⁵³ For further comments, see Kröll 2011 (3) *BLR* 162-180; Linne 2008 (20) *Pace Int'l L. Rev.* 31-42. For Congolese law see, Article 197 al. 2 for which, a party who claims to be released must substantiate the fact which has ended his/her obligation. Succinctly, both the seller and the buyer bear the burden of proving the conformity depending on their interests. For explanatory cases see Kröll 2011 (3) *BLR* 162 173 Fn32.

similar situation which prevailed under the CCO has been improved by the OHADA Commercial Act by assessing the passing of risk time at a moment different from the conclusion of the contract, viz. the date of taking delivery.

6.2.4.4 Conclusion on the conformity of the goods

It is evident that the UAGCL has updated Congolese commercial law in a number of respects connected to the conformity of goods requirement. It has, among other things, codified the objective standards of quality, quantity, and the description of the goods which were previously dealt with on a case law basis. It has also established the conformity requirement as an independent duty different from that of delivery. Its ruling is, however, not at all perfect. As for any other legal systems, the OHADA Commercial Act provisions dealing with the conformity of the goods have their shortcomings. Among these shortcomings, the most grievous is the maintenance of a double guarantee, the guarantee of conformity and the guarantee against latent defects instead of a single concept encompassing both of them. An additional gap consists of holding the seller liable for patent defects in the same way as for latent defects. Such a ruling seems unreasonable and contrary to the spirit of commercial dealings. The last shortcoming which may be mentioned is the lack of a default rule governing the fitness of goods for particular purposes. In order to fill these gaps, the provisions of the CISG and the principles of South African law are recommended to specify the conformity obligation of the seller.

Parenthetically, though the law has established a number of conformity standards, the goods delivered may still lack conformity. It is then the buyer's duty to inspect them and immediately notify the seller about the deficiency as explained in section 6.3.5 below. Before discussing that, our attention is orientated now towards seller's guaranty against third party claims.

6.2.5 Third-party Rights and Claims Guarantee

6.2.5.1 Introduction

In accordance with Article 30 CISG, the first obligation on the part of the seller consists of delivering the goods sold. This obligation is complemented by the one in the first sentence of Article 41 which requires the goods delivered to be “free from any right or claim of a third party.”²⁵⁴ The second sentence of the same provision declares that where third party rights or claims are based on industrial property or other intellectual property, the seller’s duty is governed by Article 42 CISG. The obligation of the seller to deliver goods which are free from any third party claims as ruled under the CISG is also known within many legal systems.²⁵⁵ That requirement is named in South African law as the *vacua possessio*; it is ruled in a general “warranty against eviction” framework.²⁵⁶ Within the civil law, the same obligation is referred to as the “warranty against dispossession”;²⁵⁷ and under the UAGCL rules as the “guarantee”.²⁵⁸

Compared with other legal systems, however, the CISG appears more detailed. In its field of application, the duty of the seller to guarantee the goods against legal defects covers two domains, viz. the guarantee against third party property rights,

²⁵⁴ For an illustration, see Germany 21 March 2007 Appellate Court Dresden *Stolen Automobile case* [<http://cisgw3.law.pace.edu/cases/070321g1.html>] (accessed 21-8-2012). *A propos* of this, a car sold was seized because it had been stolen. The court found the seller liable of two breaches, the inability to transfer property in the car, and the incapacity to deliver a car free from third party claims.

²⁵⁵ These include, Germany: §§433(1) and 435 BGB; UK: 1979 Sale of Goods Act, s 12; USA: §2-312(1) UCC; Switzerland: Articles 192-196 OR; France and Belgium: Articles 1625 to 1640 CC; Austria §923 ABGB. See Schwenger in Schlechtriem/Schwenger *Commentary* 649. Section 435 of the German BGB states, for example, that, “The thing is free of legal defects if third parties, in relation to the thing, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer.”

²⁵⁶ See Zulman/Kairinos *Sale* 145-154; Kerr *Sale* 179; Hackwill *Sale* 164-177; Volpe *Sale* 97-110; Sharrock *Business* 290-293; Bradfield/Lehmann *Sale* 89-94; Lotz *Sale* 361 374.

²⁵⁷ See, for France and Belgium: Articles 1625 to 1640 CC; and for the DRC: Articles 302 to 317 CCO.

²⁵⁸ See Articles 260 and 261 UAGCL.

and the guarantee against third party intellectual property rights. It is this distinction that is examined in the following paragraphs.

6.2.5.2 Guarantee against third party property rights

The CISG

In general, the seller's duty to deliver goods free from third-party claims consists in guaranteeing that the buyer is secure in his/her possession. As Flechtner has said, "the seller must transfer to the buyer the property in (good title to) the goods, so that the buyer can enjoy the use of what it purchased without interference from another claiming to be the true owner of the goods."²⁵⁹ The only exception admitted in this respect is when the buyer agreed to take the goods despite the existence of third party rights or claims.²⁶⁰ Thus, if it is proved that the buyer had knowledge of third party rights or claims on the goods, but accepted to contract despite their existence, a seller delivering the goods under those conditions has properly performed his/her obligation.²⁶¹ In the words of Kritzer and Eiselen, the requirement for guarantee against third party claims does not also mean that the seller is liable for breach of contract "every time a third person makes a frivolous claim in respect of the goods."²⁶² Instead, the claim must be serious and must intend to deprive the buyer of his/her title to the goods bought.

²⁵⁹ Flechtner Bepress 8-9; see also Etier/Rauda <http://www.cisg.law.pace.edu/cisg/biblio/raudaetier.html> (accessed 21-8-2012). In the *Automobile case*, a German seller and an Italian buyer dealt with a second hand car. After delivery, the car was seized by the Italian police because it had been registered first in Italy and was recorded as stolen. Following the seizure, the car was given back to the first owner. The court inferred that the seller was unable to transfer ownership of the car to the buyer. See Germany 22 August 2002 District Court Freiburg *Automobile case* [<http://cisgw3.law.pace.edu/cases/020822g1.html>] (accessed 21-8-2012).

²⁶⁰ Cf. Article 41 CISG, first sentence, second part. For an illustration, see Russia 21 January 1998 Arbitration proceeding 99/1997 (buyer unaware that the car bought was subject to 'a temporary import regime' while contracting) [<http://cisgw3.law.pace.edu/cases/980121r1.html>] (accessed 21-8-2012).

²⁶¹ See Russia 6 August 2002 Arbitration Court [Appellate Court] for the Western Siberia Circuit *Harvesting Combines case* [<http://cisgw3.law.pace.edu/cases/020806r1.html>] (accessed 24-8-2012); but Russia 21 January 1998 Arbitration proceeding 99/1997.

²⁶² Kritzer/Eiselen *Contract* §89:110 89-220.

South African law

As was commented on earlier, the seller's duty in respect of third party claims is ruled in South African law as a warranty against eviction. One of the leading authorities on the subject is the *Lammers and Lammers v Giovannoni* case.²⁶³ Schreiner JA ruled, in this case, that a seller delivering a property has, among other duties, to "guarantee the buyer in his possession, so that as long as the buyer enjoys *vacua possessio*, (undisturbed possession), he cannot complain that his title is defective."²⁶⁴ The learned judge specified that, "the basic obligation of the seller is to protect the buyer in his possession,"²⁶⁵ meaning to prevent him/her from any intrusion whether on the part of the seller himself/herself or a third person.²⁶⁶

It should be noted that the responsibility of the seller to guarantee the buyer against eviction covers, in the South African law environment, three main obligations. Firstly, the seller must abstain from any act which would tend to disturb the buyer's possession. Secondly, he/she must protect the buyer against any attempts at such dispossession, and undertake his/her defence in any action brought to interfere with the rights of the buyer. Finally, if the seller is unsuccessful in protecting the buyer, the buyer may bring a claim for breach of the contract.²⁶⁷ To use the words of Lehmann, where the buyer is lawfully and permanently evicted, "he may sue the seller *ex empto* for cancellation, return of the purchase price and damages."²⁶⁸ Briefly, where the seller fails to protect the buyer from any disturbance, he/she will be held liable for defects in warranty against eviction.

²⁶³ *Lammers and Lammers v Giovannoni* 1955 (3) SA 385 (A) 390A-B; reproduced in *Koop Sale* 159-172.

²⁶⁴ For comments, see *Kerr Sale* 191; *Sharrock Business* 290-293; *Bradfield/Lehmann Sale* 89; *Lotz Sale* 361 375.

²⁶⁵ For further cases, see *Volpe Sale* 97-110.

²⁶⁶ See *Zulman/Kairinos Sale* 145; *Hackwill Sale* 166.

²⁶⁷ *Ibid.*

²⁶⁸ *Lehmann Sale* 888 901

Congolese law

Article 250 al. 2 UAGCL, which defines the seller's main obligations, requires the seller to supply the buyer with his/her guarantee in addition to the delivery and conformity of the goods. The scope of the guarantee obligation is specified by Articles 260 and 261 UAGCL.²⁶⁹ As far as Article 260 al. 1 is concerned, it sets out the obligation of the seller in relation to the transfer of title in the same words as Article 41 CISG. As for the last of these provisions, the OHADA Commercial Act obliges the seller to “deliver goods which are free from any right or claim” of a third person unless the buyer accepts them in those conditions. With regard to Article 260 al. 1 UAGCL, it compels the seller, in addition, to protect the buyer from any eviction subsequent to his/her own actions.²⁷⁰

The guarantee against third party claims as required by the Uniform Act is in conformity with the civil law requirement, on the side of the seller, to offer “peaceful possession” of the property sold.²⁷¹ In line with that guarantee, the seller is not allowed to sell other peoples' properties. Such is the meaning of Article 276 CCO which declares “null and void the sale of third party's objects”, i.e. objects on which someone other than the seller claims rights. In other words, the seller must own the article sold in order for him/her to transfer ownership in it and, consequently, be able to provide the buyer with peaceful possession, or there is no valid contract of sale. A similar ruling was handed down, in OHADA law jurisdiction, by the Appeal Court of Ouagadougou, in the *Bile Bile v Cooperative Agricole Kakovika* case, in which the court held that a second sale of the same car was not free from third person claims and, therefore, nullified it.²⁷²

²⁶⁹ Compare this to Articles 303 to 317 CCO for details.

²⁷⁰ See Article 260 al. 2 UAGCL similar to Article 305 CCO. Pursuant to Articles 303 and 330 CCO, even when there is no express obligation as to warranty, the seller is legally bound to guarantee the buyer against dispossession which it may suffer in the property sold as a whole or in portion. It is also obliged to protect the buyer against encumbrances alleged on the item sold and for which the latter had no knowledge at the time of the sale. Thus, if the buyer did not know of the third party right on the goods, and that it is disturbed or rightly fears to be disturbed, the buyer may suspend the payment of the price until the eviction ceased.

²⁷¹ Cf. Article 302 CCO.

²⁷² Translated from the original French version ruled as follows:

The second part of Article 276 CCO seems, however, confusing. It states that the sale of someone else's property "may give rise to damages where the buyer did not know that the thing sold belonged to another person." That is to say, if the buyer knew or ought to have known of the rights of other people on the object, the sale would be valid.²⁷³ In this context, if the first owner claims his/her rights thereafter, the seller is no longer liable because, in such a case, the buyer is presumed to have concluded the contract at his/her own risk.²⁷⁴

It is not surprising that parties postpone the transfer of ownership in the goods by virtue of the retention of title clause in order to secure the seller's claim for payment.²⁷⁵ The guarantee against third party claims prevents the seller from selling goods in which he/she has retained title. In accordance with this, as long as the buyer is not found insolvent, the seller cannot retail the goods at the risk of bearing responsibility for breach of the sale. But, if it is proved that the delivery was consistent with the will of parties, the contract is valid.²⁷⁶ In the same way, the seller may contractually exclude or limit his/her liability for third parties claims by virtue of an exclusion of liability clause. Pursuant to Article 261 al. 1 UAGCL, any clause of this kind must be interpreted restrictively. Thus, a seller invoking any clause

Un véhicule vendu n'est pas libre de toute prétention de la part d'un tiers dès lors qu'il avait préalablement été vendu à un tiers et que le vendeur a usé de dol en faisant croire que la vente initiale avait été annulée. Une vente intervenue dans ces conditions est nulle.

See Burkina Faso 6 May 2005 Appeal Court of Ouagadougou (Civil and commercial chamber), Case No. 497 *Bile Bile v Cooperative Agricole Kakovika* [<http://www.ohada.com/jurisprudence/ohadata/J-09-163.html>] (accessed 6-4-2013).

²⁷³ Cf. Article 303 CCO *in fine* which rules about encumbrances not declared at the time of the sale.

²⁷⁴ Cf. Article 306 CCO which discharges the seller if the buyer has knowledge of the risk of dispossession at the time of the sale.

²⁷⁵ See Article 276 UAGCL; see also Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 94 §47.

²⁷⁶ Ruled by the CCJA ((1st chamber) 24 April 2008, Case No. 18 *Dr A v Distribution Pharmaceutique de Cote d'Ivoire SA*, *Recueil de la Jurisprudence* No. 11 January-June 2008 51) that,

La clause de réserve de propriété ne servant en réalité qu'à protéger les droits du créancier qui s'est dessaisi des marchandises, le contrat de vente a été formé, dès lors qu'il est établi que les marchandises ont été livrées conformément à la volonté des parties, et ce, en application de l'Article (...) (276) de l'Acte Uniforme portant sur le droit commercial général.

("The retention of property clause intends to protect the rights of the seller who has delivered the goods. In this sense, the contract of sale is formed, from the moment it is established that the goods have been delivered in accordance with the will of the parties pursuant to Article 276 UAGCL.")

excluding his/her liability for third parties claims bears the onus of proving that the buyer was aware of it and has agreed to it at the time the sale was made.²⁷⁷ If this is not the case, the responsibility of the seller remains intact.

Comments

Under the CISG, South African law, and Congolese law, the seller has the responsibility of delivering goods free from any defects in title, unless the buyer decides on taking delivery under such conditions.²⁷⁸ The point of departure from them is that, if the CISG limits the guarantee to third parties rights, the domestic laws include teething troubles the buyer would suffer as a result of actions of the seller. Thus, the domestic law guarantee is greater than the guarantee against third party claims established by the Convention. In spite of that, what is required by the obligation of guarantee, in any of the three legal systems, is the right to compensation granted to the buyer in case of dispossession by the seller himself/herself or a third person claiming rights to the goods.

6.2.5.3 Guarantee against third party intellectual property rights

The CISG

Pursuant to Article 42 CISG, the seller is obliged to deliver goods which are free from any right or claim of third party based on “industrial property or other intellectual property.” Compared with its counterpart guarantee against defects in title, the requirement to deliver goods free from industrial property rights or claims seems to be less familiar in domestic laws,²⁷⁹ although Kritzer and Eiselen may have

²⁷⁷ Article 261 al. 2 UAGCL; compare with Articles 304 and 303 CCO.

²⁷⁸ See Article 260 al 1 UAGCL; compared to Article 41 CISG and South African common law.

²⁷⁹ See Rauda/Etier 2000 (4) 1 VJ 30 32 Fn7; Beline 2007 (7) *University of Pittsburgh Journal of Technology Law & Policy* 6; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 648; but Kritzer/Eiselen *Contract* §89:127 89-235. Some of the legal systems which have established an express intellectual property infringement include, USA: §2-312(3) UCC; Germany: §435 BGB; and Spain: Article 1474 CC. Insofar as the USA is concerned, §2-312(3) UCC states that, “A seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like (...).”

an opposite view. According to them, “It appears to be the general rule in most, if not all, legal systems that the seller is obligated to deliver goods free from any right or claim of any third party based on industrial or intellectual property (...).”²⁸⁰

Concerning its meaning, the CISG is silent on what the “intellectual property right” is. In the context of the World Intellectual Property Organisation (WIPO), however, that expression includes any rights “resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”²⁸¹ Transposed into the field of the international sale of goods, intellectual property rights may be understood, in the words of Rauda and Etier, as “All rights protecting an intellectual activity which (sic) a pecuniary value, which are attached to a good and which are able to infringe the use or the resale of the merchandise.”²⁸² Beline clarifies this by saying that industrial and intellectual property rights that would be infringed should be limited “to copyright, trademark, and patents”.²⁸³

With regard to its implementation, the seller’s liability for third party intellectual property rights is subject to the condition that the seller had knowledge of the existence of such rights or claims the time the contract is concluded.²⁸⁴ As a number of scholars and courts have observed, “a seller who sells goods that are encumbered by third-party patent, copyright or trademark rights, and who knew or could have been aware of said fact”²⁸⁵ breaches the obligation to deliver goods that

²⁸⁰ Kritzer/Eiselen *Contract* §89:127 89-235.

