

**THE SUITABILITY OF THE CISG AND OHADA FOR SMALL AND MEDIUM-SIZED
ENTERPRISES ENGAGING IN INTERNATIONAL TRADE IN WEST AND
CENTRAL
AFRICA**

by

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SUMMARY

It is universally acknowledged that international trade and cooperation have become key drivers of SMEs. Indeed, the success of SMEs in the sales sector depends upon their capacity to conquer the foreign market and compete with larger companies. Many SMEs today, in particular those in Central and West Africa, are very much aware of this reality. However, because of differences between domestic laws and their maladjustment, many African SMEs still struggle to enter the international market and compete with larger companies. It is therefore obvious that any SMEs that want to succeed in international commerce today will be called upon to confront different regulations, whether domestic, regional or international, which are often shaped according to the realities and expectations of a particular environment. The challenge today is to regulate and harmonise these different legal systems, in order to render the law identical in numerous jurisdictions. This process of unifying the law internationally, in particular the law of sale, started in 1920 and culminated in 1988, with the implementation of the CISG. This Convention, which has become the primary law for international sales contracts, endeavours to deal with this problem of differences in law between states on a global scale, by attempting to achieve a synthesis between different legislations, such as civil law, common law, socialist law, and the law regarding industrialised and Third World countries.

Even though the CISG appears to be a compromise between different legal systems, the fact remains that it is not yet applicable in many countries, especially those in Central and West Africa, which are mostly still ruled by domestic and regional law, namely the OHADA. The purpose of this study is to attempt to analyse and compare the OHADA's Uniform Act Relating to Commercial Law to the CISG, in order to identify similarities and differences between the two, and to determine, with regard to the operating mode and structure of SMEs in West and Central Africa, which one of the two legislations is more appropriate.

Key terms

SMEs; Internationalisation; CISG; Comparative law; Cameroon contract law; Cameroon Civil Code; OHADA law; Formation of a contract; International sales law; Obligations of the buyer; Obligations of the seller; Sales of goods, Incoterms; Termination of a contract.

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This thesis is dedicated to my wife, Leonie Tchamko, and daughter Querene Zebaze.

LIST OF ABBREVIATIONS

ACAD MANAGE REV	Academy of Management Review
ACP	African, Caribbean and Pacific Countries.
Afr. J. Bus. Manage.	African Journal of Business Management
Am J Comp L	American Journal of Comparative Law.
AMCO Organization.	Convention of the African and Malagasy Common
AIJTR	American International Journal of Temporary Research
al.	Alinéa.
al.	Other
BGB	Bürgerliches Gesetzbuch.
BGH	Bundesgerichtshof (German Federal Supreme Court).
CC	Civil Code.
CCC	Cameroonian Civil Code
CCJA	Common Justice and Arbitration Court of OHADA.
CESL	China-Europe School of Law.
CESL	Common European Sales Law.
CIETAC	China International Economic and Trade Arbitration Commission.
CIF	Costs, Insurance, and Freight.
CISG-AC	CISG-Advisory Council Opinion.
CEMAC.	Central African Economic and Monetary Community
EC Model Law	Electronic Communications Model Law.

ECOWAS	Economic Community of West African States
CFR	Cost and Freight.
CIP	Carriage and Insurance Paid To.
CISG Sales	United Nation Convention on Contracts for the International of Goods
CLOUT	Case Law on UNCITRAL Texts.
CPT	Carriage Paid To.
Colum J Transnat'l L	Columbia Journal of Transnational Law.
Colum J Transnat'l L	Columbia Journal of Transnational Law
DAP	Delivered at Place.
DAT	Delivered at Terminal.
DDP	Delivered Duty Paid.
DFRC	Draft Common Frame of Reference.
DHL	Dalsey, Hillblom, and Lynn.
Ed(s)	Editor(s) or Edition(s).
EPA	Economic Partnership Agreement
ERSUMA	Regional High Judicial School.
EBLR	European Business Law Review
EXW	Ex Works.
EU	European Union.
Eur. J. Int'l L.	European Journal of International Law

FOB	Free on Board.
FCA	Free Carrier.
GDP	Gross Domestic Product
GICAM	Inter-Employers Grouping of Cameroon
HBR	Haward Business Review
ICLATC	Inter-American Convention on the Law Applicable to International Contracts.
ICC	International Chamber of Commerce.
Inc	Incorporated
Int'l L	International Lawyer.
Int'l Comp. L.Q.	International Comparative Law Quarterly
Pace Int'l LR	Pace International Law Review
ICTs	Information and Communication Technologies
ICBE-RF	Investment Climate and Business Environment Research Fund
INCOTERMS	International Commercial Terms.
IRJFE	International Research Journal of Finance and Economics.
Inter'l Rev. L. & Econ.	International Review of Law and Economic
JIBS	Journal of International Business Studies
J BUS RES	Journal of Business Research
JL & Com	Journal of Law and Commerce.
J Manage Stud	Journal Management Studies
Jur Rev	Juridical Review
JIEM	Journal of Innovation Economic Management

JSBM	Journal of Small Business Management
LGDJ	Librairie General de Droit et de Jurisprudence.
La. L. Rev.	Louisiana Law Review
MANAG REV	Management Review
Mich. L. Rev.	Michigan Law Review
NBER	National Bureau of Economic Research
NSB	National Small Business Act
OECD	Organization for Economic Co-Operation and Development
OHADA	Organization for the Harmonization of Business Law in Africa.
OSCE	Organization for Security and CO-Operation in Europe
Para	Paragraph.
PECL	Principles of European Contract Law.
PIL	Private International Law.
RCCM	Registre du Commerce et du Credit Mobilier
RvE&S	Review of Economics and Statistics
SA	Société Anonyme
SBA	Small Business Act.
SARB	South African Reserve Bank
SCHCL	Southern Cameroon High Court Law
S.Cal.L.Rev	Southern California Law Review
SMEs	Small and medium-sized enterprises
SSRN	Social Science Research Network

St Comp Int Dev	Studies in Comparative International Development
Strategic Manage J	Strategic Manage J
Tul L Rev	Tulane Law Review
U.A.s	Uniform Acts.
UNCITRAL	United Nations Commission on International Trade Law.
ULIS of Goods.	Convention relating to a Uniform Law on the International Sale
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.
UCC	Uniform Commercial Code.
UAGCL	Uniform Act relating to the General Commercial Law.
UEMOA	West African Economic and Monetary Union
UNECIC	United Nations Convention on the Use of Electronic Communications in International Contracts.
UNIDROIT	Institute for the Unification of Private Law or International Institute for the Unification of Private Law.
UNCITRAL	United Nations Commission on International Law Trade Law.
UNILEX	International Case Law/UNIDROIT.
UNSWLawJI	University of New South Wales Law Journal
VAT	Value Added Tax.
WTO	World Trade Organisation.

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Chapter One.

INTRODUCTION

1.1. PROBLEM STATEMENT

Small and medium-sized enterprises (SMEs) in Africa are considered to be an important lever for trade promotion today.¹ In his keynote address to the fifth annual African Development Finance Conference on 9 October 2003, South African Reserve Bank (SARB) Governor Tito Mboweni, stated that SMEs were essential to African development. He maintained that it was imperative for appropriate attention to be given to the promotion of SMEs.²

According to available statistics,³ empirical studies have shown that SMEs contribute to over 55% of the gross domestic product (GDP) and over 65% of total employment in high-income countries. On the other hand, SMEs and informal enterprises account for over 60% of GDP and over 70% of total employment in low-income countries, while they contribute to about 70% of GDP and 95% of total employment in middle-income countries.

Similarly, the IHS and DHL⁴ Express report of February 4, 2013 claimed that international trade and cooperation have become a key driver of small business, and Charles Brewer, Managing Director of DHL Express Sub-Saharan Africa, added that the possibilities opened up by new technologies, electronic communication and modern transportation mean that there are many foreign trade opportunities for African business. With thorough research and

¹ Scaling-up SME Access to Financial Services in the Developing World “Role of SMEs in Economic Development” Chapter 1, p. 9.” Available at: <http://www1.ifc.org/wps/wcm/connect/.../Scaling-Up.pdf?MOD=AJPERES> (Last accessed: 19 November 2015).

² Tito Mboweni was the eighth Governor of the South African Reserve. He succeeded Dr Christian Lodewyk on the 8 August 2009. This keynote address is available at: http://sarpn.org/documents/d0000569/P525_Mboweni_Oct2003.pdf (Last accessed: 19 November 2015).

³ Subhan, Mehmood and Sattar “Inovation in Small and Medium Enterprises (SMEs) and its impacts in Economic Development in Pakistan” (Papers delivered at the Proceedings of 6th International Business and Social Sciences Research Conference. 3 – 4 January 2013 Dubai).

⁴International shipping, courier, and packaging service. DHL was established in 1969 by Adrian Dalsey, Larry Hillblom, and Robert Lynn. The name DHL is derived from the first initial of each founder's last name.

Read more at: <http://www.businessdictionary.com/definition/DHL.html#ixzz3juDXBYLA>. (Last accessed: 18 November 2015).

a well-defined strategy, local SMEs can successfully expand into new markets, compete with larger companies, and use their size and agility to their own advantage.⁵

These assertions clearly motivate local SMEs to implementing to international trade and cooperation. According to Charles Brewer, if a well-defined strategy is implemented, such as sufficient technical expertise and management skills, an adequate investment in information, technology and cost of production, capacity of innovation and adaptation to markets,⁶ local SMEs can conquer the foreign market and compete with larger companies in the area of international commerce. Therefore, even though *a priori* a well-defined strategy would involve success in international trade, it remains true that those SMEs engaging in international trade are always confronted with several challenges, one of the most important being the differences between state laws, which slow down SMEs which would like to take part in commercial exchange considerably.⁷

According to the Organisation for Economic Co-Operation and Development (OECD), differences between domestic laws, their maladjustment to the international market (as most of these laws are often obsolete, incomplete and fragmentary), uncertainty and the conflict of laws constitute barriers to effective participation in international commerce.⁸

Indeed, doing business on a global scale not only involves having a well-defined strategy and financial resources, or securing international contracts, but also means being able to have a good understanding of foreign law.⁹ In terms of their relationship with large companies, SMEs generally consent to apply the legislation that governs their commercial partners and support the financial costs involved in the investigation of foreign laws applicable to the contract.¹⁰ This may be due to the failure to identify international business, and a lack of knowledge with regard to the different business regulations that govern most of these SMEs.¹¹

In this respect, the SMEs located in West and Central Africa, especially those in Cameroon and which engage in international commerce, are not spared from this competition and

⁵ The IHS and DHL express report "Internationalization – a driver for business", can be accessed at <http://www.dp-dhl.com/content/dam/presse/pdf/2013/sme-competiveness-study.pdf>. (Last accessed: 19 November 2015).

⁶ OECD *Removing Barriers to SMEs access to International Market* ed (OECD Paris 2008).

⁷ European Commission (Proposal for a Regulation of the European Parliament on a Sale, Brussels on 11-10-2011 COM (2011) 635 final, 2011/0284 (COD).

⁸ OECD *Removing Barriers to SMEs access to International Market* ed OECD (Paris 2008).

⁹ Main T O 2012 (704) *CILJ* 211-228.

¹⁰ European Commission (Proposal for a Regulation of the European Parliament on a Sale, Brussels on 11-10-2011 COM (2011) 635 final, 2011/0284 (COD).

¹¹ King J http://www.canadaone.com/ezine/april07/small_business_growth_challenges.html (Last accessed: 20 November 2015).

differences between state laws.¹² For most countries, as with Cameroon, instead of applying their own domestic law, they are more in favour of the cooperation and harmonisation of legislation at a regional level.¹³ For instance, one finds the Inter-American Convention on the Law Applicable to International Contracts (ICLATC) in South America, which includes Bolivia, Uruguay, Venezuela, and Mexico.¹⁴ In addition, there is the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DFRC), which contains the Principles, Definitions and Model Rules of European Private Law,¹⁵ the China-Europe School of Law¹⁶ (CESL), whose mission is to facilitate the study of law by integrating Eastern and Western concepts, and the principles of Asian contract laws which are applied in Japan, China and Korea. Furthermore, the Harmonisation of Business Law binds seventy Francophone countries in West and Central Africa.¹⁷ The majority of these Francophone African countries were colonised by France, and as a result they inherited the French legal system based on Roman law¹⁸. Only Cameroon adopted both Roman and common law systems, since this country, after World War II, was shared by England and France¹⁹. After gaining its independence, the northern part of Cameroon maintained French law, while the southern part maintained English law.²⁰ Today, however, a possible conflict regarding sales is no longer conceivable, as Cameroon is a member of OHADA, which therefore applies to all domestic sales throughout Cameroon. Thus, domestic law only applies when the OHADA legislation is silent.²¹

Indeed, in matters of international trade, the CISG, which is an abbreviation for the United Nation Convention on Contracts for the International Sales of Goods, often referred to as the Vienna Convention or the UN Sales Convention of Goods, which is the regulation governing the rights of sellers and buyers in relation to contracts for the international sales of goods,²² endeavours to deal with the problem of differences in law between states on a global scale.

¹² Fongang *la PME* 18.

¹³ Ferrari 2008 (123) *GmbH, Munich* 23.

¹⁴ The Inter-American Convention on the Law Applicable to International Contracts. (Signed at Mexico, on March 17, 1994. Available at: <http://www.oas.org/juridico/english/treaties/b-56.html>. (Last accessed on 20 November 2015).

¹⁵ Draft Common Frame of Reference. Available at: http://www.ec.europa.eu/justice/policies/civil/docs/dcfrc_outline_edition_en.pdf. (Last accessed: 20 November 2015].

¹⁶ China-Europe School of Law. Available at: <http://www.cesl.fr>. (Last accessed: 20 November 2015).

¹⁷ See Foundation for the Continental Law. Available at: http://www.fondation-droit-continental.org/jcms/c_7557/harmonisation-des-droits-regionaux. (Last accessed : 18 May 2013).

¹⁸ Fombad CM www.nyulawglobal.org/globalex/cameroon1.htm. (Last accessed: 20 November 2015).

¹⁹ Henry, Samuelson & Co. <http://www.hg.org/article.asp?id=7155>. (Last accessed: 20 November 2015).

²⁰ Cziment, 2009 (2) *Tul L Rev* 4-5.

²¹ Schwenger, Hachem and Kee *Global Sales and Contract Law* 38.

²² Kröll, Mistelis and Viscasillas *UN Convention* 1.

Adopted at the diplomatic conference in Vienna in 1980 and entered into force on 1 January 1988, the CISG has become the primary law for international sales contracts. This represents a process of synthesis whereby civil law, common law and socialist law, as well as law concerning industrialised and Third World countries, have been taken into account.²³

As of 6 March 2013, the CISG had been ratified by 79 countries from various regions throughout the world with different economic and political regimes, and included representatives of all major legal systems which had ratified the Convention.²⁴ Only six African countries have ratified the treaty to date, namely Burundi, Egypt, Gabon, Guinea, Uganda and Zambia. Key countries which are absent are the United Kingdom,²⁵ Hong Kong, Taiwan and South Africa. Brazil was the most recent country to ratify the Convention.²⁶

The CISG, through its existence and objectives, is first and foremost a substantive text for the harmonisation of law, which is characterised by its internationality, since it only applies itself to international contracts.²⁷ Secondly, the CISG is a compromise between different legal systems²⁸, with the aim being to eliminate legal impediments to international transactions, such as differences between state laws, thereby facilitating the development of international trade.²⁹

Thus, the CISG is not only an important tool for the harmonisation of law, but is also a codification of general principles.³⁰ Most experts in international trade law agree that the success of CISG is due to its impact on domestic legal systems and the number of contracting states which have ratified the treaty.³¹ There are more than 79 contracting states from various regions of the world, including all major industrial nations such as China, France, Germany, Japan, USA and more recently Brazil. The fact that the CISG is applied in two-thirds of world trade³² is proof of its success.

²³ Resolution 33/93, in A/CONF.97/1, p xv. The Conference was held in Vienna at the Kongresszentrum Holburg.

²⁴ UNCITRAL http://www.uncitral.org/uncitral/en/uncitralL_texts/sale_goods/1980cisg_status.html. (Last accessed 20 November 2015).

²⁵ Lord Sainsbury, the Under Secretary of State for the Department of Trade and Industry in the House Lords, stated the following on 7 February 2005: The United Kingdom intends to ratify the convention subject to the availability of parliamentary time.

²⁶ Cameron and Kenna MC <http://www.lexology.com/library/detail.aspx?g=e7dfed8d-77ad-44bd-a924-9fc214141690>. (Last accessed 20 November 2015).

²⁷ Schlechtriem and Hachem, in: Schlechtriem/Schwenzer *Commentary* 12.

²⁸ Vural 2013 (39) *Ankara Bar Review* 12-49.

²⁹ European Commission (Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law /* COM/2011/0635 final - 2011/0284 (COD)).

³⁰ Schlechtriem 2005 (10) *Jur. Rev* 27-34.

³¹ Flechtner 2008 (2) *UN Audiovisual Library of International Law* 25.

³² Gillette/Scott 2005 (25) *Inter'l Rev. L. & Econ.* 446-448.

However, even though the CISG's application appears to have achieved some success throughout the world, it should be noted that most Central, West and South African countries have not yet ratified the Convention. West and Central African countries simply favour a more regional approach, rather than the CISG's global application,³³ as they believe that this will benefit them more in terms of intra-regional commerce. Although this appears to be true, it does not mean that the CISG's applicability or influence in West and Central Africa are not conceivable, or that the CISG may not have any impact on West and Central African SMEs engaging in international commerce.³⁴

It would be naïve to suppose this when it is known that according to Article 1(1) (b) of the UN Convention on the Contract for International for Sale of Goods, the CISG is also applicable to contracts when the rules of private international law lead to the application of the law of a contracting state. This means that, the application of rules of private international law by a forum in a non-contracting state may well lead to the application of the CISG.³⁵ In addition, by virtue of the principle of party autonomy and guarantees of the freedom of contracts, the parties may choose the CISG as the applicable law, or derogate or vary the effect of the provisions of the convention. Thus, the parties are free to determine the content of their contract according to their respective interests.³⁶

In other words, the exclusion of the CISG does not necessary lead to the application of domestic law. It would also be unwise to suppose that CISG may have some influence on or conflict with the OHADA, without first understanding the OHADA's objective and application.

The OHADA's genesis reveals that its implementation was due to a request from African traders, who persistently urged that the legal and judicial environments of businesses should be improved in order to safeguard their investments.³⁷ Indeed, due to the economic recession, both legal and judicial insecurity prevailed in most West and Central African states during the 1980s. It was therefore imperative to restore investors' confidence, both in domestic and foreign law in order to promote entrepreneurship and attract foreign investment. This was important because private investors were discouraged by the diversities in African law which for the most part was fragmented and obsolete.³⁸

The Organisation for the Harmonisation of Business Law in Africa (with its French name being "Organisation pour l'Harmonisation du Droit des Affaires en Afrique", the abbreviation

³³ Ferrari 2008 (123) *GmbH, Munich* 121-129.

³⁴ Schlechtriem 2005 (10) *Jur. Rev* 27-30.

³⁵ Huber and Mullis *The CISG: A new textbook for students and practitioners* 53.

³⁶ Schlechtriem 2005 (10) *Jur. Rev* 27-30.

³⁷ Mouloul A *Understanding* 9.

³⁸ Mouloul A *le Régime Juridique des Sociétés* 21.

for which was OHADA) is established by the treaty signed in Port Louis (Mauritius) on 17 October 1993, and was ratified on 31 December that year by 17 African states.³⁹ It is a regional international organisation that caters for most of the Francophone African region, and is based on the Francophone legal system. Only Cameroon is unique having incorporated both French and common law systems.⁴⁰

The OHADA aims to revise both the legal and judicial systems, especially in the areas of business and corporate law. Moreover, its aim is to facilitate the economy and exchanges between member states, by providing them with a set of common and simple laws that are suited to modern economies⁴¹. Thus, the main objective of the OHADA is to establish the progressive unification of legislations, in order to enable the harmonious development of all members⁴².

According to Article 10 of Title II of the Uniform Law of Treaty, as soon as the OHADA's dispositions are adopted, they are directly applicable and mandatory within the contracting states, notwithstanding anything to the contrary in previous and future national laws.⁴³ The OHADA's uniform law applies not only to cross-border trade in OHADA member states, but also supersedes domestic laws addressing the same issues. Thus, domestic law only applies when the OHADA legislation is silent.⁴⁴ This Article defines the scope of the substantive application of the Uniform Laws and confirms the supremacy and obligatory character of the OHADA's law in relation to domestic law.⁴⁵

Thus, the reviewed OHADA's Uniform Act on General Trade of Law was adopted on 15 December 2010 in Lome (Togo) and officially published in Gazette number 23 on 15 February 2011. In its preliminary chapter, particularly in Article 10, it is clearly stated that the OHADA applies to individuals with a trader status and whose place of business is located within the OHADA region. As an alternative to Article 10 mentioned above, Article 234, particularly in Book VIII, Title 1, provides that the OHADA should also apply if rules of private law lead to the application of the law of contracting states. Thus, in the definition of the sale

³⁹ OHADA www.ohada.org (Last accessed 20 November 2015).

⁴⁰ Fontaine, Addendum: Explanatory note to the amendment in the Introduction Chapter (Article 00/1) with a view to co-ordinating it with the preliminary draft Uniform Act on Consumer Contracts transmitted to the OHADA Permanent Secretariat in September 2005, P 7-8. Available at <http://www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf> (Last accessed on 20 November 2015).

⁴¹ Dickerson 2005 (17) *Colum. J Transnat'l L.* 44.

⁴² Mouloul A *Understanding* 9.

⁴³ Mpiana *La position du Droit International dans l'ordre juridique Congolaise* 28.

⁴⁴ Cziment, 2009 (2) *Tul L Rev* 26-27.

⁴⁵ Sayegh, Pougoue and Sawadogo, *OHADA Traite et Actes Uniformes Commentes et annotes* 135.

of goods, it is noted that Articles 235 and 236 proceed by exclusion in enumerating matters that are not governed by the treaty.⁴⁶

In addition, the sale of goods must occur between the traders; this provision is expressly highlighted by the OHADA's Uniform Act and not by the CISG. It follows that the CISG may apply to contracting parties, regardless of whether or not they have a trader status, whereas the OHADA is applied only when the two parties have a trader status. However, both the CISG and OHADA texts exclude sales to the consumer⁴⁷ and govern the sale of goods.

Thus, it is worth noting that in several aspects, some of the OHADA's dispositions, such as Articles 241, 244, 245, and 275 relating to the following offer, time of formation of the contract, time of delivery, sanction for non-fulfillment, fundamental breach of contract, lack of conformity, hidden defects, guarantees of the seller, ownership transfer, and transfer of risk, are different to the CISG's conception, and as such have the potential to create the greatest barriers for West and Central African SME's engaging in international commerce.

Therefore without attempting to challenge Professor Kenfack Douajni's statement that the OHADA has been modelled on the CISG⁴⁸, it is important to note that even if it is true that the OHADA text was greatly influenced by the CISG model, it remains clear that a comparison, or even confrontation, between both legislations is unavoidable. This is especially true when the question of the determination of their scope of respective application, particularly regarding the legislations that are best suited to SMEs in West and Central Africa engaging in international trade, is raised.

It has been mentioned above that the CISG was viewed as a process of synthesis, whereby civil law, common law, and laws concerning industrialised and Third World countries were integrated, while the OHADA was the regional organisation unifying the Francophone countries whose legal rules were based on the Francophone legal system. Thus, with regard to the operating mode and structure of SMEs in West and Central Africa, which law the OHADA or CISG would be more appropriate to those SMEs engaging in international commerce? In other words, which one of the two legislations would be better suited to the unique features of SMEs in West and Central Africa which are engaging in international trade?

This study attempts to analyse and understand the possible impact of the CISG on the OHADA's regulations, and their effect, in turn on small and medium-sized enterprises

⁴⁶ See Article 235 of the OHADA and Article 2 of the CISG.

⁴⁷ See Article 235 of the OHADA and Article 2 of the CISG.

⁴⁸ Douajni 2004 (3) *Cameroonian Review of Arbitration* 26.

engaged in international trade, and in dealing with other enterprises in the countries which have ratified the Convention. This study will compare the OHADA's Uniform Act Relating to Commercial Law to the CISG, in order to identify similarities and differences, and to determine, with regard to the operating mode and structure of SMEs in West and Central Africa, which one of the two legislations is more appropriate.

In addition, this study will also address African lawyers and attempt to capture their attention with regard to the lack of awareness of the CISG. This is important because this lack of awareness of the CISG during the development of their standard contract forms may often result in some surprises, such as the CISG's application in cases where these lawyers rely on the applicability of their domestic law and therefore plead on the sole basis of that domestic law. In effect, these lawyers are often unaware that the mere fact that the pleadings are based solely on a given domestic law does not automatically lead to the exclusion of the CISG.

In this study, the researcher will seek to assess the capacities of SMEs in West and Central Africa, particularly with regard to their ability to participate effectively in the international commercial world in relation to the provisions of the CISG and OHADA.

1.2. POINTS OF DEPARTURE, ASSUMPTIONS AND HYPOTHESES

1.2.1. Points of departure

This study falls within the scope of comparative commercial law and aims to analyse the possibility of the CISG's application in West and Central Africa, as well as to compare the CISG's provisions to OHADA's Uniform Act on Commercial Law, in order to determine which of the two is more suitable for West and Central Africa SMEs engaging in international commerce.

This study will make use of various research approaches, such as the descriptive, analytical, comparative and prescriptive approaches as follows:

- The descriptive approach will be used to describe the existing situation regarding SMEs in West and Central Africa.

- The analytical approach will be used to understand the meaning of both legislations namely the CISG and OHADA.
- The comparative approach will be used to compare the CISG and OHADA's Uniform Act on Commercial Law in order to highlight their similarities and differences.
- The prescriptive approach will be used for policy recommendations, based on which of the two legal systems is more appropriate for West and Central African SMEs engaging in the international sale of goods.

Both primary and secondary sources of information on the topic will be considered in this study. The primary sources include CISG legal texts, decided cases and literature on the CISG.

The secondary sources of information include but are not limited to, relevant journal articles, as well as materials written by academics and researchers on issues that are relevant to this study. This study will also make use of important Internet sources of information on the topic.

1.2.2. Assumptions

This study is limited to the provisions of the CISG and OHADA. Due to the ambitious objectives of this study, its scope needs to be clearly defined, in order to avoid conducting research that is too broad. Thus, this study, instead of focusing on the operating mode and structure of SMEs in all West and Central African countries, will focus specifically on SME's in Cameroon, a country located in Central Africa which is also a contracting state of the OHADA.

In addition, it is evident that the legal problems concerning the sale of goods are so manifold, and it is therefore impossible to analyse all of them. Thus, this study will focus on the specific issues that are subject to different treatment by the OHADA and CISG, and which are likely to create barriers for SME's engaging in international trade. With regard to the formation of contracts, this study will focus on acceptance, counter-offers, and the acceptance period. In terms of the performance of contracts, this study will focus on ownership transfer and transfer of risk, lack of conformity and guarantees of sellers, fundamental breach of contract and remedies for non-fulfillment.

This study will not address issues related to the validity of contracts, properties of sales of goods, responsibility and corporal damage, since these issues are not relevant to the CISG, and cannot therefore be compared with the OHADA.

Lastly, this study will also not deal with all the problems faced by SMEs in West and Central Africa, such as access to finance, location and networking, scarcity of resources and so on. Instead, it will only focus on legal problems such as differences between laws.

1.2.3. Hypotheses

This study is based on the following hypotheses:

- The CISG's provisions, according to the criteria of applicability, have an impact on OHADA's sphere, and SMEs engaging in international commerce have to take this into consideration, despite the fact that most West and Central African countries have not ratified the CISG treaty.
- The OHADA's provisions, relating to commercial law have been based on the CISG philosophy, in order to highlight both the similarities and differences and between the two, which will enable the researcher to determine which of the two laws is best suited to SMEs.
- The CISG or OHADA has the potential to act as a catalyst for SMEs in West and Central Africa.
- SMEs engaging in international trade play a significant role in the economic growth of a country, but do not have an appropriate legal framework or suitable law for facilitating their participation in international commerce.

1.3. FRAMEWORK OF THE DISSERTATION

In order to investigate the suitability of the CISG and OHADA for small and medium-sized enterprises engaging in international trade in West and Central Africa, this study will begin by exploring the role and importance of SME's and their operating mode, and will then focus on

SMEs in Cameroon. Thereafter, Cameroonian domestic law and the regional law of the OHADA on the sale of goods will be examined, in order to highlight its inadequacies with regard to the regional law. A study of the CISG will follow, and a comparative study will then be done between the CISG and OHADA before conclusions are drawn. Based on the comparative study of both laws, the researcher will suggest which one might be more suitable for SMEs in West and Central Africa which are engaging in international commerce. The outline of this study will be as follows:

- Chapter 1 – Introduction (problem statement, points of departure, assumptions, hypotheses and framework).
- Chapter 2 – Role, importance and operating mode of SMEs in Cameroon.
- Chapter 3 – The Cameroonian law and the introduction of the OHADA Treaty
- Chapter 4 – The UN Convention on Contracts for the International Sale of Goods.
- Chapter 5 – Comparative study between the CISG and OHADA law and their impact on West and Central African SMEs
- Chapter 6 – Conclusion and recommendations.

Chapter Two.

ROLE, IMPORTANCE AND OPERATING MODE OF SMALL AND MEDIUM-SIZED ENTERPRISES IN CAMEROON

2.1. INTRODUCTION

During a debate organised on 7 May 2013 by the Inter-Employers Grouping of Cameroon (GICAM),¹ the European Union Ambassador in Cameroon, H.E. Mr Raoul Mateus Paula, in his keynote address, asserted that Cameroon, after initiating the intermediate agreements by signing them in 2007 and 2009 respectively, must now either implement them or resign,² since Cameroon had signed the EPAs, but had provided zero rate access to European markets. If Cameroon did not ratify them by 2014, this meant that it would no longer export at zero rates. This might negatively affect some sectors, such as the banana industry, since Cameroon's bananas, which are exported to the European market at zero rate, would be charged 130 euro per ton, and other exported goods would suffer the same fate.³

It is important to note that EPAs⁴ are legally binding bilateral contracts signed between the European Union (EU) and African, Caribbean and Pacific (ACP) group countries. Known as the Cotonou Agreement, they define the objectives and principles of the new trade arrangements between the EU and ACP countries.⁵ This means that it is a type of trade agreement which reduces the taxes (known as tariffs) on goods coming into and leaving a country (such as exports). According to the way in which Brussels interpreted the WTO's

¹ GICAM, available at: http://www.legicam.org/index.php?option=com_docman&task=doc_download&gid=650&Itemid=76. (Last accessed 20 November 2015).

² GICAM, available at: http://www.legicam.org/index.php?option=com_docman&task=doc_download&gid=650&Itemid=76. (Last accessed 20 November 2015).

³ EPAs are a type of free trade agreement. This means that both sides agree to reduce the taxes (known as tariffs) on goods coming in and going out (such as export taxes).

⁴ See the document Partnership Agreement between the members of the African, Caribbean and Pacific Group of States on the one hand, and the European Community and its Member States, on the other hand, available at: http://www.bilaterals.org/IMG/pdf/Cotonou_1_body_-2.pdf. (Last accessed 20 November 2015).

⁵ Gawu et al *Succession New ACP-EU* 3.

rules, 80% of the country's market would be opened up to the EU duty-free for a period of 15 years.⁶

Even if this study does not focus on EPAs, it is important to refer to them in order to highlight how exchanges of goods, services and access to the new foreign market have become essential for the growth of the economy in developed countries, to the extent that the EU is forcing African countries to liberalise their economies prematurely (for example, through aid or trade agreements).⁷

It is important to also note, based on the statistics, that Cameroonian SMEs are an important pillar of the economy, and in turn need protection by the government and regulations. According to the results of the National Institute of Statistics in Cameroon, more than 90% of the national economic fabric of Cameroon is represented by SMEs, which account for 34% of GDP.⁸ They contribute to a significant share of the GDP, owing to the value that they generate. In a report by the same Institute, it was stated that the SME sector comprises about 33.9% of all households in the country, and 46% of the workforce.⁹

Indeed, many African enterprises, like those in Cameroon, which are mostly made up of SMEs, state that they are not yet ready to challenge large European enterprises and others in the world, unless international or regional regulations which govern international or regional business include provisions to protect SMEs during negotiations, execution of sales, and international transactions with large enterprises.¹⁰ According to them, even though international market law imposes the need for fair competition, because of their size and low turnover, African SMEs are disadvantaged by the fact that they import more than they export, and therefore need to be protected by regulations.¹¹

This fear among Cameroonian SMEs of competing with larger companies at the international level is based on the weakness of national, regional or international legislation, which, in their view, are not suited to the effective competition of SMEs with larger enterprises. This means that these entrepreneurs feel that regardless of whether they are dealing with the

⁶ EU-Africa trade partnership negotiations stalled published 12 December 2013, available at: www.eurActiv.com (Last accessed: 20 November 2015).

⁷ The IHS and DHL express report "Internationalization – a driver for business", can be accessed at <http://www.dp-dhl.com/content/dam/presse/pdf/2013/sme-competiveness-study.pdf>. (Last accessed: 19 November 2015).

⁸ National Institute for Statistics of Cameroon available at: <http://www.statistics-cameroon.org/> (Last accessed: 20 November 2015).

⁹ National Institute for Statistics of Cameroon available at: <http://www.statistics-cameroon.org/> (Last accessed: 20 November 2015).

¹⁰ OLINGA JN <http://www.camer.be/29660/12:1/cameroun-les-operateurs-economiques-opposes-a-la-signature-des-ape-cameroon.html> (Last accessed: 20 November 2015).

¹¹ OLINGA JN <http://www.camer.be/29660/12:1/cameroun-les-operateurs-economiques-opposes-a-la-signature-des-ape-cameroon.html> (Last accessed: 20 November 2015).

Cameroonian legislation on trade, regional legislation such as the OHADA, or international legislation relating to the sale of goods, none of these three levels of legislation has been shaped or drafted in order to take the differences between SMEs and large enterprises engaging in international trade into account. These operators, mindful of the role played by SMEs in the economy, call the appropriateness of the OHADA and CISG's provisions for SMEs into question.

This concern appears to be justified, given that even the Minister of Cameroon's SMEs based on the structure, operating mode and importance of SMEs, highlighted that the Cameroonian economy would have collapsed if the EPAs were to be implemented now.¹² He added that before implementing them, certain requirements with regard to the Cameroonian economy, particularly SMEs and market regulations, have to be met. He emphasised that trade liberalisation can be a good thing in the right circumstances, if it is properly synchronised with the legal texts in a country's development.¹³ In light of this perspective, certain African governments, such as that of Nigeria, have started to protect their industries and SMEs by enacting new regulations which prohibit the importing of products manufactured in China.¹⁴ Similarly, the president of the Employers' Movement in Cameroon, Mr Protais Ayangma, during the last meeting of Cameroon Business Forum, told the Minister of SMEs in Cameroon that SMEs need to be protected in terms of certain issues, such as the time of payment, international commerce, and execution of contracts.¹⁵

One has to acknowledge that the factors of production have become mobile. The movement of men, goods, capital and information constitute the four cardinal points of economic growth.¹⁶ Thus, the competitive game increasingly forces SMEs, regardless of their size, to enlist their strategies into this planetary perspective.¹⁷ Thus, Cameroon's SMEs do not have a choice, because if they want to improve their country's economy, they have to face competition from other enterprises engaged in international trade, and strive to conquer foreign markets.¹⁸ As stated by Charles Brewer, Managing Director for DHL Express Sub-

¹² Xinhua <http://www.journalducameroun.com/article.php?aid=18953>. (Last accessed: 20 November 2015).

¹³ Xinhua <http://www.journalducameroun.com/article.php?aid=18953>. (Last accessed: 20 November 2015).

¹⁴ Nigeria - Implementation of the recommendations of Nigeria's Trade Policy, available at: <http://www.acp.int/content/nigeria-implementation-recommendations-nigeria-s-trade-policy-review>. (Last accessed 20 November 2015).

¹⁵ Protais Ayangma's address during the fourth session of the Cameroon Business Forum on 21 February 2013 in Douala.

¹⁶ European Commission http://ec.europa.eu/growth/single-market/index_en.htm. (Last accessed: 20 November 2015).

¹⁷ Torres O *Les PME face à la l'Internationasation* 33.

¹⁸ Mateus Paula's keynote address during a debate organised on 7 May 2013 by the Inter-Employers Grouping of Cameroon. Available at:

Saharan Africa, international trade and cooperation have become key drivers of small businesses.¹⁹

Today, it is obvious that any enterprise wanting to succeed in international commerce will be confronted with different regulations, whether domestic, regional or international.²⁰ Most of the time, these legislations are shaped by the realities and expectations of a particular environment. This is why these legal texts are different, and many have not been conceived by taking into account some of the realities and exigencies imposed by the international market, or by the fact that not all the competitors or actors (enterprises, traders, etc) performing in the international market are at the same level. For instance, enterprises such as SMEs need certain provisions in order to be able to perform in this arena.²¹

The following section will define SMEs and their general characteristics, before focusing on their importance in Cameroon, and the process involved in enabling SMEs to reach the international market.

