## *Understanding the Non-adoption of the United Nations Convention on Contracts for International Sale of Goods in Nigeria*

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# Understanding the Non-adoption of the United Nations Convention on Contracts for International Sale of Goods in Nigeria

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# ABSTRACT

Globalisation has created new market opportunities for Nigerian traders, resulting in the growth of international trade in Nigeria. However, the opportunity of a wider market and a broader range of goods, means that Nigerian traders have to grapple with the complexities and transaction costs of foreign laws of different jurisdictions, which are a hindrance to trade.

Given the above, there is a need for a uniform framework capable of regulating international trade transactions. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is capable of resolving such conflicts and reducing transaction costs. However, the CISG has not been adopted in Nigeria.

In light of this, the thesis considers the reasons for the non-adoption of the CISG in Nigeria. The thesis evaluates the Convention to determine if it is successful based on established criteria. Using the legal transplant theories, the thesis draws up a typology to determine whether the CISG can be considered a successful transplant in Germany and U.S. where it has been adopted. The thesis then examines the possibility, and effects of transplanting the Convention into Nigeria. The thesis also measures the level of awareness of the CISG in Nigeria and the disposition of the key legal actors towards the Convention, which serves as a determinant of adaptability and receptivity of the CISG in Nigeria, where it is adopted.

The thesis adopts a doctrinal approach, historical, socio-legal and comparative research methodologies in undertaking the research.

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# DECLARATION

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgement has been made in the text.

# STATEMENT OF COPYRIGHT

# DEDICATION

This thesis is dedicated to Daddy and Mummy, people who believed in me and gave unreservedly, without expectations.

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Finally, I thank God my saviour, without whom I am nothing.

# LIST OF ABBREVIATIONS

| | |
|---|---|
| CAMA | Companies and Allied Matters Act |
| CEDAW | The Convention on the Elimination of all forms of Discrimination against Women |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| CL | Contract Law |
| DICL | Department of International and Comparative Law Nigeria |
| FMTI | Federal Ministry of Trade and Investment |
| HPA | Hire Purchase Act |
| KADCCIMA | Kaduna Chamber of Commerce, Industry, Mines and Agriculture |
| LFN | Laws of the Federation of Nigeria |
| MAN | Manufacturers Association of Nigeria |
| NACCIMA | Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture |
| NUC | National Universities Commission |
| OHADA | Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organisation for the Harmonization of Business Law in Africa) |
| PEL | Principles of European Law |
| SGLLS | Sale of Goods Law Lagos State |
| SOF | Statute of Fraud |
| UCC | Uniform Commercial Code |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNEC | University of Nigeria Enugu Campus |
| UNGA | United Nations General Report |
| UNISA | University of South Africa |
| UPIC | UNIDROIT Principles of International Commercial Contracts |

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**United Kingdom**

**Nigeria**



**Germany**



**Norway**

**Denmark**



**France**



**Finland**



**Spain**



**Sweden**



**Switzerland**



**United States**

# CHAPTER 1

# INTRODUCTION

The thesis seeks to understand the reasons for the non-adoption of the CISG in Nigeria and the possibility, and effects of transplanting the Convention into Nigeria, using legal transplant theories. The thesis also seeks to measure the level of awareness of the CISG in Nigeria and the disposition of the key legal actors towards the Convention, which serves as a determinant of the receptivity of the CISG in Nigeria.

The current chapter presents the background to the research and the justification for undertaking the research. The aims and objectives of the research are presented first, followed by the research and the structure of the thesis. The methodology and the research design are described with detailed information on the empirical data, that is, what data is presented and how the data was obtained and how it is presented in the thesis.

## 1.0 Research Background

There has been tremendous growth in international trade in the last decades. This is a cause and result of globalisation. Trade increased from $296 billion in 1950 to about $8 trillion in 2005.[1] Such increase would benefit from a harmonised law, given the varied and disparate domestic laws on trade. A uniform law is particularly needful considering that private parties have to bargain over the legal regime that will govern their transactions. However, the variation and discrepancies of national rules in approach and concept on any law, particularly on the law of sales, creates legal uncertainty, unequal bargaining power resulting in hardship for one party, increased transaction costs and legal risks. Given this, the United Nations Convention on Contracts for International sale of Goods (CISG)[2] was created after many decades to harmonise law on international trade by reducing transaction costs, resulting in improved efficiency of cross border sales for commercial parties in different jurisdictions.

[1] World Trade Organisation, https://www.wto.org/english/news_e/archive_e/stat_arc_e.htm (WTO, 2007) (WTO, 2013) accessed 14 April 2014.

[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. 668 [hereinafter CISG].

Nigeria is considered the 24th largest economy in the world and Africa's largest economy.[3] With respect to international trade, from 2007 to 2011, Nigeria's exports increased on average by 23.5% each year amounting to $125.6 billion. During the same period, imports increased on an average by 18.6% each year to $64.0bn.[4] More recently, the Nigerian economy has grown significantly; with the GDP doubling to more than $500bn from $307bn.[5] Nigeria is also seeing more investments in the economy.

Functional public and private laws are necessary towards sustaining economic growth. A majority of international traders in Nigeria are involved in the bulk importation of goods usually resold to consumers. Apart from exportation of crude oil, Nigeria is more import oriented, especially amongst Small and Medium sized Enterprises (SME). Thus, an appreciable percentage of Nigerian traders buy already made goods and resell them. Irrespective of the trade growth in Nigeria, there are hardly sturdy legal frameworks, and consolidated policy systems to regulate trade. This leads to an unstructured trade environment, and ultimately to unequal bargaining powers of traders in Nigeria. Despite the interest in foreign trade, the unstructured trade environment makes foreign traders sceptical about dealing with their Nigerian counterpart. In cases where the Nigerian parties may have the stronger bargaining power, the dated 1893 Sales of Goods Act[6] still applicable in Nigeria is hardly considered.

The choice of law clause between traders stipulates the law applicable to the contract. This law would govern the interpretation of the contract, performance of it, how variations to the contract may be made and other factors. Parties in a contract are free to select the law, which applies to their contract. The Nigerian parties, normally the buyers in transactions are subject to the seller's law since the terms of the contract are already stipulated. This is especially the case with Eastern traders, where have templates of their contracts, which hardly offer any choice to buyers. Regarding trade with EU countries, in the absence of a choice of law clause, the Rome Convention as enacted by the Contracts (Applicable law) Act 1990 and after it, the Rome 1 Regulation 593/2008 (which applies to contracts entered into after 17 December 2009) becomes applicable.

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[3] Claire Provsot, 'Nigeria becomes Africa's Largest Economy – Get the Data' (The Guardian, 7 April 2014) http://www.theguardian.com/global-development/datablog/2014/apr/07/nigeria-becomes-africa-largesteconomy-get-data accessed 02 February 2015.

[4] U.N Data, http://data.un.org/CountryProfile.aspx?crName=NIGERIA#Trade accessed 15/10/2013; Editorial Staff, 'Nigeria: Trade and Economic Partnerships 2012' (Afribiz, 14 May 2012) http://www.afribiz.info/content/nigeria-trade-and-economic-partnerships-2012 accessed 15 October 2013.

[5] J.O'S 'How Nigeria's Economy Grew by 89% Overnight' (The Economist, Johannesburg April 7 2014) http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-2 accessed 9 July 2014.

[6] 1893 SGA.

Considering this, foreign traders leverage on the instability of the trade structure in Nigeria, and their stronger bargaining power, to insist on the governing law of their choice. Thus, hardly allowing the Nigerian trader to negotiate his terms and who eventually signs the contract without reading it. Any breach in such circumstances will hardly be remedied, since the Nigerian trader is unlikely to afford the costs and may have little or no knowledge of the governing law and the procedural rules of a court located in a foreign country.

The above situation is not only discouraging for the sole traders and SME's; it is deleterious to the economy. In the event of a breach of contract, Nigerian traders are forced into alternative ways of mitigating losses, such as setting inordinate prices for consumers of subsequent goods. The final consumer bears the brunt of the consequence of such transactions. Where this practice is protracted, it will result in inflation.

In light of the above, a functional framework familiar to parties in international trade transaction is needed. The CISG is one such law, capable of providing a framework of private rights for businesses, to facilitate transactions, enhance credit facilities and reduce transaction costs. It is also a means of modernising the 1893 SGA and possibly reforming sales law in Nigeria considering the local situation to suit modern requirements of trade.

Despite the glaring benefits of the Convention, there is reluctance by developing countries, including Nigeria to adopt it. In light of the benefits of the CISG, the thesis considers the reasons for the reluctance of developing countries, especially Nigeria to adopt the Convention.

## 1.1 Aims and Objectives

This thesis aims to understand the reasons for the non-adoption of the CISG in Nigeria. The thesis proceeds on the assumption that the CISG may be useful, although an assessment is undertaken, and the belief that there is a clear nexus between economic and social development and trade law reform. The thesis then seeks to conceptualise the transplantation of the CISG in Nigeria.

In order to successfully achieve these aims, the following objectives are necessary:

1.1.1 Critically evaluate the purported success claims of the Convention in order to determine whether the Convention is indeed a success.

1.1.2 Through answers gleaned from empirical research, examine the plausibility of the reasons for the non-adoption of the CISG in Nigeria.

1.1.3 Consider the experiences of other countries that have adopted the CISG using legal transplant theories, to determine if the Convention can be considered a successful transplant and drawing from their experiences to make a case for the CISG in Nigeria.

1.1.4 Undertake a conceptual analysis of the transplantation of the CISG in Nigeria to determine whether or not it will be a successful transplant.

## 1.2 Research Questions

The following questions will help in carrying out the aims and objectives set out above

1.1 Is the CISG a successful framework for trade?

1.2 Why has Nigeria not adopted the CISG?

1.3 Does Nigeria need the Convention?

1.4 Can the CISG be transplanted to Nigeria?

## 1.3 Structure of the Thesis

Over five chapters, this thesis examines the reasons for the non-adoption of the CISG in Nigeria and the possibility of transplanting the Convention to Nigeria. Apart from the current introductory chapter, which presents an overview of the thesis, including the aims, objectives and methodology of the thesis, chapter two considers the CISG holistically by undertaking a brief historical analysis of the CISG. This is in order to determine the reasons for, goals and aims of the Convention, which consequently provides an understanding of why the CISG may be a useful tool for international trade in Nigeria. The process of drafting the CISG is examined in order to determine its neutrality especially to understand whether the interests of developing countries are equally represented. This is important given the spectrum of countries the Convention aims to represent, from different jurisdictions and their varied levels of development.

Chapter Two also measures the level of success attained by the CISG, based on its goals and aims. This is done on the basis of certain criteria which have been used to judge the Convention successful, in order to ascertain the extent to which these claims are valid. The chapter also considers the impediments to the success of the Convention. Suggestions are made on how to overcome the problems especially in the Nigerian context. The chapter further assesses the success of the CISG in the Nigerian context in order to determine its implications for Nigeria.

Chapter Three provides theoretical and empirical reasons for the non-adoption of the CISG in Nigeria. The chapter presents the findings from interviews and surveys amongst the relevant

actors in Nigeria; Government Parastatals (The Department of International and Comparative Law and the Ministry of Trade), legal practitioners, legal academia, trade associations and the UNCITRAL. These findings are examined in order to determine whether they are justifiable, and to find out if there are ways to overcome the obstacles.

Chapter Four provides an analysis of the theory of legal transplant. This includes an explication of the relevant debates, justifications for and typologies of legal transplants. This is done, bearing in mind the categorisation of the CISG in this regard. The theory is used to conceptualise the adoption of the CISG in Nigeria. The chapter also builds the framework for the conceptual application of the CISG in Nigeria, which is discussed in the next chapter.

Given the goal of the CISG to negotiate between international and domestic laws, it is expected that the Convention should function cohesively with any legal system, particularly, the two prominently recognised legal systems in the world - civil law legal system and common law legal systems. In light of this, the chapter considers the experiences of Germany and the United States, which have ratified the CISG.

Chapter Five conceptualises the transplantation of the CISG in Nigeria. The chapter considers the reasons why the CISG should be adopted in Nigeria, the benefits of adoption and the effects of the CISG in Nigeria. The chapter examines the way the Convention will interact with the existing legal and social system in Nigeria, including the extant framework for international trade in Nigeria, the SGA 1893. Particularly, common law concepts, which may be inharmonious with the CISG, are considered with propositions of how to overcome any conflicts.

Chapter Six draws together the findings within chapters' two to five to make recommendations on what steps Nigeria should take regarding the adoption of the Convention and how to ensure the CISG functions maximally, if it is adopted.

## 1.4 Methodology

The thesis primarily adopts a doctrinal approach. The key primary source material examined is the CISG. The Convention's concepts are examined in order to determine the precise state of the law, evaluate their functionality in practice, the extent to which the CISG meets its aims, the application of the law and the concerns regarding its coherence. The examination of legal concepts embodied in the SGA and trade laws of other jurisdictions and their compatibility with the CISG is also doctrinal in nature. Secondary sources which include journal articles, books, written commentaries on the CISG, case laws, conference papers and policy documents in the area of the CISG are drawn upon to better understand, interpret and analyse concepts of the

CISG and the problematic areas of the law. The approach enables the author to examine the relationship between rules of the CISG, the areas of difficulties and ways to resolve them. These materials, both the primary and secondary sources are retrieved from various libraries in the UK as well as electronic repositories such as the CISG Pace University Website, UNCITRAL website, Jstor, Heinonline, Westlaw, Lexisnexis UK, amongst others.

The thesis also adopts a historical approach, which allows for systematic and objective location, evaluation and synthesis of evidence related to the CISG in order to establish facts about the CISG. The historical approach is employed in order to understand the motivation for uniform laws, and consequently the reasons for the goals and aims of the Convention. This approach enables a holistic analysis of the Convention, shedding light on why the Convention has certain characteristics, and why it was drafted in specific ways. It also enables an examination of the drafting history of the CISG in order to establish the level of representation of developing countries in the drafting process. This allows for more understanding of the need for the CISG, and its suitability for Nigerian international trade market. The historical approach also allows for an exposition on the background to the CISG, which can be a foundational interpretive tool for persons charged with its interpretation. Thus, it enables solutions to contemporary problems of the CISG to be sought in the past. Materials enabling the historical enquiry include the UN working Group documents (reports and commentaries) and the draft Convention.

One of secondary approaches adopted to supplement the doctrinal approach is the socio-legal methodological approach. The socio-legal methodological approach, through empirical research such as semi structured interviews and surveys allowed for acquisition of opinions from legal actors on the reasons for the non-adoption of the CISG in Nigeria. Through this approach, findings on the reasons for the non-adoption of the CISG are reported objectively, and from a neutral perspective. Although there are theoretical examinations on why certain countries have not adopted the CISG, because of the particularities of each country, this approach allows for a true understanding of reasons for the non-adoption of the CISG in Nigeria and the perceptions of legal actors. The interviews allow for an in-depth understanding of views and opinions of stakeholders whilst the surveys enable the measurement of the disposition of actors towards the CISG, in the event that it is ratified. Through the socio-legal approach the way the CISG works in other countries is measured, typically concerned with law in action.[7] This is gleaned through statements and phrases in case analysis, and secondary empirical data by other scholars such as

[7] Roger Cotterell, 'Why Must legal Ideas be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 2, 171.

surveys measuring the disposition and inclination of legal actors towards the CISG i.e. judges, lawyers and multinationals. This enables an assessment of the level of functionality of the CISG.

Another approach adopted in the thesis is the comparative methodological approach. This approach complementing the doctrinal approach is needful because it provides an opportunity of examining the CISG in context of different jurisdictions, thus allowing for an evaluation of its level of functionality and practicability. Two jurisdictions are chosen for the comparative analysis, Germany and the United States. They are chosen because they represent the two prominent legal systems in the world; civil and common law. As the CISG claims to be a neutral law, suitable for the any legal system, this investigation is necessary in order to determine whether the Convention interacts suitably with the concepts and practices peculiar to these jurisdictions. Their experiences are considered in the light of the CISG as a transplanted law. The reactions of key legal actors; their attitudes, disposition, interpretation and interaction with the Convention is assessed in these countries to determine whether or not the CISG is successfully transplanted based on criteria adopted as the definition of a successful transplant. Thus, the performance of the CISG against each of these criterions is measured in each jurisdiction and compared against the other jurisdiction.

The US is a common law system, which is the same legal system as Nigeria. This permits a comparative analysis of how common law concepts are interpreted by legal actors and their interactions with the CISG. It also allows for an examination of how common legal systems interpret civil law concepts under the CISG. Germany on the other hand, being a civil legal system allows for an examination of the interpretation of civil legal concepts, in the way they ideally should be interpreted. It also allows for examination of the interpretation of the common law concepts to gauge the level of uniformity in interpretation.

The countries are also chosen because they offer a plethora of easily accessible material to make the comparisons. It is recognised that countries on the same developmental index and with similar legal history and system, especially African countries, may have been preferred. However, there is a dearth of materials on the application of the CISG in these countries.

The comparative approach of the CISG in other systems thus allowed for a distillation of the potential problems and pitfalls, which Nigeria may face, where the CISG is adopted based on the experiences of the Convention in different jurisdictions. This provides a platform for the proper recommendations to be made on the adoption of the CISG.

The thesis adopts a conceptual style analysis. Thus, for every analysis or example gleaned from countries situation regarding the CISG, there is a conceptual analysis based on the existence of the Convention in Nigeria. This allows for practical evaluation and for appreciation of potential problems, which might be experienced in Nigeria.

## 1.5 Research Design

The research adopts both the qualitative and quantitative research methods. Adopting both methods whilst enabling the rich and context specific answers, allowed for measurement of the disposition of the stakeholders towards the CISG. Qualitatively it combines doctrinal, problem, and law reform categories of research. This is because the thesis examines the CISG, the problems affecting its application in various jurisdictions and the proposal for law reform in Nigeria. Since the thesis seeks to understand why the CISG has not been adopted in Nigeria, it seemed indispensable that the opinions of stakeholders are sought. This is in accordance with the core feature of qualitative research methods, that 'satisfactory explanations of social activities require a substantial appreciation of the perspectives, culture and worldviews of the actors involved'.[8]

As the thesis sought to gain a detailed insight into the reasons for the non-adoption of the CISG in Nigeria, the semi structured interview method was chosen because it allowed a great deal of leeway in how the respondents replied. The synergy built from comments amongst key stakeholders from different legal arena in Nigeria resulted in insightful results. As evidenced by the interview questions attached, questions did not necessarily follow the *interview guide* as some of the following questions were asked following the responses of the interviewees.

The quantitative research design particularly, surveys were employed in the thesis to measure the level of awareness of the CISG in Nigeria, the level of dissatisfaction with the current trade law and the disposition of legal practitioners towards the CISG.

### 1.5.1 Sample

The sample process adopted for the interview and survey is the non-probability sampling technique.

#### i. Interview Sample

The fieldwork exercise, which involved the researcher conducting a total of 33 semi-structured interviews, was done to gain the opinion and perspectives of stakeholders. Purposive sampling,

[8] Robert G Burgess (ed.), *Field Research: A Sourcebook and Field Manual* (Routledge, 1989) 3.

based on interviewing people relevant to the research questions was adopted.[9] Respondents included academics, legal practitioners, directors of relevant government parastatals and international organisations.

The academics were chosen based on their teaching specialisation whilst the directors were from particular parastatals; Ministry of Trade and Investment,[10] Department of International and Comparative Law, Ministry of Justice,[11] Manufacturers Association of Nigeria and the UNCITRAL.[12]

The DICL is responsible for vetting international agreements and overseeing the ratification of international agreements. As a result of their responsibilities and experience, they were able to provide relevant information on Nigeria's non-adoption of the CISG. Representatives from the FMTI charged with formulating and implementing policies and programmes to attract investment, boost industrialization, increase trade and exports, and develop enterprises were chosen because their responsibilities meant that they liaise with the SMEs and therefore understand their needs, whilst also serving as a conduit between the Nigerian people and the international trade community. This makes them best suited to offer knowledge from varied perspectives on the reasons why uniform laws such as the CISG have not been adopted in Nigeria.

The legal practitioners were chosen because of their experience in international trade practice and their representation of Nigerian traders. Their area of practice, international trade and commercial law was germane in making the choice. The legal practitioners interviewed were from nine law firms recognised as having expertise in corporate and commercial law.[13] As a result of their exposure to the dynamics of contractual agreements, they provided information on the bargaining strengths of each transacting party. They were also able to provide insights on the problems with trade and the 1893 SGA in Nigeria.

The specialisation of the legal academics enabled them to provide details of the gaps in the frameworks and the problems of ratification from an academic perspective.

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[9] Alan Bryman, *Social Research Methods* (2nd ed, OUP 2004) 334.
[10] (FMTI).
[11] (DICL).
[12] UNCITRAL.
[13] The following firms recognised as top commercial firms were contacted Olaniwun Ajayi, Banwo & Ighodalo, Aluko & Oyebode, G. Elias, Ajumogobia & Okeke, Streamsowers & Kohn, Aelex, Punuka Firm, Olawoyin & Olawoyin, Alliance Law firm. See Chambers & Partners, http://www.chambersandpartners.com/161/242/editorial/2/1 accessed 6 February 2015.

The UNCITRAL was chosen because of its experience working with African countries and the ability to provide information on the hindrances to adoption of the CISG. The organisation was also chosen because the staff experience meant that they could provide suggestions on ways to promote the CISG and show its advantages to developing countries.

The MAN, which is the collective voice for manufacturers in Nigeria, and the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture,[14] the umbrella organisation for all the State and Bilateral Chambers of Commerce within Nigeria,[15] a private initiative that seeks to create an investment friendly environment in Nigeria through formulating, making known and influencing general policy in regard to industrial labour, social, legal, training, and technical matters were interviewed. As a forum for manufacturers in the private sector to formulate and articulate policy suggestions that would be complementary to government's efforts at policy formulation,[16] they were able to provide insights on the problems faced by traders in international trade transactions.

The positions, specialisations and responsibilities of the stakeholders made them the most suitable candidates for the interview, particularly in light of the objectives of the thesis. This and their willingness to participate in the study and to give informed consent for use of the data made them the best choice of participants.

### ii. Survey Sample

The survey was chosen to augment the data obtained from the interview. In line with the research objectives, particularly with regards to the conceptual analysis of the CISG in Nigeria, it sought to measure the level of awareness of the CISG in Nigeria, the likelihood and willingness of the actors to engage with the Convention. In order to do this, sample was taken from legal practitioners in the top commercial law firms in Lagos, Nigeria. The measure made on the sample obtained is used to estimate the general level of awareness and disposition of commercial lawyers in Nigeria towards the CISG. 96 questionnaires were distributed amongst the legal practitioners in the commercial law sector, and 71 responses were received. The surveys distributed amongst the legal practitioners in the law firms were based on their availability at the time the questionnaires were administered. This is one of the shortcomings of the data collection process, as some of the intended respondents were away at the time of distribution. The number

[14] Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA).
[15] Kaduna Chamber of Commerce, Industry, Mines and Agriculture (KADCCIMA), KADCCIMA http://www.kadccima.org.ng/content/nigerian-association-chambers-commerce-industry-mines-and-agriculture accessed 22 January 2014.
[16] Manufacturers Association of Nigeria (MAN), 2012 Annual General Meeting Handbook, 15.

of responses obtained was out of the researcher's control as she was given a specific date and time to distribute the questionnaires. The sample size was a compromise between the resources and the need for generalisable results. Considering that the questionnaires were distributed amongst at least seven of the top ten commercial law firms in Nigeria, the number of responses gotten can be considered representative of the opinions of the practitioners in commercial in Nigeria.

### 1.5.2 Sample Size

#### i. Interview

The 32 interviews were conducted in Nigeria, (Lagos and Abuja) and 1 interview online via Skype. The breakdown of the interviewees is as follows:

a. **Twenty Five** legal practitioners practicing in the corporate and commercial law (some are academics)
b. **Six** academics teaching in commercial law
c. **Two** officers from the Ministry of Trade Nigeria
d. **One** legal officer with the UNCITRAL
e. **One** assistant director from The Department of International and Comparative Law, Federal Ministry of Justice Nigeria
f. **One** Acting director of the Manufacturers Association of Nigeria

For the representatives of the government agencies and international organisations, their positions ensured that not more than one person was needed since they have the authority and information to speak on behalf of the organisation or body, which they represent. This made it needless to corroborate their interviews.

The twenty-five legal practitioners interviewed, not only fits within the acceptable number for publishing a qualitative research,[17] their opinions had reached theoretical saturation. One of the challenges faced was in respect to obtaining interviews from the legal academia. Although the interviews had been scheduled weeks ahead, when they were supposed to take place, the National University Commission had just declared a strike in Nigeria and therefore, most of the academics were not available for the interview. Thus, the author acknowledges that data obtained

[17] Carol A B Warren, 'Qualitative Interviewing' in Jaber F Gubruim and James A. Holstein (eds), *Handbook of Interview Research: Context and Method* (Sage Publications, 2002) 99.

with respect to the academics is not representative, given that the institutions were on strike at the time the data was obtained.[18]

### ii. Survey

Given the time and resources, 96 questionnaires were distributed amongst the legal practitioners in the commercial law sector, however, 71 responses were received.

## 1.6 Data Collection Process

### i. Interviews

The semi-structured interview was employed as the data collection instrument for the purposes of the research. It allowed for an in depth discussion on the opinions and views of the respondents. Although an interview guide was utilised, because of the flexibility associated with the semi-structured interviews, the questions were not regimented. The follow up questions allowed for clarification of certain points though leading to less harmony since different participants raised different issues.

The researcher travelled to Nigeria in June 2013 and December 2013 to conduct the interviews. All the interviews took place from June 2013 to February 2014. The face to face interviews were conducted in Lagos and Abuja, Nigeria. The telephone interviews were conducted in Lagos and Abuja, Nigeria and Durham, whilst the Skype interview was conducted in Durham, England.

The participant information sheet was read and signed by all the interviewees before each interview. By signing the consent form, they agreed that interviewee was their choice, they understood that the thesis would be made publicly available, that the interview would be recorded and that their names could be used in the thesis.[19]

The interview started with the researcher introducing herself, the aims and objectives of the study, provision of the participant information sheet and affording them the opportunity to ask any questions or voice their concerns before the interview. The interview then proceeded with the questions set out with each interview lasting from about 45 to 120 minutes.

### ii. Surveys

The researcher used the questionnaires to garner answers on issues dealt with in the research. The questions were constructed to elicit information on the awareness of the CISG amongst the

[18] Charles Abah and Others, 'Parents, Students Jubilate as ASUU Ends 169-Day Strike' (The Punch, 18 December 2013) http://www.punchng.com/news/parents-students-jubilate-as-asuu-ends-169-day-strike/ accessed 8 February 2015. Six people in the legal academia in Nigeria were interviewed, because of the on-going University strike which was called off subsequently in December 2013.

[19] Attached in Appendix section.

legal practitioners. Two main kinds of questions were adopted; open-ended and pre-coded. The open-ended questions were adopted where the researcher had no idea what the answers would be and thus left them up to the respondents for instance 'where, when and how did you hear of the CISG?' However, a majority of the questions were pre-coded, providing a list of answers from which to choose. Attitude scales were adopted, giving the respondents the opportunity to choose options that best described their disposition towards the Convention amongst other measures. This was done to evaluate the level of acceptance, likelihood and willingness to engage with CISG where it is adopted. The attitude scale allowed for gradation in responses and minimisation of bias by covering the same range of positive and negative evaluations.

The researcher was given a specific date and time to administer the questionnaires, which were in paper format. In some cases they were handed out by the researcher to respondents whilst in other cases, they were handed to administrative staff or legal practitioner in the law firms and the researcher waited or was asked to come on a specific day to collect the responses. As a result, even where the researcher noticed some unanswered question, probably because of lack of understanding of the question by the respondent thus, requiring clarity, there was no opportunity to clarify. This was part of the limitation of the survey. Other limitations include the lack of availability of some of the participants and the lack of response to some of the question

### 1.7 Original and Significant Contribution to Knowledge

Legal scholarship within the area of the CISG, have addressed reasons why countries such as South Africa, United Kingdom etc. have not adopted the Convention. A perusal of these articles suggests distinctive reasons for the non-adoption of the Convention in particular jurisdictions. Despite the plethora of articles in this regard, there are none examining the reasons for the non-adoption of the CISG in Nigeria. Bearing in mind the distinction and particularism of each country, such as development level, one cannot adopt a one size fits all cap approach in explaining the reasons for the non-adoption of the CISG in countries, even countries with geographical proximity. Thus, there is a gap in legal scholarship, in that no article provides the reasons for the non-adoption of the CISG in Nigeria.

In light of the above, the thesis sought to fill the gap in extant literature, and contribute to legal scholarship in the area of the CISG, by undertaking an in-depth study on the reasons for the non-adoption of the CISG in Nigeria. The thesis makes an original contribution by providing a holistic understanding on the reasons why the CISG has not been adopted in Nigeria. This understanding is gained through empirical and theoretical exploration. Empirically, qualitative methodology (interviews) is employed to understand the disposition of the key actors towards

the Convention and their reasons for non-adoption. Quantitative research (surveys) is adopted to establish the level of awareness and attitude of key players in Nigeria towards the Convention, and whether or not the Convention is needful in Nigeria.

The research has several practical and policy implications. As there is currently no uniform international trade law governing international sale of goods in Nigeria, the thesis has made a call for the adoption of the CISG in Nigeria. This call is made on the basis of a comparative analysis, which demonstrates the compatibility of the CISG with the Nigerian sales law (1893 SGA) and in the Nigerian trade environment.

The thesis further makes an original contribution by providing a conceptual analysis of the effect of transplanting the CISG in Nigeria, i.e. its effects on actors and different juridical institutions in Nigeria. It is shown that the CISG as a legal framework, addresses issues with respect to international trade faced by Nigerian traders, provides a sturdy framework, which can be used to address these issues, and puts them on par with their foreign counterparts.

The thesis has drawn from the experience of the CISG in other jurisdiction on actors, and predicted potential pitfalls for Nigerians to avoid where the CISG is adopted.

# CHAPTER 2

# The CISG

## 2.1 Introduction

This chapter evaluates the CISG by providing a brief history of the Convention and assessing its success. A historical analysis is important in order to understand the reasons, goals and aims of the Convention, which provides an understanding of why the CISG may be a useful tool for international trade in Nigeria. Thus, the reasons for undertaking such endeavour, the drafting process of the Convention are examined. The emergence of, composition of and methodology adopted by the Commission, UNCITRAL, is also examined in order to establish the level of representation of countries worldwide and degree of neutrality of the substantive provisions of the Convention. The scope and structure of the CISG is analysed in order to understand the effects of the drafting style for Nigeria.

The chapter also examines the claims of success of the Convention based on the number of adoptions,[1] the percentage of coverage of world trade[2] and its increasing applicability by States and arbitral tribunals.[3] Concededly, these parameters may be indicative of 'success.' However, other vital parameters on which the success of the CISG must be measured against, are necessary to determine the adoption of the CISG in Nigeria. This is done in order to determine whether the Convention can be considered a success, and as such suitable for Nigeria.

## 2.2 Harmonisation and Unification Concepts

The concepts of unification and harmonisation have been recognised by scholars as being different, although they arguably have meeting points. The CISG may be considered an embodiment of the two concepts. However, the meanings of the two concepts shall be explored to arrive at this conclusion.

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[1] Currently there are 83 states that have ratified the CISG, The Pace CISG Database http://www.cisg.law.pace.edu/cisg/countries/cntries.html accessed 27 April 2014.

[2] John C Kleefeld, 'Rethinking "Like a Lawyer:" An Incrementalist's Proposal for First-Year Curriculum Reform' (2003) 53 (2) Journal of Legal Education 254, 262; Michael van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 University of Pennsylvania Law Review 687, 689 in Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25 International Review of Law and Economics 314, 315.

[3] ibid, Ferrari (n 2).

Unification may be considered as 'the adoption by States of common legal standard governing particular aspects of international business transactions'[4] or "the intentional introduction of identical legal rules in two or more legal systems".[5] For Kamba, it signifies "the process whereby two or more different legal provisions or systems are supplanted by a single provision or system; it creates an identity of legal provisions or systems"[6] and for Kastely, unification means "to subject people around the world to a single set of rules and principles and to have them understand and conform to these rules and principles as they would to the law of their own communities".[7] Crystallizing these definitions Osborne concludes that for the existence of unification, "there has to be the intentional substitution of domestic laws in two or more jurisdictions by a single, international-based, body of norms, which is interpreted and applied uniformly".[8]

Based on the goals and aims of the CISG, there is no doubt that it can be considered a uniform law, at least within the meaning of unification of law above. For one, the CISG establishes a common legal standard for governing international transactions worldwide, through a framework. Thus where it is adopted in Nigeria, it will subject traders in Nigeria and their foreign counterparts to a single set of rules and principles with the expectation that they will conform to these rules. Secondly, it will replace the domestic laws currently governing international trade where the parties opt for it. Consequently, it will supplant the domestic laws of traders in Nigeria and abroad in any international trade transaction, albeit choicely.

Harmonisation on the other hand 'implies a state of consonance or accord; the combination or adaptation of parts, elements or related things, so as to form a consistent and orderly whole.[9] It is also 'a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality'[10] and further it is'…effectuating an

[4] D Sridhar Patnaik and Fabrizio Lala, 'Issues of Harmonisation of Laws on International Trade from the Perspective of UNCITRAL: The Past and The Current Work' http://works.bepress.com/sridhar/10/

[5] Bogdan M, Comparative Law (1994) in Philip James Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' http://www.cisg.law.pace.edu/cisg/biblio/osborne.html

[6] W J Kamba, 'Comparative Law' (1974) 23 International and Comparative Law quarterly 485, p.501 in Philip James Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' http://www.cisg.law.pace.edu/cisg/biblio/osborne.html

[7] A H Kastely, 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' (1988) 8 Northwestern Journal of International and Business Law 574.

[8] Philip James Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' http://www.cisg.law.pace.edu/cisg/biblio/osborne.html assessed 25/01/ 2012.

[9] J.A.H. Murray, H. Bradley, W.A. Craigie et al., eds., The Online Oxford English Dictionary, http://www.oed.com/view/Entry/84303?redirectedFrom=harmony#eid accessed 25 January 2012.

[10] Martin Boodman, 'The Myth of Harmonization of Law' (1991) 39 (4) American Journal of Comparative Law 699-724, 702.

understanding about the significance of certain concepts, on certain modes of rule formulation, and on the recognition of authoritative sources'.[11]

Goldring describes the process of harmonisation as one under which '… the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries'.[12] Harmonisation is also a flexible concept which may in one context mean 'that the relevant law of the jurisdictions involved is characterized by a high degree of similarity in basic principles but not detailed provisions.[13]

From the above, harmonisation of law seems to be a less precise concept than unification of law. Distinguishing harmonisation from unification, Glenn states regarding harmonisation

> Uniformity of result is not its goal, since law is conceived in terms of process rather than result and variable results are entirely compatible with the process sought to be created. They may even be viewed as essential in demonstrating the lack of substantive bias of the system. The harmonisation, which takes place, is therefore of the intellectual cadre within which legal deliberation takes place – of broad concepts, of language and of structures. Given a broad and harmonious legal cadre the distinction between national and international cases becomes difficult. Sources are used within the cadre according to their merit, with no close regard for their formal and geographic point of origin or for the geographic locus of the dispute to be resolved. Authority within the cadre is largely persuasive, since communication is facilitated and no single solution is judged worthy of official consecration in definitive, formal fashion. Laws are thus not seen as conflicting; they simply co-exist as potential sources.[14]

From the above, the CISG tends towards unification than harmonisation since it requires the adoption of a codified common legal standard by state parties, requiring uniform application and any individuation of its principles by interpreters defeats the purpose and aim sort to be achieved

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[11] René David, 'The Methods of Unification' (1968) 16 (1/2) American Journal of Comparative Law 13-27, 15 see also René David, 'The International Unification of Private Law' in (1971) *International Encyclopedia of Comparative Law,* vol.2 (1971), 34-35, 29.

[12] John Goldring, 'Unification and Harmonization of the Rules of Law" (1976-77). 9 Fed L.R 108.

[13]. R.C.C. Cuming, "Harmonisation of Law in Canada: An Overview," in the Report entitled "Perspectives on the Harmonization of Law in Canada" (1985). Martin Boodman, 'The Myth of Harmonization of Law' (1991) 39 (4) American Journal of Comparative Law 699-724, 702

[14] H. Patrick Glenn, "Unification of Law, Harmonization of Law and Private International Law", in *Liber Memorialis François Laurent* (1989) 783-784, 783

by the drafters. Harmonisation on the other hand, depending on the context, allows for more flexibility and tolerates the difference between individual laws and their processes, which is minimally tolerated in the interpretation of the CISG. However, one cannot categorically discountenance some of the qualities of the CISG, which draws from the core definition of harmonisation. For instance, since harmonisation as construed in the legal literature, arises exclusively in comparative law and particularly in conjunction with inter-jurisdictional, private transactions,[15] the CISG for the fact that it applies solely to inter-jurisdictional contracts, can be seen as a harmonisation endeavour.

Though differences exist in these two concepts and the CISG draws more from unification concepts, it must be recognised these concepts are still related and may be used interchangeably in reference to the CISG, since their distinction is really to the extent to which they accommodate variation. Thus, since all harmonisation efforts are characterised by a certain level of degree and scope, the degree to which all a harmonisation requirement continues to tolerate difference, known as the harmonisation 'margin',[16] is the determinant of the classification of the CISG. The CISG may be considered a merger of both concepts since absolute uniformity among sovereign nations is an impossible goal and functional uniformity, which the Convention aims at, is what is more attainable. This is more the case since functional uniformity is really a compromise, which consequently results in harmonisation thus, one may find that in such cases the concept of unification becomes absorbed by harmonisation.[17] This similarity in concepts of harmonisation and unification terminologies as it applies to the CISG is relevant in making a case for the adoption of the Convention in Nigeria since it may aid towards a better understanding of the perceived shortcomings of the Convention, i.e. inability to attain absolute uniformity. Thus, what may be construed as deterrent to the adoption of the Convention in Nigeria can really be employed as a measure for success, where the CISG can be considered a successful harmonisation endeavour and to that extent, a case can still be made for the CISG. This is even more the case if one considers that in most harmonisation instances margins of tolerance are implicitly or explicitly allowed and in the case of the Convention, since there are no

[15]R.C.C. Cuming, "Harmonisation of Law in Canada: An Overview," in the Report entitled "Perspectives on the Harmonization of Law in Canada" (1985) in Martin Boodman, 'The Myth of Harmonization of Law' (1991) 39 (4) American Journal of Comparative Law 699-724, 702

[16] David W. Leebron, 'Claims for Harmonisation: A Theoretical Framework' http://heinonline.org/HOL/Page?handle=hein.journals/canadbus27&div=9&g_sent=1&collection=journals#89 accessed 15/04/2014 at 72. He states that the unification of law or the adoption of uniform law is harmonisation with a margin.

[17] Philip James Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' http://www.cisg.law.pace.edu/cisg/biblio/osborne.html accessed 27/01/2012.

harmonised institutions or any court with superior authority, it implicitly allows differences in implementation and effect, at least to a reasonable degree. Despite the meeting points between the two concepts, maintaining the distinction is a necessity as a tool for evaluating the success of the CISG, since unification remains an ideal to be striven for through the vehicle of harmonisation,[18] and laws such as the CISG may be measured in terms of unification.

### 2.2.1 Tracing the Harmonisation and Unification of Trade Law

The international process of assimilating diverse legal systems goes back in history with two notable precedents, the common law and Roman law, which have become legal systems of a large of the world, either by conquest or settlement. Nigeria shares the common law legal traditions with other colonies conquered by the Great Britain. To that extent, Nigeria is no stranger to harmonious legal standards. With regards to international transactions, the existence of harmonious laws equally dates back. Trade existed in many merchant clans like the Phoenicians, Jews and Lombards in the West and they all had special rules that were effectively binding without the sanction of any specific nation state.[19] These rules were both respected by the common law and continental courts as having some element of *lex mercatoria* or a derivative of natural law absorbed into local laws. Based on this, it may not necessarily be right to attribute most of the work on harmonisation and unification solely to lawyers and legislators but may be attributable to the result of private rule making, universally accepted through custom and contract which imperfectly finds its way into formal national and international law.[20] This fact is supported when one considers the stages of development of international trade law which comprise firstly, the appearance of universally accepted rules in the form of medieval *lex Mercatoria,* then the incorporation of these rules into the municipal laws of various national states which succeeded the feudal stratification of mediaeval society and the more contemporary third stage, which consists of the development of widely accepted legal concepts.[21] The stages of

[18] Philip James Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' http://www.cisg.law.pace.edu/cisg/biblio/osborne.html accessed 27/01/2012.

[19] Arthur Rossett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 Am. J. Comp. L. 683, 685.

[20] Good examples are the Banker's Rules dealing with documentary letters of credit. See Uniform Customs and Practice for Documentary Credit, issued by the International Chamber of Commerce Commission on Banking Technique and Practice. The latest revision was approved by the Banking Commission of the ICC at its meeting in Paris on 25 October 2006. This latest version, called the UCP600, formally commenced on 1 July 2007 in Arthur Rossett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 Am. J. Comp. L. 683, 685.

[21] The culmination of the development in the second stage was the adoption in France of the *Code de Commerce* of 1807 preceded by the *Ordonnance sur le commerce* of Louis XIV of 1673 and Colbert's *Ordonnance de le marine* of 1681, in Germany the Promulgation of the *Allgemeine Handelsgesetzbuch* of 1861 preceded by the *Allgemeine Wechselordnung* of

development are indicative of the fact that concepts found in the CISG are universally accepted concepts, which later diffused into domestic jurisdictions. This also shows that the similarities transcends the division of the world between countries of free enterprise and countries of centrally planned economies, legal families of civil and common law origins.[22] This is indicative of the fact that international trade laws are concepts which are universally known and may possibly be well understood and easily adaptable in domestic jurisdictions, which means that the laws embodied in the CISG make for easier understanding by the interpreters whether in developed or developing countries.

### 2.2.2 The CISG as a Harmonisation and Unification Endeavour in light of Art 7(1) and (2)

Art 7(1) states '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'. Through this provision it is recognised that the international character of the Convention and the need to promote uniformity in its application are the basic criteria for the interpretation of the Convention. The observance of good faith is also recognised within the subsection. The recognition of the international character of the CISG is one of its most important element given the fact that it not only stresses the character of the Convention and its overarching goal of uniform application, but also describes the process by which those called upon to apply the Convention to a particular case ascertain the meaning and legal effect to be given to its individual articles. The principle of good faith under the CISG may be used when considering the facts of certain cases to persuade a court to depart from a settled interpretation of the Convention and thus run contrary to uniformity, if only because its meaning and scope are so unclear.

Creating a uniform law such as the CISG is one step in achieving uniformity because the subsequent uniform application and interpretation is the true judgment of the unifying effort. When dealing with a piece of legislation such as the CISG, however, that has been prepared and

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1848 and in England the incorporation of the custom of merchants into the common law by Lord Mansfeld. Progressive development of the law of international trade Official Records of the General Assembly - Meetings of the Sixth Committee A/6396 - Report to the Secretary General ("The Schmitthoff Study") (document ultimately was support for the creation of UNCITRAL) accessed 23/03/2014. 4

[22] Clive M Schmitthoff, 'The Law of International Trade, Its Growth, Formulation and Operation' in *The Sources of the Law of International Trade with special reference to East-West Trade*, edited by Clive M Schmitthoff (New York, Praeger, 1964), p.3 in Progressive development of the law of international trade Official Records of the General Assembly - Meetings of the Sixth Committee A/6396 - Report to the Secretary General ("The Schmitthoff Study") (document ultimately was support for the creation of UNCITRAL) accessed 23/03/2014. 4

agreed upon at international level and has been incorporated into many diverse national legal systems, interpretation becomes far more uncertain and problematic because there is no equivalent international legal infrastructure.

The CISG was given an autonomous, self-supporting nature by its drafters. Undoubtedly, interpretive problems arise out of international laws such as the CISG especially because in the field of commercial law there is a proportional relationship that exists between issues of interpretation of the Convention. Principles of interpretation could be borrowed from the law of the forum or the law, which according to the rules of private international law would have been applicable in the absence of uniform law. Where any of these options are considered, they would result in different interpretations and implementation of the CISG, leading to dissonance in uniformity and promotion of forum shopping. Such a result would undermine the purpose of the uniform legislation and defeat the reasons for its existence.[23]

Considering that article 7(1) declares that an autonomous approach to the interpretation of the CISG must be considered given its international character and purpose, interpreters must thus understand that although the Convention has been adopted in the national legal systems, its international nature must be borne in mind.

The international character of the CISG also means that the terms and concepts of the CISG must be interpreted autonomously of meanings that might traditionally be attached to them within national legal systems. To have regard to the CISG's international character means that the interpreter should not apply domestic law to solve the interpretative problems raised in the CISG. The reading of the CISG in light of the concepts of the interpreter's domestic legal system would be a violation of the requirement that the CISG be interpreted with regard to its international character. In the CISG, the elements of internationality and uniformity are inter-related thematically and structurally because of their position in the same Part and Article of the Convention, functionally because an autonomous approach to interpretation is necessary for the functioning of both, and inter-dependently because the existence of one is a necessary prerequisite for the existence of the other. The international, rather than national, interpretation is necessary in order for uniformity in the application of the CISG to be achieved, and uniformity of application is vital if the CISG is to maintain its international character.[24]

[23] John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2001) 115-265.
[24] ibid.

The ultimate aim of the CISG, and arguably the reason for its existence, is to achieve the broadest degree of uniformity in the law for international sales transactions.[25] Its adoption by the Contracting States is a necessary but insufficient step towards this aim. What is also necessary is that the CISG, once incorporated into the various domestic legal systems, is read, interpreted, and understood in the same uniform way by all its users, in any of the Contracting States.

The third element of article 7(1) promotes the observation of good faith in international trade. Some commentators have insisted on the literal meaning of the provision and conclude that the principle of good faith is nothing more than an additional criterion to be used by judges and arbitrators in the interpretation of the CISG. Thus, good faith is merely a tool of interpretation at the disposal of the judges to neutralise the danger of reaching inequitable results. Using the concept of good faith as interpretation as a mere instrument of interpretation, good faith can pose problems in achieving the ultimate goal of the CISG - uniformity in its application - because the concept of good faith has not only different meanings between different legal systems but also multiple connotations within legal systems.

Another suggestion is that the duty to observe good faith in international trade is also applicable to the parties to each individual contract of sale.[26] This however implies that interpreters of the CISG are not only judges or arbitrators but the contracting parties as well.[27]

It has been suggested that the reference to good faith in international trade should be considered in light of the functional value of the qualification 'in international trade.' This is because the principle of good faith may not be applied according to the standards ordinarily adopted within the different national systems, and secondly the principle of good faith as expressed in the CISG must be construed in light of the special conditions and requirements of international trade.[28]

The CISG attempts to provide a uniform body of law applicable to international sale transactions. It does not constitute an exhaustive body of rules, however, and thus does not provide solutions for all the problems that can originate from an international sale transaction. Given this, Article 7(2) states '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

[25] Susanne V Cook, 'The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1988) 50 University of Pittsburg Law Review 197, 261.
[26] Felemegas n 22.
[27] ibid
[28] ibid
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the rules of private international law.' This provision was drafted to deal with problems of incomplete body of rules. Gaps in the CISG, where not resolved, threaten the uniformity and autonomy of the CISG's interpretation. These gaps must be resolved by interpretation of the CISG. Given that uniformity is the goal of the CISG, it is important that in resolving these gaps, the courts would refrain from resorting to the different domestic laws and try to find a solution within the Convention itself. The gap filling analysis does not apply to the matters excluded from the scope or application of the Convention (*intra legem*), they must be gaps praeter legem (matters governed by the Convention but not expressly resolved).[29]

### 2.2.3 Evolution of the CISG

The process of unification of international trade law dates back to the middle decades of the nineteenth century in Europe with efforts intensified after the First World War. This began to take place under the auspices of the League of Nations and intergovernmental bodies; The Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the Sixth International Conference of American States, held at Havana in 1928.[30] Ernst Rabel submitted a preliminary report on the possibilities of sales law unification on the February 21 1929 and on April 29 1930, a committee with representatives from different legal systems was constituted. Although the first draft of the uniform sales law was presented by Rabel in 1936, the World War II halted any further work on the unification. The diplomatic conference held by the Dutch government on the unification of sales law at The Hague established a singular commission tasked with ensuring progressive development of the unification effort. Following subsequent meetings in the 1950s, a draft substantive law was produced in 1956, which engineered efforts by the UNIDROIT to create a uniform international sales law. In 1958, a draft was presented and subsequently distributed amongst governments and inputs and suggestions were considered in the revised draft of 1963.[31]

### 2.2.3 The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Uniform Law on International Sale of Goods (ULIS)

Based on the work done before and after the Second World War, the ULF and the ULIS were birthed at The Hague on 1 July 1964 where they opened for signature and entered into force on

[29] ibid.
[30] UNGA Twentieth Session 'Unification of the Law of International Trade: A Note by the Secretariat' Document A/C.6/L.572 http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/vol1-p13-17-e.pdf accessed 21 March 2014.
[31] Ingeborg Schwenzer and Pascal Hachem, 'The CISG - Successes and Pitfalls' Ingeborg Schwenzer and Pascal Hachem, 'The CISG—Successes and Pitfalls' (2009) 57 American Journal of Comparative Law 457.

18th August 1972.[32] The two Conventions, precursors to the CISG, served as underlying documents for the elaboration of the CISG. They however did not fulfil the expectations of the drafters since they garnered only nine ratifications, with just two States being non-European, despite the attendance of twenty-eight at the conference.[33] This was because they reflected too exclusively the practices and concerns of Europe. Thus, developing countries and socialist bloc countries were sceptical about Conventions drafted by mainly industrialised nations.[34] Secondly, there were a number of deficiencies in the material stipulations of the Conventions for instance; there were insufficient provisions on the transport of goods by sea and on the particular questions and problems connected with that mode of transport.[35] Furthermore, the ULIS used abstract concepts, which could easily result in ambiguity and error that could not be understood by businessmen and the scope of application was considered too broad, as it was to apply regardless of conflict of rules.[36]

The 'failure' of the ULIS and the ULF served as significant lessons on the importance of equal participation by all countries in the drafting of laws such as this. Interviews carried out amongst legal practitioners and Ministerial bodies' reveal developing countries such as Nigeria are wary of laws, which have been drafted to their exclusion. However, it is suggested that this fear need not affect the decision on the ratification of the CISG in Nigeria since the history of the drafting of the Convention reveals that this factor was taken into account thus, ensuring equal participation and decision by countries from different legal families and development status.

Despite the fate of The Hague Conventions, they played central roles in the drafting and contents of the CISG and till date can be consulted in doctrinal and historical research on the CISG.

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[32] Belgium, Gambia, Federal Republic of Germany, Israel, Italy, The Netherlands, San Marino and the United Kingdom. Muna Ndulo, 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' (1989) 38 International and Comparative Law Quarterly.

[33] ibid; Sieg Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa'(1999) 116 South African Law Journal, Part II 323,334.

[34] Paul Lansing, 'The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL' (1980) 18 American Business Law Journal 274; Peter Winship 'International Sales Contracts under the 1980 Vienna Convention' (1984) 17 Uniform Commercial Code Law Journal 58.

[35] Mr Suy, 'Speech by Temporary President' United Nations Conference on Contracts For The International Sale Of Goods Vienna, 10 March-II April 1980 (Official Records) Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf 227 accessed 9 April 2014.

[36] The only countries from the third world that participated were Egypt and Yugoslavia.

### 2.2.4 The CISG

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966,[37] with its main aim being the promotion of the progressive harmonisation and unification of the law of international trade. The request for the survey establishing the problems of the ULIS and ULF was recommended by the UNCITRAL at the first session in 1968. The replies submitted in 1969 revealed the flaws of The Hague Conventions. Based on the analysis of the replies, a working group consisting of 14 member States was set up to ascertain 'which modifications of the existing terms might render them capable of wider acceptance by countries of different legal, social and economic systems or whether it will be necessary to elaborate a new text for that purpose'.[38] The working group suggested the adoption of new texts.[39]

A significant observation is regarding the constituency of the UNCITRAL at the time, consisting of seven seats from Africa, five from Asia, four from eastern European States, five from Latin American States and Eight from Western European States, was representative of the diverse legal families and their different levels of development. Amongst the African representatives included Nigeria.[40] The above is evident that the CISG, which is a product of the UNCITRAL, is representative of the interests of both developed and developing countries. In recognition of the consideration for developing countries, several representatives pointed out the extreme importance for developing countries of devoting attention to, and participating in efforts towards the progressive development of the law of international trade, particularly, as stated in the document.

Since developing countries were not able, by force of circumstance, to participate in numerous international institutions active in this field, their participation in such a United Nations organ, as had been proposed was particularly important to them…the Commission could be instrumental in improving trade practices that had evolved in the past which benefitted developed countries at the expense of developing countries.[41]

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[37] The UNCITRAL was created by Resolution 2205(XXI) of 17 December 1966 UNCITRAL Origin Mandate and Composition, (*UNCITRAL*) https://www.uncitral.org/uncitral/en/about/origin.html accessed 9 April 2014.
[38] Ndulo (n 32) 4.
[39] Official Records of the UN Conference on Contracts for the International Sale of Goods (A/CONF.97/19) in ibid.
[40] ibid.
[41] UNGA Official Records, Agenda Item 88 Twenty First Session (New York, 1966) https://www.uncitral.org/pdf/english/yearbooks/archives-e/A-6396-E.pdf 50 accessed 9 April 2014.

From the above, there is no doubt that the UNCITRAL took the failure of The Hague Conventions into account and in seeking to avoid its fate, reconstituted a more diverse body as members, and began the process of drafting of a new Convention which however was based on the texts of the Hague Convention. Commentators have suggested that a crucial factor to the success of the UNCITRAL is its varied composition. Not only were representatives experienced and versed in international trade law, some of them had participated in the drafting of the ULIS and ULF which provided continuity and experience in the unification process. The effect of the members from different backgrounds is reflected not only in the text of the CISG but also in the level of acceptance of the Convention.

A first draft of the Convention on Sales was produced in January 1976 and subsequently ratified with some changes at the tenth conference of the UNCITRAL held in Vienna in May and June 1977. Following this, the Draft Convention on Formation was deliberated on at the eleventh session of the UNCITRAL in 1978, and incorporated into the substantive sales law. The draft Convention was circulated amongst the governments of the UN members for opinions and comments, and this formed the basis for the work of the Vienna Conference. The circulation of the Draft among the members of the UN signifies consultation was sought from them and the input of every member was considered during the drafting of the CISG. This means that members were given the chance to voice any reservations or dissatisfactions, which they perceived to be detrimental to the State's interests. This further emphasises the neutrality of the process of drafting the CISG and is also one of the advantages of the Convention for Nigeria. A fear for Nigeria in terms of ratifying the Convention may be the unfamiliarity with the terminology of the Convention. However, considering that Nigeria participated in the drafting process and consented to the draft presented is an advantage, because this involvement in the drafting process results in more familiarity with the wordings, and consequently more trust towards the representation of the CISG. Secondly, the words adopted in the drafting of the CISG reveal a purposeful elimination of domestic law 'connotations in favour of non-legal earthy words' which refer to physical acts. For instance, instead of connecting risk of loss with domestic concepts such as "property" or "title", risk passes when the goods are "handed over to the first carrier"; if the buyer is to come for the goods, risk passes when the buyer "takes over" the goods.[42]

[42] CISG Articles 67(1) and 69(1); John O Honnold, 'Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth' (1995) 1 International Trade and Business Law Journal 1-10.

During the drafting of the CISG, a fundamental measure of control was provided by the repeated review of multi-lingual drafts in UNCITRAL. Thus, delegations from other legal and linguistic systems voiced their concerns whenever it was perceived that a draft lacked clarity. Accordingly, 'drafting in this setting imposed demanding standards for imagination, intellectual rigour and patience'.[43] The linguistic thoroughness is advantageous for Nigerian traders because there is a need for the same level of understanding of concepts and terms for traders worldwide, whether trade is between Nigerians and Chinese or between Nigerians and the French.

The integrity of the process of drafting the Convention is evident in its legislative history and this is particularly important for Nigeria because one of the criteria for acceptance of international Conventions is its neutrality and benefits to the Contracting State. Evidently, the CISG seems to accomplish this.

### 2.3 Measuring the Success of the CISG

Success can be defined as 'the accomplishment of an aim or purpose'.[44] From this definition, it may reasonably be inferred that for the term success to be conferred on any international uniform law, that law, must, have achieved, to an appreciable extent, its defined purpose(s). Accomplishment, in the context of the definition which means 'an act or instance of carrying into effect; fulfilment' is employed to examine the success of the Convention. The use of the word 'carrying' here, in defining accomplishment, suggests a continuous process.

The CISG has set purposes and goals; however, their accomplishment can only be through actors 'carrying' out the mandates, in designated ways. As a continuous process, one must look at the definition in terms of process, not only as an achievement. That is, if and what is 'constantly, continuously being done' to achieve the goals of the CISG. As such, it may be limited to measure success only as an end in itself i.e. what has been accomplished. Thus, what is being done to accomplish the goals of the CISG, defines success.

The Convention will be measured against the purposes it set out to accomplish, how it is accomplishing those goals and how the solutions for accomplishing those goals are. There is no singular accepted parameter for the measure of success of the CISG. Instead, it must be measured by various aims and standards holistically, to determine its success. Success therefore is a collective evaluation of the CISG against 'accepted' parameters and goals. And an examination of what is being done, the process and how effective they are in accomplishing the goals.

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[43] ibid.

[44] Oxford Dictionaries Online http://www.oxforddictionaries.com/ accessed 25 April 2014.

### 2.3.1 Measures of Success

The section below measures the Convention against; the number of ratifications, the level of influence on law reform projects and the level uniformity.

#### 2.3.1.1 Number of Ratifications

International treaties embody an agreement of a commonality between states, whilst their ratification shows the approval of the terms and willingness by States to bind themselves to such agreed provisions. Therefore, where a significant number of countries participate in the process of birthing an international agreement, subsequent ratification by a few or none of the participants is symptomatic of underlying problems, which may result in the treaty being classed a 'failure.'

Whilst one country's lack of ratification of a Convention does not spell doom for instance, the lack of ratification of the CISG by the United Kingdom, a key player in world trade, has not resulted in its demise, lack of ratification by a good number of States may result in breakdowns or near breakdowns of international cooperation and in some cases, the outright death, of any particular international endeavour.[45] The ULIS and ULF, preceding the CISG, are clear attestations, though somewhat similar in scope and content to the CISG, they were considered failures for their abysmal number of ratifications. As ratification is indicative of acceptance of the terms contained in a document, the poor number of ratifications of these Conventions bared a disagreement by most States with the contents.

Ratification by majority of countries was from the outset, a goal of the drafters of the CISG, especially considering the failure of the ULIS and ULF. With that in mind, the Convention was carefully drafted to accommodate and reflect practices universal to all countries. The acceptance of the CISG by a great number of countries signifies legislative success making it 'the greatest legislative achievement in the field of uniform law in history'.[46] It is also successful in terms of practical application.[47] The adoption also demonstrates agreement with the text of the Convention and the accommodation of the needs of countries from different legal backgrounds and varying levels of development.

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[45] Jeffrey S Lantis, *The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective* (OUP New York, 2008) accessed 27 April 2014 1, 1.
[46] Joseph Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1991) 39 American Journal of Comparative Law 403.
[47] Volker Behr, The Sales Convention in Europe: From Problems in Drafting to Problems in Practice' (1998) 17 Journal of Law and Commerce 263-299.

The traditional benchmarks for defining successful uniform law instruments have been the achievement of consensus on binding legalistic rules, and subsequent ratification by States. For the UN, apart from the achievement on legal rules, ratification is a mark of a successful treaty.

The CISG has been ratified by 83 states out of about 197 states worldwide. 78 of these are UN member states whilst 2, Macedonia and Moldova, non-UN member states have also ratified it. The ratification by non-member States of the UN is indicative of acceptance of the Convention's neutral yet efficacious provisions and an awareness of the Convention's representation of their interests. This is important considering that participation in the drafting process of any international convention is crucial in determining whether or not the Convention is ratified by a State.

The ratio of non-ratification of the Convention to ratification by UN member states, about 2 to 1, is significant for a number of reasons. Firstly, it is suggestive that ratification of the CISG is not necessarily based on affiliations with the UN, but on a reasoned and logical acceptance of its usefulness for member States in encouraging seamless international trade transactions. Secondly, the CISG can be considered successful in the area of commercial law when measured against the number of ratification of other uniform commercial law conventions. The CISG is the second most ratified uniform convention in commercial law, after the New York Convention,[48] which has 149 contracting states.[49]

The graph below showing the irregular rates and times of ratification shows that the adoption of the CISG in states does not follow any pattern, and therefore cannot be attributed to the novelty of the Convention or pressure by the U.N to ratify it, but rather that it is a purposeful decision.

[48] The "New York Convention," has been adopted by 149 states. The New York Arbitration Convention Website, http://www.newyorkconvention.org/ accessed 2 May 2014.
[49] ibid.

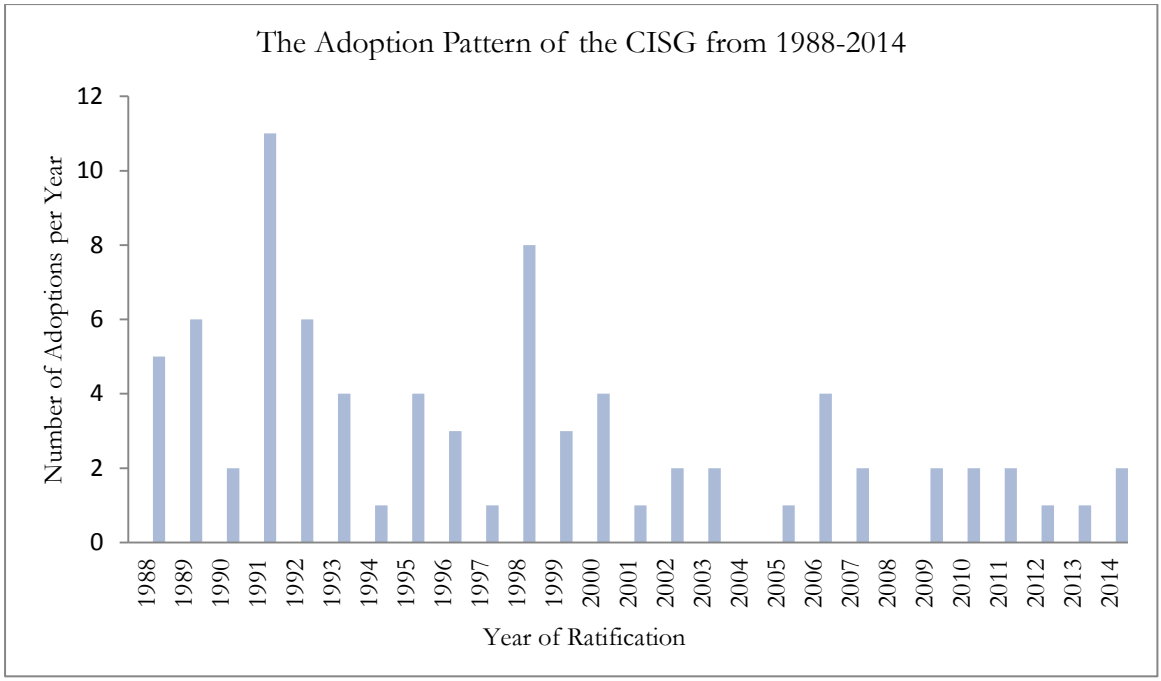


**Figure 2.1**

As the graph above indicates, there is no particular order or trend of ratification. The year 1991 records the highest number of ratifications and there are no particular reasons for this. Although this may be attributed to the recency of the CISG, the year which the CISG came into force, and the subsequent years 1989 and 1990, before 1991 were not as high. The graph also shows that no adoption was recorded in 2004 and 2008.[50] There is no particular reason for the times and pace of ratification. This is indicative of independent decisions by States, not influenced by the novelty of the Convention to ratify it or pressure from the UN, saddled with other priorities.[51]

The absence of influence by the UN to ratify the Convention is important because Nigeria should adopt the CISG based on the need for efficient trade. If the CISG is adopted in Nigeria because of pressure or incentives, but not usefulness, it may largely defeat the Convention's purpose. Such adoption may result in superfluity of laws, convolutedness and cumbersomeness in a legal system, and more importantly confusion for users of the law. It is also likely that the law will be left to putrefy. There is also no need to ratify the Convention without cogent reasons if traders will invariably, opt of it. Thus, despite the success in terms of ratification of the CISG, it fails if traders regularly excluded it from their trade transactions.[52] Furthermore, where laws are adopted because of pressure and influence without careful examination to determine the

[50] The Pace CISG Database, http://www.cisg.law.pace.edu/cisg/countries/cntries.html accessed 02 May 2014.
[51] Interview with Luca Castellani, Legal Officer UNCITRAL (Durham, 13 February 2014).
[52] Herbert Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages and Criteria for Choice' (2000) 5 (1) Uniform Law Review 13, 15.

compatibility of the law with the legal system, it results in contradiction with the local law. The fate of international laws adopted as a result of influence or pressure in Nigeria is fatal. Currently, there are over 200 international conventions and treaties, which Nigeria has signed on to but less than 15 have been properly ratified, putting the rest in legal limbo.[53] These laws have no legitimacy and are not recognised in the court of law.[54] This is a practice prevalent in Nigeria and must be avoided in the case of the CISG. Based on the above trend and reasons for ratification of the CISG in other countries, it is suggested that this will not be the case with the CISG in Nigeria, since there is no pressure of ratification and its recommendation is based on improving trade in Nigeria.

Recent empirical evidence has shown that the rewards expected by states that ratify conventions because of other states or influence do not actually materialise.[55] The absence of pressure means Nigeria can neutrally assess the usefulness of the Convention for international trade. This is also important because the adoption of the CISG would require that some measure of sovereignty be given up, for Nigeria, a compromise in this regard would be that the Convention will have 'greater vigour and strength' than domestic sales law.[56]

The prestige of countries that have ratified the CISG is also evidential of success. The top trading nations and powerful economies have ratified it, including China, the U.S, Germany, Japan, France, Netherland, Russia, Italy and South Korea, all except the U.K. This conveys acceptance and validation of its purposes and aims, consequently boosting the credibility of the treaty. This may act as a stimulus for developing countries such as Nigeria to ratify the CISG.

The number of ratification is important for Nigeria, since an important criterion for the adoption of any law, is its usefulness. Where a particular international law meets the needs of a country, it is more likely for that country to adopt it and even more likely for other states to follow suit. States will not ratify a treaty 'just because'. Therefore, the more countries have ratified the Convention, the more successful the Convention is perceived to be for Nigeria. Thus, the number of ratifications anecdotally may be an indicator of success.

The adoption of the CISG by the major trading nations indicates success, because most of the export/import transactions concerning goods, carried out worldwide, are subject to the same set

[53] Policy and Legal Advocacy Centre, 'Bilateral Ties: House Calls for Domestication/Ratification' http://www.placng.org/new/main_story.php?sn=46 (*PLAC*) accessed 26 May 2014.
[54] *Abacha v Fawehinmi* (2000) 4 S.C (Pt II).
[55] The research is within the scope of human rights. Richard A Nielsen and Beth A Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?' http://www.mit.edu/~rnielsen/Rewards%20for%20Ratification_18jan2014.pdf accessed 02 May 2014.
[56] *Abacha* (n 31).

of rules. The Convention applies to two thirds of international trade,[57] and the countries whose trade are regulated by the CISG are some of Nigeria's important trading partners.[58] Given the above, the Convention can be considered a success in terms of ratification.

#### 2.3.1.2 The CISG: A Successful Model for Law Reform

The CISG is considered successful because it has been, and still is a paradigm for other international law projects and domestic law reforms, in commercial and general contract law in different continents, from the Asia to Africa and Europe. This confirms the Convention's legislative success, since it represents neutrally and sufficiently, the distinctive characteristics of different legal families and variance in development. If the texts of the CISG were biased or carelessly drafted, it is suggested that it will not exert such influence.

##### i. A Model for Domestic Law Reform

###### a. The Scandinavian Reform

For some countries, the Convention is both an instrument for cross border transactions and for domestic sales transactions. The Scandinavian States, Finland, Norway, and Sweden, except Denmark all reformed their domestic sales laws based on the CISG. Preparation for the CISG came at the time when the proposal for a new legislation was made in Sweden. It seemed practical to carry out a reform founded on the CISG, especially since the domestic laws were based on principles different to those of the CISG and would inevitably create confusion.[59] In order to avoid setting up separate legal regimes all the Scandinavian States except Denmark opted for a revision of the national Sale of Goods Acts, bringing them in line with the system and most of the contents of the CISG. A new Sales of Goods Act came into force in Finland in 1988, Norway in 1989, and Sweden in 1991, whilst Iceland adopted a new SGA similar to the Norwegian one in 2000.[60] It seems that the conditions upon which Sweden adopted the CISG, at the epoch of revising their domestic sales law, is similar to the conditions and time of Nigeria currently. The motion for the reform of the 1893 SGA has been moved at the legislature; yet, nothing has been done towards reforming the Act. The need for reform of the 1893 SGA in

[57] Kleefeld (n 2); Ferrari (n 2); Michael van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 University of Pennsylvania Law Review 687, 689.
[58] Observatory of Economic Complexity, http://atlas.media.mit.edu/profile/country/nga/ accessed 26 May 2014. For export, 4 of Nigeria's main trading partners have not ratified the CISG; Barbados, India, South Africa and Algeria. For import, only Antigua, Barbados, India and the U.K have not ratified the Convention. See Open Data for Nigeria, http://nigeria.opendataforafrica.org/boiqhbg/nigeria-exports-major-trade-partners accessed 26 May 2014.
[59] Jan Ramberg, 'The Vanishing Scandinavian Sales Law' http://www.scandinavianlaw.se/pdf/50-16.pdf accessed 8 May 2011.
[60] ibid

Nigeria makes this the right time to adopt the CISG because it would spur the efforts towards the reform of the Act whilst still functioning as the primary instrument for international trade transactions.

In Sweden and Finland, the CISG was introduced alongside the domestic sales law, based on the CISG. Norway however went further by transforming the authentic CISG text into Norwegian and integrating both the domestic and international sales law into a single statutory instrument.[61] The adoption of the CISG in these countries was made subject to the effect, which exempts them as Contracting States with respect to Part II of the Convention on formation.[62] Sweden, Norway and Denmark agreed to this apart from Iceland. This reservation was made because formation of contract was considered a matter of general contract law and should not require any particular rules for contract of sales.[63] Thus they feared that the implementation of part II may create uncertainty as to whether a valid sales contract had been made.[64] Further, it was perceived that the provisions of the CISG on contract formation are based on the 19th century contract conceptions. For instance, with regards to the issue of whether or when an offer may be revoked, the CISG adopts a position influenced chiefly by the common law. The right to revoke an offer seemed to be alien to the Scandinavian law, since virtually all promises and contracts are binding.[65]

Although it is recognised that the promise in Scandinavian countries is binding in itself regardless of reliance of an undertaking to keep an offer open, the arguments above are hardly convincing because, the exceptions in paragraph (2) of Article 16 bridges the gap between the common law and Scandinavian law.[66] The Scandinavian rules on contract formation are clearly distinguishable from the contract validity located in chapter III. Thus, the replacements of the domestic rules on contract validity in chapter I, with the international law (CISG part II) 'hardly represent a greater threat to certainty than the Scandinavian ratifications of CISG Part III.[67] As suggested by Ramberg, the rules in Chapter 1 of the Contracts Act are not any more appropriate than articles 14-24 of the CISG because Art. 3 of the CA, by providing for a reasonable time for acceptance when the parties have not determined a specific time for acceptance of an offer in writing, hardly

[61] Joseph Lookofsky, 'The Scandinavian Experience' in Franco Ferrari (ed.), *The 1980 Uniform Sales Law: Old Issues Revisited in Light of Recent Experiences*, (Sellier, München, 2003) 99, 142.
[62] (Art.92).
[63] Ramberg (n 59).
[64] This was the Danish Governments view in the Legislative proposal for the ratification of the 1980 Sales Convention formulated by the Danish Ministry of Justice (Justitsministeriet), Lovforslag L 35 of 6 October 1988, at 76 in Lookofsky 2 (n 61).
[65] Specifically, article 5-1-1 of the Danish Law. ibid.
[66] ibid; Ramberg (n 59).
[67] Lookofsky 2 (n 61) 107.

assists a merchant. There is hardly any way for the merchant to know with sufficient certainty whether there is still time to accept.[68] Additionally, it is hardly appropriate for the Scandinavian States to rely on choice of law principles in order to determine whether there is a binding declaration or not. In cases where these States enter into contracts with other States that are parties to the CISG, where it is the seller situated in the non-Scandinavian State, the law will still apply despite the Article 92 declaration.[69]

Nigeria need not make the reservations as it would result in the same dissonant situation. Particularly since rules of private international law will refer to the seller's law and considering that Nigeria is an import driven economy, most of her cross border transactions will have the Nigerian trader as the buyer, potentially resulting in the situation where the Nigerian trader will be subjected to the laws of the seller, defeating the purpose of adoption of the CISG, balancing trade inequalities and bargaining strength. Another situation which emphasises the redundant nature of the reservation is where the other country, as the seller has ratified the CISG. Where the reservation is made and the seller's law is applicable, the CISG becomes the applicable law regardless of the reservation.

To the extent that the CISG adopts the common law approach to revocability with two exceptions,[70] the Nigerian contract formation law is to a large extent compatible with the CISG.[71]

To show that the perceived differences in the contract formation rules are not very significant and that they bring discordance, Denmark has recently abolished the Article 92 declaration stating that it had caused confusion regarding the applicable law for Danish companies as well as their business relationships abroad when drafting agreements.[72] Norway and Sweden has also completed the process to become a party to the Part II of the CISG.[73]

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[68] Ramberg (n 59).
[69] ibid.
[70] See Article 16(2)a and 16(2)b.
[71] See chapter 5 for analysis on compatibility of the CISG with Nigerian law.
[72] Denmark Becomes a Party to Part II (Formation of the Contract) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) United Nations Information Service (*Unis Vienna,* 17 April 2014) http://www.unis.unvienna.org/unis/pressrels/2012/unisl168.html; Helen Kibsgaard, (*Delacour*, June 2012) http://en.delacour.dk/news/2012/june/cisg-%E2%80%93-denmark%E2%80%99s-reservation-regarding-part-ii-is-abolished/ accessed 8 May 2014.
[73] As of 14th April 2014 Norway Becomes a Party to Part II (Formation of the Contract) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) United Nations Information Service, Norway Becomes a Party to Part II (Formation of the Contract) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (*Unis Vienna,* 17 April 2014) http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl198.html accessed 8 May 2014. On 25th May 2012 Sweden took action needed to become a party to Part II of the CISG http://www.unis.unvienna.org/unis/pressrels/2012/unisl164.html (Unis Vienna, 17 April 2012) accessed 06 August 2015

There is also the neighbour state declaration, which excludes the application of the Convention in inter-Scandinavian sales.[74] This was done in order to maintain the traditional status of the Scandinavian Sales Law. However, a requirement of the Article 94 declaration is that it is applied when rules of the reservation States are closely related. Considering this, it has been suggested that Denmark withdraw their reservation so that other Scandinavian States do not find themselves in situations leading to breach of their international obligations.[75] Furthermore, the new sales statutes in Finland, Norway and Sweden have also moved in different directions and are no longer a homogenous group of jurisdictions which have closely related domestic sales law rules as otherwise required by CISG Article 94'.[76] This provision will not be applicable in Nigeria since there are no regional trade laws subscribed to. Where Nigeria joins the OHADA in the future, the CISG still recognises the fact that regional laws are similar and parties have the right to contract out of the CISG.[77]

Considering the above, the CISG may be used as a model for the reform of the Nigerian 1893 SGA currently recommended for reform in the parliament. What is needful is that Nigerian domestic laws are brought in line with a modern trade framework, that operative laws are suited for international trade transactions and cater to the needs of the Nigerian trader.

With respect to contract formation principles, the CISG provides principles better suited to the Nigerian trade environment than the common law principles. The flexibility offered by the Convention through Articles 18(3) and 8(3), which gives effect to the understanding that is derived from all relevant circumstances of the case including the negotiations and practices, which the parties have established within themselves, ensures that there is no compulsory 'stretching or amputation of a living understanding to fit the Procrustean bed of "offer" and "acceptance".[78]

Whilst the other Scandinavian countries chose to implement the CISG treaty obligation by incorporation of the authentic treaty text, meaning that the domestic and international sales law of these States are now located in separate statutes, Norway elected to transform the authentic Convention text thus creating a distinct Norwegian version of the CISG and contemporaneously places the transformed CISG rules together with the domestic law in a single statute.[79] The

[74] Art. 94 CISG.
[75] Ramberg (n 59).
[76] Lookofsky 2 (n 61) 110.
[77] See Article 6 CISG.
[78] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999) 145.
[79] See Lookofsky 2 (n 61) 117.

decision by the Norwegian legislators have been criticised and termed a 'major mistake' because the Act has become a 'highly complex and difficult to understand'. [80]

Amongst the different methods of reforms adopted above, the better suggestion would be the method adopted by the other Scandinavian countries apart from Norway. There is no need to rewrite the CISG and merge it with the local sales law into one document. This may result in confusion regarding what is obtainable.[81] Though it is suggested that the CISG serve as a model for law reform, enabling the local sales law to be drafted according to international standards, it is also important to create a favourable and sturdy framework, taking cognisance of, and reflecting the local situation and needs. Keeping them enshrined in distinct documents, no matter the level of similarity, ensures parties have a choice regarding the applicable law. More so, the CISG is not a perfect law and has compromised on certain standards which may not be as suited to local conditions as such, and may not contain 'better rules, but better international rules'.[82] Given the above, what is suggested is a reform of the SGA, drawing from the concepts of the CISG, which are necessary, but still retaining an independent domestic framework with distinctive concepts to reflect local needs.