²⁸¹ See Article 2(viii) of the Convention establishing the World Intellectual Property Organisation, Stockholm 14 July 1967, as revised on 28 September 1979. http://www.wipo.int/export/sites/www/treaties/en/convention/pdf/trtdocs_wo029.pdf (accessed 31-8-2012). See also, Beline 2007 (7) *University of Pittsburgh Journal of Technology Law & Policy* 6 Fn24; Rauda/Etier 2000 (4) 1 *VJ* 30 32 Fn24; and Etier/Rauda <http://www.cisg.law.pace.edu/cisg/biblio/raudaetier.html> Fn11.

²⁸² Rauda/Etier 2000 (4) 1 *VJ* 30 36.

²⁸³ Beline 2007 (7) *University of Pittsburgh Journal of Technology Law & Policy* 6; see also Etier/Rauda <http://www.cisg.law.pace.edu/cisg/biblio/raudaetier.html>; Rauda/Etier 2000 (4) 1 *VJ* 30 36 Fn22. The latter authors include in the definition of “intellectual property right”, the exploitation of illegally obtained know-how.

²⁸⁴ Article 42(1) CISG; for comments, see Zeller 2011 (15) 2 *VJ* 289.

²⁸⁵ Butler *Practical Guide* 4-15; Zeller 2011 (15) 2 *VJ* 289 295; see also France 13 November 2002 Appellate Court Colmar *Printed Textile Fabric case* (professional dealer presumed knowing of the existence of the right protected) [<http://cisgw3.law.pace.edu/cases/021113f1.html>] (accessed 24-8-2012).

are free from any intellectual property right. Alternatively, if the buyer knew or ought to have known of the right or claim considered, the seller is freed from his/her responsibility.²⁸⁶ Likewise, the buyer loses the right to rely on legal defects where he/she fails to notify the seller of the infringement within a reasonable time.²⁸⁷ As was ruled in the German *Automobile case*, the notion of “reasonable time” constitutes a matter of fact which varies from case to case.²⁸⁸

South African law

South African law gives the impression of lacking an express provision dealing with the responsibility of the seller with respect to goods affected by the intellectual property rights or claims of third parties, except for consumer sales contracts.²⁸⁹ While establishing a comparison between the law of sale of Southern African countries and the CISG, Ng’ong’ola overlooked the matter. Ng’ong’ola quickly noted that the rules under Articles 41 and 42 CISG resemble the South African sales law “warranty against the eviction,”²⁹⁰ without any other distinction between defects in title and defects in industrial property rights. Oosthuizen, also, does not shed much light on this aspect. In the same way as the first author had done, Oosthuizen limited her argument to the fact that, in South African law the seller “is (...) required to make

²⁸⁶ See Article 42(2) (a) which excludes the seller’s liability in cases where “at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim.” It was ruled by the French Supreme Court that a professional buyer cannot be unaware of the counterfeit in the goods sold, namely “shoes with counterfeit ribbons”. See France 19 March 2002 Supreme Court *Footwear case* [<http://cisgw3.law.pace.edu/cases/020319f1.html>] (accessed 24-8-2012).

²⁸⁷ In Article 43(1) CISG ruling, the notice must be given in “a few days” following the date of infringement for it to produce legal effect. See also Germany 21 March 2007 Appellate Court Dresden *Stolen automobile case*.

²⁸⁸ Germany 11 January 2006 Supreme Court *Automobile case* (a two-month notice judged unreasonable) [<http://cisgw3.law.pace.edu/cases/060111g1.html>] (accessed 21-8-2012).

²⁸⁹ See s 24(2) CPA according to which,

(2) A person must not -

(a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description; or
 (b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.

²⁹⁰ Ng’ong’ola 1995 (7) *RADIC* 227 231.

available the thing sold free from all third party claims involving an immediate or a future right of possession,”²⁹¹ without further comment.

In a consumer sales law environment, however, s 24(2) CPA prohibits applying knowingly to goods a “trade description that is likely to mislead the consumer”. The concept “trade description” is defined in s 1 CPA as including, *inter alia*, “patent, privilege, and copyright”, viz. industrial and intellectual property rights.²⁹² This means that, in every transaction, the seller must make sure that he/she has legal right or authority from the right owner to sell the goods. By forbidding to the seller the application of marks to goods which may deceive the other party, the law requires the seller, by implication, to protect the buyer against third party intellectual property rights and claims. It follows from such a reading that s 24(2) CPA has supplemented the common law on the liability of the seller in respect of the issue of third party intellectual property rights and claims. Its ruling is recommended for international sales contracts.

Congolese law

The situation of Congolese law with regard to the seller’s warranty against a third party’s intellectual property rights and claims seems similar to the South African law situation prior to the CPA. As was the case in South Africa, the DRC does not have a specific provision regulating the duty of the seller to deliver goods free from third party’s intellectual rights or claims. The OHADA Commercial Act is silent on the subject as well. Although its Article 260 al. 1 reproduces literally the first sentence of Article 41 CISG, the Commercial Act lacks the equivalent of the second sentence of Article 41 and Article 42 CISG dealing with the warranty against intellectual property rights. Article 260 al. 2 and Article 261 UAGCL, which would play this role, rather regulate the obligation of the seller to abstain from troubling the buyer in his/her possession, and provide a guidance for the interpretation of clauses limiting the seller’s liability in respect of defects in title.

²⁹¹ Oosthuizen Rights 92.

²⁹² Section 1 CPA v° “trade description” (a) (vi).

The absence of an express provision dealing with the guarantee against intellectual property rights does not imply, however, the total exclusion of seller's liability for the infringement of those kinds of rights. Confirmation of this is the fact that Article 1 al. 1 of the Land Law lists "intellectual property rights" among the three patrimonial rights, in addition to obligations and ownership.²⁹³ Furthermore, intellectual property rights are ruled by the Industrial Property Law No. 82-001 of 7 January 1982.²⁹⁴ In accordance with this law, whoever possesses a patent or a trade mark, or any intellectual property rights, has an exclusive right to use them for a period of fifteen to twenty years²⁹⁵ or ten years²⁹⁶ respectively. If goods covered by such property rights are sold unbeknown to the holder, it is implied that the proper owner is free to claim his/her rights from the buyer who, in turn, must require a guarantee from the seller. But, given that there is no special legal regime regarding them, the seller's guarantee against intellectual property rights should be considered, in the DRC, as part of the general obligation for defects in title.

Comments

The CISG's duty in respect of third party intellectual property rights and claims does not have a specific equivalent in either South African law or Congolese law. It is regulated by domestic laws, in the context of a general warranty against eviction. Such an attitude is in conformity with the opinion of Schwenger according to which, "Most domestic legal systems (...) classify the seller's warranty of freedom from industrial or intellectual rights as part of general liability for defects in title."²⁹⁷ This situation appears not to be favourable to the seller owing to the specificity of intellectual rights. For more certainty, the adoption of a specific rule similar to Article 42 CISG is needed in both South African and Congolese sales laws.

²⁹³ See Article 1 al. 1 of Law No. 73-021 of 21 July 1973 as currently modified.

²⁹⁴ Industrial Property Law No. 82-001 of 7 January 1982; for comments, see Masamba *Affaires* 167-209.

²⁹⁵ Article 36 of the Industrial Property Law.

²⁹⁶ Article 137 of the Industrial Property Law.

²⁹⁷ Schwenger in Schlechtriem/Schwenger *Commentary* 661 §1.

6.2.6 Conclusion on the Obligations of the Seller

By means of a contract of sale of goods, the seller is obliged not only to deliver the goods but also to deliver the accurate goods, at the true place, and at the correct time. If he/she fails to do so, the seller will bear responsibility either for a lack of delivery or for a lack of conformity. In this regard, the CISG has indirectly influenced domestic laws, South African law *via* the 2008 CPA, and Congolese law through the provisions of the UAGCL. As far as Congolese law is concerned, the OHADA Commercial Act has codified requirements like those of quality, quantity, description, and packaging which were formerly based on case law. The same Act has, likewise, introduced into the Congolese legal system a specific documentary obligation, established an autonomous conformity obligation distinct from the delivery, and clarified the obligation of the seller to deliver goods free from the claims of third parties.

In spite of such an improvement, Congolese law still has some shortcomings in respect of the seller's obligations. Among those gaps, the most important are: the maintenance of a double warranty, the guarantee of conformity, and the guarantee against latent defects, instead of a single concept including both concepts; recognising the seller's liability for both patent and latent defects; the absence of a default rule governing the fitness of goods to particular purposes; and the absence of an express duty relating to the obligation of the seller with regard to intellectual property rights. All of these gaps are likely to undermine the security and certainty of commercial dealings in the DRC. For more certainty, the provisions of the CISG are recommended.

After having discussed the obligations of the seller, the following section analyses the obligations of the buyer resulting from the contract.

6.3 The Obligations of the Buyer

6.3.1 Introduction

This section aims to demonstrate that, though the obligations of the buyer seem alike in almost all legal systems, there are some differences among them. In Congolese law, for instance, the delay for giving notice is shorter than it is in the CISG and South African law which may cause prejudice to the buyer. Thus, after a brief summary of what the main obligations of the buyer are, the discussion will turn around the payment of the price, taking delivery, and the examination of goods and notice for lack of conformity. An assessment of the modern Congolese law will follow step by step.

6.3.2 General Principles

The obligations of the buyer are regulated under the CISG in Articles 53 to 60.²⁹⁸ Article 53 abridges those obligations by obliging the buyer to take delivery of the goods bought and to pay for them as required by the contract or the Convention. A CISG buyer has, in principle, two main obligations: paying the price and taking delivery of the goods.²⁹⁹ Both obligations are subject to the contractual agreement of the parties so that the parties may modify or limit them at will. In addition to the obligations above, the buyer also has the responsibility of examining the goods

²⁹⁸ It is noted that seller's remedies for breach of the contract by the buyer (Articles 61 to 65) are ruled in the same heading as the obligations of the buyer *stricto sensu*. Those remedies are beyond the field of this study.

²⁹⁹ See Mohs in Schlechtriem/Schwenzer *Commentary* 792 §1; Kritzer/Eiselen *Contract* §91:6 91-12; for case law, see Slovak Republic 11 October 2010 District Court in Michalovce [<http://cisgw3.law.pace.edu/cases/101011k1.html>]; Germany 11 November 2009 District Court Stuttgart *Packaging Machinery* case [<http://cisgw3.law.pace.edu/cases/091111g1.html>]; Serbia 18 June 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce *One-day old female chicken* case [<http://cisgw3.law.pace.edu/cases/080618sb.html>].

delivered in order to verify whether they conform to the goods ordered, and, if necessary, to give the seller timely notice for lack of conformity.³⁰⁰

The obligations of the buyer as ruled by the CISG resemble those stipulated under domestic law. As for South African law, there are authorities that claim that the most important duty on the part of the buyer consists in paying the price.³⁰¹ Domestic law does not seem to attach much consideration to the obligation of taking delivery. But, owing to the fact that the buyer purchases goods with the purpose of acquiring ownership of them, it is reasonable that the payment of the price goes together with “the receipt of the goods”.³⁰²

Turning to Congolese law, similar obligations are found in Article 262 UAGCL which specifies that, “The buyer must pay the price for the goods and take delivery of them.”³⁰³ In addition to the payment of the price and taking delivery of the goods, the buyer is also required to inspect the goods as soon as possible for him/her to be certain that they conform to those ordered so that he/she may notify the seller of any defects³⁰⁴ in them should it be necessary.

6.3.3 The Payment of the Price

6.3.3.1 General remarks

As a general rule, the first obligation of the buyer consists of paying the price. This obligation is considered in the CISG, South African law, and Congolese law as one

³⁰⁰ See Articles 38 and 39 CISG.

³⁰¹ See *Zulman/Kairinos Sale* 101; *Hackhill Sale* 199; *Bradfield/Lehmann Sale* 98; *Sharrock Business* 300; *Volpe Sale* 139; *Lotz Sale* 361 369. For authorities establishing that obligation, see *Kerr Sale* 221 Fn1.

³⁰² See *Eiselen in Scott Commerce* 155; see also *Hackhill Sale* 199; *Bradfield/Lehmann Sale* 94; *Zulman/ Kairinos Sale* 108; *Volpe Sale* 139.

³⁰³ Compare this to Article 327 CCO; see also *Tricom Kin/Gombe* 18 October 2011 RCE 2012 *LT Cimpex Sprl v Biz Africa Sprl*; *Goma* 13 February 2008 RCA 1670 *Kambale Kisambio v Kamaliro Paluku* (unreported decisions).

³⁰⁴ See Articles 270, 258 and Article 259 UAGCL.

of the main obligations of the buyer.³⁰⁵ The obligations of the buyer appear to be relatively simple compared with those imposed on the seller.³⁰⁶ This is justified, according to Sevon, by the fact that “in most cases the important issues relating to the price and its payment are almost invariably dealt with in the contract.”³⁰⁷

As is the case for the obligations of the seller, the obligations of the buyer are, first of all, a matter of the contractual agreement of the parties. Parties are free to determine the outline of the obligation of payment for the goods within the limits established by the law. But, as for other contractual issues, the seller and buyer may fail to determine those obligations. In such circumstances, the principles provided by the law will become involved as default rules. The payment of the price poses, in practice, a triple question relating to the calculation of the price, the place of payment, and the due time for payment. These issues are discussed in the following sections.

6.3.3.2 Assessment of the price

The CISG

The CISG has two provisions which relate to the assessment of the price. These are Article 55 ruling the issue of open price terms,³⁰⁸ and Article 56 dealing with the price set by weight. There are many methods according to which the purchase price

³⁰⁵ For the CISG, see Article 53 CISG; Mohs in Schlechtriem/Schwenzer *Commentary* 793; Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 797; Kritzer/Eiselen *Contract* §91:6 91-12; Sevon *Obligations* 203 207; Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html>; Gabriel 2005/2006 (25) *JL & Com* 273; UNCITRAL *Digest* 252 §1; see also Serbia 18 June 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce *One-day old female chicken* case. For South African law, see Kerr *Sale* 221; Zulman/Kairinos *Sale* 101; Hackhill *Sale* 199; Volpe *Sale* 139; Bradfield/Lehmann *Sale* 98; Sharrock *Business* 300; Lotz *Sale* 361 369. For Congolese law; see Article 262 UAGCL; and Tricot 2011 (281) *Droit et Patrimoine* 75 79. See also Article 327 CCO which reads, “The main obligation of the buyer is to pay the price on the day and at the place fixed by the sale.”

³⁰⁶ Under the CISG, the obligations of the buyer are regulated in eight articles out of 101 CISG provisions; under the UAGCL, they are regulated in thirteen articles (Articles 262 to 274); and under the CCO, in eight sections (Articles 327 to 334) *contra* 47 for the seller (Articles 279-326).

³⁰⁷ See Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html>; Sevon *Obligations* 203 204; see also Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 797; Gabriel 2005/2006 (25) *JL & Com* 273; and Osuna-Gonzalez 2005/2006 (25) *JL & Com* 299.

³⁰⁸ For the issue of unstated price terms, see Section 5.2.3.2 above.

can be assessed, including the price set by pieces, units or weight, depending on what way suits the parties. Where parties have opted for the last way, the question is whether goods should be measured at net weight or at gross weight. In response, the CISG gives, through Article 56, preference to the net weight. As stated by this provision “If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.”

As a rule, the buyer must pay the price fixed contractually.³⁰⁹ In the absence of an express or an implicit clause in the contract determining the price, parties are presumed to refer to the price generally charged in the trade concerned,³¹⁰ or to the one fixed by reference to trade usages and the course of dealings.³¹¹ It is only where doubt persists on the way the price should be evaluated that the residual rule in Article 56 will apply. Simply, Article 56 plays an explanatory role to fill the gaps left in the contract.³¹² The CISG does not, however, contain any provision dealing with the currency of payment so that the currency determined in the contract might prevail.³¹³

South African law

For a sales contract to be perfect, parties must reach agreement on the price or let it be determinable.³¹⁴ In the words of Coetzee, “if it is possible to determine the price by means of an *easy calculation* or if a third party is to determine the price, the requirement is met on determination of the price.”³¹⁵ Lehmann complements this by stating that, for a contract to be one of sale, there must be a price “*fixed in definite sum*, or capable of being fixed by the use of external standard without further

³⁰⁹ Cf. Article 53 which requires the buyer to pay the price (...) “as required in the contract (...).”