2.2. DEFINITION OF SMEs

As stated by Oliver Torres, the first challenge faced by numerous researchers is to choose the best definition²² for a concept, as there are several ways in which to justify the choice of definition. Generally, there are different definitions which vary according to their relevance to qualitative and quantitative research.²³ Some researchers can retain a definition because it is close to their field of interest. For example, a researcher in finance will retain a definition of

http://www.legicam.org/index.php?option=com_docman&task=doc_download&gid=650&Itemid=76. (Last accessed: 20 November 2015).

¹⁹ The IHS and DHL express report "Internationalisation- a driver for business", available at: <http://www.dp.dhl.com/content/dam/presse/pdf/2013/sme-competiveness-study.pdf>. (Last accessed 21 November 2015).

²⁰ Doing Business 2014 Understanding Regulations for Small and Medium-Size Enterprises. Comparing Business Regulations for Domestic Firms in 189 Economies A World Bank Group Corporate Flagship. Available at: <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf>. (Last accessed 21 November 2015).

²¹ Doing Business 2014 Understanding Regulations for Small and Medium-Size Enterprises. Comparing Business Regulations for Domestic Firms in 189 Economies A World Bank Group Corporate Flagship. Available at: <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf>. (Last accessed 21 November 2015).

²² Torres O «Du rôle et de l'importance de la proximité dans la spécificité de gestion des PME» (Papers delivered at the first International Congress on the SMEs 12-14 Octobre 2000 Lille) 25-27.

²³ O'Regan and Ghobadian 2004 *EBLR* 18.

SMEs based on financial criteria, whereas a researcher in law will retain a definition that comes from legislation. Thus, within the scope of this study, the researcher will retain those definitions provided by the legislations of various countries in the world, as well as Cameroon in particular, as they relate to legal research.

2.2.1. International Definitions

In the United States of America, the Small Business Administration is a government agency which provides support to entrepreneurs and small businesses, and establishes small business criteria based on industry, ownership structure, revenue and number of employees. Therefore, small enterprises are those which have five to fifty employees, whereas medium enterprises consist of between 50 and 500 employees, although this number may, in some cases, be as high as 1500.²⁴

In the European Union, an SME is defined as an enterprise employing fewer than 250 employees, with a sales turnover not exceeding 50 million euro, or an annual balance sheet total not exceeding 43 million euro.²⁵

In Africa, during the Cotonu International Forum on SMEs in West and Central Africa, it was noted that there is no appropriate formal definition of SMEs, which enables them to be easily identified and understood, as every country has its own definition. Therefore, it was recommended to the Forum to use quantitative criteria.²⁶ Following the Cotonou International Forum, SMEs have been defined as any enterprise which is legally constituted, keeps regular account, is not a multinational subsidiary, and whose number of permanent employees ranges from 5 to 99, with a turnover of between one and fifty million, or whose total investments range from 5 to 500 million FCFA.

In South Africa, the National Small Business Act (NSB) defines the five categories of businesses as follows:

- Survivalist enterprise: the income generated is less than the minimum income standard or the poverty line. In practice, survivalist enterprises are often categorised as part of a micro-enterprise.

²⁴ See United States Business, " Size Standards" retrieved 2011-08-21.

²⁵ Article 2 of the annex of Recommendation 2003/361/EC. <http://www.reach-compliance.eu/english/REACH-ME/engine/sources/regulations/launch-2003-361-EC.html>. (Last accessed 21 November 2015).

²⁶ The International Forum on SMEs, held in Cotonu (Benin) from 3 to 5 May 2005.

- Micro-enterprise: the turnover is less than the value added tax (VAT) registration limited (that is R150, 000 per year). This category of enterprise has no more than 5 employees.
- Very small enterprise: these are enterprises employing fewer than 10 paid employees, except for the mining, electricity, manufacturing and construction sectors, in which the figure is around 20 employees.
- Small enterprise: the upper limit is 50 employees.
- Medium enterprise: the maximum number of employees is 100, or 200 for the mining, electricity, manufacturing and construction sectors.

2.2.2. *Cameroonian Definition*

In Cameroon, SMEs are defined by the Small Business Act (SBA) through law N°.2010/001 on the promotion of SMEs, which was promulgated on 13 April 2010. This Act sheds some light on the issue of SMEs' categorisation, as Article 2 provides that SMEs include very small enterprises, small enterprises, and medium enterprises. Articles 4, 5, and 6 provide a classification scale according to turnover and number of employees. The classifications are as follows:

- A very small enterprise is an enterprise which employs no more than 5 employees, and achieves an annual turnover before tax not exceeding 15 million FCFA²⁷.
- A small enterprise is one which has more than 5 and less than 20 permanent employees, and achieves an annual turnover before tax of more than 15 million, but not exceeding 100 million FCFA.
- A medium enterprise is one which has between 21 and 100 permanent employees, and achieves an annual turnover before tax of more than 100 million, but not exceeding one thousand million FCFA.

²⁷ The FCFA is the Central African Franc (XAF). In French, it is the name of the two currencies used in Africa, which are guaranteed by the French Treasury. The two CFA franc currencies are the West African CFA franc and the Central African CFA franc. Although theoretically separate, both CFA francs currently have a fixed exchange rate to the euro: 1 euro = 655.957 XFA and 1USD = 475.17834 XFA.

Based on this classification, a Cameroonian SME may be defined as any enterprise whose permanent staff does not exceed 100, and whose annual turnover before tax does not exceed one thousand million FCFA. In Cameroon, one count about 93.639 enterprises displayed as follows²⁸:

Enterprises	Turnover	Number of employees	Percentage
Very small enterprises	Fewer than 15 million CFA	Maximum 5 employees	74,90%
Small enterprises	Between 15 and 100 million	5 to 20 employees	19%
Medium enterprises	Between 100 and one thousand million	Between 21 and 100 employees	5,10%
Large enterprises	More than one thousand million	More than 100 employees	0,80%

Table 1

From the above table, it is clear that the economic fabric of Cameroon is constituted of very small enterprises, and that large companies are in the minority. It is also evident that different criteria, such as number of employees and turnover, have been retained by the Cameroonian legislation as the fundamental criteria for defining SMEs.²⁹ Furthermore, it follows that the definition of SMEs is based on the quantitative approach. However, it is important to note that this quantitative approach is insufficient to understand the internal and external operating modes of SMEs. It is therefore important to also explore the qualitative approach, since this will help to enhance our understanding of SMEs, due to the fact that this approach examines the characteristics of SMEs in more detail.³⁰

²⁸ See report of the First General Assembly of Employers' Movement of Cameroon, which took place on 17 February 2011.

²⁹ Nader, Shamsuddin and Zahari 2009 SSRN 1575-1590.

³⁰ OECD <http://www.oecd.org/std/business-stats/35484622.pdf>. (Last accessed: 21 November 2015).

2.3. CHARACTERISTICS OF SMEs

The term “characteristic” refer to the quality or feature that is typical of someone or something³¹. What renders certain SMEs more effective than others is the fact that economies differ amongst countries, even though most of these SMEs present the same characteristics from a functional and organisational point of view.³² There are some typical characteristics mentioned in the literature, which are relevant to describing the nature and features of SMEs.

The concept and theory of SMEs, as formulated by Pierre Andre Julien,³³ indicate that SMEs are characterised by their 1) small size, 2) centralised management, 3) low level of labour specialisation, 4) simple, informal and direct internal and external information systems, and 5) intuitive, implicit and short-term strategy.³⁴

2.3.1. Centralised management

The management style of SMEs is highly centralised and focuses on the owner/director of the company,³⁵ who is usually very close to his/her employees.³⁶ This enables the owner/director to retain his/her hierarchical domination. As a result, his/her influence is more noticeable by his/her omnipresence, since it is unusual for SMEs to have several geographically dispersed sites.³⁷ The owner/director can be familiar with almost every employee, and is able to assess his or her performance. Due to the fact that the

³¹ See Macmillan Dictionary for definition of “characteristic”.

³² Pullen A et al *Succession* “Configuration of External SME Characteristics to Explain Difference in Innovation Performance” (Papers delivered at the 16th High Technology Small Firm Conference 21-23 May 2008 Enschede Netherlands) 7-10.

³³ According to Boissin, Castagnos and Guieu (2000), who have conducted a detailed bibliometric study of literature devoted to the subject of SMEs for the period 1990-1995 in French-speaking areas, scientific production is focused on the dominant authors. The most notable result, beyond the number of articles published, is that Pierre Andre Julien is one of the most often cited authors (together with Michel Marchesnay), making him the main actor in the network on the specificity of SMEs.

³⁴ Torres 2005 (17) *Piccola impresa review* 25-28.

³⁵ Torres 2005 (17) *Piccola impresa review* 25-48

³⁶ Torres O «The proximity Law of Small Business Finance” (communication presented to the International Council for Small Business 2006 Australia Melbourne 2006) 11-22.

³⁷ Torres O «The Proximity Law of Small business Management: between closeness and closure” (Papers presented to the 49th International Council of Small Business (ICSB) 2004 Johannesburg) 6-18.

management can easily supervise and therefore control the whole business, broad hierarchies are often not required.³⁸ The small size of SMEs increases the prevalence of direct, personal contact with employees, and a related management style.³⁹

2.3.2. Low level of specialisation

The management process in SMEs is largely personalised and depends on entrepreneurs' dominant logic.⁴⁰ The low level of structure allows them to control and manage the whole organisation, or at least a considerable part of it. According to Capet, Causse and Meunier, in small companies, the division of work is not very intensive. Many tasks are performed by the owner/director, who not only manages, but also plays the role of service manager and even carries out the task himself. The owner/director occupies here the role of composer, conductor, and sometimes even performer.⁴¹ Moreover, the management of SMEs is primarily based on flexibility, as the owner/director and employees of the company are permanently in touch with the various problems arising in the organisation. Thus, proximity stimulates versatility, which in turn discourages task separation within the company.⁴²

2.3.3. Simple, informal internal and external information systems

The main characteristics of the internal information systems of SMEs are simplicity and a low level of structure.⁴³ The literature dealing with this specific area has often highlighted the fact that many SME managers prefer to use informal media and verbal information to strengthen

³⁸ Torres O «The Proximity Law of Small business Management: between closeness and closure” (Papers presented to the 49th International Council of Small Business (ICSB) 2004 Johannesburg) 6-18.

³⁹ Torres O «The Proximity Law of Small business Management: between closeness and closure” (Papers presented to the 49th International Council of Small Business (ICSB) 2004 Johannesburg) 6-18.

⁴⁰ Torres O «The Proximity Law of Small business Management: between closeness and closure” (Papers presented to the 49th International Council of Small Business (ICSB) 2004 Johannesburg) 6-18.

⁴¹ Torres and Delmar <http://www.oliviertorres.net/travaux/pdf/torresRentXX2006.pdf>. (Last accessed: 21 November 2015).

⁴² Torres and Delmar <http://www.oliviertorres.net/travaux/pdf/torresRentXX2006.pdf>. (Last accessed: 21 November 2015).

⁴³ Torres and Delmar <http://www.oliviertorres.net/travaux/pdf/torresRentXX2006.pdf>. (Last accessed: 21 November 2015).

and extend their mode of commercialisation. In this regard, Pierre Andre Julien asserted that small companies function by means of dialogue or direct contact, in contrast to large companies, which have to establish formal and written mechanisms to ensure that information, is transmitted⁴⁴. Therefore, this preference for direct contact and verbal communication characterises the traditional operation of SMEs.

With regard to the external information systems of SMEs, it is important to note that they are usually very simple as well, because of a relatively close market, either geographically or psychologically.⁴⁵ In small companies, the owner/director operates by means of dialogue and direct contact with members of staff, as well as with clients and suppliers.⁴⁶ This type of behaviour is directly linked to the characteristics of small organisations, since the relational aspect is more important than the organisational aspect. Generally speaking, the direct link between spatial configurations and the firm's information capacities can be seen quite clearly here.⁴⁷

2.3.4. Intuitive, implicit and short-term strategy

In the cycle of strategic decision making, SMEs' time frames are usually short-term and based on reaction rather than anticipation. The decision-making process of SME managers is considered to be more intuitive and less dependent on information and formal models of decision making. In SMEs, the decision-making process usually works according to a intuition-decision-action pattern.⁴⁸ In terms of the theories of Pierre Andre Julien and Marchesnay, the features of reactivity, flexibility, interactivity and adaptability that are generally associated with SMEs are derived from strong temporal proximity. These characteristics, which are specific to SMEs, have advantages of their own, such as rapidity of decision implementation, market proximity, as well as the greater potential for adaptation and change in the short-term.⁴⁹

⁴⁴ Ferneley, Elaine and Franes, "Tinker, Tailor: Information Systems and Strategic Development in Knowledge-based SMEs" Proceedings of the 13th European Conference on Information Systems, Information Systems in a Rapidly Changing Economy, ECIS 2005, Regensburg, Germany, May 26-28, (2005) p.4.

⁴⁵ Torres O 2005 (17) *Piccola impressa review* 25-48.

⁴⁶ Torres O 2005 (17) *Piccola impressa review* 25-48.

⁴⁷ Torres O 2005 (17) *Piccola impressa review* 25-48.

⁴⁸ Wang, Walker and Redmond 2011 (5) *ECU publication* 1-10.

⁴⁹ Wang, Walker and Redmond 2011 (5) *ECU publication* 1-10.

The low degree of structural complexity of SMEs is one reason why the innovation processes run smoothly and rapidly, in comparison to large companies. This is because the limited structural complexity allows owners/managers to easily detect major issues or challenges facing the company, and to swiftly implement the processes of innovation and renewal.⁵⁰

2.4. ENVIRONMENTAL CONSTRAINTS AND AN INAPPROPRIATE LEGAL FRAMEWORK FOR PERFORMING IN THE INTERNATIONAL MARKET IN WEST AND CENTRAL AFRICA

Most SMEs in developing countries such as Cameroon have difficulties reaching the international market, due to their structure and organisation, but mostly because of environmental constraints and legal frameworks which are inappropriate for the international context.⁵¹

2.4.1. Difficulties associated with an inappropriate and hostile legal framework

A legal framework defines “the rules of the game” which must be observed and respected by a society, and this legal framework governs the interactions between public authorities, enterprises and civil society.⁵² These rules influence investment decisions and SMEs’ ability to enter the international market. It is important to note here that investors’ protection in the economies of OHADA member states is defined by OHADA texts, domestic civil code proceedings, and in general by the judicial system.

In Cameroon and the rest of West and Central Africa, when one compares the business regulations of OHADA member states and other states, one can simply conclude that OHADA law needs to make some important reforms regarding business regulations.⁵³ For instance, the creation of an OHADA enterprise space is still more complex than in the rest of the world. Nowadays, an entrepreneur which is located in the OHADA area need an average

⁵⁰ Torres, Pierre-Andre 2005 (23) *ISBJ* 355 – 377.

⁵¹ Stefanovic, Milosevic and Miletic 2010 (12) *UDC* 251-269.

⁵² Bruhn, Miriam 2001 (7) *RvE&S* 382–386.

⁵³ See report of Doing Business in the OHADA Member’s states 2012, available at: http://français.doingbusiness.org/~/_/media/FPDKM/Doing%20Business/Documents/Subnational-Reports/DB12-OHADA-French.pdf [Accessed 25 June 2015].

of 45 days to complete a process, as well as a 110% gross income per capita and at least 9 procedures, whereas in the OCDE economy, the same process takes only 12 days, 4, 7% per capita income, and 5 procedures.⁵⁴

In addition, an average of 49 payments and 400 hours are needed for an OHADA member state to meet its fiscal obligations, while in the Comores, only 20 payments and 100 hours are needed for preparing and paying tax, which is significantly less than the world average of 29 payments and 277 hours.⁵⁵

2.4.2. Failure to improve and harmonise regulations for trade between OHADA member states

What is cumbersome with regard to OHADA member states is that the legislation regarding exports and imports differs between these states. In the Ivory Coast, for instance, the time limit for exporting is 25 days, while this time limit is virtually double in Niger.⁵⁶ In Cameroon, recent statistics on container terminals point out that on average, the time which passes in Douala is 18.6 days, whereas it is 4 days in Durban, 11 days in Mombasa, and 3 or 4 days in most international ports.⁵⁷ For exporting a container in the OHADA space, an entrepreneur needs, on average, 8 to 35 documents and USD 2.292. This amounts to double the number of documents and triple the amount of time required for exporting in the EU, and more than 50% of the cost for exporting from East Asia and the Pacific, which is the cheapest region in the world for doing cross-border trade.⁵⁸

The Cameroonian legal system which regulates the import and export market clearly does not allow many SMEs to do importing and exporting easily.⁵⁹ For instance, the formalities involved in importation and exportation are stricter in Cameroon than other countries. In Cameroon, a trader or SME must fill in 12 documents in order to import a product or good, while this number ranges, on average, from 6 to 8 in emergent economies.⁶⁰ The time limit for importation is 23 days in Cameroon, in comparison to 16 days in other countries. Therefore, the importation of one product in Cameroon is more expensive than in Malaysia or

⁵⁴ Sarmiento et al *Succession 2010 IFC World Bank Group* 21.

⁵⁵ Sarmiento et al *Succession 2010 IFC World Bank Group* 23.

⁵⁶ Economic Book of Cameroon on July 2012 Number 4, p.17-18.

⁵⁷ Economic Book of Cameroon on July 2012 Number 4, p.17-18.

⁵⁸ Economic Book of Cameroon on July 2012 Number 4, p.17-18.

⁵⁹ Doing Business 2012 (26) IFC p.16.

⁶⁰ Amin AA et al *Developing a Sustainable Economy in Cameroon* 12.

Vietnam.⁶¹ It is important to note here that it is regrettable that the OHADA law has not yet considered the unification of those domestic laws regulating the import and export procedure, in order to provide a regulation which is more effective and able to alleviate the task for SMEs engaging in international trade. In all customs unions, the member states must subscribe to a set uniform obligations and commercial formalities, including customs formalities. The adoption of common standards allows for the rationalisation of bureaucratic procedures and reduces trade costs.⁶²

2.4.3. An inappropriate legal framework for enforcing contracts

The performance of contracts in OHADA member states is neither cheap nor fast. In the countries which have a Commercial Court or Commercial Chamber, the process can be as fast as in Cameroon⁶³ and Burkina Faso (446 days), in comparison to 1000 days in Gabon and Guinea Bissau. With regard to the cost, the average cost for performing a contract is 50.8% of the debt value, which is more than double the European average.⁶⁴ In most OHADA member states, the creditors must pay a higher registration fee in order to obtain an original copy of the judgment.⁶⁵ In Cameroon, Guinea and Niger, the government collects a tax of 5%, failing which any recovery and enforcement procedure cannot be considered. In light of these statistics, one may question how SMEs in West and Central Africa will be able to reach the international market if they have to break the bank simply in order to obtain original judgment papers. In this context, it is clear that many SMEs dealing with large companies will be reluctant to approach the Court, not because they do not want to, but because they do not have sufficient financial resources.⁶⁶ The capacity of an economy to perform contracts contributes significantly to its competitive advantage in the global economy. Among comparable economies, it can be noted that those which have good regulations in terms of

⁶¹ Raballand et al 2012 *The World Bank*, Washington, DC.

⁶² Doing Business 2012 (26) *IFC* 16.

⁶³ Likeng M, Djeuwo M and Bilangna S
<http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1343683063673/cameroon-economic-update-july-2012.pdf>. (Last accessed: 21 November 2015).

⁶⁴ Salvatore 2007 (13) *International & Comparative Law* 7.

⁶⁵ Doing Business 2012 *IFC and the World Bank* 26.

⁶⁶ Ahlquist, John S and Prakash A <http://link.springer.com/article/10.1007%2Fs11077-009-9093-3#page-1>. (Last accessed: 21 November 2015).

the enforcement of contracts have a tendency to produce and export more than those with poor regulations⁶⁷.

Indeed, with regard to Cameroon, even though the country has adopted OHADA legislation, it is important to highlight the fact that there are still many aspects which constitute a significant barrier to the development of SMEs.⁶⁸ There is a lack of confidence in the judiciary's ability to encourage property rights, which has a negative impact on the country's investment climate.⁶⁹ According to the World Bank, the protection of investors in the country is getting worse. The country was ranked 58th in 2005, 60th in 2006 and 113th in 2008.⁷⁰ This lack of confidence in the judicial system makes it difficult for SMEs in Cameroon to deal with partners abroad. It is therefore very important for a country to have an effective judiciary in place for the resolution of commercial disputes with harmonised and case law, since this is benefic in many respects.⁷¹ When the Courts are effective and transparent, enterprises are more inclined to form business relationships between one another, because they know they can rely on the Court to claim their rights if necessary. Therefore, without effective Courts, enterprises invest less, and this reduces their commercial transactions.⁷²

Moreover, it is worth noting that in spite of the efforts made through regional cooperation in the OHADA area, this space always lacks experience in terms of reducing insolvency. In this regard, out of the 46 economies registered in Africa, none of them have brought a bankruptcy case before the Court during the last five years.⁷³ The ratio of debts recovered is 20% in the OHADA area, while it is 68. 2% in OECD countries. In these contexts, it appears to be very difficult to have confidence in SMEs. Besides, recent studies show that with an average classification of 166, the OHADA area is one of the regions in the world where it is most difficult to do business.⁷⁴

⁶⁷ Hoekman, Bernard and Alessandro 2009 (497) *World Bank* 3.

⁶⁸ Tumnde MS <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 21 November 2015).

⁶⁹ Dickerson CM OHADA's 2011 (2) *European Journal of Law* 462.

⁷⁰ Sharma and Siddharth
http://siteresources.worldbank.org/INTFR/Resources/Siddharth_Informal_Aug09.pdf (Last accessed: 23 November 2015).

⁷¹ Beauchard R and Mahutodji JVK
<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/17-2011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>. (Last accessed: 21 November 2015).

⁷² Beauchard R and Mahutodji JVK
<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/17-2011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>. (Last accessed: 21 November 2015).

⁷³ Cristie 2005 *Administrative Law Review* 57; Ahdieh 2003 (76) *Southern California Law Review* 277–350; Black 2001(48) *UCLA Law Review* 781–855.

⁷⁴ Doing Business 2012 (26) *IFC* p.16.

A well-defined legal framework, which is favourable to SMEs both regulatory and administratively, provides an environment in which property rights are clearly established, the performance of contracts secured, the tax system simple and transparent, and where taxpayers are not obliged to pay heavy charges.⁷⁵ The registration formalities in such an environment are simpler and cheaper, and may be carried out at a distance or via the internet if those concerned prefer to do it this way. In addition, whatever SMEs import or export will then be able to deal with a customs administration in which the operating mode has been rationalised, and which applies simplified, transparent and effective recovery procedures and enforcement measures, a simple accounting system, and where the regulations governing bankruptcy do not impose heavier fines upon entrepreneurs and SMEs.⁷⁶ This means that the regulation of the private sector is very necessary, since it ensures competition and fair trade.

2.4.4. A hostile environment for SMEs due to corruption

In Cameroon, corruption is manifested in the forms of embezzlement of public funds, bribery, influence peddling, and fraud.⁷⁷ This corruption at the public markets level (contracts) considerably influences the choice of suppliers of goods and services to the State, as well as the modalities of contracts and their renewal.⁷⁸ These abuses are the prime motivation for the series of anti-corruption campaigns launched by the Prime Minister of Cameroon since March 1998.⁷⁹ Invited to debate on the facts, acts and practice of corruption in the business environment in Cameroon, the GICAM President Olivier Behlè asserted that a survey carried out in 2008 of 1052 enterprises found that corruption had a negative impact on 76% of entrepreneurship assets and their activities in 2007, in comparison to 73% in 2006. 49% of owners confessed to having offered bribes to tax agents, and 36% admitted to having offered 1 to 5% of their turnover in order to obtain services.⁸⁰ 63% of Cameroonian businessmen admitted to having no confidence in the judicial system anymore, while 48% felt that the legal

⁷⁵ International Tax Dialogue <http://www.iadb.org/en/news/announcements/2007-10-19/taxation-of-small-and-medium-enterprises-getting-it-right,4091.html>. (Last accessed: 21 November 2015).

⁷⁶ Klapper, Leora and Inessa 2004 (10) *Journal of Corporate Finance* 703-728.

⁷⁷ Justice Mbah Acha Rose *Fomundam in Corruption under Cameroon Law*

⁷⁸ Ndedi and Kingsley 2015 *SSRN* 12.

⁷⁹ Gbetnkom "Corruption and small and medium-sized enterprise growth in Cameroon" (Papers presented to the African Economic Conference 2-2-2012 Kigali Rwanda).

⁸⁰ Business Anti-Corruption Portal (BACP) <http://www.business-anti-corruption.com/country-profiles/sub-saharanafrica/cameroon/business-corruption-in-cameroon.aspx>. (Last accessed: 21 November 2015).

framework negatively affected the business environment.⁸¹ These figures provide a good indication of the corruption that exists in the Cameroonian economy. It is obvious that such practices lead to tax evasion, market distortion, and the paralysis of enterprise spirit and free competition. Moreover, due to fraud, investments are not realized with respect to economic development.⁸² According to Transparency International, the sectors in Cameroon that are most affected by bribes are customs and the police.⁸³

2.4.5. Lack of marketing skills and market knowledge

Marketing allows an enterprise to determine whether a business will succeed or not in the long term, because if potential costumers are not aware of a product or service, they will not be able to trade effectively.⁸⁴ Therefore, before considering the foreign market, enterprises need to develop strategies for first entering and prospecting this market, in order to ensure that their products will be able to be sold there. Scholars such as Ambroise have shown that the performance of SMEs depends on their ability to develop strategies and innovative plans.⁸⁵ In the same vein, Julien added that the success of SMEs includes the quality of service to customers, satisfaction of customers' needs, quality control and continuous product development⁸⁶. Thus, SMEs should not only rely on one variable, but also consider variables such as price, distribution and communication channel.⁸⁷ With regard to the international market, specifically the export market, one can note that the share taken by African SMEs is very small. The produced goods and services of these SMEs are incompatible with the potential foreign market, due to the lack of a concrete marketing approach in the international sense. Indeed, these SMEs lack sufficient manufacturing capacity, as well as technical and commercial information.

⁸¹ Business Anti-Corruption Portal (BACP) <http://www.business-anti-corruption.com/country-profiles/sub-saharanafrica/cameroon/business-corruption-in-cameroon.aspx>. (Last accessed: 21 November 2015).

⁸² Khan 2005 (60) *The Nigerian accountant* 38.

⁸³ Transparency International Available at: <http://cameroonvoice.com/news/article-news-17023.html>. (Last accessed 21 November 2015).

⁸⁴ Van Scheers L 2011 (13) *Afr. J. Bus. Manage.* 5048-5056.

⁸⁵ D'Amboise, Muldowney 1988 13(2) *the Acade. Manage.Rev* 226-240.

⁸⁶ P-Andre 1990(3-4) *International Review of SMEs* 411–425.

⁸⁷ Knight and Cavusgil 1996 8(1) *Advances in International Marketing* 11-26.

2.4.6. Inadequate managerial and entrepreneurial skills

One of the most significant reasons for the failure of SMEs in Cameroon is their inadequate application of essential business and management practices.⁸⁸ The importance of entrepreneurship education and training cannot be overemphasised, especially for those entrepreneurs who wish to embark on international trade. Training for small business owners/managers, as well as their subordinates, enables them to acquire the necessary skills to ensure the survival and success of their business. Despite the public institutions set up by the Cameroonian government to support SMEs in this way, the number of SMEs lacking managerial and entrepreneurial skills is still alarmingly high in Cameroon.⁸⁹

2.4.7. Lack of information and communication technologies (ICTs)

Communication is an important tool for enterprises to succeed today. It allows enterprises to add substantial value to their operations, thereby enhancing their competitive position in the market.⁹⁰ In Cameroon, many SMEs lack the ability to advertise themselves by means of mass communication, in order to increase their visibility, reliability and turnover. In an environment characterised by strong competition, it is obvious that in the international market context, today's enterprises have to communicate or collapse.⁹¹ Moreover, some Cameroonian SMEs lack a marketing service that is in charge of commercial communication, since they do not have sufficient funds for a marketing budget, which would have enabled them to communicate offers to the customer. In addition, even though some of them do have a marketing department, this service is also limited by financial constraints.⁹²

Furthermore, information and communication technologies, in the context of globalisation, have given birth to a new economy, namely the knowledge economy. In terms of competition, ICTs are a competitive tool whose skill and utilisation provide new opportunities

⁸⁸ Daou and Karuranga "Success of SMEs in Emerging Economies: Proposition for future research" Conference paper available at Available from: wbiconpro.comp.4. p.4.

⁸⁹ Bello, Oloua, Ayissi 2012 (2) *British Journal of Management & Economics* 60.

⁹⁰ Ismail, Robyne and Jean-Paul 2011 *Journal of African Research in Business & Technology* 12.

⁹¹ Ismail, Robyne and Jean-Paul 2011 *Journal of African Research in Business & Technology* 12.

⁹² Knight and Cavusgil 1996 8(1) *Advances in International Marketing* 11-26.

for integration into the news market.⁹³ However, some Cameroonian SMEs have not yet integrated this aspect into their activities. Many Sub-Saharan countries, in matters of communication, are limited to voice calls and SMSes.⁹⁴ They have not yet incorporated other value-added services and technologies, such as email, MMS, GPRS and mobile web-browsing, which could enhance their ability to easily reach the international market.⁹⁵ This may be due to the inferiority of the technologies still in use today in most parts of the continent, as well as the lack of interest among most SME owners/directors.⁹⁶

Moreover, norms are closely linked to technologies. They specify criteria, in order to ensure that products and services are aligned with their customers. For SMEs to achieve internationalisation, respect for these norms is essential. It is also important to highlight here that many West and Central African SMEs are understandably not able to export, because their products do not conform to the rules that apply in the area targeted by these SMEs.

2.5. IMPORTANCE OF SMEs IN CAMEROON

2.5.1. Creation of SMEs

After the independence of African countries, several enterprises were created by governments in order to achieve the goals of development and industrialisation. These enterprises had to serve as a relay in their area of implementation. The aim was to facilitate the creation and control of enterprises.⁹⁷ With the economic crisis in 1980 and the beginning of 1990, all African countries, including Cameroon, failed to achieve this objective. Thus, most large enterprises either collapsed due to bankruptcy or simply privatised for the benefit of foreign investors.⁹⁸

The effects of this crisis were severe, both in the economic and social sectors, such as the slowdown of economic activities, disappearance of several enterprises, unemployment, and loss of taxes. This situation forced many Cameroonians to find another way to address these

⁹³ “Basic Computer and Communication Tools”, available at: www.smetoolkit/en/content/en/439/basic-computer-and-communication-tools. (Last accessed: 21 November 2015).

⁹⁴ Esselaar et al 2010 (4) *Attribution NonCommercial-NoDerivativeWorks* 87–100.

⁹⁵ Arreympi et al 2010 (1) *Journal of Sustainable Development* 77.

⁹⁶ Arreympi et al 2010 (1) *Journal of Sustainable Development* 78.

⁹⁷ Forge 2009 5(3) *Journal of Asia and Entrepreneurship and Sustainability* 1-3.

⁹⁸ Forge 2009 5(3) *Journal of Asia and Entrepreneurship and Sustainability* 1-3.

issues, because government was unable to find solutions. Thus, prior to 1980, many Cameroonians began to establish small businesses in the informal sector, in order to survive the crisis.⁹⁹ Therefore, the economic crisis of the 1980s, the shift from a traditional to a modern economy, combined with the demographic boom between 1950 and the 1980s, contributed to the emergence of SMEs in Cameroon.

2.5.2. Legal form of Cameroonian SMEs

There are four main legal forms of enterprises in Cameroon, namely sole proprietorship, general partnerships, limited liability companies, and limited companies. The majority of enterprise creation in Cameroon concerns very small enterprises – in 2010, very small enterprises accounted for 73% of enterprise creation. The structural trend highlights the concentration of Cameroonian enterprises on very small and small enterprises.¹⁰⁰

In this context, SMEs appear to be a significant source of support to the economy, owing to their agility, flexibility and competitiveness. In Cameroon, most enterprises are SMEs and they are present in all economic sectors of the country. Thus, in view of their importance, the survival of SMEs is in great threat in Cameroon, because of international competition.¹⁰¹ It is acknowledged that there are certain prerequisites for development, namely political stability, human capital development, consistency of development policies, transparent monitoring, and a better infrastructure.¹⁰² In this regard, SMEs are important to almost all economies in the world, especially those in developing countries such as Cameroon. SMEs are considered as an engine of economic growth, as well as economic development.¹⁰³

⁹⁹ Courlet and Tiberghien 1986 (107) *Persee Scientific Journal* 607-608.

¹⁰⁰ See the rubric of National Repertoire of Cameroonian Enterprises, available at: <http://www.statistics-cameroon.org/news.php?id=130> (Last accessed on 21 November 2015).

¹⁰¹ Bello P 2009 (2) *Afr. J. Bus. Manage.* 52-59.

¹⁰² Subhan, Mehmood, Sattar "Innovation in Small and Medium Enterprises (SMEs) and its impacts in Economic Development in Pakistan" (Papers delivered to the Proceedings of 6th International Business and Social Sciences Research Conference on 3-4 January 2013, Dubai).

¹⁰³ Frimpong CY <http://www.modernghana.com/news/478225/1/smes-as-an-engine-of-social-and-economic-developme.html>. (Last accessed: 21 November 2015).

2.5.3. SMEs as an engine of economic growth in Cameroon

The primary importance of the SME sector in Cameroon is in terms of the creation of employment, which contributes to an individual's disposable income. This implies that if people have a disposable income, they will spend more on goods and services. SMEs have the capacity to absorb the bulk of the unemployed if they produce both for the domestic and export markets, thereby contributing to sustainable development.¹⁰⁴ SMEs support a large part of the Cameroonian population, and as mentioned above, contribute to Cameroon's Gross Domestic Product (GDP). This support is in the form of income such as salaries and wages, as most people are employed in the SME sector and earn a living through SMEs.¹⁰⁵

Private sector	Output (quantity produced by enterprises)	Weight in added value	Contribution to the GDP
Large enterprises	23,00%	11%	11,00%
Small enterprises	66,00%	74%	72%
Very small enterprises	2,76%	2,64%	13, 52%
Public sector	8,26	12,36	13,52
Total	100%	100%	100%

Table 2: Contribution of SMEs to the Cameroonian economy

The data presented in the above table, as provided by the National Institute of Statistics of Cameroon, clearly show that the private sector in Cameroon has contributed more to

¹⁰⁴ Zindiye S An empirical investigation into the factors affecting the performance of Small and Medium Enterprises in the Manufacturing sector of Harare. (LLD Thesis University of Fort Hare 2008).

¹⁰⁵ See the synthesis report of National Institute of Statistics of Cameroon: "Second Investigation on both employment and Informal Sector Cameroon", November 2011.

economic growth than the public sector. The economy relies mainly on the private sector, and most particularly on SMEs. While the manufacturing of products by SMEs (small and very small enterprises) accounts for 68.76% of output, it can be noted that both large enterprises and the public sector account for only 31.26%. In addition, this table indicates that the outlook for economic growth in Cameroon is supported by SMEs in terms of added value.

2.5.3.1. Contribution of SMEs to a competitive and efficient market

The easy entry and exit of SMEs makes economies more flexible and competitive. Large membership of SMEs creates competitive market pressure, and SMEs slow down the monopoly of the large enterprises, offer them complementary services, and absorb the fluctuations of a modern economy. They enable a diversity of business models to exist, due to their flexible and innovative nature. SMEs play an essential role as subcontractors in downsizing privatisation and restructuring large companies.¹⁰⁶

2.5.3.2. SMEs and poverty reduction

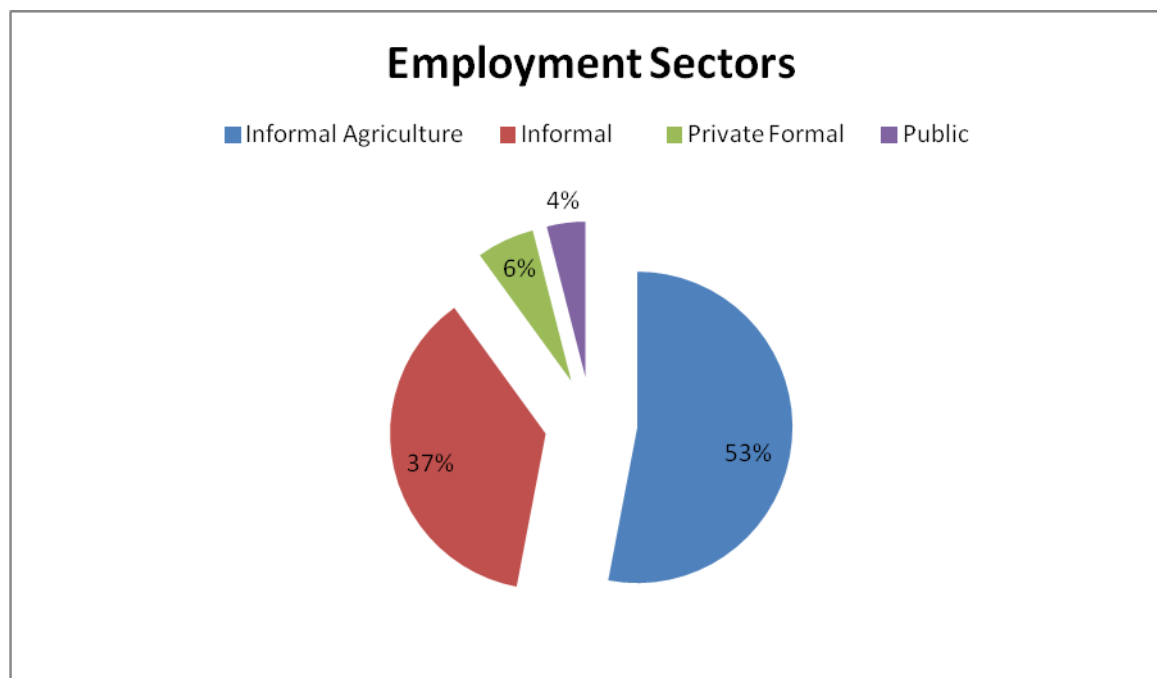
In relation to unemployment, SMEs are viewed as a significant solution to the employment crisis. Most SMEs in Cameroon operate in the informal sector, which is the principal source of employment. Self-employment is the only source of income for the less privileged, and SMEs are sometimes the only source of employment in poor regions and rural areas.¹⁰⁷ Given the failure of the public sector to absorb the growing number of job-seekers in Cameroon, significant attention is being focused on SMEs. According to Abor and Quartey, SMEs have a crucial role to play in stimulating growth, generating employment and contributing to poverty alleviation.¹⁰⁸ SMEs tend to employ poor and low-income workers. Thus, without SMEs, many people in Cameroon would be living below the poverty line. While large firms normally tend to produce an elite number of high-wage/income earners,

¹⁰⁶ Ayyagari et al 2011 (631) *the WorldBank*, Washington, DC 21.