### b. The German Reform

The German *Schuldrechtsreform* (reform of the law of obligations), which begun in the 1980s,[83] was strongly influenced by the ULIS and ULFIS, and later influenced by the CISG. Although the Hague Conventions were received sceptically, because they were different to the national sales law, [84] the CISG, gradually, met with more acceptance because it had received worldwide acceptance, through its adoption by a number of Germany's trading partners, as opposed to the Hague Conventions. However, reform in line with the CISG did not come immediately after its adoption, the implementation of the Consumer Goods Directive strengthened the CISG-influenced features of the new law.[85] With the implementation of the EU Consumer Sales law on member States, the German legislators decided to modernise the German sales law completely. Apart from the need for uniformity in contract laws there were also economic benefits. The reform of the German laws was regarding conformity of goods. Under the German law, the

[80] This complexity can be seen in the numerous non uniform rules. K Krüger, *Norsk kj psrett* 672 (4th ed. Oslo, 1999) and O Espersen et. al., *Folkere* (Copenhagen, 2002) ch. 6 in Lookofsky 2 (n 61) 118.
[81] See Norwegian experience in Lookofsky 2 (n 61) 119-121.
[82] ibid 118.
[83] Peter Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for Harmonisation of the Law of Obligations' (2005) 10 Juridica International 27-34, 29.
[84] The German rules differed from the Uniform Sales Law. Rolf Herber, 'The German Experience' in Ferrari 2 (n 61) 63.
[85] Schlechtriem (n 83) 29.

seller barely had any liability for non-conforming goods except in cases of fraud and noncompliance with qualities expressly guaranteed. However, with the CISG and the EU Consumer Sales law making the seller more liable, the need for an adjustment became evident. Following consultations regarding the modernisation of the whole system of remedies, a system similar, but not an exact duplicate of the CISG emerged.[86] Thus, the German Sales law eradicated the abnormality of the former sales law, which exempted the seller from liability from non-conformity apart from a few situations.[87]

### i. Contribution of the CISG to the Reform of the Civil Law System

Apart from specifically contributing to the German law reform, the CISG is generally considered to have liberated civil law systems from the anachronistic survival of the distinction between non-performance and defective performance. In civil law countries, it is common to distinguish between damages for various kinds of default. French law distinguishes between 'moratory' and 'compensatory' damages available for delay in performance and for other kinds of default. Moratory damages are assessed on the same principles as compensatory damages, and they are often sought for delay in performing some other obligation. The French Civil Code art. 1147 distinguishes between delay in performance, giving rise to moratory damages and non-performance, giving rise to compensatory damages.[88]

The German Civil Code also distinguishes between two kinds of default. The Verzug or delay, giving rise to damages for delay requires notice putting the debtor in default. And a further requirement of the Nachfrist notice is a general rule imposed if the creditor wishes to rely on the delay in order to put an end to the contract or to claim damages for non-performance as opposed to damages for delay. A claim for damages for delay may be accompanied with one for performance, or for damages for non-performance where the creditor exercises his right to refuse to accept performance because of the delay. This emphasises the distinction between the 'delay interest' and the performance interest. Delay interest includes gains lost or expenses incurred in consequence of the delay as well as decline in value of the subject matter during the period of delay. In principle, these distinctions in the damages do not differ from those allowed in cases of impossibility.

[86] Herber (n 84) 63.
[87] ibid, 70.
[88] Bryant G. Garth, International Encyclopaedia of Comparative Law, Vol 16, Part 1, 54.

Another type of default is the impossibility for which the debtor is responsible. This gives rise to a claim for damages for non-performance. This claim cannot accompany the one for performance.

The third kind of default widely recognised by writers but not embedded in the Civil Code refers to cases in which performance is rendered in due time but defectively. As there are no provisions of this in the Civil Code, it suggests that it is not recognised as a separate concept. The damages offered here are in principle on the same basis as damages for impossibility.

There is no distinction in common law countries, as a matter of legal principle between damages for delay and non-performance, or between damages for delay, impossibility and defective performance. The statutes relating to sale of goods in England and the U.S (except Louisiana) do contain certain special provisions as to the time of performance. But they do not contain any separate provisions, which deal with damages for delay. Although they deal separately with damages for total failure to perform such as non-delivery, and defective performance, such as delivery of defective goods, they are not based on any distinction in legal principle between the two kinds of breach. They only reflect the differences in result of each type of breach.[89]

From a factual perspective, the delivery of an *aluid* (delivery of the wrong goods) may be distinguished from the delivery of a *peius* (delivery of non-conforming goods). This distinction gives rise to the question of whether the *aliud*-delivery can be qualified as non-delivery. The CISG adopts a wide notion, using the word conformity in order to characterise the obligation of the seller and considering her liable whenever a lack of conformity is found. The very fact that the relevant CISG provisions dealing with seller's obligations do not differentiate between the delivery of an *aliud* or *peius* allows the conclusion that both have to be treated equally. Consequently, scholars take the view that the delivery of an *aliud* cannot be qualified as non-delivery but as delivery of defective goods.[90] A plethora of case laws supports this position.[91]

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[89] Garth (n 89) 55.

[90] Honnold 2 (n 78) § 256.1; Martin Karollus, 'Judicial Interpretation and Application of the CISG in Germany 1988-1994' Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 51-94, Peter Schlechtriem, 'Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof [Federal Supreme Court of Germany], A Celebration Anthology from the Academic Community [English translation of this text] (2001), at III.1, http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html accessed 02/08/2015; Tobias Plate, 'The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?' 6 Vindobona Journal of International Commercial Law and Arbitration (2002) 57, 67.

[91] Germany 3 April 1996 Bundesgerichtshof [Federal Supreme Court], case presentation including English translation available online at http://cisgw3.law.pace.edu/cases/960403g1.html accessed 02/08/2015 (stating 'an aliud delivery, at least generally, does not constitute a non-delivery'). Germany 12 March 2001 Oberlandesgericht [Appellate Court] Stuttgart, case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/010312g1.html> (stating that the delivery of an aliud in any case does not

Schwenzer recognises the particular benefit of the CISG in this respect. The inadequacy of the Swiss domestic law to international sales law is with regards to core aspects such as the distinction between the peius and aluid. She states

> In case of the former, the buyer must give prompt notice to the seller (according to Article 201 of the Swiss Code of Obligations (CO)) to preserve any remedies for breach of contract with a one year limitation period (Art. 210 CO); in case of the latter, the buyer can demand performance for ten years after the conclusion of the contract regardless whether it gave notice of nonperformance or not. And it can be extremely difficult to predict where the line between *peius* and *aliud* will be drawn in a particular case. The second example is the compensation for consequential losses. According to Art. 208(2) CO upon unwinding the contract the seller is liable for damages directly incurred by the buyer due to the defective goods. In this respect, fault is not required. However, whether "direct loss" also encompasses consequential loss is made dependent on the number of links in the chain of causation. Extremely short periods for giving notice of defects as well as a limitation period of one year in case of a *peius* also militate against choosing domestic Swiss law for the international context[92]

Accordingly it is believed that all these shortcomings may be avoided by the application of the CISG. Within this context, the CISG attempts to reach all situations where conformity or non-conformity could be used. The adoption of this unique concept is a direct influence of the common law system in which the idea of a defective performance is closer to the idea of a breach of contract in common law countries. The fact that the CISG draws from the common law concept in this regard shows compatibility of the Convention with the principles of common law to which Nigeria adopts.

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constitute a non-delivery in the meaning of Art. 49(1)(b) CISG); Germany 11 April 2002 Amtsgericht [Lower Court] Viechtach, case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/020411g1.html> (stating that Art. 35(1) CISG intentionally affords parity treatment to a defect and the delivery of an aliud in order to avoid difficulties in distinguishing between the two and that this aim would be foiled if one chose to extend the sphere of non-delivery, because the difficulty in distinguishing between aliud and defect would be shifted to the distinction between delivery and non-delivery).

[92] Schwenzer and Hachem (n 31).

### c. The Chinese Law Reform

The New Code of Obligations of China, Contract Law of the PRC,[93] reveals many legal concepts and institutions resembling that of the CISG, and the similarities are confirmed by a comparative analysis of Chinese law and the CISG. These similarities are a result of concerted effort by the drafters to achieve such unison. As stated by the main drafter of the Convention, drafters of the new Chinese law 'have consulted and absorbed rules of the CISG on offer and acceptance, avoidance (termination) with *Nachfrist* liabilities for breach of contract, interpretation of a contract and sales contract'.[94] Thus, the CISG was a source of inspiration for the Chinese law both for sales specific and non-sale specific issues.

Specifically, with regards to conclusion of contracts, Articles 9-43 of the CL (PRC) draws significantly from article 14-24 of the CISG. For instance with respect to bindingness and revocation of an offer, traditionally, the Chinese law follows the Germanic legal systems in terms of acknowledging the irrevocability of an offer.[95] However, the more recent CL follows Art. 16 CISG.[96] The CL also follows the CISG by adopting a unitary approach, the integration of liability for non-conformity with remedies for breach of contract in general.[97] With the exception of Article 148, the provisions on passing of risk (142-149) follow the model of the CISG.[98]

China initially subscribed to the Article 96 declaration, which rejects domestic requirements to form. More recently however, this declaration has been withdrawn.[99]

It is advised, that Nigeria refrains from subscribing to this reservation, apart from the fact that it brings discordance but also because, as a developing country, it is important that contracts in Nigeria allow for flexibility since oral contracts are traditionally valid under the Nigerian domestic law and the international traders may sometimes enter into oral contracts based on trust with the other party and based on the fact that they may not execute the contract in writing.

### d. Reform by other Countries

The CISG model was one of those considered, compared, and weighed, in countries that had implemented it already -- or were to implement it -- as their international sales law. A classic

[93] Contract Law (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct 1, 1999) in Shiyuan Han, 'China' in Ferrari 2 (n 38) 72.
[94] Huixing Liang, Cong san zu ding li zou xiang tong yi de he tong fa (From Three Separate Parts to a Unified Contract Law), Zhongguo fa xue (China L. Sci) 1995:3, 9) in ibid, 84.
[95] Anmin Ye, in Jiafu Wang (ed.) Zhongguo min fa xue min fa zhai quan (Doctrine of Chinese Civil Law Obligations) 1991, 290 in ibid.
[96] Other similarities can be found as well, for similarities in articles ibid, 84-85.
[97] ibid, 86.
[98] For a detailed analysis of all the provisions of the CL (PRC) similar to the CISG see ibid, 84-96.
[99] 26 January 2013.

example is the Estonian Law of Obligations Act (LOA). The Tokelau Islands, so far a trust territory of New Zealand in the South Pacific, enacted the CISG in 2004 as a sales law both for international and for domestic sales, along with some supplementation to make it a basic set of rules for contracts in general. It replaced the 19th-century SGA (Sales of Goods Act) of English provenance.[100]

### ii. A Model for Uniform Law Reform

As a landmark in the international unification process, the CISG has influenced subsequent uniform commercial laws, both soft and hard law instruments, in Africa, Europe and Asia (PACL). Its prerequisites for the application in Article 1-7 have been used as a model whilst its substantive law provisions on the contractual relations of the parties to an exchange contract in general and its provisions concerning sales contracts can be seen in the provisions of these instruments.[101]

#### a. The CISG and the EU Laws

In the EU, there is scarcely any debate on the level of influence, which the CISG has had. This has been attributed to the fact that 24 out of the 28 EU Member States have ratified the CISG thus, it 'represents a common pillar of European contract law' and though not officially, is considered as a set of common rules within the EU.[102] Moreover, the CISG is considered the most successful drafting attempt with a sustainable compromise, to merge together terminologies and concepts of both civil and common law legal families, thus, making it a worldwide success in this regard.[103] It has also been impactful on the national laws of the EU member states that have adopted it, in that their national laws have been renewed.[104] This of course means that even where the direct influence of the CISG on EU law is denied, it is impossible to deny its indirect effect, since the laws may be vertically transplanted resulting in trans-echelon borrowing, EU member State laws which often influence EU treaties, will eventually be disseminated to other EU member States. As such, where a good number of EU States have adopted the CISG and it influences their local laws, such laws will potentially influence the EU uniform laws since those laws will be generally obtainable and accepted across the States.

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[100] Schlechtriem (n 83) 29.
[101] ibid, 28.
[102] Stefano Troiano, The CISG's Impact on EU Legislation in Ferrari 2 (n 61) 222.
[103] Ulrich Magnus, 25 Jahre UN-Kaufrecht, Zeitschrift für Europäisches Privatrecht (ZeuP) 2006, 96 et seqq in Troiano (n 102) 222.
[104] This is discussed later in the paper.

### i. The EU Consumer Sales Directive

In Europe, the Directive of the European Parliament and the Council of May 25 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees,[105] was modelled after the CISG.[106] This is significant because it is the first time in a while, that an international convention plays such a significant role in the drafting of an EU Act, and because the Directive is acclaimed the most important European provision in the field of the law of contract.[107] Generally the Directive borrows the CISG's general standard of judgment and conduct. For instance the standard of reasonableness, referred to about 37 times in the CISG, occurs about 5 times in the Directive, with regards to the matters closely related to those envisaged by the CISG. This implies that a general standard of reasonableness is now adopted amongst EU member States in spite of different legal traditions.[108] This is evidence of a successful Convention, the distribution of an acceptable standard between States across different geographic locations.

Further, regarding the criterion for breach, the Directive draws on the unitary approach of the Convention by treating all breaches alike. This is true in particular, with regard to the basic concept of "conformity with the contract" of the goods to be delivered and to three of the four requirements thereof as set forth in Article 2 -- which almost literally corresponds to Article 35 of the CISG. It is also true for the remedies for lack of conformity as provided in Article 3 -- whose counterparts in the CISG can be found in Articles 36, 46, 49, and 50.[109] This is key because for most EU countries, the concept of 'conformity' was vague, despite the proviso in Recital 7 of the Directive, that it is common to the different national legal traditions. Thus, by drawing from the CISG, the Directive transforms 'this vague convergence in a truly common rule of decision'.[110] The obligation of the seller to deliver goods in conformity with the contract of sale, as enshrined in the Directive, exactly as the CISG, traces the liability of the defective goods back to the general rules on the debtor's liability for non-performance of an obligation. This, a more modern and uniform approach is preferred to the approach differentiating non-

[105] Council Directive 1999/44/EC, 1999 O.J. (L 171) 12 (EC) (Consumer Sales Directive).
[106] The EC Commission stressed the fact that the Convention was the model for Directive in their explanatory note. See COM (95) 520 final, 6 (generally), 12 (for Article 2), 13 and 15 (for Article 3), 16 (for Article 4) in Stefan Grundmann, 'Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?' http://www.kluwerlawonline.com/document.php?id=EULR2003015&PHPSESSID=euv1ju1psga5cprlteosuumjv6 accessed 04 May 2014.
[107] Troiano (n 102) 222.
[108] ibid 224.
[109] For a detailed comparative analysis see Stefan Grundmann (n 106) and Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' The Pace CISG Database, http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html accessed 04 May 2014.
[110] Troiano (n 102) 227.

performance and guarantee.[111] In spite of these similarities, there are significant differences between the Consumer Sales Directive and the CISG.[112]

The large reliance of the Directive on the CISG also plays an essential role in its interpretation.[113] According to the interpretive criteria of the EU, specifically, the historical and the objective-teleological criteria, the CISG's role as a model law cannot be ignored. This is reinforced by the rule recognised in the EU, which provides that all national provisions, which implement a Directive must be interpreted by national courts in light of the rationale informing the Directive. The interpretive role of the CISG is vital in ensuring that the similarities between the two laws are maintained while softening their differences.[114]

The influence of the CISG on the Directive is not without criticism. For one, the unitary approach of treating all breaches alike constitutes a huge change for the member states whose old sales law are based on the Roman law tradition.[115] Similarly, countries whose legal traditions date back to centuries and millenniums may not really appreciate the colonisation by a more modern law.

### 1. Influence on other EU Directives

The CISG has also influenced other EU Directives though in a less obvious manner. For instance, the Package Tour Directive of 1990[116] whose underlying structure can be traced back to the CISG.[117] This is seen in its systems of obligations and liability, particularly Article 5(2) which provides for the supplier's liability in damage for non-performance or improper performance of the travel services and permits the supplier to be relieved if the fault of the consumer or of a third party or if force majeure or an unforeseeable and unavoidable event has caused the damage, is similar to that of the CISG.[118] The definition of force majeure is also similarly worded as that of Article 79(1) of the CISG.[119]

[111] ibid, 228.
[112] See Bonell for examples (n 109).
[113] Troiano (n 102) 225.
[114] ibid; Bonell (n 109).
[115] Grundmann (n 106) 239.
[116] Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC).
[117] Ulrich Magnus in Ferrari 2 (n 61) 142.
[118] Troiano (n 102) 233.
[119] Article 4 (6) (b) (iii) Package Tour Directive and The CISG Article 79(1) for similarities. ibid.

Echoes of the CISG can be found in the Directive on Cross-Border Credit Transfers of 1997.[120] Based on the definition of force majeure in the Act, it is concluded that the act draws from the Convention.[121]

Connections have been made between the CISG and the Directive on late payments of 29 June 2000 (35/2000/EC), which concerns relationships between businesses.[122] The commonality of certain topics such as issue of interests in case of delay has led to the conclusion.[123]

### 2. Influence on other Initiatives

The CISG's use of simple prerequisites for its application inspired a couple of the conditions for applications of other conventions. In order to apply to cross-border contracts, all that is required in the CISG is that the parties have their place of business in different contracting states.[124] The Convention also allows application if the conflict of laws rules of the forum determine the law of a contracting state to be applicable law.[125] This has since remained the prerequisite of internationality in most uniform law conventions. For instance, the UN Convention on the Limitation Period for the International Sale of Goods (1974) as amended by Protocol of 11 April 1980 provides the same in Art.3, Article 1(1) of the 2001 Convention on the Assignment of Receivables in International Trade. Art 3 in the drafts for an instrument on the carriage of goods and 2 place of receipt for carriage and place of delivery in different states; Article 1(3)(a) of the Model law on International Commercial Arbitration.[126]

Article 7 of the CISG which provides measures to protect against domestic interpretation of the CISG, through directives for interpretation and gap filling have becomes paradigms for the clauses in other international law instruments. For instance, Article 7 of the Limitation Convention, Art.6 (1) of the 1983 Geneva Draft Convention on Agency in International Sale of Goods, Art 4(1) of the UNIDROIT Convention on International Financial Leasing of 1988 (Ottawa), Article 7(1) of the 2001 ON Convention on the Assignment of Receivables in International Trade and Article 5 of the Convention on International Interests in Mobile Equipment (Cape Town Convention of 2001).

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[120] Directive of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (97/5/EC). See (Art. 6(1), (Articles 9 and 6).
[121] Magnus 2 (n 102) 142; Schroeter, UN-Kaufrecht und Europäischen Gemeinschaftsrecht, 564 in Troiano (n 102) 234
[122] Schulte-Braucks, Zahlungsverzug in der Europäischen Union, Neue Juristische Wochenschrift (NJW) 2001, 103, 105 in Troiano (n 102) 234.
[123] Schroeter (n 121).
[124] CISG Article 1(1) a.
[125] CISG Article 1(1) b.
[126] Schlechtriem (n 83) 27.

The CISG is also a major influence on some of the Uniform Acts of the Organization for the Harmonization of African Business Law (OHADA). The OHADA Uniform Act on General Commercial Law contains provisions on sale contracts, which follow closely to those of the CISG,[127] albeit with certain divergences.[128] An analysis of the Draft OHADA Act on Contract law, reveals it was inspired by the UNIDROIT Principles of International Commercial Contracts which draws largely from the CISG. This shows the indirect link between the CISG and the Draft OHADA Act and any difference are with respect to specific African features.[129] The fact that the OHADA Uniform Act draws considerably from the CISG is significant because, in the event that Nigeria adopts the CISG and subsequently becomes part of the OHADA, though there might be certain instances where both instruments will be applicable, under Article 10 of the OHADA *Treaty,* the Uniform Act overrides previous or subsequent enactments of internal law. Since the CISG will be a part of the Nigerian law, the OHADA Uniform Act will override it.

### 3. The CISG's Influence on Soft Laws

The influence of the CISG on soft laws and principles are significant because although they are non-legislative codifications, and drafted outside the political sphere of states, making them non mandatory, they are useful for parties and serve as an important guide for interpreters who may have to resolve contracts unfamiliar to them.[130]

With regards to the academic endeavours in the EU, the European Commission favours the CISG as a model for the texts and more generally as a 'model for a future comprehensive set of European rules in the field of commercial law.'[131] To further emphasise this support, the European Commission included the CISG and other UN uniform law Conventions-in the broad definition of 'acquis communautaire'. Thus, stressing the fundamental role of the CISG as a model for the future unification of European Contract law.[132]

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[127] Luca Castelleni, 'Ensuring Harmonisation of Contract Law at Regional and Global Level: The United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL' Report presented at the Colloquium on "The Harmonisation of Contract Law within OHADA", held in Ouagadougou (Burkina Faso) from 15 to 17 November 2007, http://www.unidroit.org/english/publications/review/articles/2008-1&2/115-126.pdf 119 accessed 28 May 2014.

[128] For differences, see Juana Coetzee and Mustaqeem de Gama, 'Harmonisation of Sales Law: An International and Regional Perspective' (2006) 1 10 Vindobona Journal of International Commercial Law & Arbitration 15-26, 24.

[129] Ole Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law', (2005) 53 American Journal of Comparative Law 383.

[130] Christian von Bar, Eric Clive and Hans Schulte-Nölke and ors (eds), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf 4 accessed 5 May 2014.

[131] Troiano (n 102) 233.

[132] Micklitz, Ein einheitliches Kaufrecht für Verbraucher in der EG?.

### i. The UNIDROIT Principles of International Commercial Law

The CISG was a direct influence and obligatory point of reference for the UNIDROIT Principles, which provides general rules for international commercial contracts. The Principles were drafted in recognition of the gaps, vague and ambiguous provisions of the CISG, a result of the compromise necessary, in light of the differences in legal traditions and times. The Principles were thus drafted on the merits and shortcomings of the Convention. But for the worldwide adoption of the CISG, any attempt at rules such as the Principles would have been unlikely.[133] The Principles took a different route since the CISG had achieved legislative success as a binding instrument, by restating the existing international contract law, which had the most persuasive value and appeared to be more suited to cross border transactions.

With regards to issues common to both instruments, the provisions of the Principles were taken either literally or at least in substance from the corresponding provisions of the CISG and the influence of the CISG on the Principles is so much, so that it is only in rare cases that the Principles depart from the CISG'.[134] Although the Principles were not meant specifically for the purpose of harmonising or unifying European contract law, they influence debates in this field. Thus, the influence of the Principles on this debate is a further channel for the CISG to have an indirect impact in this process.[135]

### ii. The Principles of European Contract Law (PECL)

In drafting the PECL, the importance of the CISG for the unification efforts was clearly stated, consequently resulting in its adoption as a model for the Principles.[136] The provisions of the CISG resonate through the articles of the PECL.[137]

Though the PECL draws from the CISG, because of its academic nature, its primary purpose is possibly 'to stoke or enrich the debate on the future of the European private law', as such, the impact of the CISG may to a certain extent be disregarded. The author argues that the influence of the CISG in this regard, albeit indirect, must not be undermined because whether or not the PECL is used in drafting future EU laws, a vital fact is that its contents have been recognised in

[133] Micheal J Bonell, *An International Restatement of Contract Law* (2nd ed Transnational: Irvington, NY 1997) 47.
[134] ibid; Troiano (n 102) 235.
[135] ibid.
[136] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law Part I and II,* The Commission on European Contract Law (Kluwer Law International, 2000).
[137] ibid 332; For a comparative explication of the two provisions see Allison E Butler, 'Interpretation of "place of business": Comparison between provisions of the CISG (Article 10) and counterpart provisions of the Principles of European Contract Law' The Pace CISG Database http://www.cisg.law.pace.edu/cisg/biblio/butler.html accessed 5 May 2014.

the EU and have proven popular because of its ability to accomplish a synthesis of all European contract law and its simple language.[138] And, there is no denying that the more it is read, the more people in the region (EU) familiarise themselves with its contents, and the more conversant EU members become with the principles of the CISG. These users will invariably have a say in the drafting of any future law, with the likely outcome that their opinions will reflect concepts familiar to them. Thus, enabling drafters to provide laws familiar to users.

The CISG will thus have an indirect influence on the EU laws. Furthermore the PECL has become a basis and framework for further attempts on the European level, particularly, on the work of the study group on a European Civil Code, founded and chaired by Christian von Bar and now entrusted by the EC Commission to draft a Common Frame of Reference for a European Contract Law.

### iii. The Draft Common Frame of Reference (DCFR)

The DCFR is an academic endeavour by the study group on a European Civil Code (the 'Study Group') and the Research Group on Existing EC Private Law (the 'Acquis Group').[139] One of the purposes of the text is to serve as a draft for drawing up a 'political' Common Frame of Reference (CFR).[140] This framework draws both directly and indirectly from the provisions of the CISG. Indirectly, through the provisions of the PECL, the UPICC and the Consumer Sales Directive and directly, the influence of the CISG is noticeable in Book IV.A on Sales. This is unsurprising if one considers that the members of the CISG Advisory Council were a core part of the group and thus, the solutions proffered by the CISG were always an option.[141]

The CISG has also been influential in the works of the Gandolfi Group, the Academy of European Private lawyers, directed by the Giuseppe Gandolfi which started in 1995 with the drafting of a European Contract Code'.[142] The Draft of the Code was published in 2001. Although its influence is not as obvious as the PECL's influences of the CISG is still spread across it. The CISG influenced not only the sales section of the Code, but more the parts specifically devoted to the general law of contracts.

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[138] Frank Emmert, 'The Draft Common Frame of Reference (DCFR) - The Most Interesting Development in Contract Law since the Code Civil and the BGB' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025265 accessed 6 May 2014.
[139] Von Bar and Clive (n 130) 4.
[140] ibid.
[141] The Admin, 'The DCFR and the CISG' (*European Private Law News,* November 24 2007 http://www.epln.law.ed.ac.uk/2009/11/24/the-dcfr-and-the-cisg/ accessed 6 May 2014.
[142] ('Code européen des contrat') Bonell 2 (n 109) 47 in Troiano (n 102) 235.

The influence of the CISG is also in the Principles of European Law (PEL), which was drafted by the working team within the framework of the Study Group on a European Civil Code. A major aim of the Study Group was to draft a codified set of Principles of European Law for the law of obligations. The CISG served as a starting point for drafting specific rules on sales in the PEL. This was because of the Convention's wide acceptance and the influence it already had on national laws of the EU countries and the Consumer Sales Directive.[143]

Questions concerning the continued effectiveness of the CISG in light of the existence of these instruments have been raised, to the effect that the Convention may fade into obscurity and that these instruments, in most cases present more comprehensive instruments than the CISG. It seems logical that laws built on a model should be more comprehensive since they can avoid the deficiencies of the antecedent. In fact, the outright intention of the Principles was to address issues, which are either completely excluded or not sufficiently regulated by the CISG. However, these instruments do not pose any threat to the Convention rather, they complement the CISG, in that it is more useful for businesses with thousands of small contracts coming under many different systems 'having an optional instrument which, if opted into, would replace all the national laws and which, therefore, would have to have adequate protective rules in it. The CISG could not fulfill this function.[144]

As a model for domestic and uniform laws, the success of the CISG is unquestionable. It sets a standard as a model law, by providing a framework on which these laws are built and for which they can be interpreted. Thus, making the drafters work easier and promoting harmonisation of laws, which encourages seamless cross border trade transactions. More than a model framework, it serves as an interpretive tool for these laws, which draw inspiration from it.

#### 2.3.1.3 Uniformity as a Measure of Success

An important criterion for measuring the success of the CISG is the degree of uniformity achieved in its application.[145] This is particularly important within the context of Nigeria's adoption of the CISG, since a key requirement for international traders in developing countries is predictability of laws and equal bargaining powers in trade transactions with counterparts in developed countries.

[143] Sonja A Kruisinga The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law http://www.ejcl.org/132/art132-2.pdf accessed 6 May 2014.
[144] The Admin (n 141).
[145] Camilla Andersen, 'The Global Jurisconsultorium of the CISG Revisited' (2009) 13 1 Vindobona Journal of International Commercial Law & Arbitration 43-70, 44.

Recognising this, it has been suggested that the measure of the CISG against the above mentioned parameters, and the subsequent conclusion of the Convention as successful may be misleading, since one may be 'led to believe that the CISG is a comprehensive code governing international sale of goods, addressing contracting generally and therefore governs all international sales transactions and exhaustively deals with all problems.'[146] This is misleading because the CISG does not govern all international sales transactions, neither does it deal with all issues that may arise in connection with these transactions. Most uniform laws possibly provide only verbal uniformity, and their application and interpretation may amount to lip service, when in reality domestic laws are applicable.[147]

Further, since the central goal of the CISG as a uniform Convention is some standard of harmonisation, to ignore it as a measure of success will be to present an incomplete picture. [148] There is a need for a functional level of uniformity in order to achieve this goal. This is an essential goal given that the main objective for Nigeria's adoption of the CISG is primarily the predictability of the applicable law to controversies linked to a plurality of countries.

It must be reiterated that uniformity as a yardstick for measuring the success of the CISG is only complete to the extent that uniformity is considered in totality, not necessarily as an end, but also, the processes and what is being done to achieve this benchmark.

The challenges of uniformity of the CISG and the ways that they have been overcome are the best ways of measuring the level of success attained in terms of uniformity.

### i. Interpretive Challenges

As a result of the Convention's vague provisions and its applicability to transactionally diverse range of deals, any lack of interpretive consensus undercuts its overarching goals. Interpretation is important as a process of ascertaining the meaning of the CISG and adapting meaning of the legal text to changed circumstances.[149]

The possibility of political interpretations of the CISG, meaning that courts or tribunals may systematically favour their citizens, through unfair procedural means could have potentially been a problem of the CISG. However, case laws over the years reveals that there is no such tendency

[146] Ferrari, (n 2) 315.
[147] Schlechtriem (n 83).
[148] See the Preamble of the CISG, *United Nations Convention on Contracts for the International Sale of Goods* (United Nations, November 2010) http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf accessed 20 May 2014.
[149] Ulrich Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations' in André Janssen and Olaf Meyer (eds) *CISG Methodology* (sellier European Law Publishers, 2009) 34.

systematically pursued in any of the CISG member States.[150] The CISG is considered successful, because courts demonstrate an understanding of the overarching aim of the Convention.

The gaps inherent in the CISG, due to the fact of complexity of the subject matter, different economic systems, varying legal structures or even political backgrounds,[151] means there are limitations to solutions for problems in international sales. There are the external gaps, referring to issues not dealt with by the Convention, and internal gaps, issues dealt with within the scope of the Convention, which are problematic. Despite the provision of Article 7(2) to fill the gaps, difficulties such as its interplay with the interpretations Art 7(1) and the distinction between the matters that are governed by the Convention and those, which are not, are a real problem.[152] However there are numerous solutions such as the true code approach,[153] where the interpreter confines himself to the Convention itself, considering the CISG as a comprehensive document, the Meta code approach, where external legal principles are used to fill gaps found in the CISG, unless it expressly disallows it,[154] and a combination of both approaches. The drafters of the Convention compromised after some debate regarding the above-mentioned methods, choosing both methodologies.

The gaps in the Convention can also be solved by parties through party autonomy principle of the CISG. This option eliminates the divergence of interpretation and allows for parties to make their decisions.

The ability to resolve the interpretative challenges of the Convention through the above solutions is indicative of a degree of success.

The goals of the CISG to achieve uniformity have been hampered by the political and cultural differences, which exist amongst nations. Frustrating the efforts of the CISG in achieving uniformity, its main purpose, is a practice by interpreters, termed the 'Homeward Trend,' 'the temptation to project the familiar rules of one's own national legal system onto the Convention's

[150] For empirical evidence on this based on the CLOUT cases relating to the CISG. ibid 36.
[151] André Janssen and Sórren Claas Kiene, 'The CISG and Its General Principles' in André Janssen and Olaf Meyer *CISG Methodology* (Sellier European Law Publisher, 2009) 261, 262.
[152] Bruno Zeller, 'The Challenge of a Uniform Application of the CISG-Common Problems and their Solutions' (2006) Macquerie Journal of Business Law 309.
[153] Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70 Yale Law Journal 1037, 1043.
[154] John B Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods Article 7 and Uniform Interpretation' (D Phil Thesis, University of Nottingham 2000) 151.

provisions'.[155] It is also the failure of courts to consider foreign decisions while deciding cases under the CISG.

CISG jurisprudence reveals pervasive practice of the homeward trend. Two forms of homeward trend exist, 'variation which consists of the tendency by interpreters to turn to their familiar, and non-uniform, norms of domestic law in the interpretation of international standards'…and the *legis fori* variation'.[156] Amongst the two, more courts tend to apply the variation that turns to their familiar domestic laws.

To emphasise this, cases such as *Italdecor SAS v Yiu Industries*[157] come to mind where although the court applied the CISG, it failed to seek guidance from existing cases on the CISG when making the decision on fundamental breach, the court applied Art 49(1) without analysing the related Article 25.

A plethora of cases employing homeward trend in the interpretation of the CISG exist,[158] however, this pattern, comes from the novelty of the Convention in the jurisdictions. This novelty generates uncertainty because transactors will generally avoid applying a law where they lack information upon which to base reliable estimates about prospective outcomes under the law.[159] However, the CISG is no longer a novel code and has surmounted novel interpretation effects, thus, resulting in more consistent case laws. More recent cases indicate that interpreters have familiarised themselves with the Convention and thus have been following the interpretive methodology resulting in a noticeable decline in the trend.[160] Moreover, the practice of the

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[155] Harry M Flechtner, 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co*' (2002) 22 Northwestern Journal of International Law and Business 121-159.

[156] Franco Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) 13 Vindobona Journal of International Commercial Law & Arbitration 15-42.

[157] CA Milano, Mar.20, 1998, Angela Maria Romito, 'CISG: Italian Court and Homeward Trend - Queen Mary Case Translation Programme Corte d'Appello di Milano 20 March 1998 Italdecor s.a.s. Yiu's Industries (H.K.) Limited (default)' (2002) 14 Pace International Law Review 179 http://digitalcommons.pace.edu/pilr/vol14/iss1/8/ accessed 23/03/2015.

[158] For articles providing case analysis on the Homeward Trend, see; 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?' (2005) 9 Vindobona Journal 199; Ferrari 3 (n 156); Peter Mazzacano, 'The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend' (2012) 2 Nordic Journal of Commercial Law; Franco Ferrari, Homeward Trend: What, Why and Why Not' in Janssen and Meyer (n 151) 171.

[159] Steven Walt, 'Novelty and the Risks of Uniform Sales Law' 39 Virginia Journal of International Law (1999) 671, 687–88 in Karen Halverson Cross, 'Parol Evidence under the CISG: The "Homeward Trend" Reconsidered' www.moritzlaw.osu.edu/students/groups/oslj/files/2012/04/68.1.cross_.pdf accessed 19 July 2012.

[160] A more recent case commended for this include *Zapata Hermanos Sucesores v. Hearthside Baking Co* (2001) U.S District Court, 28 August 2001 The Pace CISG Database, cisgw3.law.pace.edu/cisg/wais/db/cases2/010828u1.html accessed 8 November 2012; Italian case, Italy 25 February 2004 District Court Padova (*Agricultural Products case*) The Pace CISG Database, http://cisgw3.law.pace.edu/cases/040225i3.html accessed 8 November 2012.

homeward trend is not done wittingly. Judges seem to do this more as a defense to the provisions, which they consider ambiguous within the Convention. This fact is supported by evidence showing that with regards to clear provisions of the CISG, 'misunderstandings and incorrect applications…are a rare exception.'[161]

The decline in homeward trend practice is evidence of success of the Convention bearing in mind that the likelihood of perfect uniformity is hardly possible. The impressive build-up of the jurisprudence and the ease of accessibility of the CISG is indicative of substantial uniformity.

### ii. Textual Non Uniformity of the CISG

The text of the CISG was drafted and approved in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, with each text considered equally authentic. However, this is a source of non-uniformity because of the disambiguation in translations. Although significant, this is not a problem for Nigeria because the Nigerian lingua franca, English, corresponds with the original language.

Reservations, which mean that different versions of the Convention are applied throughout the CISG states, are also a source of non-uniformity. By having varying versions of the same text apply in a seemingly uniform framework, businesses can be misled to think the same law applies where that is not the case. This presents a somewhat deceptively uniform façade. The effect of the reservation, resulting in non-uniformity means that states transacting with these countries had to depend on private international law rules to sort out the applicable law. Nigeria need not worry about making these reservations since, as earlier explained, part II of the CISG is compatible with the common law applicable in Nigeria. Understanding that these reservations were likely to cause non-uniformity, the drafters of the CISG provided in article 98 that only reservations expressly authorised by the Convention are permitted. Today, there is hardly any need for the reservations in Articles 92-96, which have a detrimental effect upon the Convention's practical application. More recently, the realisation that the reservations are obstacles to the uniformity goals of the CISG has led to their subsequent removal. This shows the level of effort invested into ensuring the uniformity goals of the CISG are met in order to encourage and promote trade. This is clearly evidence of success.

[161] Magnus (n 103, 149).

## 2.4 Overcoming Uniformity Issues: Tools and Methods and Suggestions for Nigeria

### 2.4.1 Autonomous Interpretation

It is suggested that the aims of the Convention should be kept in mind by the interpreters in Nigeria, when seeking to conform to the uniformity requirements. From the outset, the drafters of the Convention anticipated divergent interpretations and thus, included tools to guard against, and where impossible ameliorate it. This is found in Article 7, which states that regards for the Convention's international character and for the settlement of questions not governed by the Convention should be in conformity with the general principles. This means that for any interpretive issues on the CISG arising in Nigeria, resolutions must be made on the basis of the CISG itself. This is in accord with fulfilling the mandate of and contributing towards the uniform application of the CISG. Thus, interpreters should look to foreign decisions for guidance, whether as voluntary binding precedent or as persuasive precedent. And where there are conflicting decisions on a particular issue, they carefully select and reconcile those decisions through use of the CISG's interpretive methodology.

As stated earlier, the international character of the Convention must be kept in mind in order to achieve uniformity, making the purpose of the Convention crucial. Keeping in mind article 7(2), the general principles of the CISG, Nigerian interpreters are able to exclude the homeward trend and rules of private international law that seek solution outside the Convention. In light of the above, one can see that Article 7(2) prescribes the policy for Nigerian interpreters to fill gaps and thus describes the boundaries between the CISG and domestic law.

The admonition not to resort to domestic law is not to be considered a Procrustean bed, it is recognised that there are cases where recourse must be made, but this must be in situations where the CISG has expressly stated so or as a last resort where no other principles within the CISG may be referred to. It may also be used where the CISG has evidently borrowed from certain national law concepts such as the *Nachfrist*. Guidance may be sought from the national laws for concepts such as these, which are alien to the Nigerian interpreters. All these however must be done with the recognition that the single-minded pursuit of uniformity may produce a distorted reading of the Convention.[162]

[162] Harry M Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG' The Pace CISG Database, http://papers.ssrn.com/so13/papers.cfm?abstractid=2426565&download=yes accessed 22 May 2014.

### 2.4.2 Other Instruments as Aides to achieving the Uniformity Goals of the CISG

Other solution for filling the gaps in the CISG is through the use of the UNIDROIT Principles and the PECL. It must be remembered that these are soft laws, which were influenced by the CISG and thus can be used in the interpretation and gap filling of the CISG. Using these instruments have become much more popular especially in commercial arbitration, albeit with controversies.[163] Since the UPIC and the PECL have a wider scope of application and they share a common goal, with the CISG of 'de nationalisation of rules and principles' they are also useful.[164] The UPIC is particularly useful for Nigeria in the sense that since they do not have a binding application, and thus do not require ratification, they are more likely to have been heard of by traders and if the provisions are substantially similar, they will make easier for the users of the CISG. The Preamble of the UPIC in support of this, states 'that they may be used to interpret or supplement international uniform law instruments.'[165] Although the UPIC is not a legally binding text, it has been successful in practice since some courts and arbitral tribunals consider the statement in the preamble binding.[166] The UPIC has been used for instance to solve one of the most troublesome issues of the CISG, the type of interest to be applied under Art. 78. As a gap, the rate of interest has been filled by applying the UPIC as it has been considered the general principles on which the CISG is based.[167]

The use of the UPIC as a gap filler, is indicative of the success of the CISG in this regard. One can see the interplay of the success of the CISG as a role model working with the instrument to which it influences to successfully achieve its uniformity goal.

It is warned however, that in using UPIC in Nigeria as tools for uniform interpretation, interpreters must be careful to look at the contractual clauses, applicable law and forum or arbitration clauses if any – the Convention and its method of interpretation and gap filling as

[163] Magnus, Die allgemeinen Grundsätze im UNKaufrecht, (1995) 59 Rabels Zeitschrift (RabelsZ), 492-493 in Pilar Perales Viscasillas, 'The Role of the UNIDROIT Principles and the PECL' in 136. André Janssen and Olaf Meyer (eds) CISG Methodology (sellier european law publishers, 2009) 288.
[164] Pilar Perales Viscasillas, 'The Role of the UNIDROIT Principles and the PECL in 136. André Janssen and Olaf Meyer (eds) CISG Methodology (sellier european law publishers, 2009).
[165] ibid.
[166] ibid.
[167] ICC 8128/1995 (UPIC and PECL); ICC 8769/1996 UPIC; Economic Superior Tribunal of Belarus, 20 May 2003, directly applying the UPIC to fill the rate of interest; and ICC 8547/1999 where the applicable law was the Uniform International Sale of Goods. The Tribunal pointed out that in accordance with Art.17 ICC Arbitration Rules, it would apply the UPIC (Art. 4.5 and 7.1.3) as a useful complement to fill gaps in the uniform laws in Perales (n 164) 300.

well as the *lex arbitri* applied, so that the Principles 'do not come as a unforeseeable element to the parties'.[168]

### 2.4.3 Using the *Global Jurisconsultorium* of the CISG

Nigerian interpreters can gain from the juriosconsultorium of the CISG, which is 'a process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule of law'.[169] Most CISG scholars would agree that Art. 7(1) CISG provides the legal basis for a duty to aim for a uniform, transnational interpretation. Thus, the terms of Article 7 ground the use of the *Jurisconsoltorium* which institutes that duty in the Convention itself. This is a logical conclusion based on the wording of Article 7(1) CISG and its requirement of 'regard' toward internationality and uniformity.[170] Through this means, Nigerian interpreters can consult with and refer to other texts and decisions of the CISG. In undertaking to share a uniform legal text like the CISG, contracting States are also undertaking to pursue the goal of uniformity in unison. The legal basis for this duty to share sources of a uniform law when sharing the law itself is derived from comity, and from an understanding that shared international laws are unique, and that their interpretive sources are as diverse as the legal systems which share them. This brings to the fore, the argument of comity.[171]

The provision of the website dedicated to the CISG, and the continued improvement on translation of cases, refute the argument that a major substance is lost in the process of translation. Moreover, the English language is the lingua franca of Nigeria and was one of the original language texts of the CISG and so there shouldn't be interpretational problems.

A fundamental argument in terms of the development of the website is that this was not factored in, when drafting the CISG and as such, one must question the dependence on it as a uniform mechanism, especially since the drafters of the Convention did not envisage it. This argument further raises the issue as to whether there was any other means intended for promoting the uniformity of the CISG. Admittedly this is the case, although a critical examination of this view lends itself to the argument that what was expected from the outset when drafting the CISG was substantial uniformity not perfection.

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[168] ibid 288.
[169] Andersen (n 145) 47
[170] Joseph Lookofsky, *Understanding the CISG*, (2008, Kluwer) 34, 35.
[171] Andersen (n 145) 47-48.

Moreover, drawing from the examples of the Common law, which uses precedent as a mechanism for ensuring uniformity in decision, this most likely would have been the case of the CISG. The common laws, which are applicable in Nigeria, were transposed into the country upon colonisation and the precedents were equally transplanted, successfully. Thus records of the CISG decisions in foreign jurisdictions would have been physically transported to countries to ensure harmonious interpretation. Though, the Internet makes for speedy application.

Another issue in this regard is the issue of translation of CISG cases on the website. There may be issues of translations in that when Nigerian interpreters want to access the cases from the other jurisdictions they may be faced with poor translations of the decisions. But more than poor translations is the fact of language barrier of interpreters in other countries. It is suggested that this may not necessarily be an issue. Where the courts have a problem with the meaning of any word in their local language or the fact that there may be double meanings, the suggested practice is for the courts to refer to the *travaux preparatoires* of the CISG to resolve the issue, and this is the same suggestion for Nigerian interpreters. Where there are discrepancies between the decisions of foreign courts, they can look at the prevailing or dominant and accepted position to resolve the issue.

Despite the lack of a central court competent for CISG matters, Nigerian interpreters can adopt the prevailing view followed generally by a vast majority of the courts.

### 2.4.4 Travaux Préparatoires

Article 32 of the Treaties Convention recognises the use of the *Travaux Préparatoires* as a means of interpretation, albeit restrictively. The provision of the Treaty allows 'recourse to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion however, only in order to confirm a result reached under the general rule of interpretation or if this result remains unclear or manifestly absurd or unreasonable.'[172] Although preparatory work is not defined in the Treaty, Magnus suggests it includes the usual conference materials such as drafts at prior stages and records of the conference at which the treaty was concluded.

The ULIS and the ULF, which predate the CISG, can also be used by Nigerian interpreters as secondary sources of interpretation principally because they are the basis on which the CISG was birthed and because they are similar in content and scope to the Convention. However it is

[172] Article 32(a) and (b) of the Treaties Convention.

suggested that in using these Conventions, care must be taken in order to avoid conflicting results in certain cases where the CISG departs from these Conventions.[173]

Based on the above provision, it is advised that where the CISG has been adopted, Nigerian interpreters will first have to resort to the general rules of interpretation of the CISG to reach a conclusion. And where the interpreter is not sure of the decision reached, he can consult with the materials only as a supplementary means of interpretation. The validity given to these documents as a solution to interpretive problems, mean that it will be difficult for interpreters to deviate from the true purpose of the Convention.

### 2.5 Conclusion

The history of the Convention shows that much thought was given into the process of drafting of the Convention. The historical timeline of the CISG, which spanned a period of 30 years reveals that drafters not only focused on the text of the Convention but ensured that the text was politically acceptable to States from different legal families and levels of development in the world, consequently ensuring an equal level of representation which is an important factor for Nigeria, who as a developed country shies away from uniform laws usually perceived to favour developed countries.

The history of the legislative drafting process of the Convention, carried out with rigour and thoroughness is a telling indicator of the integrity of the Convention. This proves that the CISG should be an appealing framework for Nigeria.

The CISG can also be considered successful at least within the context of the needs of Nigeria, based on the criteria examined above. Particularly, the provision of and efficiency of solutions proffered to encourage uniformity, shows continuous improvement, making the CISG a success. The chapter also emphasises the fact that in measuring the success of the Convention, one must not look only to success as an end, but equally as a process i.e. the effort made towards and the continuous provision of solutions to extant problems. This is what is crucial for Nigeria, understanding that potential problems of uniformity can be resolved through the lively academic debates and write ups of the international community, specific to the CISG. Therefore, regarding both the achievement of set goals, and the process towards achieving it, there is no doubt the Convention is commendable.

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[173] Joseph Lookofsky, *Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contract for the International Sale of Goods* (Kluwer Law International, 2004) 3.

# CHAPTER 3

# UNDERSTANDING THE NON-ADOPTION OF THE CISG IN NIGERIA

## 3.1 Introduction

This chapter presents the findings of the empirical research gleaned from interviews and surveys of stakeholders in Nigeria, on the reasons why the CISG has not been adopted in Nigeria. The chapter is important in the context of the thesis, if it is understood that expansion of markets from the domestic to the international sphere promotes long run economic prosperity, and that international trade as an important source of economic growth derives from the fact that as global trade increases, its contribution to long term prosperity will continue to rise.

A necessary factor in ensuring the continued contribution of international trade to economic growth lies in the strength and functionality of the institutions in place.[1] When institutions are not functional, the costs of transacting increase, consequently preventing economies from realising wellbeing. Thus, the recognition and enforcement of property rights and contracts, and the capacity of states to mobilise sources for rule of law fundamentals such as due process and judicial and legal infrastructure are an instrumental part of promoting the rule of law.[2] This emphasises the clear nexus between economic and social development and trade law reform.[3]

Given the importance of international trade in promoting long term economic growth, and the necessity of functional institutions in maximising the advantages of trade, the chapter seeks to understand why a law such as the CISG has not been yet been adopted in Nigeria. The reason for questioning the non-ratification of the CISG, is premised on the fact that the Convention is a desirable framework, because it unifies common law and civil law concepts, eliminates the costs of dealing with distinctive legal systems, consequently allowing for a seamless flow of trade. Considering that the Convention presents a framework, which helps to overcome the

[1] Institutions here mean rules, enforcement characteristics of rules, and norms of behaviour. Constitutions, statutes and common laws and contracts specify in formal terms the rules of the game, from the most general constitutional ones to the specific terms of a particular exchange. Douglass C North, 'Institutions and Economic Growth: An Historical Introduction' World Development (1989) 17 (9) 1319-1332, 1321.

[2] In Focus Article, 'Expanding the UN Rule of Law Agenda: Rule of Law Activities that Promote Economic Development' (*United Nations Rule of Law*) www.unrol.org accessed 30 November 2013.

[3] K Pistor, D Berkowitz, J Monenius, 'Legal Institutions and International Trade Flows' (2005) 10 University of Michigan International Law Review 163-198 in Luca Castelleni, 'International Trade Law Reform in Africa' (2008) 10 Yearbook of International Private Law 548.

contradiction between the character of contracts on the international sale of goods and the regulation of these contracts by the individual states, it may be complementary to the 1893 SGA applicable in Nigeria.

The chapter specifically presents and analyses the opinions of legal practitioners in the commercial law sector, lecturers, personnel in the relevant government ministries and private agencies. The analysis is undertaken in order to understand if, and to what extent the reasons suggested have affected and continue to affect the adoption of the CISG in Nigeria.

### 3.2 Reasons for the Non Adoption of the CISG in Nigeria

From 2007 to 2011, Nigeria's exports increased on average by 23.5% each year and amounted to 125.6 billion US$. During the same period, imports increased on an average by 18.6 % each year to 64.0bln US$.[4] More recently, the Nigerian economy has grown significantly; with the GDP doubling to more than $500bn from $307bn.[5] Nigeria is also seeing more investments being made in the economy.

Although economic growth is significant, it is important to sustain this growth. Empirical research shows that factors such as the respective roles of democratic, economic activities regulation and property rights protection institutions are important for economic growth sustainability,[6] and only the regulation institutions positively and significantly affect the probability of growth sustainability.[7] These regulatory institutions constitute functional laws to regulate investment and trade relationships. Thus, although Nigeria can ignite economic growth, there is a need to sustain the growth. One way of sustaining growth is by encouraging and building the strength of the private sector, through functional laws such as the CISG, aimed at regulating trade. Laws drafted to meet the specific character of international economic relations. Since the CISG is capable of promoting economic growth by enhancing efficient trade for transactors in Nigeria, one would assume that it should have been adopted.

In addition, some of Nigeria's major export trading partners, the United States, the European Union, Brazil and Equatorial Guinea, and import partners, the European Union, the United

[4] UN Data on Nigeria, http://data.un.org/CountryProfile.aspx?crName=NIGERIA#Trade (UN Data) accessed 15 October 2013; The Editors, 'Nigeria: Trade and Economic Partnerships 2012' (*Afribiz*, 14 May 2012) http://www.afribiz.info/content/nigeria-trade-and-economic-partnerships-2012 accessed 15 October 2013.
[5] J.O.S, 'How Nigeria's Economy grew by 89% Overnight' (*The Economist*, 7 April 2014) http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-2 accessed 9 July 2014.
[6] Abdoul' Ganiou Mijiyawa, 'Economic Growth Sustainability: Do Institutions Matter, and Which One Prevails?' http://www.isnie.org/ISNIE06/Papers06/05.2%20(no%20discussant)/Mijiyawa.pdf accessed 9 July 2014, 1-2.
[7] ibid.

States, China, Antigua and Barbuda have ratified the Convention.[8] Given this, it seems desirable that Nigeria ratifies the Convention in order to facilitate and enhance trade transactions. In light of the above, the chapter presents and analyses the answers provided by the stakeholders interviewed in Nigeria, regarding the non-adoption of the CISG.

### 3.2.1 Lack of Awareness of the CISG in Nigeria

For any international convention to be ratified there must be some level of awareness of its existence in the country. Particularly, there is a burden on the relevant government ministry to be aware of its existence in order to assess its relevance.

The findings in Nigeria however reveal a fundamental lack of awareness of the existence of the CISG. Although the Convention came into force in 1988, it is hardly known within the professional legal practice, the academia and the government parastatals.

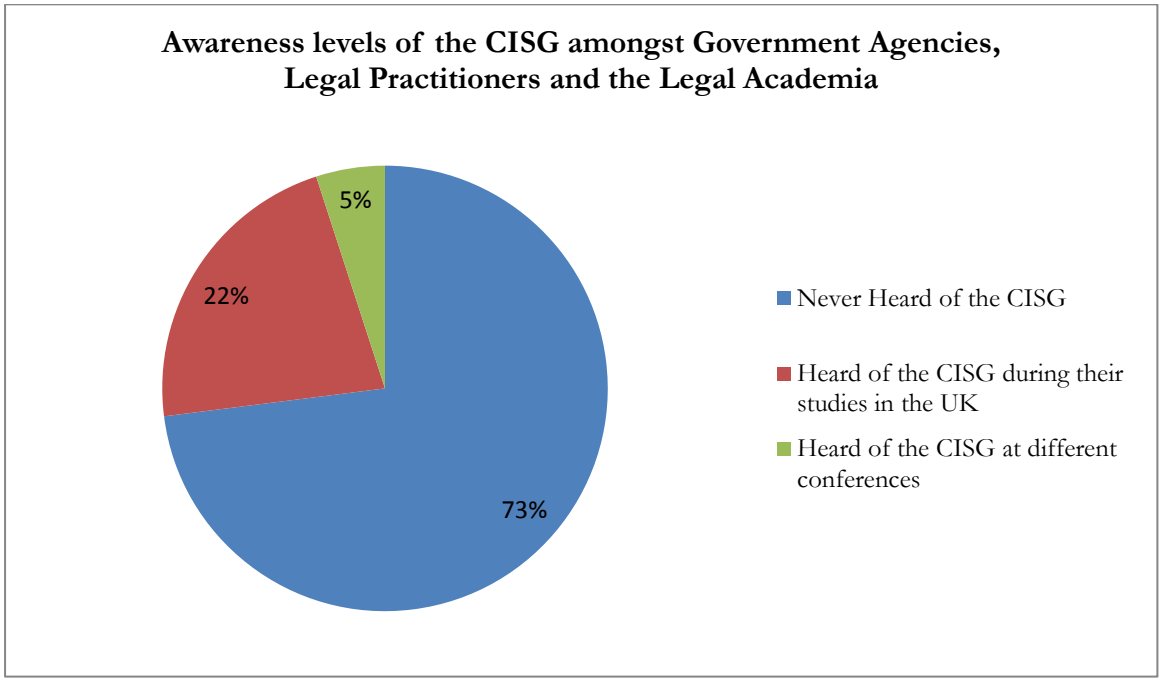


Figure 3.1: Interview Response

The diagram above shows that 73% of the respondents had never heard of the CISG, 22% of the 27% heard of the Convention during their studies in the UK, whilst 6% heard about it at conferences.[9] The percentage of respondents unaware of the CISG is almost four times that of respondents aware of the Convention. This shows a disproportionate level of awareness of the

[8] World Trade Organisation Statistics on Nigeria (WTO, September 2014) http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=NG accessed 26 March 2015.

[9] Although a total of 34 people were interviewed, 33 are affiliated to Nigeria, consequently their responses are the only relevant ones needed to measure the awareness levels of the CISG in Nigeria.

Convention. Given that a significant number of the interviewees are legal practitioners, in the commercial law firms in Nigeria, it is interesting that there is hardly any awareness of the Convention amongst them.

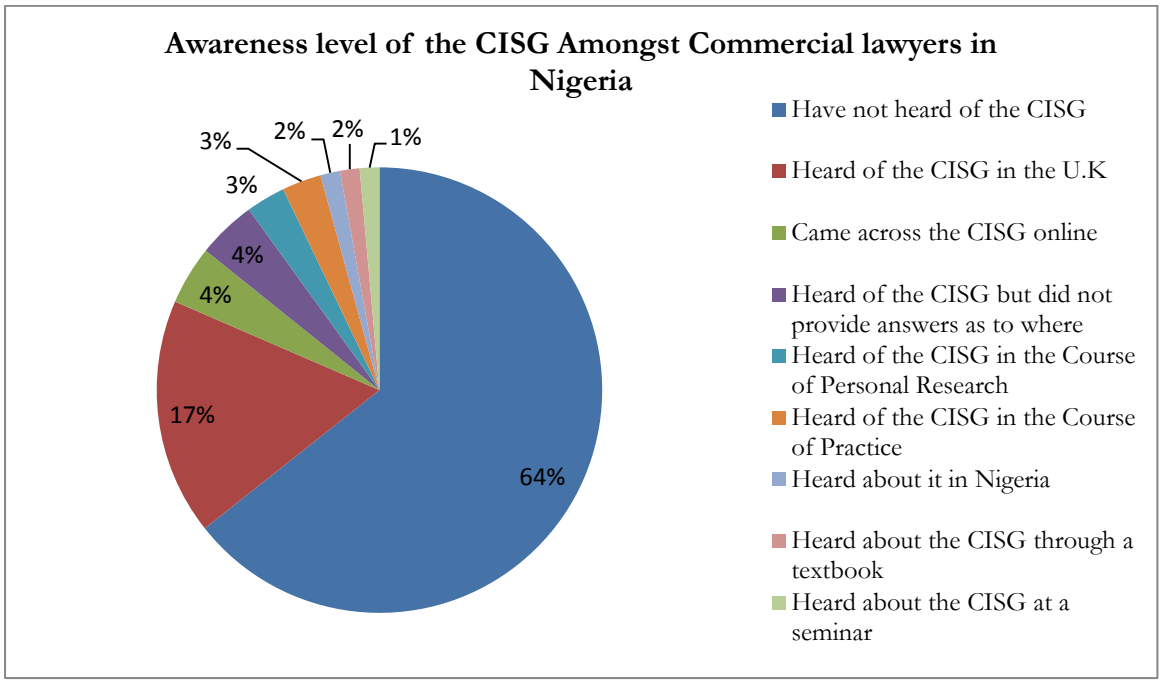


**Figure 3.2: Survey Response**

The questionnaire, specifically distributed amongst lawyers in the commercial sector, revealed a general lack of awareness of the CISG.[10] 64% of the lawyers had never heard of the CISG. 17% of the 36% who were aware, heard about it whilst pursuing their degrees in the UK. 4% of the respondents did not provide any answers when asked where they had come across the CISG. A further 4% came across the Convention in the course of practice, 3% came across the Convention in the course of personal research and the other 3% came across it online. 2% of the participants heard about it from seminars, another 2% came across it in a textbook and the remaining 2% heard about it in Nigeria but did not specify where.

Given the above, it is clear that lack of awareness of the CISG may be a major factor inhibiting its ratification in Nigeria. The dismal levels of awareness amongst legal practitioners, supposedly primary users of the law diminish the likelihood of adoption. Without knowledge of the Convention, it is hardly possible to evaluate and discuss the Convention.

In order to consider the reasons for the prevailing lack of awareness of the Convention in Nigeria, six key sectors have been identified. Their distinctive responsibilities and roles in

[10] 96 questionnaires were distributed; however, the response from the questionnaire was just 71.

promoting awareness of the Convention makes them suitable to be examined. The sectors identified are the department of international and comparative law (Ministry of Justice), the department of trade, (federal ministry of trade), commercial legal practitioners, legal academia, trade groups and the United Nations.

### a. The Legal Practitioners

75% of the interviewees were legal practitioners in the area of commercial law, and 64%[11] of them were unaware of the existence of the Convention. The lack of awareness of the CISG by the legal practitioners is not particular to Nigeria. In some of the jurisdictions where the Convention has been ratified, there is hardly any familiarity of it. Based on an empirical study carried out in 2009, about 21 years after the CISG had been ratified in the U.S, 34% of the practitioners were still not familiar with the Convention.[12]

Despite acknowledging that lawyers have an a role to play especially in staying updated with current international law and to push for changes in law, a majority of them felt that more of the obligation of creating awareness of international treaties rests on the government agencies. They believed that the government ought to be in the 'driving seat'.[13] One of the respondents stated

> As the department in charge of treaty ratification, 'you ought to come back and sensitise your people on the existence of such convention and their benefits, and then maybe circulate a communique from the conferences, and maybe get some of the experts, organise conferences where local lawyers that are knowledgeable on the area covered by the Convention can now exchange ideas.'[14]

This echoes the expectations of legal practitioners in Nigeria regarding the obligation of the government agencies of staying updated on, and spreading awareness of international uniform laws. This expectation is valid given that lawyers have no responsibility to ratify laws, and cannot

[11] Out of 33 interviewees, 25 were legal practitioners involved in practice and 16, a majority were unaware of the Convention.
[12] Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale Of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to practitioners, Jurists, and Legal Academics in the United States' http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/15/15 accessed 22 July 2014; see also M W Gordon, 'Some Thoughts on the Receptiveness of Contracts Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges', (198) 46 American Journal of Comparative Law 361 (Gordon's paper also shows that 10 years before Fitzgerald's survey there was still low levels of the CISG in the U.S.
[13] Interview with Mr Okorie Kalu, Legal Practitioner, Punuka Law Firm (Lagos Nigeria, June 2013).
[14] Interview with Khrushchev Ekwueme, Partner, Olaniwun Ajayi Law Firm (Lagos Nigeria, June 2013).

on their own undertake responsibilities of participation and ratification of international treaties on behalf of the government. Emphasising that it was beyond the scope of the legal practitioners duties it was stated

> That is not our job, I mean it would be a good thing to do, but if we have all kinds of government agencies in Abuja whose job it is to push the government that there are some contractual provisions in this Convention that may help local parties, that we need to look at, put it in local jurisdiction or even make it mandatory... But it's not my job as a legal practitioner, unless I am doing it as CSR or pro bono.[15]

This further emphasises the government's responsibility in initiating and being proactive with relevant international laws. This belief is substantiated considering that knowledge of the Convention by legal practitioners is dependent on their scope of practice. Thus, it is unlikely that there would be awareness of the CISG amongst the legal practitioners since it may be difficult to come within the scope of transactions or practice, especially since Nigeria has not adopted it.

Accordingly, the attitude of the government ministries reflects the 'general deficiency in the country in relation to awareness of what is happening globally in terms of international instruments of global governance.'[16]

Despite recognising the responsibility of the government agencies and their apathetic attitude towards ratification of relevant laws, some of the legal practitioners suggested that for any treaty to become ratified, a group of people with vested interest should push for it.[17] Accordingly, the ratification of the CISG could be initiated by private parties especially, since most reforms in Nigeria are currently being driven by private initiatives.[18]

As a result of the lack of expertise within the government agencies in specialised areas of commercial law, and the fact that the private initiatives currently play an active role setting the scene for reforms in Nigeria, these private initiatives are capable of playing more active and functional roles in providing awareness of the CISG, by drawing the attention of the relevant government agencies to the existence of the Convention.

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[15] Interview with Oghogho Makinde, Aluko and Oyebode Law Firm (Lagos Nigeria, June 2013).
[16] Ekwueme (n 15), This reason is discussed further in the section examining the government agencies and their responsibilities with regards to international laws.
[17] Kalu (n 14); Interview with Olufemi Lijadu, Partner, Ajumogobia & Okeke (Lagos Nigeria, July 2013); Interview with Adewale Olawoyin, Managing Partner, Olawoyin & Olawoyin Law Firm, Lecturer, Commercial Law University of Lagos Law School (Lagos Nigeria, July 2013).
[18] Kalu (n 14).

Supporting the fact that lawyers play a significant role in creating awareness of international conventions, one of the legal practitioners stated that the simple answer for the non-ratification of the CISG 'is that nobody has really argued strongly and forcefully that the Convention is an important one, that the country should domesticate.'[19]

Although government agencies ought to assess and galvanise into action, laws relevant to Nigeria on an international level, lawyers could also play a more active role in staying aware of global laws. Thus, 'more has to be done by the legal practitioners towards gaining knowledge of international conventions'.[20] This will enable more informed decisions regarding laws, which may be useful to clients. This is more so since global business transactions are 'potential catalysts for legal evolution and practicing lawyers and businessmen are the contemporary carriers of transnational laws, and there is a tremendous amount of globalisation in businesses and the economy and the law follows along.'[21] They have an obligation to keep themselves informed about potentially useful laws for their clients on the international scene. This is best practice especially for their clients, and it is also a part of continuous legal education. Moreover, as a result of client contact and the varied nature of commercial practice they may be better exposed to international laws," which aid legal transactions. Their exposure is important given the general lack of expertise in commercial law in the government agencies, in developing countries. Through their expertise and exposure, they can draw the attention of the government agencies to conventions such as the CISG. Their role then can be catalytic towards the ratification of the Convention.

### b. The Department of International and Comparative law

The department of international and comparative law, under the Federal Ministry of Justice Nigeria, is charged with the responsibility, amongst others, of vetting international agreements between Nigeria and various countries, rendering advice to extra-ministerial departments, and government agencies. They also oversee the ratification of international agreements, preparation of council memoranda in international meetings, provide periodic reports on treaties, ensure that all treaties entered into by Nigeria are deposited and registered in the Ministry, ensure the observance of Nigeria's treaty obligations by preparing and collating Nigeria's periodic reports

[19] Olawoyin (n 18).
[20] ibid.
[21] David Trubek and others, 'Global Restructuring and the Law: The Internationalisation of Legal Fields and the Creation of Transnational Arenas (1993) Case Western Reserve Law Review 407-498.

and monitoring Nigeria's obligations in respect of certain international organisations, mostly those legal in nature.[22]

The functions of the department indicate that their central responsibility is keeping Nigeria updated with laws on the international scene, and recommending such laws, where relevant, for adoption. Given their duties, there is an expectation of awareness of global laws by the department.[23]

The Assistant Director General, who was interviewed as a representative of the department although aware, had limited knowledge of the Convention and its purpose. When asked why the CISG had not yet been ratified, he suggested a number of reasons, particularly the administrative problems.[24] It is interesting to note that UN documents listed a Nigerian emissary as a participant in the negotiation.[25] However, there is no document to corroborate this in the department.[26]

The respondent suggested there was no documentary evidence of participation by Nigeria, and therefore hardly any awareness because the officer allocated that particular file may have been inundated with work at the time, thus relegating the report for later, intending to deal with it at an opportune time and so in time, the report is forgotten. He further suggested that the nonchalance with which reports are dealt with in the ministry could be the cause. That the officer responsible may have dealt carelessly with the documentations of the meetings leading to the loss of the document. This would result in the obscurity of the Convention amongst members of the department. It is plausible that the above reasons are responsible for lack of awareness of the CISG, considering that Nigeria participated in the drafting of the CISG.

The respondent further suggested that funding may have been a problem because in certain cases, officers though aware of possibly useful treaties, lack the funding to attend negotiation

[22] This is in accordance with Section 4 sand 5 of the Treaties (Making Procedure) Act 1993, http://www.justice.gov.ng/The_Ministry/Departments/International_and_Comparative_Law/ accessed 19 November 2013.
[23] Interview with Oni, Assistant Director Department of International and Comparative Law, Ministry of Justice. (Abuja, Nigeria, August 2013).
[24] Other reasons given, though extraneous to the reasons for the non-adoption of the CISG as it relates to awareness include; incompatibility with domestic laws, existence of other laws and section 12 of the Convention as a burden. They are examined in the following subsections.
[25] Christopher Akporode OSAR Permanent Mission of the Federal Republic of Nigeria, New York. See Travaux préparatoires United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) A/CONF.97/INF.2/REV.3 - List of Participants http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-Inf.2-Rev.3.pdf accessed 26 August 2014.
[26] A search was carried out with Mrs Ekanem, Legal Counsel at the Department of International and Comparative Law Department, Ministry of Justice, Nigeria (Abuja, Nigeria, 7 June 2011). The search revealed no evidence or documentation in relation to the CISG.

sessions thus, excluding their participation or whilst they may have participated at the initial stages, they may not be funded for participation in the subsequent stages. There is no evidence to show that Nigeria stayed or did not stay the duration of the drafting process of the CISG. Possibly, if Nigeria was absent, through a substantial part of the process, it may generate some scepticism about the Convention, since it may be felt that provisions favouring Nigeria were not sponsored. This will stifle any interest in the Convention and hinder any possibility of ratification. However, there is no evidence to either confirm or disprove this.

Although the above reasons are correlative to the lack of awareness of the Convention in the department, further reasons were suggested. Sometimes, officers sent to represent Nigeria lack the expertise and may be insufficiently educated in the particular area of law. This means the officer is unable to understand and participate significantly in discussions on that area of law. Therefore, he is also unable to produce a comprehensive report on the benefits of the treaty in question. This may have been the case of the CISG, if the representative lacked expertise in the area of uniform laws, particularly uniform commercial laws. He may not have been able to provide a comprehensive report on the Convention thus, denying the opportunity of an objective evaluation. It may also be that the emissary did not find the Convention useful. However given that there is no record of this, it is highly unlikely. The absence of any report on Nigeria's participation during the drafting stages of the CISG may then be one of the reasons why there is hardly any awareness of the Convention in the department.

The opinions of legal practitioners in the commercial law sector confirm the above as one the reasons why the Convention has not been ratified. At least, 50% of the interviewed respondents felt the DICL was responsible for the low levels of awareness of the CISG. They suggested that the onus was on the department to disseminate information about international Conventions.[27] As Dr Elias states 'there is inertia in the system, a fundamental problem with putting things in place, with ratifying treaties locally, we tend not to take it very seriously.'[28] This is attributable to lack of expertise in relevant areas of laws, lack of provision to participate on a global scene and the fact that the ratification of treaties in the area of commercial law is lacking.[29]

[27] See Interview schedule attached.
[28] Interview with Gbolahon Elias, Partner G. Elias Law Firm, Lecturer Babcock University Nigeria (Lagos Nigeria, June 2013 August 2013).
[29] For instance, the Hamburg Rules of 1978 became effective in 1992 and Nigeria ratified it 1992 however the Rules were finally domesticated and included recently in the LFN 2010. The Convention on the Elimination of all forms of Discrimination against Women- CEDAW was ratified by Nigeria on the 13 of June 1985, as of 2013 and as of the writing of the paper, the Convention has not yet been domesticated. The United Nations Treaty Collections Website http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en accessed 23 November 2013. Josephine Igbinovia, 'Nigeria is Notorious for Abandoning International Treaties' (*Vanguard,* 22

In terms of awareness of and evaluating treaties for ratification, the department acts on suggestions or calls by other Nigerian ministries specialised in, and responsible for particular topics. Thus, with regards to uniform commercial laws, the respondent suggested that the ministry of trade was also responsible. However, since there had been no request by them, there was hardly any way for the comparative law department to avert their mind to such laws. The respondent suggested the responsibility was on the ministry of trade to draw their attention to the Convention before they could advise on ratification.[30]

Given the ministry of trade's specialisation in trade and commercial matters, there is indeed an obligation on them to keep abreast of laws on the global scene, which may be useful in Nigeria and make recommendations to the DICL. Both ministries ought to work together in this regard to ensure evaluation and awareness of global laws.

It is interesting to note that since 2005, the DCIL has represented the Ministry at the Session of Working Group III (Transport Law) of the UNCITRAL, which was entrusted with the responsibility to renew current laws and practices in the area of the international carriage of goods by sea with a view to establishing uniform rules. Given this, it is a wonder that there is still no awareness of the CISG.

### c. The Department of Trade, Federal Ministry of Trade and Investment

As suggested by the Director of the DICL, there is an obligation on the Federal Ministry of Trade and Investment[31] to bring to their attention the CISG. Since they are the 'focal ministry,' they ought to play the leading role, by attending meetings and making suggestions to the DICL based on thorough evaluation of the law. Drawing the attention of the DICL to the relevant law is imperative towards staying aware of global international laws.[32]

A visit to the departments of Trade and Investment,[33] and Commercial Law under the MITI revealed little awareness of the CISG. The Principal Assistant Registrar of the Commercial law department was interviewed and although he had heard of the CISG, he did not hear of it at the ministry of trade, but whilst he was undertaking a Masters degree program abroad.[34] The Acting

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September 2013) http://www.vanguardngr.com/2013/09/nigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo/ accessed 23 November 2013.

[30] Oni (n 24).

[31] Federal Ministry of Trade and Investment (FMTI).

[32] Oni (n 24).

[33] DTI.

[34] Interview with Shafiu Adamu Yauri, Principal Assistant Registry, Federal Ministry of Trade and Investment (Abuja, Nigeria, December 2013).

Director of the DTI, who is also the head of the UNCTAD unit, stated that in his 30 years in the civil service he had never heard of the CISG.[35] The third interviewee, a commercial officer in the Bilateral Trade Division also stated that he was unaware of the Convention.[36]

The officers interviewed stated that they were unaware of the Convention because Nigeria had not ratified it.[37] This suggestion is problematic, given that the ministry in question is charged with trade matters in Nigeria and therefore is responsible for staying abreast with local and international laws governing trade.

Other reasons suggested by one of the respondents were the incompetency of the representatives in specialised areas,[38] and the inability of the UN agencies to interact effectively with certain countries.[39] This incompetency means the representative's unfamiliarity will hinder him from evaluating the Convention properly and therefore will not be able to make recommendations. Further, lack of staff educated in such areas means that the Convention may not receive the relevant attention, consequently resulting in stifled awareness.

The suggestion of insufficient interactions between the UNCITRAL and the relevant agencies in Nigeria, raises questions regarding the burden of responsibility between the government agencies particularly FMTI and the UNCITRAL.

The role of the FMTI as a representative of the Nigerian government suggests there is an obligation on the ministry to act in the interest of Nigeria in all trade matters. As agencies of Nigeria whose responsibility lie in ensuring the economic needs of the citizen are met, they are directly responsible for searching out trade laws both domestic and international laws that will potentially meet the needs and spread awareness of relevant laws to Nigerian citizens. This duty is underpinned in the state's economic responsibility to the citizens. Ideally, the Nigerian state as an economic actor should provide a neutral and functional framework for law and order and the maintenance of contractual relationships between its citizens and foreign traders.

The UNCITRAL owes no such responsibility to the citizens of any state. Furthermore, given the state's role as a regulator, setting the framework of contract and exchange, the FMTI has more responsibility to determine the laws that should regulate the affairs of the Nigerian citizens. This

[35] Interview with I K Mohammed, Acting Director, Bilateral Trade Division, Department of Trade, FMTI (Abuja, Nigeria, December 2013).
[36] Interview with Sunday Oguchie, Commercial Officer, Bilateral Trade Division, Department of Trade, FMTI (Abuja, Nigeria, December 2013).
[37] ibid.
[38] Yauri (n 36).
[39] ibid.

responsibility is particularly important given the unstructured way that trade is carried out in Nigeria and especially the fact that in most international trade transactions, Nigerian traders find themselves as the weaker bargaining parties.[40] The FMTI by assuming more responsibility in obtaining information on laws such as the CISG and spreading awareness, serves in providing a platform for the Nigerian trader to have equal bargaining strengths as his foreign counterpart. This in turn would lead to a structured market and a better economic environment.

The duty of the FMTI, which is the diversification of the resource base of Nigeria's economy, with a focus on increased production and export of non-oil and gas products,[41] further emphasises that it has greater responsibility in promoting awareness of the CISG than the UNCITRAL. In the diversification of resource base, the department ought to seek out and evaluate the best frameworks to regulate international transactions between SMEs since they can be the backbone of the economy, by providing an alternative source of income particularly, if there is a potential for such laws to promote a robust international trade environment. Thus, the major responsibility of investigating into the CISG and, subsequently disseminating information on the Convention falls on the FMTI.

The distinctive status of the UN also suggests that more responsibility of promoting awareness of the CISG falls on the FMTI than on the UNCITRAL. As an international organisation it is established by 'formal political agreements between members that have the status of international treaties.'[42] This implies that its legitimacy is derived from the states and as such, it can only be as useful as its members needs. Hence, laws such as the CISG have gained legitimacy because states have agreed to them. Further, whilst the UN has allegiance to a collective but no particular state, Nigeria owes allegiance singularly to its citizens. This means that whilst the UN represents the interests of all the states, it does not represent the interest of any particular state (at least in theory). Consequently, states such as Nigeria, which give legitimacy to the UN, albeit with other states, cannot expect the UN to take greater responsibility for promoting laws intended for the Nigeria's citizens' welfare.

Additionally, the UN is funded by states and therefore, states are able, and should provide the resources for working conjointly, if they choose to, with the UNCITRAL, towards spreading awareness of the CISG in Nigeria. Where there is no consensus, it may be infelicitous for

[40] See the sections below for detailed discussions on the nature of trade and the trading positions of traders in Nigeria.
[41] Federal Ministry of Trade and Investment (FMTI), http://www.fmti.gov.ng/ accessed 31 August 2014.
[42] OECD, 'Glossary of Statistical Terms' http://stats.oecd.org/glossary/detail.asp?ID=1434 accessed 31 August 2014.

resources pooled together by states to be designated to favour one state. Furthermore, Nigeria has the resource to fund and promote awareness of the CISG together with the UNCITRAL.

As central actors and subjects of international law, States participate in the drafting of, and subject themselves to such international laws.[43] Given that international laws represent the interests of the states, and states commit themselves to this consensual process, their participation suggests acquiescence to these laws. Such acquiescence suggests acceptance of the benefits of such laws to the states. As beneficiaries involved in the process of drafting 'UN laws' States should have more responsibility than the UNCITRAL in creating awareness of such laws. This is particularly so, given that states aim to undoubtedly represent the interests of their citizens. Nigeria's participation in the drafting further emphasises their subjection and acceptance of standardised practices.

Nigeria also understands the distinctive legal requirements of her people, and is better equipped to assess laws such as the CISG. The FMTI is responsible for collating information on trade in Nigeria and liaises with bodies that represent SMEs and sole traders. Therefore, they understand the needs of these sectors. They also work directly with, and have greater access to the UNCITRAL. The FMTI thus is a conduit between both domestic and foreign bodies, treaties and conventions, with respect to trade. Their position in this regard places more responsibility on the FMTI than the UNCITRAL in terms of obtaining and dispersing information on the CISG.