³¹⁰ See Article 55 CISG *in fine*.

³¹¹ See Article 9; see also Gabriel 2005/2006 (25) *JL & Com* 273 277.

³¹² See Sevon Obligations 203 209; Mohs in Schlechtriem/Schwenzer *Commentary* 824; Kritzer/Eiselen *Contract* §91:36 91-53; UNCITRAL *Digest* 272 §1.

³¹³ For solutions proposed in the case, see Mohs in Schlechtriem/Schwenzer *Commentary* 794-797; Butler/ Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 806-808.

³¹⁴ See Section 3.4.4 above.

³¹⁵ Coetzee *Incoterms* 87.

reference to the parties themselves;³¹⁶ e.g. *by counting, weighing, or measuring the things sold,*³¹⁷ or the seller's usual price,³¹⁸ or the current market price (...) (italics added).”³¹⁹

It follows from Lehmann's statement, and cases from which the author found support, that the price may be assessed either by reference to goods as a stock, or their weight, measure, or a unit. It is clear then that, there are instances where the goods have to be counted, weighed, or measured before the price can be assessed. Those kinds of sales are called sales *ad mensuram* or *ad quantitatem*, opposed to sales *ad corpus* in which goods are sold together for a single stipulated price.³²⁰ That is to say, contracting parties may freely adopt one or another method of evaluating the price as they see fit. The common law seems silent on the residual rule in a situation whether parties have opted for a price set by weight. With regard to the method of payment, nevertheless, it is required that payment be made in the national legal tender,³²¹ “unless otherwise agreed.”³²² Thus, as South African Rand³²³ has legal tender in the country, “the seller may refuse payment by cheque, bill of exchange, postal order, or money order.”³²⁴

³¹⁶ Cf. *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 574.

³¹⁷ *Kotze v Frenkel & Co* 1929 AD 418.

³¹⁸ See *Machanick v Simon* 1920 CPD 333 338; *R v Kramer* 1948 (3) SA 48 (N); *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) 420; *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T) 668; and *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C).

³¹⁹ See *Lehmann Sale* 888 891; finding counsel in *R v Pearson* 1942 EDL 117; *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) 420.

³²⁰ See *Kerr Sale* 30 and 72-75; see also Coetzee Incoterms 87 Fn360 and 361.

³²¹ For what constitutes legal tender in South Africa, see s 17 of the South African Reserve Bank Act 90 of 1989; see also *Exdev (Pty) Ltd v Yeoman Properties 1007 (Pty) Ltd* [2008] 2 All SA 223 (SCA).

³²² It is acknowledged that, when parties agree on payment in a foreign currency, the latter can be converted into South African currency. In such circumstances, the rate of exchange at which conversion is to be made is that which prevails at the time of payment. See *Barry Colne & Co (Transvaal) Ltd v Jackson's Ltd* 1922 CPD 372; *Bassa Ltd v East Asiatic (SA) Co Ltd* 1932 NP 386 391; *Elgin Brown & Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) 672F-674H; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 776J-777B; see also cases quoted by Lotz Sale 361 370 Fn59.

³²³ See s 15 of South African Reserve Bank Act 90 of 1989.

³²⁴ See Lotz Sale 361 370. But, Trollip J, in *Esterhuyse v Selection Cartage (Pty) Ltd* 1965 (1) SA 360 (W), who, in 1965, emphasised the importance of payments by cheque in commercial

Congolese law

The buyer must pay for the goods because payment constitutes the counterpart of the delivery obligation fulfilled by the seller. He/she is normally obliged to pay the price mutually fixed in the contract.³²⁵ If the buyer defaults on making the payment, the seller is not bound to deliver the goods even for any previous debt overdue.³²⁶ With regard to its assessment, case law states that the price should be fixed either according to the block of goods or by reference to each piece of them.³²⁷ Articles 266 and 267 CCO allude also to contracts for which goods are not sold in block, but by weight, number, or measure.³²⁸

Following from these provisions, it may be implied that where goods are sold by weight, number, or measure, the price is also calculated according to the weight, the unit (piece), or the measure of those goods. Where parties have preferred to determine their price by reference to the weight, the Commercial Act recommends that price to be calculated net weight in case of doubt.³²⁹ Additionally, if the contract is silent with regard to the determination of the price, the market price should

contracts. As Trollip said, “(...) in an ordinary commercial contract, in the absence of anything signifying the contrary, only some slight indication in the contract or evidence would generally suffice for inferring or implying that payment of the creditor can be effected by cheque, because that is now a widely used and recognised medium of payment in such transactions.” Ruling confirmed in *Vena and Another v Vena and Others* (2461/2008) [2009] ZAECPEHC 26; 2010 (2) SA 248 (ECP) (28 May 2009). Up until recently, payment by cheque was considered as the most popular method of payment. These days, owing to fraud and cost implications it entails, payment by cheque has been supplemented by newer modes of payment, i.e. the use of electronic funds transfer and credit cards. These means of payment are currently preferred because of their rapidity and the security they provide to sellers and buyers. See Eiselen in Scott *Commerce* 156.

³²⁵ Cf. First sentence of Article 263 al. 1 UAGCL. The price may also be determined according to commercial dealings or trade usages. It was ruled, in this respect, that a buyer who receives invoices submitted to him without protest recognises himself to be the debtor. See L’shi 1 December 1970 *RJC* 1971 No. 1 33.

³²⁶ Cf. Cameroun 19 January 2004 Appeal Court of the Littoral (Douala), Case No. 45/REF *SFID-PFI v Uchegbusi S* [<http://www.ohada.com/jurisprudence/ohadata/J-06-188.html>] (accessed 6-4-2013).

³²⁷ See Burkina Faso 13 June 2007 Grande Inst Ouagadougou, Case No. 83/2007 *Société de Gestion du Patrimoine Ferroviaire du Burkina (SOPAFER) v I GUIGMA & R Ouedraogo Sabane* [<http://www.ohada.com/jurisprudence/ohadata/J-06-39.html>] (accessed 20- 3-2013).

³²⁸ As stated by Article 266 CCO, “Where goods are not sold in block but by weight, number, or measure, a sale is not complete, in that the things sold are at the risk of the seller until they have been weighed, counted, or measured (...).”

³²⁹ Article 265 UAGCL; compare with Article 56 CISG.

indisputably apply.³³⁰ As it is observed, in Congolese law, contracting parties have many means of evaluating the purchase price. In all cases, the price stated in the contract is supposed to be stipulated out of charge; which means that the buyer bears any costs relating to the payment.³³¹

As is for the CISG, the Commercial Act does not allude to the currency of payment.³³² Where the contract is concluded in, or is to be performed, in the DRC, it is assumed that there the price will normally be paid in Congolese national tender, i.e. the “Franc Congolais” (FC),³³³ except where parties have stipulated to the contrary.³³⁴ In practice, however, parties prefer to stipulate payment in foreign currencies (mainly in American dollars and Euros) because of the FC frequent devaluation.³³⁵ In compliance with Article 2 al.1 ERCA, these kinds of transactions may be paid in any foreign currencies allowed by the BCC.

³³⁰ See Article 263 al. 2 UAGCL; see also L’shi 13 December 1966 *RJC* No. 1 54; L’shi 1 December 1970 *RJC* 1971 No. 1 33; and comments in Section 2.4.4.

³³¹ Cf. Sentence two of Article 263 al. 1 UAGCL; compared to Articles 269 and 146 CCO which charge all costs regarding the sale to the buyer or the debtor in general.

³³² Santos and Toe (*Commercial* 404) argue that such a silence is justified by the fact that almost all OHADA countries belong to a same monetary zone, i.e. the zone CFA, the DRC being the exception. Article 6/13 of the DUACL proposes that where a monetary obligation is expressed in a currency different from that of the place for payment, the latter may be used to extinguish the obligation. The exceptions to this are where the currency in question is not convertible or if parties did not provide a possibility of replacement.

³³³ See Article 1 of the New Monetary Unit Law-Decree No. 80 of 17 June 1998 (*JORDC* Special No. of 30 June 1998); and Article 170 of the Constitution which recognise the FC as unique national legal tender.

³³⁴ Generally, private agreements must be stipulated in FC. (See the first sentence of Article 1 of the Operations in National and Foreign Currencies Law-Decree No. 4/2001 of 31 January 2001; Article 2 al.3, first sentence, of the Central Bank (BCC) Exchange Regulation Control Act (ERCA) of 22 February 2001; Article 18 of the BCC Law-Ordinance No. 93-002 of 28 September 1993, as amended by Law No. 5-2002 of 7 May 2002 (*JORDC* Special No. of 22 May 2002 58)). See also CSJ 24 February 2006 RC 2193 *Mpumba Kyalo v BDEGL BA* 2004-2009 TI 214, as interpreted in Goma 10 January 2007 RCA 1531 *Mpumba Kyalo v BDEGL* (unreported decision), which declared null and void a contract stipulated in the Belgian Franc. (This decision is not beyond criticism). Because Congolese residents are also granted the freedom of holding foreign currencies (Cf. Article 1 ERCA), however, contracts may legally be stated in a foreign currency in line with the methods established by the BCC. (See Article 1, second sentence, of the Law-Decree No. 4/2001, and second sentence of Article 2 al.3 ERCA).

³³⁵ This is confirmed by the words of the Congolese Minister of Finance and the Governor of BCC which state that around 90 per cent of banking deposits are made in US Dollars, and about 95 per cent of credit granted by commercial banks is paid in the same currency. See AFP http://www.jeunefrique.com/actu/20130403T162_128_Z20130403T162124Z/ (accessed 5-4-

Comments

The CISG, South African law, and Congolese law all have formulated as principle that the price is set in the contract and that parties are free to determine it as they want, selecting from a number of methods determined by the law. In particular, the principles relating to the assessment of the price reveal that the UAGCL has largely been influenced by the CISG. As is for the Convention, the Commercial Act provides the “net weight” as the default way of determining the price where goods are charged with reference to their weight. Similarly, both instruments are silent as regards the currency of payment, which is consequently determined by virtue of the applicable domestic law, unless otherwise agreed. It has been observed, however, that, though Congolese law prescribes the FC as currency of payment, parties prefer foreign currencies in contrast to the situation in South Africa. On the issue of costs entailed by payment, the Uniform Act appears clearer than the CISG as it specifies that the price contractually fixed is stipulated exclusive of costs. But, as a whole, modern

2013); Unknown <http://radiookapi.net/economie/2012/09/11/rdc-le-gouvernement-sengage-la-dedollarisation-des-transactions-monetaires/> (accessed 12-9-2012). There are, moreover, a number of cases in which even damages in litigation and judicial costs are stipulated in US dollars, Euros or in Special Drawing Rights (SDR) (in French Droits de Tirages Speciaux – DTS), instead of the FC, or “indexed” to those foreign currencies. For reference to the SDR, see Kin/Gombe 28 June 2012 RCA 28 817 *Air France v Maluna* (760.00 SDR indexed in line with the Euro); Tricom Kin/Gombe 21 December 2010 RCE 1457 (1,350.00USD indexed to 1,000.00 SDR). For stipulation in US dollar or its equivalent in FC, see among others, Goma 13 February 2008 RCA 1 532 *Kambale Isemimbi v Mugabo Nkeka*; Goma 12 November 2008 RCA 1 581 *Mapendo Dieudonné & others v Tours Hotels Sarl & others*; Goma 23 March 2011 RCA 1 604 *Rwabahenda Desiré v Maisha Bosco*; Goma 21 May 2008 RCA 1 654 *Matongo bin Katunga v Kasole Mwanda & Amissi Famba*; Goma 7 May 2008 RCA 1 666bis *Muhindo Sirisombola v Paluku Kasambili*; Kin/Gombe 24 May 2012 RCA 28 402 *Celtel-Congo v Kombozi Kitenge*; Kin/Gombe 28 June 2012 RCA 28 410 *GSA Co v Alain Grevesy*; Kin/Gombe 13 September 2012 RCA 28 875 *Kabamba Kanyinda v Celtel-Congo*; Kin/Gombe 26 September 2012 RCA 29 071 *Bolongi Bomponge v Cilu Sarl*; Tricom Kin/Gombe 27 December 2010 RCE 1 573 *Jacob’s Sprl v Kabongo Development Company*; Tricom Kin/Gombe 29 May 2012 RCE 2 155 *Siforco Sprl v Fret in Construct Sprl*; Tricom Kin/Matete 19 October 2011 RCE 485 *Basakwawu v Cinat Sarl*; Tricom Kin/Matete 12 September 2012 RCE 640/766 *EBAG Sprl Agency v NRJ Sprl*; Tricom Kin/Matete 7 November 2012 RCE 748 *Richard Wynne v Sobaco Sprl*; Tricom L’shi 20 January 2010 RAC 213 *Mme Brigitte Kaloko & others v Groupe Luigi*; Tricom L’shi 23 December 2009 RAC 214 *FID Consult Sprl & Jean Moran v La Gecamine*; and Tricom L’shi 2 February 2009 RAC 228 *Oni Congo Trading Sprl v Demco Sprl* (unreported decisions).

Congolese law is consistent with the CISG and South African law on the assessment of the price subject.

6.3.3.3 Place of payment

The CISG

Rules relating to the place of payment are established by Article 57.³³⁶ As for other contractual issues, this provision relies on the party autonomy principle in determining the place of payment. It is not uncommon, however, that parties fail to indicate the place where payment is to be performed. In those circumstances, the provisions of Article 57 will fill the gap as evidenced by the phrase “if the buyer is not bound to pay the price at any other particular place”. In detail, the provision under consideration provides a double default place for payment. Pursuant to Article 57(1)(a), first, where the buyer is not bound to pay at a specific place, the seller’s place of business plays the role of place of payment. This ruling was expressly implemented by the Austrian Supreme Court in the *Gasoline and Gas Oil* case as follows:

Failing an agreement to the contrary, the interpretative rule of Article 57(1)(a) CISG determines that the buyer was bound to pay the price at the seller’s place of business in Hungary (the seller’s place of business needs to be established under Article 10 CISG). The purchase price is a debt payable at the creditor’s place of business.³³⁷

³³⁶ Article 57 states,

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) At the seller’s place of business; or

(b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

³³⁷ Austria 22 October 2001 Bundesgericht Supreme Court *Gasoline and Gas Oil case* [<http://cisgw3.law.pace.edu/cases/011022a3.html>]; see also Kritzer/Eiselen *Contract* §91:43 91-63; Sevon *Obligations* 203 212; Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html>; Gabriel 2005/2006 (25) *JL & Com* 273 277.

In addition to payment being made at the seller's place of business, Article 57(1)(b) regulates the place for payment subject to an exchange of goods or documents. In accordance with this provision, where payment is made against the handing over of goods or documents, the place where they are handed over amounts to the place of payment.

In principle, the buyer bears any costs and risks relative to the payment of the price. But, if extra costs are due to the change of the place of payment by the seller, they are to his/her charge. That is the meaning of the second paragraph of Article 57 which obliges the seller to bear any increases in the expenses that are the consequence of a change of the place of payment after the conclusion of the contract.

South African law

As a rule, the buyer must pay the price at the place expressly or implicitly determined by the parties in the contract.³³⁸ The place of payment may also be determined by the course of dealing or trade usages.³³⁹ When parties fail to reach agreement on the place, or where there are no elements from which it could be implied, the question is whether which of the seller or the buyer has to seek out the other party for payment. In response, Ng'ong'ola is unclear about how to settle the issue. The learned author declares that, "it has not always been very certain that a debtor has a duty to seek out his creditor before he has been placed *in mora* by a due demand."³⁴⁰ Differently from him, Bradfield and Lehmann explain clearly that,

(...) the residual obligation is, in the case of a cash sale, to pay the price where the property sold is delivered. In the case of a credit sale, the buyer must tender payment to the seller to avoid breach of the contract, and such payment must be at any place that is convenient to the parties and where the buyer may lawfully perform in terms of the contract. In the latter case that will usually be the place where the contract was concluded.³⁴¹

³³⁸ See Hackwill *Sale* 203; Zulman/Kairinos *Sale* 104; see also Bradfield/Lehmann *Sale* 99 Fn734; taking support on *Van Loggenberg v Sachs* 1940 WLD 253; and *Venter v Venter* 1949 (1) SA 768 (A) 778.

³³⁹ Hackwill *Sale* 203; Bradfield/Lehmann *Sale* 99.

³⁴⁰ See Ng'ong'ola 1995 (7) *RADIC* 227 236.

³⁴¹ Bradfield/Lehmann *Sale* 99.