¹⁰⁷ Ayyagari et al 2011 (631) *the WorldBank*, Washington, DC 21.

¹⁰⁸ Abor and Quartey 2011 (39) *IRJFE* 218-228.

SMEs produce a significantly large number of relatively low-income earners.¹⁰⁹ In 2010, Cameroonian SMEs achieved 15% of the total turnover and employed over 48.7% of people, while large enterprises, which accounted for 84.6% of the turnover in the productive sector, only employed 51.3% of employees.¹¹⁰



2.5.3.3. 2.5.3.3 Role of SMEs in generating entrepreneurship

Van Praag and Versloot identified four economic benefits of entrepreneurship, namely job creation, innovation, productivity and growth¹¹¹. As the Business and Industry Advisory Committee to the Organisation for Economic Cooperation and Development (OECD) stated in 2003, “Policies to foster entrepreneurship are essential to job creation and economic growth”. Government must therefore create a favourable environment in order to encourage entrepreneurs to undertake new ventures,¹¹² since it has failed to create employment in most African countries, such as Cameroon, resulting in self-employment being the only source of income for the less privileged majority. Thus, it is essential for the country to utilise the

¹⁰⁹ Nugi Nkwe 2012 (8) *AIJTR* 29-37.

¹¹⁰ Leblanc-Justin <http://legriot.info/4646-cameroun-faciliter-la-creation-des-pme-pour-soutenir-l%2E%80%99economie/>. (Last accessed : 21 November 2015).

¹¹¹ See Van Praag, Versloot 2007(2) *Foundation and Trends in Entrepreneurship* 2-5.

¹¹² See U.S Department of State/ Bureau of International Information Programs, “Principles of Entrepreneurship”, available at: <http://www.ait.org.tw/infousa/zhtw/docs/enter.pdf>. (Last accessed on 2015).

talents, energy and entrepreneurship of individuals who cannot reach their full potential in large organisations. An important part of the core strategy of public government is the development of entrepreneurship, as the creation of many enterprises will lead to the creation of employment.

2.5.3.4. Contribution to external trade

External trade involves all the importing and exporting operations of goods and services. Cameroonian SMEs participate in international commerce through the development of their various activities, as shown in the table below.

Sectors	2009		2010		2011		2012	
	Exports of SMEs	Imports of SMEs	Exports of SMEs	Imports of SMEs	Exports of SMEs	Imports of SMEs	Exports of SMEs	Imports of SMEs
Agriculture, Livestock Breeding and Fisheries	0	1322	0	11.854	0	897	0	930
Industries	41	245.595	0	183.398	0	283.578	0	333.623
Services	488	19.22	0	33.111	566	6386	735	22.217
Total	529	266.137	0	216.509	566	283.578	735	355840

Table 2: Summary of Cameroonian SMEs' imports and exports in FCFA (millions)

The above table shows that the exports of Cameroonian SMEs still remain low, as well as their imports. It is clear from the table that Cameroonian SMEs import more than they export. These imports involve mostly raw materials and other intermediate goods, such as chemical products and machines. While the total exports accounted for 529 million (FCFA) and

imports for 266.137 million (FCFA) in 2009, these exports were nil in 2010, whereas imports accounted for 216.509 million (FCFA). One can note that these exports only increased slightly in 2011, accounting for 566 million FCFA, while imports accounted for 283.578 million. In 2012, these exports only increased again slightly, with the total being 735 million FCFA, and the imports being 355.840 million. It is important to note that only the services sector in Cameroon does a small amount of exporting – the industries and agriculture sectors are almost absent in this regard.

2.6. OPERATING MODE AND INTERNATIONALISATION OF SMEs

The great interest shown in SMEs translates into a recognition of their legitimacy as a subject of research. SMEs are not simply viewed as a miniature of large enterprises, and their study constitutes a distinct field of economics.¹¹³ SMEs' unique characteristics allow them to be dealt with as a separate research area. They are major actors in the sphere of globalisation, and their international development represents the key challenges of economies in terms of innovation, employment and international dynamism.¹¹⁴ While the term 'internationalisation' has drawn the attention of several scholars, a focus on the international development of SMEs increasingly highlights their importance, particularly with regard to developing countries.¹¹⁵

Indeed, globalisation and the opening of economic borders, as a corollary to the World Trade Organization agreement and those related to free trade, in particular by the entry into force of economic partnership agreements between ACP countries and the European Union, have significantly intensified competition in the international free market economy with regard to sales of goods.¹¹⁶ In this context of perpetual mutation, SMEs' survival depends on efforts to enhance competitiveness and the ability to conquer new markets.¹¹⁷

¹¹³ Laghzaoui S <http://www.cirmap-fea.org/fichiers/iibc-slaghzaoui.pdf>. (Last accessed: 21 November 2015).

¹¹⁴ Pisareck <http://dumas.ccsd.cnrs.fr/dumas-00646583> (last accessed 23 November 2015).

¹¹⁵ O'Cass, Weerawardena 2009 (43) *European Journal of Marketing* 1325-1348.

¹¹⁶ See OECD, *Small and Medium Enterprises outlook*, 2005, p.4-6.

¹¹⁷ Laghzaoui, Annelise, "Les stratégies de développement adoptées par les PME internationales. Le cas de la PME méditerranéennes» (Papers delivered to the fourth Euro Mediterranean dialogue of Public Management 13-14 October 2009 Rabat Morocco).

In this regard, a perfect command of the internationalisation process is essential for local SMEs which would like to expand into new markets and compete with larger companies. For a long time, this has been a significant concern for scholars.¹¹⁸

Consequently, SMEs which decide to expand beyond their domestic market will have to face many issues, such as which country to select, what entry mode to use, and what criteria should be used to inform decisions regarding the target country and entry mode.¹¹⁹ Many theories have attempted to address these issues, and provide possible answers.

Thus, the internationalisation of SMEs is not only understood through one theory, since it appears to be a dynamic and broad phenomenon that is often reduced to the export question¹²⁰. Most studies in international business refer to exportation as a key international business activity.¹²¹ Traditionally, internationalisation by exporting has been considered as the only way to increase a firm's growth. Even though this is true, as exportation is still significant today,¹²² it is important to note that during the last decade, firms have been focusing on different business activities as a means of internationalisation, and also consider them to be important for achieving a competitive advantage.¹²³

2.6.1. Definition of internationalisation

Firstly, before examining various definitions provided in the literature, it is important to dissect this concept and study its origin, in order to clarify the meaning of the word.

The prefix "inter" comes from a Latin word which means "between, mutual", and the root "national" can be understood as a "country or a group with common interest". Thus, the combination of both these words is "international", which can be interpreted as "between or among countries". The verb "internationalise", which derives from the noun "international", means "making relations, effects or scopes international". Therefore, the word

¹¹⁸ Sandberg *Internationalization processes of Small and Medium-Sized Enterprises: Entering and taking off from emerging markets* (LLD Thesis Linnaeus University 2012).

¹¹⁹ Meier, Meschi 2010 (15) *IJMR* 11-18.

¹²⁰ Pierre-Andre, Ramangalahy 2003 (27) *Entrepreneurship Theory and Practice* 227–235.

¹²¹ Knight et al 2004(35) *JIBS*124–141.

¹²² Knight et al 2004(35) *JIBS*124–141.

¹²³ Mohibul & Fernandez "Internationalization Process of SMEs: Strategies and Methods" (LLD Thesis Mälardalen University School of Sustainable Development of Society and Technology, Västerås, Sweden 2008).

“internationalisation” can be defined as ideas or actions which are transferred to other nations or international society at large, and thus go beyond the boundaries of a country.

In the context of an economy, internationalisation is regarded as a development strategy in which enterprises go beyond their domestic market. Likewise, Susman and Gerald perceive internationalisation as a process which enables an enterprise to reach the international market.¹²⁴ Porter defined internationalisation as the extension of an enterprise beyond its domestic country.¹²⁵ In the same vein, Czinkota defined the concept in the following way: “transactions that are devised and carried out across national borders to satisfy the objectives of individuals and organization”.¹²⁶ At the international level, several authors have proposed different definitions of internationalisation.¹²⁷ Some of these authors, such as Beamish and Hebert, proposed a simpler definition which focuses on the nature and foreign origins of operations.¹²⁸

According to Rocher, internationalisation refers to various exchanges, whether economic, political or cultural, between States, which led to the relationship between them being peaceful or conflicting, complementary or competitive.¹²⁹ Other scholars, such as Torres, focused on established typologies involving several criteria. For instance, by distinguishing between space from localisation and space from operation of SMEs, the author identifies four categories of SMEs, namely local, global, international and global.¹³⁰

With regard to the first category, the provision and deployment of resources are done at the local, national or regional level. The second category refers to SMEs that sell on the domestic market and get their supplies, in whole or in part, on the international market.¹³¹ The third group deals with exporting SMEs, which may obtain supplies from and sell to national and international trade partners. Lastly, the fourth category refers to SMEs that achieve a part of their output abroad and develop their activities on an international scale.¹³²

¹²⁴ Susman, Robert and Klein *SMEs and the glocal economy* 5.

¹²⁵ Poter 1990 *HBR* 73-91.

¹²⁶ Czinkota *The Export Marketing Imperative* 12.

¹²⁷ A selection of definitions is proposed by Ruzzier et al. (2006), p.479.

¹²⁸ Beamish 1999 (39) *Manage. Intern Rev.* 77-92.

¹²⁹ Encyclopédie de L’Agora *Mondialisation* 39

¹³⁰ Encyclopédie de L’Agora *Mondialisation* 39

¹³¹ Encyclopédie de L’Agora *Mondialisation* 39

¹³² Encyclopédie de L’Agora *Mondialisation* 39

2.6.2. Traditional approach of internationalisation

Although the literature shows that the traditional approach of internationalisation is founded on various theories and models, it should be noted that the stage and Uppsala models appear to be the best known in this regard. Many different descriptions and analyses of the process of the internationalisation of SMEs have, however, been proposed in the literature.¹³³

2.6.2.1. Stage approach and behaviour theory

In this study, the researcher identified two methods of analysing internationalisation using this approach, namely the Uppsala Model (Johanson and Vahlne, 1977) and the innovation-related internationalisation model.¹³⁴

2.6.2.1.1. Uppsala model (1977 and 2009) (U-Model)

Developed in the early 1970s by Johanson and Wiedersheim-Paul¹³⁵ and revised in 1977 by two Uppsala university researchers, namely Johanson and Vahlne,¹³⁶ this model aims to address the following two main issues for any firm which wants to become internationalised: What market or country should it choose? And which expansion mode should it use to reach the market or country?

From their analyses of various Swedish enterprises, Johanson and Wiedersheim-Paul noted that the internationalisation of a firm is a process involving many stages.¹³⁷ The results of

¹³³ Laghzaoui 2011 (7) *JIEM* 206.

¹³⁴ Johanson & Wiedersheim-Paul 1975 *JIBS*, Johanson & Vahlne (1977 *JIBS* 1411-1421.

¹³⁵ Johanson and Wiedersheim-Paul 1975 *J.Manage.Stud* 305-322.

¹³⁶ Johanson J, Vahlne J.-E. 1977 « The internationalization process of the firm: A model of knowledge development and increasing foreign market commitments”. Jan Johanson is a member of the Faculty of the center for international Business Studies at the University of Uppsala, Sweden. Jan-Erick Vahlne is on the board of the Institute of International Business, Stockholm School of Economics, Sweden.

¹³⁷ Johanson J, Vahlne J.-E. 1977 « The internationalization process of the firm: A model of knowledge development and increasing foreign market commitments”. Jan Johanson is a member of the Faculty of the center for international Business Studies at the University of Uppsala, Sweden.

their empirical research showed that enterprises start their internationalisation process when they already have a limited sized, and then attempt to progressively develop their current activities in foreign markets. Based on their study of four Swedish firms, namely Sandvik, Atlas, Copco Facit and Volvo,¹³⁸ Johanson and Wiedersheim-Paul stated that enterprises need to first develop themselves in their domestic markets, before internationalising themselves through a series of incremental decisions.¹³⁹ The authors expressed the view that a genuine impediment to the internationalisation of firms is a lack of market knowledge with regard to foreign markets.

Therefore, the authors suggested that enterprises start to export their products to a nearby country from a geographical point of view, and which is similar in terms of management practices, before dedicating resources through the establishment of a subsidiary and attempting to conquer distant markets. This progressive development will enable enterprises to acquire information regarding the target market, accumulate experience, and increase their learning.¹⁴⁰

Johanson and Wiedersheim-Paul indicated that the difficulty experienced in gaining knowledge about foreign markets finds its origin in the concept of psychological distance.¹⁴¹ The authors defined psychological distance as “factors preventing or disturbing the flows of information between firms and market”. These factors can include a language, culture, policy, system, or educational level. They also suggested that psychological distance can change over time.¹⁴²

In their article published in 1977, Johanson and Vahlne enriched the incremental approach mentioned earlier by Johanson and Wiedersheim-Paul. They supplemented a study of four cases reviewed by the Pharmacia Pharmaceutical group. Before examining the different cases, the authors developed a dynamic model of internationalisation, which shows that every decision to enter a foreign market may affect the following stage of the internationalisation process.¹⁴³ They highlighted two aspects regarding the internationalisation of enterprises. The first aspect is linked to the stage of internationalisation which involves the decision to enter a foreign market and request the mobilisation of

Jan-Erick Vahlne is on the board of the Institute of International Business, Stockholm School of Economics, Sweden.

¹³⁸ Johanson and Wiedersheim-Paul 1975 (12) *J.Manage.Stud* 305.

¹³⁹ Johanson and Wiedersheim-Paul 1975 (12) *J.Manage.Stud* 306-308.

¹⁴⁰ Blomstermo, Deo Sharma *Learning in the internationalization process Firms New Horizons*

¹⁴¹ Johanson and Wiedersheim-Paul 2007 (12) *J.Manage Stud* 315-323.

¹⁴² Johanson and Wiedersheim-Paul 2007 (12) *J.Manage Stud* 315-323

¹⁴³ Johanson & Vahlne 1977 *JIBS* 23-28.

resources to this effect. The second aspect is linked to the stage of internationalisation which concerns this decision and the firm's current activities.¹⁴⁴

These two Uppsala University researchers then developed a model which integrates these two stages, namely "selection" and "expansion". The aim of the U-model was to explain how organisations learn and how this learning affects their investment behaviour.¹⁴⁵

Firstly, on the one hand, a static aspect of an internationalised enterprise is made up of market knowledge and transactions and on the other hand by the commitment of resources to foreign markets. This market knowledge can be general (marketing methods, common characteristics of customers) or specific (market structure, business environment, characteristics of particular customers).¹⁴⁶ Thus, the decision of enterprises to enter the foreign market is determined by quantities and the availability of the necessary resources (Johanson and Vahlne). The greater the quality of this knowledge is, the more important the commitment of resources will be. In the U-model, the decision to commit resources to the foreign market depends on market knowledge. Having a presence abroad enables enterprises to more easily perceive the opportunities and threats that exist. Thus, based on their knowledge and experience, enterprises can make the decision to identify or control their commitments.¹⁴⁷

The Uppsala model was initially developed by the Swedish scholars Johanson, Wiedershien, Paul and Vahlne (1975, 1977). It is based on two main concepts, namely gradual learning and psychological distance.¹⁴⁸

The second concept on which a U-model is based is gradual learning. According to Johanson and Vahlne, internationalisation is the result of a series of incremental decisions arising from a process of gradual learning and experience gained gradually in the foreign market.¹⁴⁹ Indeed, enterprises that wish to enter the foreign market usually find themselves in a difficult position due to their ignorance of the market. Moreover, the risks associated with resource commitment necessitate a great deal of prudence.¹⁵⁰ In this regard, gradual learning provides answers to these problems in two ways.

¹⁴⁴ Johanson & Vahlne 1977 *JIBS* 23-32.

¹⁴⁵ Forsgren 1990 (21) *JIBS* 508-514.

¹⁴⁶ Forsgren 1990 (21) *JIBS* 508-514.

¹⁴⁷ Forsgren 1990 (21) *JIBS* 508-514.

¹⁴⁸ Forsgren 1990 (21) *JIBS* 508-514.

¹⁴⁹ Forsgren 1990 (21) *JIBS* 508-514.

¹⁵⁰ Forsgren 1990 (21) *JIBS* 508-514.

Firstly, in light of the opportunities and challenges faced by enterprises engaged in the international market, it enables them to find solutions and adapt their routine in accordance with events which occur.

Secondly, it helps to alleviate problems regarding knowledge acquisition in relation to the mode of acquisition of market knowledge. It is possible to distinguish two types of knowledge, namely objective knowledge, which can be learnt, and experiential knowledge, which can be transmitted.¹⁵¹ Experiential knowledge is essential for gaining entry to the foreign market, but is difficult to acquire. However, such knowledge enables enterprises to identify and exploit opportunities in the foreign market.¹⁵²

Based on their study of Swedish firms, the above authors noted that internationalisation follows a sequential process consisting of four stages,¹⁵³ namely irregular and opportunistic exports, exports via an independent agent, and the establishment of subsidiaries of sale and production in foreign countries.

The second concept on which this model is based is psychological distance. Johanson and Vahlne used this model to explain that when the international experience increases, the psychological distance which separates SMEs from their new territories reduces.¹⁵⁴

The innovation model views internationalisation as a process whose stages may be close or similar to those related to the adoption of the new product. Most of these authors have indicated that the successful completion of each stage constitutes an innovation for the company.

2.6.2.1.2. *The network approach as an amended theory*

This approach was developed from the work of the Uppsala scholars. In 1990, Johanson and Vahlne¹⁵⁵ revised their previous model (1977), in order to emphasise the importance of the position of a firm in its network.

¹⁵¹ Penrose 1959 *MIR* 151-173, John Wiley & Sons 1959 (40) *JSBM* 17-26.

¹⁵² Penrose 1959 *MIR* 151-173, John Wiley & Sons 1959 (40) *JSBM* 17-26.

¹⁵³ Meier, Meschi 2010 (15) *Inter Bus. Manage* 11-18.

¹⁵⁴ Meier, Meschi 2010 (15) *Inter Bus. Manage* 11-18.

¹⁵⁵ Johanson and Vahlne 1990 *IMR* 321.

The aim of enterprises engaged in the internationalisation process is not to target markets that they cannot easily enter, but to become integrated into a business network, in which members already established in a foreign market may constitute key resources for enterprises to expand and become internationalised.¹⁵⁶ Thus, there is now a shift from the notion of firms facing the “liability of foreignness” to firms facing the “liability of outsidership”.

On the basis of the concepts used in their original model (commitment, knowledge, current activities and decision-making), they attempted to explain the motivations for and modalities of internationalisation by setting up company within a multilateral mobilizing intra and inter-organizational relations.¹⁵⁷

Therefore, internationalisation is defined as a network which develops through the close relationships formed with other countries via the three stages identified by Johanson and Mattsson, namely extension, penetration and integration.¹⁵⁸

Extension is the first step undertaken by a company through joining a network, which implies new investments for the firm.

The second stage, penetration, refers to the development of an enterprise’s position within the network and the enhancement of its commitment resources.

Lastly, integration constitutes an advanced stage, in which the company is connected to several national networks that it has to coordinate.

It is important to note that both the original and amended models insist on the incremental character of the internationalisation process.¹⁵⁹ Owing to their lack of knowledge concerning the foreign market and of a network of potential partners, enterprises tend to first extend their activities to countries which have a certain psychological proximity to their domestic market. In proportion to the rate at which the international experience of actors increases, psychological distances between countries are reduced, thereby enabling them to enter distant markets.¹⁶⁰

¹⁵⁶ Johanson and Vahlne 1990 *IMR* 321.

¹⁵⁷ Gankema, Smif, Zwart (LLD thesis Linnaeus University).

¹⁵⁸ Johanson and Mattsson 1988 (17) *International Studies of Management* 34-48.

¹⁵⁹ Gabrielle, Hanna, Marcus (LLD Thesis Kristianstad University 2004)

¹⁶⁰ Alexa, Wouter, Nick Pidgeon
http://eprints.nottingham.ac.uk/2253/1/public_perceptions_of_energy_choices.pdf. (Last accessed: 21 November 2015).

http://www.climateaccess.org/sites/default/files/Spence_Psychological%20Distance%20of%20Climate%20Change.pdf. (Last accessed: 21 November 2015).

In their model, Johanson and Mattson view internationalisation as a cumulative process in which relationships are established, developed and maintained continuously, in order to achieve the objectives of the firm. In the authors' view, a company may be regarded as international if other companies in its network are international.¹⁶¹

However, it is important to note that a wide network with many weak connections may imply the risk of information saturation, which can harm the international development of SMEs, since too much fragmentation with too few active connections is a great risk for the process of internationalisation.

2.6.2.1.3. Criticism of the Uppsala model in the new global era

Even though the Uppsala model has significantly contributed to a better understanding of the internationalisation process of enterprises, it is worth noting that it fails in fundamental ways to describe the whole internationalisation process. The model has therefore been subject to much criticism in the international management literature.

In the study conducted Coviello and McAuley in 1999, they found that although some studies have confirmed the theory of internationalisation based on incremental stages?¹⁶² others have invalidated this approach and levelled much criticism against it.

Oviatt and McDougall (1994) stated that there are certain SMEs which, since their establishment, have shown a geographical breakdown of turnover close or similar to that of large firms.¹⁶³ These firms, which seem to have been "born global", have experienced a significant amount of geographical expansion, and have been referred to as an "International New Venture" (INV). The internationalisation process in this regard is rapid and does not occur in an incremental manner, such as postulated by the U-model.

Torres highlighted the fact that the learning process of internationalisation is not the only way to add or diversify exportations.¹⁶⁴ He mentioned that some SMEs directly enter foreign

¹⁶¹ Alexa, Wouter, Nick Pidgeon
http://eprints.nottingham.ac.uk/2253/1/public_perceptions_of_energy_choices.pdf. (Last accessed: 21 November 2015).

http://www.climateaccess.org/sites/default/files/Spence_Psychological%20Distance%20of%20Climate%20Change.pdf. (Last accessed: 21 November 2015).

¹⁶² Coviello and McAuley 1999(39) *MIR* 223-226.

¹⁶³ Mc Douglas and Oviatt 1994 *JISB* 45-46.

¹⁶⁴ Pierre-Andre, Philippe *PME* 2.

markets, without necessarily adopting an incremental approach. These SMEs may establish themselves in the international market through subsidiaries.¹⁶⁵ According to Fisher and Reuber, enterprises whose owners already have international experience will be able to avoid the intermediate stage.¹⁶⁶ Moreover, Gankema observed that the level of internationalisation of SMEs increases over time, but in various ways.¹⁶⁷ Like Torres, Gankema noted that some SMEs skip the intermediate stage.¹⁶⁸

Pett and Wolf contended that certain firms, even without internationalisation, may jump from direct exportation to the the creation of subsidiaries abroad, while others will choose to stay in the exportation stage.¹⁶⁹

In the same vein, Etrillard highlighted the fact that more and more SMEs are engaging in the international market through a process which does not agree with the traditional model, since this model does not take the entrepreneurial dimension into account, and the fact that SMEs can export to foreign markets from the time of their creation.¹⁷⁰

Gemser's study in 2004 showed that the internationalisation process followed by many enterprises is not only determined by the learning process, as shown in the stage theory, but by specific factors linked to enterprises and their activities.¹⁷¹ Boutary, in the same vein, added that while some SMEs develop themselves progressively abroad through the learning process, other totally ignore this process in their attempt to enter the international market.¹⁷²

Lastly, the stage approach has generally dominated internationalisation theory, but its inability to explain certain behaviours has opened the way for other approaches, most notably the economic and network approaches. Calof and Beamish (1995) highlighted the U-model's determinism and linearity. They partly validated this model, but also questioned its incremental and linear nature.¹⁷³

In light of these criticisms raised by scholars, it is clear that the Uppsala model needs to be amended. In the context of this study, this model seems to examine only one side of the internationalisation process. Indeed, the reasons for the internationalisation of SMEs may be twofold: firstly, it may be due to the desire of these SMEs to acquire new customers for their

¹⁶⁵ Pierre-Andre, Philippe *PME* 4.

¹⁶⁶ Fischer and Reuber 1997 (28) *JIBS* 305-311.

¹⁶⁷ Gankema and Zwart 1997 *JSBM* 15-20.

¹⁶⁸ Gankema and Zwart 1997 *JSBM* 15-20.

¹⁶⁹ Pett and Wolff 2000 *JSBM* 34-37.

¹⁷⁰ Etrillard Papers presented 8th Francophone International Congress and Entrepreneurship 2006).

¹⁷¹ Gemser, Brand and Sorge 2004 (44) *Manage Inter. Rev.* 127-130.

¹⁷² Boutary Papers delivered in Act of Colloque AFME, Montréal.

¹⁷³ Beamish *The internationalization process Ontario firms : A research Agenda* 6.

products, or secondly, due to their desire to find new suppliers for their input purchases, as is the case with many West and Central African SMEs. In terms of the above, the Uppsala Model seems to be more focused on those enterprises which want to acquire new customers, hence leaving a gap for those who wish to obtain new suppliers. Therefore, one may conclude that this theory is not sufficiently relevant and effective for SMEs located in West and Central Africa, specifically in Cameroon, where such enterprises are more interested in obtaining international suppliers.

Moreover, based on the operating mode of many West and Central African SMEs, which are characterised by a lack of information and communication technologies, it appears to be difficult for these SMEs to adopt the Uppsala model, since this approach requires an enterprise to have specialised staff for the researching of potential markets, as well as the time needed to undertake detailed research, and the skill to communicate in English, which is the main international language of the business world. Unfortunately, many African SMEs lack these skills.

2.6.3. The Innovation model (I-model) and internationalisation

This model was developed by four studies conducted by different scholars, namely Bilkey and Tesar,¹⁷⁴ Cavusgil, Czinkota, and Reid.¹⁷⁵ These four studies view the internationalisation process as being dependent on the enterprise's antecedents and whether or not they have already engaged in exportation. The owner of the enterprise, its international experience, and its capacity to manage play an important role.¹⁷⁶ The I-model's particularity lies in the focus on maintaining a gradual vision of internationalisation, as psychological distance is an integral part of enterprise development abroad.

The studies conducted by Bilkey, Tesar and Czinkota stated that the first stage is characterised by enterprises' disinterest vis-à-vis internationalisation. It is only in the second stage that enterprises are ready to respond to this issue. The decision to export represents the surrender to external powers or mechanisms.¹⁷⁷

¹⁷⁴ Bilkey and Tesar 1977 (18) *JIBS* 235-238.

¹⁷⁵ Cavusgil and Naor 1980 (12) *JBR* 225-235.

¹⁷⁶ Oyson, Whittaker Papers delivered to the 18th Annual High Technology Small Firms Conference 27-28 May 2010 Enschede Netherlands).

¹⁷⁷ Bilkey and Tesar 1977 (8) *JIBS* 238-239.

In the two other models developed by Cavusgil and Reid, enterprises are interested in exportation from the very first stage and are very active in this regard. This means there is always an internal agent or person which pulls the enterprise towards the international market. As a result, the main difference between these studies is based on their interpretation of mechanisms.¹⁷⁸

This model is based on two main precepts, both of which have drawn from the Uppsala model. The progressive advancement of firms through stages of exportation and the existence of psychological distance are surmounted by the experience acquired by enterprises in the foreign market.¹⁷⁹ Bilkey and Tesar asserted that psychological distance is an integral part of the development process abroad. Thus, several stages of exportation have been suggested for describing the internationalisation process. According to Leonidou and Katsikeas, these stages may be presented according to three main phases, namely pre-commitment, initial phase, and advanced phase.¹⁸⁰

In the pre-commitment phase, enterprises are only interested in the domestic market; while some enterprises, although involved in the domestic market, envisage exporting. The initial phase is marked by the firm being irregularly involved in exportation.¹⁸¹ It relates to the enterprise's potential to extend its activities abroad. In the advanced phase, firms export regularly, and also envisage other commitments abroad.¹⁸²

The I-model and Uppsala model also suppose the successful domestic establishment of enterprises which internationalise their activities. The major conceptual difference between these two approaches lies in the way in which each approach views internationalisation. The I-model considers exporting to be a fruit of management. Each stage is linked to the next, and represents an innovation which needs to be managed well. Moreover, at the operational level, the I-model uses the ratio scale and exportation as the means for measuring the degree of involvement of firms in the international market. It is also evident that the I-model has been subject to the same criticism as the Uppsala Model.

¹⁷⁸ Bilkey and Tesar 1977 (18) *JIBS* 235-285.

¹⁷⁹ See Encyclopedie de L'Agora *Mondialisation* 6-12.

¹⁸⁰ Leonidou and Katsikeas 1996 (5) *JIBS* 330-335.

¹⁸¹ Leonidou and Katsikeas 1996 (5) *JIBS* 330-335.

¹⁸² Leonidou and Katsikeas 1996 (5) *JIBS* 340-345.

2.6.4. *The economic approach*

A second approach which explains the international development of SMEs is based on the work of scholars in the field of economic science.¹⁸³ Certain authors, such as Hisrish, Ruzzier¹⁸⁴ et al. and Khayat,¹⁸⁵ provided the theoretical framework for the economic approach. In this regard, they focused on the theory of internalisation, whereby companies can extend their activities to the international market through the process of vertical integration, whether upstream or downstream.¹⁸⁶

The theory of transactional costs or internationalisation, in particular the mode of entrance, is perceived as an outcome of the choice made by SMEs regarding the internalisation and externalisation of their activities. This theory, which is an extension of the internalisation theory, was developed by Williamson.¹⁸⁷ In terms of this theory, enterprises choose an appropriate organisational form, which will enable them to minimise their transactional costs. This theory enables them to understand investment behavior, but does not include a long-term perspective regarding international development (Coviello and Mc Auley, 1999). Moreover, the explanation provided by this theory is incomplete.¹⁸⁸

The eclectic paradigm developed by Dunning (1988; 2000) highlights the fact that the decision to enter the foreign market, as well as the access mode, rely on three types of advantages, namely ownership advantages, localization advantages, and internalization advantages. Ownership advantages are specific to a company and related to the accumulation of intangible resources (technological capacity, experience, etc.¹⁸⁹

Localisation advantages are made up of the productive and institutional factors within an institutional and geographical space. Lastly, internalisation advantages refer to the ability of a company to manage and coordinate its activities internally. The economic approach does not set out the criteria that SMEs need to meet in terms of their structure and functioning. In

¹⁸³ Smolarski, Wilner 2005 (2) *Journal of Business Chemistry* 55-57.

¹⁸⁴ Ruzzier Hisrish and Antoncic 2006 (13) *JSBED* 476-478.

¹⁸⁵ Khayat Papers delivered to the 7th International Congress of Francophone en Entrepreneurship of the SMEs , 27,28,29 October 2004 Cotonu Benin).

¹⁸⁶ Laghzaoui 2011 (7) *JIEM* 208.

¹⁸⁷ Laghzaoui 2011 (7) *JIEM* 208.

¹⁸⁸ Coviello and McAuley 1999 (39) *Manage Inter Rev.* 223-226.

¹⁸⁹ Coviello and McAuley 1999 (39) *Manage Inter Rev.* 223-226.

addition, the economic approach appears to be less significant for understanding the internationalisation of SMEs.

This theory places emphasis on the organisational capacity of enterprises, such as financial and material aspects, in order to explain the internationalisation of enterprises. It therefore relates to the production and financial capabilities of enterprises. Following the logic of the resources and competences approach, these capabilities are the tangible and intangible assets possessed or controlled by enterprises.¹⁹⁰

2.6.5. Resources and competences approach

This approach was first developed by Penrose in 1959.¹⁹¹ Based on his writings, many authors have further developed and explained this theory. In order to explain the development of the internationalisation of firms, Penrose believed that the indivisibility of the productive resources of firms justified their under-utilisation.¹⁹² Accordingly, firms are encouraged to extend themselves in order to consummate their under-utilised resources. In other words, the capacity for firm extension depends on the quantity of its resources.

Amit and Schoemaker suggested that the resources possessed by enterprises do not guarantee a competitive advantage and sustainable annuity. They claimed that only enterprises possessing strategic resources have this potential, and added that strategic resources are rare, sustainable, and difficult to transfer and imitate.¹⁹³ Furthermore, Wernefelt emphasised that competitive advantage is obtained by an appropriation of resources before one's competitor has the chance to do so.¹⁹⁴

Julien (2005) asserted that this theory is more suitable for SMEs whose resources are limited, because the owner is at the source of basic decisions, which most often involve resources and competences. This enables the owner to differentiate between his enterprise's abilities and those of its rival.¹⁹⁵

¹⁹⁰ Amit and Schoemaker 1993 (14) *Strateg Manage J* 33-46.

¹⁹¹ Penrose 1959 (40) *JSBM* 17-26.

¹⁹² Penrose 1959 (40) *JSBM* 19-21.

¹⁹³ Amit and Schoemaker 1993 (14) *Strateg Manage J* 33-46.

¹⁹⁴ Wernefelt 1984 (5) *Strateg Manage J* 170-180.

¹⁹⁵ Pierre-Andre J *Entrepreneuriat et économie de la connaissance* 1-5.

In this respect, Koening (1999) identified various approaches, namely the approach based on resources (Wernefelt, 1984; Barney, 1991), the theory of basic competences (Prahalad and Hamel, 1990), and the evolutionist school approach.

In explaining this theory, Wernefelt claims that one must consider resources as tangible and intangible assets belonging to enterprises.¹⁹⁶ Barney supplements this definition by viewing resources and competences as being the overall assets which enable enterprises to grasp opportunities and prevent threats.¹⁹⁷ Both authors agree that enterprises' resources are both tangible and intangible, and that their competences are linked to their ability to combine resources.¹⁹⁸

Therefore, the resources and competences approach aims to explain how and why enterprises engaged in the internationalisation process can or should avoid the strict criteria recommended by the stage approach. This theory explains that enterprises which have sufficient knowledge and learning about the international market can afford to skip the intermediate stage.¹⁹⁹

CONCLUSION

This study has noted that the I-model and U-model are both appropriate for SMEs whose competences and nature of activities restrict them to an incremental and progressive process, and these approaches also take psychological distance into account. However, these models have failed to explain the behaviour of some SMEs in the international market, where they have achieved rapid growth. The resources and network approaches have played a significant role in explaining this issue. Indeed, the resource and network profile of SMEs orientates the strategy of enterprises, and facilitates its internationalisation.²⁰⁰ This enables enterprises with significant resources to skip certain stages, while others are in the advantageous position of being able to internationalise themselves from the time of their establishment.²⁰¹

¹⁹⁶ Wernefelt 1984 (5) *Strateg Manage J* 170-180.

¹⁹⁷ Barney 1991 (17) *Journal of Management* 99-120.

¹⁹⁸ Hebert *HEC Montreal* 78-89.

¹⁹⁹ Gankema and Zwart 1997 *JSBM* 15-27.

²⁰⁰ Coviello and Munro 2001 *Intr'l Bus. Rev* 361-366.

²⁰¹ Coviello and Munro 2001 *Intr'l Bus. Rev* 361-366.