That more obligation lies on Nigeria does not absolve the UNCITRAL of its obligation because the FMTI can only create awareness of the CISG in Nigeria with the help of the UNCITRAL. However, this understanding may help in investing on staff training in commercial law. This will encourage informed participation at the international level. Understanding this, the FMTI should aim to liaise more closely with the MAN[44] to ensure effective dissemination of information on the CISG.

### d. **Legal Academia**

The data obtained with respect to legal academics shows that 86% of them were aware of the CISG.[45] However, this data is not representative, given that the institutions were on strike when

[43] Anthony Aust, *Handbook on International Law* (CUP, 2007) 2.
[44] Manufacturers Association of Nigeria (MAN).
[45] Only one person out of the 6 academics interviewed was not aware of the Convention. However, this was not at the time of the interview. At the time of the interview, Nat Ofo was aware of the CISG, but this was only because

the data was obtained.[46] However, the author believes that there is hardly any awareness of the CISG within the academic circle. This position is supported by anecdotal evidence and the reasons presented below.

Firstly, considering that the Convention has not yet been ratified in Nigeria and therefore, is not a part of the domestic laws, the National Universities Commissions,[47] even if there was a chance that they are aware of the Convention, would see no reason to include it in the academic syllabus because international trade law is not taught at the undergraduate level. Further, the scope of the commercial law module at the undergraduate level does not cover any international law and thus, international laws are not discussed as part of the module.'[48] At the undergraduate level, the Nigerian law i.e. the sale of goods is strictly taught. This is because the NUC dictates the structure of the module.[49]

Given the module structure and the mandate of the NUC, there is no avenue for conventions such as the CISG to be discussed.[50] Therefore, even if lecturers were aware of the Convention there is no platform to discuss it. This limitation supports the fact that the CISG is not known in the academic circle. And, even if they are aware of the CISG, there is hardly any avenue for them to promote awareness of the Convention.

Given the ubiquity of globalisation, it is suggested that a syllabus which reflects more international laws on trade should be considered. In order to promote awareness of the Convention it is also suggested that the CISG and other such international Conventions should be included introductorily in the syllabus as part of the commercial law module. This would keep budding lawyers informed on global laws. It also provides the relevant exposure to international laws and sets the stage for timely assessments of foreign legislations that may be relevant in Nigeria.

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the author had mentioned that this was the area of her research prior to the interview session and he chose to familiarise himself with the Convention before the interview.

[46] 6 people in the legal academia in Nigeria were interviewed, because of the on-going University strike which was called off subsequently in December 2013.

[47] The National Universities Commission (NUC), http://www.nuc.edu.ng/pages/pages.asp?id=27 accessed 21 July 2014.

[48] Phone Interview with Nkem Itanyi, Lecturer, Commercial law University of Nigeria Nsukka (UNN) Enugu campus (Durham, England September 2013).

[49] This is possibly a result of the NUC mandate Phone Interview Nduka Ekeyi, Lecturer, UNN and Legal Practitioner in Enugu; Mrs Itanyi (n 52); Interview with Professor Nnona, Commercial law lecturer UNEC (Abuja, Nigeria, January 2014); Olawoyin (n 18); Interview with Nat Ofo, Lecturer, Igbinedion University Okada (Lagos, Nigeria ; Elias (n 30).

[50] Itanyi (n 52).

One of the respondents stated that he had considered introducing the Convention to the students, since he was familiar with it. However, this was not possible because the international trade law module, at the postgraduate level was handled by the Department of Philosophy and International Law,[51] who did not see the need for the CISG.

Another respondent felt that there was no need for the CISG to be taught at the undergraduate level but that it may be offered as an optional module for postgraduate.[52] Although this is a plausible suggestion, it is the author's opinion that the syllables should in the least reflect current global trends and laws. This is to ensure that lawyers are equipped with the relevant knowledge to deal with the ever-burgeoning complex global transactions.

A perusal of the Nigerian textbooks on commercial law also reveals that the CISG is not discussed.[53] This may be because the NUC provides a strict syllabus and therefore authors would naturally seek to cater to the relevant needs. However, this is not necessarily sufficient reason not to deal with the CISG in the textbooks, at least, for informational purposes. In comparison, most of the textbooks on trade and commercial law in the UK, a country which has not ratified the CISG, discuss the Convention and in some cases to a significant extent.[54] Given the approach adopted by the academics in the UK, it is suggested that the CISG should be discussed more in the textbooks as this will serve to educate the Nigerian legal populace.

Further supporting the proposition that the CISG is not widely known within the academic circle in Nigeria is the fact that the academics that were aware of the CISG, became aware of it outside the country.[55] If awareness of the CISG amongst the academia comes from undertaking foreign studies abroad, it may be surmised that the majority of the academia, who have not undertaken any studies abroad will most likely be unfamiliar with the Convention.

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[51] Olawoyin (n 18).

[52] Ofo (n 58).

[53] A couple of the core commercial law textbooks in Nigeria consulted include; Kingsley Igweike, *Nigerian Commercial Law*, Sale of Goods (2nd edn, Malthouse Law Books, 2001); Okay Achike, *Commercial Law in Nigeria* (Fourth Dimension Publishers, 1985); M C Okany, *Nigerian Commercial Law* (Africana FEP Publishers Limited, 1992) (There is a current 2009 edition which the author is yet to access) John Alewo Musa Agbonika and Josephine Aladi Achor Agbonika, *Sale of Goods: Commercial Law Agbonika Law Series* (Ababa Press, 2009); J. Ola Orojo, Nigerian Commercial Law and Practice, Vol 2 (Sweet & Maxwell, 1983); Olakunle Orojo, *Nigerian Commercial Law and Practice* (Sweet & Maxwell, 1983) however mentions the CISG in the introductory part of Chapter 15 titled international commercial transactions.

[54] Some of the key textbooks on international trade law and sale of goods in the UK include M G Bridge, *The International Sale of Goods,* (3rd Edn OUP Oxford, 2013).. Indira Carr and Peter Stone, *International Trade Law* (5th edn Routledge 2013); P S Atiyah, John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson Education Ltd 2010) Pt V, 433; Michael Furmston and Jason Chuah (eds), *Commercial Law* (2nd ed Pearson 2013).

[55] Professor Nnona became aware of the Convention whilst lecturing in the US; Nkem Itanyi became aware of the Convention whilst undertaking an LLM program at University College London; Gbolahon Elias became aware of the Convention whilst studying at Oxford; Dr Olawoyin became aware of it whilst studying at Bristol. Mr Nduka Ekeyi did not state where he heard about the Convention whilst Nat Ofo heard of the Convention from the author.

Calculation of the mean year of post call qualification of the survey participants provides evidence to support the unpopularity of the CISG within the Nigerian academic circle. The fact that the average year of post call qualification amongst the survey participants is 3.5 years shows that a majority of the participants had been called to the bar within the last three and half years. Since they had never heard of the CISG, it is probable that it is not included in the Nigerian educational syllabus, and a majority of the lecturers did not discuss it.

Despite the possibility of the lack of awareness amongst the legal academia, they are a significant group with respect to dispersing knowledge of the Convention in Nigeria. This is reinforced by the fact that some of the legal practitioners felt, that they not only had a significant role to play in this regard, but that any ignorance of the Convention is traceable to the academic institutions. Accordingly, one of the respondents stated;

> There is a general deficiency in this country in relation to the awareness of what is happening globally in terms of international instruments of global governance because if you go to the Nigerian universities, you will see that some of the things that are being taught abroad are not being taught to the students here. I do not want to deride our lecturers. Yes, they are qualified but we don't devote enough funds for education so our curricula are not as elaborate as they are in the western world. Our professors and lecturers are not as encouraged as they are abroad. Our research institutions are not receiving adequate funding that will make them stay abreast of cutting edge research around the world.[56]

Inherent in the statement above is the suggestion that the lack of awareness of international laws such as the CISG is a result of the social problems in Nigeria, which invariably affects educational institutions. There is the problem of funding for the implementation of government policies on education and for carrying out curriculum innovations in various disciplines and at various levels of education.[57] Research institutions are also poorly funded, and this affects the educational staff. Academics at the federal universities are hardly funded to attend international conferences that discuss global trends and laws. They also lack the facilities to undertake extensive research. The federal and state governments hardly provide funding for these universities. Additionally, lecturers have to personally pay for articles required. These setbacks

[56] Ekwueme (n 15).

[57] A A Adeyinka, 'Current Problems of Educational Development in Nigeria' http://www.unilorin.edu.ng/journals/education/ije/dec1992/CURRENT%20PROBLEMS%20OF%20%20%20EDUCATIONAL%20DEVELOPMENT%20IN%20NIGERIA.pdf 5 accessed 21 July 2014.

are disincentives to gaining access to writing, thereby creating a general lack of awareness of global laws in academia.

Despite recognising the above, some of the academics perceived the ignorance of the CISG as a result of the Convention's nature. Ofo suggested that his lack of awareness of the CISG raises questions regarding the Convention's usefulness. This is especially since traders still carry on with their transactions in spite of this ignorance.[58] Supporting him Nnona states;

> [T]hat in the grand scale, the Convention is not a radical piece of legislation and cannot be considered revolutionary; at least it is not on the same level as the WTO and its endeavours. It is not that if you do not have it you will suffer too much. The rules of common law provide good enough base for international transactions.[59]

These views are understandable if one considers that even in jurisdictions that have adopted the CISG, it is frequently opted out of. This means that the CISG may not govern as much international trade transactions as imagined. This is because of the perennial problem of its unfamiliarity, which covers both lack of sufficient knowledge of the CISG and lack of awareness of its existence.[60] However, the radicality of the CISG is not the vital issue, neither is it the fact that traders are able to continue trading without the CISG. The crux of the argument is that although the CISG is not radical, it presents an option for Nigerian traders who would otherwise be the weaker bargainers in international trade transactions, because of choice of law issues, and ignorance of the existence of the CISG. Thus, the CISG provides a neutral choice in transaction, which the Nigerian traders stand to benefit more from, given their disadvantaged position. Therefore, although the Convention is not radical, it can improve the structure of trade in Nigeria and improve the transactional position of the traders.

It is also inapposite to compare the CISG with the WTO legislation and treaties because they serve distinctive functions. Whilst the WTO treaties are frameworks for the conduct of trade

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[58] Ofo (n 58).
[59] Nnona (n 53).
[60] According to Spagnolo, 'Lawyers unfamiliarity seems to vary a great deal by jurisdiction, from high levels of baseline "unawareness" in US where 44% are 'not at all familiar with it' to much lower rates of 'unawareness' in Germany, Austria and Switzerland. For example, it was recently reported that less than 2% of lawyers were unaware of the CISG in Switzerland. Anecdotal accounts sketch the picture of elsewhere, varying from very good familiarity in China and Denmark to it 'barely register[ing] on the consciousness' of Canadian lawyers, and the CISG's 'sleeping beauty slumber' in New Zealand. Unfamiliarity has long been blamed for the level of opt-outs'. Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)' The Pace CISG Database, http://www.cisg.law.pace.edu/cisg/biblio/spagnolo3.html at 138 accessed 2 July 2014.

relations amongst members in matters related to trade agreements,[61] the CISG governs private international transactions between parties from different states.

Comparatively, it is interesting to note the situation of the CISG at UK Universities. A survey carried out in 2010 in the UK shows that more than three quarters of the courses that incorporated the CISG were optional (77.3%) whereas only 22.7% were mandatory. Although both Nigeria and the UK have not ratified the CISG, the disparity in their approach is clear. This provides students with more knowledge of what is happening globally in United Kingdom.

The research also showed that the majority of the courses in which the CISG was taught, were for postgraduates, with only 31.8% being for undergraduates.[62] This suggests that knowledge of the CISG amongst legal practitioners in Nigeria may come from studying the optional module of international trade law in the UK because three quarters of the courses on which the CISG is taught is optional.[63]

Although the UK has not ratified the CISG, the level of awareness amongst the legal academia is indicative of good knowledge of the Convention. The survey showed that the majority of lecturers (42.1%) had either 'good' or 'very good' knowledge of the CISG, whereas 15.8% had 'excellent' familiarity of the CISG including publishing in the field.[64] Given this, the non-ratification of the Convention in any jurisdiction seems to be no excuse for its lack of awareness.

There is a need for proactive participation by academics in Nigeria in the discussion of global matters by attending international conferences, and organising local conferences in order to engage in discourses on treaties and conferences on possibly relevant issues within the Nigerian context.

### e. **The Traders**

The traders (SMEs and sole traders) and multinationals involved in international trade are likely to be most affected by the ratification of the CISG. However, there is a general lack of awareness of the CISG amongst them. As stated by a legal practitioner 'although there is some awareness of the issues addressed by the Convention, there is no awareness that there is something there

[61] See Article II (1) and (2) Agreement Establishing the World Trade Organisation http://www.wto.org/english/docs_e/legal_e/04-wto.pdf accessed 1 September 2014.
[62] Anna Rogowska, 'Teaching the CISG at U.K. Universities - An Empirical Study of Frequency and Method of Introducing the CISG to U.K. Students in the Light of the Desirability of the Adoption of the CISG in the U.K' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908506 accessed 1 September 2014.
[63] ibid.
[64] ibid.

that could help address the problems'.[65] This statement is valid given the unstructured nature of trade in Nigeria, and the disadvantaged position of Nigerian traders in international trade transactions. As a result, it is unlikely that Nigerian traders are unaware of their transactional position, but plausible that they have no information on accessing laws that could assist in creating parity in international transactions.

On the other hand, it may be that there is no awareness of the CISG amongst the traders because of its perceived sophistication. However, this suggestion within the Nigerian context is flawed. In order for any law to be categorised as sophisticated, there has to be awareness of that law. Considering this, the CISG cannot be considered sophisticated amongst Nigerian traders who are unaware of its existence.

Two departments that represent businesses in Nigeria were visited to determine if there was any awareness of the CISG. The MAN,[66] which is the collective voice for manufacturers in Nigeria and the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture[67] the umbrella organisation for all the state and Bilateral Chambers of Commerce within Nigeria.[68]

The MAN is a private initiative that seeks to create an investment friendly environment in Nigeria through formulating, making known and influencing general policy with regard to industrial labour, social, legal, training, and technical matters. It is also a forum for manufacturers in the private sector to formulate and articulate policy suggestions that would be complementary to government's efforts at policy formulation.[69] Given these functions, laws such as the CISG should be of interest to them. However, the Acting Director was not aware of the Convention.[70] He cited the following reasons; firstly, the status of the organisation, as a private initiative, meant they were not obligated to carry out certain duties, and this limited the scope of their powers.[71] This suggests it is solely the function of the government agencies to create awareness about international conventions. However, it also suggests a certain level of complacency. Being that the purpose of such associations is to pursue joint interests and objectives of actors from different backgrounds, in this case an inclusive function is keeping abreast with current

[65] Lijadu (n 18).
[66] MAN
[67] NACCIMA
[68] Kaduna Chamber of Commerce, Industry, Mines and Agriculture The Kaduna Chamber of Commerce, Industry, Mines and Agriculture (KADCCIMA) website http://www.kadccima.org.ng/content/nigerian-association-chambers-commerce-industry-mines-and-agriculture accessed 22 January 2014.
[69] Manufacturers Association of Nigeria (MAN) *2012 Annual General Meeting Handbook* 5.
[70] Interview with Rasheed Adegbenro, Acting Director of MAN (Manufacturers Association of Nigeria) (Lagos, Nigeria July 2013).
[71] ibid.

international laws that have the potential to promote the interest of members, it seems that this in the least should not fall outside the scope of their powers.

There is a need for the MAN to be more proactive in staying updated with global laws. This is further buttressed by the fact that reforms in Nigeria are currently being driven by the private sector.[72] There is no doubt that the MAN, given its nature, has information on the needs of its members, the potential users of the law. Through more proactivity, relevant needs can be communicated to government agencies, which will result in more awareness of potentially useful uniform trade laws.

Secondly, the voluntary nature of membership means there would normally be a slowed pace in dealing with issues not considered priority. He added that the association did not interfere with the affairs of members, especially since companies each had their style of conducting legal transactions and contractual obligations.[73] Understandably, MAN should not interfere with the legal affairs of its members. However, there is a need to frequently assess the adequacy of the frameworks governing trade, and the satisfaction levels of members.

Although the MAN receives complaints and settles disputes amongst members, it was stated that this was usually sparse.[74] This creates a gap between the traders and the MAN especially in terms of understanding their needs. One way of obtaining information on trade problems experienced by members without intruding into their business and legal affairs is by encouraging submission of complaints. This may be done through surveys and consultation documents, which specifically address issues with respect to international trade transactions. They should also carry out independent assessments to gauge the level of satisfaction of members in terms of policies that affect them. This will enable the body to draw out issues, which have not been brought to the fore by members, such as the overbearing nature of governing laws on the manufacturers and the bargaining strength of the Nigerian parties when they enter into transactions with foreign parties.

By gathering information on issues affecting international traders in Nigeria, MAN can work as a pressure group responsible for recommending international laws such as the CISG to the department of trade and investment, FMTI. This is more so, since the FMTI has direct access to

[72] See preceding section on legal practitioners for discussions on the opinions of the interviewees on the role of the private sector in law reform.
[73] Adegbenro (n 77).
[74] ibid.

the UNCITRAL, they also have facilities to disperse information on uniform commercial laws and are obligated to ensure the existence of a favourable trade environment in Nigeria.

### f. The United Nations Commission on International Trade Law (UNCITRAL)

Although the government agencies have the main responsibility of drawing attention to international Conventions, there is responsibility on the UNCITRAL to ensure awareness of the CISG by member states. Supporting this, one of the respondents at the FMTI suggested that the reason there was no awareness of the CISG in Nigeria was the 'inability of the UN agencies to interact effectively with certain countries.' [75] Another respondent stated that 'although international trade is not my primary area, there is no reason why I should not have heard of the Convention, if it is popular.'[76] Additionally, out of the respondents who were aware of the CISG, only one participant remembers hearing it mentioned vaguely at a conference organised by the UN.[77] This is indicative of a gap with respect to the dissemination of information on the CISG generally, and in Nigeria.

The UNCITRAL is the core legal body in the UN system in the field of international trade law,[78] and 'plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade, by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.' [79] It also seeks to promote wider participation in existing international conventions and wider acceptance of existing model and uniform law.[80] Given this mandate, the UNCITRAL has a duty to spread awareness of the CISG in Nigeria particularly as she is a member state.[81] However, the extent to which this duty is carried out and the sufficiency of the methods employed in promoting wider participation raises questions.

The general lack of awareness of uniform commercial Conventions such as the CISG is not atypical and the UN is not unfamiliar with the reservations regarding uniform commercial laws. Conservative routine, prejudice and inertia are considered the general obstacles to their

[75] Yauri (n 36).
[76] Interview with Ugo Ugorji, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013).
[77] Oni (n 24).
[78] A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf 25 accessed 03 September 2014.
[79] The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 in A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf 1 accessed 3 September 2014.
[80] UNCITRAL Basic Facts (n 86) 2.
[81] For a list of the member states see UNCITRAL Basic Facts (n 86) 2 annex II of the document.

adoption.[82] This is because of the 'diversity of nations, with their different economic, social and political structures and divergent ideas of justice coupled with the diversity of methods used by lawyers of the various countries in the elaboration and development of the law.'[83]

The UNCITRAL has several initiatives designed to promote awareness. There are the technical cooperation and assistance activities which include organising briefing missions and participating in seminars and conferences, organised both at national and regional levels, assisting countries in assessing their trade law reform needs, assisting with the drafting of national legislation to implement UNCITRAL texts and organising training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.[84]

The intentions behind the initiatives are commendable considering the lack of expertise in certain areas of commercial law in Nigeria. However, these initiatives fall short of expectations particularly in Nigeria. For instance, conferences held in Africa regarding the CISG are minimal. The 'First African Conference on International Commercial Law' took place in Cameroon where a couple of papers discussed the CISG and the case for accession in Africa.[85] Since then, it seems from a search on the Internet that there have been no such conferences held in Africa. This seems counter intuitive, considering that conferences provide the right platform to disperse information on the CISG and to discuss its potential benefits for Nigerian traders.

In the past five years, conferences on the CISG have been held in countries where the Convention has either been ratified, or countries where there is sufficient awareness of its existence.[86] This limits the focus on countries where there is little awareness of the CISG. The UNCITRAL should endeavour to hold conferences on the CISG in Africa, since commercial laws in countries such as Nigeria are in need of reform and the CISG may be beneficial in reforming them, whilst encouraging seamless trade.

Another way in which the UNCITRAL promotes wider participation is through the provision of the PACE University Website, dedicated solely to the CISG and the CLOUT system[87] for

[82] R David and others (eds), *International Encyclopedia of Comparative Law*, vol. II, chap.5 (Tübingen, Mohr, 1971) 24 and 25 in Kazuaki Sono, 'The Future Role of UNCITRAL' Uniform Commercial Law in the Twenty-First Century, Proceedings of the Congress of the United Nations Commission on International Trade Law' http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf 252 accessed 7 April 2015.
[83] ibid.
[84] UNCITRAL Basic facts (n 86).
[85] 1st African Conference on International Commercial Law, (Douala/Cameroon, January 13th – 14th 2011) http://www.acicol.com/Downloads-85 accessed 5 August 2014.
[86] See the UNCITRAL Website for a list of the past conference dates.
[87] Case law on UNCITRAL Texts.

UNCITRAL texts including the CISG. These websites have a digest of cases, which aid in the application and interpretation of the CISG. Although these websites are comprehensive and commendable because they provide a surfeit of articles, commentary and cases on the CISG, they are more useful for countries that have ratified the CISG. There is hardly any reason for a lawyer in Nigeria to look for information on the CISG, given that Nigeria has not ratified it. Thus, their usefulness is limited to countries that have ratified the Convention and as such, the website is a limited way of promoting awareness of the CISG. This further shows that the UNCITRAL's efforts in promoting wider acceptance of the CISG may be insufficient.

The PACE website, states that their ultimate goal is to have a CISG website for every country.[88] Although this is a laudable aspiration, it falls short of expectations. Nine out of the eighty countries that have adopted the CISG are African countries however, there is just one website catering to them- (University of South Africa) UNISA website, dedicated to the CISG which was last updated on 2011/11/24.[89] This is unsatisfactory especially when compared to how active the websites of the other four continents; the Middle East, Europe, Asia and Oceanea, and the Americas,[90] and it also demonstrates laxity in promoting awareness of the CISG in Africa.

The UN suggests that the lack of awareness of some uniform commercial law texts is because commercial laws are not considered legislative priority in some developing countries. Given this, there is insufficient number of people in the government with expertise in commercial law reforms with whom UNCITRAL would be able to establish sustainable dialogue.[91] Consequently, steps proposed towards drawing awareness of international commercial laws are aimed at achieving sustainable capacity of interested countries to implement commercial law reforms themselves with assistance from the international community where necessary.[92] Although this is a plausible reason for the minimal spread of awareness of the CISG by the UNCITRAL in Africa, it defeats the purpose of the uniform laws. This is because if the aim of uniform laws is to achieve coherent and seamless trade transactions and eliminate barriers to trade, focusing disproportionately on countries that show interest because they can afford to, skews the essence of the law.

Furthermore, the UNCITRAL suggests that because of the growth in demand for its technical assistance, and given that the regular budget does not include funds for such activities, such

[88] See The Pace CISG Database, http://www.cisg.law.pace.edu/network.html accessed 2 December 2013.
[89] UNISA, http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=582 assessed 2 December 2013.
[90] The Pace CISG Database, http://www.cisg.law.pace.edu/network.html accessed 2 December 2013.
[91] Unrol (n 2).
[92] ibid.

activities can then only be conducted if funds can be obtained from other sources.[93] However, the lack of funding is also a result of the discordant relationships between the UN Systems, which is fragmented, rife with competition and 'certainly not a harmonious cooperative whole in which the parts work towards a common purpose.'[94] The functionally decentralised UN system is not solely an organisational problem but also a result of a deeply divisive political issue hinging on the views of member states about the organisation's priorities.[95] This has led to a disproportionate allocation of funds to what is considered priority by core funders of the UN i.e. social agenda taking precedence over economic needs. The international agenda is also reflected in the millennium development goals, which are more social oriented and very little economic oriented.[96]

Prioritising social development over economic development means that commercial laws such as the CISG will hardly have funding allocated for activities, which promote awareness of the CISG in Nigeria. This means that until there is a shift from social development to economic development, the international agenda will hardly be more interested in encouraging, through funding the wider participation of uniform commercial law, texts such as the CISG.

There should be a structure by the UNCITRAL to follow up on states that have expressed interest in a treaty but have not ratified it or have ratified it, but not domesticated it. Although letters from the UNCITRAL have been sent to countries such as the UK,[97] asking about the ratification of the CISG, it is doubtful that any letters have been sent to Nigeria. This could be a way of promoting awareness of the CISG in the government sector without expending the meagre funds.

Working with bodies such as the MAN is also one way the UNCITRAL can disseminate information on the CISG, ensuring that traders become exposed to it. This can be done via technological means such as emails and Internet calls, which is less expensive, although contact may have to be initiated by the UNCITRAL. Spreading awareness of the CISG through bodies such as the MAN before it is ratified will decrease the possibility of the CISG being viewed as sophisticated by the traders. Ultimately, the benefits of the CISG may be recognised, leading to a possible demand for the law by potential users.

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[93] UNCITRAL Basic facts (n 86) 27.
[94] Jacques Formerand and Dennis Dijkzeul, 'Coordinating Economic and Social Affairs' in Thomas G Weiss and Sam Davis (eds), *The Oxford Handbook on the United Nations* (OUP, 2008).
[95] ibid.
[96] Interview with Luca Castelleni, Legal Officer, UNCITRAL, (Durham, England, 13 February 2014).
[97] Sally Moss, Why the UK has not Ratified the CISG? (2005) 25 Journal of Law and Commerce 483-485.

The UNCITRAL should also consider programs involving the legal academia, working with them towards incorporating UN laws into the law curriculum would bring about awareness on a broad-spectrum.

The next section identifies, the reasons suggested by the respondents for the lack of awareness of the CISG in Nigeria.

### 3.2.2 Familiarity with the Status Quo and Preference for the English Law

One of the reasons why there is no awareness of the CISG in Nigeria is the comfort with the extant laws. Legal practitioners and traders familiar with existent laws are not naturally disposed to seeking new laws, despite their utility. Supporting this, one of the practitioners stated,

> I don't see Nigeria signing up to that Convention because things we do not know much about, especially in this part of the world is usually a problem to accept. So human proclivity is that you gravitate around people you like, people you are used to and things you are used to. We are used to our laws and for the Nigerian practitioner, we don't believe that we have problems as such but we believe that we don't enforce our laws. And therefore where one is advocating for a holistic change of our contract laws, I'm not sure it will resonate with the legal community because we do not think that we have problem with our laws[98]

The statement reflects the natural human reaction to the unknown. Fear of laws different from what people are familiar with may require a change in existing patterns, and unpredictable results, to which they would be liable. This fear though understandable, is not sufficient to deter consideration of the best options for international trade in Nigeria. The belief that the extant commercial laws, which are out-dated and in some cases unfit for modern transactions- the SGA 1893, are still very functional, may be incorrect. The problem however is not necessarily the adequacy of the existent laws, but the gap, which the CISG seeks to fill. That is, ensuring that the Nigerian trader has equal bargaining strength with his foreign counterpart.

The suggestion that the adoption of the CISG implicates an overhaul of the current laws governing trade, or that it is fundamentally different is misleading because the Convention acts complementarily with, and can exist alongside domestic laws, because of its non-mandatory

[98] Ekwueme (n 15).

nature. As such, parties are allowed to "opt out" of the Convention in its entirety, derogate from or vary the effect of any of its principles.[99]

Respondents seemed to be more familiar with, and preferred English laws to govern their transactions, making English laws more dominant.

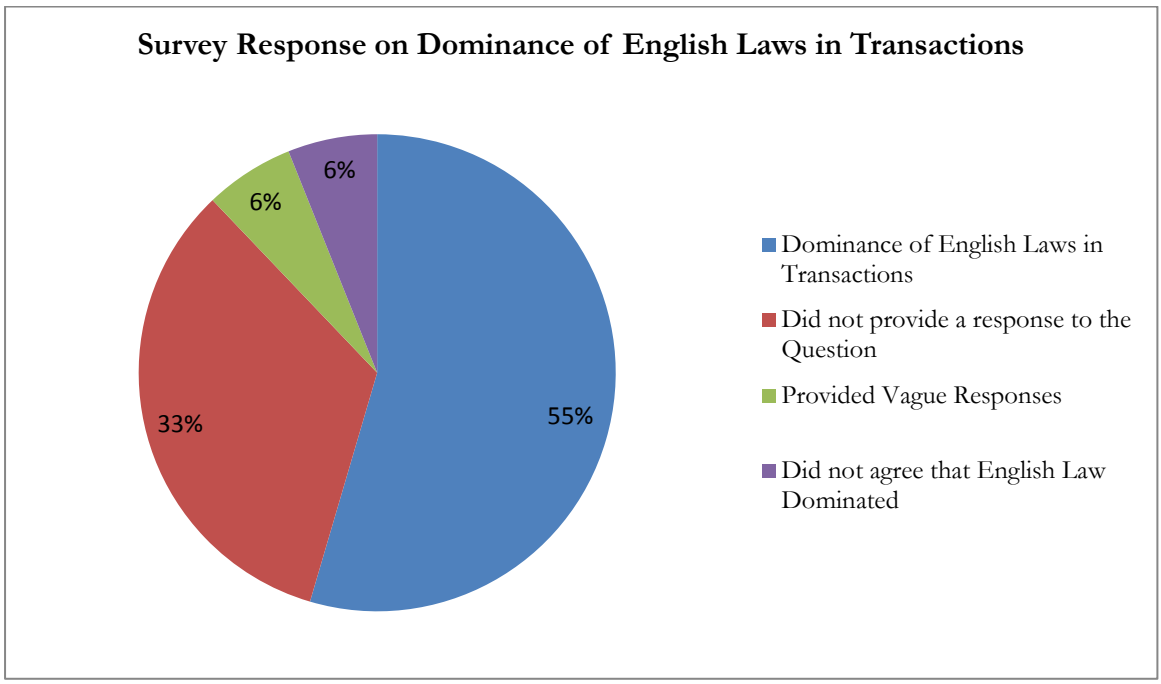


**Figure 3.3: Survey Response on Dominance of English Laws in Transactions**

[99] See Article 6 CISG.

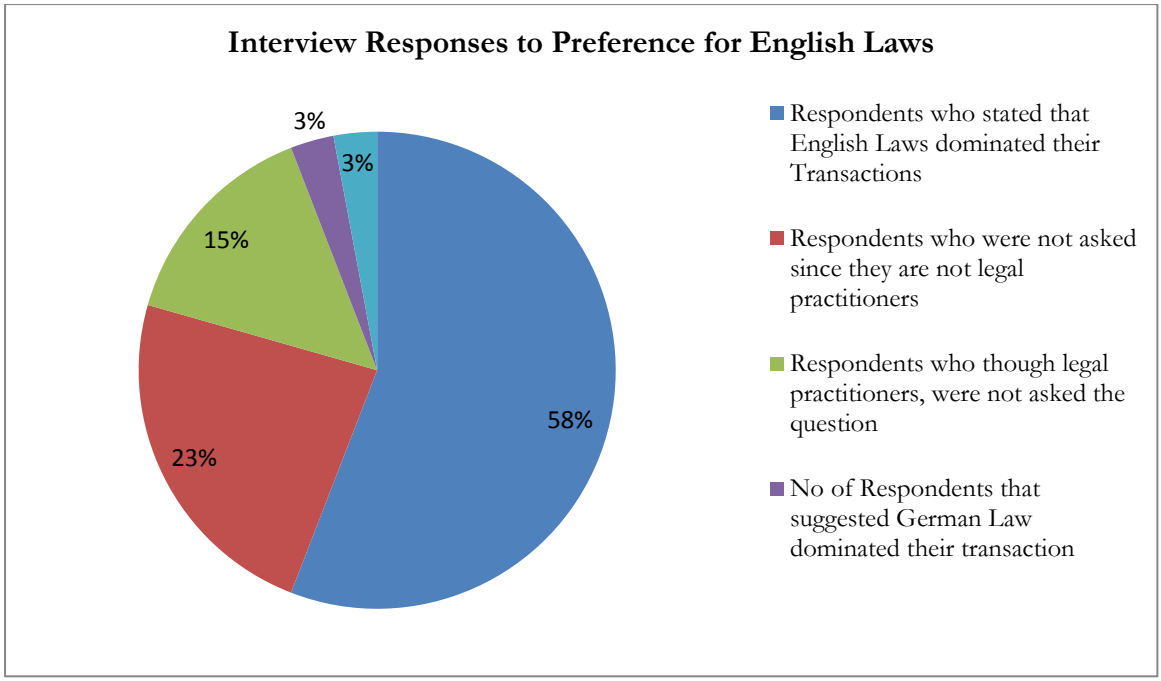


**Figure 3.4: Interview Responses to Preference for English Laws**

The above figures show the dominance of and preference for English laws in commercial transactions amongst legal practitioners in Nigeria. The first chart shows that for 55% of the respondents, English law was most frequently used in their transactions. 33% of the respondents did not provide answers on the law, which featured most in their transactions and 6% stated that arbitration was the preferred form of dispute resolution as opposed to answering questions on governing law. The other 6% stated that other laws dominated their transactions.

58% of the interviewees on the second chart agreed that English laws dominated their transactions and that they would opt for it. 24% of the interviewees were not asked about their preferred governing law because they are not legal practitioners, and thus have no experience in this regard. 15% of the respondents were not asked the question. Whilst 3% stated that German laws dominated their transactions and the other 3% stated other laws governed their transactions.

The dominance and preference for English laws in cross border transactions is not limited to Nigeria.[100] However, there are several reasons why this is the case in Nigeria. Firstly, foreign traders are wary of the Nigerian legal system. As one of the respondents stated 'there is not

[100] A global survey by queen Mary University in London in 2010 of general counsels and legal department heads found that 40% most frequently did business using English law. 'International Commercial Law, Exorbitant Privilege 'American and English Law and Lawyers have a stranglehold on cross-border business. That may not last' (*The Economist*, May 10 2014) http://www.economist.com/news/international/21601858-american-and-english-law-and-lawyers-have-stranglehold-cross-border-business-may accessed 6 August 2014; see also with regards to arbitration, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (*White & Case*) http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3786 accessed 13 August 2014.

much confidence in the legal framework in this part, and U.K laws seem to be the usual governing law requested. It is usually not a problem because of the cultural background and the ties between the Nigerian legal system and the common law of the UK'.[101] It was further stated that 'foreign laws are mostly asked for in international transactions because they believe the judicial system is likely to be compromised….'[102] These fears are founded, given that inadequate legal processes and widespread corruption is rife in developing countries. However, these fears emphasise the need for the CISG, which offers a neutral solution.

Secondly, familiarity with English laws amongst legal practitioners and judges in Nigeria makes it preferable and so any novel law may be discomforting. Confirming this, one of the respondents stated that she usually advised her clients of foreign nationality to choose English law because of its neutrality and familiarity in Nigeria,[103] particularly since legal bodies are familiar with English laws.

English law is also preferred for reasons regarding choice of law and choice of jurisdiction clauses. The purpose of a governing law clause is to express the parties' choice as to what the law interpreting and terms of the contract and its effects should be. By inserting a governing law clause, parties achieve certainty: they know what law is likely to be applied to determine questions regarding their rights and obligations under the contract. This in turn, allows them to analyse their legal position with confidence. On the other hand, a jurisdiction clause allows parties to submit all the disputes arising under their agreement to be determined by a particular national court or courts.

Despite the distinction between the choice of law clause and the choice of jurisdiction clause, in the drafting of contract terms, there is usually an interplay between the both clauses. Parties will usually want consistency between their governing law clause and jurisdiction clause. So, for example, if disputes are to be resolved in the English courts, it makes sense to choose English law. This is the motivation for choosing English laws over the CISG.

Thus, whereas the CISG offers just the governing law of a transaction, the SGA may continue to be chosen in transactions because where the jurisdiction for the resolution of conflict by the seller is England, the applicable laws would most likely be the CISG. Where the governing law clause and the jurisdiction clause are not consistent, parties would have to adduce expert evidence as to the foreign law before the English courts.

[101] Kalu (n 14).
[102] Interview with Godwin Etim, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013).
[103] Makinde (n 16).

In the above instances, the CISG may be helpful in that where it is adopted by both parties, although the jurisdiction may be England, the CISG rules which are familiar for both parties can still be applicable in the courts. This helps to balance the bargaining strength of both parties especially in light of the applicability of the sellers laws in international trade transactions by virtue of Article 3 of the Hague Convention.

The comfort of status quo resulting in routine inertia and prejudice has always been one of the obstacles to uniform law.[104] As stated by Sono

> lawyers and businessmen are attached to the status quo, to the order of the things which they know, and to which their behaviour and their ways of doing things have been adapted. They view all form of reform with suspicion, seeing primarily the trouble it will cause rather than the beneficial effects and the progress, which it is intended to produce…[105]

Commenting on the probable functionality of the CISG in Nigeria, one of the respondents stated

> It is like asking people to choose out of three cinemas in a city and then asking why they go to a particular cinema. Naturally, they would gravitate to the one they are more familiar with. So, for the known laws, that is, the legal systems, which are usually chosen these are laws that have been tested, and people are familiar with them. If English law is chosen and a dispute arises, you know that the English courts and judges are naturally familiar with it as opposed to a new body of laws such as the CISG that you know there is gonna be a lot of voyage of discovery…people may not want to resort to the CISG until such a time as the body of jurisprudence has been built or developed around it.'[106]

When asked what laws clients asked for a respondent stated 'well its not the clients normally; it is I myself who would normally request for English law…advising them that it is in their interest to

[104] David and others (n 90) 24-25.
[105] Kazuaki Sono, 'The Future Role of UNCITRAL' Uniform Commercial Law in the Twenty-First Century Proceedings of the Congress of the United Nations Commission on International Trade Law' http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf 252 accessed 7 April 2015.
[106] Interview with Nnamdi Dimgba, Partner, Olaniwun Ajayi Law Firm (Lagos Nigeria, July 2013).

use English law…English law is fairly developed, more certain, and there is a perception that they are fairer and more consistent.'[107]

There is also the demand by both foreign and local clients for English laws as the governing law of their transactions. This is because of the neutrality of the English law,[108] its fewer formalities, and the flexibility it allows in transaction structures. For the Nigerian party, the English law is preferred because in certain cases, one of the parties may have a link to the English jurisdiction, or in some cases, the subsidiary of the Nigerian company is based in England.[109]

Additionally, the traders who these firms represent are generally satisfied with the English laws. Thus, in some cases as stated by a practitioner

> Although clients may start off with other laws, people are generally happier with the English laws, and to the extent that people are comfortable, there is no need to lose the English law and their trust in the law because of a uniform law…there is no need to lose things we are familiar with or things that work in our legal system because of political reasons…[110]

The dominance of English laws in Nigerian transactions contributes to the lack of awareness of the CISG in Nigeria because stakeholders may not see the need for other laws. This is further reinforced by the fact that respondents felt that topics addressed by the CISG, were already covered by the English laws, thus questioning the Convention's significance.'[111]

The arguments above are insufficient reasons for the lack of awareness of the CISG. The dominance and preference for English laws should not inhibit the search for useful international laws. Besides, this dominance is detrimental to the Nigerian lawyer, given the potential loss of pecuniary benefits resulting from the settlements of disputes arising from transactions, by English lawyers in English courts. This depletes economic benefits ordinarily intended for

[107] Interview with Ekwerre, Partner, Alliance Law Firm (Lagos Nigeria, July 2013); Another noted that it is also his inclination to go with the English law and that he will advise his client to go with it as well. Interview with Humphrey Onyeukwu, Legal Practitioner, Alliance Law Firm (Lagos Nigeria, July 2013).
[108] Interview with Jumoke Arowolo, Legal Prtactitioner, G Elias Firm (Lagos, Nigeria July 2013).
[109] Ugorji (n 83).
[110] Interview with Dipo Okorubido, Legal Practitioner, Banwo & Ighodalo (Lagos Nigeria, July 2013); Another said 'my clients tend to gravitate towards English law as a body of law to guide the contract, so that whenever any issue comes up we will refer to it and because definitely English law is seen as robust and can always be relied on' Onyeukwu (n 116); Further it was stated that English seem to be the most acceptable, largely because of history, familiarity with UK law generally and our own common law heritage, you would find that more contracts are subject to UK laws than any other' Interview with Femi Olubanwo, Partner, Banwo & Ighodalo Law Firm (Lagos Nigeria, July 2013)
[111] Olawoyin (n 18).

Nigeria. Where any provisions require interpretations, the English lawyer is consulted. The English legal sector thus reaps large rewards because of their legal dominance. This is confirmed by statistics showing that almost two thirds of litigants in English commercial courts are foreign.[112]

The loss of pecuniary benefit has become an issue of concern for the Nigerian legal practitioners who have gradually seen a trend of preference for English laws in the transactions by local businessmen.[113] The result is that Nigerian lawyers are becoming increasingly disadvantaged.

The CISG presents a solution because it provides a neutral framework for the lawyers, irrespective of their legal background. Its provisions do not require the expertise of lawyers versed with the laws of any particular jurisdiction, since it is central to the countries that have adopted it. Legal practitioners in Nigeria therefore have an equal opportunity of sharing in the pecuniary benefits from contractual disputes.

There is hardly any doubt that the settled English laws may be easier to continue using, and to the extent that it will not be easy to understand and interpret a new law especially in the Nigerian context, one can commiserate. However, the CISG boasts of extensive websites on decided cases and scholarly writings especially dedicated to help lawyers and interpreters in reaching decisions.

The discomforting possibilities of a new law should not be a deterrent to legal practitioners and judges in Nigeria responsible for interpreting laws, especially since this is an ethical issue. Law is organic, commercial trading methods keep evolving and for any legal system, keeping up to date with internationally accepted legal practices is key to ensuring the smooth functioning of globalised commercial transactions.

### 3.2.3 Legislative Lethargy, Legislative Priority and Legislative Process

The CISG is not considered legislative priority in Nigeria because of the inertia and complacency of the legislature towards international laws. Answers garnered from the respondents reveal the interplay between the legislative lethargy on certain legal issues, which results in their being

[112] At 1.5%, the legal sector's share of British GDP is nearly double that in other big European countries. The Economist (n 109).

[113] On this point, one of the respondents specifically stated 'there is a gradual erosion of even Nigerian local disputes that are subject to English laws and subject to either arbitration in the UK or English jurisdiction clauses. So you see that those disputes are moving away from us. But if we had this Convention as part of our laws, we will be schooled in the Convention and if other countries accept the Convention the way we have accepted it then disputes with more connection to Nigeria will be increasingly handled by Nigerian lawyers as opposed to now where you see most of those disputes that are subject to English laws and also subject to foreign English jurisdiction clauses being handled by UK firms. Ekwueme (n 19).

considered lesser priority, and the unhurried process of ratifying international Conventions in Nigeria, which is an obstacle.

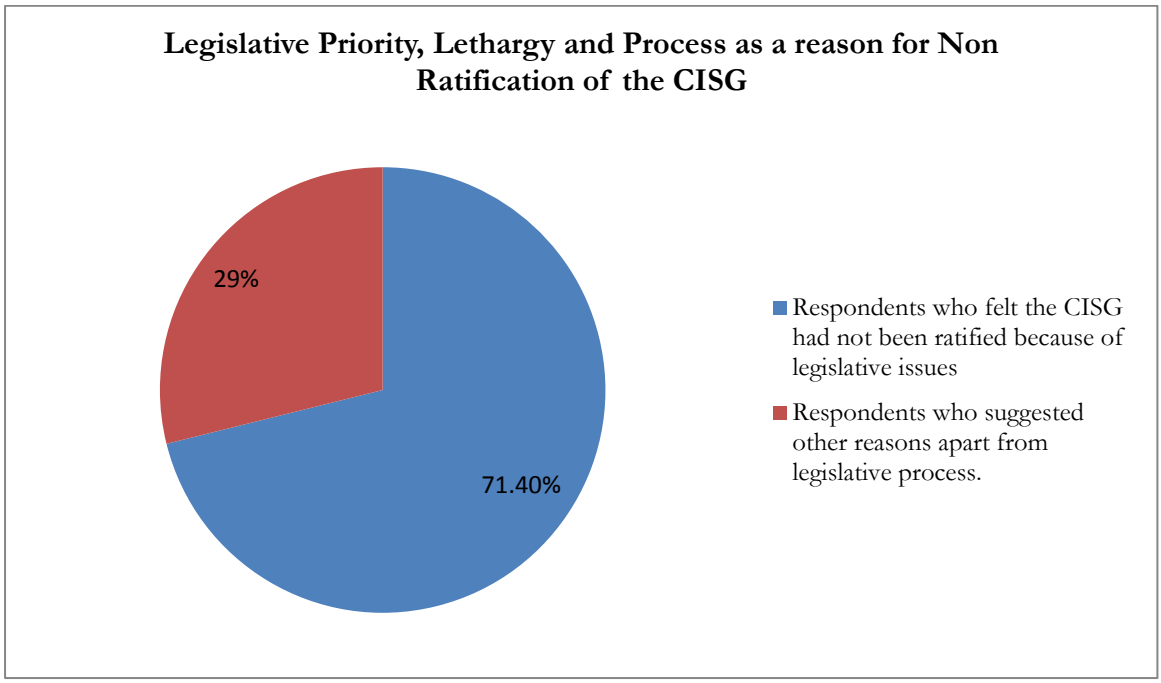


**Figure 3.5: Interview Response on Legislative Priority, Lethargy and Process as a reason for the non-ratification of the CISG**

From the table above, 71.4% of the respondents suggested that the reason for the non-ratification of the CISG was either legislative lethargy, lack of prioritisation or cumbersome legislative process, whilst 29% of the respondents gave other reasons apart from this.[114]

For law-making to be effective, the law has to be passed timeously and according to the needs of the society. However, this is a problem in Nigeria. Accordingly, one of the legal practitioners stated, 'the legislative process can be quite tedious, cumbersome, and long-winded…it is also predicated on the legislators having an interest in the Convention. So the question becomes, is this something that the legislature is interested in?'[115]

Supporting this, another legal practitioner stated

> Perhaps, because of the level of development of the legal practice and level of development of specialisation and the state of laws, Nigeria does

[114] Although 34 respondents were interviewed in total, the diagram and calculation above is based on the response of 28 of the interviewees because these were the number of people asked expressly about the reason for the non-ratification of the CISG. The rest of the respondents were interviewed to gather other information not directly related to this.
[115] Interview with Tominiyi Owolabi, Partner, Olaniwun Ajayi Law Firm (Lagos Nigeria, July 2013).

> not have so much integration in the mainstream of international laws. There are still even constitutional limitations, in the sense that as it stands right now, Nigeria cannot participate fully in international transactions no matter what amount of uniform laws that are out there, and the goodwill of their government there is a process that leads to domestication of those laws and if that is followed, they do not form part of those of laws and to that extent, one cannot say that the issue is so much of cause of burden but not that of adequacy or otherwise of the framework in terms of the modern realities we still have a lot.[116]

The unwieldy process of law making, which entails a bill passing four stages, receiving three readings and being subjected to assent by the president, before it can be passed into law, means that international laws may stall at any of those stages, and advocates of such international laws may ultimately be put off.[117] Furthermore, the unclear distinction between laws to be legislated on by the federal government and the ones to be legislated on by the state is problematic because where any of them purportedly legislate on matters not within their scope it becomes unconstitutional.[118] The reality of these issues is that an inordinate amount of attention will be paid to laws held in this process, which may take away from time allocated to research in other areas.

Furthermore, there is no 'well established process' whereby a Convention is signed and subsequently sent to the National Assembly…there should be a process, however, that process is broken.'[119] This broken process is evidenced by the gap in communication between the FMTI

[116] Kalu (n 14).
[117] Data obtained indicate that there are over 40 bills that have not been assented to by president Goodluck Jonathan, just as there are hundreds of motions whose resolutions have been waived aside by the executive as 'mere expressions of opinions' although in proposing a solution to this, a clause to check this has been suggested. 'Senate and the Challenges of Law Making' (*Nigeria Newsday*, 6 July 2013) http://nigerianewsday.com/news-a-commentary/politics-a-government/3382-senate-and-the-challenges-of-lawmaking accessed 7 August 2014.
[118] The Sale of Goods Act by virtue of the fact that each state has its own laws seems to be a state statute, although it is the same statute in every state. It is not entirely obvious that the power to legislate on the sale of Goods Act is vested in the federal government because the Sale of Goods is not in the exclusive legislative list Article 18 of the 1999 Constitution specifically, Part II Concurrent Legislative List Extent of Federal and State Legislative powers states 'Subject to the provisions of this Constitution, a House of Assembly may make Laws for that State with respect to industrial, commercial or agricultural development of the State'. This means that with regards to commercial laws, the State can make laws in that respect. However, there is currently a bill in the House of Representatives entitled, A Bill for an Act to Repeal the Sales of Goods Act of 1893 and Re-enact the Sales of Goods Bill, 2013 to Provide for Regulation of Sales of Goods in Nigeria and Related Matters, which has scaled through the second reading. (*The Will*) http://thewillnigeria.com/general/20643.html accessed 10 August 2014.
[119] Makinde (n 16).

and the DCIL with regards to whom the burden lies on regarding acquisition and dispersal of information on international conventions such as the CISG.[120]

The leisurely pace with which the legislature takes interest in laws affects proactive efforts of knowledge of the CISG, therefore stifling any possibility of adoption. This lethargy is obvious in the manner which the government agencies handle their international obligations.[121] Thus, 'we have a fundamental problem as Nigerians with putting things in place, with ratifying treaties locally. We tend not to take very seriously, and if you look at the rest of the commercial law for e.g. in many parts of shipping you find that there are many conventions we have not ratified…we took a very long time to ratify the Hamburg Rules, so that inertia is there.'[122] 'There is a huge time line to ratifying, it is laziness on the part of the national assembly, laziness also in the foreign ministry, I guess no attention is being paid to cerebral work because there is no money in it'.[123]

It was also stated that 'the Nigerian country issues also play a role in the reasons why we have not ratified the Convention that we have subscribed…on a daily basis Nigerian laws that we all know exist, continuously get breached.'[124] Another lawyer stated that the Nigerian Government has the responsibility of doing all the ratification. However, they are currently, and have not been for a long time, concerned with these kinds of things.'[125] Another asked

> If you go to the Ministry of Justice, how many people there are actually aware of the Convention? It is only what you are aware of that you can only be talking about…but because nobody in the Ministry of Justice will go and sit in the UN waiting to hear news about the Conventions which are necessary. So there is a peculiar difficulty where the channels of communication are not open and flowing.[126]

These issues make it unsurprising that the CISG is not considered legislative priority, particularly since there is no awareness of the CISG and therefore, no pressure from potential users. One of the respondents stated that 'if it's a political issue, they will look into it … and give it speedy

[120] Oni (n 24).
[121] Nigeria is a signatory to, and a party to over 200 Bilateral and Multilateral Treaties, Agreements and Protocols less than 15 of which have been domesticated and ratified. See Nigeria Bilateral Ties: House Calls for Domestication/Ratification (*Policy and Legal Advocacy Centre PLAC*) http://www.placng.org/new/main_story.php?sn=46 accessed 7 August 2014.
[122] Elias (n 30).
[123] Makinde (n 16).
[124] Etim (n 111).
[125] Interview with Mr Fumibara, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013).
[126] Etim (n 111).

attention, it is very unfortunate that this is a transaction based Convention.'[127] This statement suggests that laws regulating private transactions as opposed to political issues are not necessarily considered priority in Nigeria.

The lack of recognition of the CISG as legislative priority is a general problem of uniform commercial laws. Twenty years of the UNCITRAL experience in providing technical assistance to states with their local commercial law reforms reveals that under pressure of tackling other priorities, local needs in commercial law reforms are steadily overlooked with the result that resources are apportioned to other areas and local capacity of countries to commercial law reforms are weakened.[128] In Nigeria, whilst security, insolvency and property laws are discussed for reform, commercial laws are generally overlooked.[129] This is partly because there are hardly expert personnel in Nigeria to engage in this aspect of law reform. Furthermore, the continued operation of the 1893 SGA irrespective of its out datedness shows that commercial laws are not priority in Nigeria.

The current focus of the Nigerian legislature on more pressing laws, which it considers priority right now, is also a major deterrent to the adoption of the CISG.[130] This is also one of the reasons why the UK has not adopted the CISG.[131] More recently, authors have suggested that the idea that the UK would eventually ratify the CISG, when there is legislative time, should be dispensed with.[132]

Based on the UK experience, it is surmised that with priority being given to other laws, the CISG may not become popular in Nigeria. Considering the focus on other laws,[133] interests in commercial laws such as the CISG may continue to dwindle.

Supporting the above is the UN's recognition that in many states policymaking and legislative work related to international legal standards have not kept pace with international developments

[127] Fumibara (n 136).
[128] Unrol In focus (n 2).
[129] Kalu (n 14).
[130] See Nigeria Newsday (n 127) for details.
[131] Moss states accordingly 'ratification of the CISG in the UK would need legislation and the CISG must take its place in the queue with the Government's many other legislative priority' Moss (n 105) 483.
[132] Alison E Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the UK' (2001) 12 Review of the Convention on Contracts for the International Sale of Goods (CISG) 9-57 available at< http:// cisgw3.law.pace.edu/cisg/biblio/williams.html#3>; Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' The Pace CISG Website http://www.cisg.law.pace.edu/cisg/biblio/hofmann.html#15 accessed 7 August 2014.
[133] Nigeria Newsday (n 127).

in finance and commerce.[134] The inadequacy and insufficiency of staff with expertise in the area of commercial law has been recognised as the reason why commercial law reform on a domestic level is slow.[135]

### 3.2.4 The Disposition of African Countries Towards International Uniform Laws

The disposition of African countries towards international laws is one of the problems, which hinders awareness of, and generates disinterest in laws such as the CISG. Developing countries are chary of international laws because they have little or no input into international norms and institutions. This means that developed countries are disproportionately represented at the draft stages of these international conventions and the end products are ultimately dictates of, and favour the influential, usually, developed countries.[136] Given this, developing countries may consider themselves receivers of such norms, which have questionable legitimacy and 'may be inappropriate policy choices in countries at a different stage of economic development than more developed western countries.'[137]

It is no surprise that lawyers in Nigeria view international uniform laws with suspicion. 75% of the respondents were concerned about these international laws especially for developing countries,[138] whilst 25% of the respondents felt, that they were, for the most part, preferable to local laws. The respondents were concerned that uniform laws have no consideration for the heterogeneity of the domestic legal systems. Therefore, 'where these laws are adopted and subsequently ratified, they were not usually adapted to the local circumstances, but copied verbatim'.[139] And upon closer scrutiny, discrepancies between these laws and the local laws manifest.[140]

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[134] Unrol In focus (n 2).

[135] This statement is validated by the Assistant Director of the Department of International and Comparative Law under the Ministry of Justice Nigeria who suggests that a reason for the non-adoption of the CISG. Oni (n 24).

[136] Sarah Anderson and International Forum on Globalisation (eds) *Views from the South: The Effects of Globalization and the WTO on Third World Countries* (Chicago: Food First Books, 2000) <http://books.google.com/books?id=fai2AAAAIAAJ>; Walden Bello, "Reforming the WTO is the Wrong Agenda," in Kevin Danaher and Roger Burback (eds), *Globalize This!: The Battle Against the World Trade Organization and Corporate Rule* (Monroe, ME: Common Courage Press, 2000) 103-119. <http://books.google.com/books?id=3lRjQgAACAAJ> in Eric Brahm, International Law, (*Beyond Intractability* September 3013) http://www.beyondintractability.org/essay/international-law accessed 11 August 2014.

[137] Patrick J Kelly, 'International Law and the Shrinking Space for Politics in Developing Countries' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104694 accessed 12 August 2014.

[138] Out of the 34 respondents, 20 were specifically asked their opinions on uniform laws and 15 were strongly suspicious of the provisions of uniform laws especially in the context of developing countries, whilst 5 felt they were for the most part preferable to local laws.

[139] Interview with Anthony Emioma, Legal Practitioner, Streamsowers & Kohn Law Firm (Lagos Nigeria June 2013).

[140] ibid.

These concerns are valid considering that each country is different. Thus, for 'any law reform to be meaningful, it must be sensitive to the concept of law as an organic entity…this sensitivity must apply on practical and theoretical levels.'[141] Particularly for "'third world" countries, where there is an assemblage of a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies…',[142] uniform laws must be able to recognise and find a way to balance their distinctiveness.

Advocates of harmonisation, suggesting that international businesses are supported by the harmonisation of laws, point to a different vehicle of harmonisation as a method to ameliorate these fears. One of such methods is international agreement, which is either incorporated into the municipal laws of states or forms a model for municipal legislation.[143] Supporting the latter suggestion, one of the respondents stated;

> Uniform laws are good as a sort of guide or model when the national assembly is looking to pass its own local laws because, quite frankly the national assembly could do with the help. But beyond being a guide, it is very important that solutions are developed for the particular circumstances. Uniform laws are good as a guide for laws being developed in your own country, but I think it's important they stop it at being model laws and allow particular countries to adjust it to whatever circumstances for whatever issues are of particular concern to them and for whatever their peculiar circumstances are…I would rather we passed our own laws taking into consideration our own circumstances. This would enable us place our emphasis on the areas we have particular problems and not necessarily restrict parties in places that we don't have problems with.[144]

[141] Martin Boodman, 'The Myth of Harmonisation of Laws' (1991) 39 4 American Journal of Comparative Law 699-724.
[142] P Worsley, 'The Three Worlds: Culture and World Development' 306 (1984) in BS Chimni, 'Third World Approaches to International Law' (2006) 8 International Community Law Review 3-27, 4.
[143] Rene David, 'The International Unification of Private Law', II International Encyclopaedia of Private Law, XX; M, Mateucci, 'Unidroit – The First 50 years' in Unidroit, New Directions in International Trade Law, (Oceana, Dobbs Fery, 1976) John Goldring, 'Unification of Law in Australia' (1977) 1 Uniform Law Review 82; and 'The Unification and Harmonisation of the Rules of Law' (1978) 9 Federal Law Review 284; John Goldring, 'Globalisation, National Sovereignty and the Harmonisation of Laws' (1998) 3 Uniform Law Review 435-452, 445.
[144] Okorubido (n 120).

The fact that adopted laws are copied verbatim, without first undergoing scrutiny to determine compatibility with the domestic legal system is indicative of a problem with the legislature and not necessarily the uniform laws. International laws adopted in Nigeria are usually copied literatim. This is because of legislative languor, which means that lawyers are left to deal with the resultant discrepancies and conflict between the international treaties and local laws. It is no surprise then that legal practitioners are sceptical about these laws.

Furthermore, because of the principle of sovereignty, states are allowed to choose whether or not to ratify international laws. Where the choice is made, the responsibility then lies on the legislature to ensure that before signing or domesticating a treaty, it undergoes careful evaluation to determine its compatibility with the Nigerian law. The fact that Nigeria is a dualistic system also provides the opportunity for closer scrutiny of any convention before domestication.

The fears expressed by the respondents regarding the contents of international uniform laws and their suitability to Nigeria's local circumstance is unfounded with respect to the CISG. The CISG is a product of participation by both developed and developing countries. In fact, Nigeria participated at some of the meetings leading to the birth of the CISG. The failure of the ULIS and the ULF, because states felt they reflected too exclusively, the practices and concerns of Europe,[145] made the UNCITRAL adopt an inclusive approach in the drafting stages of the CISG.[146] Thus, the UNCITRAL ensured equal participation and representation by countries on broad spectrums of development at the drafting stages of the CISG.

Even if the CISG is considered a product of developed countries, the party autonomy principles which allows parties to derogate or vary provisions of the CISG that they want,[147] the freedom to draft contracts according to their needs, priority given to local usages and customs in CISG related transactions, and the fact that where discrepancies between Nigerian laws and the Convention exist, parties can always opt out, suggests otherwise.

Although the CISG gives these freedoms, structuring changes in the Convention to meet local needs in Nigeria, if the Convention is eventually ratified, must be done cautiously in order not to defeat the overarching purpose of the CISG as a uniform law. If the singular focus is adapting international Conventions to local circumstances or interpreting them according to local needs, it

[145] *1968 UN Monthly Chronicle* March 35; *1968 UN Yearbook* 838; John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (1982) 9.
[146] Official Records of the UN Conference on Contracts for the International Sale of Goods (A/CONF.97/19) in Muna Ndulo, 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' Cornell Law Faculty Publications. Paper 66 http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1065&context=facpub 4 accessed 9 April 2014.
[147] See Article 6, 8(3) and Articles 9 (1) and (2) respectively.

takes away from the uniformity goals to which the Convention aspires. This is because a self-evident purpose of uniform instruments is to achieve, to certain degree, uniformity in the application and interpretation of the unified rules across borders thus, easing transaction problems. Therefore, where rules are adapted to the local circumstances, it may lead to the "renationalisation" of a law drafted to achieve the opposite effect.[148]

If the CISG can improve trade transactions and structure in Nigeria, this should be a priority rather than a general focus on the fact that the interests of developing countries were not represented, which the UNCITRAL records refute. Moreover, such fears should be assuaged by the knowledge that the Convention can exist separately from the domestic sales law. This means that parties can choose a different local law for domestic transactions and the CISG for international transactions. Further, as the Convention only applies to international trade transactions where parties have opted for it, the ability of parties to choose, means that the Convention is not imposed on them even where the parties feel that the laws are at variance with the domestic laws.

Another reservation towards international uniform laws in third world countries is the fear that it represents neo-colonialism, or in some sense re-colonisation.[149] Although international laws that come in the form of uniform laws have noble aspirations and goals, which are justifiable, lawyers in Nigeria view them with scepticism.[150] This fear is justified by authors who claim that the process of globalisation has had deleterious effects on the welfare of the third world people, with international law playing a crucial role towards aiding the legitimisation and sustenance of unequal structures and processes between the developed and developing countries.[151] What has come to be imagined by the third world as the post-colonial ideal has been interpreted as allowing the major organising principles of Western Culture, the idea of infinite development as a possibility, value and cultural goal to be implanted in the poor world.[152] International laws prescribe rules which deliberately ignore the phenomena of uneven development in favour of prescribing uniform global standards and has essentially ignored the principle of special and differential treatment.[153] Accordingly, a disproportionate attention has been paid to the numbers,

[148] C Kohler, "Integration and Auslegung –zur Doppelfunktion des Europäischen Gerichtsshofes", in E Jayme, Ein internationals Zivilverfahrensrecht für Gesamteuopa (1992) 11, 12 referring to the "Lebenslüge der Rechtsvereinheitlichung in diesem Jahrhundert" in Martin Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 5 Uniform Law Review 683.
[149] Olubanwo (n 120); Kalu (n 14).
[150] ibid.
[151] B S Chimni, 'Third World Approaches to International Law' (2006) 8 International Community Law Review 3-27, 4.
[152] J Tomlinson, Cultural Imperialism: A Critical Introduction in Chimni (n 168) 18.
[153] Chimni (n 168) 4.

variations and differences in the presence of structures and processes of global capitalism which is aimed towards binding and uniting heterogeneous developing countries and these structures and processes are the reasons for colonialism and propagate neo colonialism.[154]

Despite the creditability of these arguments, international law instruments are continually being signed into. This shows that these laws cannot be discountenanced and implies that some of them are more useful practically.

Apart from the fact that these arguments do not explain the reason for the lack of awareness of the CISG, even if these problems are deterrents to the adoption of the CISG in Nigeria, solutions, which have been proffered, may allay fears. One such solution from the standpoint of the development of international law is analysing it from a people's perspective and consciously including the developing countries in the drafting of laws.[155] An analysis of the CISG reveals a conscious compromise between the Civil and Common law legal systems. This compromise is particularly important because these legal systems are the dominant families in the world and a Convention which amalgamates both principles is relevant in light of globalisation. Furthermore, the provisions of the Convention were extensively debated and deliberated upon, resulting in compromise and recognition of the distinctiveness of developing countries.

### 3.2.5 Comprehensively Drafted Contracts

One of the factors recognised by the respondents as contributing to the lack of awareness of the CISG in Nigeria is the fact that parties usually have extensively drafted contractual agreements at the very outset.[156] In this context, counsels typically seek to cover most of the substantive legal issues in their contracts in an effort to cover all eventualities, thereby limiting their reliance on governing laws.

At least, 41% of the respondents, who were asked about the CISG, felt that because their contractual agreements are drafted comprehensively, to include most of all the issues they envisage, it decreases the relevance of the governing laws.[157] This suggests the likelihood that other potentially useful laws may not be sought after. Regarding this one of the respondents stated that 'if the lawyers do their jobs well, almost all the things that are relevant are dealt with

[154] ibid.
[155] J Robe, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in G Teubner (ed.), *Global Law Without a State* in Chimni (n 168) 25.
[156] Often referred to as regulatory contract.
[157] Although 34 people were interviewed, 3 of the respondents as a result of their designation were not asked the question. 13 out of the 31 respondents that were asked suggested that part of the reason the CISG was not known was because legal counsel addressed most of all the issues dealt with by the governing law, thus watering down the effect.

in the contract based on the agreement of the two parties…but in most of the normal circumstances whatever you are relying on the general law for, typically does not come up.'[158] This submission is buttressed by a 2012 survey which revealed that some 53% of the respondents in question believed that the impact of the governing law was limited to some extent, by an extensively drafted contract, whilst 29% believed it was limited to a great extent.[159] Furthermore, it was stated regarding the CISG

> It is not popular because the guys doing business in Nigeria have other ways of handling their relationships. These people look at their contractual documents, and that basically is what they depend on and then of course…I still think it is because of the freewill to enter into a contract that is why the Convention is not so pronounced. So people believe that what they discussed and agree that is what binds them.[160]

In the Nigerian context, it appears that the CISG has a limited impact on contracts entered into because parties typically prefer relying on extensively drafted contracts which they are both familiar with, and have greater control over. Considering this, it is at least arguable that parties merely give *rhetorical force* to the governing laws in their contractual undertakings, but do not, as a matter of practice, ascribe any *normative significance* to such governing laws. In short, it is submitted that this, viewed in light of the libertarian principle of freewill to enter contracts, arguably explains why there may be little awareness of the CISG in Nigeria.

The nonchalance of transactors towards contractual details is a contributory factor in the unawareness of the CISG.[161] This was confirmed by 68% of the respondents who suggested that in certain cases, their clients may not find laws such as the CISG necessarily relevant, given their apathetic attitude to laws.[162] Thus, parties will generally go ahead with the transaction, preferring not to be bogged down by the details and hassles of carefully drafted contracts.

The fact that the thoroughness of the agreement does not impede on the contract means that the need for laws such as the CISG, offering that completeness, may scarcely be noticed by parties.

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[158] Okorubido (n 120).
[159] White & Case (n 109).
[160] Ofo (n 53).
[161] There are several reasons for this such as the fact that such planning is expensive. Hugh Beale and Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 British Journal of Law & Society 45.
[162] This is to be distinguished from the personal opinions of the legal practitioners who feel the CISG may be useful for the contractors in the private sector. Out of the 34 respondents, 32 were asked the question eliciting the answer and 22 responded that laws such as the CISG may not be relevant given that they felt contractors did not care much about formalities and thoroughness of contracts and issues such as governing laws.

Thus, beyond the contract and issues of governing law, is the fact that contractors will go ahead with transactions. This further reduces the efficacy of the governing law clause. Confirming this, one of the respondents stated that 'contractors will not necessarily go through the whole hassle of a contract,'[163] and skepticism on the real impact of the Convention on the volume of trade was expressed since parties would normally reach whatever arrangement they are comfortable with, regardless of what governing law.[164] In the end, 'it all becomes an exercise in futility in ensuring that your interest are protected in the circumstances so no one except the most snobbish will walk away from a transaction simply because the CISG is not applicable.'[165]

As a result of the limitation of human cognition, contracts cannot be perfectly drafted. This means that despite the decline in the importance of governing laws, there will always remain a need for governing laws. The CISG will also be most appreciated by parties who enter into contracts, irrespective of how well drafted it is. The Convention will cover details which the parties have ignored as a result of the costs and in the event of dispute, parties have provisions clearly defining their rights and obligations.

### 3.2.6 The Scope of the CISG and the Nature of Transactions governed by the CISG/Narrowed and more Specialised Areas of Law

One of the reasons for the lack of awareness of the CISG in Nigeria is its limited scope and the nature of transactions it deals with, sale of goods. This conclusion was reached, based on the statements by 53% of the respondents.[166] It was suggested that since the Convention covered a particular area of law, legal practitioners may not have reason to come across it because of the nature of their practice. The CISG excludes consumer contracts, contracts involving the sale of securities, ships, vessels, hover craft or aircraft and electricity.[167] Questions involving the validity of contracts are also outside the Convention, as is the effect which the contract may have on the property in the goods sold,[168] and any liability of the seller for defective goods causing death or personal injury to any person.[169] The exclusion of questions of validity of contract is significant because the Convention does not define 'validity'. Furthermore, because limitations of liability

[163] Emioma (n 154).
[164] Ugorji (n 83).
[165] ibid.
[166] Although 34 respondents were interviewed, only 30 were asked the question. 4 were not asked because they were not in the position to answer the question.
[167] Article 2
[168] Article 4
[169] Article 5

clauses are frequently encountered in sales contracts, excluding it severely 'impairs the utility of the Convention.'[170]

This problem is common amongst uniform laws because of the compromise of concepts and the need to ensure acceptability by differing legal systems. Thus, particular areas subject to conflicting interpretations are purposely omitted. At the drafting stages of the CISG certain matters were considered too controversial for inclusion, since the national laws differed too much to harmonise the various approaches.[171] The drafters thus decided to exclude these issues from the Convention's scope of application in order to garner wider acceptance, rather than end up with a complete but controversial text.[172] This compromise, despite accomplishing wide acceptance, resulted in limited knowledge and narrower application of the Convention, making it less likely to be known. This means that lawyers specialised in the areas of practice not covered by the CISG, will hardly be aware of the Convention.

The chances of a Nigerian legal practitioner being aware of the CISG is further limited, given that practitioners in jurisdictions where the Convention has been adopted, and where there is awareness of its existence, usually opt out, because of its limitations and ambiguity. Thus, even where practitioners are aware of it, the ambiguity constitutes a hindrance to the Convention's utility and consequent spread of awareness to countries that have not ratified it. Given its limited scope, the possibility of a Nigerian legal practitioner coming across the CISG, is unlikely.

The limitation of the CISG raises questions of its relevance. As stated by one of the respondents, 'it may be because there is not a lot to gain from using it and it may also be that it is important to Nigerians who do business. If it was, more people would have suggested it.'[173]

Additionally, the CISG deals with only substantive contract law and not the procedures and conflicts which are sometimes, necessarily what international traders worry about in transactions. Thus, 'the commercial parties the CISG aims to serve are usually not only interested in a suitable

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[170] This is also because the German Supreme Court held that the validity of a clause excluding the seller's liability for damages falls outside the Convention. See BGH, 24 March 1999, No VII ZR 121/98< http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html> (the *Vine Wax* case) in Jacob S Ziegel 'The Future of the International Sales Convention from a Common Law Perspective' The Pace CISG Website http://www.cisg.law.pace.edu/cisg/biblio/ziegel3.html 345 accessed 18 August 2014; See Article 4 and 5 of the CISG. For sample articles on this, see Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application' The Pace CISG Website http://www.cisg.law.pace.edu/cisg/biblio/kroll.html accessed 27 December 2013; Joseph M Lookofsky 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1991) 39 American Journal of Comparative Law 403-416.

[171] See 1978 UNCITRAL Y.B. 65f, U.N. Sales No. E.80.V.8 in Kröll (n 190).

[172] ibid.

[173] Ugorji (n 83).

contract law regime (or private law regime in general), but also in other fields such as procedural law or tax law…The problem therefore is that the CISG regime is not exclusively applicable to the party relationship. Gaps will have to be filled by the domestic law that is applicable in accordance with the rules on conflict of laws. This has been suggested as one of the main reasons why parties exclude the CISG: they prefer the imperfectness of one whole national jurisdiction to the situation in which their rights and obligations are governed by *fragments* of different origin, no matter how high the quality of these fragments may be.'[174]

The above statement substantiates the preference of clients and lawyers in choosing a holistic jurisdiction or law to govern their transaction. When respondents were asked about their preference for governing laws, English laws were chosen because they believed they were more holistic, offering not only substantive contract laws but procedural laws as well. Thus, where English law is chosen, it would also be included as the jurisdiction for the settlement of disputes.

One of the respondents stated regarding the CISG, that the question is 'whether the Convention will have terms that meet our needs as a nation.'[175] Another respondent who was sceptical about the CISG stated that the CISG does not holistically address all the issues in a contractual relationship. He suggested that with the convention, there would be a law dealing with concepts, interpretations and definitions and another law dealing with procedures and process. As such,

> Those two laws are unlikely to be Nigerian laws because if the forum is foreign, it will be those laws that will apply to either or two of those matters that I have mentioned to you, distinct from the law that settles the disputes itself. It is another law that deals with the issue of contract and that is both the court forum as well as the arbitration forum.[176]

Admittedly, the Convention's scope is limited. However awareness of the Convention and its ensuing utility need not come from solely practicing in the areas covered by the CISG. Forums discussing international laws and global issues are ideal for drawing awareness to the CISG. Further, for foreign legal practitioners in jurisdictions where the Convention has been ratified, there is hardly any need to opt out, given the current number of cases and legal scholarship.[177]

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[174] Jan M Smits, 'Problems of Uniform Sales Law – Why the CISG may not Promote International Trade' Maastricht Faculty of Law Working Paper No. 2013/1 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197468 accessed 7 April 2014.
[175] Interview with Mr Uwa, Partner, Streamsowers & Kohn Law Firm (Lagos, Nigeria July 2013).
[176] Interview with Olasupo Shasore, Partner, Ajumogobia & Okeke Law Firm (Lagos Nigeria, August 2013).
[177] Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs: Misapplications and the Costs of Ignoring the Vienna sales Convention for Australian Lawyers' (2009) 10 Melbourne Journal of International Law 141-216, 167.

Another hindrance to the awareness of the CISG is the fact that the area regulated by the Convention is the sale of goods. In Nigeria, the SGA is hardly utilised because parties choose to draft their own clauses and include their specifications and consequences of breach. Thus, it is an area hardly litigated on. This significantly impairs any awareness of the CISG, because, if parties hardly litigate on matters of sales of goods, they will hardly come across it. This suggests that laws such as the CISG being of similar nature will not be popular. Accordingly, one of the respondents stated regarding the interplay between the limitations of sale of goods transactions and the awareness of the CISG

> I believe part of it is also still because sale of goods as we knew it under common law is out-dated, in the sense that commercial law has evolved so much that the concept of chattels and goods have become a bit narrow, old approach. There is so much that has happened with the development of information technology and commercial transaction and so commercial law has completely exploded and evolved and it involves a lot of specialisation… The international aspect of trade in goods is even much more developed and does not have so much ramifications with the common law concept as we were being taught because it incorporates many aspects of commercial laws which takes you to the fact that even then some of those aspects there are a lot of specialisations a lot of uniform laws coming up in those areas. The general sale of goods act has become a bit too general. In Nigeria, we don't see much happening in terms of litigation concerning common traditional concepts of SGA. The general contract principles are really what are applying…there is very little jurisprudence that you find that has been developed in Nigeria, not the common law cases, that talk about sections of the SGA because really in the truest sense of it the law of contract and commercial transactions are on-going and whatever special contracts you have. But you find out that little do you have cases that fall under SGA because they are just relics of a lost stage.[178]

Part of the reason for this is because the Convention for instance does not govern the contract of carriage between the carrier and the shipper or receiver. As suggested by a legal practitioner, the type of disputes usually found in courts with respect to international trade is with regards to

[178] Kalu ( n 14).

the rights and responsibilities between shippers of cargo and ship-owners. This fragmentation in international trade impedes any awareness of the Convention. Furthermore, globalisation and its attendant consequences have resulted in a shift from legal practitioners dealing with broad areas to handling different areas of international commercial law. This further limits the possibility of lawyers in niche areas being exposed to this area of international trade law.

The implication of the limited scope of the CISG in Nigeria is significant because the 1893 SGA, which has the same scope as the CISG, is not applied frequently, neither is it very popularly litigated on in Nigeria. Thus, the CISG may enjoy the same unpopular status as the SGA. Further exacerbating the effects of the unpopularity of the two laws is the fact that they share certain limitations, for instance, with respect to the sale of shares or the transfer of shares. Under the SGA, there is the question of whether shares can be categorised as goods and whether it conforms to the SGA definition.[179] Article 2(d) of the CISG states categorically that it does not apply to the sale of stocks, shares, investment securities, negotiable instruments or money. Matters such as this, excluded from the scope of both laws severely limit their popularity.

The attitude and status of the Sales of Goods Law Lagos State,[180] which is equivalent to the SGA 1893, was reported in a consultation paper.[181] The findings reflected a general lack of awareness of the existence and relevance of the SGLLS.[182] When the respondents were asked why they felt the law was not known, they claimed that they had no cause to litigate in this area and that clients did not demand representation on issues within the scope of the SGLLS.[183] One of the problems, which the respondents had with regards to litigating in the area of the sale of goods, amongst other problems, was that the SGLLS is its limited scope of application. This is one of the problems of the CISG, since both they have the same scope of application, the same reticence by practitioners towards the SGA possibly plagues the Convention. This attitude thus, contributes significantly towards the lack of awareness of the CISG in Nigeria.

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[179] See S 62(1) SGA also s.2 (1) of Sale of Goods Law 1958 (West), 1973 (Lagos), 1976 (Bendel). See *Humble v Mitchell* [1839]. 113 ER 392, *Duncoft v Albrecht* [1849, 39 ER 1104; (*Bowlby v Bell)* [1946], 136 ER 114; *Watson v Spratley* [1854], 156 ER 424.

[180] SGLLS

[181] The Law Reform Commission of Lagos State, commissioned Dr Olawoyin, Department of Commercial and Industrial Law, Faculty of Law, University of Lagos to prepare a consultation paper on the reform of the Sales of Goods Law Lagos State.

[182] The Law Reform Lagos State Consultation Paper p.14. The report reflected the following: the awareness of the Sales of Goods Law amongst the respondents was 84%. Although the statistics show 63% of the respondents know the SGA through daily law practice, when asked their opinion of the law, 45% did not respond to the question, 11% claimed it was outdated whilst 8% it needs to be brought in line with recent developments. With respect to application of the SGL Lagos State, 45% rarely practiced in the area of Sale of goods, 47% fairly often and 8% practiced often. The fact that it is only 8% of the population actively litigating in the area regulated by the SGL Lagos indicates a lack of popularity of the law. For Survey Report see Law Reform Lagos State Consultation Paper, specifically The Commission's Perception Survey Report 39-64.