It is important to note that in the earlier cases, it was the creditor's duty, meaning the seller, to seek out the buyer for payment.³⁴² In modern business practices, however, it is rather the buyer who must look for the seller for payment. This innovative approach was formulated by Ramsbottom J in the *Goldfields Confectionery and Bakery v Norman Adam* case as follows:

The common practice in the business world is for the debtor to go to the creditor; he either takes his money or cheque himself, or he sends it by messenger, without any consideration of the question whether the debtor is obliged to pay in that way or whether he has the right to refuse to pay until the creditor calls or sends for his money. It is the ordinary practice of business, of which the court can take notice, for creditors to send out statements of account and for debtors to pay those accounts by taking or sending money to their creditors.³⁴³

Following from the authorities above, it is clear that, except in cases where the place of payment is dealt with in the contract, there are two supplementary places where the buyer may fulfil his/her payment obligation. These are the place where the contract was concluded, and the place where the contract is performed. As was discussed in section 6.2.2.2 above, most of the time the place of formation of the contract and its place of performance coincide. Succinctly, the place of performance corresponds to the place of delivery, meaning the seller's place of business.³⁴⁴ Therefore, the main residual place of payment is seller's place of business, or alternatively his/her residence.

Congolese law

The place of delivery is regulated in Article 266 UAGCL which states that the payment of the price is fulfilled either at seller's place of operations or at the place of delivery if the price is paid in cash, or if delivery is performed against the exchange of documents. Usually, the place of delivery is determined in the contract. That was the meaning of Article 327 CCO which obliged the buyer to pay the price "on the

³⁴² For an illustration, see *Venter v Venter* 1949 (1) SA 768 (A) 778.

³⁴³ *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T) 769-770.

³⁴⁴ See *Zulman/Kairinos Sale* 104; *Hackwill Sale* 77; and CPA s 19(2) (b).

day and *at the place fixed by the sale* (emphasis added).³⁴⁵ It is only where the contract is silent as regards the place for payment that the default rules in Article 266 UAGCL will be applied.

In detail, Article 266 of the OHADA Commercial Act designates a double place for payment, the place where the seller has his/her head office, and the place of delivery. With regard to the first residual rule, it requires the buyer to pay at the seller's centre of operations. By so stating, Article 266 is contrary to the civil code rule on payment in Article 145 CCO.³⁴⁶ Pursuant to that rule, the buyer was supposed to pay at the place where the contract was concluded or at least at his/her own place of business (or domicile).³⁴⁷ In other words, within the CCO's ambience, the seller had the obligation of seeking out the buyer before payment. This rule was known *via* a general principle of law worded as, "La dette est quérable et non portable."³⁴⁸ With the UAGCL, commercial debts are no longer *querable*, but *portable*, means payable at the seller's place of business. Because commercial debts are *transportable*, it is an obligation of the buyer to seek out the seller for payment, but not the inverse, or he/she will bear responsibility for breach of contract.

Regarding the second residual rule, it recommends that the price be paid at the place of delivery.³⁴⁹ A comparable hypothesis may occur in two circumstances, namely where it is a cash sale, and payment is due at the time of delivery, or if delivery is subject to the handing over of documents. Article 266 does not require the buyer to pay the price at his/her own place of business, but at the place of delivery

³⁴⁵ Read this with the first sentence of Article 263 UAGCL; and Article 145 al.1, first sentence, CCO.

³⁴⁶ As stipulated by the second sentence of Article 145 al. 1 CCO, and the second paragraph of the same provision,

Payment must be made in the place provided by the agreement.

Where a place is not designated, payment, if it is for a thing certain and determined, must be made at the place where the thing forming the object of the obligation was at the time of that obligation.

Apart from the two cases above, payment must be made at the domicile of the debtor.

³⁴⁷ Cf. Article 145 al. 3 CCO.

³⁴⁸ ("The debt is collectible, but not portable.")

³⁴⁹ Article 266, second part UAGCL; compare with Article 328 CCO for which, where the contract is silent as for the place of payment, "the buyer must pay at the place (...) where delivery is to be made."

of the goods. That is to say, if parties have agreed on a specific place for delivery, the same agreement would produce legal effects with respect to the place for payment without the need of a special clause on the latter issue. If there is no agreement as to a particular place for delivery, however, the place where the contract was concluded, which generally corresponds to the seller's place of business will prevail, unless when goods are manufactured or stored elsewhere.³⁵⁰ In a situation of the kind, the place of manufacture or the place of storage will amount to the place of payment. Likewise, if the contract involves the handing over of goods to a carrier, the place where goods are handed over would play the role of place of payment.³⁵¹ The same rule applies also in cases where the sale is performed step-by-step and delivery is made against exchange of documents.

Comments

The place of payment is fixed by the parties in the contract. Such being the principle admitted by all of the three legal systems being considered, rules provided by Article 57 CISG, Article 266 UAGCL, and South African common law are residual rules used to supplement the failure of the parties. Compared to South African and Congolese laws, the CISG posits a clear ruling by choosing the seller's place of business as the main default place for payment, except where payment depends on the exchange of documents. With regard to South African law, it selects the place of the contract or its place of performance, while Congolese law points at the seller's centre of operations or the place for delivery. After interpretation, it becomes clear that the places selected by both of South African and Congolese laws converge at the seller's place of business. Subsequent to that interpretation, the seller's place of business appears to be the main default place of payment in all of the three legal systems being studied. As regards the DRC, in particular, the rules relating to the place of payment have restructured civil law principles so that, currently, the buyer bears the responsibility of seeking out the seller, instead of the seller coming to the

³⁵⁰ Cf. Article 251 UAGCL relating to the place for delivery.

³⁵¹ Cf. Article 252 al. 1 UAGCL.

buyer for payment. Commercial debts “portability” appears to be a good progress as it safeguards the seller against any risk related to the currency of payment or the transfer of funds.

6.3.3.4 Time for payment

The CISG

The time for payment is ruled by Articles 58 and 59. The basic principle in these provisions is that the time for payment is freely determined by parties in the contract as is the case for the place of payment. This is implied from the use of the expression “if the buyer is not bound to pay at any specific time”.³⁵² In addition, these provisions highlight the fact that goods should be exchanged for payment of the price, and *vice versa*. Thus, as stated by Sevon, “The seller is not obliged to extend credit to the buyer and the buyer is not required to pay until he receives the goods or documents controlling their disposition.”³⁵³ More specifically, Article 58(1) provides that where parties did not reach agreement on the time of payment, the price is paid at the time of the delivery of the goods or of the documents controlling the goods.³⁵⁴ In such a case, the seller may subordinate the handing over of goods and documents to the payment.³⁵⁵

³⁵² See Article 58(1) CISG. Article 59 specifies that the buyer must pay the price on the “date fixed by or determinable from the contract” and the CISG without the need for any request or compliance with any formality on the part of the seller. For application, see Slovak Republic 11 October 2010 District Court in Michalovce [<http://cisgw3.law.pace.edu/cases/101011k1.html>]; Serbia 18 June 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce *One-day old female chicken* case.

³⁵³ Cf. Second part of Article 58(1) CISG; Sevon Obligations 203 215; Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html> 335; see also Kuoppala <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html>; and Kritzer/ Eiselen Contract §91:52 91-78.

³⁵⁴ According to Article 58(1) CISG, in the absence of an agreement on the time of payment, the buyer must pay the price “when the seller places either the goods or the documents controlling their disposition at the buyer’s disposal in accordance with the contract” or the CISG.

³⁵⁵ See Article 58(1), second sentence, and particularly Article 58(2) which reads: “If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.”

As the drafters of the CISG-AC Opinion No. 11 explain, the expression “documents controlling their disposition” has to be understood as referring to “any document (electronic or paper) that entitles the buyer to take possession of the goods or, once in the hands of the buyer, establishes that the seller no longer has the right to control disposition of the goods.”³⁵⁶ The concept “documents controlling the goods” refers, in other words, to situations where goods are delivered only against documents as it is for CIF sales.³⁵⁷ As was mentioned in section 6.2.3.4, these types of documents include negotiable bills of lading, straight bills of lading, the consignor’s copy of air waybill, and ship’s delivery orders.³⁵⁸

It is important to note that the responsibility of the buyer to pay the price is not limited to a mere handing over of money. Rather, in keeping with Article 54, it includes “taking such steps and complying with such formalities as may be required under the contract or any (...) (governing) law to enable payment (...)” at the appointed time, without need for any request from the seller.³⁵⁹ Scholars and case law admit that the relevance of Article 54 consists of ensuring that the buyer complies with government procedures together with commercial or banking requirements.³⁶⁰ Accordingly, preliminary actions that the buyer may perform in connection with the payment include the opening of a letter of credit, negotiating banking facilities, or accepting a bill of exchange.³⁶¹ Mohs puts it that,

The most secure way to arrange for the payment of the purchase price is by implementing a documentary credit. (...) Such payment arrangements are usually incorporated into an international sales contract by using the payment clause ‘L/C’

³⁵⁶ CISG-AC Opinion No. 11 §5.

³⁵⁷ See Sevon Obligations 203 216; Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html>.

³⁵⁸ For a full list of documents controlling goods, see Davies’ comments on CISG-AC Opinion No. 11 §6.

³⁵⁹ Read Article 54 with Article 59 CISG.

³⁶⁰ See Osuna-Gonzalez 2005/2006 (25) *JL & Com* 299-323; Mohs in Schlechtriem/Schwenzer *Commentary* 811; Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 803. For case law, see Russia 17 October 1995 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry; CLOUT case No. 142 [<http://cisgw3.law.pace.edu/cases/951017r1.html>] (accessed 17-5-2013). In this case, the buyer was held liable because he failed to give an order to his bank without ensuring that payment would be performed in a convertible currency.

³⁶¹ See UN Secretariat Commentary as reported by Kritzer/Eiselen *Contract* §91:16 91-21.

or 'letter of credit'. These clauses are frequently used in international trade because they present one of the most secured ways of executing an international payment.³⁶²

If parties have reached agreement on payment by letter of credit, therefore, the failure of the buyer to procure one as stipulated in the contract may amount to a breach of the sale.³⁶³ In the same way, if the buyer delays payment because of banking formalities, he/she may bear responsibility for late payment.

South African law

Within South African sales law, the buyer must pay the price at the time agreed in the contract.³⁶⁴ If there is a failure to determine a date in the contract, payment is due at the time of delivery.³⁶⁵ As was claimed while discussing the issue of the place of payment, the payment is not due immediately after the conclusion of the contract, but when the goods are delivered. Where parties have agreed on a specific time for delivery, the same agreement will govern the time of payment. Simply, the time of payment takes place simultaneously with the time of delivery of the goods. In the particular case of payment, however, the law distinguishes between cash sales and credit sales in determining the time for payment.³⁶⁶ In cases of cash sales, payment should take place concomitantly with delivery,³⁶⁷ while for credit sales, payment must intervene within a reasonable time, meaning the last day for which credit was given.³⁶⁸ In either case, the buyer is permitted to refuse to pay the price if he/she is

³⁶² Mohs in Schlechtriem/Schwenzer *Commentary* 800.

³⁶³ See Australia 17 November 2000 Supreme Court of Queensland *Downs Investments v Perwaja Steel case*; see, for comments, Gabriel 2005/2006 (25) *JL & Com* 273 274; see also Kritzer/Eiselen *Contract* §91:16 91-22.

³⁶⁴ Hackwill *Sale* 202; Zulman/Kairinos *Sale* 102.

³⁶⁵ See Eiselen in Scott *Commerce* 157; Zulman/Kairinos *Sale* 102; Kerr *Sale* 22; Hackwill *Sale* 202.

³⁶⁶ For details, see Kerr *Sale* 222-223; Zulman/Kairinos *Sale* 102-104; Bradfield/Lehmann *Sale* 100.

³⁶⁷ There is an authority that, "In cash sales, payment should be made on delivery, and the purchaser cannot claim delivery unless he tenders the price. Where delivery has been made by the seller, the purchaser should pay immediately, i.e. within a reasonable interval." (Voet 46.3.12 - Gane's translation Vol VII 106-107); see also Lehmann *Sale* 888 904.

³⁶⁸ See Bradfield/Lehmann *Sale* 100; taking support on *Celliers v Papenfus and Rooth* 1904 TS 73 79; *Nel v Cloete* 1972(2) SA 150 (A) 158E-F; *Ver Elst v Sabena Belgian World Airlines* 1983 (3) SA 637 (A) 644D-E.

not granted an opportunity to inspect the goods to ascertain whether they comply with the contract.³⁶⁹ South African law seems not to have ruled expressly about payment against the exchange of documents.

Congolese law

Comparable to the place for payment, the time payment is due is normally regulated in the contract. On this subject, Article 268 of the OHADA Commercial Act duplicates Article 59 CISG. As for the latter, Article 268 UAGCL obliges the buyer to pay the price “at the date agreed upon”³⁷⁰ without necessarily subordinating it to any request or formalities taken by the seller. It is only where parties fail to determine the due time that the provisions in Article 267 will apply. It should immediately be noted that, unlike Article 58(1) CISG, Article 267 UAGCL rules only on the due time for sales involving carriage. The right for the seller to retain the goods until total payment is, rather, regulated under the Section dealing with the obligation of taking of delivery.³⁷¹

Through Article 271 al. 1 UAGCL, the times for delivery, payment, and the time for taking delivery all coincide. All three events occur simultaneously and are mutually dependent. Such a ruling is beneficial for both parties on the grounds that the seller is allowed to keep the goods up until full payment is made and the buyer pay only when he/she has received delivery.³⁷² In order to protect the buyer from taking delivery of defective goods, parties are allowed to subordinate the payment to a preliminary examination of the goods by the buyer.³⁷³ This situation has, however, the risk of delaying the time of payment. As has been mentioned earlier, with regard

³⁶⁹ Hackwill *Sale* 204.

³⁷⁰ Compare this with Article 328 CCO which specifies that if “nothing has been fixed (...) at the time of the sale, the buyer must pay at the time when delivery is to be made”; see, for an illustration, *Tricom Kin/Gombe* 18 October 2011 *Cimpex Sprl v Biz Africa Sprl*.

³⁷¹ See Article 271 al. 1 UAGCL according to which, “When payment is due on the day of delivery and that the buyer delays taking delivery of the goods, or does not pay for them, the seller, if he has the goods with him or under his control, is expected to keep them until they have been fully paid.”

³⁷² See *Santos/Toe Commercial* 405.

³⁷³ Cf. Article 267 al. 2 UAGCL.

to sales involving carriage, the seller fulfils his/her delivery duty by handing the goods to a carrier.³⁷⁴ Because in similar situation the seller may suffer from a buyer's insolvency, Article 267 al. 1 UAGCL authorises him/her to retain the goods or the document controlling their disposition until definitive payment.³⁷⁵ With the combination of the two rules, there is now a balance between the obligation of delivery on the part of the seller and the payment of the price on the part of the buyer.

Comments

The time for payment is one of the most important moments of the performance of buyer's duties. This period is generally stated in the contract. In the context of the CISG, where the contract is silent regarding the time for payment, the time when the goods or the documents controlling the disposition of the goods are delivered corresponds to the time of payment. Though domestic laws do not rule expressly about documents, they have also adopted the day of delivery as the default time for payment. The provisions of the Commercial Act dealing with the time of delivery, in particular, have largely been influenced by their comparable CISG provisions. They read like duplicates. All of them weigh the rights of the parties so that the delivery and payment times are concomitant, unless it is otherwise stipulated in the contract. So, in the same way as the buyer may subject payment to the examination of the goods, the seller may also retain the goods and documents controlling those goods up to the day they have been paid for in full. Given these similarities, the UAGCL puts Congolese law in line with the Vienna Convention on the subject of the time for delivery. Compared to South African law, however, Congolese law does not distinguish between sales for cash and credit sales with regard to the time of payment. The ruling adopted under South African law is, therefore, recommended to improve Congolese law in this respect.

³⁷⁴ Cf. Article 252 UAGCL.

³⁷⁵ The Commercial Act invokes "document" in the singular, while the CISG speaks of "documents" in the plural. It is deemed that the UAGCL alludes to the "negotiable bill of lading" which is the most used carriage document.