Although the resources and network approaches provide guidance for the activities of SMEs in the internationalisation process and constitute a theoretical solution enabling to put an end to contradictory study about internationalization as well.²⁰² These theories highlight a few weaknesses at the level of decision-making regarding the international market. On the one hand, in the network approach, decision-making depends on evolution over time and not on an analysis and study of the actual situation, and the other hand, the resources theory explains internationalisation as a process involving strategic decision-making, which depends on the abilities and limitations associated with the possession of certain resources.²⁰³

One can note that these different theories simply examine the different strategies of SMEs for expanding into the international market. These theories, in some respects, do not take some of the legal aspects which SMEs need to consider when attempting to become internationalised into account. Indeed, the obstacles relating to regulations are those which significantly impede the internationalisation of SMEs. It is important to mention here that for an entrepreneur or SME, a lack of harmonisation of legislation regarding international commerce between states and the insufficient knowledge of SMEs about legal matters constitute important barriers to their internationalisation. A study done in Copenhagen has shown that many SMEs acknowledge the important need for the harmonisation of the law and regulations, because the additional cost linked to the legal requirements for a cross-border agreement in comparison to a domestic agreement is on average more than 10%. The abovementioned study concluded that SMEs always have more difficulties overcoming these additional costs than large enterprises. This is the practical reality that these different theories do not take into account when considering strategies for the internationalisation of SMEs.

It is also important to highlight that regulations are a significant aspect of international commerce, and as previously mentioned, may represent a serious impediment to the internationalisation of SMEs. For instance, legislation related to technologies for the production and manufacturing process is always changing, and it is often difficult for SMEs to keep up to date with these changes. Entrepreneurs, who are usually not jurists, are unable to understand and apply this legislation, and therefore neglect it.

²⁰² Madsen and Knudsen 2002 (18) *Scandinavian Journal of Management* 475-482.

²⁰³ Jones 1999 *JIM* (8) 63-65.

2.7. INTERNATIONALISATION PROCESS OF CAMEROONIAN SMEs

Views on the internationalisation of SMEs are increasingly focusing on developing countries, such as Cameroon. SMEs engaging in international trade constantly have to determine the best way to expand into new markets. With regard to internationalisation, Cameroonian SMEs have various ways of optimising their presence in the foreign market.

The strategies of Cameroonian SMEs investing in the foreign market were assessed according to their strategic orientation (specialisation, vertical integration, diversification, and partnerships). Thus, their investment modes are direct exportation, indirect exportation, licensing agreements, partnerships and investment.²⁰⁴

2.7.1. Direct exportation

The permanent supply of the foreign market by an enterprise not having a subsidiary company abroad is achieved through direct exportation. Direct exportation leads to the functional and organisational modification of enterprises, as well as mass production, management of international operations or the establishment of the warehouses abroad.²⁰⁵ The conquest of foreign markets by exportation is most suited to SMEs engaging in the manufacturing of goods, such as in the industrial and food sectors.

This direct exportation is being increasingly practiced by Cameroonian SMEs today, and occurs mostly within the Central African region. This is due to the infrastructure development which connects Cameroon with other Central African countries. Most Cameroonian SMEs export to neighbouring countries such as Gabon, Chad, Guinea, and so on.²⁰⁶ Moreover, the development of new information and communication technologies has significantly favoured the development of SMEs in the area of direct exportation.²⁰⁷

²⁰⁴ Bello, Ayissi and Barnabe 2012 *BJEM* 60-82.

²⁰⁵ Sabine *Reussir à l'exportation 2*.

²⁰⁶ See the synthesis report of National Institute of Statistics of Cameroon: "Second Investigation on both employment and informal sector Cameroon", November 2011.

²⁰⁷ See the synthesis report of National Institute of Statistics of Cameroon: "Second Investigation on both employment and informal sector Cameroon", November 2011.

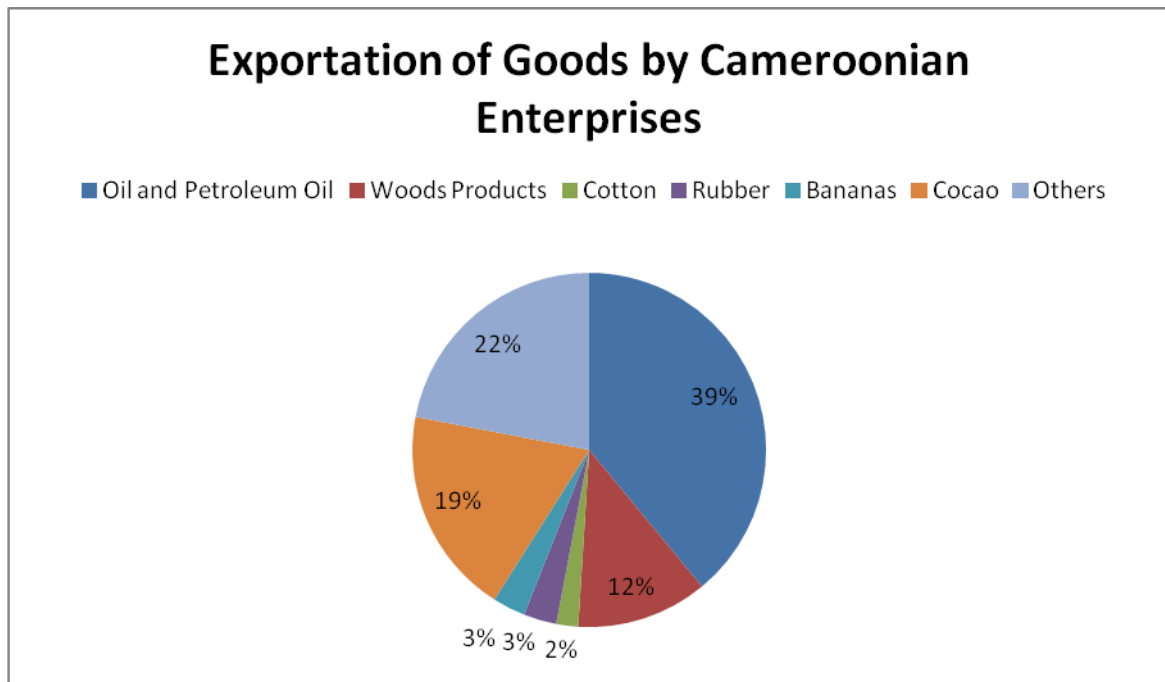


Figure 1: Products exported by Cameroonian enterprises.

2.7.2. Indirect exportation

Indirect exportation involves SMEs exporting their products or manufacturing goods through other enterprises specialising in exports and imports.²⁰⁸ Therefore, such SMEs are not directly involved in the internationalisation process. This method requires less marketing investment, but involves a loss of substantial control over the marketing process. In the specific case of Cameroon, ignorance of the specialised structures in the internationalisation process that are in charge of the accompaniment of Cameroonian SMEs hinders many enterprises' use of this method of internationalisation.²⁰⁹

²⁰⁸ Delaney <http://importexport.about.com/od/DevelopingSalesAndDistribution/a/Indirect-Exporting-Advantages-And-Disadvantages-To-Indirect-Exporting.htm>

²⁰⁹ Bello, Ayissi and Barnabe 2012 *BJEM* 60-82.

2.7.3. Partnerships or joint ventures

This strategy is geared towards SMEs which would like to engage in international commerce and join hands with foreign partners, in order to gain sufficient knowledge about the foreign market and the sale of its products there. In the specific case of Cameroonian SMEs, this method is unproductive because most Cameroonian SMEs lack sufficient financial resources, capacity management and logistical resources for ensuring the permanent supply and optimal distribution of their goods.

2.7.4. Direct investment

Having a presence abroad through direct investment constitutes the ultimate mode for enterprises to expand into the foreign market. This mode requires a good knowledge of the foreign market, acquisition of international learning, and the availability of sufficient resources for production units. This mode allows enterprises to save costs in terms of the workforce, raw materials and transport, as well as to have a good knowledge of the foreign market and overcome customs barriers. This mode is also more suitable for large enterprises, owing to the fact that they have sufficient financial resources.

Therefore, even though the environmental constraints faced by Cameroon considerably hinder many enterprises, such as SMEs, from engaging in international trade, it is important to note that the Cameroonian law does not sufficiently protect these SMEs in terms of issues such as times of payment, international commerce, performance of contracts and so on, as highlighted by Mr Protais Ayangma, President of the Employer's Movement in Cameroon.

In the context of this study, it is important to note that direct and indirect exportation are the main modes of internationalisation for Cameroonian SMEs. This exportation is mostly done in regional or neighbouring countries, such as Gabon, Chad etc.²¹⁰ These practices converge with and confirm Uppsala's theory, which suggests that enterprises have to begin their internationalisation process by exporting their products to nearby countries, in order to acquire information about the foreign market, learning process and psychological distance.²¹¹ These internationalisation practices are also in line with the resources and competences

²¹⁰ Doing Business in Cameroon 2012. World Bank. Retrieved 18 November 2012.

²¹¹ Johanson & Vahlne 1977 JIBS 77-78.

model and confirm Julien's theory, which views this model as a better one for SMEs whose resources are limited.²¹² This is because the owner is the source of decisions made regarding resources, and his competences enable him to differentiate his enterprise's abilities from those of its rival.²¹³

CONCLUSION

The purpose of this section was to examine the nature, characteristics, importance and mode of internationalisation of SMEs. In order to deal with these issues, the section was divided into two parts. In the first part, the researcher analysed the role, importance and legal obstacles of Cameroonian SMEs in the growth economy, and the second part presented a literature review of the theory of internationalisation, in order to determine which model is most suitable for and most often adopted by Cameroonian SMEs.

In the first part, definitions of SMEs were provided with reference to different countries. Due to the fact that this study deals with legal aspects, the definitions were drawn from legislations or Acts of these countries. It has been noted that criteria such as employees and turnover have been retained by most countries, such as South Africa, the USA, EU and Cameroon, as fundamental criteria for the definition of SMEs. After determining the most appropriate definition for this study, the characteristics of SMEs were discussed from a functional and organisational point of view. It emerged from the theory of Pierre Andre Julien that most SMEs in developing countries such as Cameroon, in addition to being characterised by a centralised management, low level of specialisation, simple informal and external information systems, and intuitive and short-term strategies, operate in a unique and difficult environment characterised by the lack of marketing skills and market knowledge, inadequate managerial and entrepreneurial skills, lack of information and communication technologies, etc. This chapter has shown that despite the constraints faced by Cameroonian SMEs, they have a significant role to play in the growth economy of Cameroon, based on the fact that they contribute to employment creation, economic growth, poverty reduction, and the generation of entrepreneurship.

In the second part of this chapter, the researcher critically reviewed literature dealing with internationalisation. This involved first analysing some definitions provided by scholars in the

²¹² Pierre-Andre *Entrepreneuriat et Economie de la connaissance* 21.

²¹³ Laghzaoui 2011 (7) *JIEM* 6.

literature, before proceeding to explore various theories of internationalisation. These theories included the Uppsala theory, innovation theory, economic theory, and resources and competences theory. After highlighting the limitations of these different theories, the researcher attempted to analyse these theories based on models or operating modes of Cameroonians SMEs, in order to determine which modes will be most suitable for these SMEs.

In conclusion, it is important to note that in spite of the fact that OHADA law has made important amendments, a lot still needs to be done regarding the harmonisation of some important areas in business, particularly in the tax, import and export and customs domains, which are significant issues in international commerce. These areas need to be harmonised in the OHADA environment.

Chapter Three.

CAMEROONIAN LAW AND THE INTRODUCTION OF THE OHADA TREATY

3.1. INTRODUCTION

It is universally acknowledged that one of the major problems hindering economic growth in Africa is the lack of appropriate legal systems to support economic activity and growth.¹ Indeed, suitable laws, a well-functioning judiciary system and a peaceful environment are the prerequisites for investment and economic growth.² At the beginning of the 1990s, many African states experienced the collapse of their economies due to the decrease in foreign investments.³

Most investors argued that the legal systems governing business in Africa were outdated or incomplete, and also varied from one country to another.⁴ In this respect, Cameroon was not lagging behind.⁵ In Cameroon, the rules applicable to business were dispersed, with limited accessibility, sometimes fragmentary, silent on many issues, and even lacunary.⁶ The Cameroonian Law of Business, for example, did not codify commercial sales, and the point of reference⁷ in this regard was the provisions of the Civil Code or specific legislative texts.

With regard to the Cameroonian Civil Code (CCC), even though it contains some provisions governing the law of contract, it is worth noting that in some respects, this Civil Code ignores various modern judicial techniques that are commonly used throughout the world, particularly regarding the formation and interpretation of contracts, formation of contracts between absents, exchange via an electronic system, sole ownership, which has contributed to the structure of the informal sector in which many SMEs perform today, and

¹ Kalm 2011 (2) *The Roberta Buffett Center for International and Comparative Studies Northwestern University* 2.

² Organization for Security and CO-Operation in Europe (OSCE) www.osce.org/eea/19768. (Last accessed: 22 November 2015).

³ The National Bureau of Economic Research (NBER) www.nber.org/digest/jan04/w9865.html. (Last accessed: 22 November 2015).

⁴ The National Bureau of Economic Research (NBER) www.nber.org/digest/jan04/w9865.html. (Last accessed: 22 November 2015).

⁵ Tumnde <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 22 November 2015).

⁶ Von Mehren <http://digitalcommons.law.lsu.edu/lalrev/vol15/iss4/4>. (Last accessed 22 November 2015).

⁷ Fombad CM «Researching Cameroon, GlobalLex» 2011 *Modern Law Review* available at: www.nyulawglobal.org/globalex/cameroon1.htm. (Last visited 20 November 2015).

negotiation of complex contracts. In a nutshell, the legal system of Cameroon regarding business law, specifically the sale of goods, has remained the same as that prescribed by the old French Civil Code of 1804.⁸

Thus, the degradation of the business climate, most notably due to legal and judicial uncertainty, led Cameroon, like many West and Central African countries, to consider some serious reforms with regard to business law and the rehabilitation of justice.⁹ Harmonisation was viewed by these West and Central African countries as a perfect remedy for the problems being experienced, hence the implementation and adoption of the OHADA.¹⁰

Even though some scholars have proclaimed the success of this harmonisation instrument,¹¹ which governs matters concerning business in Cameroon today, it is worth noting that the Uniform Act's applicability faces certain challenges, particularly in Cameroon.¹² Indeed, the OHADA's applicability is complex, owing to the bijural character and bilingualism of the Cameroonian Constitution, but also due to the fact that the OHADA does not govern all aspects of the contract of sale.¹³ Furthermore, the preliminary draft concerning the law of contract is still not available.¹⁴ The Uniform Law is silent on certain points, which are most often ruled by domestic law.¹⁵

Before examining the OHADA's provisions, it is important for this study to trace the legal traditions of Cameroonian law, and then to analyse the law which governs the contract of sale, particularly with regard to the formation and fulfilment of contracts.

This section will attempt to deal with the fundamental issue of the applicability of the OHADA in Cameroon, as well as the formation and performance of contracts in the Civil Code and OHADA Law.

⁸ Von Mehren <http://digitalcommons.law.lsu.edu/lalrev/vol15/iss4/4>. (Last accessed 22 November 2015).

⁹ Isdell 2011 *Center for Strategic and International Studies* 3.

¹⁰ Mancuso S 2010 (14) *Annual Survey of International & Comparative Law* 3-15.

¹¹ Igbanugo and Adiyia <http://igbanugolaw.com/news-articles/sub-saharan-africa-news-articles/the-harmonization-of-business-law-in-africa-possibility-or-fantasy/>. (Last accessed: 22 November 2015).

Tumnde <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 22 November 2015).

¹³ Melong <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

¹⁴ Dickerson 2011 *European Journal of Law Reform* 3-7.

¹⁵ Dickerson 2011 *European Journal of Law Reform* 4-7.

3.2. HISTORICAL BACKGROUND TO CAMEROON'S LEGAL SYSTEM

The present Cameroonian legal system, like most in Africa, was imported during the colonial era,¹⁶ after the discovery of this country by European explorers and Portuguese merchants in the 1500s, who did not stay there for long because of malaria. After the departure of the Portuguese, Cameroon was subjected to a triple colonial experience, namely German, English and French domination.¹⁷ Therefore, these four main periods can better explain the nature and evolution of the Cameroonian legal system in place today.

3.2.1. *The pre-colonial period: customary system*

In the pre-colonial era, the Cameroonian societal system was customary.¹⁸ One can observe manifold unwritten indigenous laws and usages which applied to distinct ethnic groups, except to the Foulbe tribes, who originally came from North Africa and occupied the area in the early nineteenth century. They had introduced the Islamic law of sharia, which was enforced in large parts of the Northern region.¹⁹ The most remarkable and controversial aspect of this system of justice was the extensive use of the principle of trial by ordeal.

Civil law, for instance, was ignored by the indigenous people, as they had been taught since birth that only customary laws were available and needed to be abided by.²⁰ In terms of matters of sale, the exchange practices between indigenous groups were based on good faith and usual practices.²¹ This means that there was no written provision which ruled these exchanges. The authorities responsible for implementing this traditional justice consisted of the family head, quarter head, chief and chief council.²² The methods for administering this justice were based on practices such as drinking poisonous concoctions, putting a person's

¹⁶ Fombad www.nyulawglobal.org/globalex/cameroon1.htm. (Last accessed: 22 November 2015).

¹⁷ Tamanji (LLD thesis Loyola University Chicago 2011).

¹⁸ Tamanji (LLD thesis Loyola University Chicago 2011).

¹⁹ Enonchong H N A *Cameroon Constitutional Law: Federalism in a Mixed Common-Law and Civil-Law System* 11.

²⁰ Lee and Schultz 2011 SSRN 3-8.

²¹ Anyangwe and Carlson *The Cameroonian Judicial System* 12.

²² Fombad *Cameroon's National Elections Observatory" and the Prospects of Constitutional Change of Government* 3.

hands in boiling palm oil or water, or holding a red-hot iron bar. If the accused came to no harm, then his innocence was considered to be proven.²³

To summarise this period, it is important to note that customary law, which was based on the traditions of ethnic groups, was adjudicated by the authorities of that group. The traditional court only exercised jurisdiction when both parties consented to this. The customary law was supposed to be valid only when it was not “repugnant to natural justice, equity, and good conscience”.²⁴

3.2.2. The colonial period: attempts to codify

This period was marked by the presence of three colonial powers, namely the German, French and English. Each country, through their manner of governing and political assimilation, made their mark on Cameroon, thereby influencing and shaping its current legal framework.

3.2.2.1. The German Period

The first colonial power was Germany, which officially proclaimed the protectorate of Cameroon on 14 July 1884, and then attempted to establish and codify Cameroonian traditional laws, before the outbreak of the First World War at the hands of British and French forces in Cameroon in 1916.²⁵ During the German colonial era, the colonisers focused mainly on commerce and the exploration of unoccupied territories.²⁶ However, there were no rules governing this commerce. Instead, transactions between German and indigenous people were based on good faith.²⁷ During their occupation of Cameroon, the Germans started to legally administrate the country, by trying to unite all the diverse ethnic groups into a single, cohesive modern polity. In doing so, the Reichstag passed a law in 1886, which conferred full powers upon the Kaiser to legislate by decree, in order to establish a good government in

²³ Fombad *Cameroon’s National Elections Observatory” and the Prospects of Constitutional Change of Government* 3.

²⁴ Fombad www.nyulawglobal.org/globalex/cameroon1.htm. (Last accessed: 22 November 2015).

²⁵ Fombad 1997 16(2) *University of Tasmania Law Review* 209.

²⁶ Mattar, Palmer and Koppel *Mixed Legal System, East and West* 121.

²⁷ Zeleza, Dickson *Encyclopedia of Twentieth Century African History* 206.

Cameroon.²⁸ This decree established two parallel systems of courts, one exclusively for Europeans, where German law was applied, and the other exclusively for Cameroonians, where traditional law under the control and supervision of the Germans was applied.²⁹ It is important to emphasise that compared to the French and British colonial periods, the German period was shortlived - just 32 years. It is therefore not surprising that there is no trace of the German presence in the Cameroonian legal system today.³⁰

3.2.2.2. The French and British Periods

Under the treaty of Versailles which was signed in 1919, Great Britain was in charge of administering the territory of West Cameroon, and France the eastern region of Cameroon. This partitioning was recognised and ratified by the League of Nations, which conferred mandates on Britain and France to administer Cameroon.³¹ According to Article 22 of the League of Nations,³² Britain and France were entitled to apply their own law to the territory, subject to their mandate.³³ In effect, this article gave complete powers of administration and legislation to both colonial countries. This was the basis for the almost wholesale exportation of the English Common Law and French Civil Law to Cameroon.³⁴

Therefore, the exchange of colonial hands many times before independence not only significantly guided and shaped the present legal system of Cameroon, as each colonial power introduced a new legal system that became embedded in the culture, but also created its current bijural legal system and infrastructure.³⁵

The British colonial period, for example, began in 1916 and ended when Southern Cameroon obtained its independence in 1961. The British enforced the policy of indirect rule, which consisted of allowing the application of customary law as long as it was not repugnant to natural justice, equity and good conscience, or incompatible with any existing law.³⁶ The

²⁸ Fombad 1997 16(2) *University of Tasmania Law Review*, 209.

²⁹ Anyangwe, *The Cameroonian Judicial System*

³⁰ Le Vine "The Cameroons from Mandate to Independence" 1964 *University of California Press* 102.

³¹ Lee and Schultz 2011 *SSRN* 3-55.

³² Article 22 Covenant of the League of Nations, available at: http://avalon.law.yale.edu/20th_century/leagcov.asp. (Last accessed: 22 November 2015).

³³ Article 22 Covenant of the League of Nations, available at: http://avalon.law.yale.edu/20th_century/leagcov.asp. (Last accessed: 22 November 2015).

³⁴ Cziment 2009 (2) *Tulane University Law School* 1-28.

³⁵ Azevedo M *Cameroon and its National Character* 28.

³⁶ Cziment 2009 (2) *Tulane University Law School* 1-28.

applicable law was based on section 11 of the Southern Cameroon High Court Law (SCHCL) of 1958, which provided for the application of English Common Law, the doctrine of equity and statutes of general application, which were in force in England on January 1, 1900, whereas the policy in French Cameroon was different, namely the policy of assimilation.³⁷

In the French region, according to their policy of assimilation, citizens were subjected to strict rules. They applied two systems of justice, namely the traditional system, which was applicable to the whole population, and the modern system, which was applicable to Europeans or those Cameroonians who opted for it.³⁸ The traditional system, however, was presided over by French administrators, who used local chiefs and notables as assistants or assessors.³⁹ The purpose of the French colonial policy was one of assimilation, which consisted of exporting French culture and customs in order to make Cameroon an “integral part of France” and transform the Cameroonians into Frenchmen.⁴⁰ The law applied in the part of Cameroon administered by the French was civil law, which was exported from France through the French decree of May 22, 1922. The decree was supposed to extend all laws and decrees created and enacted in France to French Equatorial Africa.⁴¹

In light of the above, it is evident that the colonial experience laid the foundation for the development of Cameroonian law into a mixed system. This system was derived from both civil law and common law traditions, as well as the native customary law.⁴² This legal fragmentation of Cameroon created a legal environment of uncertainty, which resulted in the conspicuous conflict of laws in the same country with one flag, one people and one destiny. Fombad correctly asserted that “Cameroon is two different countries in one”.⁴³

3.2.3. The post-colonial period

The post-colonial period was Cameroon’s third phase of legal development. It is important to note that this phase began at the end of the colonial trusteeships in 1960 and 1961, when Cameroon gained its independence.⁴⁴ The two federated states had each kept their inherited

³⁷ Cziment 2009 (2) *Tulane University Law School* 1-3.

³⁸ Fombad 1997 16(2) *University of Tasmania Law Review*, 211.

³⁹ Cziment 2009 (2) *Tulane University Law School* 3-8.

⁴⁰ Chia 2001 (2) *African Journal of Applied Linguistics* 137-141.

⁴¹ Fombad 1997 16(2) *University of Tasmania Law Review*, 211.

⁴² Tumnde 2010 the *Tulane European and Civil Law Forum* 119.

⁴³ Fombad 1997 16(2) *University of Tasmania Law Review*, 212.

⁴⁴ Alemazung 2010 (10) *the Journal of Pan African Studies* 1-3.

colonial system of justice, although this was under the control of a Federal Ministry. The federated system continued until Cameroon became the “United Republic of Cameroon” in 1972. Then, after Cameroon abandoned the two federated state system in favour of one system of government, the “United Republic of Cameroon”, a new constitution was introduced, containing ordinance N° 72/4 of August 26, 1972, which created a civilian-style unitary system of courts to replace the different court structures operating in the two states.⁴⁵ However, despite this unified court structure, the two legal systems continued to operate separately.

Indeed, with the unification of the two parts of Cameroon, the new constitution indirectly approved the co-existence of the English and French legal systems. In this regard, one can note that the 1996 Constitution’s amendment states, in Article 68, the following: “The legislation applicable in the Federal State of Cameroon and in the Federated States of the date of entry into force of this Constitution shall remain in force insofar as it is not repugnant to this Constitution, and as long as it is not amended by subsequent laws and regulations”. This article clearly establish that the Cameroonian System may be defined as bi-jural system, although most of the uniform laws that are now being introduced are essentially based on French legal concepts.

This dual system accounts for the common law and civil law flavour of the Cameroonian legal system. Among the 10 regions that make up Cameroon, common law is only applied in two regions, which are, as mentioned above, the part of Cameroon administered by the British, while civil law is applied in the other eight regions of Cameroon, which are administered by the French.⁴⁶

To sum up, one can conclude that Cameroonian law has three main sources: local customary law, the French civil code, and British law. However, these sources of Cameroon’s legal system underwent some amendments with the advent of the OHADA in the business arena.

⁴⁵ Fombad (1997) 16(2) *University of Tasmania Law Review* 209.

⁴⁶ Fombad (1997) 16(2) *University of Tasmania Law Review* 209.

3.2.4. The fourth period in the development of Cameroon's legal system: the introduction of the OHADA

This period began on 1 September 1996 when the OHADA treaty signed in 1993 by fourteen African countries, including Cameroon, came into force.⁴⁷ The Cameroonian legal system, from a constitutional point of view, was always bi-jural, which means that both legal systems continued to co-exist. However, the advent of the OHADA and its coming into effect in Cameroon seemed to mark the beginning of a terminal decline of the common law legal culture in Cameroon, given that OHADA law relies mostly on the civil law approach.⁴⁸ Even though this ratification of the OHADA by Parliament led to protests, particularly in the Anglophone region of Cameroon, owing to the fact that the treaty was largely based on the French civil law approach, this coming into effect of the OHADA brought about three important changes to the nature of the Cameroonian legal system.⁴⁹

Firstly, both previous systems, namely the application of the principles of English commercial law to all business and commercial matters in the Anglophone legal district, and the application of the French Commercial Code in the Francophone legal district, were repealed in 1996 and replaced by the new regime established under this treaty.⁵⁰ In accordance with Article 10 of the new OHADA treaty, the Uniform Acts automatically and directly repealed all existing legislation and superseded any future legislation on the same subject.⁵¹ One can identify, under this regime, eight Uniform Acts dealing with commercial matters.

Secondly, the fact that the Uniform Acts are mostly based on French civil law meant, in practical terms, that the English commercial law principles applicable in the Anglophone legal district would now be replaced by French-inspired commercial law principles.⁵² In other words, the Anglophone region had to accommodate that system.

Finally, in spite of the fact that Article 31(2) of the Constitution set forth French and English as the official languages, and the practice that law comes into effect, the fact that the introduction of the OHADA system did not take into account the bilingual and bi-jural nature of the country. The new system in Cameroon was viewed with significant distrust by the minority Anglophone population, who perceived this Act as another way of achieving the

⁴⁷ Mouloul *Understanding* 18.

⁴⁸ Fombad 1991 29(3) *Journal of Modern African Studies* 443.

⁴⁹ Tumnde 2009 *GMB Publishing Limited* 4-5.

⁵⁰ Beauchard and Mahutodji 2011 *Justice and Development Work Paper* 1-5.

⁵¹ See Article 10 of the OHADA Treaty.

⁵² Tumnde <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 22 November 2015).

broader assimilationist and “Francophonisation” agenda, which was destined to eliminate all elements of their inherited English culture.⁵³ This is one of the reasons for this treaty being subjected to criticism by the Anglophone population.

3.3. THE IMPLEMENTATION OF THE OHADA IN THE ANGLOPHONE REGION OF CAMEROON

It is clear that the adoption of a new law often poses several problems, namely acceptance by practitioners, the subject to the trial and the Courts. The introduction of the OHADA treaty and Uniform Acts was no exception in this regard. Indeed, the reactions were stronger in Cameroon, particularly in the Anglophone area, where the OHADA treaty was viewed as a tool for destroying the principles of common law.⁵⁴ Generally speaking, OHADA law was treated in that area with much suspicion and reservation. The Anglophone region of Cameroon resisted the OHADA treaty because it was originally considered as an instrument of French and Francophone neo-colonialism.⁵⁵ They asserted that the OHADA was conceived using a civil law approach.⁵⁶ In this regard, one can divide these problems into two categories, namely constitutional problems and enforcement problems.

3.3.1. *Constitutional problems*

To address a constitutional issue means to refer to those problems that derive from the unconstitutionality of OHADA reforms, as well as its Treaty. These problems are related to the issue of language, as prescribed by the OHADA.

⁵³ Tabi *Les politiques linguistiques du Cameroun* 28.

⁵⁴ Mator B et al *Business Law in Africa* 52.

⁵⁵ Mator B et al *Business Law in Africa* 53.

⁵⁶ Mator B et al *Business Law in Africa* 53.

3.3.1.1. Language problems

In accordance with Article 42 of the OHADA Treaty,⁵⁷ “French shall be the working language of OHADA”. This means that French will be the official language of the OHADA in all matters related to publishing OHADA Uniform Acts (U.A.s), and arbitrating and settling contractual disputes among litigants. This provision appears to be incompatible and contrary to the principle of bilingualism enshrined in the Cameroon Constitutions of 1972 and 1996. Thus, as per Article 1(3) of the 1996 Cameroonian Constitution, “The official language of the Republic of Cameroon shall be English and French, both languages having the same status...” This article adds that “The State shall guarantee the promotion of bilingualism throughout the country. It shall endeavor to protect and promote the national language”.⁵⁸

These provisions are the basis on which the Anglophone people in Cameroon have resisted the implementation of the OHADA in Cameroon. Thus, most of them felt that the mandated language of the OHADA was a barrier to them reaping the benefits of OHADA reform, since the U.A.s are written in French, a language that they do not understand.⁵⁹ Furthermore, the judges, magistrates and registrars, as well as lawyers, argued that because this treaty had failed to forewarn them before its enforcement, and given that they could not benefit from training at the Regional High Judicial School (ERSUMA), they could obviously not be appointed to the CCJA. This would also apply to Anglophone lawyers, since they would not be able to represent their clients in the CCJA.⁶⁰ With regard to litigants, they argued that this coming into force of the OHADA in the Anglophone region of Cameroon represented an injustice in the adjudication process and infringed upon the principle of a fair trial, which advocates that an individual must be tried in the language that he or she understands.⁶¹

Even though one can clearly state that a ratified treaty takes precedent over internal laws and the Constitution, no one can reasonably require the courts and jurisdictions to apply laws in a language which no one understands. The fact that people were not forewarned before this treaty was entered into force, in order to enable them to look before they leap, explains why legal professionals, especially magistrates, judges and lawyers, have been reluctant to apply this OHADA legislation in Anglophone Cameroon.⁶² Rightly so, Justice Nko T. Irene

⁵⁷ See Article 42 of the OHADA Treaty.

⁵⁸ See Article 1 paragraphs 1- 3 of the 1996 Cameroonian Constitution.

⁵⁹ Tumnde and Mohammed 2009 *GMB Publishing Limited*.

⁶⁰ Penda www.ohadata.com (Last accessed: 22 November 2015).

⁶¹ Tumnde et al *Unified Business Laws for Africa* 28.

⁶² Mator B et al *Business Law in Africa* 38.

Njoya.⁶³ stated that “*If the common law courts are forced to apply the OHADA Treaty and OHADA U.A.s in French, without an amendment or Article 42, they will be deprived of their inalienable rights to work and express themselves in the language they know best in the CCJA. This will be unconstitutional since the Human Rights Charter is part of our Constitution and Anglophones have the right under the said Charter to work in English*”.

The above statement was considered and reaffirmed by the Kumba High Court in the case of *Achiangan Fombin Sebastian v. Foto Joseph and Ors*. In this case, Mr. Justice Aya Paul asserted, *inter alia*, that “Any piece of legislation that sanctifies French to the exclusion of English remains inapplicable to the common law courts by reason of self-exclusion”. In the same vein and for the purpose of rejecting this treaty, the president of the Limbe Court of First Instance stated that he was reluctant to apply OHADA legislation, owing to the fact that the law was ambushing innocent English-speaking Cameroonians.⁶⁴

All the same, it would be *contra bonus mores*, within the framework of this study, if it failed to highlight the fact that something has been done to address the plight of Anglophone people, namely that the English translation of the OHADA has been enacted and published in the official journal in languages such as English, Portuguese, Spanish, and German.⁶⁵ However, it is also important to emphasise that another aspect of this issue at the level of translation remains a concern for researchers, who argue that as the official language, French remains an authentic version⁶⁶ and that this move is still insignificant. Therefore, the translations of this text have no official value, even today, and are sometimes inaccurate and incomprehensible to English speakers, who are more familiar with common law than civil law systems.⁶⁷ In this regard, Tumnde contends that these translations are “too literal, inadequate, and rather nebulous” because legal translations, in the context of OHADA, have often resulted in a lack of terminological equivalence.⁶⁸ The report of the International Law and Practice of the American Bar Association and the International Judicial Relation Committee of the U.S Judicial Conference presented on the OHADA U.A.s further state that

⁶³ Asuagbor (Papers presented at the Lomé Congress titled The Role of Law in the Economic Development).

⁶⁴ Declaration made to the students offering Law 496 in one of his court rooms at the Limbe Court of First Instance on the 8th of April 2004 at 10:15 a.m.

⁶⁵ Domoraud-Operi et al 2014 *Legal & Regulatory Bulletin* 1-4.

⁶⁶ Domoraud-Operi et al 2014 *Legal & Regulatory Bulletin* 1-4.

⁶⁷ Mator B et al *Business Law in Africa* 53.

⁶⁸ Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

“... Unfortunately, we found these English translations not to be as precisely worded as they could be in order to be of authoritative assistance...”.⁶⁹

As an example, one regrettable translation is that of “Registre du Commerce et du Credit Mobilier” (RCCM), which was translated as “Trade and Personal Property Credit Register”, and it is doubtful whether such notion exists under the common law system. Another example is the translation of “Assignation”, which in French is the modern way of bringing a case to court or addressing the judge. This word has been translated in some Uniform Acts as Writ of Summons, Summons, or motion on notice.⁷⁰ However, this concept is different in civil law to the common law concept “Assignation”, which in French is an extrajudicial act performed by a bailiff, while a writ of summons in common law is an act signed and delivered by a judge, magistrate or other officer entitled by law to do so.⁷¹

Contrary to the provisions of the Uniform Acts, it is not possible to approach the Court of First Instance and Court of Appeal through a writ of summons or summons. It could be problematic for English-speaking investors or their English-speaking lawyers to rely on the English version of the Uniforms Acts.⁷² Therefore, one can understand that French-speaking investors throughout in the world will be more inclined to invest in Cameroon than English-speaking investors.

3.3.1.2. The transfer of sovereignty

One of the reasons advanced by professional practitioners in Anglophone Cameroon for their resistance to the OHADA initiative is the transfer of Cameroon’s sovereignty over commercial or business legislation to the OHADA and its institutions. They view the new Law as the “gospel truth”, since it cannot be controverted, due to the fact that after the adoption of the

⁶⁹ Paper submitted by the American Bar Association during the International Association Conference on Uniform Commercial Laws Infrastructure and Finance in Africa holden at Yaounde, Cameroon from the 9th – 14th of December 1999.

⁷⁰ Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

⁷¹ Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

⁷² Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

OHADA legislation by the Council of Ministers, the U.A.s immediately became applicable in the Member States, thereby overriding any domestic legislation in the area of that law.⁷³

These provisions, which provide elaboration regarding the adoption of OHADA legislation, and their direct applicability and enforceability, are unconstitutional in respect of Article 2(1) of the 1996 Constitution. According to Article 2(1), “National Sovereignty shall be vested in the people of Cameroon who shall exercise same either through the President of the Republic and Members of Parliament or by way of Referendum.” The same article also states that “no section of the people of any individual shall arrogate to itself or to himself the exercise thereof”. Article 14 goes further to stipulate that “Legislative power shall be exercised by the parliament which is to be legislating and control government action”, while Article 26 (2) b (2) states that “rule governing civil and commercial obligations are reserved to the legislative power”.

In light of the above, the OHADA infringes upon these provisions, as they have governed and ruled on matters which are specifically reserved for legislators. In this regard, it is interesting that legislators have never raised this issue, in order to denounce the fact that the Council of Ministers could usurp their powers and make laws governing commercial obligations.

Furthermore, this problem of the transfer of sovereignty does not only concern legislative power - even a Cameroonian judiciary suffers the same fate, since before the implementation of the OHADA, judgments coming from the Supreme Court were final.⁷⁴ However, with the advent of the OHADA, the *status quo ante* of this high and final jurisdiction has changed. It is now the CCJA which has appellate jurisdiction over judgments from the appeal courts in all Member States in matters regarding business transactions.⁷⁵

3.3.2. Enforcement problems

The enforcement problems of the OHADA refer to those problems that handicap the adjudication process vis-à-vis OHADA business law.⁷⁶ In other words, it concerns those barriers that prevent the OHADA Law from being a tool of social control, especially in the context of this study. Among these hurdles, one can note the problem of the advent of the

⁷³ Article 10 of OHADA.