[183] Lagos State Consultation Paper (n 203).

### 3.2.7 The Nature and Environment of International Trade in Nigeria

The system and structure of trade, and the attitude of the traders involved in the transactions contributes to the lack of awareness of the CISG. Although this question was not directly asked, it was gleaned from the answers of the respondents. Generally, foreign traders are wary of engaging in trade transactions in Nigeria because of the laws and systems in place. This caution is commonplace amongst developing countries across the world since a majority lack sturdy and established legal systems and consolidated policy systems. Foreign traders leverage on the unstable institutions and structure to insist on their way of contracting, hardly leaving any room for the Nigerian trader to negotiate his terms. They transact with the Nigerian traders on a 'take it or leave it' basis through mediums such as standard form contracts or proforma invoices. Since most transactions are carried out through letters of credit, it obviates the need for a regulatory law or at least the transactors then do not concern themselves with the laws. This nature of trade done on a quick basis does not necessarily require laws such as the CISG with sophisticated documentation.[184]

Interestingly, the traders seem unperturbed about the disproportionate bargaining strength in transactions. As noted by one of the respondents, whilst most of the top firms will generally not agree to the Nigerian laws, because they consider it underdeveloped, the Nigerian party is not necessarily uneasy with the dispute resolution being regulated by other laws.[185] 'We are more generally complacent, we are more accepting to laws as long as whatever rule or law you are bringing is not immediately detrimental…we would generally go with the flow'.[186] This disposition towards trade transactions is deleterious to the traders.

56% of the respondents suggested that the unstructured mode of international trade made no room for the CISG to be known.[187] This suggestion is hardly applicable to the multinational companies who usually have a branch of their company in Nigeria and are headquartered in another location. Usually, the headquarters situate outside Nigeria deals with the legal issues and trade contracts and merely supplies the local branch of the company with the goods already acquired. Given this, it is most likely that most legal issues such as international trade transactions would be dealt with at the headquarters. In cases such as these, there is no need to examine the impact of the CISG since there would hardly be any contact locally. Even where the

[184] Owolabi (n 125).
[185] Ugorji (n 83).
[186] Arowolo (n 117).
[187] Although 34 people were interviewed, 32 were asked the question specifically. 18 out of the 32 respondents stated that the structure of trade was a factor which hindered awareness of the Convention. Thus, the 56% recorded as the number of respondents is based on the interviewees who were asked the question directly.

multinationals decide to engage in trade, they would usually have the higher bargaining powers and invariably contract with smaller or individual traders on their own terms. In any case, trade with multinationals tend to be more structured.

In the experience of the legal practitioners, the unstructured nature of trade was mostly applicable to the sole traders and the SMEs. The traders sign international trade contracts typically, without reading it. The importers constituting largely of sole businessmen, trade in a manner distinct to the multinationals. Within the private sector they have been identified as the actors for whom the CISG may be most useful for. Apart from exportation of crude oil, in terms of exchange of goods, Nigeria is more import oriented. Thus, an appreciable percentage of Nigerian traders buy already made goods and resell them to the population. The goods are usually bought and imported from foreign multinational companies. Although there is a high demand for the goods, because of the underdeveloped credit system in Nigeria, foreigners are sceptical to deal with Nigerian traders and thus would stipulate their terms of transactions. The Nigerian importers either buy the goods on the seller's terms or leave it. In reality, most of the traders sign contracts with foreign traders, these contracts are drafted in such ways that the foreigner takes all his money before the goods are delivered. The subsequent realisation that the goods are not of merchantable quality or fit for purpose is of little consequence because the jurisdiction and governing laws stipulated is that preferred by the foreigner. As suggested by one of the respondents 'this way of doing things has beclouded our vision to see that the instrument exists.'[188]

Trading in this manner is a result of the underdeveloped system. Regarding the underdeveloped credit system and the effect on trade, it was stated:

> The credit system in Nigeria is not very well developed. So you would find that for the Ibo man who is bringing in containers from foreign countries, most times you would find that it's a cash and carry transaction. Most foreign countries will not give goods to a Nigerian trader because then you have a situation where the man says I want to buy, the foreigner says how much it is and the Nigerian party transfers the money in full irrespective of the knowledge of the fact that wrong goods may be sent or contract may be breached.[189]

[188] Interview with Babatola Akpata, Legal Practitioner, G Elias & Co Law Firm (Lagos Nigeria, July 2013).
[189] Uwa (n 175).

The Nigerian importer is invariably put in a disadvantaged position because he is on the receiving end of an already drafted standard form contract and therefore offered no choice.[190] Given this, 'Most traders begin and conclude their transactions in china or internationally at the point of buying or selling and would not necessarily go through the hassle of a contract. As a result, there has been no push by these traders for a better law'.[191]

The use of standard form contracts in international trade transactions further inhibits the awareness of the CISG in Nigeria. Accordingly it was stated 'for people bringing goods for value into Nigeria, they have their own standard form contracts, and that is what you sign when you deal with them. Thus the provisions of the statute are usually not obtainable… any multinational will choose its own laws.'[192] Although these forms fulfil an important efficiency role in the mass distribution of goods and services, they also have the ability to trick consumers because of the unequal bargaining power between the parties. This mode of transaction is usually unfavourable to the party with less bargaining strength since they do not allow them to alter the terms of the contracts.

This leaves the Nigerian importer vulnerable to the whims of the multinational, already in a stronger position. In the event of dispute the Nigerian importer is most likely unable to afford the costs necessary to settle the dispute because he may have little or no knowledge of the governing law, neither will he be aware of the procedural rules of a court located in a country he is unfamiliar with. Having knowledge of the cost implication of litigating in an unfamiliar territory and being unaware of the laws thrust upon them, these parties are virtually helpless with regards to pursuing remedies if the goods arrive damaged.[193]

The underdeveloped credit system which has resulted in cash and carry transactions between international traders has amounted in reduced litigation.[194] This is not an advantage, since majority of transactions end at the point of exchange of cash for goods. This seemingly advantageous result of a poor credit system must be measured against the consequences of having no option for remedy where goods supplied are substandard. The infrequency in litigation or lack thereof should also not be considered an indication of the satisfaction of traders or businessmen, in the way international trade transactions are carried out, it is not an indication

[190] This is because with standard form contracts, the consumer typically is in no position to negotiate the standard terms and indeed, the company's representative often does not have the authority to alter the terms, even if either side to the transaction were capable of understanding all the terms in the fine print.
[191] Emioma (n 154).
[192] Elias (n 30).
[193] Olawoyin (n 18).
[194] Uwa (n 175).

of a system that works, especially if the parties have no choice in the manner in which the transaction is carried out. As such, the infrequent litigation does not signify reduction in breach of contract terms, but more a case of hardly practicable litigation options for the Nigerian trader, given the unfamiliarity of laws, and the costs of litigating in a foreign jurisdiction.

The effect of this mode of business transaction is deleterious to the traders and the economy. In the event of a breach of contract, traders have no remedy against the seller and are forced to alternative ways to mitigate losses. One way of doing this is through setting inordinate prices on subsequent goods. The exorbitant price tags on the subsequent goods in order to make up for the lost goods would seem justified since there is no regulation of the prices of goods and the way they are sold. The end consumer thus buys the goods, irrespective of the price set by the trader, because he has no other alternatives. It is then consumers of the products that bear the brunt of the forfeited claim for breach. The increased costs of goods will result in inflation in the economy.

Since the parties using the CISG are mostly unsophisticated, their approach to trade transactions and governing laws issues are unfavourable because if some of the contractual provisions contradict mandatory rules of the governing laws, they will be unenforceable.[195] The CISG may play a vital role in this aspect. Where it is adopted, spreading awareness of its provisions to sellers will ensure they are educated on structured trading especially, parties can agree on a neutral law. Since the law is mutual to the foreign seller and the Nigerian buyer, the contract can be structured to benefit them both. The CISG can also be made the choice law to govern the transaction, in the event that a law is not chosen, it will be automatically applicable. Although Cuniberti argues that pre-contractual costs for unsophisticated parties would be lower than post contractual costs, this argument only caters to a probability, that is, instances when the negotiated provisions prove unenforceable. However, parties do not have to wait for this situation to arise, the CISG is always a safe and neutral law to rely on.

With respect to the standard form contracts, the CISG can provide protection to the buyer where it is adopted. Although the CISG does not expressly deal with the requirements for the inclusion of standard terms, courts can rely on the articles dealing with the formation and interpretation of the contract in general. This issue is mainly governed by Article 8(2) of the CISG. Through this provision the Nigerian buyer is protected because where he is not aware of

[195] Giles Cuniberti, 'Is the CISG Benefiting Anybody?' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1045121&download=yes accessed 27/04/2015

the intent of the foreign trader or the standard form contract, since the courts are enjoined to provide a reasonable man's interpretation.

Another factor that plays a role in the way trade is carried out in Nigeria is the literacy levels of these traders. The World Bank Report states that the literacy level of adults over the age of 15 in Nigeria is 60.1%.[196] Although the literacy levels are higher than average generally, they are insufficient for purposes of the contractual transactions or awareness of intricate terms of the contract and affects the way transactions are carried out. According to one of the respondents 'the literacy level of the bulk of the traders 'not big companies' i.e. individual traders is high. Thus, they deal with business transactions in a manner where they find out the price of the goods, they find out the way to pay for the goods and as such would not bother with putting things in writing.' [197] The effect of this illiteracy is that the traders may not necessarily know the impact of their sales transactions and contracts or its contents.

As a result of this, traders generally see no need for a law to govern their transactions because in the first place, there is no transaction requiring a regulation since it goes no further than the exchange. Thus, even in the breach of contract, there is no remedy because sometimes, a contractual relationship has not been entered into. Given the above nature of international trade transactions in Nigeria, there is hardly a platform for the traders to hear about the CISG or seek its application in their transactions.

The sophistication of the CISG may also be a causal factor for its unawareness. This means that as a result of its status as an international law, advocates may see it as inaccessible to the potential users in Nigeria particularly because of the structure and nature of trade and traders in Nigeria. The discrepancy in number of cases adjudicated upon between developing and developed countries that have adopted the CISG, buttresses this fact. It is clear that developed countries have more adjudicated cases on the CISG than developing countries.[198] For instance the highest number of cases on the CISG is found in Germany, China, Russia, Netherlands, Switzerland and Austria. The average literacy level amongst these countries is 98.3%. On the other hand, the following countries, Uganda, Liberia, Benin, Zambia, Gabon and Guinea, considered developing

196 http://www.tradingeconomics.com/nigeria/literacy-rate-adult-total-percent-of-people-ages-15-and-above-wb-data.html (*Trading Economics*) accessed 14 August 2014.
197 Uwa (n 175).
198 The Pace CISG Website.

countries have an average literacy level of 63.3% amongst them.[199] This is indicative of more utility of the CISG in countries where trade is more structured.

The developing countries above, which share a similar development index with Nigeria, show that the CISG is underutilised because of the nature of trade in developing countries. It may thus be inferred that since the CISG is not functional in countries where it has been ratified, in the countries where it has not been ratified, the nature of trade, which is a reflection of the level of development is a correlative factor contributing to its lack of awareness. The nature of trade coupled with the level of illiteracy means that the CISG may be considered too sophisticated in Nigeria resulting in disinterest. As suggested by one of the respondents, it is possible that we have not adopted the Convention because it is not something we need at this stage in our development.[200]

The attitude of the traders towards legal information and seeking legal advice further exacerbates the issue. There is hesitancy about approaching lawyers for legal advice prior to signing contracts and in the event of a breach. Accordingly it was stated 'for commercial transactions it's not only because there is mistrust of the legal system but there is also this mind-set that I need to spend money or pay lawyers so there is also that cultural sense of it'.[201] Accordingly, transactors would usually feel that when lawyers start to review contracts they end up being destroyers of bargains.[202]

With respect to remedies, even where the Nigerian party is aware that they have been supplied the wrong goods, their attitude is not remedy oriented through recompense. Traders tend to be more complacent and would much rather solve this problem through inflated prices on goods than consulting with lawyers and engaging in complicated matters. A classic scenario given by a legal practitioner whose spouse engages in international trade of furniture is below

> Interestingly, my wife is in the furniture business, she brings a lot of goods from different parts of the world, she is not a multinational and most of the things she buys are on proforma basis. She contacts the seller who agrees and she pays in part. A lot of the times, she has to pay the seller, by the time the goods have gotten to Nigeria, there would be no risk on the seller but all the risk is on her. She finds out the goods are

[199] World Bank Report
[200] Interview with Nosa Osazuwa, Legal Practitioner, Aelex law Firm (Lagos, Nigeria July 2013).
[201] Makinde (n 16).
[202] Akpata (n 138).

> not fit for purpose, or does not meet the expectations, she has a choice, there is a contract to the extent that emails have been exchanged, the seller has been paid, but the questions is 'Is it worth pursuing? considering the amount of money I have spent on that transaction, is it worth fighting for?[203]

To minimise risks, his wife buys goods in bits and in groupage, rather than one person taking the whole trailer load of goods, five of them share it. This reduces the value of the transaction. So the value of the transaction is too minimal that it does not equate with the money to be spent on legal action. He further suggested that his wife would not litigate because of the costs. Therefore, what she does where there is a breach of contract is to aim to recover it in the next batch of goods by selling higher to consumers.[204]

This confirms the disadvantaged position and burden of risks on the Nigerian importer. The CISG can help draw attention to the effects of the unstructured trading system on the Nigerian economy. Firstly, since a major deterrent for the Nigerian importer is the inaccessibility of laws imposed by the foreign party, the CISG, by creating a common law for both buyer and seller ensures there is easier access to governing laws, eliminating the burden of learning a new law. The Nigerian trader is also in a better position to make choices regarding the pursuit of damages. If traders exercise their option to pursue compensation, the receipt of compensation will ensure that the goods are sold at a regulated price. Thus, eliminating the extortionist price imposed on the consumers because of lack of access to legal remedy. Additionally, where the CISG is adopted in Nigeria, it will help to draw attention to the hardly existent regulation on consumer goods.

Despite the perceived advantages and relevance of the CISG, the environment of trade and the attitude of the Nigerian traders to the legal aspect of international trade transaction may suppress the functionality of the Convention, resulting in questions regarding its usefulness in Nigeria. As stated by one of the practitioners 'although it may be useful to merchants, sole traders etc., the problem with the law is that these traders are not educated or literate enough to understand these things, they are focused on bring my ware in, container arrives on this day, I pay. Consequently, these traders are far removed from the process.'[205] This can be resolved by creating awareness of the CISG and its ability to streamline trade transactions.

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[203] Owolabi (n 125).
[204] ibid.
[205] Interview with Ken Etim, Partner, Banwo & Ighodalo Law Firm (Lagos, Nigeria July 2013).

Where the CISG is adopted, there has to be a reorientation of the attitude of these traders towards contracts and reference of contracts to lawyers before signatures are appended. This is to ensure there is some awareness of the contractual provisions. As such, in the event of breach of contracts, parties are aware of the remedies available to them. Traders have to be educated on the need for structured transactions despite the demand for goods. A regulatory body is needed in order to deter traders from disproportionate price increase. This will ensure that customers do not bear the brunt of breached contracts and that traders will demand fairer deals from foreign parties and exercise the option of pursuing compensation for unfit goods.

### 3.2.8 Nigerian Political History

The respondents suggested that one of the reasons why there is no awareness of the CISG in Nigeria is traceable to the political history of instability in Nigeria.[206] Political systems in African countries have been historically been marked with instability. Although at the time of decolonisation in Africa, there were favourable conditions for the effective unification of commercial law,[207] there was no real political support, since the post-colonial African states staunchly guarded their sovereign prerogatives despite pan African sentiments.[208] Thus, burgeoning supranational institutions met with resistant and stilted power transfers. Following the Nigerian independence,[209] military regimes started from 1966 and witnessed eight successions.[210] At the epoch of the military, corruption and disregard for rule of law was prevalent. This era, marked with arrests of democratic opponents, closure of media houses, convictions and executions, shifted the focus of the country to these issues. As a result, there was hardly any awareness of international uniform laws. This meant there was hardly room for commercial laws in the legislative agenda. Even if there was knowledge of such laws, it seemed an inopportune time to make demands for such laws, particularly since the relationship between Nigeria and the international community was fraught. The sequential military administration after Nigeria's independence led to a comatose civil society, resulting in a general lack of awareness of global laws.

It is only recently that Nigeria has started to appreciate the importance of a robust commercial framework as a means of improving the economic and social conditions of post conflict societies. In this regard, one of the respondents stated

[206] Interview with Olufemi Lijadu, Partner, Ajumogobia & Okeke Law Firm (Lagos, Nigeria July 2013).
[207] Interest in economic integration matched with limited technical obstacles and the similarity in commercial laws despite differing legal traditions. Castelleni (n 3) 553.
[208] ibid.
[209] Britain on 1st October 1960.
[210] The military era continued until May 29 1999. There was a brief stint of civilian rule between October 1979 and December 1983.

> We are only just starting now to have a civil society where Nigeria has a voice. We have a right to demand the laws that we feel would help us. Under the military rule, you can't say that because they will just throw you in prison. So it's part of the reawakening that has to happen and it takes time. Even in developed countries these things took a lot of time to be developed and crystallised. So I think that civil society is just waking up and people are beginning to demand laws and they know they have a right to demand those laws.[211]

The above reason plays a significant role in explaining why there is hardly any awareness of laws such as the CISG. However, this rebirthed interest should act as an impetus for private and public government agencies to proactively search out, evaluate and propose laws geared at promoting commerce and improving the economy. In light of the above, it may be surmised that given time, awareness of the Convention will spread.

### 3.3 Conclusion

From the above analysis of the empirical study, the foremost reason why the CISG has not been adopted in Nigeria is the general lack of awareness amongst the stakeholders. The legal practitioners, the legal academics, the relevant government agencies, the traders and the associations representing them are unaware of the CISG resulting in poor appreciation of benefits of the Convention.

The lack of awareness of the CISG in Nigeria is triggered by certain factors not exclusive to Nigeria. These include; comfort of the status quo, legislative lethargy, lack of prioritisation or cumbersome legislative process, the fact that potential advocates of the CISG in developing countries are chary of international laws, the fact that parties usually have extensively drafted contractual agreements the nonchalance of transactors regarding details of contract, the limited scope and the nature of transactions which the Convention deals with, i.e. sale of goods and the structure of trade and the attitude of traders in Nigeria. All the above also draw from the historical political instability in Nigeria, which affected the civil society.

However, these causes of lack of awareness are not insurmountable, given the roles and responsibilities of the actors identified and their designation. They can be overcome with the right attitude and approach by the government ministries and collaboration of all the actors identified. Whilst it is agreed that the government agencies have more responsibility in creating

[211] Lijadu (n 232).

awareness of the CISG in Nigeria, each of the other stakeholders have a vital role to play. Despite their distinctive roles, there is an interconnectedness, which should define the way awareness of the CISG should be created. The UNCITRAL should make more effort towards working together with the MAN and the FMTI to bring attention to the CISG. This is especially because there is a dearth of expertise in commercial law in Nigeria. The FMTI and the DICL are obligated to undertake research into potentially useful international laws that may encourage a favourable trade environment. They could consult more with the MAN and NACCIMA in order to assess areas of improvement and potentially useful laws. The legal practitioners and academics should also strive to educate themselves on what is happening globally so as to inform these agencies about the existence of useful laws. Where each actor recognises his role, awareness of the CISG can spread through conferences and seminars. Consultations can also be had in order to determine where the CISG will be most useful and how attention can be drawn to it.

# CHAPTER 4

# LEGAL TRANSPLANTS: THEORETICAL FRAMEWORK FOR TRANSPLANTING THE CISG IN NIGERIA

## 4.1 Introduction

This chapter uses the theories of legal transplant to draw up a framework for measuring the success of the CISG through the experience of the two countries that have adopted it. This is used to conceptualise the adoption of the CISG in Nigeria. The chapter first provides a brief overview of the theory and literature on legal transplants before drawing up a typology for measuring the success. A typology for determining successful or failed transplants is proposed in order to measure the level of success of the CISG in these jurisdictions, This enables an analysis of whether the CISG either contributed, or was detrimental to the legal systems where it was transplanted.

The chapter then considers the experiences of two countries that have ratified the CISG. The goal of the CISG to negotiate between international and domestic laws suggests that ideally, it should function cohesively with any legal system, particularly, the two prominently recognised legal systems in the world - civil and common law legal systems. However, critics have condemned the plethoric adjudication of CISG cases in civil legal systems, which surpass those of the common law legal system. These assertions are questioned in light of the increasing awareness and applicability of the CISG in the common law jurisdictions. Some of the criticisms levelled against the CISG, which have resulted in a dearth of cases in common law jurisdictions, are based on divergences between the provisions of the CISG and recognised legal concepts under the common law.

The chapter examines the application and experience of the CISG in Germany and the U.S, countries from civil and common-law jurisdictions, using them to assess the validity of the claims above. Germany and the U.S are selected because they represent the different legal families enabling a varied analysis and holistic view of the CISG in civil and common law jurisdictions and allowing for appreciation of the nuances in each legal system. They also have a high number of cases, which allows for broad and in depth analysis.

As Germany is a civil law jurisdiction, different to Nigeria, a common law system, it enables a comparative analysis of the CISG's interaction in a civil legal family distinctive to Nigeria. The CISG experience in Germany will highlight how the CISG interacts with the civil legal system. The process of adjustments and effects of application of the CISG on the key players and the system is considered, in order to draw out lessons, which may be useful to Nigeria.

The United States is chosen for its common law background. The similarity of the US legal system to the Nigerian legal system, allows for evaluation of how concepts from the CISG, alien to common law jurisdictions are dealt with. It also allows for an analysis of how civil law concepts interact with the UCC common law concepts, how this interaction affects the actors in the society, and their reactions to the CISG.

The Convention's impact on key actors - judges, legal practitioners and traders- in the society and how it coexists with, and affects the extant laws, is measured in order to understand the experience, challenges and benefits faced by these countries.

## 4.1 Brief Overview of the Theory of Legal Transplant

It is not disputed that legal transplants, the movement of laws from one jurisdiction to the other, takes place. Watson defines legal transplants as 'the moving of a rule or a system of law from one country to another...'[1] Generally, it is the transfer of laws and institutional structures across geopolitical or cultural borders and also connotes the movement of legal ideas through diverse channels that only notionally recognise national and cultural boundaries.[2] This rudimentary definition of legal transplant applies to the CISG, because although international law does not emanate from a country, there is a movement of laws from the international sphere to the national sphere. More recently, legal transplants have been linked to international legal harmonisation projects sponsored by large trading nations, international donor agencies and transnational corporations.[3]

### 4.1.1 Debates on Legal Transplants

The argument on legal transplants was a reaction to the functionalist positivist views that laws are a result of norms produced by ruling powers according to the society's needs. Watson

[1] Alan Watson, *Legal Transplants: An Approach to Comparative Law*. (University of Georgia Press, 1974) 21.
[2] Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' in John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 New York University Journal of International Law and Politics 657, 662.
[3] John Gillespie, *Transplanting Commercial Law Reform: Developing a 'rule of law' in Vietnam* (2006, Ashgate Publishing Limited, 2006) 9.

challenges this account through empirical evidence, arguing that much of law in the past has been borrowed or transplanted.[4] These copious borrowings question the assertion of innovation on the basis of local conditions.[5]

If laws are bare propositional statements and not connected to the cultural and social moorings, then transplantation can be considered easy, making success easier. Academics who support lawmakers in copying foreign rules are known as Transferists. Such Transferists include academics such as Watson, Rafael La Porta and law development organisations such as World Bank, which are trying to manufacture and export effective legal systems.[6] They believe that transplants are either all pervasive or non-existent.[7] Thus, compatibility between recipient and donor countries is irrelevant for successful legal borrowing.

From the above, one may be tempted to argue that the CISG is a bare propositional statement, because there is no connection to any social or cultural anchorages of any jurisdiction, and neither does it represent any particular culture. However, the CISG fuses the culture of different legal families and embodies an international business culture. Therefore, adopting its principles and implementing it ought to be comparatively easy. It is recognised that the interpretation of concepts of the CISG may vary in different legal systems. However, a reciprocal effect of legal unification is the production of a unified legal culture.[8]

The practical usefulness of laws introduces the social and cultural elements of legal transplants i.e., the interaction of imported laws with the local elements of the domestic jurisdiction. This process of interaction is supported by culturalists, who propose that law is culturally embedded with limited legal autonomy. That one cannot decouple law from a people because it is peculiar

[4] Watson, (n 1).
[5] Alan Watson, 'Aspects of the Reception of Law' 346-50 in Gillespie (n 2) 673.
[6] See eg Watson, *Legal Transplants,* (n 1) and ibid, Rafael La Porta and Others, 'The Economic Consequences of Legal Origins' Journal of Economic Literature, Forthcoming SSRN http://ssrn.com/abstract=1028081 accessed 10/09/2015.
[7] Nicholas Foster, 'Transmigration and Transferability of Commercial Law in a Globalized World, in Comparative Law in the 21st Century' in Andrew Harding and Esin Orucu (eds), *Comparative Law in the 21st Century* (The Hague: Kluwer Law International, 2002) 55.
[8] Ralf Michaels, 'Legal Culture' in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds) *Oxford Handbook of European Private Law* (Oxford University Press forthcoming) http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3012&context=faculty_scholarship accessed 29 April 2015.

to them, those for whom it is made.[9] The term culturalists is adopted in contrast to transferists for academics such as Legrand who believe that legal transplants are impossible.[10]

There are also limited autonomists who focus on the effects of careless transplantation. For them, the relationship between law and underlying social forces is important in analysing legal transplantation. Accordingly, if laws are socially embedded with limited autonomy, they cannot simply be decoupled from their social moorings and require careful adaptation to fit the underlying social structures.[11] These limited autonomists include scholars like Tuebner, who considers Pistor and Hantrias.[12] On the extreme, they deny the possibility of transplantation based on the inherent differences between systems involved.[13] The mobility of law is criticised on the basis of the assumption that law as a social construct, cannot remain the same. Legrand states that 'a rule is necessarily an incorporative cultural form," its meaning to be found through essentially subjective interpretative processes, which are "a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned." Therefore, transplants do not occur at all: the product of moving a rule elsewhere is always something else, "not the same rule."[14] He rejects the view that law is only about the words that can be found in legal texts. Although Legrand concedes that legal rules transfer, he argues that legal cultures and epistemological assumptions do not travel. He argues that legal transfers, untenable, are not only ineffective or short lived but that they may also stimulate tensions which will destabilise the society and cause greater problems than they intended to rectify,[15] because recipients of such laws interpret their texts using local mentalities that reconstruct the meaning of those texts.

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[9] Gillespie (n 2) 670.

[10] See various works by Pierre Le Grand including, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp. L. 111; Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality' in R Jagtenberg, E Örücü and A J de Roo (eds), Transfrontier Mobility of Law (1995) 63.

[11] Gillespie (n 3).

[12] For Tuebner he considers transplanted laws as a major irritation capable of captivating unwanted and unexpected events when a fluorine room is imposed on a domestic culture Gunther Tuebner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 Modern Law Review 11; for Pistor, the success of a legal transplant is conditioned on the receptivity of the transplanting legal systems examples civil law and common law Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard 'The Transplant Effect' The American Journal of Comparative Law; and then Hantrias who discusses the transferability of policies based on similar reources, political orientations and values Linda Hantrias, *International Comparative Research: Theory, Methods and Practice* Palgrave Macmillian 2009, 45.

[13] Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Bloomsbury Publishing, 2001) 55, 58, 59, 61.

[14] Legrand 1 (n 9); Pierre Legrand, European Legal Systems Are Not Converging, (1996) 45 International & Comparative Law Quarterly 52, 11.

[15] ibid.

It has been suggested that the disagreements between the two authors Watson and Legrand may be terminological, since both agree that lawmakers do, in the very least, copy texts from other countries.[16]

The claims of the impossibility of legal transplants however fails to take into account the manifold successful transfer of institutions among western societies which have taken place rapidly and smoothly. Neither does it consider the 'fragmentation, differentiation, separation, closure of discourses that is so typical for the modern and post-modern experience.'[17]

The extremes of the two debates opened up the ground for more nuanced debates, with authors falling generally into the middle ground. This middle ground sought to show that transplants do happen and usually involve a degree of cultural adaptation 'a domestication that is the necessary counterpart of the transplantation –whether it concerns the law, or other social or cultural artifacts that travel across space.'[18] That law is a living social construct affected by cultural and political issues. And thus, that legal culture is a key determinant of the viability of transplantation.[19] Accordingly, 'complete isolationism and hermeneutical closeness were replaced by a vision of law as rooted in its cultural/social frameworks, but also amenable to various influences.'[20] This is more evident in legal history, which shows that legal transplants take root in foreign legal terrain. Supporting this, Otto Kahn Freud, though recognising that most laws are deeply embedded in their social and institutional matrices, believes some laws are more autonomous than others and can transplant across socio political boundaries.[21] He also argues that distinctive environmental conditions in each country-particularly the political environment in the form of constitutional structure and interest group coalitions make successful transplants rare.[22] For Freud, there are different degrees of transferability, which results in the embeddedness of certain transplants. Laws intended to allot power, rulemaking, decision-making and policy making remain deeply embedded in social institutions, and are unlikely to easily transplant.[23] Essentially, Freud argues that all laws have to some extent decoupled from their socio-political

[16] Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 196.
[17] Gunther Tuebner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 Modern Law Review 11, 15.
[18] Nelken and Feest (n 13); Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 Theoretical Inquiries in Law 723-743.
[19] Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in Nelken and Feest (n 13) 71; David Nelken, 'Using the Concept of Legal Cultures', (2004) 29 Australian Journal Legal Philosophy 1.
[20] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 (3) American Journal of Comparative Law 583, 586.
[21] Otto Kahn Freud, 'On the Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 27.
[22] Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 The American Journal of Comparative Law 8.
[23] John Gillespie, 'Globalisation and Legal Transplantation: Lessons from the Past' (2001) 15 Deakin Law Review 286.

underpinnings, making legal transplants a theoretical possibility. Since there are varying degrees to which laws decouple, it is inevitable that some are more likely to survive the journey than others. Finally, the degree of coupling between law and society is determined by socio-political institutional factors; these include the ideological role of law, the distribution of state power and pressure from non-state interest groups.[24]

The social and cultural interaction of the CISG with domestic laws is plausible, considering that previously held beliefs and interpretations based on domestic knowledge may surface during the application of the CISG by domestic actors. Moreover, considering that the CISG has been a catalyst for reform of domestic laws, the effect of interaction with the legal system, there is no denying its ties and interaction with the legal systems and culture where it is transplanted.

The Convention's culture is not representative of any particular domestic culture because it represents the business community. The representation of international business laws drawn from different legal orders is not peculiar to one system. This means it is not incorporative of any cultural form. If rules are an outward manifestation of an implicit structure of attitude and reference, and a reflection of a given legal culture, the CISG represents a mix of legal cultures.

Although it may be argued that the CISG is representative of a *lex mecatoria* culture, since the *lex mercatoria* is border reluctant, and irrespective of where it originated, is now an accepted part of business practice, a synthesis of different legal cultures and families, then it belongs to no particular culture. Thus, based on Legrand's argument that a legal rule cannot survive the journey from one legal system to another unchanged, the fact that the law being transplanted is cultureless means that on its journey, it will not change. Therefore, the transplantation of international laws such as the CISG, essentially cultureless, are viable.

The effect of legal transplants may be detrimental to the society. Teubner argues that legal transplants may cause some irritability in the receiving system. Legal transplants do not automatically displace pre-existing laws and the effect of what is transplanted may be a *legal irritant.*[25] There is no repulsion or integration but rather 'it works as a fundamental irritation which triggers a whole series of new and unexpected events. It irritates, the minds and emotions of tradition bound lawyers, and more deeply, it irritates laws binding arrangements.[26]

[24] ibid.
[25] Teubner (n 17) 12.
[26] ibid.

The arguments above showing scepticisms towards legal transplants, and their consequent categorisation as legal irritants is fraught, given the fact that legal systems in today's world, have incorporated ideas from various parts of the world. Therefore, it is doubtful that there are legal systems currently in the world, which are undiluted.[27]

### 4.2 Typologies of Legal Transplants

Various categories of transplants, for different conditions exist. There are categories which define the types of movement of laws, or the places it moves from and to, i.e. the line of borrowing; here, law moves between states and between international orders and states. In this case, laws such as the CISG feature i.e. from international to national legal order. The second categorisation is based on whether transplantation is voluntary or involuntary. A further breakdown of the typology of transplants is based on motives for receiving.

#### 4.2.1 Typology Based on Movement

##### 4.2.1.1 Horizontal or Transnational Borrowing/Transplantation

Horizontal or transnational transplantation as the name implies is borrowing done across national legal systems.[28] This is the more pervasive form of legal borrowing. Comparativists through empirical legal evolution have been inclined to see national laws as borrowing from other national laws and international treaty laws as borrowing from other international treaty laws. This is supported by the first definition of legal transplants offered by Watson, limited to countries 'the moving of a rule or system from one country to another',[29] although he later admits that international uniform laws such as the CISG are considered legal transplants.[30] In horizontal legal transplants, doctrines are borrowed from countries despite the geographical boundaries. Such borrowing with its desirability has burgeoned over the years amongst legal scholars and states.

Comparative law school scholars have placed emphasis on horizontal borrowing, disregarding the reality of vertical borrowing. This skewed emphasis placed on horizontal borrowing by comparativists is a result of traditional focus of their domestic discipline on the comparison of

[27] Siems (n 16) 193.
[28] Jonathan Wiener, 'Something Blue for Something Borrowed' http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2263&context=faculty_scholarship at 1297 accessed 17/02/2014.
[29] Alan Watson, (n 1) 21.
[30] Alan Watson, 'Legal Transplants and European Private Law' (2000) 4 Electronic Journal of Comparative Law, http://www.ejcl.org/44/art44-2.html accessed 26/02/2014.

national legal systems and cultures.[31] There is hardly a want of scholarship in the area of horizontal legal borrowing, however for purposes of the thesis, it will not be explored.

#### 4.2.1.2 Vertical or Trans-Echelon Borrowing

Vertical or Trans-echelon legal borrowing is defined as 'borrowing between national and international law.'[32] This concept is hardly recognised by legal scholars because most comparativists focus largely on the borrowing between national legal systems while internationalists tend to see international treaty law as borrowing from other international treaty laws. Thus, they consider international treaties endogenous, because they only draw from other international treaties. This belief fosters the thinking that there is no meeting point for the two categories of borrowing i.e. international and national.

Understandably, there is a gulf between international and national law scholars. As a result of this gap, scholars seldom search for additions or solutions to the existing body of international laws in the analogous national laws. This is particularly for fear of costs, but there is also the pride of keeping international law untainted by other academic endeavours, since it is considered morally superior to laws of nation states.[33] Actors involved in producing these international laws apply concepts, knowledge and designs previously used in drafting prior treaties, to new treaties, thus ensuring some continuing uniformity of treaties, but furthering distinctions with national laws. More importantly, since international laws are considered paradigmatic by national laws, international scholars believe then that there is a need to maintain a neutral façade, unfettered by national laws. As such, even where there is some appropriation of national law concepts or some form of interaction between national and international law with regards to borrowing, it is either neglected or treated discreetly,[34] and in some cases, outrightly denied.

However, national laws affect international law and in some cases unilateral national action often preceded, and in certain cases spurs international treaty negotiations.[35] The incrementally global

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[31] David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) Utah Law Review 545; Wiener (n 28) 1301.
[32] Wiener ibid.
[33] Kennedy (n 31) Hersch Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 British Year Book of International Law 31 in Wiener ibid 1300.
[34] Wiener (n 28) 1302.
[35] Examples of national declarations becoming international customary law is the Truman Proclamation where the government of the United States stated [T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. At the time it was made, this claim was inconsistent with pre-existing international law. No State had ever made a general claim to control over all of the seabed resources of its continental shelf beyond twelve nautical miles, nor had anything approaching such a claim appeared in any treaty. Yet notwithstanding the initial inconsistency between the United States' claim and pre-

consistency in national laws is also indicative of convergence and makes for a higher probability of recognition as customary international law. These examples do not in the real sense amount expressly to borrowing, as they are not conscious, since there is no organised international deliberation about the selection of a new international legal rule ex ante.[36] Despite all these, vertical borrowing can still be glimpsed, particularly upwards from national into international laws.[37] Although there is the rarity of discussion on this type of transplant, authors have argued that borrowing of this sort may occur more frequently than has been acknowledged.[38]

Another variant of the trans-echelon typology of legal transplants, are processes originating at the international level, adopted within the nation state. This is known as 'down-ward diffusion'.[39] This is where international laws/ideas and their effects are felt within the domestic legal order.[40]

Another categorisation of legal transplants is voluntary and involuntary. These types of transplants are based on how, that is the choice of, the recipient country acquires the imported laws into their jurisdiction.

### 4.2.2 Typology Based on Choice

#### 4.2.2.1 Voluntary Transplants

Voluntary transplants occur when countries have made an informed decision to copy a foreign legal system. According to Watson, this is when either an entire legal system or a large portion of

existing international law, the claim rapidly acquired the status of customary international law as other States followed the lead of the United States and made similar claims to jurisdiction over their own continental shelves. By 1951 the International Law Commission had included coastal State rights over the continental shelf in a set of Draft Articles, and in 1958 the customary status of this rule was confirmed by its inclusion in various provisions of the Geneva Convention on the Continental Shelf. Michael Byers, *Custom Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 88, 91.

[36] ibid.

[37] There is the borrowing of intellectual property, particularly copyright law from national law. See Stephen P Ladas, Patents, Trademarks and Related Rights, National and International Protection 5-55, 283-286 describing national law origins of international patent and trademark law; Paul Edward Geller, 'Legal transplants in International Copyright: Some Problems of Methods' (2001) 13 UCLA Pacific Basin Law Journal 199.

[38] Edith Weiss, The New International Legal System, in Perspectives on International Law (Nandasiri Jasentuliyana ed., 1995) see also Watson (n 2), 335 in Wiener (n 28) 1307.

[39]Anna Dolidze, 'Internationalized Legal Transplants: The Internationalization of Amicus Curiae Procedure from the United Kingdom' Draft Paper. 2 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379552 accessed 27/02/2014.

[40] Sally Engle Merry has illustrated how local civil society organizations and social movements serve as intermediates in translating and vernaculirizing international human rights instruments against domestic violence. Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006). Harold Koh has written about 'the transnational legal process,' the process through which norm entrepreneurs or 'agents of internalization' facilitate states' internalization of international rules. Transnational Legal Process is a theory that explains the 'critical issue of compliance with international law.' Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599.

it is moved to a new sphere.[41] Where transplantation is voluntary, it increases its own receptivity by making a significant adaptation of the foreign model to the pre-existing conditions and structures in the domestic setting.[42] This increases the chances of success of the transplanting model in the local setting. Evident changes in the transplanted rules have been interpreted to mean positive acceptability and thus something good. This accordingly is an indication that the rules have been considered and modified as needed, taking into account the needs of the domestic circumstance.[43]

#### 4.2.2.2 Involuntary Transplants

These types of transplants occur where a system is colonised and has a foreign legal system imposed on its indigenous culture.[44] This is usually done by colonisation, and or war. Through colonisation the foreign rule is usually established for long periods of time leaving strong imprints on the institutions of the recipient country. A case in point is Nigeria, colonised by the British and having been forcefully thrust upon the English common law. Wars on the other hand may be short lived and in that case, the institutions established during the war may either be retained or abrogated. During the Napoleonic wars French codes were imposed on a large part of Europe however, after the war they were free to retain or abrogate and although a majority of them chose to retain it, many of the countries initiated their own national codifications.[45]

Watson further breaks the transplants into other category; imposed reception, solicited imposition, penetration, infiltration, crypto reception, inoculation and so on. All these types of transplants though having different names may be categorised under voluntary or involuntary.

### 4.2.3 Typology of Legal Transplants Based on Motivation

Miller categorises transplants based on the different set of factors that can motivate a transplant. This typology proves useful because it focuses on motivations of the recipient country.[46]

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[41] There are three categories of this; first, when a people move into different territories where there is no comparable civilisation, and take their laws with them. Secondly, when a people moves into a different territory where there is a comparable civilisation and takes its law with it. Thirdly, when a people voluntarily accept a large part of the system of another people or peoples. Watson (n 1) 29-30.

[42] Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard 'Economic Development, Legality, and the Transplant Effect' 11 http://deepblue.lib.umich.edu/bitstream/handle/2027.42/39692/wp308.pdf?sequence=3 accessed 26/02/2014.

[43] For example, the voluntary but blind adoption of Spanish Commercial Code 1829 by Columbia with few changes made in ignorance of the implications of the rules for businesses. The practice of requesting approval for the formation of a company.

[44] Peter De Cruz, *Comparative Law in a Changing World* (Cavendish Publishing, 2nd Edn 1999) 491.

[45] Berkowitz and Others (n 42) 10.

[46] Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 4 The American Journal of Comparative Law 845.

Moreover, the motivations within this category suggest they fall within voluntary transplants. The externally dictated transplants are included because although there are conditions and incentives attached to this transplant, it is still the choice of the government of the recipient county to adopt such laws.[47]

#### 4.2.3.1 The Cost-Saving Transplant

According to Miller, cost-saving transplants are borne out of the simplest motivation and explanation for borrowing, which is that it saves time and costly experimentation. Here, the drafter faced with the need for legal reform will look for solutions outside in order to save him the stress and time of innovating.[48] Thus, since the donor country already has the rules proposed to be borrowed, and it has already worked, it will save a lot of time and thinking by simply adopting the approach of the donor country.

The arguments for cost saving transplants are founded largely on the same reasons as Watson's theory-extreme practical utility. This is considered the basis for the reception of a law.[49] Costs saving transplants are economically efficient for the state as a whole and even particularly for the lawmaker who is saved the awful labour of thought.[50] Watson supports this by suggesting that a body set up to recommend law reforms begins normally not by trying to think its way through to its own solution based on local conditions and character, but by examining external solutions. This is because usually, there is a conscious attempt to achieve the best possible solution rules.

Cost saving transplants may involve a process of *Bricolage* which means the reformers in the recipient country will simply paste together whatever it is they have at hand resulting in miniature resemblance to the product emanating from the donor country. This is a consequence of a shoddy job or lack of detailed analysis of the law to be transplanted because of the lack of expertise of draftsman.[51] At other times it may be resultant upon the chance meeting of a draftsperson and a foreign academic,[52] and at other times it may involve functionalism which means that the borrowing is done upon prior consideration of the extent to which the foreign

[47] It is recognised that the decision may have been made under pressure as in the case of Japan, during the Meji restoration which was forced to sign unequal treaties with the Western powers. The establishment of a modern legal system was seen as a prerequisite for an economically and military strong independent country, yet the choice of the legal system and its ultimate design was still in the hands of the Japanese government. Berkowitz and Others (n 42) 10.
[48] Miller (n 46) 845.
[49] Watson 2 (n 4) 335.
[50] ibid.
[51] Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 Yale L.J. 1225, 1228 (1999) in Miller (n 46) 845.
[52] Watson 2 (n 4) 335.

approach deals with problems of similar nature.[53] The cost saving transplant may also involve some element of functionalism, that is borrowing that first considers the extent to which the foreign approach deals with problems similar to one's own. Here the transplanter examines how the same function may exist in two legal systems and the extent to which a foreign model can be sensibly adapted to fulfil the same functions in one's own system.[54]

Questions regarding the level of assistance which the cost saving transplant may offer a system's development has been raised. Whilst some theorists argue that law is autonomous since they are bare propositional statements,[55] others argue that laws are hinged on the social and political context of a particular society.[56] However, as suggested by Miller, even where it is found that the law must fit the context of the particular society, it does not impede the allure of the cost saving transplant.[57] Since cost saving transplants hardly guarantee success, it has been suggested that they should be sought where it is functional. Although, one must consider that the motivation of the cost saving transplant through bricolage and functionalism is to save resources, which would otherwise be spent in developing rules indigenously.[58] Further, cost saving transplants are hardly ever to be found existing purely as that, they in most cases exist simultaneously with the legitimacy generating transplants.[59]

Although cost saving transplants are a good motivation, one must also consider the costs of transplanting the new law, or of switching from one set of rules to another.

#### 4.2.3.2 The Externally Dictated Transplant

This transplant seems more pervasive and particularly found commonly within developing countries. It could involve foreign individuals, entities or governments who dictate (suggest) to the recipient countries, the adoption of certain rules or model laws as the basis for carrying on business, or for allowing the dominated country a measure of autonomy.[60] This typology of transplant may include transplants driven by the desire to please foreign states, individuals or entities. This can either be simply to acquiesce to their demands or to take advantage of the

[53] Tushnet (n 51) 1228.
[54] ibid.
[55] Alan Watson, *The Evolution of Law* (1985) 119; William Ewald 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 Am Journal of Comparative Law 499.
[56] Miller (n 46)
[57] ibid 846.
[58] ibid.
[59] ibid 847.
[60] ibid 846.

benefits and enticements offered.[61] Recently, externally dictated transplants have occurred more in the domestic incorporation of public international law because of opportunities and pressures in international law.[62]

#### 4.2.3.3 The Entrepreneurial Transplant

The entrepreneurial type of transplant was first recognised by Dezelay and Garth who suggest that the success of a transplant is dependent upon the willingness of the exporter to provide the capital, and an importer interested in the import.[63] For these actors, they are led by their expectations of gain, domestically, by operating internationally. International strategies as they call it 'is the way foreign actors seek to use foreign capital such as resources, degrees, contacts, legitimacy and expertises, to build their power at home'.[64] These actors responsible for this type of legal transplant have been categorised as 'norm entrepreneurs,' that is individuals and groups who leverage on these international norms to strengthen their position.[65] A negative aspect of this typology of transplant is the possibility of abuse by particular individuals or law firms who encourage the domestic adoption of particular foreign laws so as to enjoy an advantage in marketing its own legal services. Although this should be warned against, the nature of the CISG seems to suggest that acquisition of expertise in that regard is available for anybody interested through the global jurisconsultorium and the availability of resources in that regard on the Internet, which is readily available.

#### 4.2.3.4 The Legitimacy-Generating Transplant

According to Miller, the most commonly offered explanation for legal transplants and in some cases their successes, are based on the legitimacy generating transplant.[66] Transplants within this category are alluring for recipient countries and takes place as a result of the desire to appropriate the works of others. For these countries, the law has a prestigious quality.[67] This prestige can

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[61] ibid.

[62] Developing countries that have adopted the World Trade Organization's standards on intellectual property have often done so under the threat of trade sanctions from the United States. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, Vol. 31; 33 ILM 81 (1994). ibid 846-849.

[63] ibid.

[64] ibid, 850.

[65] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," 52 International Organisation (1998) 887, 893, 896-97 http://www.jstor.org/stable/pdfplus/2601361.pdf?acceptTC=true&acceptTC=true&jpdConfirm=true accessed 20/02/2014.

[66] Miller (n 46) 854.

[67] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 (1) The American Journal of Comparative Law1-34; Ugo Mattei, Efficiency in Legal in Legal Transplants: An Essay in Comparative Law and Economics (1994) 14 3 Review of International Law and Economics 8.

either be of a particular legal institution or sometimes of an entire system.[68]Although authors agree that the meaning of prestige is elusive, may be tautological and faulty, it is nevertheless agreed that the prestige of a legal model is important in the consideration of legal transplant.[69] For the recipients, the law may be perceived as efficient and globally important, thus, informing the transplantation.[70]

More specifically, Mattei has argued that what is termed prestige by comparative scholars is really the examination of the process where less developed economies opt for laws of developed economies based on the economically efficient rule, as opposed to the view that transplants based on prestige are largely empty ideas.[71] Thus, that prestige comes from efficiency. As a result of the free flow of information and limited legal parochialism, there is the replacement of more efficient legal doctrines for inefficient ones.[72]

Miller concurs with Mattei, that there is a link between prestige and efficiency though not supported by empirical evidence or an explanation of the process leading judges and the legislature to import a particular model.[73] Consequently, there may be circumstances where the Judges and the legislature search for economically efficient models and this really exemplifies costs saving transplants, since they choose not to adopt a homegrown approach for fear of the cost and labour involved.[74] Prestige he further argues is not 'relevant where there is a true free flow of information and no barriers to the adoption of the most efficient practice possible, since presumably the legislators and the public will simply weigh all the technical alternatives open to them and select the most efficient.'[75] It is the many barriers to an efficient market that make prestige relevant. Further, Miller adds that it is as likely that a model acquires prestige because of its perceived success as because of its true economic advantages.[76]

Mattei's argument that prestige based transplants are necessarily efficient does not consider the fact that countries seeking efficiency in adopting a model for transplant have a wide variety of foreign laws to choose from, and in most cases, all of the options are economically efficient.

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[68] Sacco (n 67); Watson 2 (n 4) 350-51.
[69] Jacques DeLisle , 'Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1374&context=jil 280-281 accessed 24/02/14; Sacco (n 67); Mattei (n 67) 8.
[70] Sacco (n 67).
[71] Mattei (n 67).
[72] ibid.
[73] ibid.
[74] Miller (n 46) 855.
[75] ibid.
[76] ibid.

However, they tend to choose particular laws i.e. the most prestigious out of all their options, and in fact, the laws of the particular jurisdiction opted for becomes a recurring choice influencing the choice of laws to transplant in other areas of law. This is the case with US laws, which have become popular transplant paradigms at least on the international scene. This is despite the existence of a plethora of other possibly similar laws on par or better than the US laws, which possibly serve the same function as the US laws. The model of the United States is also likely to be chosen, at least by developing countries even with the existence of variety of choices because it is considered more prestigious and popular.

The choices made by developing countries with regards to transplants are indicative of the hegemony of the US laws, and consequently could be classified as being prestigious. This of course is in line with Watson's argument for prestige as a source of authority and can be considered more of a determinant in choosing models for legal transplants than either the cost saving, entrepreneurial and externally dictated transplants.[77]

Watson has argued, although without detailed explication that legitimacy generating transplant based on prestige takes priority over all the other categories of legal transplants. [78] Miller supports this assertion by building a case for prestige based on Weber's sociology of law.[79] Accordingly, three types of legitimate domination exist to explain that authority does not rest on force alone.[80] However, the one most commonly linked to the rule of law is the 'rational' grounds of legitimate domination. This is based on the 'belief in the legality of enacted rules and the rights of those elevated to authority under those rules to issue commands'.[81] A modern state founded on a strong rule of law invariably has a strong element of rational authority, which may derive from written legal norms. However, for these written legal norms to have any rational authority, the foundation of that society must be moored on the rule of law. This of course is an unrealistic expectation of a typically developing country that has little or no reason to place faith on the rule of law. Miller states that in a bid for the government officials to assert control, they desperately

[77] Watson (n 4).
[78] ibid 350-351.
[79] Miller (n 46) 856.
[80] The three grounds as described by Weber are the "traditional" grounds of domination, where authority rests on "an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them, and "charismatic" grounds of domination, where authority rests on the exceptional sanctity, heroism, or character of a particular person, where that individual has been elevated above his peers, perhaps due to his military prowess or perhaps through an election. Miller (n 46) 856.
[81] Weber also describes "traditional" grounds of domination, where authority rests on "an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them, and "charismatic" grounds of domination, where authority rests on the exceptional sanctity, heroism, or character of a particular person, where that individual has been elevated above his peers, perhaps due to his military prowess or perhaps through an election. Miller (n 46) 856.

source for foreign models to provide that missing authority. This need for a source of legitimacy from a foreign model ascribes to that model such a superior status that it may be seen as a talisman. In such situations the model may apply in the developing country even where there is little or no link to the local substantive needs.[82]

Certain unique characteristics have been typically allotted to legitimacy generating transplants. However, these characteristics do not, and cannot apply to all legal transplants which may be included in this category because of the degree, nature and the particular subject to be transplanted.

Firstly, it is expected that proponents of the legitimacy generating transplants in debates regarding the contents of the model to be transplanted and its suitability to the local laws would tend to skirt around the issue, focusing rather on the importance of the model.[83]

Secondly, one would expect to find the acceptance of the model by persons with opposing political interests even where the model does not particularly support their substantive goals. This is done in the belief that there is a higher goal.[84]

Finally, there is the willingness to surrender future autonomy to the model without any need for local adaptation since it is assumed that the model will produce good results. A corollary of this is the unacceptability or maybe inability of the local institutions to interpret the model for fear of corruption. Thus, incorporating the future interpretation of foreign institutions is appropriate since these domestic institutions can only enjoy adjunct authority.[85]

### 4.3 The CISG – Vertical Transplant (Downward Diffusion)

Traditionally, the terminology used for laws such as the CISG in any jurisdiction is *adoption*. Adoption is defined as the 'formal act by which the form and content of a proposed treaty text are established'.[86] However, adoption as a definition of what happens with the CISG in various jurisdictions is limited. This is because adopting the CISG merely explains the process of formally signing onto it and excludes the significance and implication of the law in practice, that is, its interaction with the legal culture in any particular jurisdiction.

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[82] Miller (n 46) 856.
[83] ibid 859.
[84] ibid 858.
[85] ibid 859.
[86] Art. 9 Vienna Convention of the Law of Treaties 1969 https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#adoption accessed 25/09/2014.

In the real sense the CISG entails more than a formal act of signing. Of course, the term adoption could be used if the CISG is solely to be adopted for mere formality i.e., without the formal legal order and the informal legal order undergoing any changes. However, this cannot strictly be the case since it may be particularly difficult to adopt a treaty without the treaty effectuating any changes in the laws of the country. At the least, the potential users of the law will have to be affected. This is because the mode and manner of doing things, in this context international trade transactions may possibly have to adjust, the laws which the actors, i.e. traders and lawyers have access to will be affected, the way business is done is altered. Unfamiliar concepts will have to be dealt with in the society, which may require some adjustments in the mode of thinking and for the judiciary, a reorientation of interpretive methodologies.

In this sense, the adoption of the CISG in Nigeria may be considered a form of legal transplant. Scholars have recognised that the production of uniform or harmonised legal norms at the international level has become a major force stimulating legal transplant and these instruments are adopted in the form of international treaties and Conventions.[87] Increasingly, legal transfers have been linked to international legal harmonisation projects sponsored by large trading nations, international donor agencies and transnational corporations. In addition, there is circularity between the domestic laws of national states and transnational laws.[88] The diffusion of these laws into the legal systems of party States is considered a form of transplantation. This is further substantiated by Miller's arguments that domestic incorporation of international laws by developing countries is considered externally dictated transplants because of the level of participation. This in fact supports the theory of the CISG as constituting a form of legal transplant especially with the fact that the level of participation of Nigeria in the process of drafting the CISG is not as significant.

The choice to adopt the CISG into any jurisdiction is a voluntary one since there is no imposition through war or colonisation and since the UN makes adoption of the Convention a matter of choice. This makes it a voluntary transplant. Generally in the international society, there is no overarching sovereign, and international law has frequently been understood as involving a multitude of bilateral relationships between those entities which have international legal personality.

[87] Michele Graziadei, 'Transplants and Receptions' 455 in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook on Comparative Law* (OUP, 2007).
[88] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' 3, 3-14 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896478 accessed 05/10/2014.

Based on this typology, the transplantation of the CISG into Nigeria can be considered a vertical or trans-echelon borrowing and more specifically, it is a type of downward diffusion. This is because its adoption means the diffusion of its principles into the legal system through application of its principles subject to the various influences. Ultimately, there is an interaction of the CISG with the domestic laws and the actors in the legal system.

### 4.4 The Typology for Measuring the CISG as a Successful Legal Transplant

Various measures for, and definitions of success of transplants have been suggested and employed by legal scholars. A successful transplant may mean a transplant operating exactly as in the origin country, it may refer to good enforcement of the law, it may also mean the level of fit with the societal needs of the transplant country.[89] Further, it may be determined by the transfer of the legal idea into a host country's legislation,[90] or it may be the ability of the legal transfer to act as a catalyst that stimulates behavioural modifications in ways that may be unforeseen by lawmakers.[91]

Questions based on criteria such as the above have prompted authors, to conclude that they can often not be clearly defined as successful or failed. Given that the success or failure of the transplant cannot be clearly ascertained, it becomes imperative that the choice and design of the transplant should be done meticulously.[92]

One agreed measure of success is that it entails changing legal behaviour in the recipient country.[93] There is also, the issue of determining from whose perspective the success must be defined since the legal imports may appear useful for one social group but useless for another. And, by challenging existing patterns, imported laws may create winners and losers.[94] Based on extant literature, several criteria have been distilled and will be considered as definitions of success. They will be adopted as a baseline to define the success of the CISG in adopted jurisdictions. These criteria are not considered in isolation, but collectively, to the extent that they are all recognised as important factors in defining success.

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[89] David Nelken and Feest (n 13); David Nelken, 'Comparatists and Transferability' (2003) in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2014) 437, 442.
[90] Gillespie (n 3) 688.
[91] ibid.
[92] Siems (n 16)197.
[93] Gillespie (n 3) 688.
[94] ibid.

Although it is not necessary that the CISG meet all of the criteria, it is imperative that it meets at least half of them. It must be noted that each criterion of success has relative values, which differs according to each jurisdiction. It is also recognised that state centred narratives are more likely to link success to state policy objectives than to non-state business narratives.[95]

### 4.4.1 The Civil and Common Law Divide

The typology adopted will be woven through the lens of the divide between the civil and common law, which is a constitutive element of legal culture and therefore important. It is important to assess the fit of the CISG as a combination of concepts of civil and common law systems. A successfully transplanted law should be able to function in any legal system irrespective of this divide.

The CISG suggests a bridge of the gap between the common and civil legal system by providing principles familiar. Accomplishing the feat of unification of divergent principles and concepts of different legal families belittles the assertion of a wide chasm and disjunction between the common and civil law systems and emphasises the convergence of laws, indicative of more similarities and more superficial dissimilarities between the legal systems. This supports the argument for convergence, that all systems would eventually reach similar natural results.

The concept of a *lex mercatoria*, which the CISG represents, has been described as a fallacy because of its broad conception which offers the possibility of including aspects of domestic law that may be acceptable to some trading partners but not to others.[96] This argument however does not consider that inherent in a trading agreement is compromise. Parties normally suggest what is best for them in any contract expecting to receive counter suggestions by the other parties. This process of haggling continues until there is a compromise. Thus, the question is not whether one party has a concept familiar to him, but whether there is satisfactory compromise on concepts or laws irrespective of whether it is familiar to one or both parties.

Therefore, that the CISG has concepts and laws familiar to one party is not problematic for trade, especially if one considers that there are concepts and laws familiar to the other party. What the CISG does is to provide a law that makes the process of compromising easier and quicker for the parties. But more importantly, for jurisdictions where parties in international

[95] ibid.
[96] Monica Kilian, 'CISG and the Problem with Common Law Jurisdictions' (2000) 10 Journal of Transnational Law and Policy 217, 220.

trade are usually the weaker bargaining parties, such as Nigeria, the CISG becomes more useful in providing a guide for a balanced compromise. The Convention also plays a vital role in that for countries where international trade is unstructured, it provides a balanced guide for traders not as knowledgeable about the international trade processes, especially in comparison with their foreign counterparts. The Convention as a guide puts them in a near equivalent stead with their counterparts, making sure that there is an opportunity for the party with minimal knowledge to contract on an equal basis.

### 4.4.2 Actual Movement of the Law and Ease of Movement of the Law

The first yardstick for measuring a successful Convention is whether or not it has been adopted, and the ease of adoption. Starting with this criterion does not imply the exclusion of, nor does it attribute less to other criteria, which show a deeper interaction of the transplanted law with the legal culture of the recipient jurisdiction. At this level, what has been accomplished is a formal transfer of rules. However, there are other processes of assimilation, which determine more how the law interacts with the society. In such situations, 'the transfer is exposed to the differences of episode linkages that are at the root of different legal world constructions'.[97]

This criterion is meaningful considering that legal transplant is the moving of a rule from one country to another...,'[98] irrespective of whether what is intended is statutory rules or otherwise.[99] In the first instance, it is important that the statutory rules are adopted before the interaction with culture can take place.

This is especially important if one considers that a key part of accepting any international treaty is the ratification, not just the signing of the treaty, and that a common issue with international treaties and conventions is the signing of treaties without actual domestication or ratification. Under contemporary treaty practice, signing a treaty typically does not make the nation a party to the treaty. Rather, nations become parties to treaties by an act of ratification or accession, either by depositing an instrument of ratification or accession with a depositary or exchanging instruments of ratification. The signing of treaties under this practice is at most an indication that the terms of the treaty are satisfactory to the executive institution in that nation charged with negotiating and signing treaties and does not constitute a promise that the nation will become a

[97] Tuebner (n 3) 19.
[98] Watson (n 1) 21.
[99] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111, 112.

party to the treaty.[100] Where laws are just signed but not ratified they stay in *limbo* and nations are not obligated to them. Transplantation of the CISG occurs when interested countries adopt it. The adoption by 83 countries is indicative of success on this criterion.

The second limb of this criterion is the ease with which the Convention is transplanted into any jurisdiction. Thus, whilst legal rules may obviously reflect a society's desires, needs and aspirations, a startling characteristic of legal rules is the *ease* with which they transplanted from one system to another.[101] This conclusion is based on the history replete with borrowings. Accordingly, the ease of transplanting laws is evidence that it is autonomous, possessing a life and vitality of its own, devoid of any relationship with legal structures, institutions and rules.[102] If law does not possess any such close relationship to legal rules, institutions and structures, it therefore makes it easy to borrow. If not, laws would transplant only with great difficulty and their power of survival would be severely limited.[103]

The ease of legal transplants is attributed to the fact that human societies both past and present have a lot in common, that legal rules institutions and structures may suit several societies and continue to exist through centuries.[104] Further where two legal rules are suited equally, one will be chosen in a rather arbitrary fashion because it already exists elsewhere and once accepted, there will be little reason for change.[105] Legal rules in addition to being part of a social structure also operate on a level of ideas. Particularly because the foreign rule was known to those with control over law making and they observed the apparent benefits, which could be derived from it.[106] This argument is plausible given that these borrowings occurred rather too frequently, and the similarities in laws, especially with respect to private international trade law show historically, that they have shared similarities, transcending state borders.

The CISG demonstrates such similarity because it represents a common set of rules conversant to different legal systems and is representative of the agreed commonalities amongst the business society. The CISG is non-ideological and important to economic development, making it easier to borrow, and copy from the analogous laws of other nations. The ease of transplantation of

[100] Curtis Bradley, 'Unratified Treaties, Domestic Politics, and the US Constitution' (2007) 48 Harvard International Law Journal 307.
[101] ibid, 313-314.
[102] ibid.
[103] ibid.
[104] ibid, 315.
[105] ibid, 313-314.
[106] ibid, 315.

the CISG shows that the drafters recognised that trade and commercial laws are harmonisable because of the similarities across jurisdictions.[107]

The ease of adopting the CISG is demonstrated in the number of ratifications. This ease is rooted to the history of the development of international trade law, particularly at the third and more contemporary stage of development,[108] which marked the development of widely accepted legal concepts, bringing a measure of unification.[109] The ease of transplanting the CISG was recognised by the UNCITRAL, before embarking on the drafting of the CISG that the rules of international trade exhibit remarkable similarity in all municipal jurisdictions. Thus, the CISG transcends the division of the world, between countries of free enterprise and countries of centrally planned economy and between the legal families of the civil law of roman inspiration and the common law of English tradition. This difference means that international trade law specialists of all countries have found without difficulty that they speak a common language.'[110] Such similarities exist because parties are free, subject to limitations imposed by national laws, to contract on whatever terms they agree to, and are bound by their contracts except in exceptional circumstances.

Considering the above, the CISG can be considered a success because of the actual movement to the jurisdictions and the fact that the similarities in trade law across various jurisdictions make it easily transplantable.

### 4.4.3 Transplant Operating in the Same Way as in the Origin Country (According to Its Purpose)

The measurement of success in this regard is the use of the imported legal rule in the same way as it is used in the home country, subject to local adaptations.[111] For purposes of the thesis, and the nature of the law being discussed, international law into domestic legal order, downward diffusion as opposed to transnational borrowing, the measure of success is not how it operates in the origin country, because international laws such as the CISG do not have any origin country. Therefore, the measure of the CISG on this criterion is based on the purpose for which it was

[107] UNGA Official Records, Agenda Item 88 Twenty First Session (New York, 1966) https://www.uncitral.org/pdf/english/yearbooks/archives-e/A-6396-E.pdf 50 accessed 9 April 2014.
[108] The first stage of the development of international trade law appeared in the mediaeval *lex mercatoria* a body of universally accepted rules and the second stage saw the incorporation of the rules into the municipal laws of the various national states which succeeded the feudal stratification of mediaeval society. ibid.
[109] ibid, 42.
[110] ibid.
[111] Kanda and Curtis (n 22) 9.

created, as intended by the drafters, and how it will function. This is the measure to assess the Convention as a transplanted law.

According to the UNCITRAL, 'the purpose of the CISG is to provide a modern, uniform and fair regime for trade transactions. The CISG seeks to introduce certainty in commercial exchanges and decreasing transaction costs'[112] by ensuring uniform interpretation and application of its provisions amongst member states. This is mandated in article 7 of the Convention, that regard must be had to the international character and the need to promote uniformity in its application and the observance of good faith in international trade. The second leg of the article states that questions concerning matters governed by the Convention are to be governed by its general principles and in the absence, regard is to be had to the rules of private international law.[113]

Measuring the success of the Convention on this criterion suggests a functional operation and achievement of its purpose because the CISG is a harmonised law, and the expectation of harmonised legal instruments is functional uniformity as opposed to perfection. Thus, the measure of success of the CISG in this regard is an appreciable degree of functionality operating in light of its overarching purpose.

The success of the CISG according to this criterion is the uniformity in its application. A filed transplant in this regard would be where an international law is not interpreted according to the general principles or in light of its purpose. This would be the interpretation and application of the CISG based on the subjective interpretative process, born of the interpreter's epistemological function in accordance with the domestic belief. This would particularly constitute failure where the transplant is an international law aimed at harmonisation to the exclusion of domestic law. This interpretation would completely defeat the purpose of the CISG, making it unsuccessful. However, this is perennial problem with uniform laws such as the CISG, which defeats the neutrality and uniformity sought by the Convention in governing international trade transactions.

Tuebner suggests that the question of success of a legal transplant is not whether there is repulsion or interaction with the host country, it is the fact that a legal transplant works as a fundamental irritation which triggers a whole series of new and unexpected events.[114] The minds and emotions of tradition bound lawyers become irritated but more importantly law's binding

[112] Cyril. Emery, '1980 - United Nations Convention on Contracts for the International Sale of Goods (CISG)' <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 10 October 2014.
[113] Articles 7 (1) and (2) CISG.
[114] Tuebner (n 17) 12.

arrangements are irritated. Whatever is the product of the irritation cannot be domesticated, it does not morph from something alien into something familiar but meanings are reconstructed with the consequent result that internal context undergoes fundamental changes.[115]

Although this form of reconstruction of the CISG by domestic actors does not necessarily imply success or failure, but simply an effect of the transplant, an extreme reconstruction of meaning of the CISG would defeat its purpose because it would deter from its harmonisation goal. If the Convention seeks to cater to international traders, any reconstruction will result in unfamiliarity with the concepts. Secondly because the principles of the Convention are a combination of those of countries from different legal families and levels of development, any reconstruction would most likely be a domestic interpretation, defeating the neutrality of the Convention and encouraging issues which the Convention sought to avoid, the dominance and cost of unfamiliar domestic laws.

From the above, where it is established that there is a pattern of reconstruction of concepts of the CISG based on domestic legal principle in the two jurisdictions to be examined, the CISG will be considered a failed transplant.

#### 4.4.4 The Fit with the Societal Needs and Legal Infrastructure of the Transplant Country (Provides a Solution)

The way the transplant meets with the needs of the recipient country is important in measuring its success. Unless a commercial code meets the needs of important parts of society, it may be difficult for that law to survive as a living working instrument. Despite the importance of any transplant, it must be congruent with societal values. Although oftentimes the need for the fit is greatly exaggerated because the existence of legal transplants undermines attempts to construct a sociology of law.[116]

Fit here can be divided into three; fit with the societal need, macro fit and micro fit. Fitting with societal needs is where the transplanted law solves a problem and fills a gap in the recipient jurisdiction. Accordingly, the process of legal reform and development becomes more important than the substance of transplanted rules. If the law triggers a reform process and contributes to the development of the country, it may be considered more successful than if the bare rules fit a

[115] ibid.
[116] Legrand and Munday, (n 89) 439.

certain idea or the existing framework. Thus, simply focusing on the supply side as opposed to the demand side is not as important.[117]

Where a society's need is law reform in a particular sector, the transplanted law may be used to challenge the previous laws. It may trigger an overhaul or update of the domestic law. This would mean success. Fit in meeting societal needs does not require a fit with the culture and identity of the recipient jurisdiction, because the law is there to serve a particular purpose, which is its overarching aim, rather than fitting with the culture of the society. The assertion by culturalists that law cannot be grasped by outsiders, and that the best that can be achieved is a taste of otherness thus becomes inconsequential. Particularly, where there is a gap, and no culture for the transplanted law to conflict with.

This is usually the case with international uniform projects in developing countries. In most cases, the law is not developed sufficiently, or there is a want of expertise in that area. Thus, the uniform laws provide a solution to the need, making secondary, the need for a fit with the culture.

The CISG aims to introduce uncertainty in commercial exchanges and decrease transaction costs. It aims to fill gaps in legal systems, which domestic laws cannot, because they cannot meet the needs of international business men in any jurisdiction since they are not global laws. Parties are wary of using laws of other jurisdictions because of the costs associated. In this sense, there is hardly any need for the CISG to fit with the law of any domestic jurisdiction since domestic laws do not govern such transactions, and any domestic law would incur costs.

Apart from the costs to the transaction, there are also economic costs on the jurisdiction. The domestic lawyers are deprived of monetary benefits which would ordinarily accrue were the laws of another domestic jurisdiction not chosen. The Convention thus fills the gap and needs of the society in this way by providing a law which is neutral, allows parties to save costs and allows benefits to accrue to the social actors.

Based on these aspirations, an approximation of the demands of the countries that have, or aim to adopt the CISG would be to achieve certainty in their commercial transactions and reduce costs. Where the CISG does these for the countries, it would be considered a successful legal transplant.

[117] Randall Peerenboom, 'Toward a Methodology for Successful Legal Transplants' (2013) 1 The Chinese Journal of Comparative Law 4, 12.

Conversely, the Convention would be considered unsuccessful where despite adoption, the intended change does not occur and the system remains the same. This was evidenced in the more recent revival of the law and development program which began in Central America and spread to Latin America as well as Eastern Europe.[118] These efforts did not lead to 'any real successes…since neither the independence, nor the efficiency of the courts improved significantly.'[119]

Macro fit is how well the transplanted law complements the pre-existing institutions of the political economy in the host country. Micro-fit on the other hand, is how well the imported rules complement the pre-existing legal infrastructure in the host country.[120] In this case, the CISG would be considered a success where it complements the laws and legal system in the jurisdiction governing international trade before its advent. This would usually be the domestic sales law of the jurisdictions or foreign laws opted for most frequently by parties. With respect to legal systems, it would either be the civil or common legal system.

In light of macro fit, the civil and common law divide becomes pertinent. Here, the nuances of legal traditions and how it affects the CISG in practice in these jurisdictions play a key role.

#### 4.4.4.1 Substantive Laws

The way the CISG complements the domestic law in each jurisdiction and the extent of their differences matter. In terms of substantive laws, there is convergence of solutions in commercial law. Particularly, disputes of international trade often bear much resemblance and have converged overtime towards principles and concepts much generally accepted in the international business environment. In light of this convergence, if there is no way around the distinctive provisions of the CISG and the domestic law of the jurisdiction, leading the actors to reject the Convention, it may result in categorising the CISG as a failed transplant.

#### 4.4.4.2 Using Statutes or Case Law Precedent

Whilst both civil and common law systems are politically legitimised sources of law, traditionally civil law countries are those in which this ideal has produced general codification of law. For common law systems, case laws are a key tenet of their legal tradition.[121] Codes have burgeoned in the common law legal systems, and this is a result of the growth of welfare state legislation

[118] Yves Dezalay and Bryant Garth 'The Import and Export of Laws and Legal Institutions: International Strategies in National Palace Wars' in David Nelken, *Adapting Legal Cultures* (Hart Publishing) at 245.
[119] Lawyers Committee for International Human Rights (1996) Halfway to Reform: The World Bank and the Venezuelan Justice System (New York, NY:LCHR).
[120] Kanda and Curtis (n 22) 9.
[121] Ugo Mattei and Luca G Pes, 'Civil and Common Law: Towards Convergence' in Keith E Whittington, R Daniel Kelemen, Gregory A Caldera (eds), *The Oxford Handbook of Law and Politics* Oxford Handbooks Online 273.

through almost the first half of the twentieth century.[122] The civil legal system also saw some growth in the use of case laws, which is a result of a need to adapt the rigid codes to new circumstances.[123] Despite this convergence, the role of case law in civil legal systems is still severely limited and as such, the absence of case laws as interpretive materials will not be missed.[124] For the common law jurisdictions, codes are considered the exceptions.

A measure of success of the CISG would be if the absence of precedent affected its use or transplantation in civil law countries because of their unfamiliarity with precedents, whilst it did not affect common law countries because of their familiarity with precedents.

Currently, the CISG has a collection of cases which are suggested can be used as precedent. As the precedents grew, there seemed to be a shift in trend in the use of the cases in the common law jurisdictions.

#### 4.4.4.3 Role of Judges

The role of judges in the common law tradition is still much more important sociologically than its civil law counterpart. This implicates that in the interpretation of the CISG, one may find the likelihood of judges in the civil legal system adhering more to the CISG than in the common law jurisdictions, where judges' roles are more important and suggests some discretion in performing their duties.

The role of judges becomes more significant given that in interpreting uniform international laws, there is never a genuinely disinterested judiciary, as a judge cannot be independent of his legal paradigm.[125] Thus, a rule has a meaning, which cannot be divorced from an interpreter's perspective. The ascription of a meaning is predisposed by the way the interpreter understands the context within which the rule arises. Accordingly, whatever meaning is given to a law is 'a function of an interpreter's epistemological assumptions which are themselves historically and culturally conditioned'.[126]

If interpretations of laws such as the CISG cannot be dissociated from culturally conditioned mentalities of the interpreters, it may be inferred that this is the reason for the suggestion that the CISG favours civil legal systems. However, this discountenances the fact that there are

[122] For instance the Uniform Commercial Code and the Model Penal Codes are examples see Guido Calabresi 1982 *A Common Law For the Age of Statutes* (Cambridge Massachusetts Harvard University Press, 1982) in ibid.
[123] Lasser M 1995 Judicial (Self-) Portraits: Judicial Discourse in the French Legal System Yale Law Journal 104, 1325-410 in ibid.
[124] ibid, 274.
[125] Kilian (n 96) 219.
[126] Legrand (n 99) 114.

concepts alien to the civil legal systems enshrined in the CISG and that common law concepts are being interpreted by civil law judges accordingly.

#### 4.4.4.4 The Role of Legal Doctrine

Academics are influential in making of the civil law tradition. For the civil lawyer, scholarly commentary to enacted legislation and the case law is still part of the unavoidable component of everyday work.[127] Whilst in common law traditions, academic commentary of the law plays an almost irrelevant practical and theoretical role.

Findings suggest that there is a degree of convergence in this area in the common law system. [128] As a result, there seems to be a bigger role for legal scholarship in the common law than there traditionally was.[129]

Whilst there has been a surge in the role of academics in common law systems, there has been a decline in civil legal systems because of the enactment of general codification, a proliferation of academic institutions, borne out of democratization of academic institutions thus, resulting in the decline in quality and therefore, in prestige and influence of scholarly writings.[130] This decline means that comparatively there is a convergence between the two legal systems.[131]

### 4.4.5 The Reaction to and the Level of Interaction with the Social Actors towards the Transplanted Law

One of the criteria for measuring the success of a legal transplant is the reaction of the key players towards the transplant. That is, how the users of the law, react to the law. These actors include lawyers, interpreters and businessmen. If an imported law is accepted by the actors in the recipient society, then it is considered successful. Acceptance here means familiarity with the law, usage of the law and willingness to use the law. Undeniably, there is an interplay between the reaction of some actors, commercial lawyers, to the correspondence of a transplanted commercial statute, with the needs of the society. Where a transplanted law is not perceived as relevant, lawyers will ignore it or meet business needs by drafting around it. Where there is a purposive and conscious effort by any of the legal actors not to engage with the law and therefore to avoid it, the transplant as in the above case would be considered a failed transplant.

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[127] JP Dawson, '*The Oracles of Law*' (Ann Harbour University of Michigan Law School, 1968) in Mattei and Pes (n 121) 274.
[128] For instance in the U.S G Gilmore, *The Ages of American Law* (London: Palgrave Macmillian, 1977) in Mattei and Pes (n 121) 274.
[129] Mattei and Pes (n 121) 274.
[130] Mattei and Pes (n 121).
[131] ibid.

For the CISG to be considered a success, it should meet most or all the criteria above. Whilst to define it as a failure, would be the contrary to the factors above. That is, blatant ignorance of the law, lack of usage of the law and lack of willingness to use the law. [132]

In measuring the reaction of the actors towards the imported law, the influence of their legal culture, with regards to their legal families is examined to see what influence the origin has on their interpretation or approach to the law. In this sense, whether the fact that they are of civil or common law origin affects their interaction with the law i.e., the source of law, the legal method, their styles and techniques, and institutions and procedure.

According to culturalists, any attempt to transplant laws would result in a different interpretation by the actors because they are participating in a different legal episteme. This means that the way of doing things does not change, or that the expected change resulting in the transfer of the law does not happen. Thus, the CISG would be a failed transplant where the interpretation is not according to what it ought to be. That the mentalities of the social actors do not accord with the Convention's essence because interpreters routinely adopt the homeward trend in interpreting it.

According to the culturalists argument, given that meaning invested in rules are culture specific attempts at unification are bound to fail and even cause harm. With regards to the CISG, the issue would be how the interpreters can distance themselves from culture specific interpretation i.e., interpretations based on legal family orientation. A civil law interpreter handling a common law concept through civil law epistemology and vice versa, will invariably lead to what may be considered a failed transplant.