6.3.4 Taking Delivery of the Goods

The CISG

The obligation of the buyer regarding the taking delivery of the goods is ruled under Article 60.³⁷⁶ According to this provision, the buyer's obligation to take delivery is twofold; it consists in facilitating the delivery and taking over the goods. In detail, Article 60(a) obliges the buyer to perform "all the acts which could reasonably be expected of him in order to enable the seller to make delivery."³⁷⁷ Many scholars have argued in this regard that Article 60(a) means that where the buyer has, for instance, to collaborate in carriage arrangements, the taking delivery obligation "covers the duty to enter into a contract of carriage."³⁷⁸ Such cooperation is needed in order to enable the seller to fulfil his/her delivery obligation by handing the goods over to the carrier for transmission to the buyer.³⁷⁹ Similarly, if the seller has to deliver at the buyer's place of business, the buyer is obliged to cooperate with the seller by keeping facilities ready for the delivery.³⁸⁰

In addition to the cooperation in the process of delivery, the buyer must also take over the goods delivered.³⁸¹ This obligation covers the primary responsibility of the buyer to take control of the goods physically. As Guerin has said, the buyer's obligation to take over the goods "is of importance where the contract calls for the

³⁷⁶ As stated by Article 60,

The buyer's obligation to take delivery consists:

- (a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) In taking over the goods.

³⁷⁷ Mohs in Schlechtriem/Schwenzer *Commentary* 863; see also Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 850; compare this with Russia 24 January 2002 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitral Award *Iron Products case*, CISG-Online 88 (Pace).

³⁷⁸ Sevon Rights 203 232; Sevon <http://www.cisg.law.pace.edu/cisg/biblio/sevon.html> 232; Gabriel 2005/2006 (25) *JL & Com* 273 282; Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc; Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 851.

³⁷⁹ Cf. Articles 31(a) and 32(1) CISG.

³⁸⁰ Butler/Harindranath in Kröll/Mistelis/Viscasillas *UN Convention* 850-851.

³⁸¹ See Articles 60(b) CISG.

seller to make delivery by placing the goods at the buyer's disposal at a particular place or at the seller's place of business."³⁸² In such a case, the buyer must physically remove the goods from that place in order to fulfil his/her obligation to take delivery. Failing to do so in a reasonable time may amount to a fundamental breach leading the seller to annul the sale.³⁸³

South African law

A second obligation of the buyer, under South African law, in addition to the payment of the price, consists in taking delivery of the item sold. In this regard, there are authorities that state that, "The buyer must take delivery of the thing sold, and, if necessary, remove it, upon due tender of the article at the contract time and place."³⁸⁴ In other words, as is the case under the CISG, in South African law, the buyer is obliged to receive the goods at the time and place contractually agreed on. It is acknowledged that where the contract is silent with regard to the time and place of receipt of the goods, "the buyer must collect them from the seller within a reasonable period of time at the buyer's (sic) place of business or where the goods were situated at the time of the contract."³⁸⁵ Because taking delivery is one of the main obligations of the buyer, a buyer who neglects to do so in the time agreed falls into *mora creditoris*.³⁸⁶ The essence of the concept *mora creditoris* consists of making the

³⁸² Guerin http://www.spu.ac.th/.../TCCC_V_CISG_parties_obligations_by%20Naiyana_Guerin.doc; see also Article 31(b) and (c) CISG.

³⁸³ See Articles 61 to 64; see also Kritzer/Eiselen *Contract* §91:76 91-107; taking support on Switzerland 12 December 2002 Kantonsgericht [District Court] *Zug Methyl tertiary-butyl ether case* [<http://cisgw3.law.pace.edu/cases/021212s1.html>]; China 31 May 1999 CIETAC Arbitration proceeding *Indium Ingot case* [<http://cisgw3.law.pace.edu/cases/990531c1.html>]; Germany 24 April 1990 Amtsgericht [Lower Court] Oldenburg in Holstein *Fashion textiles case* [<http://cisgw3.law.pace.edu/cases/900424g1.html>].

³⁸⁴ See Volpe *Sale* 139; Eiselen in Scott *Commerce* 157; Hackhill *Sale* 207; see also authorities quoted by Zulman/Kairinos *Sale* 108-109.

³⁸⁵ Eiselen in Scott *Commerce* 157; see also Zulman/Kairinos *Sale* 108; Bradfield/Lehmann *Sale* 94.

³⁸⁶ See Volpe *Sale* 139. The word *mora* refers to a period of time offered to one party to perform his/her contractual obligations. It means, in other words, "a wrongful failure to perform timeously". See Mulligan 1952 (69) *SALJ* 276; quoted by Kerr *Contract* 615.

buyer responsible for failing to cooperate with the seller in order to enable him/her to achieve his/her delivery obligation.³⁸⁷

Congolese law

The obligation of the buyer to take delivery of the goods is regulated by Articles 269 to 274 UAGCL which mix the taking of delivery obligation with rules relating to the examination of the goods. Article 269 has tried to adapt to the ruling in Article 60 CISG. As is for the latter, the Commercial Act imposes on the buyer the obligation to take delivery by performing acts which enable the seller to deliver the goods and then taking over the goods. Requiring the buyer to perform acts enabling the seller to achieve his/her delivery duty implies, on the part of the buyer, collaboration with the seller. Thus, after the seller has put goods at the buyer's disposal, either at his/her own place of business or by handing them to a carrier, the buyer must take over the goods. The failure to remove the goods in time amounts to a breach of the sale.³⁸⁸

It is possible that the buyer, who has taken delivery of the goods, intends to reject them. In such a situation, the buyer is obliged to take such steps to preserve the goods as are reasonable in the circumstances. The buyer is authorised to retain the goods until he/she has been reimbursed by the seller for his/her expenses.³⁸⁹ If, furthermore, the seller takes time to return the rejected goods, the buyer may sell them after having notified the seller of that intention.³⁹⁰

Comments

The duty of taking delivery of the goods is similarly ruled in the CISG, South African law, and Congolese law. In all of them, taking delivery is coupled with a requirement

³⁸⁷ Cf. *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) 848 G; *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA); for comments, see *Kerr Contract* 616; *Christie/Bradfield Contract* 533; *Van der Merwe et al Contract* 321.

³⁸⁸ Cf. Article 334 CCO according to which, for the sale of commodities and movable things, "the avoidance of the sale takes place automatically, and without notice, in the seller's benefit, after the expiry of the period agreed upon *for the removal* (of the goods) (emphasis and parenthesis added)."

³⁸⁹ See Article 272 al. 1 UAGCL; compare with Article 86 CISG.

³⁹⁰ Article 274 UAGCL; compare with Article 88 CISG.

for parties to collaborate in order to bring the sale to a good completion. The failure of the buyer to comply with these requirements constitutes a breach of the sale. The point of departure between the CISG and the Commercial Act is that, if the CISG regulates the examination of the goods under the framework of the obligations of the seller, modern Congolese law considers the examination of the goods as one of the obligations of the buyer upon taking delivery. It then regulates it under the section regulating the obligation of the buyer to take delivery. In spite of its location, however, the legal consequences are alike for both legal systems.

Notwithstanding the incisive comment above, in all of the legal systems being considered, the buyer is primarily bound to pay the price at the time and place conjointly agreed or established by the law and to take delivery of the goods. In addition to these classical obligations, the buyer must also examine the goods in order to determine a potential lack of conformity in them.

6.3.5 Examination of the Goods and Notice for Non-conformity

The CISG

The obligations of the buyer with regard to the conformity of the goods are regulated under Articles 38 and 39 CISG. In accordance with these provisions, the buyer must inspect the goods delivered and notify the seller of possible non-conformities in the time required if he/she is not to incur the liability of losing his/her remedies.³⁹¹ In detail, Article 38(1) lays down a general principle that the buyer must examine the goods, or cause them to be examined, “within as short a period as is practicable in

³⁹¹ Article 38(1) and Article 39(1) state respectively,

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

For comments, see Fiser-Sobot 2011 (3) *BLR* 196; Andersen 2005 (9) *VJ* 17; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 557-626; Schwenger in Schlechtriem/Schwenger *Commentary* 607-642.

the circumstances.” The second paragraph of the same provision postpones the examination time up to the final destination of the goods in cases of contracts involving carriage. This exception also applies where goods have to be redirected in transit, or dispatched without reasonable opportunity for examination.³⁹²

According to commentators and case law, Article 38 is prefatory to Article 39, for which “if sufficient and timely notice has not been given, the buyer cannot rely on any non-conformity of the goods, and has no remedies available to him.”³⁹³ Thus, it is only cases where the seller either knew of, or could not have been unaware of, the lack of conformity³⁹⁴ and cases in which the buyer has a reasonable excuse for

³⁹² Article 38(2) & (3) CISG; for application, see Russia 24 January 2000 Arbitration proceeding 54/1999 (postponement examination until arrival at the port of destination considered as CISG’s general principle of fair dealing) [<http://cisgw3.law.pace.edu/cases/000124r1.html>] (accessed 21-8-2012). But, German *Ugandan Used Shoes case* whereby the fact that the buyer’s place of business was located elsewhere from the shipment harbour did not constitute sufficient presumption of redispach of the goods; see criticism by Flechtner *Bepress* 1 18.

³⁹³ See Andersen 2005 (9) *VJ* 17; Kuoppala <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html>; Guerin <http://www.spu.ac.th/.../TCCC V CISG parties obligations by%20Naiyana Guerin.doc>; Butler Guide 4-40. For case law, see Italy 11 December 2008 *Tribunale di Forlì* [District Court] *Mitias v Solidea Srl* (inspection made at the time of delivery, defects proved by pictures and notice given within seven days). It was held by a German District Court that, where the lack of conformity consists of excess delivery of different kinds of goods, a notice stating merely the value of the excess is insufficient. See Germany 5 December 2006 District Court Köln *Plastic Faceplates for Mobile Telephones case*.

As a whole, Germanic legal systems have adopted a short period of time (notice to be given without undue delay, i.e. three to five days); Anglo-American legal systems have opted for a long period (reasonable time, i.e. up to four years). With regard to French legal systems countries, they have adopted a middle period (brief delay). Italy (60 days), Portugal (eight days); Latino American countries (one month to one year), and OHADA states (one month for disclosed defects, and one year for hidden defects) are amongst civil law countries with a precise period of time for giving notice. For an overview on the period within which notice must be given in different legal systems, see Schwenger in Schlechtriem/Schwenger *Commentary* 624; Schwenger 2009 (19) 1 *Pace Int’l L. Rev.* 103 105-106; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 749; Kruisinga *Non-Conformity* 76-88; for Latino American countries, see Munoz *Contracts* 523; and for OHADA countries, see Articles 258 and 259 UAGCL.

³⁹⁴ See Article 40 CISG. For an illustration, see Sweden 5 June 1998 Stockholm Chamber of Commerce (Arbitration Award) *Beijing Light Automobile Co v Connell* (seller must have been aware of defects) [<http://cisgw3.law.pace.edu/cases/980605s5.html>]; Germany 12 October 1995 District Court Trier *Wine case* (seller could not be unaware that wine was watered) [<http://cisgw3.law.pace.edu/cases/951012g1.html>]; Germany 5 April 1995 District Court Landshut *Sport Clothing case* (seller admitted knowing of the non-conformity in the clothes) [<http://cisgw3.law.pace.edu/cases/950405g1.html>]; and ICC Arbitration Case No. 5713 of 1989 (seller knew or could not be unaware of non-conformity) [<http://cisgw3.law.pace.edu/cases/895713i1.html>] (all accessed 1-8-2012).

his/her failure to give a timely notice that are exempted from such a loss.³⁹⁵ The guarantee of period is, nevertheless, not unlimited. Pursuant to Article 39(2), the buyer has the duty to notify the seller of the defects “at latest in a period of two years” from the time of delivery; otherwise it loses once and for all the right to rely on lack of conformity remedies.³⁹⁶

South African law

Ng’ong’ola is tentative on the question of whether or not South African law prescribes “an express” duty to examine and give notice of defects in the item sold. As stated by him, although the importance of the examination of the thing sold and notice of possible latent defects is nowhere denied, “Some authorities equivocate as to whether such a duty exists.”³⁹⁷ Despite such hesitancy, it is indisputable that, as in all other legal systems, a seller, under South African law, must deliver goods free from any defect, whether latent or patent.³⁹⁸ If, in contrast, he/she delivers defective goods, the seller bears the responsibility for lack of conformity. For the buyer to discover deficiencies in the goods after delivery, he/she must have examined them or caused them to be inspected.

One may find an illustration of the buyer’s obligation to inspect the goods in the words of Ramsbottom J formulated in the *Lakier v Hager* case. In this case, Ramsbottom J said,

³⁹⁵ See Article 44 CISG. Canellas clarifies this by saying that the relevance of Article 44 is “to avoid the unfair total loss of buyer’s remedies, (i.e. reducing the price or claiming damages), when an examination of the goods and notice has been carried out within a reasonable period of time.” See Canellas 2005/2006 (25) *JL & Com* 261 264; see also Andersen 2005 (9) *VJ* 17 20; Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 559.

³⁹⁶ See China 30 March 1999 CIETAC Arbitration proceeding *Flanges case* [<http://cisgw3.law.pace.edu/cases/990330c2.html>] (accessed 1-8-2012). It was ruled in this case that Article 40 does not apply beyond the two-year cut-off period provided by Article 39(2) CISG. But, the Swedish *Beijing Light Automobile Co* case in which, the Article 39(2) cut-off period is temperate; see comments by Andersen 2005 (9) *VJ* 17 19.

³⁹⁷ Ng’ong’ola 1995 (7) *RADIC* 227 234; finding advice in *Scharzer v John Roderics Motors Ltd* 1940 OPD 170 179. In this case, it was admitted that the buyer was not bound to inspect new items. The question was whether the situation was similar for pre-owned items; the Court answered positively.

³⁹⁸ Cf. Section 6.2.4 above.

(...) The man is buying a very old car, and he must give it proper inspection. If he wishes to rely on defects existing at the time of the sale which are latent then, I think, he must show that he gave the car a proper inspection, and a proper inspection involves examining, at any rate, the external part of the car, whether that is underneath or on top.³⁹⁹

Although the *Lakier v Hager* case involved an “old car”, it may be implied that at the time goods are delivered to the buyer he/she must examine them carefully. Such a requirement is justified by the fact that a buyer who fails to inspect the goods “may not be in a position to appreciate the existence of patent defects, and he takes the risk of being considered as having accepted the goods with their obvious, discoverable defects.”⁴⁰⁰ It has already been mentioned that the seller is generally responsible only for latent defects, meaning those defects which would not be apparent upon inspection by an ordinary reasonable person. As for patent defects, the seller is not responsible because the buyer is supposed to have concluded the contract knowingly.

The discovery of latent defects in the property sold provides the buyer with a double remedy. He/she may both return the thing sold and have the price repaid to him, or keep the thing sold and have a part of the price returned to him. These two remedies are commonly referred to as “the *aedilitian* remedies”.⁴⁰¹ The *aedilitian* remedies consist of two distinctive actions, the “redhibitory action” (*actio redhibitoria*), which purports to rescind the sale and claim refund of the price if already paid, and the *actio quanti minoris* which aims to reduce the price proportionally to the actual value of the goods.⁴⁰² With regard to their implementation, the *actio redhibitoria* can be used if the buyer believes that the defect has impaired the thing so that a reasonable person would not have paid for it

³⁹⁹ *Lakier v Hager* 1958 (4) SA 180 (T) 184; see also Kerr *Sale* 140-141.

⁴⁰⁰ Ng'ong'ola 1995 (7) *RADIC* 227 234; see, in the same sense, Hackwill *Sale* 88 and 134.

⁴⁰¹ See Kerr *Sale* 106; Bradfield/Lehmann *Sale* 80.

⁴⁰² For further comments, see Zulman/Kairinos *Sale* 163-208; Kerr *Sale* 106-155; Volpe *Sale* 124-132; Bradfield/Lehmann *Sale* 80-85; Sharrock *Business* 296-299; Lehmann *Sale* 888 899; compare with Articles 44 and 50 CISG. Of course, parties may agree that the seller will not be liable for latent defects in the article sold. A clause of this kind is called a “*Voetstoots* clause”. *Voetstoots* clauses are excluded from contracts governed by the National Credit Act 34 of 2005; and their effects are also limited for consumer contracts. See Sharrock *Business* 297; Christie/Bradfield *Contract* 165-167.

if he/she had known of the defect. In contrast, the *actio quanti minoris* is used as an alternative where the thing sold is not completely defective so that the buyer prefers to adjust the price and keep the contract in effect.⁴⁰³ The degree of the responsibility of the seller in respect of redhibitory actions varies depending on whether or not he/she knew of the defects. In the first case, the buyer may claim damages in addition to the price, whereas, in the second case, only the price paid should be claimed or reduced.⁴⁰⁴

The actions available to the buyer in terms of *aedilician* remedies are not perpetual. A buyer who has discovered latent defects in the goods, but has taken time to seek for the *aedilician* remedy, is expected to have waived his/her rights to that remedy.⁴⁰⁵ Yet, scholars were hesitant on the real duration of the notification period in cases of latent defects.⁴⁰⁶ Currently, there are grounds for keeping a three-year period of time as the time limit for giving notice of latent defects as long as Parliament has not provided otherwise.⁴⁰⁷ This period runs from the time the buyer acquired, or should have acquired by exercise of reasonable care, knowledge of the defect in the thing sold.⁴⁰⁸ If the buyer fails to notify the seller of the latent defects in time, he/she loses the right to rely on *aedilician* remedies.