⁷⁴ Yakubu *Harmonisation of Law in Africa* 3.

⁷⁵ See OHADA Treaty, Article 14 paragraph 3.

⁷⁶ Tumnde et al *Unified Business Laws for Africa* 35-42.

CCJA, procedural problems, and the suspicion that the OHADA is only suitable for civil law jurisdictions.

3.3.2.1. The advent of the Common Justice and Arbitration Court of OHADA (CCJA)

The advent of the OHADA, with the imposition of the new Court having its seat in Abidjan, was strongly challenged by many Anglophone people, who felt that the CCJA infringed upon and was contrary to Cameroonian Ordinance No 72/4 of 26 August 1972, which dealt with the organisation of the judiciary.⁷⁷ Indeed, as per Article 1 of the Ordinance, as amended by Law No 90/058 of 19 December 1990 on the organisation of courts in Cameroon, “Justice in Cameroon shall be administered in the name of the people of Cameroon by the following courts: the traditional law courts, the courts of first instance, the high courts, the courts of appeal, the state security courts and the supreme court”. In this article, one can note the absence of the CCJA.

In addition, one of the main disagreements of Anglophone people with this Court is that it is too expensive and carries a risk when pursuing litigation in the CCJA, which has its only seat in Abidjan.⁷⁸ Thus, litigants, in order to appear before this Court, will need to possess a vast amount of money to cover their personal transportation, and well as that of their counsel. It is important to note that many litigants or SMEs situated in Cameroon, where the cost of living and purchasing power and turnover are low, cannot afford such expenditures.⁷⁹

Furthermore, the OHADA Treaty states that a litigant’s counsel, who is not resident in Abidjan, must provide an official address in Abidjan, not in his country, for the duration of the proceedings, in order for court papers to be served.⁸⁰ This provision again poses another challenge. Firstly, it will not be easy for the litigant to find a suitable official address, and secondly, even if a suitable address were to be found, as Tumnde argues, “Would service on the client or litigant be said to have been effected in Abidjan or when the court paper has

⁷⁷ Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

⁷⁸ See Article 20 of the OHADA treaty, which stipulates that “The judgements of the Common Court of Justice and Arbitration are final and conclusive. In no case may a decision contrary to judgement of the Common Court of Justice and Arbitration be lawfully executed in a territory of a contracting state”.

⁷⁹ Tumnde and Penda www.ohadata.com. (Last accessed: 22 November 2015).

⁸⁰ See Articles 27 and 28 of the OHADA Treaty.

been communicated to him in Cameroon?”⁸¹ In light of this, one may rightly question whether or not the period between the serving of court papers and communication with the client in Cameroon will be taken into account when calculating the time lapse for prescription.

As if this was not enough, the fact that the official language in the CCJA is French and all proceedings are conducted in French has been highlighted by the Anglophone community as being a source of marginalisation.⁸² In addition, all the judges at the CCJA are French-speaking, with civil law training, except for a lone judge from Guinea-Bissau, who speaks Portuguese.⁸³ There are at present no judges with a common law background. In this context, one can easily understand why other countries that speak English and have a common law system, such as Nigeria, Ghana, Sierra Leone, South Africa, etc., are still reluctant to adopt the Treaty.

3.3.2.2. Procedural problems

It is important to note that the rules regarding civil procedures in Cameroon vary, and depend on whether one is situated in the Anglophone or Francophone region. In the French area, civil procedure governs the rules of practice and procedure that are applicable in civil matters, whereas in the Anglophone area, the rules that are applicable are basically those of Nigerian colonial legislation (which is the Supreme Court Civil Procedure Rules) 1945 cap 2011 Vol 10 of 1948 edition of the Revised Laws of the Federal Republic of Nigeria.⁸⁴ The fact that the OHADA has not yet succeeded in enacting uniform procedural codes for its Uniforms Acts is a great concern. Given that the OHADA is silent on this matter, the procedural laws of each member state therefore remain in force⁸⁵. The question that one can ask here is the following: If an appeal goes before the CCJA, what procedure will be defensible? The vagueness about this issue needs to be addressed.

⁸¹ Tumnde and Penda www.ohadata.com. (Last accessed: 22 November 2015).

⁸² Cziment 2009 (2) *Tulane University Law School* 1-28.

⁸³ Mator B et al *Business Law in Africa* 38.

⁸⁴ Tumnde and Penda www.ohadata.com. (Last accessed: 22 November 2015).

⁸⁵ Schwenger, Hachem, Kee *The Global Sales and Contract Law* 24.

3.3.3. *The problem of suspicion*

The problem of suspicion regarding the OHADA was highlighted by the Justice Nko. T. Irene Njoya, who stated that “It is with great suspicion and reserve that common law courts have received the treaty and its uniform laws. The highhanded manner in which the text was dumped on them, the fact that French is the only working language of OHADA, and the fact that Cameroon part in the deliberations resulting in OHADA texts, as a Francophone nation, are reasons giving rise to the suspicious attitude”.⁸⁶ It follows from this statement that one of the problems with the implementation of the OHADA in the Anglophone area is that people there consider the OHADA legislation to be suitable only for civil law jurisdictions, such as the Francophone areas. Given that the applicable legal system in Anglophone Cameroon is based on common law, many scholars view this treaty as “an unruly horse and something from another planet”, in Tumnde’s words. They argue that the Cameroonian civil and common law traditions are not compatible with OHADA reforms.⁸⁷

This argument seems to be relevant because in terms of common law, the principle of *stare decisis* is very important, and the court is a significant source of law, which is considered to be national legislation in this respect.⁸⁸ In contrast, the civil law system does not recognise this principle, which means that the Court must look to universities and jurists in order to inform their commentaries on legislature enactment.⁸⁹ Indeed, it is evident that common law attaches more importance to judicial precedents, while the civil law system attaches more importance to codified law.⁹⁰ In this respect, Anglophone Cameroonians perceive the OHADA law as a menacing shark destined to swallow the common law system.

In summary, it is worth noting that law is a tool of social control that is intended to be applied to society, and not in a vacuum. This means that an elaboration of a law must take the actual problems in society into account, and must therefore include during all the classes affected by this law.⁹¹ In this regard, one can observe that the OHADA fails to adhere to these basic rules, by excluding in its elaborations and adoption certain classes, such as national

⁸⁶ Asuagbor (Papers presented at the Lomé Congress titled The Role of Law in the Economic Delopment).

⁸⁷ Asuagbor (Papers presented at the Lomé Congress titled The Role of Law in the Economic Delopment).

⁸⁸ Anderlini, Felli and Riboni 2013 SSRN 1-39.

⁸⁹ Fon and Parisi 2007 (15) *George Mason Law & Economics Research Paper* 521-524.

⁹⁰ Fon and Parisi 2007 (15) *George Mason Law & Economics Research Paper* 522-524.

⁹¹ D’Souza www.mangalorean.com/browsearticles.php?arttype=Feature&articleid=2091. (Last accessed: 22 November 2015).

institutions, jurists from all legal traditions, lawyers and other stakeholders.⁹² The fact that experts or a group are commissioned by the secretariat of the OHADA to prepare a draft law, which is subsequently submitted to each government for review and comment does not contribute to resolving the problem of insufficient participation.⁹³ One can conclude that the specificity of the Cameroonian legal dualism explains itself through the existence of a unique parliament, having jurisdiction to legislate in any domain of law, whether public and private.⁹⁴

Thus, driven by the need to preserve national unity and colonial inheritance, Cameroonian legislators strive to take into account this bijural legal system, at least at the national level, and the criminal procedures recently adopted may be used as an example.⁹⁵ There are regional economic integration instruments which have a significant effect on the Cameroonian legal bijural system. The most important problem of OHADA law, after the amended treaty included Spanish, Portuguese and English as working languages, remains, as previously mentioned the mediocrity of translation and the fact that cases cannot be submitted to the Abidjan Court in English. This may be why certain Anglophone countries, such as Nigeria, Ghana, Kenya, etc., are still reluctant to sign and adopt this treaty. If the OHADA envisages attracting these common law countries, it will need to draw inspiration from Canada, which is acknowledged as a living laboratory in matters of harmonisation, as pointed out by Louise Maguire Wellington: “The advent of the global economy and the growing interdependence of national legal systems has generated interest in ... Canada’s work in the field of harmonization, particularly among international bodies and organizations that use both the common Law and the Civil Law. Canada is the recognized as a living laboratory for harmonizing two legal systems”.⁹⁶

3.4. CONTRACT FORMATION UNDER CAMEROONIAN LAW

It is important, before examining the formation of contracts, to clearly state that the Cameroonian Civil Code regarding the elements which constitute the formation of contracts, namely offer and acceptance does not contain any provisions governing these notions. Nevertheless, based upon certain principles of the Civil Code, it is possible to gain a better

⁹² Carbonnier *Authorities* 91.

⁹³ Carbonnier *Authorities* 91.

⁹⁴ Melong J <http://revue.ersuma.org/no-2-mars-2013/etudes-21/Implementation-of-Ohada-laws-in-a>. (Last accessed: 22 November 2015).

⁹⁵ See the new Cameroonian criminal procedures.

⁹⁶ Wellington 2010 *Department of Justice Canada* 4-25.

understanding of how the formation of contracts is achieved under the Cameroonian legal system.

3.4.1. Legal tradition

The Cameroonian law regarding contracts is governed by the Civil Code, which is a copy of the Napoleon Civil Code.⁹⁷ Indeed, even though the Cameroonian law regarding sales is now governed by the OHADA law, it is important to note that the Cameroonian law regarding contracts greatly inspired the development of OHADA law, both at the level of formation and performance of contracts, and therefore requires a closer examination by this study. Thus, an understanding of the law of contract in Cameroon first requires an understanding of how the Civil Code, which governs the law of contract in Cameroon, was conceived and shaped.⁹⁸

In the Civil Code of 1804, the formation of contracts was dominated by a unique and coherent contractual model corresponding to the economic and social situation at this time, which was based on the following principles: freedom, equality, and instantaneity.⁹⁹ At that time, when the majority of contracts resulted from commerce and industry on a small scale, the parties negotiated freely, on an equal footing, and in the presence of each other.¹⁰⁰ Therefore, one can see why a postulation or assumption of liberty and equality dominated the formation of contracts, through the famous principles of contractual freedom and consensus, which were grouped together under the dogma of autonomy of will.¹⁰¹ Thus, the principle of formation of contracts under the Civil Code is based on principles such as freedom and equality, contractual freedom and consent.

⁹⁷ Hertel 2009 *Notarius International* 128.

⁹⁸ Hertel 2009 *Notarius International* 128-131.

⁹⁹ Catala 2010 *Oxford University Press* 15-19.

¹⁰⁰ Glock 2009 *European University Institute* 1-8.

¹⁰¹ Free market capitalism is an ideology that prescribes minimal government regulation of public enterprises in a capitalist economy.

3.4.1.1. Freedom and equality of parties

This principle has been greatly influenced by the individualism philosophy and free market economy doctrine.¹⁰² According to the philosophers of the eighteenth century, men considered as free beings can only bind themselves voluntarily, i.e. contractually.¹⁰³ This concept translates itself into the economic field through the free game of individual initiative, because contracts freely consented to by one party necessarily safeguard their interests. Indeed, no one will consent to an obligation which will prejudice him.¹⁰⁴ It is based on these ideas that the concept of autonomy of will is established.

3.4.1.2. The principle of contractual freedom

The principle of contractual freedom goes to the core of contracts, including international contracts.¹⁰⁵ Although it has been called into question by the dirigisme, both at formation and performance level, the principle of contractual freedom means that each person is free to form a contract and make choices in this regard¹⁰⁶. Albu states that “freedom of contract is the possibility that natural and legal persons have, by law, to create contracts and to determine content”.¹⁰⁷ This principle gives parties the freedom to contract or not to contract with each other, to freely conclude a contract without any conditions, and develop the content of their contract within a limited framework foresaw by the imperative dispositions. Contractual freedom means that the parties are free to engage in talks to guide their negotiations, and to stop the proces as and when they want.¹⁰⁸

In terms of the classical theory, this contractual freedom culminates in the formation of a contract.¹⁰⁹ In turn, at the level of the performance of the contract, this freedom flows back for

¹⁰² Taylor, Boas and Gans-Morse 2009 *St Comp Int Dev* 137-141.

¹⁰³ Bernstein 2007 *University Law and Economics Research Paper* 1-10.

¹⁰⁴ Mill and Tawney http://press.anu.edu.au/cotm/mobile_devices/ch09s02.html. (Last accessed: 22 November 2015).

¹⁰⁵ I Mill and Tawney http://press.anu.edu.au/cotm/mobile_devices/ch09s02.html. (Last accessed: 22 November 2015).

¹⁰⁶ Girlesteanu http://press.anu.edu.au/cotm/mobile_devices/ch09.html. (Last accessed: 22 November 2015).

¹⁰⁷ Girlesteanu http://press.anu.edu.au/cotm/mobile_devices/ch09.html. (Last accessed: 22 November 2015).

¹⁰⁸ Ionescu 2013 International Conference CKS - Challenges of the Knowledge 242-245.

¹⁰⁹ Atiyah *The Rise and all of Freedom of Contract* 25.

the benefit of contractual security. The contract then becomes intangible and irrevocable.¹¹⁰ In this way, the Civil Code preserves the balance between freedom and security imperatives. It appears that freedom only exists for entering into a contract, and not for exiting it.

The principle of contractual freedom also means that the parties are free to determine the terms of the contract and to develop its content.¹¹¹ This equality is considered as a purely abstract way, regardless of inequalities which can exist in fact. Besides, inequalities have always existed in society. In a general way, a person who contracts in order to satisfy a vital need is always located in the inferiority position. In the Civil Code system, the economic inequality is unimportant only the legal equality is taken into account.¹¹²

3.4.1.3. The principle of consent

This principle is anterior to the Civil Code, and some scholars, such as Loysel, have stated that "As bulls are bound by their horns, so men by their words".¹¹³ Domat also pointed out that a sale is completed only by consensus, even if the good has not yet been delivered and the price paid.¹¹⁴ It is perhaps because this principle was already enshrined in the old law that the Napoleon Civil Code did not find it necessary to consecrate it. One can refer to Article 1101¹¹⁵ of the Napoleon Civil Code, which defines a contract without referring to a form, and article 1108,¹¹⁶ which does not require any form for the agreement or contract to be valid. This principle would be implied and recognised in terms of the formation of contracts in general in article 1138¹¹⁷ and sales in particular in article 1583.¹¹⁸ In light of this definition, a

¹¹⁰ Atiyah *The Rise and Fall of Freedom of Contract* 25.

¹¹¹ Kottengen 2006 *Journal of the University of Baltimore Center for International and Comparative Law* 61-65.

¹¹² Thibierge-Guelfucci 1997 (24) *Rev. Trim. Dr. Civ.* 375-376.

¹¹³ Loysel *Institutes Coutumière*

¹¹⁴ Domat *Les loix civiles*

¹¹⁵ Article 1101 of the Cameroonian Civil Code defines a contract as an agreement by which one or several persons bind themselves, towards one or several others, to give, do, or not do something.

¹¹⁶ Article 1108 stipulates that four requisites are essential for the validity of an agreement, namely: the consent of the party who binds himself, his capacity to contract, a definite object which is the subject matter of the undertaking, and a lawful cause in the obligation.

¹¹⁷ Article 1138 of the Civil Code stipulates that an obligation to deliver an item is complete through the sole consent of the contracting parties. It makes the creditor the owner and places the item at its risk from the time when it should have been delivered. The handing over has not been done unless the debtor has been given notice to deliver, in which case the item remains at the risk of the latter.

contract is a manifestation of wills which connect one or more people, whether physical or moral.

In terms of the principle of consensus, a contract is made by the sole exchange of consent (*solo consensus*).¹¹⁹ This principle should not be understood as the absence of form, but rather as the freedom of form.¹²⁰ Some scholars are of the view that consensus will result from a wider interpretation of the principle of contractual freedom. Nevertheless, Flour asserted that it would be accurate to consider both of them as particular applications, but as separate from the autonomy of will.¹²¹ Consensus concerns the forms of contracts, and contractual freedom is a substantial rule.

According to article 1582 of the Napoleon Civil Code, which is largely based on Roman law, a sale is an agreement in terms of which one person, the seller, commits himself to delivering a determined or determinable item, and the buyer has the true intention of paying for it.¹²² Thus, in order for a contract to qualify as a contract of sale, the seller and buyer must reach consensus on essential aspects, such as the intention of the seller to sell and the buyer to buy (consensus on the nature of the contract), the item sold (consensus on what is bought and sold) and the purchase price (consensus on the monetary amount owed by the buyer to the seller).¹²³ Therefore, a commercial sale contract is an agreement between two persons with a trader status. The establishment of an agreement between the parties seems to be the most important requirement for the conclusion of a contract.

It appears that the contract of sale is a bilateral and synallagmatical contract, giving rise to obligations for both parties - these obligations are both reciprocal and interdependent. It is also an onerous contract, as each party assumes the specific obligation to obtain a counter service¹²⁴. It is also a consensual contract because it is validly concluded by reaching an agreement, regardless of the form in which the consent is expressed¹²⁵. Finally, it is a right-transferring contract, since the ownership right is transferred from the patrimony of the seller to the patrimony of the buyer¹²⁶.

¹¹⁸ Article 1583 of the Civil Code stipulates that the sale is complete between the parties and ownership is acquired by the buyer with respect to the seller, as soon as the item and the price have been agreed upon, although the item has not yet been delivered or the price paid.

¹¹⁹ Chulin 2012 (63) *Case Western Reserve Law Review* 5-10.

¹²⁰ *Idem*

¹²¹ Flour and Aubert *Les obligations* 52.

¹²² See Article 1582 of the Code Civil.

¹²³ Zara 2012 *Res Homini Consulting* 1-6.

¹²⁴ Zara 2012 *Res Homini Consulting* 1-6.

¹²⁵ *William C. Burton v. Artery Company; Inc. et al* 367 A.2d 935 Court of Appeal of Maryland January 6, 1977.

¹²⁶ Furmston 1998 (13) *Journal of Contract Law* 42.

However, it is important to emphasise that the previous laws of Cameroon, namely the Civil Code and General Commercial Code, did not expressly incorporate and define the notion of offer and acceptance with regard to the formation of contracts, whereas much contemporary legislation has dedicated provisions to these two notions.¹²⁷ Notions regarding the definition of the component elements of an offer, the question of an offer to the public, and the legal effects of an offer (basis, point of departure and duration of the binding force, revocation and withdrawal of offer, and different forms and modalities of acceptance) have been not expressly discussed by the Civil Code.¹²⁸ It will therefore be very difficult for SMEs engaging in international trade to rely on the Cameroonian Civil Code to negotiate and conclude their contracts.

In addition, business practice reveals today how important contracts can be subject to rigorous negotiations. A long period of time may pass between negotiations and the conclusion of a contract. A series of meetings, various drafts of the contract, and lots of correspondence often contribute to progressively delaying the signing of an agreement by the parties concerned.¹²⁹ Thus, the pre-contractual period is marked by numerous documents (letter of intention, minutes of meetings, agreements in principle, draft agreement, etc.). The Cameroonian law has been very silent on these different points which are so important in the contract law of sales.¹³⁰

On the one hand, one can note the increasing prevalence of industrial and financial transactions that are more and more sophisticated and require the establishment of a “tailor-made contract” negotiated between commercial partnerships, and on the other hand, the mechanisation associated with the conveyance process, which makes mass production and distribution possible.¹³¹ Furthermore, at the end of the twentieth century, the prodigious development of new information and communications technologies has enabled more contracts to be made at a distance, by means of electronic networks.

Finally, with regard to large international contracts, outsourcing, and financial packages of enterprises, a pre-contractual period is a reality, which must inevitably be subject to increased attention.¹³² However, the Cameroonian law of contract has failed to deal with these points concerning the formation of contracts, especially from a dynamic perspective¹³³. There are no provisions related to the termination of negotiations. It is international

¹²⁷ Krusinga 2009 (13) *Electronic Journal of Comparative Law* 12-14.

¹²⁸ Von Mehren 1955 (15) *Louisiana Law Review* 355-362.

¹²⁹ Brousseau and M'hand Fares *Règles de droit et inexécution du contrat* 125.

¹³⁰ Brousseau and M'hand Fares *Règles de droit et inexécution du contrat* 126.

¹³¹ Kalm 2012 *The Roberta Buffett Center for International and Comparative Studies* 6-12.

¹³² Montero and Demoulin <http://www.crid.be/pdf/public/4563.pdf>. (Last accessed 22 November 2015).

¹³³ Montero and Demoulin <http://www.crid.be/pdf/public/4563.pdf>. (Last accessed 22 November 2015).

instruments such as the CISG and UNIDROIT which attempted to deal with these questions. The Cameroonian Civil Code, by not dealing with these important points, reveals itself to be a legal system which does not embrace and integrate economic realities and international market practice. The provisions which are there seem to be outdated and obsolete in relation to the applicable law.

3.5. THE PERFORMANCE OF CONTRACTS UNDER CAMEROONIAN LAW

This section will examine the performance of contracts under Cameroonian law on various issues, such as the transfer of property and risk, lack of conformity and guarantees, and remedies involving the non-fulfilment of contracts.

3.5.1. The transfer of property and transfer of risk

According to Article 544 of the Civil Code, ownership is defined as the right to enjoy and dispose of items in the most complete manner, provided they are not used in a way that is prohibited by statutes or regulations. Indeed, issues relating to the transfer of property, or rather the moment of the transfer of property, are very important with regard to the effects of this, most notably the transfer of risk.¹³⁴ The buyer becomes the owner of the item sold and consequently the risk associated with this subject or item sold is transferred to his person¹³⁵. Thus, one could say that the transfer of risk is directly linked to the transfer of property.¹³⁶ It is therefore crucial to determine at precisely what moment this ownership is transferred to the buyer under the Cameroonian Civil Code.

It is important to highlight that in the Cameroonian Civil Code, one can distinguish between the obligation to “give¹³⁷” and the obligation to “do”.¹³⁸ The obligation to “give” corresponds to the obligation to transfer the property. It distinguishes itself from the obligation to deliver.¹³⁹ Thus, in order to determine the problem which usually arises, namely how and when the

¹³⁴ Flambouras 2001 *Institute of International Commercial Law* 87-89.

¹³⁵ Grewal 1991 (14) *Int'l and Comp L J* 325-328.

¹³⁶ Baskind, Osborne, Lee *Commercial Law* 68.

¹³⁷ See Article 1136 of the Cameroonian Civil Code.

¹³⁸ See Article 1142 of the Cameroonian Civil Code.

¹³⁹ See Article 1138 of the Civil Code.

seller must transfer ownership and deliver the item, it is important to examine articles 1136, 1138, 711 and 1583 of the Civil Code, which enshrine the principle of instantaneity.

3.5.1.1. The principle of the instantaneity of the transfer of property, as contained in articles 1136, 1138, 711 and 1583 of the Civil Code

Articles 1136 and 1138 deal with the obligation to give and deliver. In terms of Article 1138, the obligation to deliver an item is complete through the sole consent of the contracting parties, and Article 1136 stipulates that the obligation to give includes delivering the item and keeping it until delivery, on pain of damages, to the creditor. Thus, the obligation of delivery is simultaneous to the contracting parties' consent. This is referred to as an obligatory force of agreement.¹⁴⁰ As an obligation *to dare*, it immediately makes one think of the deed of transfer. Ownership transfer is defined in Cameroonian law by Article 1583 of the Civil Code. This Article provides that the sale is complete and ownership is transferred as soon as the seller and buyer have agreed upon the item and price, even if the item has not yet been delivered or the price paid.¹⁴¹

Thus, ownership transfer is carried out at the moment of the meeting of minds, corresponding to the activities of offer and acceptance.¹⁴² The Civil Code's conception of ownership transfer is based itself on Roman law, in considering the principle of *solo consensus* ownership transfer, i.e. an immediate transfer of ownership¹⁴³. Therefore, according to the Cameroonian Civil Code, ownership transfer is carried out as soon as the contract is concluded. The buyer immediately becomes the owner of the goods, and consequently the risks associated with these goods are transferred to the buyer.¹⁴⁴

This Cameroonian approach regarding the transfer of property seems to be disconnected to the reality and practice of international commerce, and may therefore appear to be dangerous for SMEs. Indeed, the reality nowadays shows that many enterprises operating as sellers prefer, for purposes of security, to include a retention title clause in their contracts, and to effectively transfer the ownership of goods when they have received full payment.¹⁴⁵ The Cameroonian approach, by rendering a property of sale automatic, abstract and

¹⁴⁰ Whittaker 2000 *Oxford U Comparative L Forum* 24.

¹⁴¹ See Articles 1582 and 1583 of the Cameroonian Civil Code.

¹⁴² MacMillan and Stone 2012 *University of London* 1-58.

¹⁴³ Roch 2003 (845) *Penant* 464.

¹⁴⁴ Roch 2003 (845) *Penant* 464.

¹⁴⁵ Limmer 2013 (9) *European Review of Contract Law* 387–408.

instantaneous, does not guarantee the certainty of the transaction between both parties. Legal safety requires that the seller must effectively hand over the item to the buyer, so that the buyer may examine the goods and confirm that these goods comply with the terms of the contract, before paying the seller.¹⁴⁶

3.5.2. The transfer of risk under Cameroon Civil Code

According to Article 1138 and 1624,¹⁴⁷ the transfer of risk follows ownership transfer. It is important to note that the corollary of ownership transfer is that the law in *rem* is accompanied by the transfer of risk following an adage *res perit domino*. This adage, better explained in Article 1138 paragraph 2, foresees that if the item perishes, it is the owner who must support the risk. This means that the burden of proof is connected to the property. However, the burden of proof will fall on the buyer if the item perishes after the conclusion of the contract.¹⁴⁸ In the case of a sale of distance, the transfer is effective when the seller has handed over the goods at the carrier disposal.¹⁴⁹

Under Article 1138 and 1583 of the Cameroon Civil Code, risk is supported by the owner of the good at any given time, and passes to the buyer at the same time that the property is transferred. In the absence of any provision foreseen by the parties to the contract, ownership is supposed to be transferred when the contract is made in respect of article 1583 of the Civil Code.¹⁵⁰ Thus, the Cameroon Civil Code, contrary to the CISG, does not separate the transfer of risk and transfers of property- both activities are connected. According to the CISG, the transfer takes place when the good is delivered or handed over to the first carrier.¹⁵¹

This Cameroonian approach regarding the moment of transfer or risk only provides for the passing of risk in cases involving a carriage of goods, but is silent regarding the passing of risk for goods sold in transit. Furthermore, the Cameroonian Civil Code is silent about the interaction between INCOTERMS. It is undeniable that INCOTERMS are currently the rules

¹⁴⁶ Limmer 2013 (9) *European Review of Contract Law* 387–408.

¹⁴⁷ Article 1624 stipulates that the question as to whom, between the seller and the buyer, falls the loss or deterioration of the item sold before its delivery, shall be decided according to the rules prescribed in the title of contracts, or conventional obligations in general.

¹⁴⁸ See Article 1138 paragraph 2 of the Cameroon Civil Code.

¹⁴⁹ Glock 2009 *European University Institute* 1-68.

¹⁵⁰ Glock 2009 *European University Institute* 1-68.

¹⁵¹ Christie http://uctscholar.uct.ac.za/PDF/1428_LMMTHO001.pdf p.26- 30 (Last accessed: 22 November 2015).

which usually govern the risks between international traders.¹⁵² This Cameroonian provision will not be effective in the international context, and will limit SMEs engaging in international trade, which have to rely on the Cameroonian Civil Code as the law governing their contracts, and will then be obliged to elect another to fill the gap of INCOTERMS and goods sold in transit and by sea.¹⁵³

3.5.3. Conformity of goods and guarantees under Cameroonian law

A sale consists of two types of effects: on the one hand, the transfer of property, and on the other hand, it creates certain obligations between the seller and the buyer. As far as the seller's obligations are concerned, his main obligations are that of delivery and guarantees with regard to latent defects.¹⁵⁴

The delivery of the item or good to the place agreed on by the parties is insufficient for the seller to implement his obligations.¹⁵⁵ He must ensure that the goods conform to the terms of the contract.¹⁵⁶ In other words, an obligation of delivery is not just a question of transferring the goods sold to the possession and power of the buyer, as stipulated in Article 1603¹⁵⁷ of the Civil Code, but to also provide the seller with a good which corresponds to the terms of the contract. Therefore, as previously stated, the seller has two obligations, namely delivery and guarantee from latent defects.

3.5.3.1. The obligation to conform delivery

The Cameroonian legal texts provide two obligations to conform delivery: the one is derived from the Civil Code¹⁵⁸ and the other comes from the Consumer Code.¹⁵⁹ This section will

¹⁵² LAZÄR 2011 *Juridical Tribune* 143-151.

¹⁵³ Frison-Roche (Papers presented at the 11th Conference of the customs thought groups 16 October 2012 Paris.

¹⁵⁴ See Plitz *UN Convention* 475.

¹⁵⁵ Gashi 2013 (2) *Hanse Law Review* 1-3.

¹⁵⁶ Gashi 2013 (2) *Hanse Law Review* 3-5.

¹⁵⁷ Article 1603 of the Cameroonian Civil Code provides that the seller has two main obligations, namely to deliver and to guarantee the item which he sells.

¹⁵⁸ See Articles 1136 to 1145 of the Cameroonian Civil Code.

¹⁵⁹ See Article 11 of the Cameroonian Consumer Code.

focus on the one stipulated by the Civil Code, since the Consumer Code can only be invoked by the consumer. In other words, traders cannot invoke this code to support their argument.

In the classic sketch of Civil Code, the scope of application of article 1603¹⁶⁰ is chronologically unlike. The first obligation is the delivery of goods, not transfers of ownership or possession of the item, but only its detention. It is a counterpart of the buyer's obligation to pay the price. It simply consists of placing the item sold in the possession and power of the buyer, as provided by Article 1604.¹⁶¹ Indeed, the obligation to deliver an item involves the seller handing over the item ordered by the buyer.

This means that the seller must deliver the goods fit for the purposes for which these goods are ordinary used, or equipped with the same quality as the specimen or model mentioned by the buyer in the contract.¹⁶² It is very important that the specificities of the goods are mentioned in the contract, in order to allow an objective comparison between the delivered item and the one which was ordered by the buyer.¹⁶³ These comparisons are both qualitative and quantitative, and commercial documents will also serve as a basis for comparison. Thus, if the subject matter of the sale is the delivery of a fungible item which could be used in place of the other, the obligation of delivery is met in this case if the seller delivers an item of the same type.¹⁶⁴ However, if the item to be delivered refers to a specific good, the obligation is met if the seller hands over a good which fits all the requirements agreed on by the parties.¹⁶⁵

The Civil Code points out the modalities of performance of these obligations in articles 1605 to 1615,¹⁶⁶ but does not include special provisions concerning the quality of goods. Thus, the lack of conformity may be defined as all differences between the quantity, quality, type, wrapping or packaging of delivered goods and what is prescribed in the contract.¹⁶⁷

Usually, the parties ensure that they have clearly defined the main characteristics of the products.¹⁶⁸ Therefore, the seller fails in its obligation if the good delivered does not conform to these characteristics.¹⁶⁹ Indeed, in terms of article 1616 of the Civil Code, "the seller is obliged to deliver the capacity such it is specified in the contract, subject to the

¹⁶⁰ Article 1603 of the Cameroonian Civil Code provides that the seller has two main obligations, namely to deliver a good and to guarantee the item that he sells.

¹⁶¹ Article 1604 of the Cameroonian Civil Code stipulates that delivery is the transfer of the item sold to the power and possession of the buyer.

¹⁶² Gashi 2013 (2) *Hanse Law Review* 6-8.

¹⁶³ Gashi 2013 (2) *Hanse Law Review* 9-10.

¹⁶⁴ Gashi 2013 (2) *Hanse Law Review* 11-14.

¹⁶⁵ Gashi 2013 (2) *Hanse Law Review* 14-20.

¹⁶⁶ Articles 1605 to 1615 of the Civil Code deal with the requirements of delivery.

¹⁶⁷ Värvi and Piia 2009 (15) *Juridica International* 1-9.

¹⁶⁸ Värvi and Piia 2009 (15) *Juridica International* 1-9.

¹⁶⁹ Varul 2008 (16) *European Review of Private Law* 1-4.

modifications". This means that the item or good must conform to the stipulations in the contract.

At this stage, it is important to note that the Civil Code has only identified the main obligations of the seller in matters of sale. Certain additional obligations are nevertheless still important in terms of international commerce, such as the obligation to hand over documents relating to the sale, and to conclude the insurance contract, on which the Civil Code has been silent.¹⁷⁰ Therefore, it will be difficult for Cameroonian SMEs engaged in international trade to rely on the Civil Code as the law governing contracts in this regard.

In addition, with regard to the place of delivery, the Cameroonian Civil Code provides that this place is determined by the parties to the contract, and stipulates that the seller's place of business constitutes the main or default place of delivery.¹⁷¹ However, the Cameroonian Civil Code only identifies a default place of delivery, regardless of whether or not the sale involved the carriage of goods, whether goods were specified or unidentified, or whether goods were to be manufactured or produced.¹⁷² According to the Cameroonian Civil Code, the buyer has to collect the goods after conclusion of the contract at the seller's place of domicile. However, in an international market transaction, it is difficult, even impossible, to have a situation in which the buyer himself collects goods from the seller. The most frequent situation is where the seller is also obliged to organise the conveyance of the free carrier.¹⁷³ It is therefore clear that this Cameroonian provision is limited and inconsistent with the complexity of current international commerce, and does not allow SMEs engaging in international commerce to safely conduct their business in a convenient manner.

¹⁷⁰ See for instance Bridge 2007) 37 Hong Kong Law Journal 17, arguing that the United Nations Convention may be better suited to the sale of manufactured goods, while the United Kingdom Sale of Goods Act, with a well-established case law, is better suited to the sale of commodities. See also the reply to this article in Singh and Leisinger 2008 (20) Pace International Law Review, 161.

¹⁷¹ Indeed, in conformity with Article 286 of the Cameroonian Civil Code, except contrary convention, the seller had to fulfill his duty of delivery at the place where goods sold were situated at the time that the sale was made.

¹⁷² Kahindo LLD Theses of University of South Africa Pretoria 2014.

¹⁷³ Cf. Schlechtriem in Gaston/Smit Sales 6-10 and 11; Flechtner Honnold's Uniform Law 313.

3.5.3.2. Obligation of guarantee

An obligation of guarantee of the seller has two different subjects: the enjoyment of an item through a guarantee of eviction, and the absence of latent defects through a guarantee *actio redhibitory*.¹⁷⁴

3.5.3.2.1. Guarantee of eviction

The guarantee of eviction serves to guarantee anything which may hinder the enjoyment or possession of an item.¹⁷⁵ This guarantee is governed in the Civil Code by articles 1626 to 1640. One can distinguish between a warranty of personal acts and warranty of third acts.¹⁷⁶ The buyer can act by means of recourse or exception. Where there is eviction, the buyer may use the method of recourse, by ordering the seller to respect its warranty, or use the method of exception by interning during a trial to claim its warranty.¹⁷⁷

3.5.3.2.2. Guarantee against latent defect

Guarantees on matters of sale concerning latent defects are governed by articles 1641 to 1649 of the Civil Code.¹⁷⁸ These articles stipulate the substantial requirements, effects and times for bringing a latent defect action. A latent defect may be defined as a defect of the item sold, which is of such a nature that it renders it inappropriate for the purpose for which it was bought or normally used, and which defect was not known by the buyer at the time of the conclusion of the contract, or could not be discovered by the buyer without a reasonable examination of the item sold.¹⁷⁹

¹⁷⁴ See Article 1625 of the Civil Code.

¹⁷⁵ Vernea, Sorin 2014 (3) *Social-Economic Debates* 66-72.

¹⁷⁶ Vernea, Sorin 2014 (3) *Social-Economic Debates* 66-72.

¹⁷⁷ Vernea, Sorin 2014 (3) *Social-Economic Debates* 66-72.

¹⁷⁸ These Articles provide a warranty against the defects of the item sold.

¹⁷⁹ Bourdelin <http://fisetlegal.com/en/what-is-the-legal-warranty-against-latent-hidden-defects/>. (Last accessed: 23 Novembre 2015).