### 4.4.6 The Duration of the Imported Law

The last criterion for measuring a transplant's success is the duration of the transplant. Thus, an unsuccessful transplant is one that is short-lived. Recognisably, there is no standard for measuring the length of time for a transplant to be considered successful in any jurisdiction. The simple measurement for success is if at a later time, when the transplant is examined, it is still being used in the jurisdiction. It would be considered a failed transplant if it is no longer being used.

An examination of transplants across history shows both successful and unsuccessful transplantation of law, [133] one may find that for laws that are considered successful it is

[132] See the classic story of unsuccessful legal transplant was with regards to the US Aid and the Ford Foundation. David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062; James Gardner, *Legal Imperialism*: *American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1981).

irrespective of whether it is voluntarily borrowed or imposed. For instance, in Indonesia,[134] despite the imposition of Dutch law, riddled with detestation by the subject population, subsequent conflicts with, and modification of the law when it clashed with the culture, overtime the legal culture has adjusted to it and even embraced it.[135]

The continued usage of the law despite imposition is evidence of success. This buttresses Watson's argument that most transplants, startlingly, have the capacity for a long life. And although with the passage of time modification may occur, however the alterations have limited significance.[136] Thus, irrespective of numerous attacks on transplanted laws they manage to survive in the recipient jurisdiction.[137]

There is also evidence of legal transplants becoming unstuck in the recipient jurisdictions. The law and development movement was proclaimed a failure within a short period of being transplanted.[138] This failure was attributed to the cultural differences between the western donor countries and the developing recipient countries.[139] The recent revival of the law and development initiative inclusive of the World Bank, on building institutions to train the judiciary, akin to that recognised in the US cannot also be considered a success.[140]

The case of the Anglo American trust in Russia through Edict 2296[141] also shows that a law can still come unstuck directly after transplantation, albeit in its early stages. The Edict attempted a legal transplant of the Anglo-American trust in situation when the new Russian company law was at its initial stages. Right from its early stages, the introduction of the full Anglo American trust failed because of the strong opposition of both the Russian Parliament and legal scholars against the presidential edict.[142]

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[133] As evidence, Alan Watson suggests the reception of Roman law into Western Europe.
[134] For instance, see the *Six Widows* Case, in the matter of *Choo Eng Choon, Deceased* (1908) 12SSLR 120, extracted in Leong Wai Kum (1990), 106, 275 in Andrew Harding, Comparative Law and Legal Transplantation in South East Asia' 207 in David Nelken, *Adapting Legal Cultures* (Hart Publishing, 2001).
[135] Singapore just left the unfettered application of English law only in 1993, 20 years after the UK joined the EU see Application of English Laws Act 1993. This is the same case in Thailand, Vietnam and Philippines.
[136] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal 313.
[137] ibid, 314.
[138] Trubek and Galanter, (n 132)1080.
[139] Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America,* (1995) 36 Virginia Journal of International Law 167, 229-230; Jane Kaufman Winn, *How to Make Poor Countries Rich and How to Enrich Our Poor,* (1992) 77 Iowa Law Review 899, 922.
[140] Yves Dezalay and Bryant Garth 'The Import and Export of Laws and Legal Institutions: International Strategies in National Palace Wars' in 245, in Nelken and Feest *Adapting Legal Cultures* (Hart Publishing, 2001).
[141] Edict No.2296, on Fiduciary Ownership (the trust) on 24 December 1993.
[142] Andrey Zhdanov, 'Transplanting the Anglo-American Trust in Russian Soil' (2006) 31 Review of Central and East European Law 179, 186.

The CISG will be considered successful if it is still being applied at the time of writing. Where cases are still being reported and articles still written, it would be indicative of continued engagement with the law thus, making it a living instrument.

## 4.5 The CISG in Germany and the United States

This section considers the experience of Germany and the U.S with the CISG based on the typology of a successful legal transplant provided above.

### 4.5.1 The CISG in the United States

#### 4.5.1.1 Actual Movement and Ease of Movement of the Law

The CISG became effective in the US on the 1st of January 1988, although it was ratified officially in 1986. Under the Supremacy Clause of the U.S. Constitution, the CISG, as a duly ratified treaty, is part of the "supreme law of the land."[143] It has the rank and effect of a federal statute and directly applies to all cases covered by it, in both state and federal courts.[144] The adoption of the CISG in the US makes it the default substantive law governing contracts for the sale of goods between a buyer and a seller from a different jurisdiction. The implication of signing and ratifying the CISG is that its provisions qualify as American federal law, thereby pre-empting state law. This means that unless specifically excluded, the CISG—and not the UCC—is applicable to any contract that falls within its scope. Thus, buyers and sellers located in the United States are faced with two legal texts, one for the domestic, and the other for international contracts for the sale of goods.

The adoption of the CISG in the US meets the first criterion of a successful transplantation. This is particularly important, given that the US has a pattern of signing onto treaties without ratifying them.[145] The CISG was however signed and ratified by the US.

The consent of the Senate without significant objections to the ratification of the CISG when requested by the president is indicative of easy transplantation.[146] It was also recommended and

[143] Article VI § 2 of the Constitution of the United States of America.
[144] While this is true only for so-called self-executing treaties (see *Foster and Elam v Nelson.* 27 U.S. 253 [1829]). It is generally accepted that CISG falls into this category.
[145] For examples of such treaties, see Private International Law' <http://www.state.gov/s/l/c3452.htm> (US Department of State) accessed 11 November 2014.
[146] *President's Message to the Senate Transmitting the Convention,* 19 Weekly Comp. Pres. Doc. 1290 (September 21, 1983) in Jorge Barrera Graf, John Honnold and the Vienna Convention on the International Sale of Goods http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4598&context=penn_law_review accessed 11 November 2014 945.

approved by the American Bar Association.[147] The ease of adopting the CISG at the time was because of its perceived usefulness for trade transactions.

#### 4.5.1.2 Transplant Operating According to Its Purpose

The purpose of the CISG is to provide a uniform and fair regime for contracts of international sale of goods. To ensure certainty, Article 7 provides that regard must be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade. The above supports uniform interpretation and application of the CISG's provisions.

One effect of legal transplant is the likelihood of attaching old and familiar meanings to new rules and attaching new meanings to old institutions. The effect of this is a production of a different set of rules and institutions distinct from the original transplant. In order for the CISG to be considered successful, there is a need for autonomous interpretation by actors. The US courts however disregarded this notion in their interpretation of the CISG in the early stages.

At the preliminary stages of the adoption of the Convention in the US, the courts, at loss regarding what to make of the Convention applied their domestic understanding to the interpretation of concepts of the CISG. This attitude is known as homeward trend, the 'tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained unto the international provisions of the Convention'.[148]

Several cases demonstrate this. For instance, the way *Raw Materials Inc v Manfred Forberich Gmbh*[149] was decided showed the way in which national courts disturbingly misuse domestic sales law to interpret and apply a treaty with international reach. Here, the courts recognised the CISG as the applicable law but endorsed the plaintiff's general assertion that case law on U.S domestic sales law, Article 2 of the UCC could be used for guidance in applying the CISG, where the relevant provisions track that of the UCC. The court particularly declared that the case law interpreting the UCCs excuse provision S 2-615, provides guidance for interpreting Article 79 of the CISG since it contains similar requirements as those set forth in the Convention. Based on the

[147] 1981 Summary of Action Taken by the House of Delegates of the American Bar Association 25 in Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 Ohio State Law Journal 265-305.

[148] Joseph Lookofsky and Harry Fletchner 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?' (2005) 9 The Vindobona Journal of International Commercial Law & Arbitration 199.

[149] U.S. [Federal] District Court, Northern District of Illinois.

defendant's consent, the court went ahead to apply the UCC cases to the CISG and this marked the end of any mention of foreign case commentaries and cases on the CISG.

The effect of any homeward trend interpretation of the CISG violates the mandate of Article 7 of the Convention. Although this case has been criticised heavily, problems of this nature are attendant with transplanted laws and unless, and in situations where grave injustice is carried out and the purpose of the Convention is not achieved, it may not necessarily be considered a failed transplant.

Thus, if justice is efficiently carried out to the detriment of the mandate of the CISG, it can be considered a process of adaptation. Given this, although the *MCC-Marble* case[150] has been hailed by commentators as a standard to aspire to by courts, particularly courts in the US, in interpreting the CISG, Cross has criticised such accolades for the decision in adherence to Article 7(1) of the CISG. She argues that such decision emphasizes uniformity at the expense of other important considerations. Anyways, a main consequence of any unification project, which may be unavoidable, is the homeward trend. Consequently, the "categorical condemnation" of the concept by scholars may be unwarranted.[151]

Cross suggests that the homeward trend should also enhance the CISG's legitimacy and acceptability over the long term,[152] because of the paucity of cases in the U.S. She suggests that while the dearth of cases may be due to factors such as the prevalence of arbitration or the possibility that the applicability of the CISG is unknown or ignored by U.S courts resolving transnational contractual disputes, another possible factor is that the U.S parties and their attorneys engaged in such disputes choose to opt of the CISG. This according to Walt is a problem resulting from the "novelty" of the Convention, which generates uncertainty because transactors will generally avoid applying a law where they lack information upon which to base reliable estimates about prospective outcomes under the law. This in turn hinders the success of the uniform law.[153] He concludes that resort to domestic law principles, both with respect to filling gaps in the Convention and interpreting ambiguous language should limit the uncertainty

[150] United States 29 June 1998 Federal Appellate Court [11th Circuit] (*MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino*).
[151] Karen Halverson Cross, 'Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered' (2007) 68 Ohio State Law Journal 133.
[152] ibid.
[153] Steven Walt, 'Novelty and the Risks of Uniform Sales Law' (1999) 39 Virginia Journal of International Law 671, 687–688.

generated by novelty and therefore enhance the likelihood that parties ultimately will utilise the Convention.[154]

As seen from the above, domestic actors may infer or suggest meanings different to what the Convention intended whilst interpreting the CISG. This essentially defeats the purpose of the Convention and creates unintended consequences, concurring with Teubner's theory, that what is produced will be alien and unfamiliar and in most cases cannot be transplanted, especially if it is glaringly so. Although there is a probability it may not be transplanted, there is also the possibility of righting the unintended interpretation through subsequent judgements. Where one judge interprets the CISG, producing unintended consequences, another judge can correct the misnomer by creating the intended consequences. This is just a matter of time, and can be considered the adjusting period of the CISG.

The transplantation of the CISG in the US evidences this. At first when the CISG was adopted, most of the US Federal Courts based their interpretation of the Convention's concepts on the guidance of the UCC and the cases that apply to the US domestic sales and contract law, asserting that UCC case law can guide them in interpreting the Convention.[155] However, in subsequent cases the judges recognised the importance of interpreting the CISG autonomously. In *St. Paul v Neuromed Medical Systems*,[156] for instance, it was stated that 'the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language', a statement incompatible with the homeward trend. In *MCC-Marble*,[157] the need to refrain from reading domestic concepts into the CISG was addressed more directly, that 'courts applying the CISG cannot [...] substitut[e] familiar principles of domestic law when the Convention requires a different result.' This line of reasoning constitutes the basis for other US court decisions too, such as *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*,[158] stating that 'UCC case law is not *per se* applicable to cases governed by the CISG'[159] and *Calzaturificio Claudia S.n.c. v Olivieri Footwear Ltd.*,[160] where it was expressly stated that 'although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC's writing

[154] ibid.
[155] See eg *Macromex S.r.l. v. Globex Intern., Inc.*, U.S. Federal District Court, Southern District of New York, 16 April 2008, 2008 WL 1752530 (S.D.N.Y.); *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. Federal District Court, Minnesota, 31 January 2007.
[156] U.S. Federal District Court, Southern District of New York, 26 March 2002.
[157] *MCC-Marble* Case.
[158] U.S. Federal District Court, Southern District of New York, 10 May 2002.
[159] ibid; for the statement referred to in the text, see most recently *Hilaturas Miel, S.L. v Republic of Iraq*, U.S. Federal District Court, Southern District of New York, 20 August 2008, *Orbisphere Corp. v United States*, U.S. Court of International Trade, 24 October 1989.
[160] *Cahaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*, U.S. Federal District Court, Southern District of New York, 6 April 1998.

requirement for a transaction for the sale of goods and parole evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC case law in construing contracts under the CISG.

#### 4.5.1.3 The Fit with the Societal Needs and Legal Infrastructure of the Transplant

In order to understand how the CISG meets the societal needs and the legal infrastructure of the US, this section examines the domestic concepts of the UCC with those of the CISG to see the discrepancies and how the courts resolved them.

**a. The CISG and the UCC**

As a result of the influence which the UCC had on the drafting of the CISG, some authors have argued that their basic concepts such as the concept of good faith and trade usages are similar in approach and content and therefore, interpretational inspiration should be drawn from the UCC when faced with similar issues in the USA.[161] It is true that a comparison of the provisions of the UCC and the CISG may have some similarities, however, it does not necessarily resemble Article 2 of the UCC either in scope or substance.[162] Thus, there is the danger of wrong interpretations using the UCC to interpret the CISG.[163] The above arguments were adopted by the American businessmen and the judges in the application of the CISG, leading to a flawed analysis of cases.[164] They essentially failed in holding up the objectives of the CISG, uniformity through autonomous interpretation and resorting to domestic law as the last option.

The following section examines the compatibility of the CISG with the concepts fundamental to the common law UCC.

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[161] Isaak Dore and James DeFranco, 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' (1982) 23 Harvard International Law Journal 49; Michael Kabik, 'Through the Looking-Glass: International Trade in the Wonderland of the United Nations Convention on Contracts for the International Sale of Goods' (1999) 9 International Tax and Business Law 408.

[162] For differences see David Frisch, 'Commercial Common Law, the United Nations Convention on the International Sale of Goods and the Inertia of Habit' (1999) 74 Tulane Law Review 495, 504.

[163] Franco Ferrari, 'The Relationship between the UCC and the CISG and the Construction of Uniform Law' (1995) 29 The Loyola of Los Angeles Law Review 1021.

[164] For instance see *Beijing Metals & Minerals Import/Export Corp. v American Bus Ctr.*, Inc., 993 F.2d 1178 (5th Cir. 1993). CISG, art. 8(3). Where the court failed to distinguish the American Parole Evidence rule and Article 8(3) of the Convention that allows a court to give due consideration to the negotiations of the parties.

### 1. Parol Evidence Rule

The Parol evidence rule states that oral evidence may not be adduced to, added to, contradict or controvert a written document. It means that where there is a written contract, a court may not admit any oral evidence to contradict the terms of the written contract. It has been suggested that Article 8(1) (2) and (3) eliminates the parol evidence rule,[165] which opens the door for prolonged litigation, since there is a significant impact on the summary judgment rule.

A combined reading of the provisions of Art 8(1) and Art 8(3) of the CISG shows that it promotes open ended reliance on parol evidence as well as parties' behaviour in all circumstances of the contract.[166] On the other hand, the provisions of §2-202[167] and §1-205 of the UCC implicate that any oral agreement made by parties prior to the conclusion of the agreement when introduced for evidence purposes is not valid.

The rejection of the parol evidence rule by the CISG became a problem for the courts in America since scholars believe that the provision of article 8(3) of the Convention overrides any domestic parol evidence rule.[168] This contention and reluctance to adopt the mechanisms of the CISG was evidenced in the case of *Beijing Metals and Minerals v American Business Centre.*[169] The lower court excluded the testimony about oral agreements under the state's "parol evidence" rule. The appellate court declined to resolve the dispute about whether CISG or state law applies to the parties' contract because it concluded that to do so would be unnecessary to its decision. Nevertheless, the court states expressly that the parol evidence rule "applies regardless" of whether CISG applies or not.[170]

This decision has been criticised because it carelessly dismisses the obvious application of the CISG and its rejection of the parol evidence rule. However, prior to this decision, the court in *Filanto S.p.A v Chilewich International Corp*[171] addressed the differences between the UCC and the CISG on the issues of offer and acceptance and the battle of the forms.[172] After engaging in a

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[165] John P McMahon, 'Applying the CISG: Guides for Business Managers and Counsel' 'Electronic Library on International Commercial Law and the CISG' <http://www.cisg.law.pace.edu/cisg/guides.html> accessed 29 April 2015; Kilian (n 96) 231.

[166] Henry Gabriel, *Practitioner's guide to the Convention on Contracts for International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)* (Oceana Publications Inc, 1994).

[167] § 2-202. The UCC and the CISG are similar here, only to the extent that they both accept that the express words of the contract supersedes all other interpretation.

[168] Henning Lutz, 'The CISG and Common Law Courts: Is there really a Problem? (2004) 35 Victoria University of Wellington Law Review 711,719.

[169] *Beijing Metals Case.*

[170] ibid.

[171] 2d instance Circuit Court of Appeals, 984 F.2d 58 (2d Cir.).

[172] See 789 F. Supp. at 1238.

thorough analysis of how the CISG applied to the dispute before it, the district court tangentially observed that article 8(3) "essentially rejects . . . the parol evidence rule."

This statement evidences recognition of the CISG's rejection of the rule. Thus, suggesting that courts are averse to the Convention because it does not support the principles, which they are familiar with, may not be very true since case show judges alluding to it in the first instance, recognising the Convention's position.

It is suggested that anybody looking for the principle of parol evidence should not look to the *Beijing Metal* case without considering the court's decisions in *MCC-Marble.*[173] Here, the issue before the court was whether the parol evidence rule of domestic law applies to the interpretation of a contract governed by CISG. The US Court of Appeal rejected the opinion in the *Beijing Metals* as being not particularly persuasive on this point and reversed the District Court's judgment holding that article 8(3) displaces the parol evidence rule even though its role is not expressly stated in article 8.[174]

The *MCC-Marble* decision came six years after the decision in *Beijing Metals,* which is indicative of more understanding and applicability of the CISG in the U.S. This case thus supports the argument against habits as an excuse for wrongful application of the CISG. Even if habits were a factor to be considered as affecting the CISG in the U.S, those habits eventually decline. Particularly with the understanding by judges that habit should not be a reason for the perversion of justice.

Indeed, the American courts have in recent times, recognised the CISG's rejection of the Parol Evidence Rule. In 1998, the Federal District Court in *Mitchell Aircraft Spares v European Aircraft Service*),[175] confirmed the rejection of the parol evidence rule in the CISG. More recently, in the 2011 case *Cedar Petrochemicals inc. v Dongbu Hannong Chemical Ltd*[176] where the court, stated that 'the CISG does not merely lack a parol-evidence rule, it commands courts to consider extrinsic evidence that illuminates the parties' intent'.[177] While there is some scholarly debate as to whether Article 8(3) rejects the parol evidence rule or is confined to interpretation questions,[178] there is no

[173]*MCC-Marble* .
[174] ibid.
[175] United States 27 October 1998.
[176] United States 28 September 2011 Federal District Court [New York].
[177] ibid.
[178] Ronald Brand and Harry M Fletchner, 'Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention' (1993) 12 Journal of Law and Commerce 239, 251-252.

doubt that CISG does not recognise the parol evidence rule as known.[179] However, because that court viewed CISG through its domestic lens, it provides a distorted image,[180] suggesting a failed transplant.

There are still ways to ensure compatibility, through the insertion of "merger" or "integration clauses" in the written contract, which serves as evidence to provide express manifestation of the intention that writing constitutes the sole and exclusive statement of their agreement.[181] This is supported by Article 6 of the Convention. The effect of the merger clause has also been recognised by the CISG Advisory Council stating that 'the parties may wish to assure themselves that reliance will not be placed on representations made prior to the execution of the writing. The Merger or Entire Agreement Clause has been developed to achieve certainty in this regard'.[182]

The above shows that parties can adopt the merger clause in their contracts, governed by the CISG, and still have the parol evidence rule apply. A better approach suggested by Murray, is by explicit reference to the parties' intention to derogate from Article 8(3) through Article 6, since there is some doubt about the implied derogation of CISG terms under article 6 and it may then prove insufficient for the parties to just rely on article 6 without specifically mentioning article 8(3).[183]

The solutions above show that the CISG is clearly compatible with one of the core common law concept of the UCC, the parole evidence. To this extent, the CISG cannot be considered a failed transplant.

### 2. The CISG and the Statute of Frauds (SOF)

The American Statute of Frauds lays down rules that prescribe formalities for certain categories of contracts. Given its function to cure, or at least circumvent deficiencies of the law of evidence and common law, it is important for American businessmen.[184]

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[179] In *Filanto* (n 107) the opinion states, 'It should be noted that . . . the Convention essentially rejects both the Statute of Frauds and the parol evidence rule'.
[180] John Murray, 'The Neglect of CISG: A Workable Solution' (1998) 17 Journal of Law and Commerce 365.
[181] John Murray, 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 17 Journal of Law and Commerce 11.
[182] CISG Advisory Council 'Opinion No 3', http://www.cisgac.com/default.php?ipkCat=145&sid=145#26 accessed 3 April 2013.
[183] Murray 2 (n 181).
[184] Joseph Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form' (1974) 43 Fordham Law Review 2.

The implication of Article 11 of the CISG is that it eliminates any mandatory requirement for enforcement based on any domestic requirement of form.

The counterpart to article 11 is found under §2-201 of the UCC which states that contracts 'for the sale of goods for the price of $5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against which enforcement is sought or by the party's authorized agent or broker…'

A comparison of these two provisions reveals that the CISG embodies a more updated version of current legal practice because the SOF prescribes a method of contracting which is not in conformity with the way business and transactions of that sort are normally carried out in recent times. However this is only with respect to some provisions of the statute rather than all of them.[185] Although the SOF was provided to ensure that parties write down their agreements and take them more seriously, ensuring matters are approached less hastily, it has been criticised for not extending its application to other categories of contracts. Another reason for the SOF was to deter fraud by preventing parties from lying in a court about a contract without it being written down. This function, while preventing one type of fraud makes it possible for another type, and causes some injustice by allowing defendants to get out of promises made which should in all fairness, be enforced by allowing them argue that the promise was not in writing.

Regarding the SOF, there is really no way for parties of mitigating or excluding the provision of the CISG, which does not have any restriction on the formality of contracts. Although there are provisions of the CISG allowing a country to opt out of article 11 and apply its domestic legislation, which requires putting contracts in writing, such as Article 12, this option will not avail the US because that declaration has not been made. This implies that contracts between the US and foreign parties will not be subject to the SOF unless the non-U.S party has its place of business in a country that has opted out of article 11.[186] Where the CISG applies, parties will have to keep in mind that there are no restrictions regarding any class of contract either written or oral.

[185] The University of Alberta Edmonton, Institute of Law Research and Reform Alberta Background Paper No. 12 'Statute of Frauds' (March 1979) http://www.law.ualberta.ca/alri/docs/rp012.pdf accessed 4 April 2013.
[186] The American Law Institute and the National Conference of Commissioners on Uniform State Laws, Revision of Uniform Commercial Code Article 2 - Sales (National Conference of Commissioners on Uniform State Laws, 1 May 1998).

At first, the courts misapplied Article 11 of the CISG. For instance in the majority opinion in *GPL Treatment, Ltd. v Louisiana-Pacific Corp,*[187] where the courts overlooked the clear applicability of the of the CISG under 1(1)a, was based on seller having a place of business in Canada and buyer's place of business in the U.S. They however applied Section 2-201(2) of the UCC. Whilst the court concluded that communication sent by the buyer to the seller after the alleged oral contract was entered into qualified as a confirmation of the oral contract which then became enforceable against the recipient who did not object to its content, the dissenting judge stated that the application of the CISG would enable the seller to enforce the oral agreement since Article 11 abolishes the SOF requirement.[188]

The U.S courts in contrast to the above decision have recognised the excludability of the SOF. In *Calzaturificio Claudia* the courts recognised the applicability of CISG under the "places of business in different contracting states" rule. Applying Article 11 of the CISG, the court rejected Buyer's argument that in the absence of a written contract or any purchase order setting forth the terms of the parties' sales transaction no enforceable agreement existed between Buyer and Seller. The court concluded, "unlike the U.C.C., under the CISG a contract need not be evidenced by writing . . . and is not subject to any other requirement as to form.[189] Also as stated by the Federal District Court in *Fercus, S.r.l. v Mario Palazzo, et al.* 'Unlike the U.C.C., the Statute of Frauds does not apply to the CISG' although the court went on to hold that the CISG did not apply since there was no binding contract between the parties.[190]

The continued existence of the SOF in the UCC has been questioned, with abolition suggested for a number of reasons; for the CISG's lack of recognition of it, that it should be repealed or revised.[191] The only reason it exists in the UCC is simply because Karl Llewellyn 'was enamoured of it.'[192] The suggestion to abolish the SOF in the UCC is supported by the author, since the original reasons for the SOF no longer exist and there are no new reasons for the SOF in cases of contract.

The CISG can be considered successful because it presents a more useful and version of current legal practice, than what is currently embodied in the UCC, and is accessible to domestic actors Thus it provides a way for international transactors not to be bound by the archaic provision of

[187] Louis Del Duca, 'Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions In Civil And Common Law Countries' (2006) 25 Journal of Law and Commerce 133, 135.
[188] ibid.
[189] *Calzaturificio.*
[190] U.S. District Court, Southern District Court of New York (8 August 2000).
[191] American Law Institute Conference (n 186).
[192] Karl N Llewellyn, 'What Price Contract? An Essay in Perspective' (1931) 40 The Yale Law Journal.704, 747.

the UCC. In light of the provision of a better and more updated law useful in modern business for American businessmen, the perceived incompatibility of the CISG with this provision of the UCC becomes irrelevant.

### 3. The CISG and Firm Offers

The common law position on offer is that they are generally revocable even where the offeror has made a promise to keep it open unless the offer is supported by consideration or is under seal. Article 16 of the CISG on the other hand provides that

1. "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

2. However, an offer cannot be revoked;

    a. If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

    b. 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".

Article 16 of the CISG was drafted to bring a balance between the Civil and Common legal system principle on offer and so, it incorporates elements from both systems. The first paragraph of the CISG article 16 suggests that offers made under the Convention are freely revocable, provided acceptance has not been dispatched. This gives the offeror the freedom to revoke the offer and opportunity to take his business elsewhere until the offeree accepts or where the offeree has failed to make acceptance.[193] Although this position seems to tilt towards the common law principle of revocation, there are no implications regarding the point in time when a contract is deemed concluded.[194] Moreover, paragraph one is just the starting point and must be read in conjunction with the subsequent paragraphs which then bring the implications and results closer to the principle of revocability under the civil law systems, which principles are stringent.[195]

Under the American UCC, the position is that a merchant can make an irrevocable or a firm offer without the need for consideration. However, this is qualified by certain criteria; the offeror

[193] Joseph Lookofsky, *Understanding the CISG* (3rd ed, Kluwer Law International, 2008) 53-54.
[194] ibid.
[195] ibid, 54.

must be a merchant; the offer must be in signed writing; the offer must contain an assurance that it will be held open and the period of irrevocability must not be longer than three months.

Unlike the UCC, the CISG does not require that the offeror be a merchant, neither does it make writing a criterion and there is no limit to the period of irrevocability. The Convention however allows the offeror to revoke by expressly stating it. So, where an offeror states that the offer is irrevocable, he cannot subsequently revoke it before the written time, even where he changes his mind. Under the UCC, precise and clear wordings are fundamental parts of irrevocability so much so that if an offeror states that "this offer will expire June 1" or if he states that 'this offer will be open until June 1" it may not be considered clear enough. In the first case, it may be regarded as merely establishing an expiration date for the offer and in the second case, may either be interpreted as an assurance that the offer will remain available for acceptance until June 1 or that it will not expire until June 1. However, under the CISG any of the two cases mentioned above will suffice.[196]

The effect of a fixed time of acceptance under Article 16(2)a has generated arguments amongst scholars. These contentions are not limited to scholars now, but also existed at the time of drafting of article 16 of the CISG. Despite the disputes over the language, UNCITRAL approved the language that an offer cannot be revoked if it indicates, whether by stating that a fixed time for acceptance or otherwise that it is irrevocable.'[197] While some delegates argued that the revision reflected the view that the ultimate test was the interpretation of the offer rather than the use of a specified expression, others argued that it represented an irrevocable offer. In light of the arguments made by delegates from different jurisdictions, Honnold suggests that in order to give effect to the two decisions one may conclude that the reference in an offer to a fixed time for acceptance creates a presumption of irrevocability until the stated date. But however, this presumption may be rebutted by showing that an offer in its full setting Art 8(3) would be understood to refer to the automatic expiration of the offer.[198]

Schlechtriem on the other hand suggests that the offeror can also declare the offer to be irrevocable and does not need to do this expressly, but rather his intent to be bound can be deduced from the circumstances relevant to the interpretation of the offer and particularly from

[196] William Dodge, 'Teaching CISG in Contracts' (2000) Journal of Legal Education 72-94.
[197] Art 16 (2) a CISG.
[198] John Honnold, *Uniform Law for International Sales*, (3rd ed. Kluwer Law and Taxation Publishers, Deventer, 1999) 159, 162-163.

his setting a fixed period during which the offer is open.[199] Lookofsky suggests that there is no one correct interpretation since the offeror is recognised as the master of the offer under the CISG, thus his offer should be interpreted in his own terms.[200]

In order to avoid any snag, since two interpretations may be made out of the issue of acceptance, it has been suggested that common law lawyers, when drafting provisions of contracts to be governed by the Convention should ensure that their meaning regarding the irrevocability of an offer is clear.[201]

Another aspect of article 16 is the offeree's action based on his reliance on the offer. The CISG recognises that an offer may be considered irrevocable if it was reasonable for the offeree to rely on the offer as being irrevocable.[202] This principle applies even if there was no express indication of irrevocability under paragraph 2(a).

This approach has support in domestic law because some civil law legal systems hold offers to be irrevocable for the period needed for the period until the response while other legal systems hold that reasonable reliance either bars revocation or makes the offeror liable in tort for damages.[203] There is some semblance between the principle of reliance on the offer and the doctrine of promissory estoppel under the American domestic law principle of promissory estoppel although there is no express foreseeability required from the offeror and no express requirement that the offeree's reliance be detrimental.

It has been asked whether section 2-205 permits the finding that an offer is irrevocable because of the offeree's reliance or whether it displaces any case law applying promissory estoppel so that it cannot be introduced through section 1-103?[204]

Initially, the courts were not very clear on the applicability of the doctrine of estoppel even though the Restatement (First) of Contracts contained a promissory estoppel doctrine stating that the promisee's reliance on a promise could make the promise enforceable despite the lack of consideration. This was because section 35 provided that an offer could be terminated by the

[199] Peter Schlechtriem, 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' (Manz, Vienna 1986).
[200] Lookofsky (n 193) 54.
[201] Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 Law Quarterly Review 201, 214 and ibid; Orkun Akseli, 'Editorial remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 16 of the CISG' Guide to Article 16' <http://www.cisg.law.pace.edu/cisg/text/peclcomp16.html#er> accessed 30 April 2013.
[202] Article 16(2)b.
[203] Honnold (n 198).
[204] Henry Mather, 'Firm Offers Under the UCC and the CISG' (2000) 105 Dickinson Law Review 31, 36.

offeror's revocation except as provided in sections 45 through 47 but the promissory estoppel doctrine was contained in section 90.[205] In later times, the courts in the landmark case *Drennan v Star Paving Co.*[206] stated that even if there was no explicit promise not to revoke the foreseeability of the offerees reliance on an offer created an implied promise by the offeror not to revoke. Where the implied promise lacked consideration, it could be enforced under the promissory estoppel doctrine.[207]

The last sentence of comment 2 to section 2-205 states that when oral offers are relied upon, they remain irrevocable under the article since a central part of the article is the necessity of writing. It has been asked if this is to be interpreted to mean that oral offers cannot be made irrevocable by S2-205 or if it means the only way to render an offer lacking consideration is through complete compliance with S2-205?[208] Certain cases have been cited more recently to suggest that support can be found not to exclude the application of promissory estoppel. In these cases, although the court did not expressly hold that an offer not complying with S 2-205 can be made irrevocable under promissory estoppel theory, they approved the use of promissory estoppel doctrine in the sale of goods transaction.[209]

American authors are divided on the issue of estoppel. While some argue that where the requisites of S2-205 are not met, it should not be taken as preventing offerees from invoking promissory estoppel or restatement doctrine[210] with support from others arguing that S2-205 should not be read to preclude the application of promissory estoppel and that the section was not intended to deal with the revocability of offers from which consideration is given or that for which a substitute for consideration is present.[211] Gibson argues to the contrary that courts have misused the promissory estoppel doctrine since the idea espoused by Karl Llewelyn, the primary drafter of the UCC Art 2 is not intended to include the promissory estoppel doctrine especially in light of his desire for a formal authentication of firm offers.[212]

The CISG provides more support for an offer being irrevocable as a result of reliance by the offeree than the UCC, however a way of applying this irrevocability under the UCC is still

[205] See *James Baird Co v Gimbel Bros*., 64 F. 2d 344 (2d Cir.1993)
[206] Mather (n 204) 33-34.
[207] 333 P.2d 757 (Cal. 1958).
[208] Mather (n 204) 37-38.
[209] See *E.A Cronis Associates v M Gordon Construction Company* 216 A.2d 246 (N.J. Super. Ct. App Div. 1996; *Ivey's Plumbing & Elec . Co. v Petrochem Maint.*, Inc 463 F. Supp. 543 (N.D. Miss.1978)).
[210] Mather (n 204) 38-39.
[211] ibid.
[212] ibid.

possible especially in light of the cases examined above, where the promissory estoppel principle was used in sales of goods cases.

### 4. The CISG and the Doctrine of Consideration

Article 29(1) of the CISG states that 'a contract may be modified or terminated by the mere agreement of the parties'. This provision of the CISG eliminates the consideration requirement under the common law and the cause requirement under the civil law system. The position of the Convention departs from the common law doctrine of consideration where something of value, flowing from the promise, in the eye of the law must be given for a party to be entitled to bring an action.[213] The drafting history of the CISG reveals that working parties were particularly adamant about including the doctrine of consideration, because consideration was considered a barrier to enforcing agreements. It was then agreed that it should be considered one of the general principles pursuant to Article 7(2).[214] Although this was the position in the US, one of the changes in the common law of contracts effected by the UCC in the already existent duty rule was permitting the modifications of contracts made in good faith to be enforceable without consideration,[215] this is provided in § 2-209(1) UCC.

Considering that the Convention does not explicitly mention consideration, one may think that it favours the principle of the civil system to the disadvantage of the common law system. However, this is not the case as the Convention also eliminates the cause requirement under the civil legal system.

The purposeful omission of the doctrine of consideration from the CISG has not been without consequences on its application by the courts. The provision of article 4(1), which excludes the application of the Convention to validity issues, has provided a means to find consideration in contracts, through national laws. This problematic issue of incorporating consideration can be seen in the interplay between the article 4(1) of the CISG and the resort to domestic law. As predicted by Winship who envisaged the likelihood that common law judges, unfamiliar with civil law methodology of drawing out gap filling, will be quick to find gaps in the Convention and fill it with domestic laws. More importantly, voicing his concern that 'a judge so disposed

[213] *Currie v Misa* (1875) LR 10 Exch 153 at 162.
[214] Honnold (n 198).
[215] See the amendment of the UCC 1977.

may find issues of validity much more readily than anticipated by the drafters and thereby turn to national solutions'.[216]

Despite the warning, the courts still found a way to fall into what has been termed a 'black hole…'[217] Certain domestic legal systems, for instance, the American state law system provides both delictual and contractual remedies for abuses like misrepresentation and also allows the coexistence and competition of claims grounded in tort to compete with contract-based claims. In other jurisdictions however, where a contractual remedy is applicable to a case, the competing claim in tort is trumped.[218]The implication of this is that within the international sales context is that an interpreter might allow a domestic theory of recovery to compete with a CISG-based claim or hold that the CISG has priority over the domestic remedial rules.[219]

In *Geneva Pharmaceuticals*[220] an American plaintiff brought a case against a Canadian defendant. In considering the Buyer's various CISG and domestic law claims, the court distinguished between intentional and negligent torts and held that the plaintiff's negligence based torts were not covered by the Convention while the business tort claims for tortuous interference with contract and business relations were not. More importantly, the court allowed the plaintiff to rely on the domestic law principle of promissory estoppel to support his equitable claim, that although the sales contract was not supported by any consideration, it was still valid and legally binding under the New Jersey domestic law. The court found legitimacy for this under Article 4(a) of the Convention, since consideration was a validity issue, domestic law and not the Convention will govern it.

The better position would have been for the judge to examine properly, the position of the CISG with regards to consideration. If this had been done, the court would have found that the Convention just like the domestic law, does not does not make consideration a criterion for the modification of contract under Article 29.[221]

Despite the position of the Judge in the above case, does this serve as an obstacle for common law judges to embrace the CISG? It is the author's opinion that the answer is an emphatic no. This case in the U.S should not be considered representative of the attitude of the courts

[216] Peter Winship, 'Commentary on Professor Kastely's Rhetorical Analysis' (1988) 8 Northwestern Journal of Law & Business 623-639.
[217] ibid.
[218] Joseph Lokoofsky, 'CISG Case Commentary on Preëmption in *Geneva Pharmaceuticals* and *Stawski*' (2003) Pace Review of the Convention on Contracts for the International Sales of Goods 115-122.
[219] ibid.
[220] *Geneva Pharmaceuticals* (n 94).
[221] Lutz (n 168)723.

towards the elimination of the requirement for the doctrine of consideration by the CISG or even the general attitude of the common law courts towards the CISG. In fact, the courts in the civil law system have been guilty of the same thing. The German District Court (Amtsgeritcht) of Nordhorn,[222] held in a case that based on article 4(a), the validity of the seller's conditions was beyond the scope of the Convention and the contract had to be determined by the governing law, Italian law. A clause in the seller's general conditions of contract provided the buyer could avoid a contract for the sale of shoes provided a notice of demand was sent to the seller and only after 15 days of receipt of such notice by the seller. After the seller's late delivery, the buyer declared the contract avoided and seller sued the buyer for full repayment.

The court was criticised for ignoring the provisions of Article 47 of the Convention and the underlying general principles.[223] Had the provisions of Article 47, fixing additional time for performing contracts been considered, the courts would have seen no need for the recourse to domestic law.[224]

In light of the above, it is obvious that this anomaly in the application of the Convention is a central problem of the Convention, not limited to common or civil law legal systems, it is however not without solution. It seems the courts have failed to see that the provision of article 4(a) was meant to promote elasticity.[225] Authors agree with Honnold's suggestion that a general rule which must be borne in mind by interpreters is that where a domestic law provides legal solutions on the same operative facts that require the application of the Convention, the Convention displaces domestic law governing validity issues if its provisions and general principle address the issue.[226] In order words, where it is found that under the domestic law, the case is one for validity, an interpreter must examine the provisions of the CISG to determine if that domestic validity rule is displaced by a rule under the CISG. This solution was drawn from the drafting history of the Convention and proves suitable because it furthers the uniformity

[222] AG Nordhorn [AG = Amtsgericht = Petty District Court] http://cisgw3.law.pace.edu/cases/940614g1.html accessed 12 April 2013.
[223] Article 47(1) allows the buyer to fix an additional period of time of *reasonable length* for the seller to perform. Article 47(2) prevents the buyer from resorting to any remedy prematurely, i.e., before the expiration of the time fixed under 47(1).
[224] Lutz (n 168) 723; Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 Minnesota Journal of Global Trade 105-152 Koneru states that 'The inquiry should not have been whether such clause was "valid," but rather whether the time fixed was a reasonable time.' 147.
[225] Patrick Leyens, 'CISG and Mistake: Uniform Law vs. Domestic Law The Interpretative Challenge of Mistake and the Validity Loophole' The Pace CISG University Website http://www.cisg.law.pace.edu/cisg/biblio/leyens.html accessed 13 April 2013.
[226] Honnold (n 198) 66; Ulrich Magnus *J von Staudingers Kommentar um Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)* (Sellier - de Gruyter, Berlin, 1994) 77; Lutz, (n 168); Koneru (n 224).

principle of the CISG while acknowledging the domestic law validity provisions and may be a draw for practitioners.[227]

Despite the above, one still finds that there is to a large extent, great compatibility between the CISG Article 29 eliminating the consideration requirement and § 2-209(1) of the UCC that allows for the enforcement of a contract. As such, this has posed no problem to the American lawyers or judges and has been upheld in several cases, most notably in *Shuttle Packaging systems LLC v Jacob Tsokanis*[228] where the court rejected the defendant's argument that a complementary agreement between the parties was ineffective due to the lack of consideration. The court then held that under Article 29 of the Convention, a contract for the sale of goods may be modified without consideration for the modification.[229] More recently in the case of *Chateau des Charmes Wines Ltd v Sabaté USA Inc, Sabaté SA*[230] where a buyer from Canada and a seller from France entered into a contract for the sale of wine corks and the issues before the court were whether the parties orally concluded a contract; and whether the forum selection clause contained in the seller's invoice modified the original terms of the contract or rather constituted a separate agreement between the parties. The court found that a contract was orally concluded and that the forum selection clause contained in the invoice was neither a modification of the original contract or a separate agreement, as the buyers silence did not constitute acceptance of the forum selection clause. In reaching this decision, the court acknowledged the provision of article 29 of the CISG allowing for modification of a contract based on the mere agreement of the parties. However, the court also stated that the CISG did not provide that failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an agreement within the terms of article 29.[231]

### 5. CISG and the Battle of Forms

As a result of increased mass production and large-scale enterprise, there has been the exchange of standardised form contracts in the sale of goods. The idea of standardising repeated negotiations into forms ensures some efficiency in trade or contract agreements.[232] The efficiency

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[227] Leyens (n 225).
[228] http://cisgw3.law.pace.edu/cases/011217u1.html accessed 09 April 2013.
[229] ibid.
[230] US CA (9th Cir), 5 May 2003. See other cases such as *BTC-USA Corporation v Novacare et al.* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/080616u1.html *Solae, LLC v Hershey Canada Inc.,* 557 F. Supp. 2d 452, 457-458 (D. Del. 2008); *C9 Ventures v SVC-West LP* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/120127u1.html accessed 30 April 2015.
[231] *Chateau des Charmes Wines Ltd. v Sabaté USA, Sabaté S.A* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/030505u1.html accessed 30 April 2015.
[232] On standardization and the negative consequences see Friedrich Kessler, 'Contracts of Adhesion-Some thoughts about Freedom of Contract, (1943) 43 Column Law Review 629, 631-32 in Charles Sukurs, 'Harmonizing the Battle

of these forms however has brought situations where the seller and the buyer simply exchange forms with small print conditions on the reverse side and this depending on the jurisdiction will either constitute a counter offer or an acceptance. This exchange has in the event of a dispute, raised questions regarding the existence of a contract and the final constituted terms of the contract.[233]

The position under the UCC is that a definite expression of acceptance operates as an acceptance even though it states terms additional to or different from those offered. These additional terms may become part of the contract if a party expressly accepts them or automatically, so long as the offer does not limit acceptance to the terms of the offer, the additional terms does not materially alter them and the offeror does not object to the additional terms.[234] What constitutes the different terms not articulated in § 2-207(2) has brought division in the courts. While the majority of the courts believe that conflicting terms cancel each other out and are replaced by the UCC's gap fillers, the other minority view argue that the different terms do not automatically become a part of the contract since § 2-207 does not recognise them.[235]

The CISG does not clearly address the battle of forms issue, however, where it does in article 19, it adopts a different solution to that provided under the UCC. Under the common law mirror image rule, an acceptance that added to or changed the terms of the offer was deemed to be a rejection and a counter offer. This has produced what is called the 'last shot doctrine' which means that each form sent is a counter offer until the last one is accepted. The CISG adopts a similar approach to the mirror image rule. Article 19(1) states that the reply to an offer, which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter offer. However, Article 19(2) waters it down by stating that if the additional terms are not material or substantial and the offeror does not object to them, then the purported acceptance is an acceptance and the additional or different terms become part of the contract. Article 19(3) goes on to outline the meaning of different terms which comprises such a broad definition it becomes difficult to find any changes which are not material.[236]

The problem caused by the different principles led to the misapplication of the CISG rules by the American courts in order to align the decision according to what they thought it might be

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of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods' (2001) 34 Vanderbilt Journal of Transnational Law 1481-1515.

[233] Susanne Cook, 'CISG from the Perspective of a Practitioner' (1998) 17 Journal of Law and Commerce 343,347.

[234] See UCC § 2-207(1).

[235] *Northop Corp. v Litronic* Indus., 29 F. 3d 1173, 1178-79 (7th Cir. 1994).

[236] Dodge (n 196) 82-83.

under the UCC. In *Filanto*,[237] the court applied the CISG noting that Article 19 was different from the principles of the UCC. It further stated that the Convention does not allow any material alterations to an offer and interprets it as a counter offer, and the arbitration clause was a material alteration to the contract. The judge in the decision misapplied the CISG first, by holding that Filanto did not object to the terms of the contract, which thus meant acceptance. However, this is contrary to CISG Article 18(1) which provides that silence or inactivity does not amount to acceptance. The court hinged its argument on the past dealings of the parties, that Filanto had in the past, informed Chilewich of his objection to the arbitration clause within a month but in this instance had waited five months.[238] It has been suggested that a more reasonable interpretation would not have been that Filanto's silence constituted acceptance but that he continued to object.

The above case illustrates the court's tendency towards continued usage of the principles of the UCC. The court found a way to manoeuvre through the CISG and apply the UCC. While Filanto's case suggests a deviation from the application of the CISG for domestic principles another case on the other hand demonstrates the court's strict adherence to the application of the mirror-image principle of the CISG. *In Magellan International corporation v Salzgitter Handel GmBH*[239] unlike the court in Filanto, the court held according to the Convention, that based on 19(1)a, a reply to an offer which contains any alterations is a rejection of the offer and constitutes a counter offer, reflecting the mirror image rule. Thus, Salzgitter's February 17 response to the purchase orders did propose price changes and hence can be seen as a counter offer that justified Magellan's belief that its acceptance of those new prices would form a contract.

In a more recent case, *Hanwha Corporation v Cedar Petrochemicals Inc*[240] the District Court of New York applied the correct principle of the mirror image rule as enunciated by the CISG. The court recognised this by stating the provisions of Article 19 and holding accordingly that Hanwha made, and Cedar accepted a sufficiently definite offer within the provisions of article 14 of the CISG. However, the parties never worked out the final terms of the contract because they never formed an agreement on the term they deemed material, a choice of governing law. Hanwha had on several occasions proposed a different choice of law and Cedar had accepted the proposal either implicitly or explicitly. The parties therefore performed under various contracts. After Hanwha's modification of Cedar's contract document and the proposition of a different choice

[237] *Filanto*.
[238] Dodge (n 196) 82-83.
[239] *GmBH* http://www.cisg.law.pace.edu/cases/991207u1.html accessed 7 May 2013.
[240] http://cisgw3.law.pace.edu/cases/110118u1.html accessed 7 May 2013.

of law, Cedar rejected the change. These activities constituted a counter offer and a rejection of the counter offer within the meaning of article 19(1). Furthermore, he recognised that Hanwha's modification of Cedar's choice of law, and his insistence that the contract could only enter into force upon the countersigning of Hanwha's version of the contract document, in addition to the subsequent immediate and insistent nomination of its own term by Cedar, who also stated that the change was material resulted in the non-formation of a final contract.

The last shot doctrine, a solution to the battle of forms propagated by the CISG has been criticised for being arbitrary because it favours one of the parties, usually the seller, since he is the last person to send his form. It also leaves the buyer in a vulnerable position since if the seller does not send the goods, the contract will not be concluded but if the buyer accepts the goods he would have impliedly accepted the terms contained in the seller's forms.[241] Another criticism is that it encourages bad faith in a contract. Thus, in a volatile market situation, a party may play on the changing market situations through the alteration of material terms of the contract, which is a result of the application of the mirror image rule. Furthermore, because parties recognise that the last form is the final form, they will try to get their forms to be the last one by increasing the volume of paper work that flows between the parties. This shifts the focus from the business realities to the routines.[242]

In determining if there is a binding contract, it must be noted that the CISG based on Art 19(1) invalidates a contract for lack of mutual assent and as stated earlier it ameliorates this harshness by allowing acceptance where alterations are only minor. However, since almost all the alterations listed are likely to be material, it implies that most acceptances will probably be constituted as counter offers thus upholding the mirror image rule as the main rule for contract for formation.[243] To answer the question of bindingness of contracts, where the parties have not performed any obligations of the contract, the CISG holds that there is no contract. However, where the parties have met some core obligations of the contract, the CISG states that a contract has been formed due to the conduct of the parties. The formation of this contract as some scholars and courts have reasoned goes that the communication which first contained the standard terms are the offer, the second communication then constitutes a counter offer which

[241] Dodge (n 196).
[242] Maria del Pilar Perales Viscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155.
[243] Andrea Fejös, 'Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution? (2007) 11 Vindobona Journal of International Commercial Law & Arbitration 113, 117.

had been impliedly accepted by the performance of contractual obligation by the offeror.[244] Others have found the existence of a contract on the assumption that parties waived the validity of their conflicting terms of business or they derogated form the application of article 19, instead opting for party autonomy provision under article 6.[245]

From the above, it can be concluded that courts are willing to find a contract on the basis of the action of the parties under the mirror image rule even where the offer and acceptance are not in unison.

Both the UCC and the CISG seek to enforce clauses in exchanged terms and conditions. To this extent, one sees compatibility of purpose between the two laws, which is a key factor in any legal transplant. However, there are material differences, while the UCC does not enforce any of the differences in the contract, the CISG will enforce either the offeror or the offeree's terms. The UCC knocks out the buyer's version and the seller's version and a new version of the clause derived from the governing law is substituted from the applicable governing law.

Although the knock out rule is considered a neutral approach, it has been criticised because it undermines the intention of the parties and the bargain it is intended to strike. For instance, with regards to the issue of notice of non-conformity, where parties have contradictory days for time to issue a notice of non-conformity, The UCC will displace their number of days and replace it with the one stipulated in the local governing law, even though this may be to the dissatisfaction of the parties.[246] The principles of the CISG will in this case be preferable to that of the UCC because interpreters have opportunity and discretionary power to interpret reasonable time based on the number of days given for notice by the parties.[247] Another example is with regards to arbitration. If parties opt for arbitration but have different arbitration clauses, the effect of the knock out rule will be the exclusion of both clauses and subsequent trial of the disputes in the national courts. Furthermore, in cases where prices lower than the normal prices are arrived at, with the consequence of a restricted warranty, the application of the knock out rule will invoke a statutory warranty which can change the character of the intended bargain.[248]

Although both the UCC and the CISG have flaws in the modes in which they deal with the resolution of the Battle of Forms, it is suggested that the CISG presents a better approach than the UCC. Firstly because knocking out the parties agreement for the governing law undermines

[244] ibid.
[245] ibid.
[246] Pilar Perales (n 242).
[247] ibid.
[248] ibid.

the intention of the parties and may result in undesired results whereas, with the CISG parties are generally aware of who gets what in the last terms, seller, and the buyer can reject the seller's terms and the goods. This is supported by the attitude of the courts towards the CISG and its principles. From the cases above, it is seen that in more recent times there has been a shift in the attitude of the courts, especially in recognition of and upholding the principles of the Convention on consideration.

From the above, the CISG presents a fairer rule than the provisions of the UCC with regards to the battle of form. It respects the parties contractual agreement as opposed to imposing on them the governing law concept in this respect. This shows that the CISG can be considered a successful transplant to the extent that it presents parties with a better alternative than the extant law. Furthermore, despite the misapplication of the CISG, recent attitude shows that the courts recognise the distinction between the CISG and the UCC and apply it in cases in this regard.

### 6. CISG and the Mailbox Rule

Under common law, acceptances become effective upon dispatch even if they never reach the offeror. The CISG however adopts a receipt rule, which provides that acceptances become effective when they are received.[249] This variance is important considering that the common law principle seeks to protect the offeree against a possibility of revocation once the acceptance is dispatched and still places the risk of lost communication on the offeror.[250]

Albeit this distinction, Article 18(2) of the CISG must be read in conjunction with Article 16(1) which allows that an offer may be revoked if the revocation reaches the offeree, before he has dispatched an acceptance. This provision thus softens the strictness of the Article 18(2) because the implication of conjunctive reading is that while the CISG and the UCC both protect the offeree against the possibility of a revocation once the acceptance is dispatched, the risk of lost communication is on the offeror under common law, however, under the CISG it falls on the offeree.[251]

The CISG provides better protection by balancing out the interests for both the offeree and the offeror than the common law protection, since the offeree is protected from revocation but the offeror is protected from lost acceptances, this allows him to carry on business where he does not get any acceptance in the mailbox. More importantly, the risk of lost acceptance is better

[249] Article 18(2) CISG
[250] Louis F Del Duca and Patrick Del Duca, Internationalization of Sales Law- Practice under the Convention on International Sale of Goods- A Primer for Attorneys and International Traders in *New Developments in International Commercial and Consumer Law* (Hart Publishing, Oxford UK 1998).
[251] Dodge (n 132) 81.

placed on the offeree since he is in a better position to know whether the medium he chooses is subject to hazards or delays.[252]

Since the CISG presents a better model than the UCC, and considering that one of the functions and reasons for a transplant is offering an enhanced model to the extant law, the CISG may be considered successful to that extent. Although the Convention has not triggered law reform as expected with transplants, it is sufficient that domestic actors have a more favourable option in pursuing their business transactions.

#### 4.5.1.4 The Reaction and Level of Interaction with the Social Actors

Although the CISG had been in effect since 1988, in 2001 it was reported that there had still been relatively few reported decisions on the Convention by US parties. At the time, the first statistics gleaned from the PACE University Website showed that out of over 1800 decisions involving the CISG, a total of 87 or less than 5% were rendered in the US. Most of the cases were from courts of first instance, barely a dozen from appellate tribunal and not a single one from the US Supreme Court.[253] Practically, it seemed the cases were fewer than 87. In actual terms, as at 2001 the real number of cases in which the CISG played an actual role was 40.[254] Concluding at the end of the evaluation of these statistics in 2001, in the United States, one of the authors stated that 'the fact that a country with a population, economy, and court system approaching that of Western Europe produces at most a dozen of re-reported CISG cases per year strongly suggests that the Convention does not play a significant role there'.[255] This suggests the inability of the court to transcend their particular traditions and pursue the development of the elusive CISG general principles.[256]

The above is clearly indicative of lack of engagement by actors in the US with the CISG, a prevalent occurrence in common law countries. These trends have been attributed to U.S legal counsels who habitually advise their clients to opt out of the Convention and choose the UCC as the governing law in their sales transaction.[257]

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[252] Honnold (n 198).
[253] Mathias Reimann and Ann Arbor Mich, 'The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care' (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 115-129 117.
[254] ibid, 117-119.
[255] ibid. 119.
[256] ibid.
[257] Harry Flechtner, 'Changing the Opt-Out Tradition in The United States' (Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571281 accessed 11 November 2014.

At the height of the marginal number of cases dealt with under the CISG, authors provided various explanations for the behaviour of the legal counsels in the U.S. Firstly, because of fundamental ignorance of the Convention, parties simply overlooked its application.[258] However, it has been suggested that ignorance plays a minor role in the above context,[259] because though it seemed so at the initial phase of adoption, circa 10 years, it fails at least 20 years into the adoption. Considering this, at 20 years of adoption of the CISG in the U.S, awareness of the Convention had increased since lawyers who graduated from the law school would have invariably heard of the Convention, given that some contracts casebooks used in the U.S American law school discuss it, [260] and the courses dealing with international business transactions do as well. [261] Moreover, at the time, there were extensive literature on the Convention, particularly on the practitioner level, case digests were available so were at least more than a hundred law review articles.[262]

It was further suggested that although it was plausible that the American businessmen and their lawyers may overlook the CISG when drafting contracts, it was unlikely that the litigators did because they are usually highly specialised and experienced, and therefore would be thorough in searching out the applicable law.[263] Given the above, it was concluded, at the 21st anniversary of the CISG that 'American lawyers are not ignorant of the Convention, but rather conscious of, and hostile to it.'[264]

The illicit avoidance of the CISG by attorneys representing clients in courts also contributes to the paucity of cases. The failure to invoke the CISG provisions in cases where it may apply has been suggested to be as result of parochialism. However, this reason is insufficient because where the CISG applies, it will be advantageous to at least one of the parties. This suggests more reason for the party to raise it in court. Furthermore, intentionally failing to apply the CISG will amount to a betrayal of a lawyer's clients' interests and violation of their professional obligation. This will result in risking their reputation and exposing themselves to liability for malpractice.[265]

Another reason for the avoidance of the CISG is that though the litigants invoked the Convention, courts may not address it either out of neglect, incomprehension or even hostility.[266]

[258] Reimann and Mich (n 253) 118.
[259] ibid. 117-119.
[260] ibid. 120.
[261] ibid.
[262] ibid.
[263] ibid.
[264] ibid.
[265] ibid. 122.
[266] ibid. 122.

This happens only in exceptional cases since judges have to deal with arguments and legal sources before them. The attitude of the US courts, through interpretation and methodology showed resistance and hostility towards the CISG. Contrary to suggestions that judges would neglect the CISG only in exceptional cases, empirical evidence of the application of the CISG in the US at its initial stages show outright neglect and disregard of the Convention. Confirming this is the fact the federal courts in the US did not truly begin to use the CISG until ten years after it had been ratified.[267] This trend continued even after the 21th anniversary of the CISG, with a mere handful of cases being recorded in 2001.[268]

One way the courts showed their neglect of the CISG is through the appropriation of foreign elements disguised by dressing them in familiar clothes, making the CISG alien. This however is one of the challenges of transplanting laws. Graziadei states 'such strategies help to forestall adverse reactions to change and to facilitate its acceptance, yet they also betray the difficulty of understanding change in its own term'.[269] The fear of application of new laws put in place especially where there is existing law means that the new law will be avoided at all costs. The *Raw Materials Case*[270] shows misinterpretation and avoidance of the CISG. The court did not distinguish the CISG from the domestic law but rather seemed eager to make an exit into a more comfortable and familiar realm. It treated the CISG as irrelevant, albeit finding it as the governing law- as if it were in some unexplained fashion superseded by US domestic law. As stated by one commentator

> Not one word of this discussion would have to be changed if UCC Article 2 had actually been the applicable law. A more flagrant and depressing example of a court ignoring its obligations under CISG article 7(1) and indulging – nay, wallowing in- the homeward trend is hard to imagine…the only good that could come of the *Manfred Forberich* decision, in this authors view, is if it became an example of what to avoid when interpreting the CISG[271]

[267] Alain Levasseur, 'United States of America', in Franco Ferrari, *The CISG and Its Impact on National Legal Systems* (sellier european law publishers GmbH 2008); Lorena Castellet, 'Application of the Vienna Convention in the United States (CISG)' (1999) The International Business Law Journal 582, 582.
[268] Reimann and Mich (n 253) 115.
[269] Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Reimann and Zimmermann (n 87) 462.
[270] *Raw Materials*; Lookofsky and Fletchner (n 148).
[271] Harry Flechtner, 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation' in Franco Ferrari (ed), *Quo vadis CISG ?: celebrating the 25th anniversary of the United Nations convention on contracts for the international sale of goods* (Sellier European Law Publishers 2005).

Apart from neglecting the CISG principles and consulting with domestic laws, decisions from U.S courts have also not exhibited a great deal of enthusiasm for consulting foreign authority.'[272] This defeats the purpose of the Convention to promote uniformity. In terms of the impact of the CISG on the style adopted by the US courts, evidence showed that the courts did not engage with foreign material. They did not make reference to scholarly writing. There was no use of and any quotation from any foreign doctrinal writing in the body of an opinion. Although in uncommon instances the judges referred to academic material borrowed by the judges from a party's brief.[273] This may be because of the attitude of common law judges towards law making. Although judges in common law jurisdictions base their decisions on legal precedents, their attitude towards law making, enjoying the elevated status as lawmakers may be an impetus for their delay in applying the CISG and consulting with foreign authority on the CISG. Ideologically, common law judges may tend to see themselves as law makers; this may remotely encourage an unconscious egoistic adamance at continuing with familiar laws, thus affecting their disposition towards a legal transplant. Accordingly, one reason for the paucity of cases in the United States is that judges were not equipped to interpret the Convention in an international light, because of their domestic epistemology. This reaction affected the success of the CISG at the initial stages because it undermined the purpose of the Convention and the requirement for autonomous interpretation. Although Murray suggests that it is merely an aspiration for a court to adopt an international interpretation of the Convention and disregard their national law interpretation,[274] he undercuts the ability and integrity of the judiciary, who can adopt purposive mind-set when interpreting the CISG. Moreover, judges serve as neutral arbiters in the interpretation of the law,[275] despite unavoidable influence by other external factors such as role orientation, attitudes, partisanships and parochial values[276] and habit. [277] Although this must not be used as a justification for dispensing flawed cases. In order to interpret the law effectively, the judge must take the pains to understand the law and the purpose for which it was drafted and he must be willing to adjust to the laws either through breaking ingrained habits in order to effectuate justice.

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[272] Reimann and Mich, (n 87) 122.

[273] For instance in *Barbara Berry, S.A. de C.V. v Ken M. Spooner Farms, Inc.* http://cisgw3.law.pace.edu/cases/071108u1.html accessed 16 November 2014 Franco Ferrari, 'Applying the CISG in a Truly Uniform Manner: Tribunale Di Vigevano (Italy), 12 July 2000' (2001) 6 Uniform Law Review. The same brief referred to Larry DiMatteo and John Honnold. Franco Ferrari, *The CISG and Its Impact on National Legal Systems* (sellier european law publishers GmbH 2008) 314.

[274] Murray (n 180).

[275] The traditional legal model of judicial decision making posits that the law and the dispute determine outcomes. The model holds the view that judges are viewed as neutral arbiters who remain unfettered by societal biases.

[276] Frisch (n 162) 519.

[277] ibid, 520.

Kilian defending Murray suggests that the intention was not to denigrate the ability of the judges but simply that judges may see no pressing need for this paradigm shift. [278] This further undermines the position of judges and implies that judges may be somewhat lazy in undertaking the necessary steps towards interpretation of law. Frisch recognising the impact of habit more explicitly states 'The intellectual stubbornness brought on by habit may lead judges to reject not only optional innovations that may present themselves but may provoke them to construe mandatory provisions as if no change had occurred.'[279] However he concludes by stating that 'the inertia of habit is not forever. Eventually, when supporting environment for performance shifts, new behaviours develop'.[280]

Mapping a timeline of the CISG in the US shows an accurate fulfilment of Frisch's statement. The ingrained habits of judges applying the UCC in place of the CISG were only an initial natural reaction to an unfamiliar law, and thus was only a temporary hurdle. At the time these arguments were made, the CISG was only a decade old and there were just a few cases.[281] Moreover, the judges recognised the need to consider the application of the CISG after it entered into force as was stated in *Orbisphere v. U.S*

> for international contracts for the sale of goods between U.S. parties and foreign parties -- which [the Customs Service] contends the present transactions are -- concluded on or after 1 January 1989[282] the applicable commercial law is not the UCC, but rather, the United Nations Convention on Contracts for the International Sale of Goods . . . unless the parties expressly contracted out of the Convention's coverage [283]

Over the years, judges have recognised the need to use the CISG principles and have considered the CISG jurisprudence where necessary in deciding cases.

The third reason for the shortage of cases on the CISG in the US is the fact that parties effectively opt out of the Convention under Art. 6.[284] For practitioners and merchants, the CISG evokes a general sense of discomfort stemming from the unknown.[285] The purposeful avoidance

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[278] Kilian (n 96)228.
[279] Frisch (n 162)525.
[280] ibid, 524.
[281] *Beijing Metals* (n 100)*Delchi Carrier SpA v Rotorex Corp.,* 71 F. 3rd 1024, 1030 (2d Cir. 1995).
[282] [sic: 1 January 1988].
[283] *Orbisphere v U.S* http://cisgw3.law.pace.edu/cases/891024u1.html accessed 25/03/2013.
[284] Article 6 of the Convention states: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.
[285] Del Duca (n 187) 349.

of a legal transplant results in a failed transplant.[286] As such, when a transnational commercial transplant is ignored or lawyers meet their business needs by drafting around it, it is no longer a living working instrument. Thus, the prevalent practice of opting out of the CISG at the drafting stages in the US may be suggestive of some failure.

Although there is the intimation that the CISG is a failed transplant because of the prevalent opt outs. There has been a steady decline in the opt out practice by lawyers. Initial reports showed that 71 per cent of lawyers opted out of the CISG[287] whilst subsequent reports showed a decline to 55 percent.[288] The difference between the times of the survey show significant decline and it is likely that any recent survey would show a further decline.

Based on the above, it would be infelicitous to consider the CISG a failed transplant, on the basis of avoidance, in the US. It must also be noted that despite the shortage of cases in the U.S., there is a glut of academic commentary on the CISG from U.S scholars. In that regard, the CISG is clearly a successful transplant.

#### 4.5.1.5 The Duration of the CISG in the U.S

The continued existence, and use of the CISG in the US signifies a successful transplant. Although there seemed to be rejection initially, there has been a decline in the opt out and avoidance levels of the CISG. In fact there has been an upsurge and more acceptance of the CISG. There continues to be articles written and cases decide on the Convention. This is the characteristic of a successful legal transplant. This is because the Convention is in its 26th year and there is evidence of its continued application in transactions in the US up until 2014. In 2014, the US recorded the highest number of cases amongst all the jurisdictions.[289]

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[286] Kanda and Curtis (n 22) 896.

[287] Martin F Koehler, 'Survey regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application (2006)' The Pace CISG Website http://cisgw3.law.pace.edu/cisg/biblio/koehler.html accessed 30 April 2015.

[288] Fitzgerald's study in 2006–07 of US practitioners showed that 55 per cent typically opt out. Note that only 47 respondents were in a position to answer this question. Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists and Legal Academics in the United States' (2008) 27 Journal of Law and Commerce (forthcoming) 24.

[289] United States 27 March 2014 District Court for the Eastern District Court of New York (*Rienzi & Sons, Inc. v N. Puglisi & F. Industria Paste Alimentari S.P.A.);* United States 20 March 2014 Federal District Court [Illinois] (*Global Material Technologies, Inc., v Dazheng Metal Fibre Co., Ltd*); CISG Database, 'Yearbook of CISG cases: 2000 – 2014' http://www.cisg.law.pace.edu/cisg/text/YB2006-2000.html accessed 30 April 2015.

### 4.5.2 The CISG in Germany

#### 4.5.2.1 Actual Movement and Ease of Movement of the Law

Although Germany was not amongst the first countries to ratify the CISG, they embraced it completely. The former German Democratic Republic (GDR) became a CISG Member State on March 1, 1990. However, GDR membership was short; on October 3, 1990, the GDR ceased to exist and its territorial units became parts of the FRG. This created problems as the CISG was applicable in the former GDR from March 1, 1990, until October 2, 1990.[290] The CISG does not apply to a similar contract made at the same time if the seller was located in Köln (FRG), since the FRG did not become a CISG Member State until January 1, 1991. The CISG came into force in Germany on January 1 1991. The Convention was adopted without reservation albeit with declaration concerning Articles 1(1)(b) and 95.[291]

From the above, there was actual movement of the CISG into Germany, despite the delay in ratification. This reluctance however was influenced by the fact that the acceptance of its predecessors the Hague Conventions of 1964, by the industry was very slow. First, the rules were different from the German national law, particularly as it favoured the seller, and only a few of the German trading partners had ratified it.[292]

Despite this, and with the scepticism of the German industry, one sees the actual movement of the CISG into the German jurisdiction through its approval by ratification and subsequent reception by both the legislators and the trading industries. The industry gave up their resistance mainly because the CISG preserves the freedom of contract via Article 6.[293]

The experience of Germany with the previous uniform laws and the initial difficulty with respect to GDR and its cessation though obstacles did not stop the ratification. This demonstrates successful transplantation of the Convention.

#### 4.5.2.2 Transplant Operating According to Its Purpose

The interpretation of the CISG by the German courts showed consideration of its purpose. From 1988-1994 records showed that judges generally adhered to the CISG and applied it when the need arose. For instance with regards to Article 1(1)b, usually in the absence of a choice of law provision in the contract, the German rules on conflict of laws generally lead to the

[290] For example, if a merchant located in Leipzig (former GDR) sold tools in July of 1990 to a merchant in Budapest, the CISG would be applicable.
[291] The CISG Pace Website http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html accessed 17 November 2014.
[292] Rolf Herber, 'The German Experience' in Franco Ferrari (ed) *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (Sellier European Law Publishers, 2003) 62-63.
[293] ibid.

application of the seller's law.[294] If the country had adopted the CISG before 1991 the German courts applied the Convention as part of the seller's law.

The zealousness of the interpreters in engaging with the CISG can be seen in the wrongly decided case of *Veneer Cutting Machine,*[295] where the judge ignored the applicable law of the contract which ought to be the Indiana law and applied the CISG. This was done on the basis that the US was a signatory to the CISG. The judge however ignored the fact that the U.S had opted out of Article 1(1) b by the declaration under Article 95. The attitude of the court here is one of the effects of a transplant, resulting in irritability and wrongful use of the transplant. However, this is an isolated incident in the Courts' interpretation, and the sum total of cases suggests a more correct interpretation.

At the initial stages of adoption of the Convention in Germany, its application tilted towards the homeward trend. These trends could be observed in the lower courts, where concepts of German domestic law were incorporated into the interpretation of the CISG.[296] In the LG Stuttgart,[297] although the court held that the CISG was the applicable law, and in effect found for the seller. The court stated with regard to the issue of examining goods within reasonable time 'it may be left open whether one applies Article 39 of the CISG or German law.[298] The result is the same in either case. The buyer must examine the goods immediately, as the circumstances so require.' The court applied the very strict and short notice period of the German law.[299]

The Court's decision in such cases is not habitual practice. The courts have gradually recognised the autonomous and international application of the Convention. This position is confirmed by Magnus, who having collected and prepared the German decisions for UNCITRAL and its CLOUT system for a decade suggests he is of the impression that German courts 'today do neither directly nor indirectly, on a subconscious follow a homeward trend'.[300] In a more recent decision, the Federal Supreme Court reiterated the status of the Convention as an international and autonomous framework while stressing that the Convention does not allow any redress to concepts developed under national law.[301] While there are some courts in Germany that have

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[294] *See* Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB] Articles. 27-28 in Martin Karollus, 'Judicial Interpretation and Application of the CISG in Germany 1988-1994' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 51, 52.
[295] Germany 2 July 1993 Appellate Court Düsseldorf (*Veneer cutting machine case*).
[296] Ulrich Magnus, 'CISG and its Impact in Germany' in Ferrari (n 273)156.
[297] [LG = Landgericht = District Court], Case Number 19890831 dated (31 August 1989). http://cisgw3.law.pace.edu/cases/890831g1.html accessed 16 May 2013.
[298] (Article 32, section 2, EGBGB; Section 377 HGB).
[299] See also LG Aachen 3 April 1990, RIW 1990 491; OLG Düsseldorf 8 January 1993, IPRax 1993, 412.
[300] Magnus (n 296) 156.
[301] BGH 2 March 2005, IHR 2005, 158 (159) in Magnus (n 296)156.

simply referred to the need to interpret the CISG by having regard for its international character and to the need to promote its uniform application,[302] other courts have gone further. In 1996, the German Supreme Court expressly stated that 'the CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Article 7 CISG).'[303] It is this reasoning that has led the Court of Appeal of Karlsruhe to state that 'German legal concepts such as "*Fehler*" and "*zugesicherte Eigenschaften*" are therefore not transferable to the CISG'.[304]

The court at the initial stages also applied the very strict and short notice period under German law for the interpretation of Articles 38 and 39. The prevalent view was that in the absence of specific circumstances, the average period was about 2 weeks. However, the Federal Supreme Court in the *Machine for Producing Hygenic Tissues Case,*[305] prolonged the period in the interest of an international acceptable solutions since other countries allow for a longer notice period or require no period at all. Thus, the rule of thumb for the examination of goods and giving notice of defects under Articles 38 and 39 is roughly one month, if no special circumstances like perishable goods require a shorter period.[306]

In Germany, the application of Article 79 of the CISG opposes the homeward trend problem experienced by various jurisdictions. Art. 79 which developed out of the variants of similar domestic legal principles, stands alone as an autonomous international doctrine under the CISG. As has been suggested, 'its development in Germany may ultimately evolve into an autonomous international norm. It further supports the notion that Article 79 is capable of creating relative uniformity within the context of the CISG's goal for a sales law that is transnational in design'.[307]

The German courts did not invoke the domestic legal concept such as the national equivalent to Article 79—the principle of *Wegfall der Geschäftsgrundlage*[308] German jurisprudence in support of

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[302] See e.g. Oberlandesgericht Frankfurt, 20 April 1994, The CISG Pace University Website <http://www.cisg-online.ch/cisg/urteile/125.htm> accessed 30 April 2015.

[303] Bundesgerichtshof, 3 April 1996, The CISG Pace University Website < http://cisgw3.law.pace.edu/cases/960403g1.html> accessed 30 April 2015.

[304] Oberlandesgericht Karlsruhe, 25 June 1997, The CISG Pace University Website < http://cisgw3.law.pace.edu/cases/970625g1.html> accessed 30 April 2015.

[305] Germany 3 November 1999 Supreme Court (*Machine for producing hygenic tissues case*) http://cisgw3.law.pace.edu/cases/991103g1.html accessed 30 April 2015.

[306] Germany 8 March 1995 Supreme Court (*New Zealand mussels case*) [http://cisgw3.law.pace.edu/cases/950308g3.html accessed 30 April 2015.

[307] Peter Mazzacano, 'The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend' (2012) 2 Nordic Journal of Commercial Law 1.

[308] According to Chengwei Liu, Wegfall der Geschäftsgrundlage can be translated into English as "disappearance of the basis of the transaction". See Changed Contract Circumstances [2nd edition: Case annotated update (April 2005)], The CISG Pace University Website <http://www.cisg.law.pace.edu/cisg/biblio/liu5.html> accessed 28 July 2015. Similarly, Theo Rauh translates Wegfall der Geschäftsgrundlage into "destruction of the basis of the contract".

this proposition indicates that there has developed a generally cohesive body of case law exemplifying a functionally uniform and autonomous doctrine of excuses for non-performance.

The German federal Supreme Court has also provided guidance on the issue of non-conformity of goods and excuses for non-performance. In the *Vine-wax case*, a case that has been considered a landmark in CISG jurisprudence,[309] the Supreme Court demonstrated an advanced and sophisticated understanding of the Convention's interpretative methodology.[310] In this case, the buyer claimed vine wax sold by the defendant (seller), which was obtained from a third party was defective. The buyer demanded damages but the seller claimed he was exempt from liability on the basis that the damages were from frost and he was only an intermediary agent. Thus, the reasons for damages were out of his control. The invocation of this article by the seller reflects the broader interpretation of excuses for non-performance, which is resonant in civil law jurisdictions. Under German law, this would mean a determination as to whether or not physical performance was still possible for the promisor. Where possible, a case for delay may be made and in such situations, specific performance may be awarded. This allows a greater scope for the aggrieved party to perform. Although scholars had argued that the intention of the drafters was not that Art 79 should apply to deliveries of non-conforming goods, this was not made clear in the provision.

Given this, the court considered impediments which may excuse a party from damages and the court stated

> Because the seller has the risk of acquisition […] he can only be exempted under CISG Article 79(1) or (2) (even when the reasons for the defectiveness of the goods are—as here—within the control of his supplier or his sub-supplier) if the defectiveness is due to circumstances out of his own control or out of each of his suppliers' control[311]

The decision of the court in this case was hailed by Schlectriem with him stating

> The decision of the *Bundesgerichtshof* in the "vine-wax case" brought needed clarity in this respect and is furthermore, a "liberation," in that it

See "Legal Consequences of Force Majeure Under German, Swiss, English and United States' Law" (1997) 25 Denver Journal of International Law and Policy 151, 152.

[309] Peter Schlechtriem, "'Uniform Sales Law in the Decisions of the Bundesgerichtshof' 50 Years of the Bundesgerichtshof: A Celebration Anthology from the Academic Community' <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html> accessed 28 July 2015.

[310] Bundesgerichtshof [BGH] [Federal Supreme Court], 24 March 1999, VIII ZR 121/98 [Vine wax case], http://cisgw3.law.pace.edu/cases/990324g1.html accessed 28 July 2015.

[311] *Vine wax case*, at s. II. para. 2(a).

> shows our Anglo-Saxon colleagues that in Germany an exemption for the seller in the case of non-conforming goods is not taken into consideration just because the seller obtained the goods or individual components from third parties. Suppliers, and in turn, their suppliers, are within the seller's sphere of influence. As the *Bundesgerichtshof* correctly pointed out, the seller's liability for them is the same as if he had manufactured the goods himself. In its treatment of the legal issue as well as in its reasoning, the decision is not only a welcome movement towards the point of view of other legal systems regarding seller's liability, which is extremely important for the preservation of a uniform interpretation of the Convention, but is also in two ways guiding for the future legal developments in internal German sales law and the Convention: Control, meaning foreseeability, avoidability, and ability to overcome impediments within the meaning of Art. 79(1) CISG, has always been understood as physical control. The decision demonstrates, however, that it is also a matter of economic risk control. In other words, as long as the risk is within his economic sphere, the seller is in a better position than the buyer to carry the risk of damages due to a delivery of defective goods[312]

Despite the commendation of the decision, it has been argued that the vagueness of the Court's position on leaving open the question that Article 79 might in some other circumstances exempt a seller for delivery of non-conforming goods suggests according to a dicta from the German Federal Supreme Court that a seller could escape liability for damages under Article 79 for supplying non-conforming goods. This would allow a fault based liability, a concept recognised under German law, to creep into Article 79. Given that article 79 is distinct to civil law, which hinges its solution to impediments on the doctrine of fault,

> Such a development should it occur would undermine the objective of the CISG to create an internationally uniform sales law. For this reason, while the Vinewax case is an admirable addition to CISG jurisprudence, theoretically, it does leave open the possibility of divergence in the case law on Article 79 in national courts[313]

[312] Schlechtriem (n 309).
[313] Mazzacano (n 307).

The battle of forms under the CISG is considered controversial because the Convention does not specifically address it but offers general guidelines and principles. This is through exchange of forms between parties,[314] by practices or previous negotiations between the parties[315] and international trade norm or practices.[316]

The controversy in the application of the battle of forms based on these provisions can be seen in the German court interpretation based on their domestic knock out rule. This demonstrates the courts' approach using domestic interpretation. In the *Knitwear Case,*[317] the parties concluded a contract on essential terms but each relied on their own standard terms, which contained a conflicting choice of law clause. Strictly under Article 19, no contract was formed. The Court however held that a contract was formed, as the parties had started performance, showing their intention to be bound by the terms already agreed upon as well as by any standard terms which were common in substance, with the exclusion of the conflicting terms such as the choice of law clauses (knock-out rule).