Congolese law

The requirement for the examination of goods is regulated, in the DRC, by Article 270 UAGCL which reproduces word by word Article 38 CISG. Compared to the latter provision, the first sentence of Article 270 al. 1 of the Commercial Act requires

⁴⁰³ Cf. Eiselen in Scott *Commerce* 162-163.

⁴⁰⁴ See *Krooner v Hess & Co* 1919 AD 204; compare with Article 40 CISG.

⁴⁰⁵ See *Goldblatt v Sweeny* 1918 CPD 320; see also *Vorster Bros v Louw* 1910 TPD 1099.

⁴⁰⁶ According to Ng'ong'ola (1995 (7) *RADIC* 227 234), for instance, in 1969 that period *was set at three years* (emphasis added). For Lotz (Sale 361 382), "Until 30 November 1970 the *actiones redhibitoria* and *quanti minoris* were subject to a shorter prescription period (of one year) (...)."

⁴⁰⁷ See s 11(d) of the Prescription Act 68 of 1969, entered into effect on the 1st of December 1970. See also Van Niekerk/Schulze *Trade* 97; Sharrock *Business* 705; Lotz Sale 361 383. Section 11(d) of the Prescription Act 68 of 1969 states that all debts for which there is no a specific period of prescription are prescribed by three years, except where Parliament has ruled otherwise. For the definition of the concept "debt" in the Act's understanding, see Christie/Bradfield *Contract* 501.

⁴⁰⁸ s 12(3) of the Prescription Act.

the buyer to look at the goods or cause them to be inspected as soon as possible after taking delivery. Such being the general principle, Article 270 al. 2 accepts the examination to be postponed until the arrival of the goods at their destination only for sales involving carriage, and for goods redirected or redispached.

The examination duty as ruled by the OHADA Commercial Act is different from the one which was in force in the previous law particularly in connection with the place and time of examination and the time limit for giving notice of non-conformity. As regards the place and the time of performance of the obligation of examination, there was authority that the inspection was to be performed at the time and the place of delivery, viz. immediately after the conclusion of the contract.⁴⁰⁹ One should bear in mind that, until recently, the place and time of delivery corresponded in the DRC to the place and time of the formation of the contract. Nowadays, such concomitance has been judged inconsistent with the complexity of modern international transactions so that situations where the buyer collects the goods himself/herself are becoming more and more rare.⁴¹⁰ Conscious of such an imperative, a number of cases delayed the inspection time limit until the arrival at the destination of the goods in some circumstances.⁴¹¹ That was the case for sales where the buyer was not able to inspect the goods or cause them to be inspected,⁴¹² or if the buyer was not informed of the date of delivery.⁴¹³ In addition, taking delivery

⁴⁰⁹ See First Inst Léo 5 March 1941 *Rev Jur* 1941 155, in *Répertoire* 135; and Article 264 CCO relating to the immediate enforceability of sales contracts.

⁴¹⁰ Cf. Schlechtriem in Gaston/Smit *Sales* §6.02 6-10; Flechtner *Honnold's Uniform Law* 313.

⁴¹¹ See First Inst Léo 5 March 1941 *Rev Jur* 1941 155; compared to Article 38(2) & (3) CISG.

⁴¹² There are authorities that state that the principle according to which goods must be examined at the moment and place of delivery has no effect if it was impossible for the buyer to inspect the goods before shipment. See Comm Brux 26 April 1951 *Pas* III 1953 29; Elis 16 August 1949 *RJCB* 1950 120; Liège 16 November 1948 *RJCB* 1950 117; see also Katuala *Code* 185; Piron 125.

⁴¹³ As ruled by the Lower Court of Kinshasa,

As a rule, the inspection of the goods is performed at the moment and the place of delivery. But, when the seller, in spite of the purchaser's express demand, let him unaware of the date of delivery, sends the goods and prevents him from examining the goods by himself or by third party, (...) the examination is delayed until the receipt of the goods at the place of destination. See First Inst Léo 5 March 1941 *Rev Jur* 1941 155; in *Répertoire* 135.

of the goods *per se* does not suffice to attest their approval by the buyer.⁴¹⁴ There are, nevertheless, grounds for presuming that the buyer has approved the goods if he/she receives them without complaining about non-conformity after a brief delay.⁴¹⁵

As far as the notification of the defects is concerned, a number of scholars argue that in countries following the French law legal system, as is the case for the DRC, “there is no duty to give notice of lack of conformity.”⁴¹⁶ According to them, the only requirement on the subject is that the action for lack of conformity be sued “within a brief delay from the discovery of the defect.”⁴¹⁷ With humility, it is considered that this argument ought to be taken with reservations. In effect, although in most of civil law countries the civil code section dealing with the guarantee against latent defects does not set down “an explicit” duty on the part of the buyer to give notice of the defects, a similar obligation may be implied from provisions regulating the effects of obligations in general.⁴¹⁸ To exemplify this, Articles 38 and 44 CCO deal with a practice well-known as the *mise en demeure*.⁴¹⁹ As stated by Article 38 CCO, “A debtor is given notice of default either through a demand or other equivalent act (...).” Article 44 CCO complements this by stating that, “Damages are due only

⁴¹⁴ See First Inst Cost 17 September 1943 *RJCB* 1946 115; compare with First Inst Léo 8 September 1951 *JTO* 1952 151.

⁴¹⁵ Elis 28 February 1956 *RJCB* 1956 209.

⁴¹⁶ See Schwenger in Schlechtriem/Schwenger *Commentary* 624; Schwenger 2009 (19) 1 *Pace Int'l L. Rev.* 103 105; see also Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 596 where the authors refer to Article 1648 FCC. For a list of civil law countries with an express obligation of notice rule, see Schwenger in Schlechtriem/ Schwenger *Commentary* 624 Fn13; Thieffry 1988 (22) 4 *Int'l L* 1017 1024.

⁴¹⁷ Cf. Article 1648 FCC which reads, “The action resulting from *redhibitory* defects must be brought to court by the buyer within a *brief delay* depending on the nature of the defects and the usages of the place where the sale was concluded.” For comments, see Schwenger 2009 (19) 1 *Pace Int'l L. Rev.* 103 105; Kröll in Kröll/Mistelis/ Viscasillas *UN Convention* 596; Thieffry 1988 (22) 4 *Int'l L* 1017 1024. As explained below, Article 1648 is differently worded from its comparable Article 325 CCO.

⁴¹⁸ See Articles 33 to 62 CCO, especially Articles 38 and 44, which correspond to Articles 1134 to 1164, especially Articles 1139 and 1146; read with Article 234 UAGCL and Article 265 al. 3 CCO extending the general principles of the law of contract to sales contracts.

⁴¹⁹ The expression “*Mettre en demeure*” is defined as “giving a formal notice” to a party to perform an act or an obligation within a time limit on responsibility of legal consequences. See Glossary by Crabb *Constitution* 383. The same meaning applies to the French concept “*dénoncer*” used in the French version of the CISG to translate the English phrase “to give notice”.

where a debtor is *given notice to fulfil* his obligation (...) (emphasis added).⁴²⁰ Subsequent to these provisions, it appears that, as is in other legal systems, a buyer, under Congolese law, should invoke defects in the goods on condition that he/she has “*mis en demeure*” the seller; viz. notified him/her of the alleged defect.⁴²¹ According to case law, a notice may be given by any means.⁴²² What is needed is that the notice be properly and timely given; otherwise the buyer will lose his/her rights to rely on latent defects remedies.⁴²³

Normally the seller is liable for latent defects only.⁴²⁴ With regard to the time in which notice must be given, Article 301 al. 1 UAGCL provides a two-year period for any action resulting from the sale, “except [where] otherwise stipulated” in the Commercial Act. In other words, contrary to other sales contract issues, the period for notice for lack of conformity is governed by Articles 258 and 259 UAGCL.⁴²⁵ These provisions state the time of notice depending on whether the non-conformity is patent or hidden. Specifically, notice relating to patent lack of conformity must be given within the month following the day of delivery. With regard to latent defects, actions relating to them are prescribed within a one-year period of time from the day the defect was discovered or would have been discovered.⁴²⁶

⁴²⁰ For the application of the “*mise en demeure*” requirement, see: Kin/Gombe 13 September 2012 RCA 28 875 *Kabamba Kanyinda v Celtel-Congo Sarl*; Tricom Kin/Matete 28 November 2012 RCE 706 *J Ngebo Ngebu Liwanga v F Fadi Mahmoud Sha’Ban*; Tricom Kin/Matete 25 June 2012 RCE 641 *Golden Money Trust Sprl v Cinat*; Tricom Kin/Matete 22 June 2011 RCE 486 *Jack Kalanga v Cinat*; Tricom Kin/Gombe 7 June 2011 RCE 1618 *FDK Sprl v Socider* (unreported decisions).

⁴²¹ Tricom Kin/Gombe 11 January 2012 RCE 1967 *Dijimba Sprl v Tractafric Congo Sprl*; Tricom Kin/Gombe 26 June 2007 RCE 18 *Regideso v Mohak Co* (unreported decisions).

⁴²² For a notice given by letter missive, see Léo 15 October 1929 *Jur Col* 1930-1931 279.

⁴²³ Remedies available to the buyer are ruled in Article 283 UAGCL which states the replacement of non-conforming goods by conforming goods as primary solution. But, Article 321 CCO for which the buyer may return the goods and have the price paid back, or keeps them and reduces the purchase price.

⁴²⁴ Cf. Articles 318 and 319 CCO.

⁴²⁵ Article 258 states that, “If the buyer wishes to take advantage of the defect, a lack of conformity apparent at the day of taking delivery must be notified to the seller within the month following the delivery.” As regards Article 259 al. 1, it states that, “The action of the buyer, based on a lack of conformity hidden at the day of delivery, is prescribed within a one-year delay from the time when the defect was discovered or should have been discovered.”

⁴²⁶ But, Article 325 CCO in which, “Proceedings resulting from redhibitory defects must be sued at latest within a period of 60 days, not including the day fixed for delivery.” It was ruled that the

It is not excluded that the parties stipulated a contractual guarantee longer than the legal period of notice. In circumstances of that kind, the period of prescription will start running from the expiry of that guarantee.⁴²⁷ After the expiry of the period stated above, the buyer is deprived of his/her rights to rely on non-conformity remedies.⁴²⁸

Comments

It is a principle that the seller is liable for lack of conformity in the goods delivered. For him/her to know whether the goods delivered are in conformity with the goods ordered, the buyer must examine them immediately after having taken delivery of them and notify the seller in time of any defect. The duty to examine the goods and give timely notice is known to Congolese law as it is under the CISG and South African law, though there is still doubt about its implementation in South African law. The greatest difference among the three legal systems consists of the period within which notice of lack of conformity should be given. If the CISG has adopted a compromise between the short and long limitation periods by adopting a two-year period limit, South Africa law has adhered to the long limitation period of three years. Concerning the DRC, it has, *via* UAGCL provisions, recently opted for a shorter limitation period of one month or a year depending on whether the non-conformity is patent or latent.⁴²⁹

As is clear, the short period for giving notice in Congolese law is not favourable to buyers from developing countries. Yet, the CISG two-year limit was considered as “too drastic for developing countries”;⁴³⁰ there is greater reason for

principle in Article 325 CCO entailed that the defect had to be discovered within 60 days and the claim brought to court within the same period of time. See *Elis* 7 April 1917 *RJCB* 1932 28; confirmed in *Elis* 21 March 1942 *RJCB* 1942 124.

⁴²⁷ Read Article 259 al. 2, with Article 302 UAGCL.

⁴²⁸ See Articles 282 to 284 UAGCL, in particular, Article 283 UAGCL which provides that, “If the buyer notifies the seller of the defect in the goods in due time as stated by Articles 258 and 259, the seller may impose, at his own costs and without delay, to the buyer the replacement of defective goods by conforming goods.”

⁴²⁹ The previous cut-off time was fixed, in the CCO, to 60 days for both disclosed and hidden defects.

⁴³⁰ Canellas 2005/2006 (25) *JL & Com* 261 262.

one month or a year. In the context of the CISG, it was contended that buyers from developing countries “often buy machinery and lack the technical knowledge needed for an immediate examination of these complex goods.”⁴³¹ Applied to the modern Congolese law, the compliance to the notification requirement is more exacting than the two comparable legal systems, which would certainly constitute a reason for the rejection of Congolese law as the law governing the contract.

Simply, accession to the OHADA law did not greatly enhance Congolese law with regard to the issue of the notification of lack of conformity period. Of course, with its coming into force, the previous period of notification of latent defects has been increased from two months (60 days) to one year, i.e. an average of ten months. As regards apparent defects, however, there is a decrease of one month in the notification period, what is not considerable for buyers. Passing from two months to one year, likewise, is not yet significant, especially for importing countries as the DRC is. In order to make a worthwhile improvement of Congolese law in this respect, the adoption of a default limitation period similar to the one in force in the CISG or under South African law is recommended.

6.3.6 Conclusion on the Obligations of the Buyer

The obligations of the buyer resulting from a contract of sale are summarised in three main activities: the payment of the price at the right place and time; taking delivery of the goods; and the examination of the goods in due time in order to notify the seller for lack of conformity. With regard to these obligations, the OHADA Commercial Act has largely duplicated CISG provisions so that it brings Congolese law into line with the Vienna Sales Convention. For instance, because of the influence of the Commercial Act, the civil law principle relating to the place for payment has changed so that it is no longer the seller who seeks out the buyer for

⁴³¹ Ibid, but Kruisinga *Non-Conformity* 86 ; citing Witz C 2000 *D Jurisprudence* 789-790, for whom a period of one month is considered as reasonable for international transactions.

payment, but the inverse. Some shortcomings remain in Congolese law, however, particularly in relation to the time limit to give notice for lack of conformity and the time for payment. Regarding the time of notice, a one-year period is very severe for buyers so that the period stated by the CISG or South African law is suggested as reference. Similarly, because Congolese law does not differentiate between cash sales and credit sales on the issue of the time of payment, the South African law rule on the subject is recommended.

6.4 Conclusion on Chapter Six

Chapter six has consisted of a comparison between the CISG, South African law, and Congolese law on matters regarding the obligations of the parties to a contract of sale. The common principle governing these obligations is that they are normally determined by parties in the contract. Consequently, the rules provided by the CISG, the OHADA Commercial Act, or by South African common law, depending on the legal system, play a subsidiary role of filling the gaps left in the contract.

Following from the examination of the rules of law in force in each of the three legal systems above, it is clear that the main obligations of the seller consists of delivering the right goods, at the right place, and at the correct time; otherwise he/she will bear responsibility either for lack of delivery or for lack of conformity. In addition, the seller must guarantee the buyer against third party claims. On the subject of the seller's obligations, South African law and Congolese law appear to have been influenced indirectly by the CISG, the first through the 2008 CPA, and the second *via* the UAGCL. As far as Congolese law is concerned, it has particularly codified requirements such as those of quality, quantity, description, and packaging, which were previously dealt with in the DRC on a case law basis. The Commercial Act has, moreover, introduced into the DRC a specific handing of documents obligation; implemented an independent obligation of conformity different from the delivery

obligation; and elucidated the obligation of the seller in connection with the guarantee against third person's claims.

Notwithstanding this enhancement, Congolese law still has a number of gaps in respect of seller's obligations. These include: the maintenance of a double warranty, the guarantee of conformity and the guarantee against latent defects instead of a single concept of conformity; holding the seller liable for both patent and latent defects; and the absence of a default rule governing fitness of goods to particular purposes. Similarly, there is not yet an express requirement in the DRC as regards the responsibility of the seller for intellectual property rights. All these gaps, if not filled, are likely to weaken the security and certainty of commercial transactions in the DRC. In order to fill them, the adoption of the CISG, or reference to South African law, is recommended.