Substantial requirements

The buyer can only implement this action if the following four requirements are met: the item sold must have a defect, the defect must be significant, the defect must not be apparent at the moment of purchase, and the defect must be discovered anterior to the sale.¹⁸⁰ In fact, it is necessary that the buyer proves that the delivered item is marred by a latent defect.¹⁸¹ With regard to the notion of defect, Article 1641 evokes the defects of items, explaining that these defects may be related to the deterioration or anomaly of the item.¹⁸²

Furthermore, the revealed defect must be latent and only noticed at the time of using the item. This means that the buyer cannot invoke this guarantee if he was fully conscious at the moment of the transaction of this defect and accepted it without any reservations.¹⁸³ It should be noted that a buyer must nevertheless proceed to the verification and examination of the delivered good.¹⁸⁴ However, the buyer is not required to proceed to exceptional examination, as if only this enables him to obtain knowledge of the defect, which is supposed to be latent. The judge, in this case, also takes the buyer's skill and knowledge on the matter into account, depending on whether the buyer is professional or profane.¹⁸⁵

The buyer of the defective good can only act on the basis of a latent defect if this defect presents a serious problem.¹⁸⁶ In fact, Article 1641¹⁸⁷ identifies two assumptions about determining the defect. According to this Article, the defect must render the item unsuitable for its envisaged usage. In addition, there must be a normal usage diminution of the good, in cases where the buyer has not contracted with the seller. Finally, and according to article 1641, the defect must be prior to the sale or at least exist at the moment of conclusion of the contract. Indeed, the defect does not have to come from the good's carriage.

¹⁸⁰ See *Lakier v Hager* 1958 (4) SA 180 (T); see also *Sharrock Business* 284 & 293; *Van Niekerk/Schulze Trade* 71; *Lehmann Sale* 888 897. See also cases reproduced by *Volpe Sale* 119-120; *Zulman/Kairinos Sale* 171-172.

¹⁸¹ *Connick and Witt* www.fasken.com (Last accessed: 22 November 2015).

¹⁸² See Article 1641 of the Cameroonian Civil Code.

¹⁸³ *Glover* www.fenwickelliott.co.uk (Last accessed: 22 November 2015).

¹⁸⁴ *Glover* www.fenwickelliott.co.uk (Last accessed: 22 November 2015).

¹⁸⁵ See for instance in the case *In the Kroomer v Hess & Co* case, a party sold monkey nuts knowing that they were "for human consumption". The buyer rejected the nuts on delivery and sued for damages; his evidence showed that the nuts were mouldy, weevily and smelt and were not fit for human consumption (emphasis added). His action was upheld.

¹⁸⁶ *Sorohan* <http://www.internationallawoffice.com/newsletters/detail.aspx?g=cf872e3e-ce29-406e-9208-2d19a9e18d0f>. (Last Accessed: 22 November 2015).

¹⁸⁷ This Article 1641 stipulates that "A seller is bound to a warranty on account of the latent defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them."

3.5.3.3. The effects of the legal guarantee

Where the substantial requirements of the legal guarantee are met, the purchasing party may obtain, according to his or her preference, either an avoidance of contract or reduction of price. Thus, two actions are available to the buyer, namely the action *redhibitoria* and the action *quanti minoris*.¹⁸⁸

Actio redhibitoria and actio quanti minoris

Article 1644 of the Civil Code stipulates that the buyer has the choice of either returning the item and having his payment reimbursed, or keeping the item and receiving a partial reimbursement, after an appraisal by an expert.¹⁸⁹

This text emphasizes that the purchasing party has a choice between two actions. On the one hand, the buyer can have recourse to the *quanti minoris* action, if he prefers to keep the item and be reimbursed for part of the price paid for it. This means that the buyer requests a diminution of price, with the sale being maintained. On the other hand, the buyer can initiate the *redhibitoria* action, whereby he chooses to return the item. The purpose of the *redhibitoria actio* is the cancellation of the sale.¹⁹⁰ The buyer must then return the item and the seller must reimburse him in full for the price paid.¹⁹¹

Time limit for implementing an aedilition action

In order to better understand the time limit for implementing a guarantee action, it is important to determine its duration and computation. Indeed, Article 1648 of the Cameroonian Civil Code stipulates that the action resulting from redhibitory vices must be brought by the buyer within a period of two years following the discovery of the vice.

As far as the duration is concerned, Article 1648 grants the buyer a time limit of 2 years to take legal action. The article therefore clearly defines the period of time available to the buyer to submit his claim. Even so, it is important to mention that this period may seem a bit long, and may be prejudicial to the seller or SME in this position.

One can note that the Cameroonian Civil Code does not deal with claims by third parties and the effects of the lack of conformity by the seller. By not dealing with these issues, the Civil

¹⁸⁸ Tuñón <http://www.cisg.law.pace.edu/cisg/biblio/muria.html>. (Last accessed 23 November 2015).

¹⁸⁹ See Article 1644 of the Cameroonian Civil Code.

¹⁹⁰ Tuñón <http://www.cisg.law.pace.edu/cisg/biblio/muria.html>. (Last accessed: 23 November 2015).

¹⁹¹ Tuñón <http://www.cisg.law.pace.edu/cisg/biblio/muria.html>. (Last accessed: 23 November 2015).

Code places enterprises, especially West and Central African SMEs, at the mercy of unreliable sellers, since these SMEs are usually in the position of a buyer. One can understand why the CISG has included this provision in article 40 of its text.¹⁹² Moreover, there is no provision in the Cameroonian Civil Code that expressly deals with the quantity, quality and nature of goods. Articles 1603 and 1604 simply oblige the seller to deliver the item sold “in the condition in which it was at the time of the sale.” This provision is not very clear and is also ambiguous. These articles fail to identify and enumerate the conditions under which one must determine the goods to be defective.

3.6. REMEDY FOR NON-PERFORMANCE OF CONTRACTS UNDER THE CAMEROONIAN CIVIL CODE

The performance of a contract depends on its content and the different terms agreed on by the parties. The parties must comply with these terms in order to perform a contract well¹⁹³. However, when one party does not perform its obligation, it exposes itself to sanctions. The non-performance may be a delay of performance, which means that the obligation is performed late in comparison with the due date agreed on in the contract.¹⁹⁴ The non-performance may also be total or partial. Indeed, the Civil Code foresees that in cases of non-performance of an obligation, the creditor may seek to repair this non-performance by obtaining the performance of the contract. In this case, he may request the judge to order a forced fulfillment, which may be specific. This means that the debtor will be obliged to perform the due delivery. Alternatively, the debtor may be requested to pay damages in compensation, or merely to terminate the contract.¹⁹⁵

3.6.1. Specific performance

In contrast to the common law, where the primary remedy is damages, and where the Court only grants specific performance when damages would be inadequate compensation, and that Court also has a discretionary power to decide whether or not it will grant specific

¹⁹² See Article 40 of the CISG.

¹⁹³ Shavell 2005 (11) *Harvard Law School Cambridge* 21-38.

¹⁹⁴ Le Net *Performance and Non-performance of Contract Law of Vietnam*.

¹⁹⁵ Courlet and Tiberghien 1986 (107) *Persee Scientific Journal* 607-616.

performance, the situation is quite different under the Cameroonian Civil Code, which is relied on in the civil law system.¹⁹⁶ Thus, the primary remedy for non-performance under the Cameroon Civil Code is specific performance, and the court must grant it based on certain requirements.¹⁹⁷ It is important to note that contrary to the common law system, the Court does not have the discretionary power to grant specific performance.¹⁹⁸ The requirements to grant specific performance are dictated by the law, and these requirements must be observed by the judge.

3.6.1.1. Specific performance: examination of the notion

In order to better understand the notion of specific performance, as well as its character and enforcement under Cameroonian law, it is important to first explore the classical period of Roman law.

3.6.1.1.1. Specific performance under Roman law

During the Roman law period, the creditor had the right to incarcerate his debtor, enslave him or even kill him.¹⁹⁹ Later, during the classical period, the creditor had the right to monetary compensation, and the decision by the *praetor* to award damages, which brought about the obligation “to do” or “to refrain from doing”, was executed against the property of debtor.²⁰⁰ The creditor only received damages as a result of the non-performance of the obligation.

During the Middle Ages, commentators developed the idea of enforcing a contractual obligation on a debtor, and it is during these commentaries that a distinction was drawn between the obligation “to do” or “not to do”, and the obligation to give”.²⁰¹ According to Bartolus, who was considered to be one of the most important commentators at this time, determined that it was possible to enforce the performance of a contract when the obligation

¹⁹⁶ Lando & Caspar 2004 (24) *International Review of Law and Economics* 473–476.

¹⁹⁷ Musgrave 2009 (34) *UWA Law Review* 302-308.

¹⁹⁸ Musgrave 2009 (34) *UWA Law Review* 302-308.

¹⁹⁹ Jackson 2008 (24) *Tul. L. Rev* 401-416.

²⁰⁰ Litvinoff *The Law of Obligation* 8.

²⁰¹ Berryman 1985 (17) *Ottawa L Rev* 295, 318.

is “to give”. However, it was therefore impossible, even unacceptable, to enforce performance when it was related to an obligation “to do” or “not to do”, because it threatens the personal freedom of the debtor.²⁰² In the same vein, Pothier, who greatly influenced the drafters of the French Civil Code in his writings on the law of obligations, asserted that no one could be forced into a specific act.²⁰³

According to Pothier, the obligation “to give” may be enforced by seizure, and the obligation “to do” or “not to do” may not be enforced. The plaintiff must, in this case, rather receive damages.²⁰⁴ The need to guarantee and defend the personal freedom of the debtor from any attack and protect him from violence has motivated scholars to conceive and adopt the notion of specific performance.²⁰⁵ This concern for the personal freedom of the debtor and the protection of the debtor from any violence was consolidated and enshrined in Article 1142 of the Cameroon Civil Code.

Specific performance is catered for by article 1142 of the Civil Code, which provides that any obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor. The drafting of this article is conceived in such a way that it seems to appear *a priori* that the remedy for non-performance involves the condemnation of damages, thereby excluding, by assumption, condemnation of specific performance.²⁰⁶ Thus, even if it is true that there is no article in the Civil Code which expressly recognises the right of a creditor to claim specific performance in cases of the non-performance of his debtor, it is important to note that the case law, through the interpretation of articles 1143, 1144 and 1184, highlights article 1142 and establishes this right of specific performance.²⁰⁷

3.6.1.1.2. The substitution of an item

As previously mentioned, the Cameroon Civil Code is based on the French Civil Code. The fact that this system draws a distinction between the obligation “to do” or “not to do” and the obligation “to give” means that the enforcement of an obligation differs according to the type

²⁰² Bartolus 2009 (5) *Louisiana Law Review* 193-199.

²⁰³ Pothier is a commentator on the French legal system. He drafted the first French Civil Code.

²⁰⁴ Pothier was quoted by Daniel Chipman in “An essay on the law of contracts: for the payment of specific articles” 2011, p.18.

²⁰⁵ Dawson 1959 (57) *Dawson Michigan Law Review* 495-538.

²⁰⁶ Malaurie, Aynès, Stoffel-Munck *Les obligations* 23.

²⁰⁷ Rowan 2012 (18) *Oxford University Press* 265.

of obligation.²⁰⁸ Indeed, the enforcement of an obligation “to give”, which is viewed as an obligation to transfer property, does not actually cause any problems, since ownership is simply transferred through the conclusion of the contract. As far as the delivery of the goods contracted for is concerned, delivery may either take place by forcing the seller to deliver, or through an attachment executed by a designated official of the court.²⁰⁹

With regard to the obligations “to do” and “not to do”, the former applies when the debtor has to perform a positive act or service other than a transfer of property. The latter is an obligation to refrain from certain acts. These obligations, at first glance, may lead one to think that a debtor always has the right to choose damages and escape the duty to perform, as the article stipulates that “every obligation to do or not to do resolves itself in damages in case of non-performance”. However, a closer examination of article 1142 reveals the contrary.

In order to better understand and explain the reason for this article, it is important to examine the history related to its adoption. Indeed, before the 1789 revolution in France, the functions of judges were inherited and sold.²¹⁰ This situation created an elite group and gave great power to this group of judges, which could exercise significant control and power over the population, which was dangerous. Therefore, in order to reduce that power and protect the population, it was decided to grant the debtor the right to choose between performance or damages, and leave the matter to the discretion of a judge, who might impose strict conditions on the debtor.²¹¹

Another reason is that because the drafting of the Civil Code occurred during the time of the French Revolution, notions such as freedom and liberty were still fresh in the drafters’ minds, and article 1142 was therefore based on these two values, namely freedom and liberty.²¹² Therefore, this article may only apply when it is not possible to perform an obligation because of its personal character, which requires special skills of the debtor. In this case, one cannot force the debtor to perform an obligation - the only remedy available to the creditor is damages. In return, on any obligation which does not personally involve the debtor, the creditor has the right to claim specific performance.²¹³

²⁰⁸ Viney 2013 (6) *Capitant Law Review* 256-289.

²⁰⁹ Viney 2013 (6) *Capitant Law Review* 256-289.

²¹⁰ Nicholas *The French Law of Contract* 219.

²¹¹ Vranken 1999 (39) *UNSWLawJl* 22.

²¹² Holtman 1981 *The French Review* Published by: American Association of Teachers of French 215 – 222.

²¹³ Lebois 2013 *Capitant Law Review* 18-42.

The best illustration of an obligation which does not involve the person is the obligation to “give”, which can be the sale of goods. Besides, this conclusion regarding article 1142 is supported when examining articles 1143 and 1144.

Article 1143 grants the creditor the right to ask the court to eliminate, at the expense of the debtor, what has been done in violation of the contract. In addition, the language of this article makes it clear that the Court cannot deny this remedy to the creditor when he relies on this article to claim specific performance.²¹⁴ Article 1144 of the civil code comes again reinforce by providing that the substitution of the thing is allowed when it relates to an obligation to give. In the light of article 1144 of the Civil Code, the creditor may perform the obligation himself, at the debtor’s expense. It is important to note here that the creditor, before engaging in such performance, must obtain the authorisation of the Court.

Based on a closer examination of Articles 1142 and 1143 of the Civil Code and their legal history, it appears that specific performance is achievable in all obligations where the skills of or performance by the debtor himself is not required. It is a right appertaining to the creditor, and represents the primary remedy in the French system.

3.6.1.1.3. The right of the creditor to claim specific performance

Contrary to the common law system, where the Court has the discretionary power to grant specific performance,²¹⁵ in the Civil Code, this right belongs to the claimant.²¹⁶ The Court is then under the obligation to grant specific performance as soon as the requirements are met. The Court does not have discretionary power in this matter, even if there appear to be certain circumstances where the right to receive performance is limited, such as when it is impossible to perform the contract. In this case, the judge may refuse to enforce the contract and therefore grant the claimant damages in compensation.²¹⁷ Another restriction may be where it is unconscionable or unfair to carry out the performance of the contract. In such cases, the Court may refuse to enforce the contract, even if it will be unfair to do so.

²¹⁴ Fitzgerald 2009 *Institute of International Commercial Law* 12-20.

²¹⁵ Lucke “Specific Performance At Common Law History And Present Nature Of The Action For Money Due Upon Simple Contract”, also Cf. Rules of the Supreme Court 1965 (Tas.), 0. 3, r. 8; Rules of the Supreme Court, 1909 (W.A.) 0. 111, r. 7; Rules of the Supreme Court of the State of Victoria, 0. 111, r. 5

²¹⁶ Henrik Lando & Caspar Rose 2004 (24) *International Review of Law and Economics* 473–487.

²¹⁷ Didier *Forced execution in contractual obligations to do* 29.

Indeed, in spite of the general coverage of article 1142 of the Civil Code, it is acknowledged that the creditor may submit to the judge that he pronounces the specific performance, whether through a direct process (seizure) or an indirect process, as a constraint.²¹⁸ The principle of specific performance is first of all conformity to article 1184 para 2 of the Civil Code, according to which the party for whom the obligation has not been performed has the choice either to compel the other party to perform the obligation if possible, or to request its avoidance with damages.²¹⁹ Cameroon's Tribunal has, for the most part, adopted the thesis according to which all obligations may be subject to specific performance- that is the obligation to give, to do, or not to do.²²⁰ The creditor has an option regarding a remedy for non-performance.

3.6.2. Remedy involving damages

Traditionally, damage is defined in Cameroonian civil law as the blow to the patrimonial and extra-patrimonial interests of a person, who can be referred to as the so-called 'victim'.²²¹ Article 1147 of Cameroonian civil code states that "A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part".²²² This article clearly stipulates that the damage resides in the total or partial non-performance, or a delay in performance. In order to recover both types of damages, the aggrieved party or claimant has to comply with certain requirements, namely foreseeability, fault and certainty.

²¹⁸ Didier *Forced execution in contractual obligations to do* 29.

²¹⁹ Courlet and Tiberghien 1986 (107) *Persee Scientific Journal* 607-616.

²²⁰ See Summaries of Judgements, Advisory Opinions and orders of the International Court of Justice. 1997 – 2002.

²²¹ See "Study of Civil Liability Systems for Remedying Environmental Damage". This first report, which was originally prepared by McKenna & CoMcKenna & Co, is now known as CMS Cameron McKenna, as at 31st December 1995.

²²² See article 1147 of the Cameroonian Civil Code.

3.6.2.1. System of damages under Cameroonian law

In the civil law system, before any litigation can take place, the creditor must make a formal demand for the debtor to pay the amount due or perform his obligation. This relates to a request whereby a creditor officially requires the debtor to pay him in a stipulated period of time.²²³ The requirement of the delivery of a notice to the debtor comes from case law and legislative provisions. This notice is, however, required by the judge, unless otherwise stipulated by the parties in the contract.²²⁴ It is thus possible for the parties to incorporate an exemption of formal demand or notice in the contract.²²⁵ Therefore, the Civil Code requires that certain criteria regarding damages are met before the judge can award compensation. These requirements are the following: foreseeability, certainty and fault.

Foreseeability: Article 1150 of the Cameroonian Civil Code provides that “A debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled”. In light of this, it is obvious that the Civil Code requires foreseeability before attaching liability. This foreseeability requirement applies to both types of damages, and the two amounts of damages. It has the effect of restricting damages, especially that for lost profits. The Cameroonian legal system requires that both the nature of the damage and the damage value ratio are foreseeable.²²⁶ The parties must be able to foresee the occurrence of damages that are more or less specific and obvious, as well as the severity of damages.²²⁷ This approach involves the concept of moderation with regard to damages. Pothier argues that the Court should rely on moderation and should not have to order a debtor to pay an amount beyond that which he could imagine or envisage.²²⁸

Certainty: To be repairable, the damage must be certain in its existence, and not in its amount. Thus, future damages may be recovered as long as they are certain to occur in the future.²²⁹

²²³ Pejovic http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf p. 827. (Last accessed: 23 November 2015).

²²⁴ See Article 1139 of the Civil Code.

²²⁵ Pejovic http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf p. 827. (Last accessed: 23 November 2015).

²²⁶ Ferrari 1993 *Louisiana Law Review* 1-6.

²²⁷ Ferrari 1993 *Louisiana Law Review* 1-6.

²²⁸ Pothier *Traite des Obligations* For translation see Pothier in *Treatise on Obligations*, Trans F Martin (Union New Jersey, the Law Book Exchange Ltd. 1999).

²²⁹ Pothier *Traite des Obligations* For translation see Pothier in *Treatise on Obligations*, Trans F Martin (Union New Jersey, the Law Book Exchange Ltd. 1999).

Fault: In the Cameroonian Civil Code, the existence of fault is the basis for granting damages to the creditor. Indeed, the debtor is responsible for damages that he caused intentionally or negligently, but he will not be responsible for purely accidental and force majeure damages.²³⁰ Under Cameroonian law, this concept of contractual liability based on fault is found in article 1147 of the Civil Code. Thus, according to article 1149, the claimant may recover the loss incurred and the benefit of which he was deprived.

3.6.2.2. Calculation of damages

In a contract of sale that is terminated or avoided, the aggrieved party may obtain damages from the party at fault.²³¹ Indeed, the amount of damage granted by the judge must cover an integral part of the repairable prejudice by the creditor, but does not have to exceed it.²³² Thus, an assessment of prejudice and granting of damage depends on whether one is dealing with a delay in performance, or total or partial non-performance.

In cases of total or partial non-performance, Article 1149 of the Civil Code stipulates that “Damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of, subject to the exceptions and modifications”. In light of this article, the legislator has intended to establish a protector principle aimed at integral award compensation. Indeed, a tax assessment of an award compensation of this prejudice is based on losses sustained and losses of profit.²³³ Thus, a buyer who does not receive the goods ordered, or only partially receives them, and who is then obliged to order the goods somewhere else and at a higher price, will have the right to reimbursement in the event of the termination of the contract, not only for the amount paid, but also for the additional price he has paid, and the benefit of resale which he lost.²³⁴ The loss sustained includes the costs of proceedings and the loss related to the injury suffered by the creditor, as well as the loss of profit, including lost opportunities and fees.²³⁵

²³⁰ Hom, Kotz and Leser 1983 (46) *Modern Law Review* 244-248.

²³¹ Pejovic http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf. (Last accessed: 23 November 2015).

²³² Pejovic http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf. (Last accessed: 23 November 2015).

²³³ André www.lautreprepa.fr. (Last accessed : 23 November 2015).

²³⁴ André www.lautreprepa.fr. (Last accessed : 23 November 2015).

²³⁵ André www.lautreprepa.fr. (Last accessed : 23 November 2015).

With regard to the reparation of damages resulting from a delay of performance, the assessment is based on Article 1153 paragraph 3 of the Civil Code, which stipulates that “A creditor to whom his debtor in delay has caused, by his bad faith, a loss independent of that delay may obtain damages distinct from the interest on arrears of the debt”.²³⁶ The same article, in paragraph 1, specifies that these damages are due, without the creditor having to prove any loss. This means that an award of compensation due to a delay of performance seems to have a mutually inclusive character.

In terms of a claim for a reduction in price, the Cameroonian Civil Code, in Article 1645, gives the buyer of defective goods the right to claim for a reduction in price if the goods have any undisclosed defects. The amount of the reduction will be determined at the discretion of the judge.²³⁷

However, it is important to highlight the fact that the Cameroonian Civil Code does not provide a formula according to which the Court must proceed in order to calculate the damage - this is left to the judge’s discretion. Furthermore, the Civil Code does not foresee an abstract calculation system, as in article 76 of the CISG.²³⁸ This point is nevertheless important in the international trade context, where the prices of goods are frequently changed. Indeed, it may be that at the time when the contract is avoided, the price of goods has decreased in respect of the initial price envisaged in the contract. This provision then allows the creditor who has not made a purchase or resale of the goods to recover the difference between the price fixed by the contract and the current price at the time of the avoidance of the contract. The Cameroonian Civil Code fails to include this important provision. This gap does not allow SMEs to clearly calculate their damage in cases where the initial price agreed on in the contract has changed at the time when the contract is avoided.

3.6.3. TERMINATION OF CONTRACTS

The termination of contracts is a delicate art under Cameroonian civil law. According to article 1184 of the Cameroonian Civil Code, “A condition subsequent is one which, when it is

²³⁶ See Article 1153 paragraph 3 of the Cameroonian Civil Code.

²³⁷ See Article 1645 of the Civil Code.

²³⁸ See Article 76 of the CISG.

fulfilled, brings about the revocation of the obligation, and which put things back in the same condition as if the obligation had not existed". This means that the non-performance of a contract by one of the contracting parties may lead the other to request the termination of the contract. Thus, faced with this situation of non-performance, the creditor, who may be the seller or the buyer, has the choice, as previously mentioned, of requesting specific performance or having the contract terminated.

With regard to the termination of the contract; the claimant will have to refer his case to a Court in order to have request damages. Under Cameroonian civil law, and precisely Article 1184 paragraph 3, even though there are some exceptions, the principle is that only the judge may pronounce the termination of the contract after verifying that the requirements have been met. The principle is therefore one of the Court's intervention as a prerequisite for the termination of any contract.²³⁹

3.6.4. The intervention of the judge as a prerequisite

In the Cameroonian legal system, the intervention of the judge is necessary and must precede the termination of the contract. This prerequisite is provided by paragraph 3 of Article 1184, which stipulates that "Termination of contract must be applied for in court, and the defendant may be granted time according to circumstance". It is therefore clear that the creditor cannot proceed to the termination of the contract by himself, as Article 1134 requires a priori authorisation of the judge.

The judge in fact disposes of a certain part of the broad operation in the consideration of non-performance.²⁴⁰ It will be up to the judge to review the circumstances of the non-performance and the good faith of the contracting parties. All the elements, even those posterior to the conclusion of the contract, may be taken into account. Therefore, if the debtor has started to perform his obligation, the judge may consider this in his decision and grant the debtor a grace period, in order to give him time to perform his obligation.²⁴¹ The

²³⁹Carbonnier *Les Obligations* 302.

²⁴⁰Contract Law Remedies | Free Contract Law Essay Read more at Law Teacher: <http://www.lawteacher.net/free-law-essays/contract-law/contract-law-remedies.php#ixzz3bQQEMfnf>. (Last accessed: 23 November 2015).

²⁴¹Contract Law Remedies | Free Contract Law Essay Read more at Law Teacher: <http://www.lawteacher.net/free-law-essays/contract-law/contract-law-remedies.php#ixzz3bQQEMfnf>. (Last accessed: 23 November 2015).

judge may also request the debtor to pay damages. He may finally pronounce the partial or total termination of the contract.²⁴²

Indeed, the judge must establish non-performance, and this non-performance must be serious.²⁴³ In fact, the non-performance must concern a significant obligation included in the contract. For this purpose, the judge distinguishes between an accessory obligation and a main obligation, in order to establish if the non-performance was decisive for the contract, and therefore if the non-performance may result in the termination of the contract.²⁴⁴ Thus, from the time that a decisive obligation has not been performed, the termination of the contract may be granted.

However, it is important to note that the Cameroonian legal system, by making the intervention of the judge a prerequisite for the termination of the contract, may cause some inconvenience. The fact that the creditor's request relies wholly on the judge's supreme discretion may delay an unavoidable breach of contract, by significantly adding to the injury resulting from it. If a priori this control is viewed as being effective, it is also important to bear in mind that in the context of international market requirements, which demand swift actions, this may be risky for SMEs.

In the Cameroonian context, where the Court process is characterised by slowness of trials, if one imagines a situation in which a Cameroonian SME performing in the international market receives non-conforming perishable goods from his overseas seller, and would like to avoid the contract based on this ground, which normally constitutes a fundamental breach, he will be obliged to approach the judge and wait for his decision. The Civil Code, by not foreseeing a unilateral termination, does not permit the aggrieved party to safeguard his interests first, before avoidance of the contract.

However, if the principle is to refer a case of non-performance to a judge before proceeding to the termination of the contract, it is acknowledged by jurisprudence that the parties may avoid this judicial intervention in terms of the provisions of Article 1134, by including in the contract, at the moment of its conclusion, a termination clause. In fact, by virtue of the principle of contractual freedom, the parties to a contract may decide on the eventual outcome of the non-performance by one party, by foreseeing the termination of the contract.

²⁴² Contract Law Remedies | Free Contract Law Essay Read more at Law Teacher: <http://www.lawteacher.net/free-law-essays/contract-law/contract-law-remedies.php#ixzz3bQQEMfnf>. (Last accessed: 23 November 2015).

²⁴³ Contract Law Remedies | Free Contract Law Essay Read more at Law Teacher: <http://www.lawteacher.net/free-law-essays/contract-law/contract-law-remedies.php#ixzz3bQQEMfnf>. (Last accessed: 23 November 2015).

²⁴⁴ Rivkin, David, *Lex Mercatoria and Force majeure* 18.

The termination clause allows the creditor to unilaterally terminate the contract, without referring the matter to the Court. Thus, by taking these difficulties into account, the prerequisite intervention of the judge may be excluded. The unilateral termination of a contract is allowed in matters of sale, as indicated in article 1657 of the Civil Code.

This has resulted in the Cameroonian law concept of avoidance being either automatic or judicial. It is automatic if the parties have included it in the contract, and it is to the benefit of each party. It is judicial when it is necessary to refer the matter to a judge. However, the Civil Code provides that a judge may always be approached, even in the absence of a provision which foresees this possibility.²⁴⁵ The principle of the parties unilaterally terminating a contract remains an exception to the Cameroonian law, since even though the parties would have foreseen the unilateral breach of the contract, the claimant should still submit it before the court, in order for the judge to approve the termination.²⁴⁶

CONCLUSION

In light of these provisions contained in the Cameroonian Civil Code, one may observe that SMEs operating in sub-saharan African countries, particularly Cameroon, must be greatly mistrusted if the Civil Code must apply, as the law governing their contracts, due to the juridical and judicial insecurity that prevails.²⁴⁷ The texts governing business law in Cameroon are maladjusted to the needs of the modern economy, and are characterised more by the absence of the publication of legal rules.²⁴⁸ Although this judicial insecurity arises mainly from the delay in justice due to the slowness of trials, unpredictability of the courts, corruption of the judicial system, and difficulty in enforcing judgments,²⁴⁹ it is worth noting that in matters of contractual sale, Cameroonian law is silent on several important issues regarding the formation of contracts and obligations of the parties. For instance, within the domain of the formation of contracts, specifically with regard to mutual consent, there are no provisions in the Cameroonian Civil Code which are dedicated to mutual consent, will concordance, definition of an offer, counter-offer, acceptance of contracts,²⁵⁰

²⁴⁵ See Article 1184 of the Civil Code.

²⁴⁶ Cartwright, Vogenauer and Whittaker <http://www.ub.unibas.ch/tox/GBV/563480068/PDF>. (Last accessed: 23 November 2015).

²⁴⁷ Cartwright, Vogenauer and Whittaker <http://www.ub.unibas.ch/tox/GBV/563480068/PDF>. (Last accessed: 23 November 2015).

²⁴⁸ Fombad www.nyulawglobal.org/globalex/cameroon1.htm. (Last accessed 23 November 2015).

²⁴⁹ Fombad www.nyulawglobal.org/globalex/cameroon1.htm. (Last accessed 23 November 2015).

²⁵⁰ Montero & Damoulin <http://www.crid.be/pdf/public/4563.pdf> (Last Accessed: 23 November 2015).

difficulties regarding form, and the inclusion of standard terms of the contract, which are today the key practices followed by international traders for concluding contracts.

One may also conclude, in light of this examination of the Cameroon legal system in relation to contracts, that it is difficult to see how Central and West African SMEs, which are already exposed to the law of large enterprises, may rely on this Cameroonian Civil Code in order to resolve issues regarding their disputes. In the same vein, with regard to the performance of contracts, one can note that this Civil Code has been conceived for governing mostly domestic problems between traders, since it is silent again on many important points which characterise the lives of traders in international commerce, such as INCOTERMS, the process for handing over documents relating to the sale of goods. In a nutshell, it is clear that the Cameroonian Civil Code appears to be maladjusted and inappropriate to international commerce, and it would not therefore be wise for SMEs to rely on its provisions in order to operate in the international trade context. One may well understand why there is a need for the introduction and adoption of new legislation which integrates the realities that are being faced by West and Central African countries.

3.7. HISTORICAL PERSPECTIVE OF THE OHADA

The idea of harmonising African law was first expressed in May 1963 at a meeting of the Ministers of Justice, led by Professor René David. This idea was supported by eminent African jurists and resulted in the Convention of the African and Malagasy Common Organization (AMCO) and the African Union and Mauritius.²⁵¹

In article II of the Convention establishing AMCO, the following was stated: “The High Contracting Parties undertake to take all measures to harmonize their respective trade laws to the extent consistent with requirements that result from the requirements of each of them”.²⁵² Unfortunately, the organ in charge of facilitating this harmonisation, namely the Bureau for Research and Legislative Studies (BAMREL), which was established by article 3 of the Convention of July 1975, was not provided with sufficient funds for realising the project.

²⁵¹Aregba “The globalisation of the economy requires the harmonisation of the laws and practices of the law”. OHADA is “both a factor for the economic development and an engine of regional integration” Niamey June 9th and 10th, 1999. P.8.

²⁵²Mouloul *Understanding 17*; see also Diallo *Vente 14*.

It was only in April 1991 that the idea resurfaced at the meeting of finance ministers of the Franc CFA area, which took place in Ouagadougou, the capital of Burkina Faso. During this meeting, a group of experts led by the Senegalese Justice Keba M'Baye²⁵³ was appointed to lead a feasibility study based on a form of legal collaboration that would ensure economic integration and attract investment.²⁵⁴ In October 1992, during the African Summit in Libreville, Gabon, Mr. Mbaye presented his report, which recommended the creation of a supranational organisation comprising the entire Franc area.²⁵⁵

He argued for an integration and unification of the law, which would replace pre-existing national laws and be directly applicable to all signatory members.²⁵⁶ Thus, Summit member adopted this suggestion and was opened the treaty to all African states, whether or not members of the African Union (UA).²⁵⁷ Thus, the first three Uniform Acts (General Commercial Law, Commercial Companies and Economic Interest Groups, and Secured Transactions) were adopted on April 17, 1997, and entered into force on January 1, 1998. Amendments to the Acts on Secured Transactions and General Commercial Law were adopted on December 15, 2010, and entered into force on May 15, 2011.

3.8. BACKGROUND TO THE OHADA AND ITS INSTITUTIONAL FRAMEWORK

M. Aregba Polo, Permanent Secretary of the OHADA in Niamey, asserted that “The globalization of the economy requires the harmonization of the laws and practices of the law”. The OHADA is “both a factor for the economic development and an engine of regional integration”.²⁵⁸ These assertions clearly indicate that the OHADA has been created for the purpose of achieving economic integration. This concern about the need for the creation of integrated economic area was highlighted by the legal and judicial insecurity resulting from

²⁵³ Mbaye died in 2007 after having occupied the offices of Chief of Justice of the Senegalese Supreme Court, Chief Justice of the Senegalese Constitutional Council, and Vice President of the International Court of Justice.

²⁵⁴ Kirsch 1998 *Penant review* 129. Walsh <https://openknowledge.worldbank.org/bitstream/handle/10986/2912/574450ESW0P1121n0Afri-ca010June02010.pdf?sequence=1&isAllowed=y>. (Last accessed: 23 November 2015).

²⁵⁵ See also Secretariat of the OHADA comments available online at: http://perso.mediaserv.net/fatboy/cd_ohada/pres/pres.02.en.html. (Last accessed: 23 November 2015).

²⁵⁶ Yakubu J. A “Community Laws in International Business Transactions” in *Unified Business Law for Africa: Common Law Perspectives on OHADA*, ed. Claire Moore-Dickerson.

²⁵⁷ Beauchard and Mahutodji <http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/17-2011CanOHADAIncrease.pdf?resourceurlname=17-2011CanOHADAIncrease.pdf> (Last accessed: 23 November 2015).

²⁵⁸ Mouloul *Understanding* 17.

the dilapidated and obsolete nature of the applicable laws.²⁵⁹ In support of these realities, Me Keba M'Baye stated that "The law within the fourteen franc zone countries is like a harlequin dress made of fragments and pieces. In addition to this diversity of texts, we can also notice their inadequacy to the current economic context".

Therefore, it is clear that legal and judicial security would be a prerequisite for establishing a sustainable confidence.²⁶⁰ It had become necessary for African countries to have a single law, a law appropriate for African contexts, adapted to the real needs of business, and which could ensure the security of creditors, investors and traders – in short, a law that could promote and support economic growth.²⁶¹

The Harmonization of Business Law in Africa (with its French acronym of "Organisation pour L'harmonisation du Droit des Affaires en Afrique" and acronym of OHADA) was established by the initiative of heads of state and African traders, who complained that the business environment was not secure.²⁶² It was created by the treaty signed by 14 African heads of state in Port Louis (Mauritius) on 17 October 1993. The treaty came into force on September 18, 1995, and now has 17 member states.²⁶³ As per Articles 5 and 6 of the Treaty, OHADA statutes are prepared by the Permanent Secretariat in accordance with governments of member states and are adopted by the Council of Ministers on the advice of the CCJA. These statutes are recognised as "Uniform Acts"²⁶⁴ and are "exclusively business-related".²⁶⁵ This tool constitutes a unique experiment involving the legal integration of states and sharing in different economic, trade and monetary unions.²⁶⁶ The OHADA has produced a series of standardised pieces of legislation on business, and counts nine Uniform Acts

²⁵⁹ Aregba "The globalisation of the economy requires the harmonisation of the laws and practices of the law". OHADA is "both a factor for the economic development and an engine of regional integration" Niamey June 9th and 10th, 1999. P.12.

²⁶⁰ Article 1 of the Treaty is clear that "The objective of the (...) Treaty is the harmonisation of business laws in the contracting states by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging Arbitration for the settlement of contractual disputes."

²⁶¹ Those commentators include: Yakubu *Business* 1; Martor et al *Business* 1; Mancuso 2006 (5) 2 *Jl TR LP* 55 59; Dickerson 2005 (44) *Colum J Transnat'l L* 17; Feneon *Arbitration* 53.

²⁶² Houanye and Shen *Business Law in Africa* 3.

²⁶³ In the order of ratification, the OHADA member states are: Guinea-Bissau (01/15/1994), Senegal (06/14/1994), Central Africa Republic (01/13/1995), Mali (02/07/1995), Comoros (02/20/1995), Burkina Faso (03/06/1995), Benin (03/08/1995), Niger (06/05/1995), Ivory Coast (09/29/1995), Cameroon (10/20/1995), Togo (10/27/1995), Chad (04/13/1996), Congo (05/28/1997), Gabon (02/02/1998), Equatorial Guinea (04/16/1999), Guinea (05/05/2000), Democratic Republic of Congo (09/13/2012). See the table in Joseph Issa-Sayegh, Paul-Gerard Pougoue, and J. Michel Sawadogo, "OHADA: Traité et Actes Uniformes, Commentés et Annotés (Poitiers, France: Juriscope 2002).