The *Powdered Milk Case*,[318] provides a classic example of differences between the offer and acceptance which may arise where both parties insist on the use of their standard terms prior to the conclusion of the contract and it is unclear from the facts which set of standard terms should prevail where both the parties referred to their standard forms during the negotiations phase of the contract. It was clear that a contract had been formed, but it was not possible to determine which set of standard terms was actually agreed on. The court was faced with a dilemma that is difficult to resolve on the basis of general principles of the CISG.

The German Supreme Court reaffirmed the knock-out rule approach to cases where there is performance. The Court did not consider the conflict between the last shot doctrine and knock-out rule in determining contract formation, but stated the contract was valid contract due to the performance of the parties. Employing the good faith principle in deciding whether or not T&Cs are in conflict, the Court stated that a party who uses a "rejection clause" should be barred from picking only favourable terms of the other party's boilerplate. This ensured that the seller's

[314] Art. 14(1) CISG and Art. 18(1).
[315] Art. 8(3) CISG.
[316] Article 9.2 CISG.
[317] AG Kehl, 3 C 925/93, 6 Oct. 1995 (Knitware case) (F.R.G.).
[318] Germany 9 January 2002 Supreme Court (Powdered Milk Case) http://cisgw3.law.pace.edu/cases/020109g1.html accessed 28 July 2015.

"rejection clause" prevailed and completely excluded the buyer's terms. Thus, the knock-out rule then applied.[319]

Although in the above cases, it is found that the German courts followed the domestic principle of knock out rule, this approach using the knock out rule is justified and has been recommended as the better approach, even favoured by the majority of commentators[320]and the case law.[321] Given this, one can say that although the knock out rule is the domestic approach of the German domestic law, it still is the best solution to the controversy of battle of forms under the CISG and has been suggested as furthering the purpose of the CISG and therefore it operated according to purpose.

Moreover, even if one were to condemn the German courts' resort to their domestic interpretation, the Courts' have more recently, adhered to the principles of the CISG, following its purpose. In 2005, the German Supreme Court stated that

> insofar as the Court of Appeals refers to [various German] judgments [...] in analysing the question whether, at the time the risk passed, the delivered meat conformed to the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were issued before the CISG went into effect in Germany and refer to § 459 BGB [...]. The principles developed there cannot simply be applied to the case at hand, although the factual position -- suspicion of foodstuffs in trans border trade being hazardous to health -- is similar; that is so because, in interpreting the provisions of CISG, we must consider its international

[319] Landgericht Baden-Baden 4 O 113/90, 14 Aug. 1991 (F.R.G.) available at UNILEX.

[320] Schroeter in Schlechtriem/Schwenzer Commentary Art 19 para 36-38; . See however, Ferrari in Kröll/Mistelis/Perales Viscasillas CISG Art 19 para 15. The knock-out rule has the advantage that it is in conformity with the intention of typical parties in international commercial relations and leads to acceptable results in cross-border trade situations. The rule avoids an arbitrary choice between the two sets of competing standard terms, instead using only those elements, which are common to both sets. This accords with the actual intention of both parties. Although the last shot rule seems to be in accordance with a strictly literal interpretation of Article 19, it often leads to results, which are random, casuistic, unfair and very difficult to foresee for the parties. CISG Advisory Council [1] Opinion No. 13, 'Inclusion of Standard Terms under the CISG' http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html accessed 28 July 2015.

[321] Germany 9 January 2002 Supreme Court (Powdered milk case) <http://cisgw3.law.pace.edu/cases/020109g1.html>; Germany 6 October 1995 Lower Court Kehl (Knitware case) <http://cisgw3.law.pace.edu/cases/951006g1.html>; France 16 July 1998 Supreme Court (*Les Verreries de Saint Gobain v. Martinswerk*) <http://cisgw3.law.pace.edu/cases/980716f1.html>; Germany 25 July 2003 Appellate Court Düsseldorf (Rubber sealing parts case) <http://cisgw3.law.pace.edu/cases/030725g1.html>; Germany 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>.

character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG)'.[322]

The interpretation given by the courts in the above cases show that the CISG accomplishes its purpose of uniformity interpretation and application of its concepts. It shows that the Convention can be considered a successful Convention in Germany since the interpretations and applications of the concepts are in line with the requirement of autonomous interpretation and uniform application as mandated by Article 7. Thus, the application of the CISG in Germany is according to its purpose and therefore successful.

#### 4.5.2.3 The Fit with the Societal Needs and Legal Infrastructure of the Transplant

At the time when the CISG was adopted in Germany, there had been calls to reform the German law of obligations. Therefore, the convention came at an opportune time. One criterion for a successful legal transplant is the extent to which it meets the needs of the society. Thus, if a transplanted law meets the reform needs, triggering an update of the domestic law thus, contributing to the development of the country, it will be considered successful.

Legislators sought to reform the German law of obligation to bring it in line with the law as applied by the courts. Since the courts had shaped the BGB by interpretation and invention of new legal institutions, such that the Civil Code was no longer fully representative of the law.[323] Legislators also sought to bring the German law in line with international conventions particularly the Uniform Sales Law.[324] The initiative for the reform of the law of obligations was launched in 1978. Following the discussions leading to the reform, the CISG played a major role. These discussions based on the CISG, led to a proposal drafted by the Commission, which was to a great extent to the model of the Uniform Sales Law.[325] The general concept of the CISG was convincing to the Commission who extended it with a few exceptions to the general law of obligations.[326] The proposal based on the CISG was widely accepted especially amongst the German lawyers,[327] although it did not bring immediate response from the legislators.

[322] Bundesgerichtshof, 2 March 2005, < http://cisgw3.law.pace.edu/cases/050302g1.html> accessed 30 April 2015.
[323] Magnus (n 296) 149.
[324] Magnus (n 296)158.
[325] ibid.
[326] This was also similar to what was obtainable the UNIDROIT Principles and the PECL.
[327] See Beschlüsse des 60. Deutschen Juristentages, Münster 1994, Abteilung Zivilrecht.

The development of the European private law and the need to implement the European Consumer Sales Directive catalysed the reform of the German 'Schuldrechtsreform'. The CISG influenced the Directive. In adopting the Directive into German legal system, the legislators eventually followed the proposal of the Commission for the reform of the law of obligations. Some fundamental and basic concepts of the German law were changed and brought in alignment with the concepts of the CISG. The Convention not only constituted a major ground for the discussion of the German reform discussion, it had also a real impact on the final outcome of the 'Schuldrechtsreform', regarded as the most important revision of the BGB since 1900. The reform was not limited to sale specific matters but changed the general law of obligations.[328] In this regard, although one may find differences, the similarities are more.[329] The 'Reisevertragsgesetz' Travel Contract Act of 1979, which regulated the duties and liabilities of travel operators was also enacted based on the structure and basic concepts of the CISG.

At the time the CISG was birthed, the German law of obligations was in need of a reform. The fact that the CISG served as a model for the law reform providing a solution for the domestic law makes it a successful legal transplant. That it served as a fertile soil for the reform of not only the Civil Code, but the Travel Contract Act, shows it met the needs Germany. The CISG served as a gap filler and trigger for law reform in Germany, making it successful. Accordingly, 'Although the Uniform Sales Law was not the main reason for reform, its existence added to the climate for reform and served as the major inspiring source for the revision of the law'.[330]

The extent of fit between the CISG and the German law can be seen in the fact that the interpretation of the domestic law is in light of the CISG. Magnus observes that the interpretation of the BGB, which is modelled after the CISG takes the convention into account. Commentaries on the domestic law refer to the CISG as part of the legislative history of the respective provisions.[331] Furthermore, the interpretation of the provisions which were introduced into the BGB via the Consumer Sales Directive frequently considers the Directive as a model to which the domestic provision must comply. This is significant because the Directive draws inspiration from the CISG. Thus there is an indirect influence of the CISG on the interpretation of the BGB.

In terms of fit with the legal infrastructure, the approach of the courts to discrepancies between the Convention and the German domestic principles is significant. Even in the face of conflict

[328] ibid, 160.
[329] ibid.
[330] ibid, 159.
[331] ibid, 161.

with already accepted and practiced principles, the courts esteemed the Convention by interpreting it according to its overarching principles and purpose. Of particular interest is the German courts' attitude towards Article 18 of the CISG. The principles of German law on confirmation notices are quite distinctive to most other legal systems. Under German law a party may send to the other party, a notice purportedly confirming the content of the contract that actually deviates from the contract. If the other party does not contest this confirmation, the contract is irrefutably regarded as having the content of the confirmation note. The other party cannot argue that the contract is different from the confirmation notice or that the contract had not been formed. With the CISG, it was suspected that German courts would try to incorporate these principles into their application of the CISG.

However, the courts proved otherwise by stating in the *Rare Hardwood* case that the confirmation notice of the principles do not apply under the CISG.[332] Failure to respond to a confirmation notice has no effect under the CISG. The notice can only be used as evidence. While the German principles on confirmation notices could be applicable as a usage under CISG Article 9, the decision of the OLG Köln shows that German courts are not prepared to accept such a usage, merely because one contracting party comes from Germany.[333]

Two other German courts reiterated that trade usage must be international in order for it to be implied into a contract. In the *Shoes Case*, the court distinguished the use of letters of confirmation in a national context from the international context. Here, a French buyer and a German seller had concluded an oral contract regarding the price of chocolates. When the buyer was silent as to the different terms in the seller's letter of confirmation, the court held that the terms of confirmation letter were not part of the contract as such letters could not be considered part of international trade usage as required by Article 9(2). The court concluded that although the practice was well recognised in Germany, it was not so recognised in France. Another court held in the *Chocolate Produce Case* that a buyer seeking to hold a seller to the modified price contained in a letter of confirmation did not establish that there was a usage known in international trade recognising silence as acceptance to a commercial letter of confirmation.[334]

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[332] Germany 22 February 1994 Appellate Court Köln (*Rare hard wood case*) http://cisgw3.law.pace.edu/cases/940222g1.html accessed 17 November 2014.
[333] Peter Schlechtriem, *Kurzkommentar,* 1994 EWiR 867, 868 (discussing the judgment and agreeing with its conclusion in Karollus (n 294) 60.
[334] Germany 5 July 1995 Appellate Court Frankfurt (*Chocolate products case*) http://cisgw3.law.pace.edu/cases/950705g1.html accessed 17 November 2014.

A more recent decision by the courts emphasised the position of the CISG as opposed to the domestic German law.[335] The court made recourse to Articles 14 and 18 of the CISG in order to determine whether general terms have been incorporated into a contract governed by the CISG. It stated that recourse must not be had to the domestic substantive law, which is applicable by virtue of international conflicts of laws rules,

> it would run contrary to the principle of good faith Art. 7(1) CISG if the recipient were under a full duty to investigate the content of any standard terms which the declaring party has not sufficiently communicated or, in other words, if the recipient was burdened with the risk of unfavourable standard terms which had never been made known to it…it cannot be invoked that it is sufficient under German substantive law that standard terms can already be incorporated into commercial contracts if the incorporating party grants the recipient a reasonable opportunity to recognise their content[336]

The courts above show a purposeful recognition of the aim of the CISG and sought to promote uniformity in interpretation and application instead of succumbing to its bias or domestic law disposition.

The attitude of the courts towards the distinction in the above cases flies in the face of Legrand's proposition of impossibility of legal transplants where he suggests that the meaning of a rule is a function of the application of the rule by the interpreter, determined by who and where the interpreter is, and to an extent, by what he wants in advance unwittingly'.[337] The courts show that they understand what is expected of them and have no problem dispensing their function according to the requirement of law. This is in line with the key function of the judiciary to sit as a neutral arbiter remaining unfettered by societal biases. The German courts have also shown that Murray's claims regarding the dearth of cases in the common law jurisdictions, being a result of acquired habits from years of applying domestic law is flawed.[338]

The role of the judges in this context becomes important especially in light of the distinction of roles of judges under civil and common legal systems. The more reserved roles of the judges in civil law may aid adherence and correct interpretation of the Convention. Since judges are not

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[335] Germany 13 February 2013 Appellate Court Naumburg (*Cereal case*) http://cisgw3.law.pace.edu/cases/130213g1.html accessed 17 November 2014.
[336] ibid.
[337] Legrand 3 (n 99) 114.
[338] Murray 1 (n 180).

considered lawmakers in the civil legal system, unlike in the common law legal systems they would have no problems with the CISG. The consistent practice of interpreting laws based solely on the statutes as it is, makes them also predisposed to interpreting the CISG within its rules and less likely to tilt towards the homewards trend. This is unlike the common legal system where the judges see themselves as lawmakers and are therefore more easily swayed by their legal epistemologies.

It has been suggested that the CISG has not changed the way lawyers draft their claims, defend or plead in court. However, the civil law tradition of academic influence on legal practice manifests in practice. Thus, for a practitioner, scholarly commentary to enacted legislation and case law is an unavoidable component of the everyday work of the lawyer. This is clear in the practice of the CISG in Germany. Practitioners tend to quote the respective literature on the CISG where necessary whilst cases are less often cited. However, it is the German literature on the CISG, which is more often cited, clearly a result of the language barrier. German commentaries have been noted as being fully devoted to international uniform interpretation and application. Thus it has been suggested that citing the German commentaries, practitioners 'rely indirectly but nonetheless effectively on a uniform interpretation of the CISG.'[339]

From the above, German courts made and continue to make concerted efforts in applying the CISG according to its aims. The application of the CISG according to its purpose makes it a successful Convention in this regard.

#### 4.5.2.4 The Reaction and Level of Interaction with Social Actors

It has been stated that 'German lawyers take the CISG very seriously'. This is clear in the level of interaction and engagement of domestic actors with the Convention.[340] In terms of acceptance of the CISG, surveys, though not representative show a general acceptance of the Convention. Almost 100% of lawyers who practice in the field of international sales law, although not all exclusively, know the CISG.[341] Awareness of the CISG in Germany came through various sources which are indicative of engagement with the Convention. At the early stages of the CISG in Germany, several introductory courses were offered by the lawyers' associations, chambers of commerce, publishing houses and universities. Currently, the CISG is part of the curriculum of

[339] Magnus (n 294)158.
[340] For bibliographies see Michael R Will, International Bibliography 1980-1995 (1995) Karollus (n 230) 52.
[341] Despite the high levels of awareness, the survey also shows that there is a wide range between awareness of the existence and precise knowledge of its content. MF Kohler, Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss (2007)310 et seq.; J. Meyer, U.N-Kaufretch in der deutschen Anwaltspraxis, RabelsZ 69 (2005) 310 et seq.; J Meyer, U.N-Kaufretch in der deutschen Anwaltspraxis, RabelsZ 69 (2005) 457et seq in Magnus (n 294) 145.

students, though optional. Further, every standard commentary on the German Civil Code comments on the CISG and cases published on the Convention have a special law journal.[342]

An expected reaction of social actors toward legal transplants as advocated by Legrand is the inevitable slowed pace of change in legal epistemologies of social actors. However Germany and their reception to the CISG evidences how quickly legal epistemologies change, thereby confuting his argument.

Despite the impressive levels of awareness of the CISG in Germany, half the times, it is excluded from application in contracts.[343] Reasons for excluding the CISG include; little awareness of the Convention, same reasons as the U.S-legal uncertainty especially in terms of unforeseen solutions, clients being unaware of the CISG and the notion that the German law comparatively is more advantageous. A further reason is the habits and traditions, especially practice of excluding the predecessors of the Convention within the business circle just carried through.[344]

Reluctance towards the CISG in Germany is somewhat unfounded because it is dependent on the extent of specialisation of legal practitioners in international sales law. Particularly the extent to which they have to deal with the CISG in their daily work. Thus, the more specialised they are in their daily work, the more advantages of the CISG they see.[345] However, despite knowledge of the CISG, the preponderant attitude is towards exclusion of the CISG, based on the fear of uncertainty and unforeseeable results.[346]

Increasingly however, business associations recommend non-exclusion of the CISG. As noted by one practitioner;

> Whenever I talk to clients active in international trade and tell them about the CISG, or as the case maybe, the CISG supplemented by the *UNIDROIT Principles (2004)* to the extent that a subject is not covered in the CISG, they are usually convinced by this concept regardless of their nationality or their place of business. Sometimes clients ask for a comparison between the CISG and the provisions on sale in the German Civil Code. Yet, this is rare. As a result, I am using both the

[342] ibid. 145.
[343] In international contracts quite often, may read, for example: *"This contract is governed by German national law excluding the Vienna Convention on the International Sale of Goods."* Eckart Brödermann, 'The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)' http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf accessed 15 February 2015.
[344] Magnus (n 296)145.
[345] ibid. 147.
[346] ibid.

> CISG and the UNIDROIT Principles quite often when negotiating or drafting a contract.[347]

This is significant if one considers that German practitioners almost regularly excluded the predecessors to the CISG, The Hague Uniform Sales Law of 1964. However, this practice changed considerably with the CISG.

Scholarly interest in the CISG in Germany is particularly impressive showing acceptance of the Convention. Hundreds of dissertations focus exclusively or in part on the CISG. Extensive commentaries and handbooks on the CISG abound and there are countless articles on the subject. Almost every book on the law of contractual obligations mentions the CISG.[348] To the extent that scholars engage to a high level with the Convention, it may be considered successful in Germany. This interest is traceable to the German history with the CISG, particularly the forerunner of the CISG set the pace and its protégés followed suit.[349] The interest in the CISG grew particularly in light of the initiative by the German government to reform the law of obligations, which was at the same time when the CISG was adopted.

The willingness of the courts to consider the application and use of the CISG in cases before it shows a positive reaction and therefore acceptance of the CISG.

#### 4.5.2.5 The Duration of the Imported Law

The CISG has been in Germany for 24 years, since its adoption and is still currently being applied. This is evidence of a successful transplant. At the end of 2014, a case on the CISG was recorded by the German Federal Supreme Court,[350] whilst in 2013, 10 out of the 41 cases recorded were from Germany. This is indicative of its continued usage in international trade transactions and engagement with it by domestic actors.

## 4.6 Conclusion

Several things can be gleaned from the transplantation and experience of the CISG in the U.S and Germany. Firstly, one can see the polarised adaptational process of the CISG in the U.S and Germany. Generally, the process of adaptation of a legal transplant happens in different conditions and at different times. Thus, the process of adaptation of the CISG could be through integrating into a new legal system more or less successfully, by the CISG becoming an alien

[347] Brödermann (n 258).
[348] Magnus (296) 147.
[349] ibid.
[350] Germany 7 January 2014 Federal Supreme Court (*Printed work case*) http://cisgw3.law.pace.edu/cases/140107g1.html accessed 4 December 2014

body within the legal system or by representing the departure point of a new system. In the two jurisdictions, the CISG integrated itself into the legal systems successfully but at different times.

At the initial stages of adoption of the CISG in both jurisdictions, one found there was the interference of habits, whereby the CISG was interpreted within the old habitual forms and frames of the domestic law, borne out of intrinsic thinking of the actors responsible for interpreting the CISG. The explicit avoidance of the CISG in contracts was also a common occurrence in the two countries at the initial stages of adoption. Lawyers avoided the CISG both in the US and in Germany, choosing to stay with more familiar domestic laws.

Understandably, traditions and ideology are a 'highly efficient means of constancy, contributing powerfully to asserting the existing law, to increasing legal knowledge, to applying the law quasi-habitually and to curbing change with great intensity.'[351] However what actors are used to traditionally should always work pendent on given circumstances and contents of the tradition or law. Thus where a new law is transplanted into a jurisdiction, and it provides a better alternative to the existing law, habits and traditions should not be in perpetuity.

From the above, there is the expectation that the natural inclination of interpreters drawn from the domestic law will feature subconsciously in the interpretation of the CISG. It has been shown that this is an acceptable process of adaptation. This happened in both jurisdictions although the process of adaptation of the CISG took longer in the U.S. Whilst there were a few anomalies with the interpretation of the German courts, subsequent interpretations within three years showed an adjustment and settlement of the CISG in Germany. The differing times of adjustment are by no means indicative of failure of the Convention in Germany or the U.S, but a difference in adaptation times and process.

Success can be dependent on the recipient jurisdiction, as evidenced in Germany. Although the courts struggled at the initial stages of adoption, as expected with novel laws, they were quick to change their approach. The judges in the U.S. on the other hand seemed to linger in their adjustment. Admittedly, the early adaptation of the German actors to the CISG may be attributed to factors such as prior affiliation and experience with precursors to the CISG, the Hague Conventions, and the habits normative to actors in the civil legal system. These may explain the keenness to interpret the CISG autonomously, in contrast to judges in the common law jurisdiction, who considering the practice of judicial precedent and applying case law to the

[351] Gyula Eorsi, *Comparative Civil Private Law Law Types, Law Groups and the Roads to Legal Development'* (Akadémiai Kiadó, Budapest) 425.

cases to be decided, may be more predisposed to applying already made and previous decisions to new laws, irrespective of their requirement for autonomous interpretation.

Although these factors may be contributory, they cannot be disproportionately considered as uniquely responsible for the difference in attitude of actors in the different jurisdictions. There is an onus on the actors to play an active role in ensuring receptivity of the CISG, by recognising its purpose and aligning their attitudes to that purpose.

This is particularly, considering the role of judges as justice effectors and impartial referees in courts, and the preponderant influence which legal doctrine and methodology have on the outcome of cases. It is suggested that what must take precedence in the interpretation of the CISG in any jurisdiction is a consideration of the appropriate law, as evidenced in Germany. Thus, the rational doctrinal model of judicial law making should take precedence over the role of discretion in the interpretation of the CISG.

Based on the above, one can see from the timeline of the CISG, the different interactional experience of the different countries with the CISG. Initially, one would have a found a case of rejection of the Convention in most of these jurisdictions. However, as time progressed we see the CISG, slowly melding into the local jurisdiction. This is evident through the adaptation and acclimatization by the actors of CISG concepts, and an appreciation and distinction between the domestic or preconceived interpretation and the autonomous interpretation of the CISG concepts. One can surmise that there is a fertile and healthy interaction between the actors in the domestic legal order and the CISG.

The analysis above shows that the CISG in these jurisdictions can be considered successful based on the definition that success means the law works according to the criteria set out above with the domestic legal order. This is more so since scholars and academics understand that what is striven for is functional uniformity.

# CHAPTER 5

# CONCEPTUAL TRANSPLANTATION OF THE CISG INTO NIGERIA

## 5.1 Introduction

This chapter conceptualises the transplantation of the CISG in Nigeria. The chapter will consider the reasons why the CISG should be adopted, its effects and implications in Nigeria. The chapter will also examine the way the Convention will interact with the extant framework for international trade in Nigeria, the Sale of Goods Act 1893. Given the importance of international trade in promoting long term economic growth, and the necessity of functional institutions in maximising the advantages of trade, the chapter assesses the adequacy and continued usefulness of the 1893 SGA. Following this, the chapter will also consider the CISG as a possible complementary framework to the SGA.

An examination of how the CISG will work in Nigeria will be undertaken. In considering this, the chapter will examine alternative legal frameworks available for international trade transactions in Nigeria, such as the OHADA. This is in order to determine the most suitable framework for international trade in Nigeria, and, whether the laws can coexist.

Undertaking a conceptual analysis of the CISG in Nigeria enables an evaluation of the likelihood of success of the Convention in Nigeria. Although there is a strong case for the adoption of the Convention, there are inevitable costs of adopting the Convention. Recognising that such costs may exceed the benefits, this examination becomes important in order to make the necessary recommendations and suggestion of the pitfalls to be avoided by the legal actors.

Using the empirical research data, the chapter measures the attitude of legal practitioners towards the Convention. This is in order to gauge the level of acceptability and willingness to embrace the Convention.

## 5.2 Making a Case for the CISG in Nigeria

The benefits of the CISG are stated in the aims and objectives. However, there are more and specific benefits for Nigeria in transplanting the CISG, particularly in lieu of international trade in Nigeria.

### 5.2.1 Justifications for Transplanting the CISG into Nigeria

#### 5.2.1.1 Facilitation and Development of International Trade in Nigeria

The high dependence on import means a large number of traders on the international scene are sole-traders and SME's that buy already manufactured products and resell it. It is suggested that these are the actors to whom the CISG would be most beneficial for. SME's who tend to dispense with formalities such as governing law issues, as opposed to multinationals who trade on their own terms and especially not in cases of government contracts where the Nigerian government is usually the stronger party.

The growing interdependence in the relation of states, the increase in global trade and global markets, global communication travel migration amongst others suggest an inevitable pull towards uniformity in laws. This interdependence has resulted in increased trade in Nigeria. The 'extensity, intensity and velocity of globalisation' justify uniform laws such as the CISG to govern international trade.[1] The extent to which global activities stretch across borders and distances, the intensity which is the magnitude of interconnectedness in the transactions, the way in which the transactions have gained speed and the impact, i.e. the enmeshment between the global and the local,[2] justify the adoption of the CISG in Nigeria for international trade transactions.

Despite creating new market opportunities, globalisation creates challenges for international traders in Nigeria, who having the opportunity of a wider market and a broader range of goods, grapple with complexities of foreign laws of different jurisdictions, which hinders trade. Furthermore, national judges are increasingly being confronted with disputes of international nature, which have different interpretational issues. The overwhelming flurry of commercial activities is substantially and continuously hindered by national laws, suggesting the need for the CISG, a framework capable of minimising transaction costs in international trade, while encouraging globalisation.

Globalisation also creates an expectation of countries towards other countries. A legal transplant can function as a signal, conveying a message to the world-at-large regarding a system's commitment to a certain set of values or its robustness as a viable participant in the international

[1] Stephan Hobe, 'Globalisation: A Challenge to the Nation State and International Law', in Michael Likosky (ed.), *Transnational Legal Processes: Globalisation and Power Disparities* (London Buttersworth LexisNexis UK, 2002) 378, 386.
[2] Ralf Michaels, 'Globalization and Law: Law Beyond the State' Law and Social Theory (Banakar & Travers eds., Oxford, Hart Publishing, 2013), Forthcoming http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240898 accessed 18 December 2014.

discourse.[3] It also explains the adoption of various kinds of international and foreign norms. As trade transactions increase in Nigeria, her trading partners would expect her to be motivated to reform her laws to meet modern commercial transaction, thereby justifying the CISG. Given this, adopting the CISG in Nigeria can be a signal to other countries trading with her, of her interest in improving her trade regime,[4] and a commitment to international businesspersons that she is committed to the promoting international trade transactions. This is a justification for Nigeria to adopt the Convention.

The convergence of international trade concepts into the CISG makes its adoption in Nigeria justified.

The upsurge of transnational laws, which represent a hybrid of international and domestic laws, play a significant role in convergence. The transnational legal process is a 'transubstantive process whereby states and other transnational private actors use the blend of domestic and international legal process to internalise international legal norms into domestic law.'[5] Countries agree on treaties and conventions that envisage the harmonisation of legal rules.[6] These laws, agreed upon by different countries, through the international treaties emanate from the domestic laws. Thus, there is an undeniable relationship and interaction between the domestic laws and the international laws. Transnational laws, which emanate from domestic laws through repeated cycles of interaction-interpretation-internationalisation, interpretations of applicable global norms are eventually internalised into states' domestic legal systems.[7] Consequently, similarity of laws of legal systems stem from subscription to public international laws.

Since transnational laws represent a hybrid of international and national laws, laws such as the CISG are clear examples of convergence and yet, equally acting as a force of convergence. This is particularly in light of the role of private international law on convergence. The absence of a global private international law emphasises the need for legal certainty which is a catalyst for the convergence of substantive laws. Private international law problems in cross border businesses are also a motivation for transnational law. In this area the *lex mercatoria* is an example. The

[3] Assaf Likhovski, 'Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling' (2009) 10 Theoretical Inquiries in Law.
[4] David Nelken, 'Signaling Conformity: Changing Norms in Japan and China' (2006) 27 Michigan Journal of International Law 933 in ibid.
[5] Harold Hongju Koh, 'The Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 Nebraska Law Review; in Harold Hongju Koh, Why Transnational Law Matters' (2006) 24 Pennsylvania State International Law Review 745-746.
[6] Mathias Siems, *Comparative Law* (CUP, 2014) 224.
[7] Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 Pennsylvania State International Law Review 745, 747.

similarity in the trade laws which are most often inadvertent, represent convergence, thus making the CISG desirable for international trade in Nigeria in order to solve private law problems. Since legal systems and laws are converging, it makes sense that in recognition of the growing similarity of laws, that Nigeria subscribe to embodiments of convergence in order work with, and access similar laws, continuing with the already existing trend of converging legal systems.

The fact that other transnational and regional laws conveying convergence are already being used in Nigeria, is reason for, and makes the adoption of the CISG easier. Particularly, in the area of trade, laws such as the New York Convention,[8] UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[9] which have been subscribed to and are in use, show familiarity and acceptance of convergence in this area.

Apart from these, the CISG can specifically do the following;

### i. Ensure Legal Certainty in Trade in Nigeria

The adoption of the CISG in Nigeria is justified on the basis that it can facilitate trade is by ensuring legal certainty, that is, ensuring that laws are accessible operable, legible, intelligible and up to date.[10] This means that the Convention can allow Nigerian actors to ascertain with clarity the applicable law governing their transactions, the availability of the law, and what the outcome of their transaction will be at any given time. For international traders judicial certainty, allowing legitimate expectations of how judges are likely to interpret and apply the law in court decisions is also vital because it enables them assess the risks involved in pursuing any foreign trade endeavour.

In commercial contracts, governing law clauses express the parties' choice as to what that law should be. Where they omit to do so complex rules exist to determine what the governing law of the contract should be. Where parties are located, or obligations are to be performed, in different jurisdictions, determining the governing law of the contract may be difficult. This may lead not only to uncertainty but also to time and cost being spent arguing at the outset of any dispute over what law should be applied. The need for the CISG in Nigeria becomes clear considering

[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").
[9] Subscribed to by Nigeria in 2007.
[10] Julie Anne Kerheul and Raynouard Arnaud, 'Measuring the Law: Legal Certainty as a Watermark' (2010) 8 (4) International Journal of Disclosure and Governance, 360, 379,; Georgetown Law and Economics Research Paper No. 10-12 17, 2 in Gustav Kalm, 'Building Legal Certainty through International Law: OHADA Law in Cameroun' Buffett Centre for International and Comparative Studies Working Paper Series, October 2011 http://www.abstract.xlibx.com/a-economy/43776-1-building-legal-certainty-through-international-law-ohada-law.php accessed 18 March 2015.

that empirical research[11] shows that sole traders and SME's do not usually include these clauses in their contracts and where they are included, they are usually the sellers preferred law. Thus, where the parties have not agreed on a choice of law, the courts will have to identify the applicable law objectively. The main rule in Article 3 of the Hague Convention is that the law of the country where the seller has her business establishment or habitual residence at the time of receipt of the buyer's order will govern the contract of sale. Given that the Nigerian SME's are the buyers in the contract, this suggests that the applicable law would be the foreign seller's law. This means that the Nigerian buyer is already at a disadvantage because the sellers' law would always vary depending on the type of goods and contract.

The CISG may help to solve problems of this nature in Nigeria for SME's, given that the bulk of the trade transactions are with countries that have adopted the CISG. Thus, the applicability of the seller's law may because of private international law rules lead to the CISG, by virtue of ratification. Where Nigeria has adopted the CISG, the contracting parties would already be familiar with the Convention, thereby eliminating unfamiliarity of a foreign domestic law. Since even where Nigeria has not adopted the CISG, it may still apply by virtue of seller's law, it is advisable that the CISG is adopted in any case because it would still apply to the Nigerian party. The CISG can act as a neutral law in this regard, ensuring familiarity of both parties with the governing law in this respect.

The CISG can facilitate commerce in Nigeria by lifting barriers resulting from the complexities of different legal regimes because it creates a legal framework tailor made for international transactions, disregarding differences in the regulation of domestic transactions. This is particularly an important advantage for developing countries like Nigeria that have in the past two decades, doubled their share of global trade, and in spite of recession, ensured that their economies have remained fairly resilient.[12]

In order to continue this growth, the World Bank has suggested that developing countries place more emphasis on internal productivity and enhancing policies[13] since their growth especially the Sub-Saharan regions of Africa has remained robust.

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[11] See Chapter 3.

[12] The World Bank 2013, Global Economic Prospects, Vol 6, January 2013 (Washington, DC: World Bank) 61 http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/8287139-1358278153255/GEP13AFinalFullReport_.pdf accessed 31 January 2013 see especially for diagram indication figure trade.6 indicating the share of developing countries in global trade steadily growing in importance.

[13] ibid 3.

An accommodative policy environment translates to legal certainty which is one of the aims of the CISG, whose adoption and application results in the reduction of legal risks, increase in the value of transactions and allows parties to make commitments with predictable consequences. This makes it easy for them to rely on each other and ensure more productive behaviour.[14] Through the adoption of the CISG, parties in Nigeria and their foreign counterparts have a default law which they can rely on for predictable consequences.

It has been argued that certainty in transactions may result in an optimal level of risk greater than zero.[15] Meaning that greater clarity in rules require the provision of more precise instructions to cover a greater number of contingencies which may lead to less desired outcomes such as avoidance. Thus, the CISG may become counterproductive for Nigerian parties who will most likely not want such details, particularly since in international trade, parties continually make trade-offs between flexibility and certainty, with business people seemingly preferring flexibility.[16] They eventually will avoid such excessively detailed requirements.

This argument is flawed because there is a broad spectrum for defining precise rules and one end of that spectrum is infinite. This infinity exists because human cognition is limited and cannot allow a perfect foreseeability of all possible outcomes thus there would always be imprecise rules, no matter how precise a rule like the CISG is. Further, this point raises the question of balance. How, when or where exactly do we decide and measure the level of precision parties demand? How do we determine any, or which particular set of rules have attained that level of precision (that is if precise parameters have been set)? The argument seems nebulous since there are no tools to carry out such measurement for parties in Nigeria and thus no way of determining precision.

Regarding the argument that parties do not generally prefer off the rack regimes, but only where they do not cramp the relationships they govern with excessively detailed requirements, since parties prefer flexibility to a large extent, it seems a particular strength, yet paradoxically, a weakness of the CISG is its flexibility. The Convention was drafted with the understanding that certain areas could not be compromised on and consequently was left for the determination of the national courts. But more importantly, the CISG respects party autonomy with provisions embodied in Articles 6 and 9, which can provide value and allows flexibility for Nigerian traders. These are appropriate tools for use in a commodity sales contract, especially when applied to

[14] Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' The Pace CISG Database http://www.cisg.law.pace.edu/cisg/biblio/stephan.html accessed 20 January 2012 at 4.
[15] ibid.
[16] ibid.

contracts that incorporate internationally recognised trade terms or standard usages into the contract.[17]

Furthermore, the argument that parties may prefer flexibility is problematic because the level of flexibility is dependent on the jurisdiction and the level of development. The degree of flexibility for instance in the U.K or Germany, would not be the same degree of flexibility in Nigeria. This is for a number of reasons; from the disparity in quality of laws and institutions to the rule of law, in fact, the juridical system. Thus, it may not necessarily be the case, neither is it in the best interest for foreign traders seeking to trade in Nigeria to seek a high level of flexibility since they may prefer definition and rigidity in order to be able to predict the risks involved since the legal institutions are not strong enough. Conversely, it is not a particularly desirable option for the Nigerian businessman having unequal bargaining power with neither knowledge nor capacity, to pursue a breach of contracts in a foreign law or foreign jurisdiction, to seek flexibility.

Other authors have questioned the reality of the effect the CISG has on legal certainty. Cuniberti suggests that the choice of law rules which applied prior to the advent of the CISG allowed for legal certainty in that parties could determine with precision the legal regime to govern their contract since all they needed to do was include the choice of law in their contract to that effect.[18] As such, the fact that some of the interaction issues which the CISG claims to solve can be resolved by private ordering has led to the assertion that the abilities of such uniform laws are usually overstated.[19] This overstatement is labelled the 'globalisation of law', which really means that since there are more international transactions, there is a greater need for uniformity.[20] Leeman suggests that this does not follow as issues such as the economies of scale could decline with an increase in international transactions.[21]

The arguments above assume that Nigerian sole traders and SME's traders have equal bargaining power. Although this may be true in a few transactions, for most international trade agreements, the Nigerian trader is disadvantaged because of the unstructured credit system, out-dated laws and little or no existence of the rule of law, trends particular to most developing countries. This suggests they are in no position to demand laws favourable to both parties. Rather they accept

[17] Katrina Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) 14 Vindobona Journal of International Commercial Law and Arbitration 83.
[18] Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' (2006) 5 Vanderbilt Journal of Transnational Law.
[19] David W Leebron, 'Claims for Harmonisation: A Theoretical Framework' (1993) 27 Canadian Business Law Journal 78.
[20] 'Symposium: The Globalisation of Law, Politics, and Markets: Implications for Domestic Law Reform' (1993), 1 Indiana Journal of Global Legal Studies 1. ibid.
[21] ibid

whatever law is thrust on them by the party with the stronger bargaining power. Foreign parties will not be willing to compromise on choice of law knowing the instabilities associated with trade in Nigeria. This is not the case for most developed countries, where parties agree on laws favourable to both of them because of the stability and sturdiness of the juridical system. And even the party with the stronger bargaining power is willing to compromise in order to advance the business.

A further argument is that the legal certainty provided by the Convention, through default laws where parties have not chosen any laws is doubtful because the decision not to provide for a particular law by parties may be indication that parties are not sufficiently concerned with the issue of applicable law or legal certainty, making the CISG useless.[22] There seems to be a broad generalisation which defeats this argument. It is assumed that parties normally choose to neglect the governing law clause because they do not sufficiently care about it. However, in Nigeria, the environment of trade and the calibre of traders, especially individual traders, are such that the majority of them are largely unaware of general contracting issues and procedures. And even where they are aware, because of the risk perceived by foreigners as being associated with the Nigerian trade environment, they are handicapped to negotiate on their own terms since their foreign counterparts demand that they buy goods on contracts signed on a 'take it or leave it' basis. Thus, Nigerian traders may care about the choice of law clause but circumstances handicap them from making a case for a particular law.

A further issue is that the sole traders and SMEs in Nigeria tend to do away with legal formality and explicitness as they can be considered burdensome to contracts. For them, the trade transaction is more important and there is an eagerness to conclude the trade contract without conscientiousness. The CISG can serve as a safeguard in the event of breach and resultant dispute, where parties have hastily concluded their contracts.

It has also been argued that since default conflict of law rules still exist, the same level of legal certainty provided by the CISG can still be achieved,[23] thereby, obviating the need for CISG. It is not disputed that both forms of the unification, either of the private international law rules or of the substantive rules are valid. However, a more pertinent question is 'which of the two approaches is to be preferred?'

[22] Cuniberti (n 18).
[23] ibid.

Despite the existence of these two choices for reducing divergences in trade with the choice of law rules, seeking to 'establish rules regulating the conflict of laws, and the unification and harmonisation of laws which are more preventive provide a better option,[24] it seems unification of laws which work to avert law conflicts[25] and harmonisation of trade laws are more effective methods since they present a universally accepted regulation of a particular transaction. Whilst it is assured in the former that the same country's rules will apply no matter the forum in which a dispute is brought, in the later it is assured that the same legal rules will be applicable no matter where the parties litigate.[26]

Thus, the CISG is to be preferred in Nigeria as more superior and of a higher level, [27] because it is specific and its sphere of application is more limited, leading directly to a substantive solution. Whilst the private international law rules require the identification of the applicable law and the application itself.[28]

For Nigerians, the CISG is to be preferred because whilst the unification of private international rules means that the laws of a particular country are applicable, thus providing an unfair advantage to lawyers from that jurisdiction, thereby depriving Nigerian lawyers of pecuniary benefits and participation in dispute resolution on a global level, the CISG by providing uniform substantive laws, applicable to all parties and in all jurisdictions where it has been adopted, ensures an equal distribution of the participation in cross border transactions and pecuniary benefits. Moreover, for the Nigerian trader, having the domestic laws of another country applicable to international trade transaction is still tantamount to the initial problematic situation where the unfamiliar domestic laws of another jurisdiction are imposed upon him.

Despite the need for equal bargaining power, simplification of trade processes and rules for Nigerian traders, which the CISG may provide, its inability to provide a wider application to respond to special and local circumstances is an obstacle. This means that the CISG ought to cater to the needs of Nigeria as well as developed countries. The CISG garnered success because

[24] UNGA Sixth Committee (21st Session) 'Progressive Development of the Law of International Trade (23 September 1966) Doc A/6396 and Add.1 and 2, 4 A/6396 - Report to the Secretary General ("The Schmitthoff Study") (document ultimately was support for the creation of UNCITRAL) accessed 23 March 2014 4.
[25] See Official Records of the General Assembly, Twentieth Session, Sixth Committee, 895th meeting, paras. 13 and 15. ibid.
[26] Peter Winship, 'Private International Law and the U.N. Sales Convention' (1998) 21 3 Cornell International Law 487, 487.
[27] René David, *The International Unification of Private Law International Encyclopaedia of Comparative Law* (J.C.B. Mohr Paul Siebeck, 1971) 1, 73.
[28] Franco Ferrari, 'PIL and CISG: Friends or Foes?' (2012) 12 Internationales Handelsrecht.

it is based on the desire for unification by countries of their legal systems for political, racial, social or economic need.[29]

The CISG however offers a wide application because although the countries involved in the drafting process of the CISG had different backgrounds, the level of participation during the drafting process is indicative of the desire to unify commercial law concepts. That Nigeria participated in this process is also suggestive that there is a desire for unification of commercial laws and secondly, the differences in the level of development by countries were significant in the drafting and outcome of the Convention.

The rarity of harmonised conflict of laws could be because uniform laws are more useful. However, the CISG can also exist side by side and be complementary to harmonised conflict of laws.[30] Thus, to the extent and limitation in scope of the application of the CISG, uniform PILs can supplement.

### ii. Reduce Transaction Costs

The adoption of the CISG in Nigeria is justified because it employs a legal framework to set international standards, which supports economic transactions. For the Nigerian exporter, every transaction potentially raises the issues of a different legal regime, which means that transacting will especially be costly. The Convention can resolve interface problems of jurisdiction between the Nigerian party and his foreign counterpart. This is preferable to the option of having identical domestic rules. In Nigeria, there is a need to minimize contract drafting costs i.e. knowledge and problem solving costs.[31] The CISG can reduce the costs of the Nigerian trader educating himself of the consequences of learning a new set of rules in a world of multiple legal systems and the transaction costs of bargaining over the applicable law, since the trader only has to familiarise himself with, the Nigerian 1893 SGA and the CISG.

The costs of learning a new law are simply unaffordable in Nigeria because counsel must spend time acquainting himself with foreign laws on behalf of his client. The adoption of the CISG is justified because it would encourage fair competition.[32] Fair competition here does not mean that lesser regulatory burden will give producers an unfair advantage in international trade, rather it

[29] R H Graveson, 'The International Unification of Law' (1968) 16 American Journal of Comparative Law 4, 6.
[30] Kenneth C Randall and John E Norris, 'A New Paradigm for International Business Transactions' (1993) Washington University Law Quarterly 599, 612
[31] Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales Law' (2005) 25 International Review of Law and Economics 446.
[32] J Bhagwati and R Hudec, *Fair Trade and Harmonisation,* Vol 2 (Cambridge, MA, MIT Press, 1996) 10; Leebron (n 19) 84-87.

refers to the advantage gained by English lawyers over Nigerian lawyers because of the dominance of English laws in international trade transactions. Practically in Nigeria, as revealed by empirical evidence, English laws are dominant in contracts to be executed in Nigeria.[33] This means that although the commercial legal practitioners in Nigeria draft the contracts, they have to consult the English lawyers to advise on certain issues. Providing this advice means that whatever the lawyer gets paid will be split with the English lawyer, if the client has a retainership with the firm. The client in this case will not pay for the extra legal services thus, amounting in reduction of profits. Secondly, in the event of dispute, resulting from the contract drafted by the Nigerian lawyer but governed by the English laws, the Nigerian lawyer is deprived of the experience of handling international trade cases, which widens his scope. The more important concern however is the deprivation of pecuniary benefits attached to the dispute resolution since English lawyers will have to be consulted.

This unfair advantage over Nigerian lawyers' distorts the conditions of competition. However, this may not solely be attributable to distortion but the fact that there is no existence of a level playing field and even where the Nigerian lawyer decides to learn the English law, a more ethical approach is the consultation of English counsel. The CISG can eliminate this cost by providing a neutral law, which does not favour any particular jurisdiction. Thus, lawyers across jurisdictions have a chance to compete fairly since they can acquaint themselves with, and have the same exposure to the CISG. Thus, the adoption of the Convention in Nigeria will ensure that lawyers both in Nigeria and the UK are on a level playing field.

For these actors, the CISG a neutral and familiar law presents an effective solution. It produces a uniform legal language allowing parties to retrieve key information about any particular issue. The Nigerian businessman does not have to pay lawyers in different jurisdictions, the lawyer does not have to acquaint himself with new laws neither does he have to give up the opportunity at pecuniary benefits.

To ensure continued economic growth in sub-Saharan Africa, foreign investors will seek a standard legal language and method of categorising and interpreting legal rules which will result in reduction in legal knowledge costs. As an import-dependent economy, Nigeria's trade is largely unbalanced.[34] This one sided trade means that the Nigerian market is largely dependent

[33] See Chapter 3.
[34] As of September 7 2013, it was reported that Nigeria's international trade was 92% import, 8% export. Editor 'Nigeria's International Trade remains at 92% Import, 8% Export in Six Months' (*Business Day,* September 11 2013) http://businessdayonline.com/2013/09/nigerias-international-trade-remains-at-92-import-8-export-in-six-months/ accessed 24 March 2014.

on foreign traders and their goods. With such high demand for foreign goods, foreign sellers may act opportunistically. A higher bargaining power demands favourable contract terms for at least one of the parties, which in most cases is not the Nigerian trader. This situation calls for a reassessment of the costs of business transactions for the Nigerian traders.

Anecdotal evidence suggests that SMEs and sole traders involved in the importation of goods in Nigeria are unsophisticated parties unaware of the implications of choice of governing law clauses and in cases where they are aware, it may not signify much. Parties also tend to undermine the importance of contractual provisions when conducting transaction and would exclude lawyers for fear of incurring costs. The CISG plays can play a vital role for Nigerian traders because its default rules will automatically apply where they neglect the governing law in their contracts. Furthermore, the CISG will save them the costs of going back and forth to lawyers, but they can simply rely on its provisions in repeated transactions.

It has been argued that where the parties are unsophisticated, as may be the case in Nigeria, the lack of awareness and importance attributed to the governing law regime may lead to the assumption that its utility is purely regarding dispute resolution.[35] Thus, Nigerian parties may not appreciate the default rules provided by the CISG which could void some other contractual provisions and also save the costs of negotiating contractual provisions to that effect. This may result in an incurrence of negotiation costs for already provided default rules contained in the CISG or in hasty negotiation of contracts. Thus any transaction costs will be ex post or the parties will end up applying a neutral law. The application of the CISG may end up voiding the negotiated clauses.

Where the CISG is adopted in Nigeria, this situation can be remedied by spreading awareness of the Convention, its functions, utility and pitfalls to traders. Adequate knowledge and information of this potentiality and ways to avoid them is an imperative towards ensuring that the Convention enjoys a seamless application in Nigeria.

In Nigeria, the sole traders and SMEs deal largely with manufactured goods. The CISG may help reduce ex post transaction costs in this regard. For instance, through the Convention's provisions on examination of goods and giving notice of non-conformity, which provides that the buyer must examine the goods within as short a period as practicable in the circumstances and that the buyer has to give the seller notice of lack of conformity, specifying the nature of the non-conformity, within reasonable time after he discovers it, and in any event he must provide

[35] Cuniberti (n 18) 1520.

the notice within a period of two years latest, otherwise, he loses his right to rely on the lack of conformity.[36]

The provision of two years for the expiration of time to provide notice to the seller is particularly favourable to the Nigerian importer because it allows time for examination of the goods. This is significant considering the environmental, social and developmental factors which the trader has to contend with, such as corruption and bureaucracy at the custom's port resulting in inefficiencies, delays, and theft, lack of steady electric power supply meaning that examination is not practicable where the ascertainment of conformity of goods is dependent on power supply and the scarcity of fuel hindering the timely transportation of the goods to their final destination.

The drafting history of the CISG reveals that all these factors were put into consideration before designating two years.[37]Although leading drafters of the (ULIS), seemed to favour the stricter approach, because of the wider participation by other countries during the drafting of the CISG, modifications were made.[38] The arguments and subsequent resolution of the section to reflect the case by case approach is indicative of the fact that the situation of developing countries was considered. [39]

Based on the drafting history of the CISG, it is clear that the Convention was drafted with consideration of the developing countries and may be especially favourable to the Nigerian trader, on whom the risk of non-conforming goods usually falls on. And because of the trade environment hampered by development issues, the flexibility of the Convention proves particularly helpful and safeguards the buyer from any opportunistic tendencies by the seller who may knowingly deliver non-conforming goods.

#### 5.2.1.2 Law Reform in Nigeria

Transplantation of laws can be a tool for policymaking by governing powers or institutions to achieve legislative reforms through an examination of the best possible options. Increased communication and competition may sometimes lead towards uniformity—of culture, of policies, and of laws. Thus although Nigeria participates in this globalisation trend, through evolving culture and laws, Nigerian laws which ought to regulate newly opened borders are not global in nature. The CISG can provide a better alternative to the existing rules in Nigeria. This is one of the normative components of harmonisation, that the laws of one society should be conformed

[36] Article 38(1) and 39 (1)&(2) CISG.
[37] CISG-AC Opinion no 2, 'Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39' 7 June 2004, The Pace CISG Database http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html accessed 30 March 2013.
[38] ibid.
[39] ibid.

to a better standard.[40] Although in some countries this may not always be the case, for instance, where the local laws are constantly being updated to reflect modern trends in international trade, reflective of the global convergence of laws, the opening up of markets and globalisation. However, in Nigeria the process of law reform is slow which obstructs the rule of law and is deleterious to international trade. Given this, Nigeria stands to benefit from the CISG because it may improve the status quo through some social goal by enhancing economic welfare.[41]

In Nigeria, investors are suspicious of the trade environment because of prevalent juridical and judicial instabilities, out-dated laws and the unsuitability of such laws to the needs of modern day economy. This constitutes major hindrances in economic development and growth. Given this, empirical studies show that there are correlations between development and institutional qualities.[42] The current growth in Nigeria and the potential for continued growth rests on her seeking improvements in the overall policy environment through strengthening of the rule of law, reductions in corruptions and declines in regulatory obstructions to business activities.[43]

Currently in Nigeria, the law governing international sale of the goods is the 1893 SGA, which is over a hundred years old. This is the law that Nigerian traders and foreign investors have to use in any dispute. Empirical research shows that the SGA is not frequently used by the traders, commercial lawyers and foreign investors. And where it is applied, it is more out of obligation than choice.[44] English laws are more commonly applied by traders.[45]

International investors and traders are wary of the trade system and framework in Nigeria, including the SGA and the untrusted credit system. Confirming this, one of the interviewees stated

> the credit system in Nigeria is not very well developed. So you would find that for the Ibo man who is bringing in containers from foreign countries, most times you would find that it's a cash and carry transaction. Most foreign countries will not give goods to a Nigerian trader because then you have a situation where the man says I want to

[40] Leebron (n 19) 75.
[41] Stephan (n 14) 5.
[42] The argument then is that governance matters. See Daniel Kaufmann and Others, 'Governance Matters' (World Bank, Working Paper No. 2196, 1999) in Ronald J Daniels and Michael Trebilcock, 'The Political Economy of Rule of Law Reform In Developing Countries' (2004) 26 Michigan Journal of International Law 99-140.
[43] World Bank Report (n 12) 29.
[44] This is for example where the contract is between the Nigerian government and a foreign party. The Nigerian government in this case would be the stronger bargaining party and because of the amount of money involved.
[45] The English SGA 1979 for international trade transactions. See chapter 3 for empirical research showing the preference of the English Sale of Goods Act.

> buy, the foreigner says how much it is and the Nigerian party transfers the money in full irrespective of the knowledge of the fact that wrong goods may be sent or contract may be breached.[46]

This is the typical situation for SMEs, considered the backbone of a modern and balanced economy. In Nigeria, there is the need to encourage SMEs with limited financial and human resources, who find themselves as the weaker bargaining parties in international trade agreements, by simplifying the issue of choice of law applicable. It is also important to reduce the dependency on English laws in trade, in order to ensure that Nigerian lawyers have a fair share of handling contractual disputes. This can be achieved with the CISG which reflects accepted global practices.

The lack of updated laws and the trade environment puts the Nigerian buyer at a disadvantage. He is importing on a 'take it or leave it' basis and even where he has an option to negotiate, an out-dated domestic law is hardly desirable.

Generally, law reform is measured because of the need for careful preparation, meticulous planning and effective execution. However, the pace of law reform in Nigeria is in certain cases non-existent.[47] This lethargy is evident in Nigeria given that the bill for the reform of the SGA has been in the house of assembly for almost 2 years.[48] It is uncertain when this bill will eventually become law. Understandably, there are several constraints[49] to law reform in Nigeria resulting in dormancy of Bills. This is not only a result of the military regime because post that era, there still remains a 'deliberate indifference or absolute lack of commitment and political machinations on the part of the political class in the area of law reforms'.[50] The CISG whilst capable of governing international trade transactions, can serve as a model law for the reform of the SGA, or the enactment of a new law in sales of goods. It can also serve as an interim law for international trade transactions especially where the Nigerian party is the stronger party and demands his local law. This in any event will not prejudice the foreign party since it is a neutral law.

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[46] Interview with Mr Uwa, Partner, Streamsowers & Kohn Law Firm (Lagos, Nigeria July 2013).
[47] For a paper on the reasons for the slow process of law reform in developing countries see Daniel and Trebilcock (n 42).
[48] Onwuka Nzeshi, 'House Moves to Repeal 120-year-old Law' (*This Day Live,* Abuja 9 May 2013) http://www.thisdaylive.com/articles/house-moves-to-repeal-120-year-old-law/147089/ accessed 13 January 2015.
[49] Dahiru Musdapher, 'Law Reform in Nigeria: Challenges and Opportunities' (lecture at Federal University Dutse, Jigawa State, Nigeria 20th May 2014) http://fud.edu.ng/sites/default/files/media-content/LAW%20REFORM%20IN%20NIGERIA.pdf accessed 13 January 2015.
[50] ibid.

Calls have been made by legal practitioners and academics in Nigeria for the reform of the Act.[51] The status and attitude of legal practitioners towards the SGL Lagos State, which is equivalent to the SGA 1893, was reported in a consultation paper. The findings reflected a general lack of awareness of the relevance of the SGL.[52] Only 16% of the respondents had litigated in this area whilst the remaining 84% had not.[53] The respondents suggested that the comatose state of law played a significant role.[54]

Concepts in the Act which have been suggested for reform include the Market Overt Exception,[55] the definition of goods,[56] the inconsistency in the provisions dealing with the examination and acceptance of goods,[57] rejection for delivery of wrong quantity.[58] The CISG can act as a guide for reforming the SGA to include provisions suitable for international trade thus, saving time and costly experimentation.

The factors inhibiting law reform in developing countries such as Nigeria, were considered, albeit on a broader scale when drafting the CISG. It draws from an international pool of legal talent increasing the level of expertise and considerations in solving any issues. Additionally, the systematic study of the experience of different legal systems provide law reformers with more and better data for drawing conclusions about which rules work best.[59] For Nigeria, there are principles which can be drawn from the CISG at least when considering reform of sale of goods and contract laws such as the Nachfrist Notice, a concept which allows for an extension of time for the parties to a commercial contract to fulfil their obligations. By providing additional latitude and protection to the debtor contracting party, it seeks to optimise the fulfilment of

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[51] The general consensus at a meeting held to discuss the reform of the SGA was that it was archaic. Lemmy Ughegbe, (*Guardian Newspaper* 25 November 2014) http://www.ngrguardiannews.com/features/law/187816-121-years-sale-of-goods-act-a-case-for-reform accessed 15 January 2015; Nat Ofo, 'Sale of Goods Act Reform: Other Considerations' (*The Corporate Prof,* 20 February 2013) http://thecorporateprof.com/sale-of-goods-act-reform-other-considerations/ accessed 15 January 2015.

[52] Law Reform Lagos State Consultation Paper, 14, and specifically The Commission's Perception Survey Report 39-64.

[53] ibid, 53.

[54] ibid, 54.

[55] Nat Ofo, 'Sale of Goods Act in Nigeria and its Market Overt Exception' (*The Corporate Prof,* 23 January, 2013) http://thecorporateprof.com/sale-of-goods-act-in-nigeria-and-its-market-overt-exception/ accessed 15 January 2015.

[56] Nat Ofo, 'Sale of Goods Act Reform: What does "goods" mean?' (*The Corporate Prof,* 13 February 2013) http://thecorporateprof.com/sale-of-goods-act-reform-what-does-goods-mean/ accessed 15 January 2015.

[57] For a discussion on this issue and the suggestion for reform see Nat Ofo, 'Sale of Goods Act Reform: Reconciling the Provisions on the Examination and Acceptance of Goods' (*The Corporate Prof,* 30 January, 2013) http://thecorporateprof.com/sale-of-goods-act-reform-reconciling-the-provisions-on-the-examination-and-acceptance-of-goods/ accessed 15 January 2015.

[58] Nat Ofo, 'Sale of Goods Act Reform: Rejection for Delivery of Wrong Quantity' (*The Corporate Prof,* 6 February 20130 http://thecorporateprof.com/sale-of-goods-act-reform-rejection-for-delivery-of-wrong-quantity/ accessed 15 January 2015.

[59] Stephan (n 14) 747-748.

contractual obligations. This provision is capable of improving the Nigerian business environment where it is adapted in the reform of the local sales law.

Although the Nigerian reform agencies can easily access the wide pool of talents accessible to the CISG, it has particularities. There are disparities between the socialist and African countries that have to grapple with colonial laws and its effects, whilst their developed counterparts do not. In Nigeria, law reform is hindered by certain factors such as embezzlement of funds allocated to reform initiatives, corruption, minimal or barely existent rule of law, political instability and civil unrest. Furthermore, commercial law reforms in developing countries take the backburner in the agenda of bodies such as the UN, because of the lack of fund by both the UN and the developing countries.[60]

Since the UNCITRAL cannot offer law reform initiatives to Nigeria at no cost, because of other priorities, it means that Nigeria must seek out and pay for whatever reform and expertise is needed in the commercial sector. This will hardly be possible where there are other priorities.

If it were as easy to carry out reforms it should have already been done in countries like Nigeria. A substantial number of the laws transplanted into the institutions have been reported as unsuited or discredited transplants.[61] It seems intuitive to test the suitability of the CISG, whose incongruity with local laws is known, and even if unknown, the effects can be avoided by reservations and outright exclusion of the law by parties, than to riskily invest in the search for a suitable transplant and reform of laws, whose effects and costs to local circumstances are unknown, and where they fail, will leave Nigeria poorer and without any immediate remedies.

The above reasons are further strengthened by the fact that the CISG exemplifies rules of convenience and responds to rational rather than emotional desires and has more potential for success. This makes adoption of the CISG in Nigeria justified since the Convention represents commercial law which does not have any emotional ties to the Nigerian people but is based on reason and intellect of simplifying trade transactions which may eventually encourage economic growth. Emphasising the lack of emotion to trade laws in Nigeria is the fact that the applicable trade law is the 1893 SGA, which continues to apply to modern commercial transaction, despite not being tailored to Nigerian local market or situation.

Trade law reform based on uniform global standards is important in order to promote sustainable economic and social development in Nigeria, making it needful to reform the 1893

[60] Interview with Luca Castellani, Legal Officer UNCITRAL (Durham, 13 February 2014).
[61] Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook on Comparative Law* (OUP 2006) 443, 461.

SGA to reflect more current practices in trade. As a cost saving transplant, the CISG is an ideal model for law reform in Nigeria. This has been proved in different national and regional spheres. This is the ideal time for adopting the CISG because the SGA is presently with the legislature and has been proposed for law reform. The CISG can serve as one of the laws which will influence the reform of the SGA. This function of the CISG is evidenced in the reform of domestic laws in other states where it has been ratified. These developments and reform of domestic laws has been through various channels.

## 5.3 Transplanting the CISG into Nigeria

### 5.3.1 The CISG as a Legal Transplant in Nigeria

The CISG will operate in different capacities as a legal transplant in Nigeria. As a ready-made model, it will function as a cost saving transplant because of Nigeria's need to restructure and develop the international trade environment and legal framework in Nigeria, particularly given the current plans to reform the 1893 SGA. Thus, there is a motivation for Nigeria to adopt the CISG because it will save time and costly experimentation, which is a natural path for drafters, who should begin not by exerting energy in thinking through solutions but by examining external solutions, eliminating the time and stress of innovating.

The CISG already works as a model for international trade, blending the civil and common law concepts and balancing the needs of developing and developed countries. Given this, the adoption of the CISG becomes a matter of practical utility in that it is economically efficient for Nigeria and the lawmakers. This invariably increases its chances of receptivity.

The motivation by Nigeria to adopt the CISG as a cost saving transplant, is supported by the legal evolution theory.[62] Legal systems will over time choose the most efficient rules and institutions from a selection of solution found in different national systems.[63] Therefore, adopting the CISG in Nigeria is an efficient endeavour because it is a blend of the most efficient laws regulating international trade.

The CISG as a cost saving transplant involves some element of functionalism, in that a consideration of the extent to which the CISG may be adapted to perform its functions, i.e.

[62] John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 New York University Journal of International Law and Politics 657.
[63] Ugo Mattei, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 (3) International Review of Law and Economics in ibid, 669.

achieve its stated objectives in Nigeria, and the extent of fit with the Nigerian system reveals that it can easily be adapted to Nigeria's needs because of globalisation and convergence of legal systems resulting in fading state borders. This means that the CISG is the ideal model for law reform in Nigeria especially towards achieving a standardised international legal framework.

The level of assistance that the cost saving transplant may offer a system's development raises issues. There is a contest between the autonomous nature of law, making them propositional statements,[64] and laws hinged on the social and political context of a particular society.[65] The CISG is a common framework meant to govern trade on the international level and is suited to the international community as a neutral framework, preferable to any domestic law, which invariably leaves one party in the transaction weaker. Given this, it is better to adopt the CISG when functionalism indicates it appropriate for Nigeria. However, the motive of transplant which is a result of bricolage and functionalism saves the resources that otherwise would need to be spent developing rules autochthonously.[66] This is representative of what adopting the CISG in Nigeria would be since it would not singularly be for cost saving reasons. In fact, the primary reason for the CISG in Nigeria is its functionalism that is, providing an improved regulatory framework for international trade transactions in Nigeria. The cost saving benefit of the CISG in Nigeria therefore becomes peripheral to regulating international trade transactions. This precedes the intention to reform the 1893 SGA, which is complementary.

The functionalism of the CISG however does stop its allure as a cost saving transplant. Moreover, costs saving transplants do not exist as purely that,[67] meaning that the CISG is not adoptable in Nigeria solely on the basis that it will save costs.

The CISG can also function in Nigeria as an externally dictated transplant. Such transplants are more pervasive in developing countries because they involve foreign individuals, entities or governments who dictate (suggest) to recipient countries, the adoption of certain rules or model laws as the basis for carrying on business or for allowing the dominated country a measure of autonomy. Such transplants may be driven by the desire to please foreign states, individuals or

[64] Alan Watson, *The Evolution of Law* (The Johns Hopkins university Press, 1985) 119; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 American Journal of Comparative Law 499 in Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 The American Journal of Comparative Law 846.
[65] Roger Cotterrell, 'Is There a Logic of Legal Transplants?', in David Nelkin & Johannes Feest, (eds.), *Adapting Legal Cultures* 71, 79 (2001) ibid 846.
[66] ibid 846.
[67] ibid.

entities. This can either be simply to acquiesce to their demands or to take advantage of the benefits and enticements offered.[68]

Although the CISG is an externally dictated transplant, the above motives are not applicable in Nigeria because adopting the Convention is not simply to acquiesce to the demand of the UN, Nigeria's trading partners or any government. There is no pressure from the UN, and evidence from the empirical research both from the Nigerian Ministry of Trade –Department of Bilateral Trade and Investment, the Ministry of Justice-DICL, Legal Practitioners in Nigeria reveal a lack of awareness of the CISG. This is corroborated by the UNCITRAL representative who stated regarding the UNCITRAL's priorities, 'that there was nothing currently being done to promote awareness of the CISG in Nigeria'.[69] Therefore, adopting the CISG is not to please the UN, neither is there any pressure by the foreign governments and Nigerian's key trading partners such as China and the US, despite their own ratification of the CISG. The CISG is to be adopted on its merit and usefulness in Nigeria. Thus, although the CISG can be an externally dictated transplant because it emanates from the UN, an external entity, its beneficiaries are sole traders and SMESs in Nigeria with limited financial and human resources to negotiate contracts. The CISG is important given their weaker bargaining status and the Convention's ability to promote seamless and fair trade.

It has been suggested that commercial laws such as the CISG are essentially externally dictated transplants because of the limited participation of developing countries in the drafting process and their need to eliminate trade barriers and encourage investments.[70] This argument is valid because an important criterion for the ratification of uniform laws by developing countries is their level of participation in drafting them.

The failure of acceptance of the ULIS and the ULF, predecessors of the CISG, by countries demonstrates this. However, Nigeria participated in the drafting of the CISG, despite the sparse participation by African countries. The nature of the CISG as an amalgamation of civil and common law system concepts makes it a neutral law that does not cater expressly to any particular legal system. Given that Nigeria is a common law country, it is already familiar with at least half of the concepts and principles. Furthermore, the substantive aspects international commercial laws are a product of the *lex mercatoria* which is recognised by traders irrespective of their legal system or culture.

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[68] ibid 847.

[69] Castellani (n 60).

[70] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 The Modern Law Review 11 in Miller (n 63) 847.

The CISG can also function as an entrepreneurial transplant in Nigeria because its success would be dependent upon the willingness of the exporter to provide the capital, and an importer interested in the import. Thus, actors are led by their expectations of gain domestically, by operating internationally.[71] International strategies 'is the way foreign actors seek to use foreign capital such as resources, degrees, contacts, legitimacy and expertises, to build their power at home'.[72] The actors responsible for this type of legal transplant are 'norm entrepreneurs', individuals and groups who leverage on international norms to strengthen their position.[73] The advocacy of the CISG by law firms, traders or academics in Nigeria makes it an entrepreneurial transplant. This also happens where individuals who travel abroad to study a particular area of law come home with foreign degrees in the area, establish a law firm or an NGO in the relevant field, and then work with legislators to get a law passed, modelled on the statute that was the subject of the study abroad'.[74]

It is suggested that the assessment of the benefits of the CISG in Nigeria, in this thesis is an example, because of the author's belief that the Convention can be useful for trade in Nigeria.

Further reasons for this form of transplant in Nigeria abound. For the commercial lawyers representing traders, the CISG will ensure more economic benefits by giving them a chance to compete on the same level playing field as English lawyers. Thus, they have a duty to advocate for the CISG, making them norm entrepreneurs. For the Nigerian traders the CISG can provide them with the opportunity for equal bargaining power. Thus, they can also act as impellers of the CISG. There are also incentives for the legal academia, who will benefit from an exposure to an international law and the participation with the international community on international commercial law matters, able to bestow knowledge upon budding lawyers.

Admittedly, there is the potential for abuse by individuals or law firms who encourage the adoption of the CISG. Although this is warned against, the nature of the CISG suggests that acquisition of expertise in that regard is available for anybody interested, through the global jurisconsultorium and the readily available resources online.

The CISG can also function as a legitimacy generating transplant in Nigeria. As the most commonly offered explanations for transplantation, they are usually alluring for recipient

[71] Yves Dezelay and Bryant G Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States (2002) in ibid 850.
[72] ibid.
[73] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 893, 896-97.
[74] Miller (n 64)850.

countries and borne out of the desire to appropriate the works of others. For these countries, the laws are usually prestigious.[75] Despite the elusiveness of a definition of prestige, it is an important consideration when transplanting laws.[76] For the recipients, the law may be perceived as efficient and globally important thus, informing the transplantation.[77] The CISG as a prestigious framework is desirable for Nigeria.

Prestige is really the examination of the process where less developed economies opt for laws of developed economies, based on the economically efficient rule, as opposed to the view that transplants based on prestige are largely empty ideas.[78] Thus, that prestige comes from efficiency and as a result of the free flow of information and limited legal parochialism, there is the replacement of more efficient legal doctrines for inefficient ones.[79] The CISG qualifies as a prestigious and consequently a legitimacy generating transplant because it will be economically efficient by saving transaction costs in international trade in Nigeria.

While it is plausible that there is a link between prestige and efficiency, it is not supported by empirical evidence or an explanation of the process to the importation of a particular model.[80] Nigeria's adoption of the CISG can be economically efficient, exemplifying a cost saving transplant since a home grown approach is not necessary because of the fear of costs and labour involved.

Although prestige is not 'relevant where there is a true free flow of information and no barriers to the adoption of the most efficient practice possible, since presumably the legislators and the public will simply weigh all the technical alternatives open to them and select the most efficient.'[81] It is however, the many barriers to an efficient market that make prestige relevant. As Miller suggests, it is as likely that a model acquires prestige because of its perceived success as because of its true economic advantages.[82]

Though it is possible that this might be the case, it is not only barriers that make prestige relevant. Countries seeking efficiency in adopting a model for transplant have a wide variety of foreign

[75] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 The American Journal of Comparative Law in Mattei (n 63).
[76] Jacques DeLisle, 'Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond' (1999) 20 University of Pennsylvania Journal of International Economic Law 179, 280-281; Sacco (n75).
[77] Sacco (n 75).
[78] Mattei (n 63).
[79] Miller (n 64) 855.
[80] ibid.
[81] ibid.
[82] ibid.

laws to choose from. However, they may be willing to take the most prestigious of all their options, which in most cases will be a popular US law. This is in spite of a plethora of other laws on the same topic. Furthermore, whether or not there are barriers to an efficient market, prestige stands as an independent decision when developing countries make their decision. The model of the US is likely to be chosen, at least by developing countries, despite other options because of its popularity and prestige. This does not mean other laws are inefficient. The choices made by developing countries with regards to transplants may be indicative of the hegemony of the US laws, consequently making it prestigious. This resonates with Watson's argument for prestige as a source of authority and therefore more of a determinant in choosing models for legal transplants than either the cost saving, entrepreneurial and externally dictated transplants.[83]

Miller suggests three types of legitimate domination, which explain that authority does not rest on force alone. The one most commonly linked to the rule of law is the 'rational' ground of legitimate domination, based on the 'belief in the legality of enacted rules and the rights of those elevated to authority under those rules to issue commands'.[84] Amongst the three, a modern state founded on rule of law has a strong element of rational authority, which may derive from written legal norms. However, for these written legal norms to have any rational authority, the foundation of that society must be moored on the rule of law. This however is an unrealistic expectation of a typically developing country, with little or no reason to place faith on the rule of law. In a bid for the government officials to assert control, they desperately source for foreign models to provide that missing authority. This need for a source of legitimacy from a foreign model ascribes to that model such a superior status that it may be seen as a talisman. In such situations the model may apply in the developing country even where there is little or no link to the local substantive needs.[85]

The above suggests that the CISG is more of a legitimacy generating transplant but with some caveats. Although Nigeria as a developing country may have issues with respect to the rule of law, Miller's conclusion is not necessarily applicable in this context. There is the need for a rational authority when looking for the best international sales law model for Nigeria, the CISG provides such model. It provides the most efficient law in international trade because of its neutrality, eliminating the option of a party's domestic law, and more importantly because it is the only unified substantive law governing international trade. Thus, faced with a broad scope of options

[83] Alan Watson, 'Aspects of Reception of Law' (1996) 44 The American Journal of Comparative Law 350-351 in ibid.
[84] Miller (n 64) 856.
[85] ibid.

of foreign models for governing international trade in Nigeria, CISG is the most preferred option. Other options such as model laws like UNIDROIT Principles of INCOTERMS are soft laws and usually are complementary to the CISG. They were not designed to be part of the domestic laws but can only serve as model laws.

Furthermore, since Nigeria is a developing country, the CISG provides rational grounds of legitimate domination because of the legality of the substantive rules which it provides and because the UN is viewed by most nations as intrinsically possessing the rights and authority to issue such command. Thus, where measured against Weber's theory on rational grounds for legitimate domination, the CISG in Nigeria aligns itself accordingly, because its rules are efficient for international trade and unless where expressly excluded, the Convention will take precedence over any domestic law in any international trade transaction in Nigeria.

The advantages of choosing the CISG as foreign model to govern international trade law in Nigeria abound. With the 1893 SGA governing international trade, and considering that it is hardly ever the applicable law because of its out datedness, what is needed is the CISG to govern international trade in Nigeria, whilst serving as a model for local law reform.

The hegemonic nature of American laws is unattractive for developing countries such as Nigeria, intent on preserving their sovereignty. The CISG is also to be preferred to the English SGA 1979, given that the current laws governing sales of goods in Nigeria and international trade transactions in the rarest cases, is really an outdated version of this Act and brought through colonialism. The CISG presents a better alternative because its provisions are drawn from two known legal systems, yet it maintains its neutrality making it appealing for Nigeria as a developing country.

Moreover, adopting the CISG in Nigeria is not a forced or desperate measure by the Nigerian government since there is no need to prove any authority in the area of international trade, but simply because there is a need for a functional, modern, fair and efficient framework, an essential element of a business enabling environment, capable of contributing significantly to good governance and the rule of law. As a law from the UN, even if the institutions to administer it are weak, it is more likely to be respected and interpreted normatively in order to project a good image of Nigeria.

Certain unique characteristics have been typically allotted to legitimacy generating transplants. However, these characteristics do not apply to all legal transplants in this category because of the degree, nature and particularity of the subject to be transplanted. One of such characteristics is

the tendency for model critiques to skirt around where there are debates regarding the specific content of the model focusing rather on the importance of the model.[86] However, because of the CISG's ability to reduce transaction costs, there is no need to focus on importance rather than content. Moreover, this only arises where there are questions on the viability of the content, so this situation is not a given. It is however important that the CISG undergoes an examination of its contents to justify its efficiency in Nigeria.

Another characteristic is the acceptance of the model by persons with opposing political interests even where the model does not particularly support their substantive goals, because there is a higher goal. There should hardly be any opposition to the CISG in Nigeria because of its subject matter commercial law.

Finally, there is the willingness to surrender future autonomy to the model without any need for local adaptation since it is assumed that the model will produce good results. Flowing from this is the unacceptability or inability of the local institutions to interpret the model for fear of corruption. Thus, incorporating the future interpretation of foreign institutions is considered appropriate since these domestic institutions can only enjoy adjunct authority.[87] Although the adoption of CISG into Nigeria requires some surrender of autonomy, this is not compulsory for the parties. Countries can fully or partially opt out of the CISG, but for parties wishing to use the Convention, they still have the autonomy to choose any laws to govern the transaction. The power of interpretation of the CISG falls to the Nigerian judiciary, as shown by other countries that have adopted it. There is the freedom to interpret the Convention in the local courts, albeit in a purposive manner.

Transplanting the CISG into Nigeria is voluntary and a downward type of diffusion from the international sphere to the State. There is no doubt that the justifications for the types of transplants are embodied in the CISG and therefore makes its adoption worthwhile in Nigeria. It will save costs and time of the law reformers, it will promote trade because the legality of its substantive rules come from the prestige of the UN as possessing rights and authority to issue such laws.

[86] ibid.
[87] ibid.

### 5.3.2 Legal Frameworks for International Trade Law in Nigeria

#### 5.3.2.1 Current Legal Framework Governing International Trade in Nigeria

The legal framework governing international trade in Nigeria draws from a range of sources. Since the Nigerian legal system is largely based on the English common law and legal tradition, there is substantial similarity between Nigerian and English laws and in certain areas it is an exact replication of the English law. There are also Nigerian statutes and case laws, although a majority of the principles are based on the English laws and cases. For international trade and commercial law, the current sources are;

**a. English Law and Statute**

Before Nigeria's independence in 1960, various acts of the British parliament were applicable in Nigeria. This was received through local legislation such as Section 45(1) of the Interpretation Act which enables the application of the English Common Law and Equity as well as the Statutes of General Application (SOGA) in force in England on 1st of January 1900, in Nigeria with the exception of the former Western States.[88] Section 3 upholds the application of the Common law and Equity principles whilst section 4 states 'subject to the provisions of this law, no imperial Act hitherto in force within the state shall have any force or effect therein. The effect of these provisions is that English Statutes dealing with matters which fall within the competency of the states will not be applicable.

These provisions give legitimacy to the core statute governing international trade in Nigeria, the English SGA 1893.[89] Although Section 4 of the Application Law above stipulates that no imperial Act shall have any force within the designated States where the matters to be governed fall within the competence of the States, this is mere formality because although the States have enacted their own Sales of Goods Law, they are exact replications of the 1893 SGA.

**b. Nigerian Statutes/Legislation**

Nigerian legislation also governs international law. The validity of laws made by the National and State houses of Assembly is derived by the provision of Section 4 of the 1999 Nigerian Constitution which gives the legislature power to make laws on matters in the exclusive

[88] This now consists of Ogun, Ondo, Oyo, and Bendel State now Edo and Delta States, Lagos and Imo States.

[89] The laws then applicable to commercial transactions in the former western region states (Oyo, Ogun, Ondo and Osun States) is the Sale of Goods Law 1958; for Bendel States (Edo and Delta State) Sale of Goods Law 1976; for Lagos State Sale of Goods Law 1973; Imo State Sale of Goods Law (1994).

legislative list and certain matters in the concurrent list. Thus they are empowered to enact laws in specific commercial law areas such as Banking, Taxation, Bills of Exchange, Currency Incorporation and Stamp Duties.[90]

The Nigerian legislation renders any law from any other source null and void to the extent of its inconsistency with the provisions of the legislation. This is supported by section 1(3) of the Constitution, which establishes the supremacy of the Constitution.[91] This implies that where the CISG is ratified, it must become part of the Nigerian law. Thus, laws inconsistent with the domesticated Convention will be rendered null and void. This provision gives legitimacy and validation to international laws which have gone through the proper process of ratification and become part of the Nigerian legislation. Consequently, where the CISG is ratified, it adopts such status.