With regard to the obligations of the buyer, they consist, in all of the three legal systems being considered, of paying the purchase price, taking delivery of the goods, and inspecting them promptly in order to notify the seller for lack of conformity. As for the obligations of the seller, the UAGCL has fundamentally been influenced by the CISG so that almost all principles established in the Convention in respect of buyer's obligations have obtained application in Congolese law. The point of departure between the two legal systems is located now in the notification of lack of conformity period. As it has been demonstrated, a one-year period of time stated by the OHADA Commercial Act is too short to protect the buyer victim of the defect. Thus, a two-year or three-year period of time as stated by the CISG or South African law appears reasonable. In the same way, a differentiation of the due time for payment in cash and credit sales as ruled in South African law is also welcomed in the DRC.

Chapter Seven

CONCLUSION AND RECOMMENDATIONS

7.1 General Statement of the Purpose of the Study

This study is based on the assumption that disparities in national laws create obstacles to international trade. In order to remove those obstacles, it was necessary to harmonise the law of sale internationally by creating a single substantive law applicable worldwide. Such an objective was achieved in 1988 when the CISG entered into force.¹ The DRC has not yet ratified the CISG. The failure of the DRC to ratify the Vienna Sales Convention has had the consequence that Congolese sales law has, for a very long time, been out-dated and not suitable for modern international trade requirements. This situation was, to some degree, ameliorated, from the end of 2012, owing to the introduction of OHADA law in the DRC.

Since the advent of OHADA law is still very new, this comparative study of international sales contracts in Congolese law has aimed at assessing the rules established by the OHADA Commercial Act by comparing them with the former Congolese Code of Obligations (CCO), the CISG, and South African law rules. By undertaking a comparative analysis, this study has had the intention of examining whether current Congolese sales law, as modified by OHADA law, is adequate for modern international commercial transactions or, instead, whether it still has gaps. In the case of the second alternative being proved, this study aimed at identifying remaining gaps of Congolese sales law and making proposals about how to provide appropriate solutions to help fill those gaps.

With regard to its objectives, this study intended to achieve a quadruple goal. The study aimed, firstly, to outline the basic principles of Congolese contract and

¹ See Section 1.3; Section 1.4; and Section 4.2.4.3.

sales laws. It, secondly, intended to establish a comparison between Congolese sales law rules and the rules and principles established by both the CISG and South African law, with the aim of amending Congolese law. This study intended, thirdly, to assess the extent to which OHADA law rules have improved Congolese sales law in order to determine the gaps left over and propose the means to overcome them. This study, finally, aimed to recommend the ratification of the CISG should Congolese international sales law still have gaps.

From the preceding chapters, it has been learned that the adoption of OHADA law by the DRC has meaningfully improved modern Congolese domestic sales law. With regard to Congolese international sales law, however, it still has some gaps that need to be filled. Owing to the fact that the adoption of OHADA law did not fill all the gaps of modern Congolese international sales law, this study ends with a suggestion to the DRC to adopt the CISG.

As mentioned later, this study has primarily made use of the comparative method. Two legal systems, namely the CISG and South African law, were selected in this regard, the first because of its modernity, and the second by reason of its mixture and flexibility character. The comparative approach has helped us to discover that any legal system which combines both the rules and principles of the civil and the common law legal systems, as is the case with the CISG and South African law, is valuable in the sense that it constantly evolves. The same method has also helped us to learn that, because of their common civil law denominator, the CISG, South African law, and modern Congolese sales law share many similarities with respect to the formation of contract and of the obligations of the parties to international sales contracts.

Thus, this final chapter reviews the merits of a unified legal system. It also highlights some of the innovations introduced in modern Congolese sales law through OHADA law, which appears to have been borrowed from the CISG, and it re-emphasises existing gaps. A proposal for the DRC's ratification of the CISG concludes the discussion.

7.2 Implications of a Unified Legal System for International Transactions

It is certain that sales contracts play an important role in international transactions. Their smooth development is, however, often compromised owing to their international character and the origins of parties. In fact, notwithstanding the availability, these days, of advanced transport and communication facilities, law still remains territorial. It has effect only within a specified national boundary, and is, therefore, not binding over other countries. In addition, domestic laws differ from country to country. To give an example of a contract between absent persons, countries with a civil law legal system delay the formation of such a contract until the notice of acceptance reaches the offeror. With regard to Anglo-American legal family nations, they presume that the contract has been made immediately after dispatch. Owing to the fact that domestic laws are different, one or other of the parties may be frustrated by a foreign law. As Coetzee has observed, "Differences in the sales laws of countries give rise to uncertainty as to the content of legal rights and obligations and reduce the possibility of predicting the outcome of a dispute."² In an attempt to prevent such uncertainty in international trade, it was indispensable to unify the law by providing a set of substantive rules that are applicable universally. UNCITRAL was entrusted with that mission from 1966.

At the time that UNCITRAL was established, in fact, it was accepted that differences in domestic laws constitute an enormous handicap to international trade. The Vienna Convention adopted in 1980, under the auspices of UNCITRAL, was then considered to be a suitable instrument to improve the situation.³ Preceded by two unsuccessful Uniform Laws, the ULIS and ULF, the CISG has the advantage that, once it is ratified, it becomes binding on all contracting states. As regards its scope, the CISG deals generally with the conclusion of sales contracts as well as with

² Coetzee Incoterms 321; see, in the same sense, Lehmann 2006 (18) *SA Merc LJ* 317; De Ly 2005 (25) *6JL & Com* 1; Davis 2001 (106) *Commercial Law Journal* 457; Viejobueno 1995 (28) *CILSA* 201.

³ Cf. Paragraph 3 of the Preamble of the CISG; and Paragraphs 5 and 9 of the Preamble of the Resolution 2205 instituting UNCITRAL.

parties' rights and obligations resulting from international sale of goods agreements. Considering the increasing number of current member countries, the Convention appears to have fulfilled the objective of the harmonisation of sales law.⁴

To be precise, since its entry into effect in 1988, the influence of the CISG has been very practical in that the Convention is currently applied as applicable law in 79 countries. In the same way, the number of reported cases, approximately 2,500, dealing with the CISG shows that the Vienna Sales Convention has had a valuable practical impact despite the approach of some companies to exclude the application of the CISG in their contracts.⁵ In addition to the number of contracting states and the number of reported cases, the Vienna Convention has also influenced legal reforms around the world, either on a local, regional, or international level. On the European continent, for instance, the PICC, PECL, the CFR, and the CESL are largely inspired by it. Furthermore, national laws of countries such as the Scandinavian states, Germany, Estonia, and China were inspired by the CISG. In Africa, the influence of the Vienna Sales Convention is evident in the OHADA Commercial Act. Because the provisions of the Commercial Act are inspired by the CISG, the adoption of OHADA law in the DRC has definitely brought innovations to Congolese sales law and has, accordingly, also imported some of the influence of the CISG albeit indirectly, as reminded below.

7.3 Improvements to Congolese Sales Law

Before September 2012, commercial transactions were governed, in the Congo, by rules dating back to the colonial period, namely the 1888 CCO. Those rules had become outdated, obsolete, incomplete, and inadequate to meet international transaction requirements as discussed in Chapter 2. Most of their sections were no longer aligned with the evolution of commercial dealings worldwide which

⁴ See Section 4.2.4.3.

⁵ But, Brunner (CVIM 91 112), who believes that the CISG is not regularly excluded in practice.

constituted a source of legal uncertainty and an obstacle to foreign trade.⁶ This situation motivated the implementation of a law authorising accession to OHADA law, whose preamble clearly states that the harmonisation of business law should help to enhance legal security, an indispensable condition for improving the business climate in the DRC.

It is evident that the introduction of OHADA law in the DRC has significantly improved Congolese law as set out in Chapter 2 and in comparative assessments in chapters 5 and 6. A discussion of UAGCL rules, with specific reference to those applicable to commercial sales contracts in general, or those governing the formation of contracts and the obligations of sellers and buyers in particular, has revealed that the sales Uniform Act was largely influenced by the UN Sales Convention.

With regard to general provisions applicable to sales contracts, first, the innovations include the following:

- 1) To restrict the subject matter of sales contracts to goods; the idea of a contract dealing only with “sales of goods” is new to Congolese law.⁷ This concept refers, in the context of the UAGCL, mainly to the sale of tangible, corporeal, and movable items. It is in this sense that Article 236(d) and (f) excludes from commercial transactions issues related to sales of stocks, shares, investment securities, negotiable instruments or money, and sales of electricity.⁸ In the previous regime, anything and everything likely to be exchanged for money, including both corporeal and incorporeal properties, could form the object of sale, except in circumstances where its alienation was prohibited by law as it is in South African law.⁹ As for the CISG, UAGCL provisions exclude from commercial contracts the sale of ships, vessels, hovercraft, or aircraft.¹⁰ This exclusion appears, however, not to be right, given that the Commercial Act

⁶ See Section 2.2.6.

⁷ Cf. Article 234 of the Commercial Act; compared to Article 1(1) CISG; see also comments in Section 2.4.3 and Section 4.3.2.3.

⁸ Compare Article 236(d) and (f) UAGCL to Article 2(d) and (f) CISG.

⁹ Cf. Articles 275 and 27 CCO; see also Section 2.4.3 with Section 3.4.3.

¹⁰ See Article 236(e) UAGCL, compare to Article 2(e) CISG.

governs both domestic and international sales contracts. The OHADA legislator should rather include an exception to this principle, limiting the exclusion to international sales.

- 2) To extend sales rules to mixed contracts; in terms of Article 235(b) of the Commercial Act, when a party supplies materials for goods to be manufactured or produced, or it mixes labour and sales, if the contribution is substantial or preponderant, the contract is a sale.¹¹ This distinction was not made in the former Congolese sales law as is still the case in South African law.
- 3) To codify trade usages and practices; unlike the former legal regime, Article 239 UAGCL codifies trade usages and practices. This provision extends the principle of party autonomy to the incorporation of usages and practices into contractual agreements. Consequently, in modern Congolese sales law, parties are bound by any usage to which they have agreed and by whichever practices they may have established among themselves as is the case under the CISG and South African law.¹² In addition to contractual usages and practices, Article 239 al. 2 UAGCL automatically incorporates into contracts the practices that parties “knew or ought to have known” and which are familiar in their sector of business.¹³ Previously, and in contrast to the CISG and South African law, usages and practices were referred to as a mere general principle of law.

With regard to the topic of the formation of contracts, next, the most important improvement of Congolese sales law is the introduction of the offer and acceptance approach to contracting.¹⁴ Under the ambit of the CCO, but different from the CISG and South African law, the process of concluding contracts by means of offer and

¹¹ See Article 235(b) UAGCL, compare to Article 3 CISG.

¹² See Article 239 al. 1 UAGCL, compare to Article 9(1) CISG; see also comments in Section 5.2.3.3.

¹³ Compare Article 239 al. 2 UAGCL to Article 9(2) CISG; see also comments in Section 5.3.3.3.

¹⁴ See Articles 241 to 249 UAGCL, compare to Articles 14 to 24 UAGCL; see also chapter 5 in general.

acceptance was not regulated. It was instead left to the will of the parties. Congolese law was silent on when and how an offer can be considered to be effective or an acceptance to be valid. Courts tried to fill the gap, not without difficulty. As a result, the characteristics of a valid offer and acceptance, as well as mechanisms such as those of withdrawal and revocation of an offer or an acceptance, were as an alternative established by case law. These days, all these legal institutions have become code-based. Thus, in the same way as with the CISG and South African law, substantial requirements for a valid offer and acceptance are now determined by law.¹⁵ It follows then that, under modern Congolese sales law, any effective offer must be sufficiently definite and disclose the offeror's intention to be bound by the offer as is the case in the two other legal systems considered. With regard to the acceptance, it must be regularly communicated and reach the offeror in order to have legal effect in all of the three legal systems being studied.

In addition to the codification of the formation of contracts process, in general, other improvements include the following:

- 1) To introduce the rule of the revocability of offers; in the initial approach, offers were in principle binding, i.e. irrevocable, and occasionally revocable. The Uniform Act has inverted the rule. Currently, offers in Congolese law have become generally revocable and exceptionally irrevocable, as is the case under the CISG and South African law.¹⁶ In that sense, under modern Congolese sales law, an offer should be irrevocable if the parties have intended it to be so by fixing a period for acceptance or, if the party accepting the offer was reasonable, to rely on the irrevocability of the offer. When it is accepted, however, the offer becomes binding in the DRC as is the case in all other legal systems.
- 2) To codify the means of acceptance by conduct; on the issue of acceptance, the Uniform Act has been an innovation by giving effect to conduct indicating

¹⁵ See Section 5.2.3 and Section 5.3.3.

¹⁶ See Section 5.2.4.

assent as it is under the CISG and South African law.¹⁷ In so doing, the Act has anticipated the application of the reliance theory on the grounds that, as long as one party has reason to believe that by his/her comportment, words or acts, the other party has expressed his/her consent, a contract is formed. Under the former system, contracts were based solely on an exchange of agreements.

- 3) To have a preference for the last-shot rule as a solution to the battle of forms problem; battle of forms issues do not frequently occur in Congolese law, and the researcher was interested to determine which of the last-shot or knock-out doctrines apply in that legal system.¹⁸ It has been discovered, through the interpretation of general rules applicable to the formation of contracts, especially those relating to the legal regime of additional terms, that the OHADA Commercial Act has adopted the last-shot rule as a means for solving the battle of forms issue as is also the case under South African law. Since the latter principle has been largely criticised as being arbitrary, the adoption of the knock-out solution is recommended to both South African and Congolese sales laws. This should enable them to conform to the most recent commercial instruments and laws, and to align them with the contemporary preferred solution of the CISG case law.
- 4) To adopt the reception theory as a suitable approach for contracts between persons not in each other's presence; previously, faced with the silence of the CCO, courts grappled with the information, declaration, and reception theories as a means for determining the right time and place for a contract to be concluded.¹⁹ Currently, there is a clear belief that a contract is formed when acceptance reaches the offeror, regardless of whether or not he/she knows of it. This is also the solution preferred by the CISG and South African law for

¹⁷ See Article 241 al. 1 UAGCL, compare to Article 8 CISG; see also Section 5.3.3.2 with Section 3.3.2.3.

¹⁸ See Section 5.3.5.4.

¹⁹ See Section 5.4.3.

contracts formed between parties absent from one another and for electronic, not instantaneous, communications.

As regards the obligations of parties, finally, innovations include the following:

- 1) To introduce the notion of “reasonable time” and the concept of “cure” for early delivery; pursuant to Article 253 al. 3 UAGCL, where the contract is silent as to the time for delivery, the seller should carry out his/her delivery obligation “within a reasonable time after the conclusion of the contract” as it is under the CISG and South African law.²⁰ Contrary to South African law, but similar to the CISG, in cases where the seller has delivered the goods early, the seller, in modern Congolese sales law, may repair any deficiencies in them up to the date stipulated for delivery. The only exception to this rule is where the exercise of the right stipulated above would cause the buyer unreasonable inconvenience or unreasonable expenses.²¹ It should be remembered that when the CCO was drafted in 1888, it was supposed to regulate situations of rapid performance. Within its field of influence, the seller was supposed to make the item bought available once and at the same time, as it continues to be the case in South African law, immediately after the conclusion of the contract or at least at the time specified in the contract.²² In cases where parties failed to determine a time for delivery, a default period for delivery was stated by the Court, but not a reasonable time as is currently the case. Such a ruling aligns thus Congolese law with its two other comparable legal systems. With regard to the seller’s prerogative to replace any deficient goods, it is considerable as it helps to take the interest of both sellers and buyers into account. That mechanism is then suggested for South African law as well.
- 2) Establishing an independent conformity obligation; Article 255 al. 1 UAGCL obliges the seller to deliver goods whose quantity, quality, and nature are in

²⁰ Compare this to Article 33(c) CISG; see also Section 6.2.3.3.

²¹ Compare Article 257 UAGCL to Article 37 CISG, but not South African law.

²² See Section 6.2.3.3.

conformity with those stipulated in the contract.²³ The former CCO did not contain such an express provision. A similar obligation should, of course, be implied from the interpretation of Article 291 al. 1 CCO, which required the seller to deliver the property sold in the condition in which it was at the time of the sale. Even in that condition, however, the conformity was considered to be a supplementary duty to the delivery obligation, and was, therefore, viewed as a mere guarantee of the goods sold, not a veritable obligation. Currently, the requirement with regard to conformity has become one of the seller's main obligations, as it is under the CISG and South African law, which means that if he/she fails to do so, the seller will bear responsibility for the lack of conformity.