²⁶⁴ Article 5 al. 1 of the Treaty; For instances of Uniform Acts currently in force, go to: <http://www.ohada.com/actes-uniformes.html>.

²⁶⁵ Dickerson 2005 (44) *Colum J Transnat'l L* 17 20; Coetzee/De Gama 2006 (10) 1 *VJ* 15 19.

²⁶⁶ ECOWAS, UEMOA and CEMAC.

which are in force,²⁶⁷ namely the Acts relating to General Commercial Law¹, and Commercial Companies and Economic Interest Group;²⁶⁸ Acts governing Securities,²⁶⁹ Arbitration,²⁷⁰ and the Carriage of Goods by Road;²⁷¹ Acts regulating Simplified Recovery Procedures and Enforcement Measures,²⁷² Collective Insolvency Proceedings,²⁷³ and Accounting Systems;²⁷⁴ and more recently, the Uniform Act relating to Cooperative Corporation.²⁷⁵ It is important to

²⁶⁷ The Uniform Acts cover the following: General Commercial Law, Companies, Secured Transactions, Bankruptcy, Arbitration, Simplified Debt Collection and Enforcement Measures, Accounting, Carriage of Goods by Road, and Cooperative Companies.

²⁶⁸ This new Act was adopted on 30 January 2014 and entered into force on 05 May 2014, in order to substitute the old Act of 17 April 1997. It is made up of two parts. The first part sets forth the general provisions common to all forms of commercial companies, and the second part regulates the various forms of commercial companies, namely General Partnerships, Limited Partnerships, Limited Liability Companies, Limited Companies, Joint Venture Companies, De facto Companies, and Economic Interest Groups. The new Uniform Acts also include Simplified Joint Stock Companies. This new text introduces important provisions relating to the stock exchange law, as well as improving the processing of regulated conventions, in order to facilitate corporate governance. The third part provides details regarding contraventions of the Constitution, as well as the functioning, dissolution and liquidation of Commercial Companies.

²⁶⁹ The Act was adopted on 15 December 2010 and came into force on 16 May 2011, in order to replace the old Act of 17 April 1997. It introduces the professional security agent in charge of other management securities, as well as their constitution and achievement. This law regulates different securities, such as personal guarantees, property guarantees, mortgages and real estate securities.

²⁷⁰ Adopted on 11 March 1999 and entered into force on 11 June 1999. This law contains the general principles of arbitration law, rule of different stages of proceedings, the requirements for the acknowledgement and enforcement of foreign arbitral awards, and the right of recourse or appeal against awards (appeal for a rescission, appeal for a review, and third opposition).

²⁷¹ Adopted on 22 March 2003 and entered into force on 01 January 2004. The contract of carriage of goods by road applies to all contracts of carriage by road when the places for taking possession of goods and delivery, as agreed on by the parties, are located either within the territory of the member state or of different states, of which at least one is a member of the OHADA.

²⁷² This Acts was adopted on 10 April 1998, and provides for two simple judiciary proceedings that can be implemented in order to force a debtor to perform his obligations. There is the order to pay and the order to deliver or provide restitution. This latter is accompanied by two seizure namely apprehension seizure and claiming seizure. With regard to the enforcement proceeding, the Uniform Act regulates the basic data for the execution of a writ and the different enforcement proceedings: sequestering of property and enforceable garnishment.

²⁷³ Adopted on 10 April 1998 and entered into force on 01 January 1999. This Act regulates the collective procedures related to court orders and judiciary control in matters involving insolvency, and defines the patrimonial, professional, civil and criminal sanctions applicable to the debtor and leader of an insolvency company.

²⁷⁴ Adopted on 22 March 2003 and entered into force on 01 January 2004. This Uniform Act establishes accounting rules, plans, rules relating to the bookkeeping of accounts, and the presentation of financial statements and financial reporting. It includes the personal and legal accounts of companies, consolidated accounts, combined accounts, as well as criminal provisions.

²⁷⁵ This law was adopted by the Council of Ministers on 17 April 1997 and called the Uniform Acts on General Commercial Law. It consisted of 289 Articles and was amended on 15 December 2010. The newly amended Uniform Acts of 2010 regulate trader and entrepreneur status. The new status of entrepreneur was adopted during the 2010 amendment, with the aim of favouring the passage of actors from the informal economy to the formal economy, and regulating the economy. The Register of Trade and Personal Credit, which receives the registration of the natural and legal entity traders, as well as the registration of property security; The lease for professional use substituting itself for the commercial lease, which provides specific protection for all professionals performing their activities on premises which

highlight the fact that other Uniform Acts, such as Uniform Acts relating to Contract Law, Labour Relations, and the Uniform Act on Evidence, are still in process. Moreover, the OHADA's institutional framework is made up of five components²⁷⁶, namely the Council of Ministers,²⁷⁷ Permanent Secretariat,²⁷⁸ Common Court of Justice and Arbitration,²⁷⁹ (CCJA) Regional Training Center for Legal Officers²⁸⁰ (ERSUMA), and the Conference of Heads of States and Governments.²⁸¹

In terms of the Commercial Act, which is the subject of this study to a large extent, it is important to note that before the adoption of the current version, most matters relating to general commercial law and associated issues were governed by the 1807 French Commercial Code, which had been introduced in French colonies since 1850. Ever since the independence of the majority of African countries, this Code had not been amended.

they do not own; The stock in trade made up of all means permitting traders to attract and retain customers.

A commercial intermediary (broker, delivery man, commercial agent) who is considered to be natural or legal entity acting professionally on behalf of another person, in order to conclude a legal act with a third party, an act which has a commercial character. The Commercial Sale regulates the contract of sale between traders, including the supply of goods destined for manufacturing or production.

²⁷⁶ Sarahlewis "The harmonization of Business Laws in Africa and its impact on investors", June 26, 2009.

²⁷⁷ See Article Art.27 (2)-30 of the OHADA Treaty. This institution consists of the Ministers of Justice and Finance of Member States. It remains the highest decision-making body and adopts, by consensus, the Uniform Law. This council has an administrative, regulatory and legislative function.

²⁷⁸ See Article Art.33-40 of the OHADA. Attached to the service of the Council of Ministers, it is responsible for the drafting of Uniform Acts in coordination with member states and the CCJA, and introduces these drafts at the Council of Ministers' meeting. It also plans for the harmonisation of the annual programme of business law, and handles official news publications of the OHADA.

²⁷⁹ See Art 31-49 of OHADA. It is an organ composed of nine judges elected by the Council of Ministers to a non-renewable term of seven years. The Court has a double function with regard to the law. It serves both as a forum for international arbitration and as the court of last resort for judgments rendered and arbitral awards issued within member states. It also has a judicial attribute, which consists of the interpretation of the Treaty, Uniform Acts, and regulations. It is worth noting that the CCJA is one of the OHADA's strongest supranational institutions, as it is a Supreme Court for judgments delivered by national Courts of Appeal.

²⁸⁰ See Art.41-42 of the OHADA. The role of this institution is to improve the legal environment of the member states by providing training to judges, lawyers, notaries, court experts and the OHADA law.

²⁸¹ See Article 27(1) of the OHADA.

3.9. SCOPE OF APPLICATION OF THE OHADA TREATY

The wide range of Uniform Acts requires that the geographical area within which they perform and the persons to whom these rules apply are clearly specified. The territorial field of OHADA application appears *a priori* to have already been fixed, as it covers only the contracting members.²⁸² Therefore, the OHADA Treaty applies to 17 countries. Those countries are for the most part Francophone countries. Even though the Treaty has listed the contracting members, this does not mean that its applicability is fixed. Indeed, the OHADA is open to all African countries belonging to the African Union, as well as those which do not. However, in this latter case, it is necessary to have a letter of invitation from all the contracting members. It is therefore the aim of the OHADA to expand its reach throughout Africa.²⁸³

3.9.1. Direct applicability according to article 10 of the OHADA provision: an overriding and supranational provision

In order to attract investors to Africa, the legislative organ of the OHADA has adopted uniform laws known as Uniform Acts. Article 10 of Title II stipulates that Uniform Acts are directly applicable to member states, notwithstanding any conflict that they may give rise to in relation to the previous or subsequent enactment of domestic laws. By virtue of the supranational rule, this article contains a rule relating to the repealing of domestic laws.²⁸⁴ Thus, unless otherwise indicated by the Uniform Acts themselves, the repealing effect of this article amounts to an abrogation of any legislative and statutory domestic law.²⁸⁵

This abovementioned article therefore clearly stipulates that the OHADA Uniform Acts supersede national laws.²⁸⁶ The Treaty provides that Uniform Acts should be entered into

²⁸² Tumnde <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 22 November 2015).

²⁸³ Tumnde <http://www.ohada.com/doctrine/ohadata/D-04-37.html>. (Last accessed: 22 November 2015).

²⁸⁴ Fagbayibo 2013 (16) *PELJ* 1-4.

²⁸⁵ See Article 14 of the OHADA Treaty. On a number of occasions, the CCJA has ruled that the OHADA laws are superior to any conflicting national laws.

²⁸⁶ The Common Court of Justice and Arbitration of the OHADA, in interpreting this article 10, has clearly indicated that the OHADA Treaty abrogates national laws that are contrary and even identical to the OHADA laws, with reference to two cases. One was in response to a request by the Ivoirian government, and the other was as a result of the court's review of an intra-state

force 90 days after their adoption. In addition, any party is allowed to rely on its provisions 30 days after their publication in the OHADA official journal. However, it is important to note that the application of Uniform Acts in the member states is restricted in terms of provisions which deal with matters related to criminal liabilities, criminal penalties, and other matters which were not included in the Treaty. Domestic laws only apply where the OHADA is silent.

3.9.2. Applicability of Uniform Acts by virtue of articles 234 to 236 relating to general commercial sales

In accordance with Article 234, the Uniform OHADA Acts apply to contracts for the sale of goods between traders, natural persons or legal persons, including contracts for the supply of goods for manufacturing or production. Article 234 provides, in paragraph 2, that the contract of sale is also subject to commercial provision if the parties have their place of business in an OHADA state, or if a rule of private international law leads to the law of an OHADA state.²⁸⁷

This article stipulates that Uniform Acts of the OHADA may be applied directly or indirectly. In principle, in order for the OHADA to be applied directly, the place of business of each party must be located in the contracting state. In addition, the indirect applicability of the OHADA means that the place of business of the parties is located in different states, without them necessarily being the contracting states. However, the state whose law will be applicable in terms of the rules of private international law must be a contracting state.

Indeed, the scope of this article 234(2) constitutes a considerable extension of the scope of application of the Uniform Acts, given that paragraph 2 establishes an additional possibility of application, even though the requirements of article 234(1) have not been met. However, this article highlights that the parties can agree otherwise and excludes the application of the OHADA sales law.

Articles 235 and 236 proceed by listing the categories of sales which are not applicable and ruled by the Uniform Acts.

arbitration. See J Issa-Sayegh "Reflexion et suggestions sur la mise en conformité du droit interne et des Etats parties avec les Actes Uniformes de l'OHADA et reciproquement » January-March 2005. Available at: <http://www.ohada.com>. (Last accessed: 23 November 2015).

²⁸⁷ See Article 234(2) of the Uniform Acts on General Commercial Law.

Article 235 paragraphs 1 stipulates that these provisions do not apply to sales of goods bought for personal, family and household use, unless the seller, at any time prior to, or at the time of the conclusion of the contract, did not know and should not have known that these goods were purchased for such use.

Article 236 highlights several categories of sales which are not subject to application by the Uniform Acts, namely: sales at auctions, sales by execution, or in any other way, through the authority of justice, sales of securities, effects of trade and currency, and operations with other financial instruments, sales of ships, vessels, air-cushion vehicles and aircrafts, and sales of electricity. However, an important criticism that can be levelled against the Uniform Acts is the lack of clarity regarding commercial sales. Like the old text, the new text does not provide any definition of a commercial sale, which would have helped to properly characterise a commercial sale.

3.10. THE FORMATION OF CONTRACTS OF SALE UNDER THE UNIFORM ACT OF THE OHADA RELATING TO GENERAL COMMERCIAL SALES

Before looking at the formation of contracts of sale according to elements such as acceptance, counter-offer, and the acceptance period provided by the Uniform Acts relating to Commercial Sales in Book VIII, Title II, it is important for this study to define the notion of contracts and contracts of sale, and to identify the various conflicts which influence the process of the formation of contracts, such as the principles of contractual freedom and mutual consent.

The Uniform Acts relating to Commercial Sales do not expressly define the concept of a contract, but it is important to remember, as previously mentioned in this study, that the OHADA legal system is modeled on the French system, and that domestic law is applied when the OHADA is silent on any issue.²⁸⁸

According to Article 1101 of the Napoleon Civil Code, a contract is an agreement by which one or several persons bind themselves towards one or several others, to give, to do or not to do something.²⁸⁹ Based on this definition, a contract is a manifestation of wills which connects one or more people, whether they are physical or moral. This definition retained by

²⁸⁸ Le Bars B *International Arbitration* 27.

²⁸⁹ See Article 1101 of the Civil Code.

the Cameroonian Civil Code is almost a transposition of the French Civil Code. These manifestations of will and meeting of minds is complex and made up of several steps, such as offer and acceptance, as well as the place and time of the formation of a contract.

A contract of sale is an agreement between a buyer and seller in relation to the sale.²⁹⁰ This contract of sale is formed by the combination of an offer and acceptance. One party takes the initiative by formulating an offer, and the other party manifests its agreement through an acceptance, either immediately or after a long discussion involving a series of counter-offers.²⁹¹

The Uniform Acts of the OHADA address the formation of contracts in this classic manner of an offer and acceptance.²⁹² An examination of domestic legislation reveals, in general, that there are no specific provisions applicable to the formation of contracts of sale. Thus, the mere agreement of the parties is sufficient for the valid conclusion, modification or termination of a contract.²⁹³

The OHADA Law does not take into account the notion of “consideration”, which is traditionally viewed as a prerequisite for the validity or enforceability of a contract in common law systems.²⁹⁴ The agreement of the parties is in itself sufficient to conclude a contract. It is therefore appropriate to refer to the principles and rules governing the general formation of contracts. In the OHADA’s legislations, a contract is formed by the combination of an offer and acceptance.²⁹⁵ This matter is governed by Articles 241 to 249 of the Uniform Acts relating to General Commercial Sales.

3.10.1. Offer and acceptance as requirements for a valid contract

The doctrine of offer and acceptance forms the basis of the rules of contract formation.²⁹⁶ Indeed, both concepts (offer and acceptance) have traditionally been used for determining how and when the parties have reached an agreement.²⁹⁷ The establishment of consensus

²⁹⁰ Miller, Leroy and Gaylord *Fundamentals of business Law: Summary Case 28*.

²⁹¹ Miller, Leroy and Gaylord *Fundamentals of business Law: Summary Case 28*.

²⁹² Chiffot www.tvdma.org (Last accessed: 23 November 2015).

²⁹³ Robert <http://netk.net.au/Contract/02Formation.asp>. (Last accessed: 23 November 2015).

²⁹⁴ Dinesh <http://www.jdsupra.com/legalnews/consideration-under-common-law-85741/> (Last accessed: 23 November 2015).

²⁹⁵ Traore and Xiao 2011 (4) *Journal of Politics and Law* 311-316.

²⁹⁶ Pannebeker 2013 (2) *Eramus Law review* 1-11.

²⁹⁷ Pannebeker 2013 (2) *Eramus Law review* 1-11.

between the parties is the most important requirement which has to be met for the conclusion of a contract.

3.10.2. The essential elements of an offer and acceptance

As already shown in this study, before the advent of the OHADA, the domestic law ignored the notions of offer and acceptance, particularly with regard to contracts of sale. The OHADA's Common Court of Justice has addressed these notions by defining their respective characters and effects. Before examining the elements of counter-offer, acceptance and acceptance period, it is important to briefly analyse the concepts of offer and acceptance.²⁹⁸

3.10.3. An offer

Some authors, such as Treitel, define an offer as "an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed".²⁹⁹ An offer can therefore be viewed as a statement of the terms under which the offerer is willing to be bound. The expression of this offer may, however, take different forms, such as a letter, newspaper advertisement, fax, email, or even conduct.

3.10.3.1. Definition of an offer under OHADA Law

Article 241 paragraphs 3 of Title II Book VIII of the Uniform Acts of OHADA related to General Commercial Sales stipulates that a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offerer to be bound in the case of acceptance.

²⁹⁸ Case Haddad Khali v Company Niger Lait, National Company of Alimentary Products, International Bank for Africa in Niger and Balla Kalto Loutou decision n°028/2011 on December 6, 2011.

²⁹⁹ Edwin *The Law of Contract* 13.

This Article, by defining an offer as being distinct from other types of communication which one party may make during negotiations aimed at the conclusion of a contract, establishes two requirements for a valid offer³⁰⁰: the proposal must be sufficiently definite in order to enable the contract to be concluded by simple acceptance, and indicate the intention of the offerer to be bound in cases of acceptance.³⁰¹

3.10.3.2. The accuracy of an offer

The offer must be of such a nature that it may be accepted without any further qualification. Given that a contract is concluded by the simple acceptance of an offer, the terms of future contracts must be sufficiently clear in the offer itself.³⁰² It is important to specify that it is difficult in general to determine if an offer complies with this requirement, because even the essential terms of contracts, such as the description of goods, determination of price, payment of price, etc., may remain undetermined in the offer, without necessarily rendering this offer insufficiently definite.³⁰³ One can always find out if the offerer and offeree have the intention of being bound by a contract. Usually, one can also surmount this lack of precision through a reference to the practices or usages established by the parties.

3.10.3.3. Intention to be bound

The second criteria to determine whether a party makes an offer in order to conclude a contract or simply initiates negotiations is the intention or will of this party to be bound in cases of acceptance.³⁰⁴ Article 241 paragraph 3 does not define or establish the terms which enable one to determine whether or not a will is expressly stated, since this will is rarely

³⁰⁰ understand the roles of offer and acceptance in the formation of a contract, available at: www.csun.edu/sites/default/files/blawoffer.pdf. (Accessed on 12 - 06 – 2014).

³⁰¹Wald http://www.associationofconstructionanddevelopment.org/articles/view.php?article_id=10790. (Last accessed: 23 November 2015).

³⁰² Hare *The law of contracts* 63.

³⁰³ Hare *The law of contracts* 63.

³⁰⁴ According to Article 241 al. 3 of the UAGCL, “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it, *inter alia*, (...) indicates the intention of the offeror to be bound in case of acceptance.” It was ruled that a proposal with retention of the title clause is inoperative if that clause is not publically brought to the knowledge of the offeree. See Senegal 15 January 2002, *Mehsen A v Saleh J* case.

stated. It is the doctrine which has established the way in which this intent can be determined.³⁰⁵ It may depend on the way in which a proposal is presented, for instance by expressly defining it as an offer or just as a mere statement. Thus, the content of an offer is very significant, as the more accurate a proposal is, the more likely it will be to be considered as an offer. A proposal addressed to specific people will have a better chance of being considered as an offer than a proposal addressed to the public in general.³⁰⁶

Article 241 al2 stipulates that an offer is sufficiently definite when it indicates the goods, and expressly or implicitly defines the quantity and price, or shows the signs that enable one to determine them. This definition enshrines the necessity for accurate prices and the determination of the offeree as requirements for a valid offer.

3.10.3.4. Description of goods and determination of price as essential elements of an accurate proposal

An offer must be a very clear manifestation of the will to conclude a contract, since the purpose is to distinguish it from contractual talks. In order to be binding, the offer must be complete and serious. It must contain all provisions, terms and qualifications which are included in the contract. Specifically for contracts for the sale of goods, an accurate proposal must have two elements, namely the description of the goods and the determination of the price.

3.10.3.4.1. *Item sold and purchase price*

For a valid contract of sale, the buyer and seller must reach consensus on the item sold. This is an important prerequisite, as the item must be determined and determinable at the time of the conclusion of the contract. This makes it possible for the performance of a contract to be achieved. Therefore, if the item is too vague to accurately determine what is sold, the

³⁰⁵ Traore and Xiao 2011 (4) *Journal of Politics and Law* 318-326.

³⁰⁶ See Cf. Article 241 al. 4 UAGCL, which states the following: "A proposal addressed to undetermined persons is to be considered merely as invitation to make offers, unless the contrary is clearly indicated by the party making the proposal." The OHADA Draft Uniform Act on Contract does not have a similar provision.

contract will be null and void. In its articles 235 and 236, the OHADA Law provides a list of the items forbidden, and those which are not subject to the application of the Uniform Acts.

No contract of sale may exist where the price is not determined and determinable. The seller and the buyer must reach consensus on the purchase price, which must be fixed and in an acceptable currency. For instance, letters of credit are the most frequent method of payment in international trade.

3.10.4. An Acceptance

An acceptance constitutes the final step in the process of contract formation³⁰⁷. It is defined as the unqualified and unequivocal assent to all the terms of an offer. Like an offer, it contains a voluntary element (the offeree's will to engage in the contractual relationship proposed by the offerer) and a material element (the content and form of the acceptance).³⁰⁸

The parties should make each other aware of their intentions in terms of the contract. Communication usually takes place in the place of spoken or written words, or even through conduct. Article 244 of the Uniform Act stipulates that the contract will be concluded as soon as the acceptance of an offer takes place.³⁰⁹ This article deals with a significant problem, namely that concerning at what point an offer that has been accepted will result in the formation of a contract, particularly in cases where the negotiating parties are geographically distant from each other or not physically present.³¹⁰

3.10.4.1. Mode of acceptance

Article 241 al1 of the Uniform Acts relating to General Commercial Sales stipulates that a contract may be concluded either by the acceptance of an offer or by the conduct of the parties, which is sufficient to indicate agreement.³¹¹ Article 243 paragraph 2 provides that an acceptance constitutes any declaration by or conduct of the offeree which indicates his

³⁰⁷ Willmott et al *Contract Law* 38.

³⁰⁸ George Hudson Holdings Ltd v Rudder (1973).

³⁰⁹ See Article 244 of Book VIII of the OHADA Uniform Acts.

³¹⁰ Petru 2012 (2) *Judicial Doctrine & Case-Law* 1-6.

³¹¹ See Article 241 of Book VIII of the OHADA.

assent to the offer. It adds that silence and inactivity cannot in themselves constitute an acceptance.³¹² This last sentence means that silence or inactivity may be considered as acceptance if they clearly provide sufficient assurance of the offeree's assent.³¹³

However, the Uniform Act does not define silence and inactivity, which therefore makes it difficult to accurately determine that silence and inactivity indicate assent.³¹⁴ Even if article 244 paragraph 2 sets forth that an offeree may, without any reply to the offer, show his assent by means of his conduct, it remains true that this article does not give any information about the definition and determination of silence and inactivity.

It is important to note that this article is a little unambiguous, as it does not clearly define the meaning of the conduct of the parties. In commercial contracts, especially complex transactions, contracts are often concluded after prolonged negotiations and without any party being able to accurately identify the sequence of offer and acceptance. The Uniform Acts, by failing to precisely identify the kind of conduct which may be equated with acceptance, leave a gap in this regard, which gives the judge broad powers of discretion. An effective law needs to identify and enumerate the different types of conduct, in order for enterprises engaged in the negotiation process to be able to accurately determine whether the specific answer or conduct of their partner means that he agrees or disagrees, since a party may sometimes feign with his conduct. In such cases, it will be difficult to SMEs to clearly determine whether the contract has been concluded by acceptance of an offer, or by the conduct of parties which indicates such acceptance.

In addition, one can note that there is no specific provision in the Uniform Act relating to Commercial Sales which deals with the issue of electronic communication, and worse still, the Uniform Act has not attempted to deal with this matter, such as was done by the CISG through CISG-AC Opinion No 1. This considerably weakens the capacity of the Uniform Act to rule on problems regarding the formation of contracts by means of electronic communication. Today, the tendency is for the majority of SMEs engaging in international trade to integrate these new methods of communication into the negotiations and conclusions of their contracts, given that their contract partners are often located overseas. These parties may, for instance, choose or agree to use electronic forms of communication to conclude a contract, without the intervention of a natural person.³¹⁵

³¹² See Article 243 (2) of Book VIII of the OHADA.

³¹³ Delforge *La Formation des Contrats* 13.

³¹⁴ IDEF Code Annotated OHADA, Uniform Act Relating to the General Commercial Law (AUDCG) Art. 244.

³¹⁵ Meyer <http://www.unidroit.org/english/publications/review/articles/2008-1&2/393-404.pdf>. (Last accessed: 23 November 2015).

3.10.5. The counter-offer (article 245)

It is often found, in business transactions, that the offeree, by indicating his assent, adds another element to his reply.³¹⁶ This additional proposal is usually different from the initial offer. In doing so, the additional proposal made by the offeree can be viewed as a counter-offer, which in turn impedes the formation of a contract.

A counter-offer is an offer made in reply to a previous offer by the other party during negotiations. It relates to a modified acceptance.³¹⁷ Article 245 of the OHADA stipulates that a reply that tends to indicate acceptance of an offer, but that contains additional or different facts which do not substantially alter the terms of the offer, constitutes an acceptance. Paragraph 2 of the same article adds that a reply that tends to indicate acceptance of an offer, but which contains additions, restrictions or other amendments, should be considered as a rejection of the offer, and therefore constitutes a counter-offer.³¹⁸

It is clear that the Uniform Act, through these paragraphs, establishes a “material alter” as a fundamental criteria for determining an acceptance.³¹⁹ The Uniform Act draws a distinction depending on whether or not additional amendments constitute a substantial alter.³²⁰

Thus, where the additional modifications do not materially alter the initial offer, the terms of the offer constitute an acceptance. The contract is therefore concluded with the modifications included in the acceptance.³²¹ This is the application of the last shot theory. In contrast, when the modifications are substantial enough to considerably alter the essential terms of the contract, the acceptance constitutes a counter-offer.³²²

However, the same article, in paragraph 2, provides an exception to the general rule mentioned in paragraph 1, by pointing out that if the additions or modified terms of an offer do not materially alter the terms, then a contract is concluded with these modifications, unless the offerer expresses his disagreement without undue delay. It is important to note

³¹⁶ Meyer <http://www.unidroit.org/english/publications/review/articles/2008-1&2/393-404.pdf>. (Last accessed: 23 November 2015).

³¹⁷ See Lopez v. Charles Schwab & Co., (2004).

³¹⁸ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 150.

³¹⁹ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 151.

³²⁰ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 151.

³²¹ Traore and Xiao Y Traore and Xiao 2011 (4) *Journal of Politics and Law* 311-318.

³²² See “Understand the roles of offer and acceptance in the formation of a contract”, available at: www.csun.edu/sites/default/files/blawoffer.pdf (Accessed on 24 - 06 – 2014).

that it will be very difficult to accurately determine what constitutes a substantial modification. All this will depend on the circumstances of each case.³²³

It is regrettable that the Uniform Act does not provide a list of additional terms which may be considered as material alterations to an offer. The failure of the UAGCL to do this therefore makes it difficult for judges to distinguish clearly between terms which materially alter the content of a contract, and matters which are of little importance.³²⁴ These gaps ultimately undermine the legal security of international commerce, which is intended to enable enterprises, particularly SMEs, to perform safely.

Other elements related to the price, mode of payment, place and moment of performance will usually constitute a substantial modification of an offer. In general, these elements are analysed and assessed by taking the commercial branch of the parties into account. These elements do not have to constitute a surprise for the offerer.³²⁵

It is worth noting that the Uniform Act addresses the notion of a counter-offer to some extent, but fails to deal with a significant aspect which occurs frequently in international commerce, namely the problems of forms and the inclusion of standard terms of the contract. The tendency today is for many enterprises engaged in international trade to operate and negotiate with each other by using their own standard form of contract. The silence of the Uniform Act on these issues weakens its ability to effectively protect SMEs engaging in international trade.

3.10.6. Period of acceptance

As far as the period of time within which an offer must be accepted is concerned, Article 243 paragraph 1 deals with this point by drawing a distinction between a verbal and written offer. In terms of a written offer, this time will depend on whether or not an offer stipulates the exact time or date for acceptance. If this is the case, an offer must be accepted by a certain date, whereas in other cases, an indication of acceptance has to reach the offerer in "a reasonable

³²³ Dickerson 2011 (13) *European Journal of Law Reform* 3-4.

³²⁴ Dickerson 2011 (13) *European Journal of Law Reform* 3-4.

³²⁵ See "Understand the roles of offer and acceptance in the formation of a contract", available at: www.csun.edu/sites/default/files/blawoffer.pdf (Last accessed: 23 November 2015).

time”, taking the circumstances into account, especially the speed of the means of communication used by the offerer.³²⁶

In the case of a verbal offer, this offer has to be immediately accepted, unless otherwise indicated. Thus, the doctrine highlights the fact that an offer must be considered as verbal when it is made in the presence of the offeree, and that this offeree should be in a condition to reply immediately. This also applies to an offer made telephonically or electronically.³²⁷

In light of the different communication technologies used today by actors in the sphere of international commerce, it is important to focus on the issue of the time and place of the formation of a contract. In other words, when will communications become valid and binding in cases where the parties are not in touch with each other directly or negotiate an agreement electronically? For instance, one of them might use electronic messages to make, withdraw or revoke an offer, and the other party might indicate and revoke his acceptance using the same means. Between different domestic systems, one can also note several opposing theories which deal with this issue.

One such theory is the information theory, which determines that communication only becomes effective once the recipient takes notice of the content of the communication.³²⁸ This theory is usually applied to instantaneous methods of communication, such as the telephone.

Furthermore, the receipt theory determines that a contract only becomes effective once the recipient has actually physically received the communication, or it has at least been made available to the recipient, even though he may not yet have taken notice of the content.³²⁹ This theory is usually applicable to non-instantaneous means of communication, such as the telegram and telex, and has its origin in the civil law system.

The third theory is the expedition theory, which sets forth that the contract is effective once it has been posted or sent by the sender. This theory is also applied to cases of indirect communication, and has its origins in the common law system.³³⁰

According to this theory, the acceptance of an offer must be communicated to the offerer in order to become effective.³³¹ Thus, the acceptance becomes effective as soon as the

³²⁶ See Article 243 (1) of AUDCG

³²⁷ See “Understand the roles of offer and acceptance in the formation of a contract”, available at: www.csun.edu/sites/default/files/blawoffer.pdf. (Last visited: 23 November 2015).

³²⁸ Viscasillas 1997 (16) *Journal of Law and Commerce* 319-324.

³²⁹ Viscasillas 1997 (16) *Journal of Law and Commerce* 325-334.

³³⁰ Viscasillas 1997 (16) *Journal of Law and Commerce* 325-334.

³³¹ See Article 244 of AUDCG

expression of acceptance reaches the offerer's address³³². This amounts to saying that a contract is only made on the date that the dispatched goods reach the offerer. This could be a cause for concern, because an offerer would then be able to revoke the offer.³³³ The receipt theory adopted by the OHADA also raises some concerns in relation to implied acceptance or the performance of a contract.³³⁴ It is true that the preference of the drafters of the OHADA for the receipt theory is justified by the fact that the system of omission by which the contract is concluded at the moment that the offeree decides to accept the offer has the disadvantage of leaving the formation of the contract to the mercy of the offeree.³³⁵

CONCLUSION

The study of the formation of contracts in this section consisted of analysing the notions of acceptance, counter-offers, and time limit for acceptance. In doing so, the researcher began by examining the notion of acceptance. It has been noted that this concept is defined by article 241 of the OHADA, and is based on the mirror mirage rule. According to article 241, the OHADA has adopted the freedom of form concerning the way in which the acceptance of an offer is expressed. The OHADA, while enshrining the freedom of form of acceptance, and indicating that silence and inactivity do not in themselves constitute acceptance, fail to provide some examples or cases which would enable one to determine whether or not this silence and inactivity constitute an acceptance.

The study then examined the notion of a counter-offer. It has been noted that this concept is governed by article 245 of the OHADA and an offer may only be viewed as a counter-offer if the reply to the initial offer requires some modifications, which materially alter the terms of the contract. Thus, it has been found that the OHADA's Law does not identify the circumstances under which the reply to an offer materially alters the terms of the contract.

Lastly, this section analysed the notion of the time limit for an acceptance. In this regard, the notion is governed by article 243 of the OHADA, and is dependent on whether the offere is an oral or written one.

³³² Traore and Xiao 2011 (4) *Journal of Politics and Law* 364-365.

³³³ Traore and Xiao 2011 (4) *Journal of Politics and Law* 365-368.

³³⁴ Pougoue <http://revue.ersuma.org/numero-special-novembre-decembre/doctrine/Doctrine-OHADA-et-theorie> 2011. (Last accessed: 23 November 2015).

³³⁵ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 162.

3.11. THE PERFORMANCE OF CONTRACTS UNDER OHADA LAW

3.11.1. *Transfer of property and transfer of risk*

The transfer of property and passing of risk take great importance in all international sales. Indeed, goods that are subject to sale usually face various risks, such as physical risk, damage, total loss or failure.³³⁶ The main issue of concern is determining who, the seller or the buyer, must be responsible for or support the effects of this risk.³³⁷ With reference to the OHADA Uniform Act relating to Commercial Sales, the following sections will discuss the transfer of property and transfer of risk.

3.11.1.1. The transfer of property

The main question that arises in relation to the transfer of property involves determining exactly when the transfer of property takes place, and which acts have to be performed by the seller in this regard.

According to Article 275 of the OHADA Uniform Acts relating to Commercial Sales, the taking up of delivery involves the transfer of property (of the good sold) to the buyer, and Article 276 makes it possible for the parties to delay the transfer until the date of effective payment by the buyer. It is worth noting here that the OHADA has rejected the solo consensus principle, which is part of its history.³³⁸

Therefore, the rule established by article 275 is a supplement rule. It is not a public policy rule, which means that the parties may derogate this rule by inserting a clause in their contract.³³⁹ They can, for instance, stipulate that the transfer of property will take place as

³³⁶ Petru 2012 (2) *Judicial Doctrine & Case-Law* 1-6.

³³⁷ Petru 2012 (2) *Judicial Doctrine & Case-Law* 1-6.

³³⁸ Roch Adido "Réflexion sur le Transfer de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

³³⁹ Roch Adido "Réflexion sur le Transfer de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

soon as an agreement has been reached, as indicated in article 1583 of the Cameroonian Civil Code.³⁴⁰

It has been mentioned above that the OHADA inherited and adopted the French legal system model, and it is therefore important to determine why the OHADA drafters did not adopt the principle of *solo consensus* expressed by articles 1138 and 1583 of the French Civil Code, which was included in their domestic law. It could perhaps be due to the complexity of articles 1138 and 1583, which establish this principle, as stated by Ghestin and Desché.³⁴¹

According to the articles which enshrine the principle of *solo consensus*, the transfer of ownership in matters of sale is automatic, abstract and instantaneous. Therefore, the transfer of property is no longer an obligation on the part of the seller, which may present a certain inconvenience for the third party.³⁴² Thus, in matters related to the sale of goods which are movable property, where the seller first made a feigned sale *to primus*, then an actual sale to *secundus*, in the case of a dispute between two successive buyers, who is preferred? This doctrine was divided on this point.³⁴³

On the one hand, some authors, such as Ferrière, Guyot and Henrys, have chosen the *secundus*, and on the other hand, Pothier indicated that the *primus* should be privileged. Articles 1141³⁴⁴ and 2279³⁴⁵ of the Civil Code attempted to resolve this problem, by establishing that only an effective possession and material transfer constituted ownership of the movable property, whereas in respect of the principle of *solo consensus*, logic dictates that it is the first buyer who must be an owner. Alternatively, as in the case mentioned above, it would be the second buyer who takes possession of the item, and he would therefore be the genuine owner.

However, the OHADA drafters chose simply to adopt the effective principle. Under the Uniform Act of the OHADA, the transfer of property is bound to the effective tradition. Thus,

³⁴⁰ See Article 1583 of the Cameroon Civil Code.

³⁴¹ Ghestin J, Desché B «Traité des Contrats. La Vente» 1990 (42) *Revue internationale de droit comparé* 1376-1377.

³⁴² Roch Adido "Réflexion sur le Transfert de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

³⁴³ Roch Adido "Réflexion sur le Transfert de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

³⁴⁴ Article 1141 of the Civil Code provides that where an item which one is bound to transfer or deliver to two persons successively is purely movable, the one who has been put in actual possession of the item is preferred and remains its owner, provided that the possession is made in good faith.

³⁴⁵ Article 2279 provides that in matters of movable items, possession is equivalent to a title.

as long as the goods are at the seller's disposal, he always remains the owner. It is therefore up to the buyer to ensure that the seller has possession of the goods.

Thus, in referring to the example presented above, according to the OHADA Law, the seller will always remain the owner of goods, until the moment of delivery. Therefore, the parties have to foresee the modalities of delivery and sanctions in their contract, because the transfer of risk will be determined according to the place of delivery. The Uniform Act, specifically articles 251 to 254, requires the seller to deliver the goods to the agreed place,³⁴⁶ given that the transfer of property is determined regardless of whether or not the goods are the buyer's disposal.

3.11.1.1.1. *Delivery procedure*

The obligation of delivery in the Uniform Act depends on whether the goods are subject to a carrier or are delivered to a place agreed on by the parties.