Within the Nigerian statutes, the primary law governing international trade in Nigeria is the 1893 SGA, which became operational through the SOGA.

#### c. Judicial Precedent/Case Laws

Commercial law in Nigeria also derives from case laws and precedents. Precedents from English statutes and case laws applied to Nigerian cases have created a body of legal principles recognised as binding in the Nigerian commercial jurisprudence. However, precedent as a source of law for international trade in Nigeria is problematic because the cases on which the principles are drawn from are out-dated and based on out-dated laws, such as the 1893 SGA. However, case laws as binding precedent in commercial law in the Nigerian jurisprudence is significant because a vital part of achieving the uniformity goals of the CISG is by interpreters drawing upon the decisions of other courts in the application of the Convention to build harmony and consensus resulting in certainty in international trade.

### 5.3.2.2 Alternative Framework for International Trade in Nigeria

An alternative framework which may govern international trade in Nigeria is Book 5 of the Uniform Act Organization for the Harmonization of Business Law in Africa (OHADA).[92]

#### i. A General Overview of the OHADA

The OHADA seeks to address the needs of the individual foreign traders and investors who otherwise will be subject to national laws which they are not familiar with, and which because of

[90] 1999 Constitution.
[91] Section 1(3) ibid.
[92] Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

their domestic nature are not tailored to deal with cross border transactions.[93] The OHADA was birthed following a failed project, through the efforts of the French Ministry of Cooperation in the early 1990s.[94] It was signed in Port Luis, Mauritius by fourteen states on the 19 October 1993, upon the presentation of the treaty by a working group. However, it came into force in July 1995,[95] with the aim of fostering economic development of its member states through up to date business laws. OHADA seeks to create a contemporary business law and reinforce legal certainty in order to facilitate business in the member states and within the region, improving business environment and attracting more foreign investment.[96] In light of these aims, it seeks to provide a framework such as the CISG and may be considered suitable for international trade.[97] Although the OHADA is a grouping of countries, it serves as a treaty concluded between them and an international organisation established by the treaty to perform specific tasks.[98]

### i. Compatibility with the Nigerian Legal System

The dichotomy between common and civil legal systems raises issues regarding the OHADA as the best framework to govern international trade for Anglophone countries like Nigeria and Ghana. This has raised scepticism amongst common law practitioners regarding the ambitious aim of the OHADA's Uniform Act.

Despite occupying the same geographic region, the laws in each African country differ because of the legal stratification in the continent. Besides the colonial laws which heavily influence the current laws, the customary laws applied in Africa prior to colonisation still feature. Additionally, the era following independence brought about the importation of different systems.

The OHADA laws 'retain the strong French flavour of their predecessors.'[99] This distinction matters, considering that the Nigerian legal tradition is distinct from the civil law tradition. Firstly, with regards to the civil law system characterised by codes and other statutes containing extensive legal provision, there is a tendency for civil lawyers to depend more on the codes and

[93] Polina Dlagnekova, 'The need to Harmonise Trade-Related Laws within countries of the African Union: An introduction to the Problems posed by Legal Divergence' (2009) 15 (1) Fundamina: A Journal of Legal History 1, 2.
[94] Boris Martor and others, *OHADA and the Harmonization Process: Business Law in Africa* (GMB Publishing 2007) 5.
[95] OHADA Legis, http://www.ohadalegis.com/anglais/presohadagb.htm accessed 4 February 2013.
[96] Gustav Kalm, 'Building Legal Certainty through International Law: OHADA Law in Cameroon' (2011) 11-005 Buffett Centre for International and Comparative Studies Working Paper Series.
[97] The OHADA joins 17 countries in the West and Central Africa mainly francophone; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo (Congo Brazzaville), RDC Congo, Côte d' Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Senegal, Tchad and Togo, Democratic Republic of Congo, to common business legislation.
[98] Jean Paillusseau, 'Practique et actualites du droit OHADA Journées d'études Juriscope Poitiers' 101.
[99] K Mamadou, 'The new commercial law of OHADA zone countries; Comparison with French law' Paris: LGDJ, Coll. Library of Private Law in Paulin Houanye and Sibao Shen, 'Investment Protection in the Framework of the Treaty of Harmonizing Business Law in Africa (OHADA)' 2013 4 (1) Beijing Law Review 1.

statutes. This interpretational style of the OHADA users differs from that of the common legal systems, who will seek judge made precedent and the overall interpretation of the text.[100] This will invariably create a distorted interpretation of the OHADA laws. Since the OHADA is a system with a set of laws preponderantly based on civil laws and tradition, the Nigerian interpreter will struggle much more significantly than the user from civil jurisdiction. In this regard, the CISG is a better alternative for Nigeria, because it incorporates both civil and common law concepts adopted by both civil and common law countries, thereby creating a substantial body of uniform interpretation that allows equality for users from both civil and common law countries. Moreover it deals with only one area of law and can be opted out of.

There is also the question of which of the two legal regimes best promote economic growth and political liberalisation. Literature suggests that common law regimes outperform their civil counterparts.[101] In other words, legal families with investor friendlier laws have stronger enforcement regimes. The implication is that the French laws are less protective of property rights. This is because of the history of civil legal systems the Napoleonic codes were very detailed in their design, removing all discretion from the judges.[102] For developed countries that do not protect property rights, this may be counteracted by a well-developed legal profession that could create space for a protection of property rights through contractual provisions, and protection against abuse of power by the executive through use of all remedial tools.[103] However, these measures are not available for developing countries because of their legal infrastructure, developing legal profession that can hardly provide protection and the relatively weak judiciary inherited from the French legal system, who in all cannot challenge the executive's interference in the market.[104] On this basis, common law systems focused on protecting property, irrespective of the level of development are considered better suited to support capitalist impulses both in developed and developing countries.[105]

From the above, the OHADA which is based on the French system may be unsuitable for Nigeria based on its legal infrastructure as a developing country, since the already existent common law is more flexible and this flexibility is significant in the level of economic output of any country. Based on this, the CISG is a better alternative to the OHADA for Nigeria.

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[100] Martor and Others (n 94) 19.
[101] Rafael La Porta and Others, 'Law and Finance' (1998) 106 6 Journal of Political Economy 1113.
[102] Claire Moore Dickerson, 'Harmonising Business Laws in Africa: OHADA Calls the Tune' (2005) 44 Columbia Journal of Transnational Law 17, 32.
[103] ibid, 33.
[104] ibid, 33.
[105] Raghuram G Rajan and Luigi Zingales, 'The great reversals: the politics of financial development in the twentieth century' (2003) 69 Journal of Financial Economics in ibid 36.

Another constraint of the OHADA is the principle set out in Article 10 of the Treaty and its confliction with sovereignty. State sovereignty means that states have ultimate and independent authority to govern themselves and those within their territory. The state has the authority to govern the supremacy of the governing authority, the independence of the governing authority and the territoriality of the governing authority. Article 10 of the OHADA Treaty[106] implies that the OHADA Uniform Acts automatically and directly repeal all existing legislation and supersede any future legislation on the same subject matter. The OHADA structure also renders the supreme courts in the ratifying countries inutile, causing member states to renounce their legislative and judicial sovereignty.[107]

Undoubtedly restriction of sovereignty is one of the attendant problems of uniform laws. Any effective international law necessarily impinges on the state sovereignty.[108] This is because in order to enjoy the protection and rights which international or uniform laws offer, states must be willing to relinquish sovereignty through domestic legislation. However, there are still concerns where international law infringes on domestic sovereign authority.[109] These concerns stem from the premise that a state ought to have unrestricted authority to make the laws which govern its citizen. Considering this, Article 10 of the OHADA removes all State rights to legislate on their own laws by subsuming them into laws already legislated on by OHADA. As a result of compromise, member States are mandated to apply the Uniform Acts.

Article 10 presents interpretational problems because the extent to which the national laws are abrogated by virtue of the Uniform Acts is not stated. This may mean that only national laws, or the individual provisions of these national laws contrary to the Uniform Act, should be considered abrogated.[110] However, Mator suggests this is a complicated approach because it 'requires an analysis of which provisions of the national law are contrary to a Uniform Act and which are not.'[111] Furthermore, it suggests interpreting Article 10 as meaning that a Uniform Act abrogates any national law having the same subject matter. This would obviate the need to carry

[106] Article 10 OHADA.
[107] Martha Simo Tumnde and Others, *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (GMB Publishing Limited 2009) 47.
[108] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421, 436-437 in Oona Hathaway, 'International Delegation and Domestic Sovereignty' (PhD thesis, Yale Law School 2008).
[109] Oona Hathaway, 'International Delegation and Domestic Sovereignty' (PhD thesis, Yale Law School 2008).
[110] Martor and Others (n 94) 20.
[111] ibid.

out a detailed inspection of national laws since the national law would automatically disappear upon the entry into force of the Uniform Act.[112]

Although the latter interpretation allows efficiency and simplicity in the application of Uniform Acts in each Member State and to achieve full harmonisation,[113] however, the wordings of the Treaty suggest the first interpretation.[114]

Irrespective of the interpretation taken, that individual provisions of the national laws having the same subject matter should be considered abrogated, the effect of joining the OHADA, it is an unnecessary loss of sovereignty. Opting for the OHADA means that Nigeria would forgo all her rights to legislate on her business laws. Further, issues dealt with by the Uniform Acts, in most cases would have been covered by Nigerian legislation. Regarding commercial and international laws, there is the SGA, the Hire Purchase Act and the Companies and Allied Matters Act[115]. These laws are already familiar to Nigerians. Particularly, CAMA was drafted to suit the business needs of Nigeria. Joining the OHADA nullifies the provisions of the domestic laws. The CISG provides a better alternative because it deals specifically with international trade law, and can coexist alongside with the SGA.

The fact that the OHADA Uniform Acts deals with a broad spectrum of laws may also encourage legislative lethargy in Nigeria, since the legislature would become dependent on the OHADA for legislating laws affecting Nigeria. Thus, minimum efforts would be devoted towards ensuring careful consideration of the provisions of future OHADA Acts at the drafting forums. Furthermore, there will be reduced exposure to, and knowledge of global trends by Nigeria, a particular problem for African countries, already struggling to meet up with global legal standards and generally known for indifference towards law reform.

Although the OHADA may be of help to member countries that may not have contemplated reform in the nearest future,[116] it is not the best for Nigeria because it abrogates local laws contrary to its provisions. And, law reforms on a national level should aim to reflect the best possible laws for Nigeria, suited to modern business. Where international business laws are to be adopted, they should work complementarily with the domestic laws not to render any domestic provisions void.

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[112] ibid, 21.
[113] ibid.
[114] Advisory Opinion No. 001/2001/EP in ibid, 22.
[115] CAMA 2004.
[116] Dickerson (n 102)17-33; Martha Tumnde 'The Future of OHADA in the Age of Globalisation' (OHADA Conference, Accra Ghana, 4 November 2003); Martha Tumde, 'OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists' in Tumnde and Others (n 107)71.

The Uniform Act becomes a part of OHADA only after examination by the Council of Ministers of Justice and Finance and recommendation of the CCJA, which is upon agreement where at least two-thirds of the member states are represented, and by a unanimous vote. This implies that member states have the power to veto any proposed legislation by having their ministers present at the meeting and casting a negative vote in Council. This raises questions about the position of the minority member states who disagree with a particular law.[117] If Nigeria subscribes to the OHADA, she may be the part of the minority during the draft stages of laws incongruent with her socio economic realities.[118] As part of the minority, Nigeria's choice for certain concepts suited to her local circumstances may be rejected, putting her in a disadvantaged position. In this regard, the CISG is a better alternative because it presents an option to opt out.

Another issue with the OHADA is language problems. The first draft of Article 42 of the OHADA Treaty provided that French was the working language of the organisation, this was one of the biggest obstacles especially because of its economic integration objective, which is not limited to the francophone countries, and French is not the only language of Africa. This was a deterrent to non-French speaking countries.

However, the OHADA Treaty was revised in 2008 incorporating French, English, Spanish and Portuguese as the working language.[119] This is however still problematic for a number of reasons. Practically all the Uniform Acts and the treaty already drafted in French and the ones yet to be, must be drafted and redrafted, or translated into each of the recognised languages of the member states to promote the principle of linguistic equality. Since the OHADA laws oust the current national and future laws contrary to it, citizens of member states must be able to comprehend it in their own language. However, in promoting this linguistic equality principle, there are many complex and costly problems of legal translation.[120] Firstly, the mandatory process of translating the existent instrument in French into the other languages creates mistakes. This means that the final official versions will most likely not have the same meaning with the other texts. Another problem is translating texts of legal instruments already in existence to other languages. This may lead to different meanings from the original being given to translated texts. Consequently, the interpretation rendered by Courts or arbitrators may be different to the meaning intended by the law making body of the OHADA, leading to a miscarriage of justice.

[117] Tumnde suggests that this 'provision ensures general consensus of member states before any Uniform Act is passed and is designed to allay the fears of other African states that may wish to join the OHADA family' ibid, 48.
[118] ibid.
[119] Article 42 of the Revised Treaty.
[120] Edgardo Rothman, 'The Inherent Problems of Legal Translations: Theoretical Aspects' (1995) 6 Industrial International and Comparative Law Review 189.

Legal translation is peculiar and different from ordinary linguistic translation because it is full of hidden traps. It is not an 'approximate process which focuses only on linguistic side, since it implies the transposition of legal concepts from a system to another, with the consequent employment of comparative law and its methodology.'[121] It requires that the translator not only complies with the rules of the foreign language, but also with the rules of the foreign legal system.[122] The translator must also find equivalent legal terms in the target language or terms that have an equivalent legal function. In some cases, the translators may not find equivalent legal terms in the target language or terms that have the same function.[123] Where the Uniform Acts are drafted to cater to both civil and common law legal traditions drafters must be careful, especially when translating civil law terms into common law terms and vice versa, since the words belong to different legal systems whose meanings derive from the history, social context and the cultural changing of the legal tradition concerned.[124] This is more so in Africa, where the different legal systems are not purely civil or common law systems but influenced by the customary laws religious laws.

The linguistic problems of the OHADA especially considering the scope of laws which it deals with, makes it problematic for Nigeria whose lingua franca is English. The discordance in interpretation, consequent of translation makes it challenging for Nigeria. Moreover, since it is being translated to English from French, it means that Nigeria will deal with it as secondary language recipients, subjecting them to provisions with inferior meaning.

Although the OHADA is commendable for its achievements, its requirements of yielding judicial and legislative sovereignty and allowing compulsory legislation on other aspects of law not envisioned by Nigeria, must be carefully considered. It is needless to relinquish that level of sovereignty, in order to improve international trade laws especially with the CISG as a more viable option.

In any event, the CISG can coexist with the OHADA because its scope and sphere of application ensures other instruments can be accommodated. First, the CISG is flexible in accommodating parties' needs and respects parties contractual freedom. Parties are free to opt

[121] Maria Vittoria Onufrio, 'Harmonisation of European Contract Law and Legal Translation: a Role for Comparative Lawyers' http://ssrn.com/abstract=1371556 accessed 21 February 2013.
[122] Rothman (n 120) 189, 190-192.
[123] Dennis R Klinck, *The Word of the Law* (Carleton University Press, 1992) 25 in ibid, 192.
[124] Rothman (n 120)189.

out of any or all of its provisions.[125] Article 92 provides for a declaration made by contracting states which allows them not to be bound to either Part II or III of the Convention. This gives Nigeria the right to allow OHADA prevail over CISG, where both of them are adopted. However, parties are subject to the CISG in spite of the provisions of Article 92 which excludes the application of the CISG by Article 1(1) a. However, the CISG can still apply through Article 1(1) b. This is possible through private international law rules, which makes the CISG applicable where one of the parties to a contract is not a member, but the other party is for instance a seller leading to the application of the seller's rules.[126]

Nigeria may however still exclude the application of Article 1(1)b through the Article 95 declaration, which allows parties to opt out of Article 1(b), this would allow the OHADA to govern the contract.

Article 94 of the CISG also emphasises the independence of parties and Contracting States to use unified regional laws. This would mean that if Nigeria joins the OHADA after ratifying the CISG, and enters into a sale of goods contract with another country such as Gabon, also a member of the OHADA and the CISG, because of their memberships to OHADA, and closely related legal rules through the OHADA, provided their businesses are located in the contracting states, they can declare that the CISG will not apply. Through this provision, the CISG allows exclusion of contracts under regional treaties or regional uniform laws.

The CISG's limited sphere of application is also indicative of its ability to coexist with the OHADA. The Convention does not cover all contracts for the sale of goods.[127] As a result, the Convention allows for derogation and resort to domestic laws. Consequently, OHADA can coexist with the CISG, particularly to complement it in such areas, without conflict.

Specific provisions of the CISG, for instance, Art 6 also provide for exclusions of any or all provisions of the CISG from contracts. This means that the OHADA Uniform Act can directly apply where the CISG is excluded.

The CISG also respects other international instruments through Article 90, which states that in any conflict with regional laws, the regional law will prevail.

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[125] Luca G Castellani 'Ensuring Harmonisation of Contract Law at Regional and Global Level: the United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL' 2008 Uniform Law Review 115, 120.

[126] Juana Coetzee and Mustaqeem de Gama 'Harmonisation of Sales Law: An International and Regional Perspective' http://www.cisg.law.pace.edu/cisg/biblio/coetzee-degama.html 22 accessed 5 March 2013.

[127] Franco Ferrari, 'CISG and the OHADA Sales Law' in Ulrich Magnus, *CISG vs. Regional Sales Law Unification*: *With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 80.

Article 9(2) also supports coexistence of the CISG and OHADA. This means that where a binding usage exists in a specific region, the regional usage will prevail over the CISG provided the requirements of Article 9(2) are met. Where the parties agree that they will be bound by the regional usage such as the OHADA, the terms of that usage will prevail against the application of the CISG by the provision of Article 9(1).[128]

An analysis of the draft OHADA Act on Contract Law and the CISG demonstrates practically, how universal and regional uniform trade law texts can complement each other. Commentators in the preparation of the Draft OHADA Act stated that the CISG deals effectively with the same issues.[129] This indicates the CISG's ability to regulate international trade. Thus, member states of OHADA may be able to strengthen their process of economic integration by adopting the CISG. Where the Convention is adopted, they 'will benefit from its application to contracts for the sale of goods concluded with commercial partners located in non-OHADA African States, and in other parts of the world.'[130]

A measure of the CISG's complementarity with the OHADA is regarding similarity in substantive issues of law, and similarity in outcome. The draft OHADA Act on contract law was inspired by the *UNIDROIT* Principles, which draws inspiration from the CISG.[131] This indicates some link between the two laws, which suggests some consistency between the texts, thus promoting uniformity among the legislature. Considering this, interpreters will be able to refer to cases and materials already decided under the CISG and the UNIDROIT Principles in the interpretation of the Draft OHADA Act. This is particularly useful for the interpreters if they are to accelerate justice especially in the areas where the OHADA Act shifts significantly from the existing principles, known to domestic laws.[132]

Some of the issues raised at the conference in preparation of the Draft OHADA Act have already been addressed by the CISG. Thus, where these principles are incorporated into the OHADA Act, these similarities will help coexistence, and prevent conflicts. They will also help to promote principles which the CISG promotes.[133]

[128] Coetzee and Gama (n 126) 22.
[129] Castellani 2 (n 125) 119.
[130] ibid.
[131] Ole Lando, 'CISG and its followers: A Proposal to Adopt some International Principles of Contract Law' (2005) 53 American journal of Comparative Law 379.
[132] See for instance in the case of Unilateral termination of the contract for non-performance which the CISG already deals with. Castellani 2 (n 125) 119.
[133] Castellani 2 (n 125) 120.

The principle of good faith in contract has a significant place in Africa and this same principle is a leading one under Article 7(1) CISG. Thus, it impacts the Draft OHADA Act in a positive way especially since it assists in addressing abuses from informal transactions.[134] Any reference to cause and consideration which have their essence in the different legal systems are avoided by the CISG and instead replaced with provisions acting as functional equivalents. This solution is effective because it ensures effective regulation of contract while rejecting the misleading references to domestic notions.[135]

### 5.3.3 Determinants of Successful Transplantation of the CISG in Nigeria

Several factors are important in determining the workings, and to what extent the CISG will be successful in Nigeria, these factors will be considered.

#### 5.3.3.1 Transplantation as a Common Phenomenon

That 'most of the private law of all modern legal systems of the Western world (and also of some non-Western countries) apart from the Scandinavian, derives more or less directly from either Roman Civil Law or English Common Law',[136] and the fact that the history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law,'[137] suggests the pervasiveness of legal transplants. This also suggests striking similarities and formulations of laws in different jurisdictions.[138] Particularly, in commercial law there are many examples of legal concepts, legislation and legal institutions being transplanted from one society to another.[139]

The commonality of transplants suggests the ability of a system to easily assimilate laws from other jurisdictions irrespective of differences. Even where there are variances between the domestic law and the transplanted law, the system is able to adapt in its own ways, such as by either formulating laws or borrowing from other systems, thus, overriding the differences. The successful transplantation of English laws into Nigeria during the colonial era, albeit by imposition, and its continued use, demonstrates its successful reception despite variation. This is illustrative of Nigeria's ability to successfully receive legal transplants, and therefore is indicative of the potential success of the CISG in Nigeria.

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134 ibid, 121.
135 Castellani 1 (n 125) 121.
136 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed University of Georgia Press, 1974) 22.
137 R H Lowie, *Primitive Society* (New York, 1920) 441 in ibid.
138 Watson (n 136) 22.
139 Ross Cranston, 'Legal Transplants: The Sri Lankan Experience' in Ross Cranston, *How Law Works* (OUP 2006) 293.

The number of adoptions of the CISG worldwide, 83 to date, shows that its transplantation is common amongst countries. This shows that the CISG will be easily transplanted to Nigeria.

#### 5.3.3.2 Transplantation as a Source for Development

The fact that legal transplants are a major source of development, 'the most fertile source of development',[140] makes them appealing to recipient jurisdictions, contributing greatly to the likelihood of success. Since most changes in most legal systems are a result of borrowing,[141] recipient legal systems 'do not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule.'[142] Adopting the CISG into Nigeria is alluring because it can promote development by facilitating trade and catalyse the reform of trade laws and structure.

There is a strong association between economic development and legality, meaning that good legal institutions are a precondition for long-term economic growth.[143] Good legal institutions have been transplanted to developing countries in order to actuate reform. For these laws to work effectively, they ought to be meaningful in the applicable context, so that actors have an incentive to use the law, and to request institutions that work to enforce and develop the law.[144] Granted, some of these laws have not worked because of the undetailed examination of their fit with the local system, where it is undertaken in context, there is a high likelihood that the transplanted law would be successful. Given that the provisions of the CISG are compatible with common law concepts, and would aid in developing trade in Nigeria, while serving as a model for law reform, the CISG is considered a source of development and therefore necessary in Nigeria. The benefits of the Convention suggests actors would be motivated to engage with it. Seeing the CISG as a potential for economic development therefore increases the probability of success.

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[140] Watson (n 135) 95

[141] ibid.

[142] ibid, 107.

[143] David S Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some Are So Poor* (Norton, W W & Company 1999); Paolo Mauro, 'Corruption and Growth' (1995) The Quarterly Journal of Economics 681-712; S Knack, Stephen, and Philip Keefer, 'Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures' (1995) 7 (3) Economics and Politics 207.

[144] Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 European Economic Review 165.

#### 5.3.3.3 The Legality of the Jurisdiction from which the law Emanates and the Receptivity of the Recipient Country

Nationalism plays an important role in determining which system will be the source of borrowing.[145] Thus, the origin of law is a determinant factor on whether or not the law will be accepted, and the likelihood of success. The donor jurisdiction or organisation plays a key role for the donee jurisdiction in deciding whether or not it would be transplanted.

For Nigeria, the UN may be seen as an organisation that caters to the needs of various nations through neutral laws. The UNCITRAL with membership of over 60 countries, including Nigeria is a fundamental legal body of the UN system in the field of international trade law, focused on modernisation and harmonisation of rules of international business. It formulates fair rules on commercial transactions through Conventions such as the CISG, which are acceptable worldwide, legal and legislative guides and recommendations of great practical value, updated information on case law and enactments of uniform commercial law, technical assistance in law reform projects regional and national seminars on law reform projects.[146]

The UN on its own is a well-respected body concluding multilateral agreements and recommending laws to nations both developed and developing. Most countries model their laws after the UN Laws, since they are considered models to aspire to in terms of political and development decisions. This is because the UN does not represent any particular country, but seeks to protect the interests of all nations and assist in upgrading their laws. Since the UN aims to provide laws not influenced by any particular jurisdiction and purposed to serve the interests of all nations, irrespective of their level of development, understanding the source and legality of its laws become imperative in order to determine its neutrality and level of representation which the CISG can offer Nigeria, which can be a direct influence on the Convention's level of success.

Borrowing can be from domestic laws to international laws i.e. 'vertical or Trans-echelon borrowing.'[147] Advocates of legal borrowing in international laws suggest that, borrowing originates from prior international treaties and from works on public international law and as

[145] Watson (n 136) 51.
[146] www.uncitral.org accessed 6 February 2013.
[147] Wiener terms it 'Vertical legal borrowing' to term the borrowing from domestic law to international laws Jonathan Wiener, 'Something Blue for Something Borrowed' (2000) 27 Ecology Law Quarterly 1295.

such, each treaty is an effort to build on, and extend an assemblage of principles of international law.[148]

Considering this, the CISG draws from the ULIS and ULF, and 'some provisions of the CISG are substantially the same as provisions of…the 1964 Conventions'.[149] Based on the document evidencing the conception of the UNCITRAL, its origin and mandate state that one of the legal techniques used to reduce conflicts and divergences in international trade law is the harmonisation and unification of substantive rules. The development of the law of international trade has gone through three stages; in the first stage, it appeared in the form of the medieval *lex mercatoria,* a body of universally accepted rules.[150] In the second stage, the rules were incorporated into the municipal law of the various national states and the third stage is the development of widely accepted legal concepts. In the third stage, three distinctive characteristics are identified, that the rules of international trade exhibit similarities with rules of commerce in municipal jurisdictions, the application is provided for by authority of the national sovereigns and thirdly, their formulation is brought about by international agencies created by Governments or by non-governmental bodies. Based on the above, it is concluded that the CISG does not draw singularly from any particular domestic law but draws from commercial laws generally accepted in various jurisdictions, which have become universalised and internationalised. Consequently, the CISG is a neutral law fit to be adopted by Nigeria.

One of the methods recognised by the UNCITRAL for unification is the introduction of normative regulations devised and elaborated within the framework of international treaties and agreements concluded by two or more States.[151] A second method is formulation, normally under the auspices of an international agency, of commercial customs and practices, which are founded upon the usages of the international commercial community.

A transplant can be successful irrespective of the level of development of the country. This is based on Watson's deduction that the length of time during which Roman law has exercised its influence on Scotland indicates that something can always be successfully borrowed and adapted

[148] Philippe Sands, Principles of International Environmental Law (1995) and Paul C Szasz, Edith Brown Weiss (ed.) *International Norm-Making in Environmental Change and International Law: New Challenges and Dimensions* (1992) 41 in Wiener (n 147) 1300.
[149] John O Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer 1989) 6.
[150] See Gérard de Malynes' 'Lex Mercatoria', First Published in 1636 in UNCITRAL Yearbook http://uncitral.org/pdf/english/yearbooks/archives-e/A-6396-E.pdf 4 accessed 17 February 2014.
[151] UNCITRAL Yearbook http://uncitral.org/pdf/english/yearbooks/archives-e/A-6396-E.pdf 4 accessed 17 February 2014.

from a highly developed system to a country at a different stage of development.[152] This is true even where the parent system is not fully understood and even if the result is a simplification.

The above can be considered true regarding the transplantation of the CISG in Nigeria. Although the CISG is a more developed law – because of its recency when compared to 1893 SGA- and the international legal order on which it is founded, it can be successfully adapted to the Nigerian legal system. This is notwithstanding that the provisions of the CISG may be simplified. Where the CISG is transplanted into the Nigerian system, there will be no need to simplify the contents because of the dichotomy between the CISG as a developed system and Nigeria as a developing system. The CISG can still be applied harmoniously because of the availability and accessibility of its materials, which are useful for understanding and applying the CISG uniformly.

A foreign rule can be successfully integrated into a different system, and even into a branch of law, which is constructed on very different principles from that of the donor.[153] The reception of Roman property law by the Scottish, despite their differences is illustrative. That these disparate systems are able to transplant successfully shows the likelihood of successful transplantation of the CISG in Nigeria. This is because the principles on which the CISG was constructed are even marginally dissimilar to the common law principles of Nigeria.[154] The Nigerian Legal system is based on the common law legal system, both in concept and practice whilst the CISG is an adaptation of both civil and common law concepts. Thus, the CISG embodies some familiar concepts.

Furthermore, commercial laws of various jurisdictions share the same heritage and are based on principles that have evolved overtime from customs and practice amongst traders.[155] Consequently, there is a common source for all commercial laws whether applicable in the common or civil law system. The accepted international trade and customs which developed through the *lex mercatoria* diffused into both civil and common law jurisdictions irrespective of their backgrounds.[156]

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[152] Watson (n 136).
[153] ibid, 55.
[154] 1893 SGA and the Contract Reform Laws.
[155] Bruce L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 Southern Economic Journal 646; UNGA (n 24).
[156] TFT Plucknett, *A Concise History of the Common Law,* the Edition (London Butterworth, 1948) 332; Clive M Schmitthoff, 'The Law of International Trade, Its Growth, Formulation and Operation' in *The Sources of the Law of International Trade with special reference to East-West Trade*, Clive M Schmitthoff (ed) (New York, Praeger, 1964) 3 in UNGA (n 24) 3.

Nigeria's laws are based on UK laws, drawn from the *Lex Mercatoria*. This suggests that despite slight differences in the principles and concepts governing international trade, they are fashioned out of the same principles and with the same goals in mind. Secondly, although the CISG reflects concepts and principles of two prominent legal systems, civil and common law, this does not affect its functionality ability to serve these countries efficiently.

Despite the mixed nature of the CISG, it is suggested that it will be successful for the following reasons. Firstly, there are marginal distinctions between civil and common-law legal systems. Modern laws are 'practical, technical and problem solving', and do not differ greatly from country to country.[157] Friedman states that a 'French lawyer and an English lawyer would have an easier time comparing notes on say urban planning… than they would discussing legal problems with a lawyer from the days of Henry VII or Louis XIV respectively.'[158] These similarities increase the potential for successful transplantation of the CISG in Nigeria.

The dearth of cases in common law jurisdictions at the first stages of the Convention's adoption refutes Watson's argument, that a law can be successfully transplanted irrespective of the difference in principle. The disparity in the number of cases in the Civil and Common law jurisdictions was attributed to the fact that the CISG may be more based on the civil legal system and interpretational hindrance by judges in the common law.[159] This thus may hinder the successful adaptation of the CISG in Nigeria.

These arguments are flawed because the CISG seeks to bridge the gap between the civil and common law legal systems and does not favour one system to the detriment of the other. In fact, the CISG in a bid to represent both systems, compromises on certain aspects, by regulating certain issues and excluding others. As Ferrari suggests common law courts have a broader, more civil-law oriented approach to interpretation, and the rigidity of the literal rule has been eased not only in England but in other common law jurisdictions.[160] Considering this evolution in interpretation in common law jurisdictions, courts in Nigeria may adopt this approach towards the CISG. This indicates a potential for the successful application of the CISG in Nigeria.

The literature on transplants received widespread attention among comparativists because it showed that legal systems can accommodate a plurality of models, despite transplantation

[157] Jan Dalhuisen, *Dalhuisen on International Commercial, Financial, and Trade Law*, (2nd ed Hart Pub, 2004) 128 in Siems (n 6).
[158] Siems (n 6).
[159] Monica Kilian, 'CISG and the Problem With Common law Jurisdictions' (2000) 10 Journal of Transnational Law and Policy 217, 219.
[160] Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 Georgia Journal of International and comparative Law 183.

occurring across legal systems that already have much in common. Though only some legal systems are currently classified as mixed, many more exhibit features revealing that borrowing or transplantation are regular occurrences, even across boundaries that seemed to be impermeable. This finding casts serious doubts on the utility of the established approach to comparative law with its heavy reliance on the classification of legal systems into legal families. The ability of countries to accept a plurality of models disproves the suggestion that unfamiliarity to common law practitioners and the judiciary is the reason for the infrequent application of the CISG in common law jurisdictions. Moreover, the increased application of the CISG in common law jurisdictions in recent years further invalidates the argument. Given the above, it is likely that the CISG would be successful in Nigeria.

#### 5.3.3.4 Area of law: The Ease of Transplanting Commercial and Business Laws

Scholars believe that mechanical transplants i.e. those concerning technical legal rules occur easily while organic transplants, those involving institutional structures and processes, require careful selection and adaptation of the relevant norms.[161] Emerging global norms in business, the environment, and trade,[162] implies a synchronisation of laws governing business and trade. This suggests an easier ability of business laws to transplant successfully.

This means that because of the commercial nature of the CISG, it would easily and successfully be transplanted to Nigeria. Business, commercial and economic laws are less affected by political, social and cultural factors which are important in determining the patterns of legal migration for constitutional and human rights laws, ideas and institutions.[163] The CISG is considered as non-ideological yet, instrumental to economic development. As stated by Watson,

> If the rules of contract law of two countries are similar (as they already are), it should be no obstacle to their unification or harmonisation that the legal principles involved come ultimately from different sources, or that the habits of thoughts of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and business men in

[161] Frederick Schauer, '*The Politics and Incentives of Legal Transplantation*' 2000 No. 44 Centre for International Development at Harvard University.
[162] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 240-251; Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' Gunther Teubner, (ed.) (Dartsmouth, 1996) 3, 3-14.
[163] Schauer (n 161).

> Scotland and England do not in general perceive difference in habits of thought but only and – and often with irritation – differences in rules.[164]

Thus, for businessmen, there is a similitude in how business is done across borders, which suggests an understanding of the underpinnings of commerce. Consequently, it will be easier for these businessmen to transplant the CISG to Nigeria.

This is supported by Freud's suggestion that most laws are deeply embedded in their social and institutional matrices and therefore it cannot be taken for granted that rules or institutions are transplantable. He however agrees that some laws are more autonomous than others and can be transplanted across social political boundaries.[165]

The polarity in attitude of nations with respect to varied areas of laws transplanted is demonstrated by the Estonian law reform. While having the American bankruptcy law in Estonia seemed to most Estonians not much different from drinking French wine and owing German or Japanese cars,[166] having an American constitution was something else. It meant giving up sovereignty, a loss of control and what is constitutive of a nation.[167] This is further buttressed by the suggestion that constitutions are especially immune from the effect on legal migration, being of the same member family. Thus, despite the fact that common law countries follow models from other common law countries, the same as civil law countries, French colonies and Spanish colonies, this is not typically so for constitutions.

Nigeria is a typical case in this respect because although a majority of her laws are based on common law system, and are in some cases are exact replications of the English law, the current 1999 Constitution is not adopted from the British system.[168]

This implies that laws within the commercial category like the CISG, being non-ideological and important to economic development are capable of being borrowed from the analogous laws of other nations because trade laws are similar in most jurisdictions. Thus, the transplantation of the

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[164] Watson (n 136).
[165] Otto Kahn Freud, 'On Uses And Misuses Of Comparative Law' (1974) 37 The Modern Law Review 1; Teubner (n 162) 19.
[166] Peter Byrne and Philip G Schrag, 'Law Reform in Estonia: The Role of the Georgetown University Law Centre' (1994) 25 Law and Policy in International Business 449; See Samuel L Bufford, 'Bankruptcy Law in European Countries Emerging from Communism: The Special Legal and Economic Challenges' (1996) 70 American Bankruptcy Law Journal 459 in Schauer (n 161) 9.
[167] The same concerns were echoed in Poland. Wiktor Osiatynski, 'The Constitution-Making Process in Poland' (1991) 13 Law and Policy 125-43; Wiktor Osiatynski, 'Perspectives on the Current Constitutional Situation in Poland' in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley (eds.) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 312-20 in Schauer (n 161).
[168] Olaide Aro, 'Towards the People's Constitution in Nigeria' (2010) 7 (2) Journal of Law and Diplomacy.

CISG into Nigeria will most likely be successful because commercial laws are not indigenous to Nigeria. Moreover, Nigeria can apply certain reservations; parties can exclude it from the scope of application of their contract, and derogate from its provisions, allowing for cultural acceptations.

#### 5.3.3.5 Motivation and Voluntariness of Transplant

Motivation must be analysed from the perspective of the law reformers initially responsible for the transplant, and the legal actors, the potential users of the law. From the reformer's perspective, the more predominant the practical utility of a law is, the more likely it is that the transplant will be successful. If only because motivation is likely to affect the law reformers attention to micro fit other motives such as politics or symbolism, which are far less conducive to success. Yet the initial motivation for the transplant (whether conducive to success or not) can be overcome by those with the authority to apply or enforce the law subsequent to its codification in the local regime.

If a country has a genuine motivation to transplant a law, their attitude is likely to be positive towards that law, therefore increasing the likelihood of success. For instance, Germany seemed more willing to use the CISG and quickly adapt to interpretations based on the aims of the CISG because the prominent German legal scholar Rabel was involved in drafting the Convention.

There are several motivations for Nigeria to adopt the CISG; the desire to improve international trade by employing a better legal framework, the aspiration to use the CISG as a model for law reform and the desire to be respected by her trading partners and the UNCITRAL. According to Schaeur, the desire of a country to be esteemed by a particular group of nations bears a causal relationship to the degree to which that country will attempt to harmonise its laws with that of the group or community of nations, and also bears a causal relationship to the extent to which the country's laws will eventually resemble the laws of that community of nations.[169] Therefore, the motivations for Nigeria to adopt the CISG stated above increases the chances of its success.

Voluntariness is another determinant of a successful transplant. Where transplantation is voluntary, it increases its own receptivity by making a significant adaptation of the foreign model to the pre-existing conditions and structures in the domestic setting.[170] This increases the chances of success of the transplanting model in the local setting. Considering that there is no pressure

[169] Schauer (n 161).
[170] Berkowitz and Others (n 144) 11.

from any authority regarding the adoption of the Convention in Nigeria, it suggests voluntariness, therefore increasing the likelihood that actors will engage with it, making it successful.

#### 5.3.3.6 The Availability of Substitutes

The fewer the available substitutes for the transplanted laws, within or outside the legal system, the more likely the transplanted rule or institution will be adapted to the local conditions and used by actors in the host country.[171] This is because of limited choices, which increase the appreciation for the transplanted law. Further, where the existing laws are not considered standardised, they will not be considered an alternative.

For Nigeria, there are hardly any viable substitutes, neither the 1893 SGA, the incompatible OHADA, nor the current structure of international trade, which are unfavourable to the Nigerian trader are suitable. Given the limited options, actors will be forced to engage with the CISG where it is adopted thus, increasing the likelihood of successful reception.

#### 5.3.3.7 Attitude of Actors Towards the CISG

An important determinant in predicting the success of the CISG is the attitude of actors i.e., their willingness to engage with the Convention and how helpful they perceive that the Convention would be. In order to determine the likelihood and the degree of likelihood, the willingness and the degree of willingness of Nigerian actors towards the Convention, were it to be adopted, a survey was carried out amongst legal practitioners in Nigeria, the actors who will engage most with the CISG. This survey and response is particularly significant considering that one of the reasons for the CISG's obscurity in some countries such as the U.S, Australia and surprisingly Germany, where it is considered most engaged with, is that legal practitioners were not willing to offer it to businessmen as an alternative.

##### i. Likelihood of learning a New Convention

The purpose of this question was to determine if the legal practitioners were likely to learn a new Convention, considering exogenous factors, independent of their own willingness or contribution.

[171] Hideki Kanda and Curtis J Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 The American Journal of Comparative Law 10.

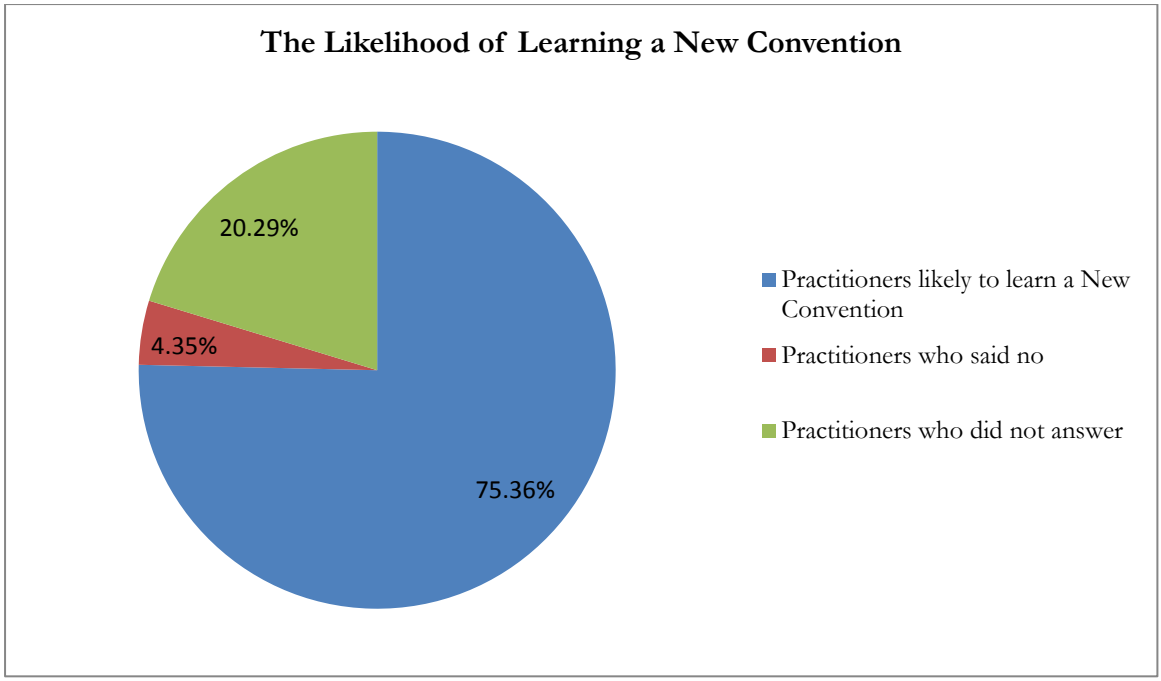


Figure 5.1

The responses from the above diagram show that 75% of the legal practitioners are willing to learn a new Convention. This is three times the number of legal practitioners who did not answer the question, 20%, and about eighteen times the number of practitioners who said no, which is 4%.

This indicates a positive attitude not only towards the possibility of a new convention such as the CISG but to other Conventions.

### ii. Degree of Likelihood of Learning a New Convention

This question was asked to measure the degree of the likelihood of the legal practitioners to learn a new Convention. The question helps to show the extent to which Nigerian practitioners are likely to learn a new Convention, that is, how probable it is. This is employed to assess the degree of success of the CISG in Nigeria.

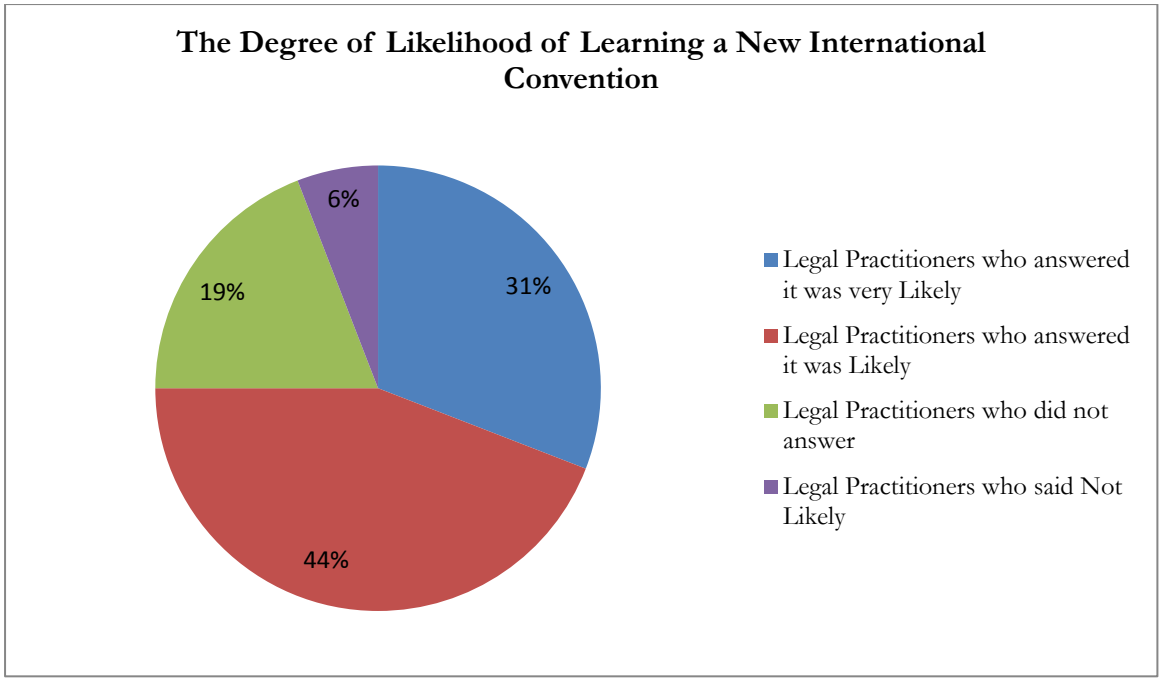


Figure 5.2

The diagram above shows the extent to which the practitioners are likely to learn about the Convention. Whilst 44% stated it was **Likely,** 31% stated it was **Very Likely**, 19% did not answer and 6% said **Not Likely**. The degree of probability of learning about the Convention which in total is 71% shows positivity towards the convention, therefore increasing the potential of the Convention being successful in Nigeria.

### iii. Are you willing to learn a new Convention?

This question deals with the personal disposition and readiness of practitioners to engage with the Convention where it is adopted. The question sought to determine their willingness based on personal dispositions, to engage with a new convention.

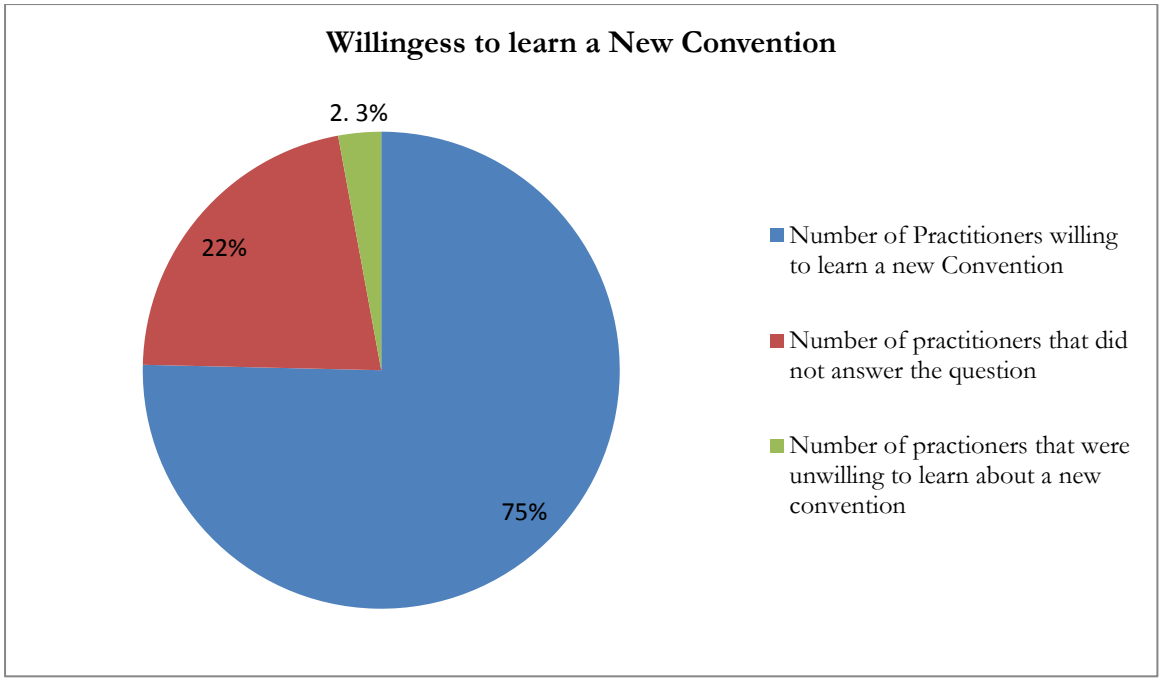


Figure 5.3

The figures show that 75% of the practitioners are willing to learn a new convention. This is three times the percentage of the practitioners that did not answer the question, and the number of practitioners unwilling to learn a new Convention. This shows that a majority of the legal practitioners of their own volition are willing to engage with the Convention where it is adopted.

### iv. The Degree of Willingness to Learn a New Convention

This question tries to establish the extent to which the legal practitioners are willing to learn a new Convention. It is recognised that although they may be willing, the degree of willingness is important on how it impacts the potential of success of the Convention.

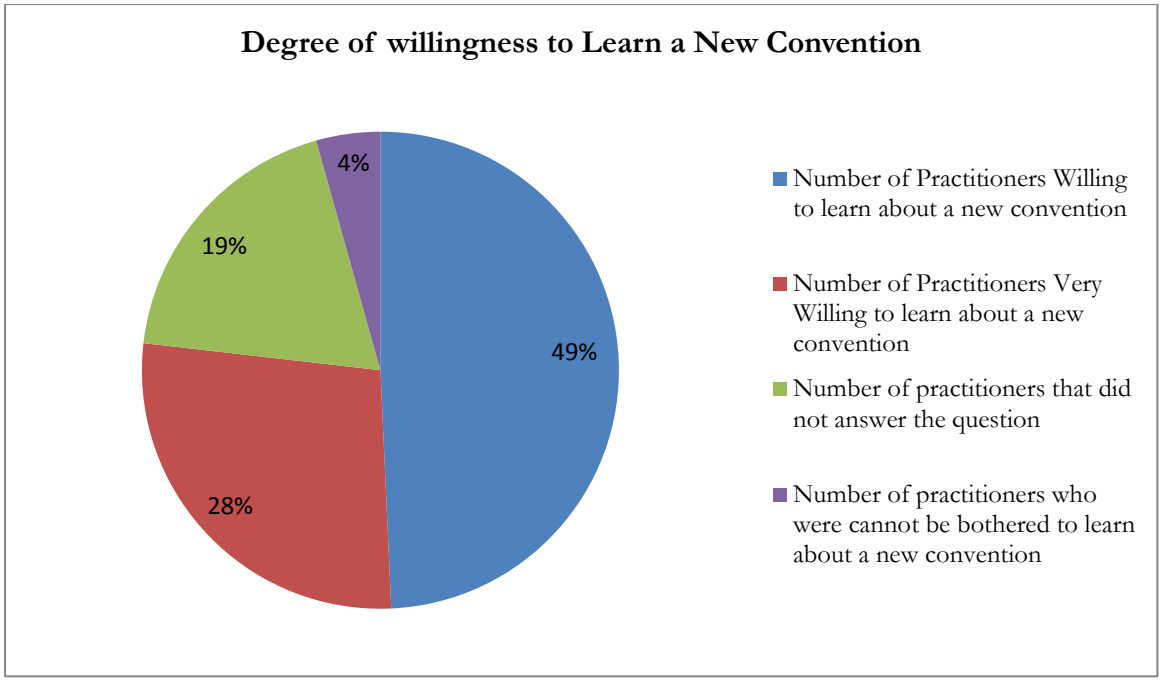


Figure 5.4

The chart shows that there is a high level of willingness of legal practitioners to learn a new Convention. Whilst 49% were willing, 28% were very willing, 19% did not answer the question and 4% stated that they could not be bothered. This suggests a more positive attitude towards the Convention thus, increasing the likelihood of success.

### v. Would you be willing to offer the CISG as an Option to Businessmen?

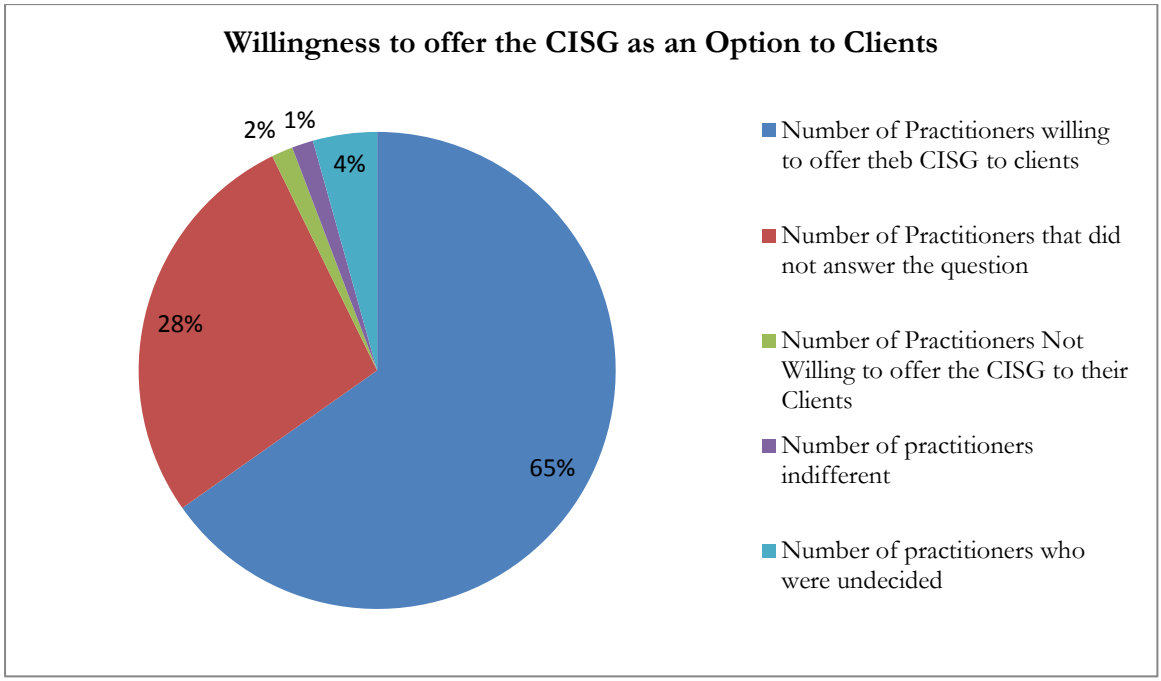


Figure 5.5

The chart above shows that 68% of the respondents would be willing to offer the CISG as an option to businessmen even without knowing it personally. Another 28% did not answer the question. It is suggested that the percentage of respondents willing to offer the CISG as an option to clients would be more, had the respondents answered the survey questions carefully.[172] This willingness is particularly significant in determining the success of the Convention because one of the reasons why the CISG is minimally used in other jurisdictions is because lawyers are reluctant offer to it to their clients as an option, in fact, they purposely exclude it.

The questions above show that the disposition of legal practitioners towards the Convention is very positive. This increases the likelihood of success the CISG in Nigeria.

Additionally, as globalisation broadens Nigeria's trade borders, it also provides an easy platform for movement of laws, through norm entrepreneurs; students and business men, familiarising themselves with foreign laws through education and international transactions. These can then be transported to domestic jurisdictions, which transcend borders, resulting in the production of uniform laws. Exposure and familiarity of laws makes the soil fertile for transplantation, not only

[172] Because this was the last question on the survey sheet and some of the respondents did not turn to the next page, they may have omitted the question. Furthermore, because the initial questionnaires distributed by the author were misunderstood, some of the questions were omitted. Thus, a large proportion of those that did not answer the question may have been willing.

with regards to choice, but in receptivity and adaptation. Globalisation has enabled familiarity with foreign laws such as the CISG. Therefore, Nigerian students who studied abroad and migrated back are already familiar with the Convention, making it easier for the CISG to adapt successfully.

### 5.4 The CISG and the 1893 SGA in Nigeria: Compatibility with Common Law Concepts

The adoption of the Convention in Nigeria means that there will be two regimes governing international trade transactions. On one hand the 1893 SGA, able to govern both domestic sales transactions and international trade, and on the other hand the CISG, designed for international trade. This may be problematic because it will introduce variations in the interpretation and application of both the SGA and the CISG, leading to unanticipated inconsistencies in practice. Another concern is the relegation and consequent obscurity of the 1893 SGA.

These fears are unfounded firstly because the CISG governs international sales transaction not domestic contracts, leaving ample room for the application of the domestic law. Secondly, empirical research in Nigeria shows that the SGA is hardly the choice of law in international trade transactions.[173] Most of these transactions are governed by English laws, hence, the SGA will hardly be missed. Furthermore, because the SGA is not an indigenous law, being part of the laws transplanted from England, it will not be offensive to substitute it with the CISG.

Although concerns about varied interpretation are valid, they can be overcome as demonstrated in Germany and the U.S, previously examined. Where the CISG is adopted in Nigeria, interpreters are urged to keep in mind the Convention's purpose and requirement for autonomous interpretation. Moreover these tendencies can be avoided given availability and accessibility of resources on the CISG. The Convention also allows parties to opt out via Article 6 meaning that the SGA can always be chosen.

Given that where the CISG is adopted in Nigeria, it will exist alongside the SGA, the concerns of the complementarity of the CISG with Nigerian law necessitate an examination of the common law concepts, which may cause divergences, with the CISG.

[173] Lagos State Consultation Paper (n 52).

### 5.4.1 CISG And the Statute of Fraud in Nigeria

The law Reform (Contracts) Act No. 64 1961 is the foundational law for contracts in Nigeria.[174] Prior to the law of 1961, apart from common law, equity and Nigerian case law, statutory provision applicable to contracts in Nigeria were S4 of the Statute of Fraud 1677, and S24 of the SOGA 1893. These two provisions supplemented the common law on the enforcement of contracts for the sale of goods.[175] Currently, the statute of fraud is enshrined in the various laws.

Under the Amendment Act 1828, a contract for the Sale of Goods of 10 pounds value or in excess of 10 pounds is not enforceable unless; first, the buyer accepts part of the goods sold and actually receives the goods or gives something in earnest to bind the contract or in part payment or second, some note or memorandum in writing of the contract is signed by the party to be charged or an agent on behalf of the party.

The effect of the U.K Statute of Fraud 1677 and the Amendment Act 1828 on the Nigerian contract law is that enforceability must be evidenced by a memorandum or note in writing signed by the party to be charged or some person authorised by the individual. The classes of contract listed to be governed by the statute of fraud are unsurprisingly similar to the ones found in the UCC.

Cases upholding the SOF principle, albeit majorly in land abound. In *Ali Safe v Northern States Marketing Boards*[176] the appellants amongst other issues asserted on appeal that the trial court was in error in finding that Exhibit 4, the receipt issued to the plaintiff on behalf of the vendor for the sale of a property, did not comply with the requirements of section 4 of the Statute of Frauds. The court applying the Law of Property Act 1925 and stating that this law is equivalent to section 4 SOF held that the receipt was sufficient memorandum in itself to conclude the matter.[177] More recently the case of *Nweledim v Uduma* [178] where the court dismissed the case of

[174] However its application does not extend to the former Western Region and Lagos State because they possess their own contract laws The Act applied to the whole of Nigeria until 1958 when it was repealed in the then western Region now comprising Oyo, Ondo, Ogun Osun, Delta and Edo States. With the repeal, the Sale of Goods Law, No. 43 of 1958 was enacted to take its place. It was cap. 115 of the laws of Western Region of Nigeria 1959 and became Cap. 112, 116 and 117 respectively of the 1978 Edition of the laws of Ondo, Oyo, and Ogun States. It also became Cap. 125 of the Laws of Lagos State of 1973. Law Reform (Contracts) Act Chapter 517 Laws Of F.C.T; Law Reform (Contracts) Law Chapter L63 (Lagos).
[175] Charles Mwalimu, *The Nigerian Legal System: Private Law* (Peter Lang Publishing Inc. 2009) Vol 2.
[176] (1972) LPELR-SC.535/1970.
[177] Lewis JSC in ibid.
[178] (1995) 6 NWLR (Pt.402).

the plaintiff/appellant holding that based on Section 4 of the SOF that the receipt used for the transfer of land was not sufficient to constitute a memorandum as provided by the Statute.[179]

With the recognition of section 4 of the SOF in Nigeria, it is admitted that like the parol evidence rule, courts and business men may struggle to understand and apply the provisions of the CISG if they are not familiar with it. However, the CISG recognises that some jurisdictions may be keen on the application of the writing as a form requirement and thus, it makes the provision for opting out under article 96.[180]

In order to avoid any contradiction with the law and to avoid any misapplication or misinterpretation of the CISG, it is suggested that where the CISG is ratified in Nigeria, the option of making a declaration under Article 96, is a way of overcoming the obstacle of habit. The reservation clause enables states preferring a formal writing to decide, by application of the domestic law invoked by conflict rules, the form issue for contracts concluded by parties with a place of business in one of these states. The effect of this provision is that since the Nigerian contract laws and the courts still recognise and apply section 4 SOF, there will not be any conflict between the CISG and the Nigerian contract law.

Even where the declaration is not made, that businessmen still have the option of including in their contracts, clauses agreeing to a writing requirement and this will be valid because it follows from the basic principle of party autonomy, which is recognised in article 29(2), sentence 1.[181]

### 5.4.2 The CISG and Firm Offers in Nigeria

The principle of revocation of offer under the Nigerian contract law is a replication of the English law, which is that the revocation of an offer before an acceptance involves no liability on the part of the offeror, even if he promises to keep it open. This has been recognised in Nigerian *Amana Suits Hotels Ltd. v P.D.P.*[182]

Considering this, applying the CISG may be challenging for lawyers and judges' since the fixing of a time for acceptance of an offer could be interpreted as meaning that the offer is irrevocable at the time, or could simply refer to the expiration of the offer.[183] This principle draws from the civil law principles of revocability of offer.

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[179] *Nweledim* (n 178); *Anthony Ibekwe v Oliver Nwosu* (2011) LPELR-SC.108/2006
[180] Peter Schlechtriem, 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' (Manz, Vienna 1986).
[181] ibid, 46.
[182] (2007) 6 NWLR (Pt. 1031) 453 at 478 Paras. B - D (CA).
[183] See Section 16 CISG.

However, this is not insurmountable. Since two interpretations can be given to acceptance, it has been suggested that when lawyers from the common law system are drafting provisions of contracts to be governed by the Convention, they should ensure that their meanings regarding the irrevocability of an offer is clear.[184]

Another aspect of article 16 is the offeree's action based on his reliance on the offer. The CISG recognises that an offer may be considered irrevocable if it was reasonable for the offeree to rely on the offer as being irrevocable.[185] This principle applies even if there was no express indication of irrevocability under paragraph 2(a).

This approach which finds support in the domestic law of some civil law systems, hold offers to be irrevocable for the period needed until the response, while other legal systems hold that reasonable reliance either bars revocation or makes the offeror liable in tort for damages.[186] There is some semblance between the principle of reliance on the offer, and the doctrine of promissory estoppel under the American domestic law, although there is no express foreseeability required from the offeror and no express requirement that the offeree's reliance be detrimental.

The Nigerian principle on promissory estoppel is the same as the English doctrine. The initial position under estoppel was that there had to be some detriment to the offeree, by reliance on the offer. Detriment as an essential part of the application of promissory estoppel in Nigeria was recognised in the case of *Ajayi v RT Briscoe.*[187] The High Court and the Supreme Court held in the company's favour and a further appeal to the Privy Council resulted in the dismissal of the case with the court stating that Ajayi had not altered his position by reliance on the promise. The court held that Ajayi did not worsen his position by not putting forward counter proposals after the receipt of the company's proposal that payment should be suspended during repairs. There was also no evidence that he had altered his position by reorganising his business on the basis of the promise. The implication of this being that he had suffered no detriment and detriment was

[184] Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 Law Quarterly Review 201, 214; Joseph Lookofsky, *Understanding the CISG* (3rd ed, 2008 Kluwer Law International) 54; Orkun Akseli, 'Editorial remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 16 of the CISG' Guide to Article 16' <http://www.cisg.law.pace.edu/cisg/text/peclcomp16.html#er> accessed 30 April 2013.
[185] Article 16(2) b.
[186] John Honnold, *Uniform Law for International Sales*, Kluwer Law and Taxation Publishers, Deventer (1999, 3rd ed) 159-168, 164.
[187] [1964] 3 All E.R. 556; [1964] W.L.R. 1326.

an important constituent in a plea of promissory estoppel.[188] This initial position is at variance from the Convention's requirement that the offeree's reliance need not be detrimental.[189]

However, the decision and views expressed in this case has been criticised because of its inconsistency with a majority of cases dealing with promissory estoppel. After a review of the cases where promissory estoppel was successfully pleaded, Lord Denning stated in *WJ Alan & Co. Ltd. v El Nasr Export & Import Co.*[190] that 'in none of these cases does a party who acts on the belief, act to his detriment. It is not a detriment but a benefit to him. Nevertheless he has conducted his affairs on the basis that he has that benefit, and it would not be equitable now to deprive him of it.'[191]

Based on this, the requirement of alteration of position means 'he must have been led to act differently from what he would have otherwise done. The cases show that all that is required is that one should have acted on the belief induced by the other.'[192] Decisions in cases after that echo Lord Denning's view that to establish promissory estoppel, there is no need to show detriment. It is merely sufficient for a party to conduct his affairs on the basis of a representation made by the other party.[193] From the above, detriment is not an essential element in a plea of promissory estoppel in the Nigerian contract law.

The current view is more in alignment with the provisions of the CISG, which does not make detriment a necessity under Article 16(2)b. This shows that firm offers in Nigeria is compatible with the CISG, thus eliminates one of the obstacles to the interpretation of the CISG. Considering this, courts may not find it too distinct when applying the provisions of the Convention.

### 5.4.3 The CISG and the Doctrine of Consideration in Nigeria

At common law, when an agreement to modify a contract merely increases or reduces the obligations of one of the parties, the agreement may be unenforceable since it is not supported by "consideration" -- i.e., by an act or promise given in exchange for the new promise. By virtue of the application of principles of common law in Nigeria, the doctrine of consideration has

[188] IE Sagay, *Nigerian Law of Contract* (Spectrum Books Ltd, 1989) 74-75.
[189] Article 16(2)b.
[190] [1972] 2 Q.B. 189; Sagay, (n 188) 74-75.
[191] ibid.
[192] ibid.
[193] Sagay (n 188) 74-75.

been and is still well recognised under the Nigerian contract law. In *Alfotrin Ltd v A.G Federation* Justice Iguh stated the principles of a binding contract,

> To constitute a binding contract, there must be an agreement in that the parties must be in consensus ad idem regarding the essential terms and conditions thereof; the parties must intend to create legal relations and the promise of each party, in a simple contract, not under seal, must be supported by consideration. There must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term or condition unsettled.[194]

The same principle was reiterated in *Yaro v Arewa Construction Ltd* where it was stated that the ingredients of a contract constitute amongst other elements, consideration.[195]

With the recognition of the doctrine of consideration as a core of contract law in Nigeria, the application of the CISG, which does not require consideration as a criterion for modification of contract may create disharmony with the local laws.

It has been suggested that the omission of the doctrine of consideration is without any significance because 'a sale is an onerous transaction, where "consideration" is supplied by the exchange of promises to deliver and to pay; and a challenge to the enforceability of a promise for lack of consideration as an issue of "validity" dehors the scope of application of the Convention, hence remitted under conflict rules, to the applicable national law'.[196] Since this is an issue of validity, it is outside the scope of application of the CISG and thus, would not come within the interpretation of the courts.

Moreover, the elimination of the doctrine of consideration was not objected to by common law delegates during the drafting stages of the Convention because common law restrictions on the parties' ability to adapt their transaction to new circumstances had already generated pressure for modifications of the traditional common law rule.[197] The above indicates the Convention is not at odds with the doctrine of consideration in Nigeria.

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[194] **(**1996) LPELR-SC.126/1989 PER IGUH, J.S.C. (P. 29, Paras. B-D). See *also, Branwhite v Worchester Works Finance Ltd* (1969) AC 552; *Imana v Robinson* (1979) 3-4 SC 1; *Ojikutu v Demuren* (1957) 2 FSC 72 Per Awala JCA.

[195] (1998) LPELR-SC.97/1997.

[196] Article 4(a) Alejandro M Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' (1989) The International Lawyer 443-483.

[197] The Uniform Commercial Code (UCC) upholds contract modifications without consideration. *See* U.C.C. § 2-209(1) (1977) (a modification needs no consideration to be binding). Honnold (n 186) 202.

### 5.4.4 CISG and the Battle of Form in Nigeria

In Nigeria, there is no known express law dealing with the battle of forms. However the principle of offer and acceptance which may be applied to disputes on battle of forms is the same as the common law mirror image principle, which is that any modification or amendment of the offer will constitute a counter offer, cancelling the original offer. The purported acceptance thus becomes a fresh offer. This was clearly recognised in *Amana Suits*[198] where the court stated 'that acceptance is ineffective unless there is complete agreement on all material terms.'[199] This case also reflects the mitigation by common law courts of the mirror image rule which imposes the additional question of whether the new terms are material.

Art. 19(1) of the CISG is the same as the above provision where it states that a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications, is a rejection of the offer, and constitutes a counter-offer.

Despite this advantage, the rules of Article 19(1), which reflects the mirror image rule of the CISG, is considered rigid. However, this rigidity is eased by 19(2) of the CISG which states that the only time an acceptance will conclude a contract is when the acceptance varies from the terms of the offer is when it contains additional or different terms "which do not materially alter the terms of the offer" and the offeror does not promptly object to the alteration. Therefore, even if the additional or different terms do not alter the offer materially, if the offeror objects to those terms, no contract will be formed.

The impact of subsection 2 is however diminished by the overinlusiveness of materiality contained in subsection 3, which suggests that nearly all alteration will be material. Thus, the CISG whilst retaining the spirit of the mirror image rule provides that where alterations to an original offer are not material, they will not defeat the contract, and instead will become part of the contract unless an objection is made.[200]

The Nigerian principles on the constitution of an offer, counter offer and acceptance are parallel to those of the CISG. Both rules favour the last party to submit its terms. This makes for an easy

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[198] *Amana Suits* (n 186); *Chief T.O.S Benson v Nigerian Agip Oil Co. Ltd* see also *Oni v Communications Associate (Nig) Ltd* (Unreported) High Court of Lagos, Lambo J. Suit no. LD/625/71 delivered on January 8 1973.
[199] *Amana Suits* (n 186); *Okubule v Oyagbola* (1990) 4 NWLR (Pt. 147) 723. Per. Aboki JC.

[200] Henry D Gabriel 'The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code: The Common Law and the Uniform Commercial Code' (1994) 49 (3) The Business Lawyer 1053, 1058.

interpretation and application of the CISG in that regard. This is because there will be not be substantial change from the principles recognised under the domestic law.

Under the CISG, it has been suggested that the issue of battle of forms should be considered a gap that must be resolved by applying the general principles upon which the Convention is based. Following this approach, some authors believe that the principle of good faith should apply. They conclude that the parties are in agreement on the main terms and that all standard terms which are not in conflict, will form part of the agreement. Conflicting terms are excluded and replaced by the dispositive or residual law applicable. That is, they adopt a solution such as that followed in certain legal systems, the "*knock-out* rule.[201] Some authors have favoured the opinion leading to the application of the "last-shot rule" - the last person to send his form is considered to control the terms of the contract and therefore the one who wins the battle.[202]

It would seem that the knock-out rule is favoured by the majority of commentators and the case law, although there is also support for the last shot rule. Where the knock out rule is favoured, it would be contradictory to the Nigerian common law, which favours the last shot doctrine. Despite this conflict, the knock-out rule has the advantage that it is in conformity with the intention of typical parties in international commercial relations and leads to acceptable results in cross-border trade situations. Considering this, the battle of forms resolution through knock out rules as preferred by commentators of the CISG can be considered an advantage in facilitating international trade transactions.

### 5.4.5 The CISG and the Mailbox Rule

The mailbox rule under common law is applicable in Nigeria. Here, acceptance takes place the moment it is posted. This is different to Art 18(2) of the CISG, which states that acceptance takes place upon receipt. Based on these differences, it is cautioned that lawyers and interpreters of the CISG pay particular attention not to misapply Art 18(2) by tilting towards domestic law interpretation.

While it is cautioned that care be taken in the application of this section of the CISG, there are suggested ways around it. First, Article 18(2) must be read in conjunction with Article 16 of the CISG.[203] Where this is done, the result for interpreters will be the same with the common law,

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[201] Pilar Perales Viscasillas, 'Editorial remarks on Article 19' January 2002 http://www.cisg.law.pace.edu/cisg/text/peclcomp19.html accessed 02 August 2015.
[202] CISG Advisory Council [1] Opinion No. 13, 'Inclusion of Standard Terms under the CISG' http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html accessed 28 July 2015
[203] Honnold (n 186).

that the offeree has protection from revocation because the offeror cannot revoke once the offeree has dispatched acceptance.[204] However, the change will be with regards to whom the burden of lost communication falls on. As the CISG has proven to be better law in this regard than the Common law rule, it will bring some fairness for international businessmen who have opted to use it. Since the offeree already bears the burden of mailing the acceptance, it will ensure that he practices effective and reliable business communication by providing the best possible postal service for relaying his message.

Professor Uche suggests regarding the acceptance on posting rule in Nigeria that the position ought to be contrary to the principle in *Adams v Lindsell* i.e. acceptance being immediate on dispatch. He argues that based on Section 3 of the Post Office Act, a postal article is deemed to be in the course of transmission by post until delivered to the addressee, and delivery takes place if the article is delivered at the house, or office of the addressee or to the addressee himself or his authorised agent. The effect is that in Nigeria, an acceptance by post does not take effect until the letter is delivered to the offeror or his agent.[205]

Assuming the argument is valid by virtue of the peculiar circumstance of post in Nigeria, acceptance in Nigeria with regards to post would be the same as that under the CISG, it would take effect upon delivery. This suggests an alignment with the CISG and there would be no discord in interpretation.

However, Sagay argues that this position does not have the effect suggested by Uche, since that provision is meant to define the liability of the post office for the loss or damage to postal articles, and what is being stated in the section is that the liability of the post office does not arise until the article is in the course of transmission and ends with delivery. Therefore, it cannot and does not, purport to lay down any rules governing the formation of a contract between private individuals who happen to use the post office as a carrier.[206]

Despite the above arguments, there is consonance between the provision of the CISG in this respect and the exceptions of the mailbox rule under common law. The exception is that the rules do not apply where the terms of the offer either expressly or implicitly indicate that acceptance must reach the offeror. This exception was recognised in *Afolabi v Polymera Industries,*[207] where the plaintiff had applied to be appointed an agent of the defendants. He was

[205] UU Uche, *Contractual Obligations in Ghana and Nigeria* (Frank Cass Publishers, 1971) 93.
[206] Sagay (n 188) 31-32.
[207] (1967) 1 All NLR 144.

offered the position in a letter with the following words 'will you please read, study carefully and sign duplicate copy attached, signifying your agreement to all points as listed above and return at your earliest convenience for records. There was no evidence that he ever returned the signed duplicate copy. It was held that the defendants' letter had set out the manner in which the offer it contained should be accepted, in order to become a binding contract and in the absence of acceptable evidence that he signed and returned the duplicate copy, there was no valid acceptance of the offer.

Based on this, lawyers can advise their clients to state categorically if they want the acceptance to take effect upon receipt by the offeror since the CISG honours the terms of the contracts of parties first before its rules. Additionally, judges interpreting this section of the CISG will not find themselves in unfamiliar territory since it also falls under one of the exceptions of the common law rule, which they are already conversant with.

## 5.5 A Comparative analysis of the CISG and the SGA- Remedies of specific Performance, Price reduction and Additional Time

Where the CISG is adopted in Nigeria, contracting parties may choose the remedial scheme under the CISG or SGA. While the SGA recognises the same general concept, the scope of the equivalent provision in the SGA is somewhat narrower.[208] The fact that the CISG offers a framework that caters to varied legal systems means that certain provisions were drafted to suit international traders from different spheres. Thus, considering that the CISG is to work and exist with the SGA, a comparative analysis of certain provisions in both regimes would show their complementarity.

### 5.5.1 Specific / Enforced Performance

Specific performance is a key aspect of international trade because in most cases, buyers would rather continue with the same seller than spend time finding another seller, causing delay and frustration in the maximisation of profit. Normally, businessmen are more concerned with actually doing the business as opposed to focusing on the formalities of a contract and the comprehensiveness of the contract.[209] Particularly in Nigeria where empirical evidence suggests

[208] Section 55(1) of the SGA allows the parties to negative or vary "a right duty or liability", which arguably is narrower than the scope of Article 12 of the CISG. Peter A Pilliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?' 12 (2000) Pace International Law Review 1-46.

[209] Stewart Macaulay, 'Non-Contractual Relations in Business' (1963) 28 (45) Am. Sociological Review abridged in Aubert (ed) *Sociology of Law* (1969 Penguin, London) 195-209.

that the traders are more focused on transactions, which are 'cash and carry',[210] what is readily available by the seller in the event of breach, becomes priority. Recognising this, where Nigerian traders go through with formalising their contracts, there is a high likelihood that rather than going through with instituting an action for breach for contract they would prefer that the seller remedies the contract and saves time and cost of re-contracting. Furthermore, giving the opportunity for the seller to remedy the contract saves the contractual relationship and avoids the time and process of finding another seller.

### i. SGA

S52 of the SGA states 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages'

A number of issues arise here; firstly the section limits specific performance to those circumstances involving 'specific' or 'ascertained' goods. This suggests that the section ought only to apply in limited circumstances involving limited types of goods. The inclusion of specific or unascertained goods however is not a guarantee that the court will exercise its discretion and order specific performance. This discretion causes uncertainty. Thus, a plaintiff seeking specific performance has no means of knowing whether the remedy will be granted even if successful on the merits of the case.

There is also further uncertainty arising from a lack of consensus regarding the nature of the SGA itself. The nature of the SGA as a codification of common law and equity regarding sales law suggests that the only remedies available are those codified by common law. With respect to specific performance, it is relevant in considering whether the remedy can be granted for unascertained goods. This view has been adopted in a number of cases, [211] and criticised.[212]

The court however granted specific performance in other cases, taking a different route.[213] Although they refrained from discussing whether in fact it had the power to grant such a remedy under those circumstances or how the remedy fit into section 52, the decision of Re Wait or even the general remedial structure of the SGA.