- 3) To categorise the guarantee against third parties' rights as an autonomous obligation; as with the conformity obligation, the guarantee against other people's rights was previously seen as a complement to the delivery requirement.²⁴ Nowadays, it has been implemented as an independent obligation in addition to delivery and conformity. A comparison between the CISG, South African law and modern Congolese sales law reveals that the obligation under consideration appears to be broader in domestic laws than under the CISG. In domestic laws, that obligation includes, in addition to the claims of third parties, hindrances that the buyer may encounter as a result of the seller's own rights or claims.
- 4) Reference to market price terms; Article 263 al. 1 UAGCL reminds us of the general principle that, for a contract to be valid, parties must determine the price of the goods. The second paragraph of the same provision adds, however, that, where parties make reference to a market-price, meaning the price generally charged in the trade concerned, the price so determined is valid.²⁵ Under the CCO, the price has to be assessed by parties at the time of the

²³ Compare to Article 35 CISG; see also Section 6.2.4.2.

²⁴ See Section 6.2.5.2.

²⁵ Compare this with Article 55 CISG.

contract as is the case under South African law. The idea of an open price was implausible.²⁶ With regard to the notion of “reasonable price”, it is not regulated under Congolese law. The debate concerning this notion is still open even in South African law where the question of the validity of contract with reasonable price has been asked. For that reason, reasonable price terms are not suggested to the DRC.

- 5) Restructuring civil law principles with regard to the place for payment; debts, which previously were paid at the buyer’s domicile, are currently payable at the seller’s place of business. In modern Congolese sales law, therefore, the buyer must seek out the seller for payment, instead of the seller coming to him/her. Commercial debts, within the DRC are, like in the CISG, and modern South African law, portable but no longer collectible.

With the diversity of the innovations above, one may conclude that the DRC has indirectly adopted many of the principles and rules of the CISG. Without denying the value of these improvements, there are still, however, some unresolved gaps which also need to be recapitulated.

7.4 Remaining Gaps to be Filled

As mentioned earlier, the accession by the DRC to OHADA law has significantly modernised Congolese law and aligned it, to some extent, with the CISG and South African law on matters regarding the conclusion of contracts and the obligations of parties. In spite of the improvements registered, there are, however, some unresolved gaps which may obstruct the smooth development of international trade in the DRC. These shortcomings include the following:

- 1) Failure to enumerate conduct which may amount to acceptance; Article 241 al. 1 of the Commercial Act states clearly that a contract is concluded either

²⁶ See Section 2.4.4.

by acceptance of an offer, or by the conduct of the parties which indicates their acceptance of the contract.²⁷ The provision does not, however, provide a list of the kind of conduct which may be equated with acceptance in the example of Article 18(3) CISG.²⁸ A similar situation is also observed under South African law even though the reliance theory may be supported as an independent approach to contract in the latter legal system. As a result, the nature of this conduct has to be determined by courts on a case-by-case basis by virtue of interpretation of the terms of the contract, a mechanism which may generate uncertainty. For more legal security, a provision similar to Article 18(3) CISG is recommended to both South African law and Congolese sales law.

- 2) The lack of a list of additional terms which may become material alterations of the offer; Article 245 al. 2 UAGCL provides, without listing them, that “additional terms which do not materially alter the terms of the offer” may constitute an acceptance. With regard to South African law, it does not neatly distinguish between substantial and immaterial alterations.²⁹ The absence of a list of material alterations in the two legal systems might make the task difficult for judges to draw a line between terms altering materially the content of the contract and issues of minor importance. Thus, for more legal security, the adoption of a provision similar to Article 19(3) CISG is suggested to both South African law and Congolese sales law.
- 3) Preservation of a double warranty, the guarantee of conformity and the guarantee against latent defects, instead of a single concept of conformity. As with the CISG, but in contrast to South African law, the UAGCL has adopted, through Article 255, an independent obligation of conformity. Unfortunately, instead of limiting itself to that duty, the Commercial Act has caught up with South African law by combining, once again, the obligation of conformity

²⁷ On South African law, see Section 3.3.2.3 dealing with agreements based on reasonable reliance.

²⁸ See Section 5.3.3.2.

²⁹ Cf. Section 5.3.5.2.

with guarantees against hidden and patent defects.³⁰ In so doing, the provision has encountered criticism that it was supposed to avoid, and it has thereby introduced legal uncertainty into Congolese international sales law. In other words, by conserving a dual guarantee on the part of the seller as mentioned above, modern Congolese law, as influenced by OHADA law, has gone back to square one. It would have been better had the OHADA legislator provided the rule in Article 255 UAGCL with an exception regarding international sales. In that sense, the adoption of a provision similar to Article 35 CISG is suggested to both South African law and Congolese sales law.

- 4) Recognising the seller as being liable for both patent and latent defects; establishing the seller's liability for hidden defects is reasonable. To make him/her responsible for disclosed defects in addition to hidden lacks of conformity appears, however, to be irregular. In effect, the fact of the buyer's taking delivery of the goods despite their deficiency would normally be interpreted as his/her tacit acceptance. If not, the buyer should, in reality, reject deficient goods immediately at the time of delivery. Such is the position of the CISG in Article 35(3) and of South African common law. The adoption, therefore, of a provision similar to Article 35(3) CISG or close to South African common law is recommended to the Congolese legislator in order to secure the seller in international dealings.
- 5) Lack of a default rule governing the fitness of goods to particular purposes requirement; even if this gap is able to be filled by virtue of the party autonomy principle, a specific provision is also necessary as is the case under the CISG and South African law in order to clarify the obligations of the seller.
- 6) Harmful shorter cut-off period for notice of lack of conformity; pursuant to Articles 258 and 259 UAGCL, patent lack of conformity is notified within a month after delivery, and latent defects within a year of their detection.³¹ A

³⁰ See Section 6.2.4.2.

³¹ Cf. Section 6.2.4.3.

one-year period appears to be too short to protect buyers from developing countries such as the DRC. The three-year period of South African law, therefore, or, at least, the two-year CISG period is recommended to Congolese law to protect the buyer against the consequences of acquiring non-conforming goods.

- 7) Absence of an express requirement with regard to the seller's duty for intellectual property rights. Congolese and South African laws do not have a specific provision dealing with the seller's responsibility for defects in industrial rights as does the CISG.³² This obligation is understood in domestic laws from the perspective of a general guarantee against eviction. Owing to the increasing importance of intellectual property rights over the past decade and the coming of the "information age", together with the current "digital revolution",³³ a suggestion for the adoption of a provision similar to Article 42 CISG is supported in order to align domestic laws with modern international trade developments.

From what has been said thus far, South African law appears to be more developed than Congolese sales law in some respects and modern Congolese sales law, as amended by the OHADA Commercial Act, more developed than South African law in other respects. There is, therefore, the possibility of a reciprocal influence between the two legal systems. Insofar as Congolese sales law is concerned, it would benefit from South African law, in addition to the improvements already mentioned, the differentiation of the due time for payment in cash and credit sales. In the same way, because Congolese law has not yet ruled about electronic communications, the South African ECT Act would serve as reference to align Congolese law with modern international commercial legislations and practices.

Apart from the above, many of the shortcomings encountered in Congolese international sales law are also met in South African law, so that the presence of gaps

³² See Section 6.2.5.3.

³³ Cf. Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 648 §2.

in the two legal systems provides ample motivation for accession to the CISG for both of them.

7.5 Additional Reasons for the DRC to Adopt the CISG

The researcher has already made mention of the preamble of the law authorising the introduction of OHADA law in the DRC which recognised the merit of harmonising business law into a legal system. This foreword showed that a prosper commerce cannot be achieved without a secure legal and commercial environment. Meaning, a harmonised law stimulates business transactions. If that privilege is conferred on a regional instrument in the example of the OHADA Treaty, there is greater reason for a Convention such as the CISG, which is accepted universally. Explanations for the DRC to ratify the Vienna Convention may be found in the following:

- 1) Despite the introduction of OHADA law into the DRC, there are still gaps in modern Congolese sales law. It follows then that the ratification of OHADA law was not sufficient for the harmonisation of the entire Congolese business law. A supplementary solution of the type of the Vienna Convention remains needed for a complete improvement.
- 2) OHADA is a regional community whose law is currently limited to seventeen member countries,³⁴ whereas the Vienna Convention is a universal instrument applicable today in 79 countries.
- 3) None of the current OHADA countries form part of the DRC's leading trade partners, whereas five of them, namely Belgium, China, France, the USA, and Zambia, are at present CISG contracting states. Against this background, the provisions of OHADA law should actually be relevant to domestic

³⁴ Of course, pursuant to Article 53 of the OHADA Treaty, the community is open to any African country. This is, however, yet to happen.

transactions.³⁵ For international sales contracts, however, the CISG would be the most suitable source of reference.

- 4) The fact that five of the main Congolese trade partners and three of its surrounding countries, i.e. Burundi and Uganda, in addition to Zambia, have endorsed the UN Sales Convention; this may apply to many international sales of goods contracts concluded by Congolese merchants with their foreign allies. Article 1(1)(b) CISG, in fact, envisages the possibility of the application of the Convention by virtue of conflict-of-laws rules. Or, unless otherwise stipulated, international contracts are ruled, in the DRC, by the law of the place where they were formed. If, therefore, Congolese PIL rules lead to the application of the law of a member state, for example, one or another of the seven countries cited above, the CISG should apply even if the DRC has not yet accessed the Convention.
- 5) Congolese membership of the OHADA community is not in conflict with probable accession to the CISG. The Vienna Convention has anticipated the situation of conflict by providing a number of provisions favourable to its co-existence with regional sales instruments such as the OHADA Commercial Act. These provisions include: Article 90 relating to the conflict of conventions, which authorises the replacement of the Vienna Convention by other sales conventions in existence where parties are located in states which are parties to these agreements; Article 92(1) which allows the exclusion of either CISG Part II or Part III; and, particularly, Article 94(1) dealing with member countries having related legal rules.³⁶ Insofar as Article 94(1) is concerned, it authorises contracting states with the same, or closely related, legal rules to exclude the Convention from contracts concluded between parties established in these countries. That is to say, if the DRC has to ratify

³⁵ These provisions should apply to international transactions concluded in the DRC only by virtue of conflict-of-law of rules or if they are selected by parties. Situations of this kind might be rare because the DRC is an importing country.

³⁶ See Section 4.5.5; see also Ferrari OHADA 79 86-95.

the UN Sales Convention, in one or other of the above cases, OHADA law will prevail over the CISG.

Succinctly, the interaction between the provisions of the CISG and OHADA law rules constitute an appropriate solution to the definitive harmonisation of modern Congolese international sales law. In this way, gaps not resolved by the rules provided by the Commercial Act will be filled by the CISG. For other remaining gaps, for instance, those relating to the deadline for payment depending on the nature of the sale, or for electronic contracts, an inspiration from South African law would be recommended.

7.6 Concluding Recommendation

It is a strong recommendation of this study that the DRC, which played a major role in the drafting process of the CISG, now considers ratifying it for the reasons set out above. Its membership of the OHADA law will not present a barrier in this regard.

TABLE OF CONVENTIONS, MODEL LAWS, CONSTITUTIONS, AND OTHER REGULATIONS

I. Congolese Legislations

- 1886 Principles Applicable to Judicial Decisions Ordinance of 14 May 1886 approved by Decree of 12 November 1886 (*BO* 1886 188)
- 1887 Commercial Companies Decree of 27 February 1887 as amended and completed by Law No. 10/8 of 27 April 2010
- 1888 Code of Obligations Decree of 30 July 1888 (*BO* 1888 109)
- 1891 Status of Foreign Nationals Decree of 20 February 1891 integrated in the Decree of 4 May 1895 (*BO* 1895 140)
- 1895 Civil Code of Persons Decree of 4 May 1895 (*BO* 1895 138)
- 1908 Colonial Charter of 18 October 1908 (*BO* 1908 65)
- 1912 Trade register Decree of 31 July 1912 (*BO* 1912 726) as amended by Law No. 10/009 of 27 February 2010 (*JORDC* Special No. 3 March 2010 1)
- 1913 Commercial Code Decree of 2 August 1913 (*BO* 1913 775)
- 1934 Bankrupt Decree of 27 July 1934 as amended by the Decrees of 19 December 1956 and of 26 August 1959
- 1959 Consumer Protection Decree of 1 April 1959 (*BO* 1959 1284)
- 1960 Code of Civil Procedure Decree of 7 March 1960 (*MC* 1960 961)
- 1966 Code de la Navigation Fluviale et Lacustre Ordinance Law No. 66-96 of 14 March 1966 (*MC* 1966 902)
- 1973 Land Law No. 73-21 of 21 July 1973 as amended by the Law No. 80-8 of 18 July 1980 (*JO* Special No. 1980 reedited 1 December 2004)
- 1982 Industrial Property Law No. 82-1 of 7 January 1982
- 1987 Family Code Law No. 87-10 of 1 August 1987 (*JO* Special No. 1 August 1987)
- 1993 BCC Law-Ordinance No. 93-2 of 28 September 1993 as amended by Law No. 5-2002 of 7 May 2002 (*JORDC* Special No. of 22 May 2002 58)
- 1993 OHADA Treaty of 17 October 1993 as amended on 17 October 2008 (*OHADA OJ* No. 4 1 January 1997)
- 1997 General Commercial Law Uniform Act of 17 April 1997 as amended on 15 December 2010 (*OHADA OJ* No. 23 of 15 February 2011)

- 1998 New Monetary Unit Law-Decree No. 80 of 17 June 1998 (*JORDC* Special No. of 30 June 1998)
- 2001 Operations in National and Foreign Currencies Law-Decree No. 4/2001 of 31 January 2001
Central Bank Exchange Regulation Control Act (ERCA) of 22 February 2001
Commercial Courts Law No. 2/2001 of 3 July 2001 (*JORDC* No. 14 of 15 July 2001 4)
- 2002 Investments Code Law No. 4/2002 of 21 February 2002 (*JORDC* No. 6 of 15 March 2002)
Mining Code Law No. 7/2002 of 11 July 2002 (*JORDC* Special No. of 15 July 2002)
- 2006 Constitution of 18 February 2006 as amended by Law No. 11/2011 of 20 January 2011 (*JORDC* Special No. 5 February 2011 5)
Packaging Regulation No. 409/CAB/MIN/TC/0082/2006 of 18 July 2006 (*JORDC* No. 18 15 September 2006)
- 2007 Transformation of Public Companies Law No. 08/7 of 7 July 2007 (*JORDC* Special No. 12 July 2008)
- 2010 Ratification of the OHADA Treaty Law No. 10/2 of 11 February 2010 (*JORDC* Special No. 3 March 2010)
National OHADA Commission Decree No. 10/13 of 23 March 2010 (*JORDC* 1 April 2010)
Publication of Official Acts Law No.10/7 of 27 April 2010 (*JORDC* Special No. 3 March 2010)
Public Procurements Law No. 10/10 of 27 April 2010 (*JORDC* Special No. 30 April 2010)
Civil Aviation Code Law No.10/14 of 31 December 2010 (*JORDC* Special No.16 January 2011)

II. South African Regulations

- 1969 Prescription Act 68 of 1969
- 1981 Alienation of Land Act 68 of 1981
- 1989 Reserve Bank Act 90 of 1989
- 1996 Constitution of the Republic of South Africa Act No. 108 of 1996 as amended by Act No. 34 of 2001
- 2002 Electronic Communications and Transactions Act 25 of 2002

- 2005 National Credit Act 34 of 2005
 2008 Consumer Protection Act No. 68 of 2008 (Government Gazette Vol. 526 29 April 2009 No. 32 186)

III. International and Other Countries Legal Instruments

- 1804 French Civil Code translated by Rouhette G and Rouhette-Berton A
 1831 Belgian Constitution of 7 February 1831 as amended by the Law of 14 June 1971
 1858 Australian Torrens Act of 2 July 1858
 1893 English Sale of Goods Act 1893
 1955 Convention on the Law Applicable to International Sales of Goods, The Hague 1955
 1963 Senegal Civil and Commercial Obligations Law of 10 July 1963
 1964 Convention relating to a Uniform Law on the International Sale of Goods, 1 July 1964
 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague 1 July 1964
 1966 UN General Assembly Resolution 2205 (XXI) of 17 December 1966 establishing the United Nations Commission on International Trade Law
 1967 Convention Establishing the World Intellectual Property Organization (WIPO), Stockholm 14 July 1967 as amended on 28 September 1979
 1974 UN Convention on the Limitation Period in International Sale of Goods, New York 14 June 1974
 1978 American Uniform Commercial Code (UCC) of 1978 as last revised in 2012
 UN Convention on the Carriage of Goods by Sea, Hamburg 1978
 1980 Convention on the Law Applicable to Contractual Obligations, Rome 19 June 1980
 UN Convention on Contracts for the International Sale of Goods, Vienna 11 April 1980
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