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[210] See chapter 3 for an elaboration of the reasons why the CISG has not been adopted in Nigeria.
[211] This view was taken in the leading case of *Re Wait,* [1927] Ch 606. This view of codification has been criticised by some commentators [50] and has not been consistently applied in all cases.
[212] See e.g GH Treitel, 'Specific Performance in the Sale of Goods' (1966) Journal of Business Law 211, 223-224.
[213] Sky Petroleum Ltd. v VIP Petroleum Ltd. [1974] 1 WLR 576.

The conflict of the courts in this area, demonstrates uncertainty because the precise scope of when a court might have the power or discretion to grant specific performance is therefore unclear.

The language in S 52 also causes uncertainty in that it adopts the term 'plaintiff' and 'defendant' without any reference to buyer or seller. Yet S 52 falls within buyer's remedies. This suggests that it may be argued that the seller can theoretically sue for specific performance,[214] or simply that only the buyer has a right to ask for specific performance.[215] Although certain circumstances have been identified as grounds for the seller to ask for specific performance, the position of the seller is unclear under the SGA.

### ii. The CISG

Article 46 of the CISG which allows that a 'buyer may require performance of the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement' is the equivalent of S.52 SGA. Unlike the SGA, the CISG contains a provision in favour of the seller in Article 62 to require the buyer to 'pay the price, take delivery or perform his other obligations'. Although this area is clearer under the CISG, it has been suggested that the provision allowing specific performance in favour of the seller is unlikely to have a significant practical effect except in exceptional circumstances.[216]

The CISG in Art 46 and 62 does not require that goods for which the specific performance is sought should be specific, ascertained or otherwise identified under the contract. The Convention thus proves superior to the SGA in this regard because it eliminates uncertainty. The only exception regarding the buyer's ability to demand specific performance is resorting to a remedy, which is inconsistent with specific performance. Like the SGA, the buyer can claim damages in addition to specific performance.

A distinction between the CISG and the SGA is with regards to the person entitled to pursue the remedy. Whilst the SGA designates the remedy of specific performance to be granted by the court, discretionarily, the CISG makes it the buyer's option to request specific performance from the seller without recourse to the court. This requirement shows the inclusive nature of the

[214] See, M Furmston, *Sale of Goods* (Surrey: Croner Publications, 1990) 173; GH Treitel, 'Specific Performance in the Sale of Goods' (1966) Journal of Business Law 211, 229-230; L Marasinghe, *Contract of Sale in International Trade Law* (Singapore: Butterworths Asia, 1992) 178. This issue could also turn on whether the SGA exempts all non-enumerated remedies, since before the SGA, in Buxton v Lister (1746) 26 ER 1020 at 1021, the court assumed that a seller could obtain an order for specific performance.

[215] See, e.g., PS Atiyah and JN Adams, The Sale of Goods, 9th ed. (London: Pitman Publishing, 1995), at 507

[216] It is unclear whether or not English law might grant remedy. Piliounis (n 208).

Convention in considering the preference for many legal systems that an international text should focus on the rights and obligations of parties rather than reference to tribunals.[217] The effect of the wordings of the CISG distinct to the SGA is considered uncertain. However, practically, the wordings seem more useful in Nigeria since a typical buyer would prefer the seller to make good on his obligations before resorting to court. This is ultimately similar to the SGA because in any event, a court would most likely award specific performance where the buyer has asked for it specifically.

The CISG proves superior to the SGA in this regard because it does not mention the discretionary power of the court whilst the SGA does so. This suggests that specific performance would be granted more under the CISG. This is useful for SME's and sole traders in Nigeria, buyers, who may prefer delivery of goods as opposed to the hassle of finding another buyer. However, this advantage is watered down by the provision of Article 28 of the CISG, which limits the ability of a party to obtain specific performance in certain circumstances. The article states

> If, in accordance with this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention

This suggests that any determination by an English court regarding the granting of specific performance would require consultation with S 52 SGA. This to a large extent, defeats the uniformity goal of the CISG.

Despite the above, one must recognise that this would only be defeated where the jurisdiction of the contract is possibly a common law jurisdiction. Given that the CISG is just applicable in terms of governing law clause and not jurisdiction clause, where it is in another jurisdiction the reference to domestic law may result in the grant of specific performance without reservations.

It has also been suggested that there is still some scope for English judges to use the CISG to expand the doctrine of specific performance based on the wording of Article 28. It states that the court is not bound to enter a judgment for specific performance unless it would do so under

[217] *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat*, UN Doc. A/Conf. 97/5, published in Official Records UN Doc. A/Conf. 97/19, 14-66, reprinted in CISG W3 database, Pace University School of Law, 2 September 1998.

domestic law. However, it does not expressly limit specific performance to those circumstances allowed under English law. Since article 28 is discretionary, common law courts in different jurisdictions may choose to apply Article 46(1) to grant specific performance where it might not be clearly available under the SGA.

Given the advantages of the CISG, with the ability to provide clarity through its provisions in an unclear area such as with the issue of the ambit of the court's discretion in granting the remedy of specific performance, it is advisable that Nigerian traders consider the remedial scheme under the Convention as opposed to the SGA.

### 5.5.2 Granting Additional Time to Defaulting Party

The remedy which allows a party to grant additional time to the other party is not really a stand-alone remedy. It usually goes with other remedies especially the ones, which repudiate the contract. This remedy gives the opportunity for a defaulting party to cure its performance by making delivery or paying purchase price.

#### i. The CISG

Article 47 of the CISG states

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance

This remedy, borrowed from the German concept of *Nachfrist has* the same effect. Article 47 accompanies Article 46. There is also some bearing with Article 33, which fixes time for the seller to deliver goods and Article 63, which is associated to the time obligations of a buyer in Article 38(1) and Article 59.

Article 47 is inextricably linked to the concept of fundamental breach under the CISG. It has the principal purpose of protecting the buyer waiting for delayed delivery. The buyer in such circumstance may determine at what point the seller's delay becomes a fundamental breach, thus entitling him to avoid or repudiate. The seller uses the additional time concept where the buyer doubts if there has been fundamental breach. This period must be reasonable, although

reasonable is not defined by the CISG. Article 49 1(b) allows the buyer to declare the contract avoided if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph 1 of article 47, or declares that he will not deliver within the period so fixed.

Article 47 and 49(1)b raises uncertainty regarding the full effect of Art 47 as a remedy.[218] Although Article 47 states that additional time may be granted to allow the seller to perform its 'obligations', while Article 49(1)(b) speaks only avoidance in regard of the delivery obligation, the opportunity of the buyer to avoid the contract where the seller has breached an obligation other than a delivery obligation is limited to cases where there is in fact a fundamental breach. This means that if a buyer gives a Nachfrist notice in such circumstances, the effect of the notice will be that the buyer will be prohibited from resorting to any other remedy for breach of contract during the period of such notice.

Although the seller has the opportunity to cure the breach, at the time, the buyer would be precluded from taking any remedial action. This provision is considered to be more useful for the seller who is trying to cure the defect. However, with respect to the buyer, it seems unclear what purpose a Nachfrist notice would serve in those circumstances. Instead of offering a remedy to the buyer, it imposes a burden.[219] Despite this, the buyer after the expiration of the time is still entitled to other remedies allowed by the CISG.

It has been suggested that the CISG by granting additional time to defaulting parties may tend to favour the seller more than the buyer. Thus, the provision of the CISG in this regard may be unfavourable to the Nigerian SME and sole trader, who in international trade bargain imports goods, thus, making him the disadvantaged buyer. It is suggested however that this assumption must be examined in light of the preference of the buyer i.e. whether he prefers the seller to cure his wrong or resort to the courts for resolution and possibly break the contractual relationship and go through the hassle of finding another seller.

Furthermore, the essence of the *Nachfrist* notice must be appreciated.

> Where a remedial scheme does not have a clear distinction between obligations that allow for repudiation and those that do not (such as conditions and warranties), some remedy is required in the cases where

[218] Piliounis (n 208).
[219] AH Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods (Deventer: Kluwer, 1989) 356.

the delay is "borderline". Even within such a scheme, there are instances where an innocent party can be uncertain as to the remedies available to it. In these circumstances, the *Nachfrist* concept introduced from German law seems to be a useful tool[220]

### ii. The SGA

The SGA does not have specific provisions resembling the *Nachfrist* notice.[221] However a similarity can be found within the rules relating to breach of timing obligations and whether it allows avoidance. Under the SGA, avoidance of a contract is based on the importance of the term being breached, either a warranty or a condition.[222] Thus, where a time stipulation is breached, an innocent party is not obligated to deliver any notice before seeking repudiation. Section 10(2) of the SGA provides that whether any other stipulation as to time is, or is not of the essence of the contract, depends on the terms of the contract. This provision suggests that the seller does not have the right to repudiate and any other time obligation does not allow for repudiation since it is dependent on the construction of contract.

Several authors and English cases demonstrate that breach of time obligation is of the essence.[223] This shows that there is no need for the *Nachfrist* notice before a contract can be repudiated.

Irrespective of the strictness of breach of timing obligations, the innocent party is still free to give the defaulting party additional time to perform its obligations. However, this is considered a waiver by the party rather than the equivalent of the *Nachfrist* notice. This process requires two steps first a waiver of the time obligation and second a new notice making time of the essence. The effect of the first step is that time is no longer considered of the essence. However, equity has intervened to propose that breach of the time specified after the waiver, which constitutes a notice requiring performance entitles the innocent party to avoid or rescind.[224]

As a result of the above, a similar result would probably be reached in most cases by the common law as by the CISG.

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[220] Piliounis (n 208).
[221] ibid.
[222] Whilst breach of condition allows repudiation, breach of warranty, which is a lesser term allows for a claim for damages.
[223] Cheshire, Fifoot and Fumston's Law of Contract, 13th ed (London: Butterworths, 1996), at 567-568. *Bunge Corpn* v *Tradax SA*, [1981] 2 All ER 513, 540.
[224] Stickney v Keeble [1915] AC 386 (per Lord Parker of Waddington); Hartley v Hymans [1920] 3 KB 475; Charles Rickards v Oppenhaim [1950] 1 KB 616, esp. per Denning L.J.

> Under both regimes, the innocent party can deliver a notice, the validity of which is dependent on the reasonableness of the innocent party's position and of the time period required. Both structures give the defaulting party the protection of a reasonable time, at the expense of the innocent party's certainty of when a time period would be considered reasonable[225]

The above shows that although English law does not have the exact equivalent of the *Nachfrist* notice, where an innocent party waives a time obligation, the same results would invariably be reached. This suggests that there would be minimal difficulty in the application of the CISG in Nigeria with common law provisions.

### 5.5.3 Reduction of Price

The remedy which allows reduction of price gives a buyer the opportunity to keep non-conforming goods delivered by the seller in which case the contract is adjusted to reflect the new situation. Here, the price of the goods is reduced just as if the subject matter of the contract had initially been the value of the reduced price. In this regard, the CISG drew upon the principles of the European legal systems. This principle has no real counterpart in common law, where it is replaced by the right to claim damages.[226] Although the English law and the CISG do not fully embrace the traditional Roman law position, one may still find resemblances in them.[227]

#### i. The CISG

Article 50 of the CISG reads:

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

[225] Piliounis (n 208).
[226] Peter Schlechtriem and Ingeborg Schwenzer (eds), Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd edn, Oxford University Press 2005) 596.
[227] Piliounis (n 208).

The non-conformity of goods availing the buyer of this remedy is on the basis of Article 35, and there is no distinction between the different types of non-conformity i.e. quality, quantity and description. Thus, the remedy applies irrespective of the reason for non-conformity. This provision is particularly beneficial to the buyer from a developing country, and was drafted, bearing the perspective of the buyer.

This is evidenced by the fact that price reduction is an autonomous right of the buyer, which he exercises by declaration without any formal requirement.[228] He also has the power to solely determine the difference in value between the contract price and the actual value. This means that the buyer does not need a court or tribunal to decide this.[229] For buyers in developing countries such as Nigeria, this right is particularly useful, given the likelihood of their preference to carry on with business and make profits from the damaged goods, rather than waiting for new goods, thus encouraging delay. This is particularly detrimental where the goods sold are seasonal.

The power of the buyer may be reduced where he has already paid the purchase price because he would be seeking a refund from the seller for a portion of the purchase price. This puts him in the position of the claimant, burdening him with litigation proceedings. It has been shown in most cases under this Article, that buyers did not use Article 50 offensively but rather as a counter claim or a defence to an action by the seller. [230] A problem with this remedy is how to calculate the price to be reduced in terms of quality. This may lead to litigation, which means the buyer would in most cases seek full damages for breach rather than just price reduction. It has been suggested that for the buyer to maximise his recovery, he should seek damages alone because it is calculated on the basis of the buyer's loss, whilst price reduction alone is calculated without reference to the loss suffered by the buyer, and so therefore would not include common costs.[231] Article 45(2) however allows the buyer to combine price reduction with damages under Article 45(1) b. Thus, the buyer may therefore base his claim for price reduction on Article 50 and claim additional losses under Article 45(1)(b).[232]

[228] Schlechtriem and Schwenzer (n 226) 598.
[229] Any price reduction by the buyer must certainly be reasonable, otherwise it would be disputed by the seller and subject to review by a court. During these proceedings, expert evidence would in all likelihood be adduced as to the value of the goods. Additionally, the burden of proof on the value of the goods (both the value of delivered goods and conforming goods) is squarely on the buyer. ibid; Piliounis (n 208).
[230] AM Tunon, "The Actio Quanti Minoris and Sales of Goods Between Mexico and the U.S.: An Analysis of the Remedy of Reduction of the Price in the UN Sales Convention, CISG Article 50 and its Civil Law Antecedents" (June 1998), printed in CISG W3 database, Pace University School of Law, 4 January 1999, at 2 in Piliounis (n 208).
[231] ibid Piliounis.
[232] Schlechtriem and Schwenzer (n 226) 605.

There are certain cases where the buyer would prefer to seek price reduction as opposed to damages because he has difficulty proving his loss. In such instances the CISG protects the buyer. A particular problem with price reduction is where it is in conjunction with Article 79. A seller may be exempted from damages where failure to perform was due to *force majeure*. However, Article 79(5) states that this is only applicable to claims for damages and parties can exercise their rights to other remedies. Thus, a buyer may still claim price reduction. In certain circumstances where a buyer is precluded from claiming damages, his only remedy would be price reduction. Article 50 can in such circumstances be seen as an additional form of risk allocation between the buyer and seller in these circumstances.[233]

The remedy of price reduction is more beneficial to the buyer than claiming for damages particularly in situations where the market price of the (conforming) goods has changed substantially between the time of contracting and the time of delivery. The calculation method for price reduction has been referred to as "proportionate", versus "linear" or "absolute" calculations for damages.[234] The price reduction remedy favours the buyer in that he can reject the goods if there has been a reduction in price and obtain conforming replacement goods on the open market at less than the contract price. However the CISG balances this out with the seller's rights by providing that Article 50 is subject to the seller's right to cure any defect under Article 48. This article is favourable because it does protect the buyer from certain inequitable situations that would otherwise not be properly remedied by damages alone.

### ii. **The SGA**

The SGA does not explicitly provide for price reduction. However, some of the remedies provided by the SGA can be considered equivalent to the remedy of price reduction such as sections 30 and 53. Section 30 though referring only to delivery of the wrong quantity, follows the same general principle by stating that a buyer must pay for goods less than the contracted quantity, delivered by seller, 'at the contract rate'. This 'contract rate' is comparable to the 'proportional' calculations made under Article 50 of the CISG. Given this, the practical application of S 30 would have the same effect as Article 50.

S 53 despite its applicability to only breaches of warranty and phrased in terms of setting off the breach against the price due, has a similar effect. Like the CISG, it allows the price reduction

[233] The policy rationale for such a rule is that it would otherwise be unjust for the buyer to be forced to pay full price for non-conforming goods. Piliounis (n 208).
[234] Schlechtriem and Schwenzer (n 226).

remedy for the buyer in lieu of a claim to damages. While the CISG allows the buyer a general right to reduce the price, S 53 of the SGA allows price reduction only as a defence to the seller's action for price. This section is further distinct from the CISG in that its calculation is linear or absolute like the calculation of damages as opposed to the proportional method of Article 50. Accordingly, where there has been a market price change (either a rise or fall) from the contract price, the difference in value test could reach a different result than the proportionality test, but not in all circumstances.[235]

Even without a specific remedy comparable to Article 50, English law probably reaches the same result as the CISG in most cases where there is a breach of a warranty.[236]

From the above comparison one can see similarities between the CISG price reduction remedy and the remedies offered by the SGA. This shows that the CISG complements the SGA, and interpreters would have no difficulty understanding the purpose of the Convention and interpreting it in that light. It also shows that as a legal transplant, the CISG has the potential to be successful in Nigeria. This is particularly in light of the fact that remedies such as pride reduction are more favourable to the Nigerian buyer who may feel out of his depth by the application of the sellers' foreign laws.

### 5.6 Potential Effects/Implications of the CISG in Nigeria

The initial interaction of the CISG with the domestic laws, the reactions to it by the actors in the jurisdictions where it is transplanted invalidates Watson's argument that legal transplants are socially easy because it is just words being transplanted. Experience of other jurisdictions show that at the initial stages of adoption of the CISG, there were mixed interpretations with the domestic law, avoidance of the CISG, and instances of homeward trend.[237] All these illustrate the difficulties of transplanting a law.

However, the suggestion of the impossibility of legal transplant by Legrand fails because with time, users of the CISG became more familiar with it and applied it appropriately, according to its purpose. Thus, although adaptation of the CISG did not occur immediately, apart from the

[235] Piliounis (n 208).
[236] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, UN Doc. A/Conf. 97/5, published in Official Records UN Doc. A/Conf. 97/19, 14-66, reprinted in CISG W3 database, Pace University School of Law, 2 September 1998. However, it would differ in cases where the buyer accepts the goods and (1) the buyer is unable to prove damages, (2) force majeure, and (3) the market price of conforming goods increases between the time of the contract and the time of delivery. These are the circumstances under the CISG where the price reduction remedy of Article 50 differs from an award of damages, and the same difference would hold true between Article 50 and damage awards under the SGA. ibid.
[237] See chapter 5 for the German and US Experience.

actual adoption of words, subsequently, legal actors became familiar with it and applied it accordingly, avoiding subjective interpretations.

This confirms literature suggesting that there is usually a middle ground between success and failure when a law is transplanted. Thus, whilst the eager assertion that transplants are ever flourishing, and the opposing argument that they are impossible, may be somewhat far-fetched, there is indeed a strong case for the eventual adaptation of the transplant given time.

Following this, an examination of the effects of the CISG on the various actors and domestic law are examined bearing in mind that there are degrees in adaptation of the Convention in each jurisdiction.

### 5.6.1 Effects on Actors

#### 5.6.1.1 Judges/Arbitrators

**i. Wrongful Interpretation of the CISG**

One effect of transplant is the likelihood of attaching familiar meanings drawn from existing institutions to new institutions, and vice versa, resulting in the production of rules and institutions distinct from the original transplant. The CISG was not exempt from this consequence, particularly because Article 7 requires an autonomous interpretation. Thus, it is not possible to directly resort to national methodology. Since the Convention is silent on how to attain autonomous interpretation, there may be issues for Nigerian interpreters in following a uniform approach.

At the preliminary stages of its adoption in the U.S, Courts, at loss regarding what to make of the Convention applied the domestic understanding to the interpretation. Cases such as *Raw Materials Inc v Manfred Forberich Gmbh,*[238] where the courts despite recognising the CISG as the applicable law, endorsed the plaintiff's general assertion that case law on U.S domestic sales law, Article 2 of the UCC, could be used for guidance in applying the CISG, where the relevant provisions track that of the UCC, demonstrate this. The court particularly declared that the case law interpreting the UCCs excuse provision S 2-615 provides guidance for interpreting Article 79 of the CISG since it contains similar requirements as those set forth in the Convention. Based on the defendant's consent, the court applied UCC cases to the CISG. This marked the end of any mention of foreign case commentaries and cases on the CISG.

[238] U.S. [Federal] District Court, Northern District of Illinois.

This was also the case in Germany, in *Veneer cutting machine case,*[239] where the seller came from Indiana, and the law applicable to the contract was therefore the law of Indiana.[240] However, The OLG Düsseldorf decided the CISG was applicable, because the United States had been a CISG member since 1988.[241] The Court ignored the fact that the United States had opted out of Article 1(1)(b) by declaration under Article 95.[242]

This behaviour is also found in other jurisdictions such as Australia. For instance in *Kotsambasis v Singapore Airlines Ltd*[243] the courts referred to *The Shipping Corporation of India Ltd v Gamlen Chemical Co*[244] and stated that 'It is only if the interpretation of certain words by a national court assists in the interpretation of the same words that appear in an international Convention that any significant weight can be imported to the municipal law.'[245]

These wrongful interpretations result in miscarriage of justice, ultimately defeating the purpose of the CISG.

However an examination of the case trajectory both in Germany and the U.S. show that with time the interpretational challenges abated and interpretations are now more aligned to the CISG. The actors in these jurisdictions showed more adaptability by recognising not only the applicability of the Convention in disputes but also by recognising the errors of the courts in previous decisions and calling for the right interpretation.

Presently, Nigeria has not adopted a lot of international treaties and as such there is a dearth of cases on their interpretation. However, the application of the purposive approach in the interpretation of a statute is widely recognised and acknowledged by the courts. This suggests there is a foundation for interpreting the CISG according to its aims and purposes. In *AG Lagos State v AG of the federation & ors*,[246] the issue was whether the court is entitled to consider materials or information used during legislative process in enacting a law to determine the true intendment of a statutory or constitutional provision. The court found that it is

> …entitled to take account of, and use such materials or information which it considers will help it determine the true intendment of a statutory or constitutional provision in a purposive interpretative

[239] Germany 2 July 1993 Appellate Court Düsseldorf
[240] EGBGB art. 28.
[241] Judgment of July 2, 1993, OLG Düsseldorf, 1993 RIW 845.
[242] 52 Fed. Reg. 6262 (1987).
[243] Matter No CA 40154/96 (13 August 1997).
[244] [1980] 147 CLR 142.
[245] [1980] 147 CLR 159.
[246] (2003) LPELR-620(SC).

> approach or which will lead it to assess the correctness of a meaning it has, through the usual canons of interpretation, given to such a provision.[247]

The courts also recognised the paramountcy of the purposive approach in *Fbn Plc. & Ors. v Maiwada & ors*, where it was stated that 'it is not in doubt that in deserving situations, purposive interpretation should be employed by the court. The purpose of legislation is of paramount factor.'[248]

The adoption of the purposive approach in the interpretation of laws by Nigerian courts demonstrates their ability and willingness to recognise the aims of the CISG and avoid domestic interpretation, where it is adopted. The cases also show that the courts will consider the materials and information used during the legislative process in drafting a law. This suggests that where there is controversy or ambiguity in the interpretation of the CISG, the courts will not only consider the purpose of the CISG but look to its historical materials, thus, eschewing domestic laws. This is particularly important since a recognised method of interpreting the CISG is through consultation with its antecedents, ULIS and ULF, and considerations of the proceedings of the draft committee.

Some Nigerian cases have had recourse to international law to resolve domestic legal issues.[249] In *Mojekwu v Ejikeme* the Court of Appeal invoked the Convention on the Elimination of All Forms of Discrimination against Women[250] in the context of determining a native law and custom.[251] This willingness of courts to adopt international treaties in interpreting domestic law is indication that they will have no problem resorting to precedents from courts of other jurisdiction i.e. CISG jurisconsultorium, in determining the right interpretation of the CISG, thus ensuring uniform interpretation.

The court's attitude in giving priority to international treaties in Nigeria where they have been properly domesticated, as in *Abacha v Fawehinmi,* where the court pointed out that owing to its

[247] ibid Per Uwaifo, J.S.C. (Pp. 51-53, paras. E-A) (2003) LPELR-620 (SC) see also *Ibrahim v Barde* (1996) 9 NWLR (Pt.474) 513*; U.A. Ventures v FCNB* (1998) 4 NWLR (Pt.547) 546.
[248] SC.204/2002.
[249] This is in spite of the effects of Section 12(1) of the 1999 Constitution.
[250] 18 December 1979, 19 ILM 33 (1980).
[251](2000) 5 NWLR (Pt 657), 402 CA. see also In *A-G Federation v A-G Abia State,* (2002) 6 NWLR (Pt 764).

international flavour the African Charter Act has a greater strength and vigour than ordinary legislation,[252] also demonstrates that where justified, the courts will give priority to the CISG.

### ii. Avoidance of the CISG

The fear of application of new laws especially where there is existing law means that the new law will be avoided at all costs. Judges avoided the CISG at the initial stages of its adoption in other jurisdictions. In *Raw Materials,*[253] there was not only misinterpretation of the CISG but avoidance. The court did not distinguish the CISG from the domestic law, but treated the Convention as irrelevant, albeit finding it as the governing law-as if it 'were in some unexplained fashion superseded by US domestic law'.[254] As stated by one commentator

> Not one word of this discussion would have to be changed if UCC Article 2 had actually been the applicable law. A more flagrant and depressing example of a court ignoring its obligations under CISG article 7(1) and indulging – nay, wallowing in- the homeward trend is hard to imagine. The court's methodology should mean that its analysis will properly be ignored by other courts-both U.S and foreign- that are called upon to apply CISG article 79…[255]

The avoidance of the CISG by judges at the initial stages of adoption, though prevalent in the US was not in Germany. The polarization in the approaches of judges suggests it is possible from the outset, where the CISG is adopted in Nigeria, despite unfamiliarity, not to shun it.

There is also an imperative for judges to apply the CISG and where they apply it, to do so autonomously. This is part of their functions as umpires, simply called to apply the rules.[256] Therefore, Nigerian judges are constrained to act with integrity where it is clear that the CISG is the appropriate law. Avoidance or misapplication of the CISG may hinder administration of

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[252] A O Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts' (2009) 17 (2) African Journal of International and Comparative Law 326, 332. E Egede, 'The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention', (2004) 19 (2) International Journal of Marine & Coastal Law 151,155 in Chilenye Nwapi, 'International treaties in Nigerian and Canadian Courts' (2011) 38 African Journal of International and Comparative Law 46.

[253] *Raw Materials* case.

[254] Harry Flechtner, 'The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation' in Franco Ferrari (ed), *Quo vadis CISG ?: celebrating the 25th anniversary of the United Nations convention on contracts for the international sale of goods* (Sellier European Law Publishers 2005).

[255] ibid.

[256] Second day Hearings on the Nomination of Judge Roberts 2005 in William Blake, 'Umpires as Legal Realists' (2012) 45 Political Science and Politics 271, 272.

justice. It is suggested that Judges should leave aside their preferences and adopt the CISG where it ought to be applied.

#### 5.6.1.2 Lawyers

**iii. Avoidance of the CISG**

One of the effects of transplanting the CISG is that lawyers may exclude it from their contracts. This may be considered a safe option where lawyers have little or no awareness of the Convention. The uncertainty and unpredictability will result in minimal or no application. Thus, 'what the peasant does not know, the peasant will not eat'.[257]

The experience of other jurisdictions with respect to the CISG evidences this. In Australia, 22 cases were recorded after 20 years of adoption.[258] Justice Finn of the Federal Court of Australia suggested "it is fair to say that the *CISG* is scarcely known in this country".[259] Anecdotal evidence also supports the routine exclusion of the CISG. The Federal Defence Department of Australia in their supply contracts routinely exclude the CISG.[260]

This avoidance is also practiced in Germany and the U.S, where legal practitioners insist on excluding the CISG from their contracts.[261] The reasons for this practice include; little awareness of the Convention, legal uncertainty especially because of unforeseen solutions, clients being unaware of the CISG and the notion that the German law comparatively is more advantageous. Habits and traditions such as the practice of excluding the predecessors of the Convention within the business circle also carried through.[262]

It is predicted that this same avoidance based on a majority of the reasons above may be experienced amongst lawyers in Nigeria. However this can be avoided and it must be remembered that despite sympathy for the excuses, there are consequences for avoidance.

Firstly, failure to consider the CISG when advising clients on choice of law issues, and absence of utilisation of the CISG in arguments is detrimental to the interests of clients. An important

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[257] Eckart Brödermann, 'The practice of excluding the CISG: time for change? Comment on the limited use of the CISG in private practice (and on why this will increasingly change)' (Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007).

[258] Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs: Misapplications and the Costs of Ignoring the Vienna sales Convention for Australian Lawyers' (2009) 10 Melbourne Journal of International Law 141, 142.

[259] P Finn, 'National Contract Law and Transnational Norms and Practices' (Cross-Border Collaboration, Convergence and Conflict Conference, Sydney, 9 February 2010) 9.

[260] Spagnolo (n 258) 141.

[261] See Chapter 4.

[262] MF Kohler, Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss (2007)310 et seq.; J. Meyer, U.N-Kaufretch in der deutschen Anwaltspraxis, RabelsZ 69 (2005) 457et seq in Ulrich Magnus, 'Germany' in Franco Ferrari, *The CISG and Its Impact on National Legal Systems* (sellier european law publishers GmbH 2008)145.

duty of the Nigerian lawyer is to provide clients with proper service and representation. Accordingly, the Rules of Professional Conduct[263] provide that 'The lawyer owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of the client's rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied…'[264] Entire devotion in this context includes devotion to understanding any new laws which might be beneficial to client and offering clients the option of that law where it may be applicable. Failing to do this leaves the practitioner open to legal suits for negligence, recognised under the new S4 (1) of the Legal Practitioners Act.[265]

It is suggested that in the interest of the clients, and for the avoidance of negligence claims, where applicable, the CISG should be offered to clients.

Avoiding the CISG is also detrimental to the lawyers in that it could hinder the ability of the Nigerian legal practitioners to compete on a global scale with other practitioners. In developing countries where commercial laws are desperately in need of reform, the CISG will increase the financial gains of lawyers. Empirical evidence suggests that majority of the contracts drafted by commercial lawyers in Nigeria are governed by the English SGA 1979.

This means that most of the disputes will be referred to English lawyers resulting in reduced participation in international trade disputes for Nigerian lawyers. The effect of the CISG in this regard is that it would provide a neutral framework, which creates a level playing field for lawyers in Nigeria, who because of scepticism associated with legal infrastructure of any developing country, and the fact that the SMEs in Nigeria are by virtue of governing law clause puts lawyers representing them at a disadvantage. This will ensure that international trade disputes are fairly distributed, meaning more pecuniary benefits. It is no wander that the UK has not adopted the CISG, with the anxiety that London will no longer retain its status as the commercial hob of the world.[266]

Avoidance of the CISG can be resolved by creating awareness of the CISG, and unfamiliarity abates with time and continuous usage. Moreover, business associations in different jurisdictions are now beginning to recommend non-exclusion of the CISG in contracts.

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[263] Legal Practitioners Act Chapter 207 Laws of the Federation of Nigeria Rules of Professional Conduct in the Legal Profession 1990.
[264] Section 14(c) ibid.
[265] S 4(1) of the Bill Legal Practitioners Act, which This Bill seeks to amend the Legal Practitioners Act Cap. 207 Laws of the Federation 1990 as amended.
[266] This fear is unfounded because the CISG is capable of working complementarily with the domestic sales laws and moreover, issue on the CISG are still being arbitrated on by the London arbitrators who are unfamiliar with the Convention.

#### 5.6.1.3 Traders

An impediment faced by businessmen in Nigeria is understanding the foreign legal framework in international trade transactions. This is because of the difficulty in accessing the foreign law, and the distribution of bargaining power, which often makes them the weaker bargaining party. When these contracts are breached, the choice of law and jurisdiction clauses will favour the stronger party. The Nigerian party usually unwilling to pursue remedies through a law, and in another country unfamiliar to him bears the loss of the whole transaction. These losses are mitigated by increasing the price of subsequent goods, to make up for the lost money from the previous non-conforming batch. The astronomical price is paid by the consumer who is left with hardly any choice.

As a result of the unstructured nature of trade in Nigeria, businessmen sign contracts with foreign counterparts ignoring the details of the contract. It is usually in the event of the breach of contract that the unfavourable provisions are discovered. Where the CISG operates, the Nigerian businessman may redraft his standard terms and conditions to make provision for the requirements and stipulations of the Convention, knowing it will fit with the applicable legal system and mitigate drafting costs. The choice of opting out ensures he will not be constrained to the provisions of the Convention but can have his terms and conditions tailored to his needs. By providing a legal foundation with default terms familiar to parties while working to reduce transaction costs and ensuring certainty, the effect of the Convention will be the facilitation of international trade in Nigeria.

The effect of transplanting the CISG in this regard is that the way international trade transactions are carried out by Nigerian businessmen will undergo a change, favourable to them. These traders have the ability to standardise their preferred position on choice of law. Thus, the CISG as a neutral law will ensure equal bargaining position of parties. By providing a standard legal language and a method of categorising and interpreting legal rules, the CISG invariably reduces legal knowledge costs for Nigerian traders, as the costs of resolving disputes are reduced.

The effect of the CISG is that it also reduces the risk that the forum will misapply the law chosen, since the obligation of any of the courts seized with the interpretation of the CISG is the same, to apply the CISG as a uniform international law, having reference to CISG scholarship and cases. Because the CISG stands a better chance of being uniformly applied more than any other alternative choice of law, irrespective of the location or nature of the forum,[267] the effect

[267] Spagnolo (n 258) 149.

for Nigerian traders is a more stable, predictable outcome for international trade transactions in Nigeria.

Given its accessibility, the CISG has the effect of further simplifying trade for Nigerian businessmen, reluctant to consult with lawyers at the initial contractual stages. The simplicity of the Convention's language means that traders at any level can understand the concepts. Materials on the CISG are easily accessible on internet sites dedicated to the dissemination of CISG cases and scholarship. Nigerian traders can consult precedents on the CISG to understand the implication of certain concepts and envisage the outcome of their cases in the event of dispute. When compared to the impracticability of accessing different foreign laws and their intricacies, the Convention is a preferred option.

### 5.6.2 Broader Effects of the CISG in Nigeria

As already discussed,[268] the CISG has the effect of catalysing law reform for developing countries. It follows therefore that whatever reform the Convention engineers in Nigeria would lead to change in the mentality of actors in Nigeria. Firstly, because of the security, which comes from having a neutral law known to both parties, Nigerian traders will have more confidence when transacting with foreign traders. Thus, removing the fear of uncertainties and enabling more trade transactions.

For the legal academia, the adoption of the CISG in Nigeria would provide an opportunity to engage with academics globally in the area of international sales, broadening their scope of research. The Convention where it is adopted will improve the syllabus of the Nigerian law school, exposing and preparing potential lawyers to laws and concepts, which they will use in practical transactions. The CISG will expose actors to concepts of different legal systems e.g. civil legal system. This is more relevant in light of globalisation and convergence of legal systems.

## 5.7 Conclusion

This chapter has shown that the CISG which embodies the qualities of different legal transplants can be adopted in Nigeria. The Convention's flexibility makes it the most suitable framework for international trade, particularly for the sole traders and SMEs. Adoption of the CISG to Nigeria will facilitate trade whilst serving as a model for law reform in Nigeria. Recognising the justifications for the CISG in Nigeria, makes it arguably, the best law for international trade in Nigeria.

[268] See Chapter 2 for examples of CISG and law reform and earlier section of this chapter for how it can reform the Nigerian law.

The CISG also proves to be the better framework amongst the available alternatives such as the OHADA, for Nigeria. The Convention's flexibility to private parties and States means it can function complementarily with the OHADA.

Factors such as motivation, availability of substitutes, the commonality of legal transplants, willingness by actors to engage with the CISG and legality and neutrality of the CISG all suggest that the Convention will be successful where adopted in Nigeria.

Having examined the potential effects of the Convention in Nigeria, it is suggested that the positive effects outweigh the negatives. Furthermore, these effects can be counteracted with certain tools and solutions accepted by users of the CISG worldwide. The experiences of other jurisdictions that have adopted the Convention demonstrate the functionality of the Convention and effectiveness of the solutions.

# CHAPTER 6

# CONCLUSION

## 6.1 Introduction

This thesis set out to understand the reasons why Nigeria has not adopted the CISG, and to explore the possibility and implications of adopting the Convention in Nigeria. The study was necessary, given the burgeoning and continuous desire for growth of international trade in Nigeria, and the fact that the trade environment, including trade policies are unstructured, consequently, putting the Nigerian trader in a disadvantaged position. Such factors, invariably detrimental to economic growth in Nigeria, emphasise the need for enhancing international trade laws and policies in Nigeria.

A framework capable of promoting and enhancing international trade in Nigeria is the CISG. The Convention offers a coherent and comprehensive legal framework for working through complex transactional issues related to international trade by ensuring certainty and reducing transaction costs. Besides providing a sturdy and general framework for trade, the provisions of the Convention are particularly useful for Nigeria as a developing country because they are designed to reduce ex post transaction costs for sole traders and SMEs, dealing with a high level of importation, requiring them to contract more with manufactured goods.

Given the perceived needs in international trade and the possible benefits of the CISG in Nigeria, it is surprising that it has not yet been adopted. Based on this, an assessment of the Convention has been undertaken in the thesis to determine its legitimacy, the reasons why it has not been adopted in Nigeria, the need, if any, for the Convention, and the interaction of the Convention with the Nigerian legal system.

Having considered literature on the reasons for the non-adoption of the CISG in different countries, it is shown that although there is some similitude for the non-adoption of the CISG in Nigeria and other countries, the distinctive reasons for Nigeria's non adoption evidences the individuality of each jurisdiction.

Although the Convention is considered successful by certain accepted measures, this success is measured in the Nigerian context to determine its implications for Nigeria. Through empirical research, the thesis presents the reasons why Nigeria has not adopted the CISG. The thesis then

draws up a typology based on the legal transplant theories to evaluate the successful interaction of the Convention in Germany and the U.S, both civil and common law jurisdictions where the Convention has been adopted. This analysis also helped to assess the effects of the CISG as a legal transplant on actors and the legal system. This is used to conceptualise the interaction of the CISG in Nigeria.

By recognising the distinctiveness of each jurisdiction in their economic development and requirements, the thesis provides answers to the following questions on the CISG bearing in mind possibilities and implications of adopting it in Nigeria.

1.1 Is the CISG a successful framework?

1.2 Why has Nigeria not adopted the CISG?

1.3 Does Nigeria need the Convention?

1.4 Can the CISG be transplanted to Nigeria?

## 6.2 Findings

### 6.2.1 On the Success of the Convention

The thesis began by providing an overview of Convention, through an examination of its history, and the purposes, for which it was birthed. The goals and aims of the CISG show that the Convention promotes uniformity by establishing a common legal standard for governing international transactions worldwide, through a framework. The Convention also promotes harmonisation because it encourages consonance and accord. The Convention merges both the uniformity and harmonisation concepts to ensure the attainment of functional uniformity, where absolute uniformity is an impossible goal. As a unification endeavour, the CISG is more suited to Nigeria because it can subject Nigerian traders and their foreign counterparts to a single set of rules with an expectation of conformity.

Through the historical analysis of the Convention, it is shown that the drafting style of the Convention and constituency of the UNCITRAL, particularly given the failure of the Convention's precursors, the ULIS and the ULF, was representative of the diverse legal families and their different levels of development. The structure and content of the CISG shows that it was drafted in order to allow flexibility in the exclusion and application of the Convention. The above factors buttress the suitability of the Convention for Nigeria.

The thesis has also shown that the Convention has functionally fulfilled and still continues to fulfil its goals. Indicative of its success in this regard is the number of ratification, currently, 83. This evidences final legal commitment by States and acceptance of the CISG as a mechanism for addressing common problems. The ratification also shows acceptance by countries from a wide spectrum of development. Acceptance of the CISG is also a signification of legislative success, as well as success in terms of practical application. This indicates a substantial level of agreement with the text of the Convention, thus making its successful.

Ratification of the CISG by top trading nations and powerful economies including China, the U.S, Germany, Japan, France, Netherland, Russia, Italy and South Korea, further accentuates acceptance and validation of its purposes and aims. This hints at the credibility of the Convention and is an incentive for Nigeria to adopt it. This is more significant given that most of these countries are Nigeria's most important trading partners, and the fact that the Convention applies to two thirds of international trade.

The Convention is also successful as a model for domestic law reform and a paradigm for other international law projects, within the field of commercial and general contract law. As a legislative instrument, the Convention represents neutrally and sufficiently, the distinctive characteristics of different legal families, and variance in development indices, making its successful. The Convention was a model for the Scandinavian law reform. The Scandinavian States, Finland, Norway, and Sweden, except Denmark all reformed their domestic sales laws in accordance with the CISG. These reforms and the processes are particularly useful for Nigeria as the adoption of the CISG could spur the efforts towards the reform of the 1893 SGA whilst still functioning as the primary instrument for international trade transactions. The reform of the German law of obligations and sales law based on the CISG and the New Code of Obligations of China, Contract Law of the PRC, are evident of Convention's success as a model for law reform.

The CISG also influenced subsequent uniform commercial laws; both soft and hard law instruments, in Africa, Europe and Asia and its basic concepts have influenced and continue to influence several initiatives worldwide. The EU laws such as the Consumer Sales Directive and other EU Directives, soft laws such as the UNIDROIT Principles were drafted on the merits and shortcomings of the Convention. The provisions of the CISG resonate through the articles of the PECL and the Draft Common Frame of Reference was also influenced by the CISG. The extent to which the Convention has influenced these laws is illustrative of its success.

It has been shown that there is a functional level of uniformity in the application of the CISG. This enables the achievement of the Convention's goals; supporting international trade and exchange of goods, taking into account the different social, economic and legal systems, despite being hampered by interpretative challenges, political interpretative challenges, gaps, issues of homeward trend, several language versions, reservation effects, vague provisions and applicability to transactionally diverse range of deals. Although these problems frustrate the Convention's uniformity goals, the mechanisms and the on-going efforts towards systemising and unifying the issues, ensure attainability of functional uniformity. The use of interpretive mechanisms and guidelines such as Article 7, the ability of interpreters to use foreign decisions whether as voluntary binding precedent or as persuasive precedent for guidance and the reconciliation of conflicting decisions on specific issues through use of the CISG's interpretive methodology are the ways which the Convention maintains its success.

Where the CISG is adopted, keeping in mind article 7(2), the general principles of the CISG, Nigerian interpreters would be able to exclude the homeward trend and rules of private international law that seek solution outside the Convention. The use of other instruments such as the UNIDROIT Principles and the PECL for resolving the problems of the CISG are also workable mechanisms which enable the continued success of the Convention. Thus, Nigerian interpreters can gain from the juriosconsultorium of the CISG, which allows for consultation across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given law. In undertaking to share a uniform legal text like the CISG, contracting States are also undertaking to pursue the goal of uniformity in unison. The provision of the website dedicated to the CISG, and the continued improvement on translation of cases, demonstrate success by overcoming the effects of translation.

The *Travaux Préparatoires* recognised by Article 32 of the Treaties Convention is a means of interpretation, albeit restrictively, which allows recourse to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion. This includes the usual conference materials such as drafts at prior stages and records of the conference at which the treaty was concluded. The ULIS and the ULF, which predate the CISG, can also be used as interpretive mechanisms.

By collectively evaluating the goals of the Convention against the parameters accepted, and the efforts being put towards continuity in fulfilling the goals, the thesis has shown that CISG is indeed successful.

### 6.2.2 On Why Nigeria has not adopted the CISG?

Having considered and determined the functionality of the CISG based on the parameters above, and considering the desirability of the CISG as a suitable framework for governing international trade in Nigeria, by overcoming contradictions in the character of contracts on the international sale of goods and the regulation of these contracts by individual states, thus, eliminating transaction costs for parties dealing with distinctive legal systems and consequently allowing for a seamless flow of trade, the thesis, through surveys and interviews considered the factors affecting the non-adoption of the CISG in Nigeria.

It is found that the foremost reason for the non-adoption of the CISG in Nigeria is a lack of awareness of the Convention. At least 73% of the interviewees, a majority of them legal practitioners in the commercial law sector were not aware of the CISG. 64% of the respondents (legal practitioners) of the survey were also not aware of the Convention. Legal practitioners suggested that this lack of awareness was because of the deficiency and inertia by the government agencies whose obligations are with respect to international treaties. This lack of awareness hinders the adoption of the CISG since it is hardly possible that the Convention can be evaluated without knowledge of its existence.

For the government agencies lack of awareness of the Convention is attributed to administrative problems such as the disproportionate levels of work assigned to officers, lack of expertise in commercial law and funding. The want of expertise in the area of commercial law is characteristic in developing countries and the lack of funding hinders participation in the drafting stages of international treaties. The disconnection between the ministries responsible for the recommendation and adoption of international treaties in Nigeria inhibits awareness of the Convention. There has also been no request by the Ministry of Trade, obligated to suggest relevant trade laws to the DICL, Federal Ministry of Justice, normally in charge of ratification of international laws in Nigeria.

Respondents suggested that the CISG is hardly known in these agencies because of the lack of expertise of staff in commercial law, resulting in the inability to make informed recommendations on international treaties, consequently causing lack of awareness of the CISG. This makes it hardly possible for the UNCITRAL to work effectively in Nigeria to promote awareness of the Convention.

Respondents stated that the lack of awareness amongst the legal academia is because the Convention is not part of the Nigerian domestic laws. This they suggested is the reason why the NUC did not include it in the Nigerian syllabus. The fact that international trade law is not taught at the undergraduate level, and neither is it discussed in the Nigerian textbooks, means there is hardly any opportunity to discuss the Convention with the students, further limiting the possibility of creating awareness.

Social problems in Nigeria such as lack of funding for the implementation of government policies on education, and for carrying out curriculum innovations in various disciplines and at various levels of education, and poorly funded teaching and research institutions which hinder access to international laws, also stifle awareness of the Convention.

There is no awareness of the Convention amongst traders in Nigeria because of familiarity with the unstructured nature of trade and the disadvantaged position of Nigerian traders in international trade transactions, which has been accepted as normative. This suggests some level of ignorance of their anomalous transactional position. This, coupled with inaccessibility of laws capable of creating parity in the international transactions contributes to their lack of awareness.

The UNCITRAL is also a contributory agent in the continued lack of awareness of the CISG in Nigeria. By decreasing attention on commercial law matters and focusing disproportionately on other perceived priorities, developing countries such as Nigeria may continue to stay uninformed about the CISG. Although this is a result of discordant relationships between the UN Systems and disproportionate allocation of funds, functional initiatives are needed to promote awareness of the Convention in Nigeria.

Other reasons for lack of awareness of the CISG in Nigeria are; familiarity with the extant laws which makes actors hesitant to seek new laws and the dominance and preference for English laws in commercial transactions in Nigeria which respondents and traders were more familiar with. The inertia of the legislature and the tedious legislative process also results in complacence regarding global laws meaning that laws such as the CISG will not be considered priority. Other issues are; the wariness of developing countries such as Nigeria towards international laws which they feel are unduly representative of developed countries, comprehensively drafted contracts and the freewill of parties, nonchalance of Nigerian transactors towards contractual details in international trade transactions, the limited scope and the nature of transactions dealt with by CISG, i.e. sale of goods, the fact that the Convention deals with substantive contract law not procedural, the unstable system and structure of trade in Nigeria which allows foreign traders to

capitalise on this by insisting on their terms in contracts, thus hardly leaving any room for the Nigerian trader to negotiate his terms, the underdeveloped credit system which has resulted in cash and carry transactions between international traders, leaving the Nigerian trader with hardly any possibility of obtaining remedies and the Nigerian political history marked by instability and abuse of human rights, leading to minimal focus on international commercial laws such as the CISG. All these factors contribute to the lack of awareness of the CISG in Nigeria.

The thesis shows that despite the validity of these reasons, they are insufficient to justify the non-adoption of the Convention in Nigeria, and can be surmounted.

### 6.2.3 On Whether Nigeria Needs the Convention?

Although there is still a significant amount of international trade going on in Nigeria without the CISG, more could be done towards ensuring a more structured trade environment, which will invariably promote trade growth. The thesis has identified that the CISG although appropriate for all parties in international trade is most germane for sole traders and SMEs, particularly considering their weak bargaining position.

The growing interdependence in the relation of states, the increase in global trade and global markets suggest an inevitable pull towards uniformity in laws. This interdependence has resulted in increased international trade transactions in Nigeria. New market opportunities however creates challenges for international traders in Nigeria, who having the opportunity of a wider market and a broader range of goods, grapple with complexities of foreign laws of different jurisdictions. The overwhelming flurry of commercial activities is substantially and continuously hindered by national laws, suggesting the need for the CISG, capable of minimising transaction costs in international trade, while encouraging globalisation. Adopting the CISG can also be a signal to Nigeria's trading partners of her commitment to improve and engage in structured trade. It also signals a commitment to international businessmen that Nigeria is committed to promoting international trade transactions and encouraging foreign investment.

The CISG is able to provide legal certainty through laws that are accessible operable, legible, intelligible and up to date for international traders in Nigeria. It is imperative that traders are able to ascertain with clarity, the applicable law governing their transactions, the availability of the law and the outcome of their transaction at any given time. The CISG will facilitate commerce in Nigeria by lifting barriers resulting from the complexities of different legal regimes. It also provides a ready-made legal framework tailored for international transactions.

In Nigeria, the environment of trade and the calibre of traders are such that the majority of them are unaware of general contracting issues. The structure of trade also makes them handicapped to negotiate their own terms and more importantly, the governing law clauses, which stipulates the sellers' laws, makes them incapable of choosing their preferred law.

The CISG is able to provide neutrality in international trade contracts for the parties. The sole traders and SMEs in Nigeria tend to do away with legal formality when transacting because the trade transaction is considered more important, and parties are eager to conclude the trade contract without conscientiousness. The CISG can serve as a protective measure and safeguard in the event of breach of contract and resultant dispute, where parties have hastily concluded contracts without any caution.

Admittedly, there is the option for Nigerian traders of unification of private international rules, which means that the laws of a particular country are applicable. However, this gives unfair advantage to lawyers from that jurisdiction with the necessary expertise. Such exclusivity deprives Nigerian lawyers of pecuniary benefits from legal disputes and participation in international dispute resolution. The CISG is preferred in this case because it provides uniform substantive laws applicable to all parties and in all contracting jurisdictions, and will ensure an even distribution of participation in cross border transactions and pecuniary benefits, giving parties equal access and opportunity.

For the Nigerian exporter, every transaction potentially raises issues of a different legal regime, which means that transacting will especially be costly. The costs of learning a new law are simply unaffordable in Nigeria, as lawyers must spend time acquainting themselves with the laws of foreign jurisdictions. Transaction costs are increased if the governing law is English law because clients have to engage English lawyers in the event of disputes. The CISG will help reduce these transaction costs since the Nigerian lawyer would only have to familiarise himself with the Nigerian 1893 SGA and the CISG.

Considering that the trade environment is a disadvantage to the Nigerian party, having neither the knowledge of, nor resources to litigate in a foreign country, the goals and aims of the CISG and the fact that it is a common legal standard for governing international transactions worldwide, indubitably makes it suited to international trade transaction in Nigeria. This is because it will subject both parties to a single set of rules and principles with the expectation that they will conform to these rules. In Nigeria, the sole traders and SMEs deal largely with manufactured goods. The CISG may help reduce ex post transaction costs in this regard.

As a cost saving transplant, the CISG is an ideal model for law reform in Nigeria. This has been proved in different national and regional spheres. This is the ideal time for adopting the CISG because the SGA is presently in the legislative house and has been proposed for law reform. The CISG can serve as one of the laws, which will influence the reform of the SGA in Nigeria. This function of the CISG is evidenced in the reform of domestic laws in other states where it has been ratified. Since the CISG is designed specifically for international sales, it is preferable to the out-dated SGA, derived from earlier laws and principles, which are not based on harmonised or transparent standards and increase commercial risks, thus hampering the activities of commercial entities. Given the slow process of law reform in Nigeria, the CISG can act as an interim law before the law reform is completed.

### 6.2.4 Regarding the Transplantability of the CISG

The thesis explored the CISG as a legal transplant, since it entails the movement of a system of law from one country to another. The CISG is a legal transplant capable of being transplanted but with considerations of social interactions. The interaction of the CISG with domestic laws is plausible, given that interpretations based on domestic knowledge surface during the application of the CISG. Since the Convention has been a catalyst for reform of domestic laws in various jurisdictions, an effect of its interaction with the legal system, there is no denying its ties with the legal systems and cultures of the countries where it is transplanted.

It is recognised that the interaction of the Convention with domestic laws may be a source of irritation on the legal system to which it has been transplanted. Two jurisdictions, Germany and the U.S were examined to determine this. The interaction of the CISG with the legal culture of the jurisdictions in the context of the thesis meant the interaction of the CISG with the actors. That is, the extrapolation of legal methods, legal styles and techniques and interpretation borne out of interaction with pre-existing frameworks to the CISG. Legal culture was taken to mean the effects of the concepts, the interaction with the pre-existing legal frameworks and the effect of the CISG on domestic law.

The success of the CISG as a legal transplant was measured against several criteria; actual movement and ease of movement of the CISG. The CISG proved to be a successful transplant considering that Germany and the U.S, and all the countries that signed into it have ratified it. The ease of transplanting the CISG is attested to by the fact that the CISG was adopted in both countries with enthusiasm and without legislative issues. This is partly because private international trade law historically have shared similarities transcending state borders. Based on this criterion in the two jurisdictions, the CISG is judged successful.

The thesis measured the success of the CISG in Germany and U.S against the second criterion which is the operation of the CISG according to its purpose. That is, the way the drafters intended that the Convention should function, to provide a modern, uniform and fair regime for contracts for the international sale of goods. The CISG ought to introduce certainty in commercial exchanges and decreasing transaction costs by ensuring uniform interpretation and application of its provisions amongst member states as mandated by article 7 which requires that regard must be had to the international character, the need to promote uniformity in its application and the observance of good faith in international trade. In the U.S, although at the preliminary stages of adoption, the courts at a loss regarding what to make of the Convention, applied the domestic UCC principles to the CISG. However, in time the Courts began to apply the Convention independent of domestic interpretations.

The interpretation of the CISG by the German courts at the initial stages, despite tilting slightly towards the homeward trend, normalised almost immediately, thus evidencing consideration of the Convention's purpose. In terms of interpretation and uniformity amongst the judiciary, from 1988-1994 records showed that the judges generally adhered to the CISG and applied it when the need arose. The courts recognised the need for autonomous and purposive application of the Convention.

The thesis found the Convention to be successful in both jurisdictions based on the second criterion. Although the pace of interpretation of the CISG according to its purpose varied in both jurisdictions, with Germany having a faster pace, the Convention is currently being successfully applied.

The third criterion, which the CISG is measured against, is the congruence with societal needs and legal infrastructure of transplant countries. The thesis examined whether the CISG was able to fill gaps in the legal systems of Germany and the U.S, which domestic laws cannot achieve. The Convention fills the gap and needs of both jurisdictions by providing a neutral law, which allows the parties to save costs and accrue benefits to social actors. The way the CISG complements the domestic law in Germany and the U.S and the extent of their differences was considered. In the U.S, although the principles of the CISG were distinct to concepts of the UCC, causing interpretive problems, with time, the courts began to dissociate from the use of domestic concepts and finding solutions, enabling compatibility of domestic concepts with the CISG.

The fact that the CISG served as a model for domestic law reform in Germany makes it a successful transplant. That it served as a fertile soil for the reform of not only the Civil Code but the Travel Contract Act shows it met the needs of the German jurisdiction. The extent of fit between the CISG and the German law can be seen in the fact that the interpretation of the domestic law is in light of the CISG model. In terms of fit with the legal infrastructure, the approach of the courts to discrepancies between the Convention and the German domestic principles shows harmonious fit. Even in the face of conflict with already accepted and practiced principles, the courts esteemed the Convention by interpreting it according to its overarching principles and purpose. The CISG served as a gap filler and a trigger for law reform in Germany, making it successful.

The interaction and reaction of the actors in both jurisdictions towards the CISG is used to measure its success. In the U.S, legal practitioners and interpreters initially showed lack of engagement with the CISG. They showed a lack of familiarity, lack of usage and willingness to use the CISG. Although these reactions are symptomatic of the CISG as a failed transplant, they were only at the initial adoption stages of the Convention. There has been a steady decline in the opt out practice by lawyers in the U.S which is evidence of familiarity and willingness to engage with the law.

The number of cases recorded in Germany on the CISG is illustrative of engagement with the Convention, although not at an optimal level. Thus, even though users take it seriously, they still exclude it in their transactions. However, increasingly business associations recommend non-exclusion of the CISG. Scholarly interest in the CISG in Germany is particularly impressive showing acceptance of the Convention. Considering the growing usage of the CISG in both jurisdictions, it is considered successful.

The last criterion on which the CISG's success was measured is its duration in Germany and the U.S. Thus, considering that a characteristic of an unsuccessful transplant is that it is short-lived, the existence and continued application of the CISG in the U.S means that it is successfully transplanted. That the Convention has been in Germany for 24 years, since its adoption and is still currently being applied in recent cases evidences sustained usage by actors, making the Convention successful.

The successful transplantation of the CISG in Germany and the U.S is an indication of the potential for success of the Convention in Nigeria.

### 6.2.5 On how to Transplant the CISG into Nigeria and the Implications?

The CISG will function as a cost saving transplant because it is a readymade model for law reform, particularly considering the on-going plans to reform the 1893 SGA. With the rise in globalisation, and converging legal systems, borders are fading and laws such as the CISG are exemplar models for Nigeria especially towards achieving a standard for international trade transactions. The CISG can be considered an externally dictated transplant in Nigeria, because it emanates from the UNCITRAL as a framework for promoting seamless and fair trade. Considering that the Convention's success in Nigeria may be dependent upon the willingness of exporters to provide the capital, and importers interested in the import, it can also function as an entrepreneurial transplant.

Qualifying the CISG as a prestigious law emanating from the UN makes it a legitimacy-generating transplant because it will provide economic efficiency by saving transaction costs associated with international trade in Nigeria. The association between economic development and legality means that the CISG will help in promoting long-term economic growth.

The thesis considered the possibility of other legal frameworks for international trade in Nigeria such as the OHADA, a regional framework. However, because the OHADA laws retain a strong French flavour and have a set of laws preponderantly based on civil laws and tradition, it was suggested that it will prove challenging for the Nigerian user conversant with common law tradition. As the CISG incorporates both civil and common-law concepts, and is used by countries from both jurisdictions, it is a better choice for Nigeria. This combination and recognition by countries ensures the collation of a substantial body of uniform interpretation that allows equality for users from either jurisdiction. Moreover the Convention deals with only one area of law and can be opted out of.

The OHADA laws are also not the best for the Nigerian business environment because the existent common law is more flexible, and this flexibility contributes to the level of economic output of countries. Opting for the OHADA also means that Nigeria would forgo all her rights to legislate on domestic business laws, and further, that the discordance in interpretation, resulting from translation may be problematic for Nigeria. On these bases the CISG is a better alternative to OHADA for Nigeria.

Irrespective of these problems, the CISG can coexist with the OHADA, because its scope and sphere of application ensures that other instruments can be accommodated. This is through its flexibility in accommodating parties' needs and respecting parties' contractual freedom, its

limited sphere of application, respect for other international instruments through Art 9(2) and the similarity in substantive issue of law and similarity in outcome.

The thesis measured the likelihood of the CISG succeeding as a legal transplant in Nigeria. It is shown that the pervasiveness of legal transplantation around the world is suggestive of the ease of transplantation. This indicates an innate ability of legal systems to assimilate transplants, an ability from which Nigeria is not exempt. The CISG as a medium for developing international trade law, thereby facilitating trade and catalysing the reform of extant trade laws, thus, encouraging development in Nigeria makes it appealing.

As the success of a transplant is not dependent on the level of development of the country of transplant, the CISG a much developed and international legal order can be successfully adapted to the Nigerian legal system. Although the principles of the CISG may be marginally dissimilar to those governing trade in Nigeria, because of the Convention's mixed nature it would still be successful. This is because of minimal distinctions between civil and common-law legal systems. And the practicality of modern business laws and their problem solving nature minimise the variance from country to country.

The commercial nature of the CISG means that it can easily and successfully be transplanted to Nigeria. Thus, it will be less affected by political, social and cultural factors important in determining the patterns of legal migration for constitutional and human rights laws, ideas and institutions. The CISG is non-ideological yet, instrumental to economic development, making for easier borrowing and receptivity of the CISG in Nigeria.

Through empirical research, the thesis demonstrates that legal practitioners in Nigeria show a high degree of willingness and likelihood to learn about a new Convention, and also the willingness to offer it to businessmen in international trade transactions. This attitude, borne out of the motivation to have a better legal framework for international trade, for law reform and the desire to be esteemed with her trading partners, indicates a positive disposition towards the Convention, thus increasing the likelihood of success.

The thesis has shown that the CISG is also compatible with common law concepts applicable in Nigeria. Where there are divergences, established solutions by the *jurisconsultorium* over the years may be used. These solutions will ensure that there will hardly be hindrances in the application of the Convention where it is adopted. Although challenges for actors in the application of the CISG such as avoidance and misinterpretations exist, these issues can be worked through as seen from the application of the CISG in other jurisdictions.

Adopting the CISG means that the way international trade transactions are carried out by Nigerian businessmen will undergo a change, favourable to them. Given its accessibility, the CISG will simplify trade for Nigerian businessmen. The simplicity of the Convention's language also means that traders at any level can understand the Convention's concepts. Materials on the CISG are easily accessible around the world on Internet sites dedicated to the dissemination of CISG cases and scholarship.

# RECOMMENDATIONS

The main thrust of the thesis, given the reasons for the non-adoption of the CISG in Nigeria, is that the Convention is beneficial to Nigeria, in that it can provide legal certainty, reduce transaction costs and strengthen the bargaining position of Nigerian traders in international trade contracts.

Based on the above, the following recommendations are made,

1. **Adoption of the CISG in Nigeria**

The CISG should be adopted in Nigeria particularly since it would be beneficial for sole traders and SMEs by strengthening their bargaining positions and providing them with the opportunity to pursue remedies in the event of breach.

Although it is recognised that the CISG is not a radical framework, the argument for adoption is based on the improvement of Nigerian trade structure and the traders position in Nigeria through cost effective means. The CISG provides this means.

2. **Creating Awareness of the CISG in Nigeria**

In order to facilitate the adoption of the CISG in Nigeria, it is suggested that the UNCITRAL should allocate more resources towards promoting its awareness in Nigeria. Given the lack of expertise in commercial law in Nigeria, the UNCITRAL equipped with more expertise is in a better position to initiate contact.

There should be more interaction between the UNCITRAL and the relevant agencies in Nigeria to promote awareness of the CISG. The FMTI, which is in charge of policies on trade, should actively work with the UNCITRAL towards dispersing information of the CISG in Nigeria. They can liaise with the MAN to disseminate information on the CISG. This is one way of ensuring that traders affiliated with the MAN become aware of the CISG. Understandably, funding for the commercial law sector is limited in the UN. However, such contact and communication may be done via the Internet. This will ensure that the CISG is more familiar to the users before it is ratified. Ultimately, the benefits of the CISG may be recognised, leading to a possible demand for the law by potential users.

The UNCITRAL should also consider programs involving the legal academia and working with them towards incorporating UN laws into the law curriculum would bring about awareness on a broad-spectrum.

Given the functions of the department of international and comparative law as advisors on the ratification of international laws in Nigeria, they can work with the UNCITRAL by providing funding to assist in the implementation of commercial law reform.

Legal practitioners in Nigeria should be more proactive towards globally recognised laws such as the CISG. This will enable more informed decisions regarding its adoption. Their exposure and input is vital, given the lack of expertise in commercial law within the government agencies in Nigeria and their access to the traders who are potential beneficiaries of the CISG.

Considering the global nature of commercial law, it is important that the Nigerian law syllabus should include and be more reflective of laws such as CISG, and it should be discussed. This is a way of keeping budding lawyers informed about global laws and promoting awareness of the CISG. It also provides the relevant exposure to international laws and sets the stage for timely assessments of foreign legislations that may be relevant in Nigeria.

The CISG should be discussed more in the trade and commerce textbooks as this will serve to educate the Nigerian legal populace. Despite the possibility of lack of awareness amongst the legal academia, they are a significant group with respect to dispersing knowledge of the Convention in Nigeria.

# APPENDICES

## APPENDIX 1: Interviewees

1. Mr Anthony Emioma, Legal Practitioner, Streamsowers & Köhn Law Firm (Lagos Nigeria June 2013)
2. Mr Godwin Etim, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013)
3. Mr Khrushchev Ekwueme, Partner, Olaniwun Ajayi
4. Mr Nnamdi Dimgba, Partner, Olaniwun Ajayi Law Firm (Lagos Nigeria, July 2013)
5. Mrs Jumoke Arowolo, Legal Prtactitioner, G Elias Firm (Lagos, Nigeria July 2013)
6. Mr Dipo Okorubido Banwo & Ighodalo Law Firm (Lagos Nigeria, July 2013)
7. Mr Ekwere, Partner, Alliance Law Firm (Lagos Nigeria, July 2013)
8. Mr Humphrey Onyeukwu, Legal Practitioner, Alliance Law Firm (Lagos Nigeria, July 2013)
9. Mr. Okorie Kalu, Legal Practitioner, Punuka Law Firm (Lagos Nigeria, June 2013)
10. Mr Ken Etim, Partner, Banwo & Ighodalo Law Firm (Lagos, Nigeria July 2013)
11. Mr Olufemi Banwo, Partner, Banwo & Ighodalo Law Firm (Lagos Nigeria, July 2013)
12. Mr Fumibara, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013)
13. Mr Gbolahon Elias, Partner, G Elias Firm (Lagos, Nigeria July 2013)
14. Mr Emuwa, Partner, Aelex Law Firm (Lagos Nigeria, July 2013)
15. Mrs Oghogho Makinde, Partner, Aluko & Oyebode (Lagos Nigeria, July 2013)
16. Mr Olufemi Lijadu, Partner, Ajumogobia & Okeke Law Firm (Lagos Nigeria, August 2013)
17. MR Olasupo Shasore, Partner, Ajumogobia & Okeke Law Firm (Lagos Nigeria, August 2013)
18. Dr Nat Ofo, Lecturer, Igbinedion University Okada, Edo State Nigeria (Lagos Nigeria, July 2013)
19. Dr Adewale Olawoyin, Partner, Olawoyin & Olawoyin (Lagos Nigeria, July 2013)
20. Mr Rasheed Adegbenro, Acting Director of MAN (Manufacturers Association of Nigeria) (Lagos Nigeria, August 2013)
21. Dr Oni (Assistant Director) Federal Ministry Of Justice, The Department Of International and Comparative Law (Lagos Nigeria, August 2013)
22. Mrs Itanyi, Commercial Law Lecturer, University of Nigeria Enugu Campus (UNEC) (Abuja Nigeria, August 2013)
23. Tominiyi Owolabi, Partner, Olaniwun Ajayi Law Firm (Lagos Nigeria, July 2013)
24. Shafiu Adamu Yauri Esq Principal Assistant Registrar, Federal Ministry of Trade and Investment (Abuja, Nigeria, December 2013)
25. Professor Nnona, University of Nigeria Enugu Campus (UNEC) (Abuja Nigeria, 23rd December 2013)
26. Sunday Oguchie, Commercial Officer, Bilateral Trade Division, Department of Trade, FMTI
27. Luca Castellani, Legal Officer, UNCITRAL, Durham, England, 13 February 2014)
28. I K Mohammed, Acting Director, Bilateral Trade Division, Department of Trade, FMTI (Abuja, Nigeria, December 2013)

29. Nduka Ekeyi, Lecturer, University of Nigeria Enugu Campus
30. Ugo Ugorji, Legal Practitioner, Aelex Law Firm (Lagos Nigeria, July 2013)
31. Mr Uwa, Partner, Streamsowers & Kohn Law Firm (Lagos, Nigeria July 2013)
32. Babatola Akpata, Legal Practitioner, G Elias & Co Law Firm (Lagos Nigeria, July 2013)
33. Nosa Osazuwa, Legal Practitioner, Aelex law Firm (Lagos, Nigeria July 2013)

**APPENDIX 2: Consent Form**


## CONSENT FORM

**TITLE OF PROJECT:**

**UNDERSTANDING THE NON-ADOPTION OF THE UNITED NATIONS CONVENTION ON CONTRACT FOR INTERNATIONAL SALE OF GOODS (CISG) IN NIGERIA**

(The participant should complete the whole of this sheet himself/herself)

| | *Please cross out as necessary* |
|---|---|
| Have you read the Participant Information Sheet? | YES / NO |
| Have you had an opportunity to ask questions and to discuss the study? | YES / NO |
| Have you received satisfactory answers to all of your questions? | YES / NO |
| Have you received enough information about the study and the Intended uses of, and access arrangements to, any data which you supply? | YES / NO |
| Were you given enough time to consider whether you want to participate? | YES/ NO |
| Who have you spoken to? Dr/Mr/Mrs/Ms/Prof..... | |
| Do you consent to participate in the study? | YES/ NO |
| Do you consent to having the interview recorded? | YES / NO |
| Do you consent to having excerpts from the interview published as part of the researcher's thesis? | YES / NO |
| Do you consent to having excerpts from the interview published as part of a series of articles/monograph in the future? | YES / NO |
| Do you understand that you are free to withdraw from the study:<br>* at any time and<br>* without having to give a reason for withdrawing and<br>* without any adverse result of any kind? | YES / NO |

**Signed** ..... **Date**.....

(NAME IN BLOCK LETTERS) .....

*** This project has been given approval by the Durham Business School Sub-Committee for Ethics.**

**APPENDIX 3: Participant Information Sheet**


# PARTICIPANT INFORMATION SHEET

The interview is expected to last for one hour or less, and will be (voice) recorded, so as to facilitate accurate transcription. You can, however, choose not to have the interview recorded.

Provided that you consent to having the interview recorded, please note that the recording will be securely stored.

The recording will be accessible only to the researcher, his supervisors, and examiners.

The researcher will treat your information with utmost confidence, and should you indicate that you do not wish to have your identity revealed when the researcher publishes his results, this will be respected.

You will incur no financial costs as a result of participating in this interview.

No major risks are anticipated by virtue of your taking part in this exercise.

Following the completion of the fieldwork, you will be provided with a brief written summary of the exercise.

Finally, it is worth reiterating that your participation in this exercise is entirely voluntary. You may choose to renege on participating at any time, or choose not to have the information supplied recorded or published as part of the researcher's thesis. This should, however, be indicated at the earliest possible time so that alternative arrangements can be made.

## APPENDIX 4: Introduction and Request for Interview

[Name of Interviewee]
[Address of Interviewee]

Dear [Name of Interviewee]

I am currently undertaking a PHD program in International Trade and Commercial Law at the Durham University Law School.

My research examines the reasons for the non-adoption of the United Nations Convention on Contract for International Sale of Goods (CISG) in African Nations with a focus on Nigeria. The research also seeks to understand the current role and effectiveness of the 1893 English Sales of Goods Act (applicable in Nigeria through the Statutes of General Application) in international trade and commerce in Nigeria.

As part of the research, experts in key organisations and parastatals in Nigeria including the Department of International and Comparative Law-Ministry of Justice, In House Lawyers in business and trade organisations, international trade and commercial lawyers, International trade and commercial law lecturers in the top ten universities, The Council of Legal Education, Institute of Advanced Legal Studies, Nigerian Law Reform Commission and Judges in Nigeria will be consulted and interviewed. This is in order to obtain their opinions and disposition towards uniform international conventions and their possible impact on trade in Nigeria.

As a specialist in commercial law, your opinion will be invaluable in understanding the role a uniform commercial law such as the CISG will play in international trade in Nigeria and consequently the economy. This is especially in light of the antiquated nature of the 1893 SGA and its role in commercial trade in Nigeria.

I currently in Lagos, Nigeria for this purpose and I will be very grateful if you could arrange a suitable date and time for the interview. The interview is estimated to last 20 minutes. To arrange this interview, you may contact me by email (u.g.anyamele@durham.ac.uk) or by phone on 08091594908.

Any information or opinion given will be used solely for the purpose of the research and will be accorded utmost confidentiality.

Thank you for your time and I look forward to your response.

Kind Regards
Uche Anyamele (PHD Student)
Durham Law School
The Palatine Centre
Durham University
Stockton Road
Durham,
DH1 3LE

# APPENDIX 5: INTERVIEW GUIDE

### 1. Personal Questions

i. What is your name?

### 2. Professional Career

ii. How many years are you at the bar?

iii. How long have you worked for this firm?

iv. What type of Contract does the Firm handle?

v. What is your area of specialisation?

### 3. Knowledge and Awareness of the CISG

i. Have you heard of the CISG, if yes, where and where did you hear about it?

ii. If NO, give an overview of the Convention and start asking for opinions of why the Convention, given its nature has not been ratified in Nigeria

iii. Do you think there is sufficient awareness of international laws in Nigeria amongst lawyers and law enactors?

### 4. Opinion on Uniform Laws?

i. What is your opinion of Uniform laws?

ii. What is your attitude towards uniform laws?

iii. Do you have any reservations on uniform laws adopted?

iv. What are your reservations about uniform laws and their applicability in Transactions?

v. Have you heard of the OHADA

### 5. The Non Ratification of the CISG in Nigeria

i. Why do you think we have not ratified the CISG?

ii. Why do you think there is no awareness of the CISG?

iii. Do you think the CISG would be useful if adopted?

iv. Should Nigeria adopt the CISG?

v. Who do you the Convention would be useful for when adopted?

vi. If the CISG is adopted what do you envisage would be challenges of applying it?

**vii. Applicable Laws/Frequently used laws**

i. What laws have you come across more frequently in practice?

ii. As a practitioner, would you prefer English laws for your client?

iii. Do you have concerns regarding foreign laws?

iv. What happens in the event of a breach of contract?

v. What sort of contracts does the firm/solicitor deal with?

vi. Would you say your clients are generally satisfied with English law?

vii. Are governing laws a barrier to your transactions?

**6. The Role of legal practitioners in the ratification process**

i. Why is there no pressure by Legal Practitioners to the Government to ratify the Convention?

ii. What is the role of lawyers in Law Reform?

**7. The Experience with the Nigerian Sale of Goods Acts**

**i.** What is your opinion and experience with the Nigerian SGA/ SGL 1893?

**ii.** Do you think our domestic laws are a barrier to trade?

**iii.** Do you think our domestic laws affect the bargaining strength of Nigerian Traders?

**iv.** What happens when you have to apply laws from other jurisdictions?

**8. International Commercial and Trade Law in the Curriculum**

i. Did you study any international trade laws whilst in school?

ii. Do you think international commercial laws should be included in the curriculum?

# APPENDIX 6: QUESTIONNAIRE

## a. INTRODUCTION

The research seeks to understand the role, which the English Sales of Goods Act (1893) (applicable in Nigeria through the Statutes of General Application) plays in trade. It is aimed at evaluating the current usefulness and applicability of the SGA in commercial transactions. The research also seeks to understand the reasons for the non-adoption of the United Nations Convention on Contracts for International Sales of Goods (CISG) in Nigeria.

The questionnaire also seeks to evaluate the level of awareness of the CISG as an international trade convention in Nigeria. The questionnaire also seeks to understand the disposition of legal practitioners towards the Convention (CISG) and the English Sales of Goods Act (1893). The questionnaire will also draw on the opinions of legal practitioners involved in international trade and commercial law towards the CISG and the SGA.

The Practitioner's likelihood and level of willingness to accept the Convention is also measured to access the success of the Convention where and if it is adopted in Nigeria.

## b. QUESTIONS

### PART A: THE NIGERIAN SALES OF GOODS ACT (SOGA) 1893

*i.* *Can you tell me a bit about yourself- your name, year of call, how long you have been in active practice?*

*ii.* *How long have you worked for this law firm?*

*iii.* *Does the firm handle international trade disputes/deal with international commercial law?*

*iv.* *In your experience, what laws have been used to settle international commercial/ trade disputes?*

*v.* *What laws in your experience have been referred to in contractual disputes? e.g Swiss Law, German Law, English SOGA 1973*

*vi.* *What is your opinion about the Nigerian SOGA 1893? (outdated, useful)*

*vii.* *In your experience with sales contracts and disputes, how often has the 1893 SOGA been used as the governing law?*

☐ *Very often - **Most** of the contracts I have come across and cases in courts have incorporated it. (If you have ticked this box, please go to question vii)*

☐ *Often - **Some** of the contracts I have come across and cases in courts have incorporated it. (If you have ticked this box, please go to question vii)*

☐ *Hardly - **Barely** any of the contracts I have come across **Nor** cases in courts have incorporated it. (If you have ticked this box, please go to question vi)*

☐ *Never- **None** of the contracts I have come across and **Nor** cases in courts have incorporated it. (If you have ticked this box, please go to question vi)*

*viii.* *Why do you think it is not frequently referred to?*

*ix.* *Do you think the SGA is still useful? If yes, why? If no, why not?*

*x.* *Do you think the SGA should be reviewed?*

**PART B: THE UNITED NATIONS CONVENTION ON CONTRACT FOR INTERNATIONAL SALES OF GOODS (CISG)**

*i.* *Have you heard of the United Nations Convention on Contracts for the International Sale of Goods (CISG)? If **No,** Please Continue to Question iv.*
*Yes*

*ii.* *If **YES**, Where, When and How?*

*iii.* *Do you think the **CISG** should be adopted in Nigeria?*

☐ *YES* ☐ *NO*

*iv.* *Are you likely to learn a new international convention?*

☐ *YES* ☐ *NO*

*v.* *How likely are you to learn a new international convention?*

☐ *Very Likely*

☐ *Likely*

☐ *Can't be bothered*

☐ *Not Likely*

*vi.* *Are you willing to learn a new international convention?*

☐ *YES* ☐ *NO*

*vii.* *How willing will you be to learn a new international convention?*

☐ *Very Willing (I will do all that is necessary to attend conferences and symposia related to the Convention. I will carry out research and educate myself on the Convention and its applicability.)*

☐ *Willing (I will not go out of my way, but I will attend conferences and symposia related to the Convention. I will carry out research and educate myself on the Convention and its applicability.)*

☐ *Can't be bothered (I do not care, unless the need arises in my law firm or in practice to acquire the relevant knowledge)*

☐ *Not Willing (I am not willing to learn any conventions or laws, the Nigerian laws on trade are fine.)*

*viii.* *Would you be willing to offer the **CISG** as an option to business men?*

☐ *YES* ☐ *NO*

*ix.* *Have you heard of the Organisation for the Harmonisation of Business Laws in Africa (OHADA)? Where, When and How?*

*x.* *Do you think we should join the OHADA? (leave blank if you have never heard of the OHADA)*

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