3.11.1.1.1.1. *Delivery involving a carrier*

Article 252 paragraph 1 of the Uniform Acts provides that when the contract of sale involves the carriage of goods, the seller complies with its obligation of delivery towards the seller when it hands the goods over to the carrier.³⁴⁷ The second paragraph of this article imposes the duty upon the seller to carry out and conclude any necessary subsidiary contracts, so that the carriage of goods to the agreed place of delivery can be successfully achieved.³⁴⁸ The seller has to instruct the carrier to transmit the goods to the buyer and to conclude such contracts that are needed for carriage, and if necessary, give the buyer notice of the consignment.³⁴⁹ The mere placing of the goods at the carrier's disposal is insufficient - the seller must ensure that the carrier takes possession of the goods and that the goods will

³⁴⁶ See Articles 251 and 254 of AUDCG.

³⁴⁷ See Article 252 (1) of AUDCG.

³⁴⁸ See Article 251 (2) of AUDCG.

³⁴⁹ Lazar <http://www.internationallawreview.eu/fisiere/pdf/rules-Ancapdf.pdf>. (Last accessed: 23 November 2015).

safely reach the buyer's place. Since the buyer is not present, it is much more difficult for him to protect the goods.³⁵⁰

The third paragraph of the same article requires the seller to transfer to the buyer any documents needed by the buyer to take the goods from the carrier upon delivery.³⁵¹ Article 254 requires the seller to transmit these documents and any other accessories related to them. This article specifies that the seller has to withdraw from this obligation at the moment, place and conditions provided in the contract.

3.11.1.1.1.2. *Delivery not involving a carrier*

The delivery of goods by the seller when he is not required to hand over them to the carrier is regulated by article 251 of the Uniform Acts of the OHADA relating to Commercial Sales. This article provides that where the contract of sale does not foresee the handing over of the goods to a specific place, the seller must hold them for the buyer's disposal either at the place where those goods have been manufactured or stocked, or the seller's place of business.

3.11.1.2. Transfer of risk

The transfer of risk is simply the corollary of the transfer of ownership - in other words, the transfer of property necessarily involves that of risk. The Uniform Acts has ignored the Incoterms, which in practice deal with the transfer of risk. Specifically, articles 277 to 280 of the Uniform Acts of the OHADA relating to Commercial Sales deal with this issue.³⁵²

The moment of the passing of risk is determined in the Uniform Acts by the transfer of property.³⁵³ Article 277 provides that the transfer of property leads to the passing of risk to the buyer. This means that the transfer of ownership is effective at the moment of the

³⁵⁰ Babiuc *International Commercial Law* 25.

³⁵¹ See Article 252 (3) of AUDCG.

³⁵² See Articles 277 and 280 of AUDCG.

³⁵³ Roch Adido "Réflexion sur le Transfer de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

handing over of goods to the buyer. The seller is discharged of its obligation of delivery and risk as soon as he places the goods at the buyer's disposal.³⁵⁴ This article clearly connects the risk to the delivery. Therefore, the property (the good sold) does not immediately get transferred to the buyer, and the seller's creditors may consequently seize these goods already sold but not yet delivered.³⁵⁵ As already mentioned, the Uniform Acts foresees different procedures for handing the goods over to the buyer. The determination of the passing of risk will be established depending on these factors. It is therefore logical that a court has restored the injunction to pay its full effect, on the ground that the SFF company, having performed its obligation to deliver, is entitled to seek payment.³⁵⁶

In doing so, when the sale involves a carriage of goods, Article 278 of the OHADA Uniform Acts provides that the risk is transmitted to the buyer as soon as the seller hands over the goods to the first carrier.³⁵⁷ In this case, the handing over of the goods is indirect, and the fact that the seller is entitled to keep the documents, which are representative of the goods, does not affect the passing of risk.³⁵⁸ Indeed, it was held by the Abidjan Court Tribunal that the transport company could not rely on the principle of the exception to refuse to pay the price of the goods.³⁵⁹

The second case concerns sales of goods in transit. The OHADA Uniform Act, specifically in article 279, identifies the moment of the passing of risk as the date relating to the conclusion of the contract. In this regard, the general rule of transfer of risk at the moment of handing over the goods to the carrier clashes with the fact that the goods would not have been handed over to the carrier for transfer to the buyer, since the contract was not concluded at the moment of this delivery. One can conclude that this solution provided in article 279 seems to be rather severe for SMEs, which are in the buyer position, given that they have to support the risk when the goods are lost or damaged, something which both parties involved took cognisance of when they concluded the contract.³⁶⁰

³⁵⁴ Roch Adido "Réflexion sur le Transfert de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

³⁵⁵ Roch Adido "Réflexion sur le Transfert de la propriété des marchandises vendues dans l'espace géographique OHADA à la lumière du droit Français". Available at: www.ohadata.com. (Last accessed: 22 November 2015).

³⁵⁶ Case Lotus Import c / Company SKALLI Fortant de France, CA Abidjan, No. 677, 1-6-2001:Ecodroit, No. 13-14, July-August 2002, p 55, Ohadata-J-02-174.)

³⁵⁷ Case Lotus Import c / Company SKALLI Fortant de France, CA Abidjan, No. 677, 1-6-2001:Ecodroit, No. 13-14, July-August 2002, p 55, Ohadata-J-02-174.)

³⁵⁸ See Article 278 of AUDCG.

³⁵⁹ Case Co CML c / Company JB CA Abidjan, No. 1155, 15-12-2000: Co CML c / Company JB Bulletin Juris Ohada, No. 1/2002, January-March 2002, p. 57, Ohadata J-02-137.

³⁶⁰ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 162.

Even though it is true that the second paragraph foresees that the seller must support the risk if it has had or ought to have had cognisance of these losses or damages, and did not inform the buyer, it is also very difficult for SMEs in the buyer position to prove the bad faith of the seller.³⁶¹

With regard to goods not yet identified, Article 280 stipulates that the transfer of risk is effective at the moment of their identification, which means placing these goods at the buyer's disposal. The Uniform Act seems to have precluded cases where the goods must be delivered to a pre-determined place. This means that the handing over of goods to the carrier is only effective if it is done at this specific place.³⁶²

3.11.2. Conformity of goods and guarantees

The study of non-conformity involves a definition of its content and an examination of the physical and legal criteria of the goods.

3.11.2.1. The category of non-conformity

Conformity is mostly dealt with in the OHADA from a physical and legal perspective. The Uniform Act defines the criteria of the physical conformity of goods through Article 255 paragraph 1. This article identifies the different criteria according to which conformity has to be considered. It provides that the seller must deliver the goods in the appropriate quantity, quality, packaging and wrapping.³⁶³ With regard to the legal aspects according to which conformity is defined, the second paragraph of the same article stipulates that in the case of the silence of the contract, the seller must deliver the goods fit for the purposes for which these goods are ordinarily used, or equipped with the same quality as the specimen or model presented to the buyer.³⁶⁴ The second paragraph adds that the seller must also deliver the goods in the proper packaging used for that type of goods.

³⁶¹Schwenzer *Global Sales Law* 25.

³⁶²Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 163.

³⁶³See Article 255 (1) AUDCG.

³⁶⁴Johnson 2003 (8) *Uniform Law Review* 71-78.

3.11.2.1.1. *The subjective criteria of non-conformity*

The exigencies required of the seller regarding the physical conformity of goods are based on dispute prevention. Indeed, in matters of international sales, most disputes arise from the non-conformity of the item sold to what was agreed to in the contract.³⁶⁵ This means that non-conformity values itself relative to the item previously defined during the conclusion of the contract.

The Uniform Act, through article 255, indicates the elements according to which one has to measure the physical conformity of the goods. It relates to the quantity, quality, packaging, specifications and wrapping. When the item sold does not correspond to the order, the discrepancy is considered to be a breach of the contractual obligation of the seller, which is to hand the goods over to the buyer.³⁶⁶ The burden of proof belongs to the buyer to provide evidence of non-compliance with this obligation. The lack of conformity may therefore be understood, according to the OHADA Law, as the difference between the item, such as stipulated by the terms of the contract, and the item that is eventually delivered.³⁶⁷

Indeed, pursuant to Article 250 al.2 UAGCL, the seller must make sure that the goods delivered meet the requirements of the order placed and offer his/her guarantee. Therefore, this seller may be sued if the goods do not meet the requirements – in this case, the seller will be sued for lack of conformity. Article 256 of the OHADA provides that this lack of conformity must be established at the time of taking delivery, even though the fault might only be apparent later. This article emphasises that the seller's responsibility for non-conforming goods is assessed at the time of delivery. This means that a buyer who fails to inspect the goods, but takes them and starts to use them, cannot in the future claim for a new item on the ground that the first was defective. This provision appears to be a little dangerous for SMEs, because in matters of sale, the lack of physical conformity is usually only discovered by the buyer at the time of using the item.

³⁶⁵ Douajni 2004 (3) *Cameroonian Review of Arbitration* 26.

³⁶⁶ Douajni 2004 (3) *Cameroonian Review of Arbitration* 26.

³⁶⁷ Case Mejo M'OBAM Moise v. limited company Laborex Cameroon. Decision n°246 rendered on 04-03-2002 Tribunal Mfoundi.

3.11.2.1.2. *The objective criteria of non-conformity*

The second paragraph of article 260 of the OHADA Uniform Act highlights the importance of the legal criteria regarding conformity. The handing over by the seller of goods conforming to those ordered by the seller is one requirement, but this is insufficient. The seller must place, at the buyer's disposal, goods fit for the purpose for which goods of the same description would ordinarily be used. Thus, when the good sold does not conform to the one ordered and described in the contract, the failure is legally considered as a lack of required delivery. The onus is on the buyer to provide the burden of proof of this failure.³⁶⁸

3.11.3. Legal criteria and guarantees

The seller, in OHADA law as a Cameroonian domestic law, is required to provide two types of guarantees, namely the guarantee against eviction and guarantee against latent defect.

3.11.3.1. Guarantee against eviction and latent defect

In Cameroonian law, a dissatisfied buyer, as indicated above, has the benefit of two possible recourses against the seller: the latent defect guarantee, and lack of conformity.³⁶⁹ The problem usually experienced here is that these two legal, autonomous mechanisms overlap, and the demarcation between the two is unclear.³⁷⁰ According to some authors, it is important to abrogate this traditional dualist system, while others believe that it is important to maintain them. Both the Uniform Act and CISG have abandoned the notion of latent defects and merged them into the guarantee of conformity.³⁷¹ Therefore, regardless of whether it relates to the OHADA or CISG, the notion exists in both systems as the one and only recourse in case of the non-conformity of delivered goods.³⁷²

³⁶⁸ Supra note 335, 360.

³⁶⁹ See Articles 1626 and 1640 of the Cameroon Civil Code.

³⁷⁰ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 173.

³⁷¹ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 175.

³⁷² Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 175.

In accordance with Article 260, the seller must hand over the goods free of any right or claim by a third party, unless the buyer agrees to take them under such conditions. Paragraph two of the same article specifies that the seller must also guarantee the buyer against any eviction or trouble resulting from the errors of the former. This article therefore requires a new rule for serious defects.³⁷³

An eviction may be defined as any action by a third party who has more rights to the item sold than the buyer, and who deprives the buyer of the total or partial use, enjoyment and disposal of the item sold.³⁷⁴ This principle would mean that the buyer does not become the owner of the item sold simply by the conclusion of a valid contract. The seller is obliged to give the buyer a warranty against eviction due to personal acts and a third party. The guarantee against personal acts aims to ensure that the buyer has peaceful possession of the item in respect of the maxim that whoever has the guarantee cannot be evicted.³⁷⁵ This guarantee against personal acts covers both jure and fact disturbances. The guarantee against a third party must also guarantee the buyer protection against disturbances resulting from a third party. This guarantee only concerns jure disturbances and not fact disturbances.

3.11.4. The examination of goods

The examination of goods is governed by Article 270 of the OHADA Commercial Act. A reading of this article shows that the Uniform Act has copied Article 38 of the CISG word for word. The al. 1 of this Article 270 requires the buyer to examine the goods as soon as possible after delivery. Article 270 al.2 sets forth that the inspection of goods for sales involving carriage and goods redirected or redispached can be postponed until the arrival of these goods at their destination.

The analysis of the mechanisms established by the Uniform Act relating to Commercial Sales enables one to distinguish two kinds of time periods for the enforcement of a seller's liability. One can observe the time period necessary to both parties of lack affecting the goods, and the time period.

³⁷³ See Article 260 AUDCG.

³⁷⁴ See Article 260 AUDCG.

³⁷⁵ This maxim is an adage in French Law.

However, in order to be able to claim the lack of conformity, the buyer must act within the time limit stipulated by articles 258 and 259.³⁷⁶ These articles provide a specified time within which the buyer must act for a lack of conformity, in order to avoid speculation regarding the notion of “reasonable delay”. In addition, the time limit of one month retained by OHADA law conforms to the classic conception, which would like the buyer to act quickly in order to not lose his right to sue. After the handing over of goods which conform to the contract, the seller has another obligation, which is that of guarantee.³⁷⁷

3.12. REMEDY FOR NON-PERFORMANCE

These remedies concern sanctions involving the performance of contracts by nature, and financial compensation.

3.12.1. Remedy involving specific performance

The application of these sanctions takes place in order to meet the requirements that the parties have stipulated during the formation of the contract. The choice between unlike or prescribed sanctions is made, depending on the gravity of the non-performance. Thus, an arsenal of means has been put at the buyer’s disposal in cases of a breach of contract by the seller. This latter may request the substitution of goods, or reparation of failure.

3.12.1.1. The substitution of goods

Article 281 paragraphs 1 stipulates that any party to a commercial contract of sale is entitled to request a competent Court to dissolve the contract for total or partial failure in executing

³⁷⁶ Article 258 states that “If the buyer wishes to take advantage of the defect, a lack of conformity apparent at the day of taking delivery must be notified to the seller within the month following the Delivery”. Article 259 al. 1 states that “The action of the buyer, based on a lack of conformity hidden at the day of delivery, is prescribed within a one-year delay from the time when The defect was discovered or should have been discovered.”

³⁷⁷ Roch Adido see supra 339.

an obligation by the other party. Paragraph 2 of the same article is more explicit, when it provides that the gravity of the behaviour of a party to the contract of commercial sale may justify another party putting a unilateral end to the contract, at its own risk.

Paragraph 2 of this article puts the option of substitution at the disposal of the buyer, which differs from Article 1144³⁷⁸ of the Civil Code. The latter article makes it possible for the creditor to get the items from a third party, at the expense of the seller in the case of non-performance of the contract by the latter. Indeed, according to the provisions of the Uniform Acts, the replacement or substitution is carried out by the seller, who is liable for the failure.³⁷⁹ Replacement means that the goods must be returned to the seller who, owing to the failure for which he is liable, assumes all the risks associated with this. It is in purpose of attenuate this stingless that this article imposes certain requirements.³⁸⁰

3.12.1.2. The buyer's right to require specific performance

Article 283 of the OHADA Uniform Acts relating to Commercial Sales provides that when the buyer invokes, within the time period fixed by articles 258 and 259, the non-conformity of delivered goods, the seller may, at his own expense and without delay, propose to the buyer the substitution of the defective goods with goods that conform to requirements. This article gives the seller the right to suggest the substitution of the defective goods. This is considered to be a reversal of the OHADA's approach with regard to the old text, before the new one was entered into force in 2010.

In the old text, specifically article 250 paragraphs 2, the option of suggesting a substitution of the goods belonged to the buyer. Now, however, in respect of article 283, the buyer has lost this option, which is now in the hands of the seller. The seller is now the sole judge of whether or not to replace the defective goods.³⁸¹ However, even though this article aims to

³⁷⁸ Article 1144 of the Civil Code stipulates that a creditor may also, in cases of non-performance, be authorised to have an obligation performed at the debtor's expense. "The latter may be ordered to advance the sums necessary for that performance".

³⁷⁹ Nsie 2005 (2) *CEFDIP* 1-23.

³⁸⁰ Nsie 2005 (2) *CEFDIP* 1-23.

³⁸¹ See Article 283 AUDCG (2010).

address the lack of conformity, it is important to note that it is silent on the extent of the lack of conformity.³⁸² In other words, does this apply to the whole or just a part of the goods?

The second paragraph of the same article makes it possible and admissible for the buyer to fix an additional period of time for performance by the seller. In reference to parallels in German law, this is often called the *Nachfrist mechanism*.³⁸³ In fact, it is not related to an obligation, but is merely an option for the buyer. Thus, when the buyer fixes a reasonable *Nachfrist* under this paragraph, he will not be entitled to resort to any remedy except damages for the delay.³⁸⁴

3.12.2. REMEDY INVOLVING DAMAGES

The damages mentioned in articles 291 to 293 of the OHADA aim to compensate an aggrieved party who has suffered a loss at the hands of the other party. These damages are for the loss suffered by the buyer or seller.

Article 292 of the Uniform Act grants damages to the aggrieved party who has suffered a loss. The aggrieved party may be the buyer in cases where he has proceeded to the purchase, through the substitution of the goods, or the seller in cases where the latter has proceeded to the resale of the goods. Article 293 stipulates that the party who invokes the non-performance of the contract must take any reasonable measures, with regard to the circumstances, to reduce his loss or preserve his profit. This section will examine the eventual granting of damages to the aggrieved party, bearing in mind the terms and conditions stipulated in article 293 for the party claiming this damage.

³⁸² Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

³⁸³ Ericson P. K «Nachfrist Notice and Avoidance under CISG» 1999 (18) *Journal of Law and Commerce* 301-331.

³⁸⁴ Diplama M «Nachfrist under National Law, the CISG, and the Unidroit and European Principles: A Comparison» 1999 (2) *International Contract Adviser* 28-38.

3.12.2.1. System to grant damages under the OHADA

Article 292 of the Uniform Act stipulates that following the seller's non-performance of his obligation of delivery, which has led to the avoidance of the contract, it is quite normal for the buyer, who has been betrayed, to not want to continue to wait. It is obvious that out of fear of losing his customers, he will proceed to purchase another good in substitution.³⁸⁵ These measures are justified by the "necessity state" in which the buyer finds himself because of the loss that he suffered through the non-performance of the contract.³⁸⁶

The AUDCG has broken with formalism and empowered the buyer sufficiently, since he has suffered due to the seller's failure.³⁸⁷ Thus, whereas the contract of sale is avoided, the buyer (Cameroonian buyer) has already proceeded to the substitution, even before the judge pronounces the termination of the contract.³⁸⁸ Thus, bearing this situation in mind, the judge, who is literally faced with a "fait accompli", will proceed to the assessment of damages by way of compensation for the injury sustained by the buyer.³⁸⁹

In this particular case, it is clear that the expectations that the buyer had with regard to the specific goods ordered from his habitual supplier were not met by the seller due to negligence. Having the creditor to satisfy, it is normal that the buyer will take any necessary measures in order to supply these goods to the creditor within the stipulated period of time. He will not have any other choice but to find another seller with the equivalent goods as the original supplier. The issue of the cost of substitution is very important. In the case in question, the Cameroonian buyer should have purchased these goods at a higher cost than the original price provided in the avoided contract.

The Uniform Acts provides that the buyer will obtain damages corresponding to the difference between the purchase price of the substitution and the agreed price in the contract.

³⁸⁵ Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

³⁸⁶ See Heuze *La vente internationales* 271.

³⁸⁷ Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

³⁸⁸ Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

³⁸⁹ Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

This position of the OHADA marks a distinct break from article 1144 of the Cameroon Civil Code. Indeed, while the Uniform Act is more liberal on this matter, the Cameroon Civil Code requires the buyer to first obtain the prior authorisation of the Court, before implementing this procedure.

3.12.2.2. Damages granted to the seller in cases of the resale of goods

In the socioeconomic international context, the seller is used to exposing himself to risks. The buyer may fail to pay a price or omit to take delivery of goods. Such behaviour could lead to the avoidance of the contract. However, the relevant question is what the seller will do with goods which are still in his possession.

The Uniform Act foresees the possibility of a seller restoring the balance by seizing the first opportunity that is presented to him. The stake as to the stock outflow may be due to various reasons, such as inflation or the depreciation of the goods. This may lead the seller to enter into business with another partner. Thus, the risk associated with entering another more or less competitive market is that the resale price might be undervalued in comparison with the initial price of the contract. In this unfortunate situation, when the contract is terminated and the seller has proceeded to the resale of the goods, the latter may obtain damages corresponding to the difference between the agreed price in the contract and the resale price.³⁹⁰

However, it is important to note that the granting of damages to satisfy the loss of the aggrieved party may dangerously compromise the seller if he forgets to minimise his losses.

3.12.2.3. Restrictions to the granting of damages

According to article 293 of the Uniform Acts, the party who invokes non-performance of contractual obligations must take any reasonable measure under the circumstances to mitigate the damages or safeguard his profit.

³⁹⁰ See Article 292 paragraph 2 of the OHADA relating to general commerce.

The second paragraph of the same article specifies that the aggrieved party who knowingly fails to moderate his damage is guilty of negligence. Thus, with regard to the assessment of injury, the Uniform Act uses a method based on the amount of loss suffered, including lost profits. Paragraph 2 of article 293 stipulates that the aggrieved party may request a reduction of damages equal to the amount of loss which might have avoided and the profit which might have been expected. It is therefore the loss which might have avoided or the profits lost which should be assessed. In this case, how should the assessment be calculated? The OHADA law does not deal with this question, hence leaving it to the discretion of the judge.

3.12.2.4. Price rebate

The rebate of the price is viewed as a sanction that is closely related to financial compensation. This price rebate is governed by article 288.³⁹¹ It relates to a soft sanction which applies when the non-fulfilment of a contract by a party does not cause significant harm to others. These sanctions enable the buyer to obtain financial compensation, which aims to make up for the lack of non-fulfilment. It relates to the reduction or rebate of the goods when their qualities and quantities do not comply with contractual provisions. The rebate aims to equilibrate the performance of both parties and sanction the seller, without breaching the contract. It is a sanction which affects only one element of the contract, notably the price.

3.12.3. TERMINATION OR AVOIDANCE OF CONTRACTS UNDER THE OHADA

The termination of a contract for non-performance under the OHADA is the fruit of a long process cadenced by the depth modification.³⁹² Thus, under the old Uniform Act relating to General Commercial Law of 17 April 1997, the criteria of substantial deprivation enabled one to determine the intensity of the debtor's failure. This failure had to qualify as substantial in

³⁹¹ In cases of the lack of conformity of goods, however, regardless of whether or not the price has been already been paid, the buyer may reduce the price based on the difference between the price that the conforming goods would have had at the time of delivery, and the value that the delivered goods effectively had.

³⁹² Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

order for the contract to be avoided. The introduction of the new Uniform Act on 15 December 2010 overturned the concept established by the communal lawmakers.³⁹³ The criteria of substantial deprivation was substituted with that of gross misconduct.³⁹⁴ Therefore, in order to proceed to the avoidance of the contract, the creditor is required to comply with both the requirements of substance and form.³⁹⁵ The substance conditions require the parties to establish the existence of gross misconduct by the defaulting party, while the requirement of form means that the creditor must motivate its unilateral breach of contract sufficiently before the court, as well as respect the obligation to give notice.³⁹⁶

3.12.3.1. The notion of gross misconduct as a substantial requirement for the avoidance of a contract

The notion of serious gross misconduct refers to the debtor's state of mind or conscience at the time of the performance of the contract.³⁹⁷ The seriousness of the debtor's attitude seems to be confused with the behavioural or subjective fault of the party to the transaction. The OHADA's drafters were strongly inspired by the praetorian solution that emerged from the Germanic-Roman system, notably in France.³⁹⁸ This innovation is most significant in view of the fact that the Uniform Act provided the case law solution through rules directly applicable to contracting States as the common law system.³⁹⁹

The OHADA's drafters, by using the term "gross misconduct", wished to extend the seriousness threshold of debtor non-performance. Thus, the debtor's gross misconduct refers to its state of mind and mood⁴⁰⁰ at the time of its performance.

Therefore, with regard to gross misconduct, the Cassation Court's mixed chamber in France defined it as negligence of extreme seriousness limited to deceit and denoting the debtor's

³⁹³ Ebata R «La résolution du contrat de vente en droit OHADA : d'une réforme à l'autre» https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

³⁹⁴ See Acte Uniforme of 2010, Article 281.

³⁹⁵ Abbad *Le fait Generateur de la responsabilité Contractuelle* 25.

³⁹⁶ Abbad *Le fait Generateur de la responsabilité Contractuelle* 25.

³⁹⁷ Abbad *Le fait Generateur de la responsabilité Contractuelle* 25.

³⁹⁸ Ferron http://www.lautreprepa.fr/wp-content/uploads/right_sidebar_articles/Droit%20civil%20-%20Responsabilit%C3%A9%20contractuelle%20-%20d%C3%A9lictuelle.pdf. (Last accessed: 23 November 2015).

³⁹⁹ Case Dremont v. Ouagraoua, 7 December 2001, Civil Chamber of Ouagadougou, (Burkina Faso), Arrêt n°99, available at: http://www.ohada.com/imprim_juris.php?article_juris=2188. (Visited on 23 November 2015).

⁴⁰⁰ Abbad *Le fait Generateur de la responsabilité Contractuelle* 25.

failure to perform his contractual obligation.⁴⁰¹ Gross misconduct is consequently considered by the judge as a fault in civil law. Rightly so, Marianne Faure Abbad stated that, regarding the determination of gross misconduct, the judge has to bear judgment on the debtor's behavior, as if they bore judgment on the person responsible for the damage.⁴⁰²

The criteria of the seriousness of the behaviour of one party thus correspond to the search for the existence of debtor misconduct, which considerably affects the essence of the contract.⁴⁰³ Therefore, the parties' behaviours refer to both the good faith and loyalty obligations. The parties' behaviour is considered to be a corollary of the determination of non-performance. In doing so, the behaviour of the parties far outweighs the mere obligations of the sale, such as provided by articles 250 and 262 of the Uniform Act.⁴⁰⁴

It is up to economic operators in general and the Courts in particular to bend over additional subjective elements, such as the habitual or intentional character of each obligation.⁴⁰⁵ The Court must always attempt to search for reasons why the parties are doing business.⁴⁰⁶ For instance, why have this Cameroonian seller and South African's buyer been conducting business with each other for such a long time? It could be because the two parties respect their obligations or that a relationship of trust has been established between both parties, which leads to them renewing their contract every year.⁴⁰⁷

3.12.3.2. The motivation for unilaterally terminating a contract before a judge by the first party

The unilateral breach of a contract by one of the parties is dealt with in article 281 paragraph 2 of the Uniform Act. This article provides that the seriousness of the behaviour of one party to the contract of sale may justify the other party's unilateral breach of the contract at his own risk.⁴⁰⁸ In this regard, the OHADA lawmaker emphasises that one cannot easily get rid of the

⁴⁰¹ Case Faurecia v.Oracle, decision Court de Cassation de France in, 29 June 2010, Bull. n° 09-11.841.

⁴⁰² Abbad *Le fait Generateur de la responsabilité Contractuelle* 25.

⁴⁰³ Malaurie, Aynès and Stoffel-Munk, *Les Obligations* 38.

⁴⁰⁴ See Articles 250 and 262 of AUDCG.

⁴⁰⁵ Telecom and Societe Etisalat c. Societe Planor Afrique and Societe Telecel Appeal Court of Ouagadougou (Burkina Faso) decision n° 037/09 of 19 June 2009.

⁴⁰⁶ Case Groupe SOCOPAC/FOMUP c/ La SCI des Frères Reunis decision n° 124/ Appeal Court of Centre (Cameroon). (Last visited: 23 November 2015).

⁴⁰⁷ Malaurie, Aynès, and Stoffel-Munk, *Les Obligations* 28.

⁴⁰⁸ See Article 281(2) of AUDCG.

concluded contract.⁴⁰⁹ The OHADA judge has to scrutinise, decorticate and examine the seriousness of the debtor's behaviour. It considers the grounds alleged by the creditor, at the request of the most diligent party.⁴¹⁰

Indeed, similar to the clean hand doctrine in English law, the creditor alleging the unilateral breach of contract must be irreproachable.⁴¹¹ Thus, the motivation for the unilateral breach of contract appears to be a necessary means of neutralising the creditor's suspicion, because he may often be tempted by an abuse of rights.⁴¹² In these circumstances, if the continuation of the contract still proves to be possible, the OHADA judge will have to maintain it.

3.12.3.3. The exigence of a notice

The obligation to give notice before breaking the contract highlights the fact that the OHADA's drafters have eliminated the principle of *ipso facto avoidance*. Indeed, this right enabled the creditor to get out of the contract of sale with the slightest slip in his partnership.⁴¹³ As a result, this called into question the safety and binding effect of contracts.

With regard to article 281, one can note that the OHADA's drafters did not require a legal time period for giving notice. It relies solely on a sufficient time period that the parties have to respect.⁴¹⁴ Therefore, one can refer to the usages as provided by article 239 of the OHADA. One could also say that by not stipulating a time period for giving notice, the OHADA's drafters wanted to leave this to the discretion of the judge.⁴¹⁵ Thus, in order to determine if there is an abuse of the time period for giving notice on the part of the creditor, the French case law has developed several ways. It examines the essence of the commercial relationship, the importance of the financial interests called into question, the longevity of the

⁴⁰⁹ Genicon *La resolution du Contrat pour inexécution* 36.

⁴¹⁰ Stoffel-Munck *L'abus dans le contrat, essai d'une theorie*.

⁴¹¹ See the maxim of equity « He who comes to equity must come with clean hands » illustrated in the case of *Dering v Earl of Winchelsea*. This maxim means that a party seeking an equitable remedy must not himself be guilty of unconscionable conduct.

⁴¹² Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴¹³ See Article 281 of AUDCG (2010).

⁴¹⁴ Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴¹⁵ Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

commercial relationship, the circumstances which led to a breach of contract, and the effect of avoiding the contract.⁴¹⁶ All these elements will enable the judge to have a detailed overview of the contractual environment and to determine the time period which will be most appropriate to the specific case.⁴¹⁷

Thus, the Uniform Law requires two conditions relating to the extent to which the party who wishes to break the contract has been vitiated by the seriousness of the debtor's behaviour. Firstly, he should have to motivate the unilateral breach of contract before the judge, and secondly, he must give notice to the debtor.⁴¹⁸ After complying with these requirements, the creditor will then have two choices: to break the contract himself, or to get the judge to do so.⁴¹⁹

3.12.3.4. The extrajudicial avoidance of the contract of sale under the OHADA

The unilateral avoidance of a contract seems to be similar to private justice, and for this reason it operates at the risk of the aggrieved creditor. It appears to be a seductive remedy in the creditor's hands.⁴²⁰ Since the 2010 reform of the OHADA, the creditor has played an active role and is no longer obliged to obtain permission from the judge for the measures that he wishes to take against the debtor.⁴²¹

The enforcement of the unilateral termination of the contract is a new provision in the OHADA approach. Thus, a Cameroonian seller who has taken a delivery of perishable foodstuff from its South African supplier too late will have the right to avoid the contract. This intention to avoid the contract will have to be motivated by the Cameroonian seller before the judge if the first party requests this from the judge and notifies the other party within a reasonable time, at the risk of the liability of the aggrieved party.

⁴¹⁶ See decision of Appeal Court of Bordeaux (France) on 11 June 1996, JCP ed. E 1997 I 617, n°9 Mousseron, quoted by A. Sonet, id., n°605.

⁴¹⁷ See decision of Appeal Court of Bordeaux (France) on 11 June 1996, JCP ed. E 1997 I 617, n°9 Mousseron, quoted by A. Sonet, id., n°605.

⁴¹⁸ Aurelie Brès *the Termination of Contract by unilateral denunciation* 18.

⁴¹⁹ Ebata
https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴²⁰ Ebata
https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴²¹ See Article 281 of AUDCG (2010).

In this case, is it actually an extrajudicial avoidance, given that the avoidance still relies on the judge's decision? In the context of this study, it is not because the judge is still there to examine the seriousness of the debtor's behaviour. Its appearance at the moment of the creditor's denunciation is simply out of place. It is no longer related to *priori control*, but to *posteriori control*. One cannot therefore, although the debtor is at the creditor's mercy, consider an extrajudicial avoidance of contract as a private justice, since this process is controlled by the judge. This private justice is just for show, since it is no longer valid once the posteriori control of the judge takes over.⁴²² Contrary to article 1184 paragraph 3 of the Cameroonian Civil Code, which specifies the judicial avoidance of a contract as a ground for termination, the OHADA law expressly grants the unilateral avoidance of a contract to the creditor, although conferring upon the judge the power to control the eventual abuses of the parties.⁴²³

Therefore, in doing so, the OHADA law clearly affirms the subsidiary character of the right to unilaterally avoid a contract. The Uniform Act, by specifying in its article 281 that the unilateral avoidance of a contract is done at the creditor's own risk and peril, warns the latter that he may be exposed to negative consequences.

3.12.3.5. The judiciary termination of a contract of sale

In light of article 281 of the OHADA, the judiciary avoidance of a contract is decided by a judge and will be pronounced in cases of the non-performance of the contract. The creditor who was injured because of the gross misconduct of the debtor has to submit and prove this misconduct before the Court. Only a Court, after examination of the misconduct of a party, might pronounce a breach of contract.⁴²⁴

The seriousness of a breach of contract is considered by the judge at the request of the first party.⁴²⁵ Therefore, it is up to the creditor to consider and assess whether or not the

⁴²² Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴²³ See Tribunal régional hors classe de Dakar (Sénégal), Ordonance n° 1326 of 30 November 1998, case Indivision Pierre-Michel – Robert Lahoud c/Ibrahima Doumbya, available at: http://www.ohada.com/imprim_juris.php?article_juris=1111 .(Accessed on 14 – 08 – 2014).

⁴²⁴ Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴²⁵ Meyer <http://www.ohadata.com> (Last accessed: 23 November 2015).

seriousness of the non-performance of the debtor is sufficient for avoiding the contract of sale. It is a considerable power which is given to the first party which makes a request.⁴²⁶ The old OHADA text of 1997 did not foresee the unilateral breach of contract, but through this article, one can conclude that the creditor has a redoubtable power, which has to be used with the greatest parsimony.⁴²⁷

Therefore, the unilateral termination of a contract by a party must be justified by “gross misconduct”.⁴²⁸ Thus, if this principle of the unilateral breach of contract is to be used as a weapon of defence for both parties, it remains true that it appears to be dangerous for the party who first uses it, because he may risk having his wish to break the contract invalidated by the judge, based on the absence of the seriousness of the other party’s conduct. It is important to note here that the Uniform Act does not clearly define the notion of “gravity of behaviour”.⁴²⁹

CONCLUSION

This study of the performance of contracts under book VIII of the OHADA Uniform Act has enabled the reader to better understand how the transfer of property and passing of risk, non-conformity of goods and remedies concerning non-performance have been dealt with by the Uniform Acts. Thus, the OHADA, by dealing with the transfer of property in its article 275, has failed to take into account the solo consensus principle, as was present in the French civil law system, which advocated that the transfer of property was effective from the time when the seller and buyer agreed upon the price and the goods sold, even if the goods were not yet in the buyer’s possession. The OHADA has declined to adopt this principle and stipulates that the seller remains the owner of the goods until the time of delivery. The transfer of property has obliged this study to also explore the time of the passing of risk under the OHADA. In doing so, it has been highlighted that the time of the passing of risk is determined according to the time of the transfer of property. In addition, it has been noted

⁴²⁶ Nsire 2005 (2) *CEFDIP* 1-23.

⁴²⁷ See articles 245 to 247 of the old AUDCG (1997).

⁴²⁸ Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

⁴²⁹ Ebata

https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf?sequence=2. (Last accessed: 23 November 2015).

with regard to non-conformity that book VIII of the OHADA addresses this notion by examining the physical and legal criteria.

Lastly, with regard to sanctions for non-performance, it has been highlighted that through the reforms of 2010, regional African law positioned itself between tradition and modernity. Tradition, thanks to its maintenance of the inherited French civil law approach to the termination of contracts, and modernity, thanks to the introduction and influence of transnational law. Indeed, the text of the OHADA regarding the non-performance of contracts has become the major orientation of international commerce. Thus, the unilateral termination of contracts that is recognised today by the OHADA has injected liberalism into the practice of business law in Africa.

3.13. SOME DIFFERENCES BETWEEN THE OHADA AND CCC AND THEIR RELEVANCE TO SMEs

Based on the analysis of these two legal systems, namely the UAGCL and CCC, it is important to highlight the major differences between the two regarding the formation, performance and non-performance of contracts. With regard to the formation of contracts, it is important to note that when a contract is concluded by consensus, compared to the provisions of domestic law, which is silent on this point, the Uniform Acts carefully rules on the determination of content and meetings of will, by respectively and successively defining and regulating the notions of an offer and acceptance.⁴³⁰ Thus, the accuracy and relevance of these definitions enables issues concerning transactions carried out between distant persons to be regulated, using numerous written and oral correspondences to negotiate. This study is of the view that in spite of some of the shortcomings related to the UAGCL, it is still better structured than the Civil Code regarding the formation of contracts. It is also important to highlight the fact that the UAGCL has copied the CISG provisions in this regard to a large extent.

From the same perspective, one can also note, regarding the obligation of the seller, that both legal systems present some differences, particularly in terms of the transfer of property and transfer of risk. For instance, the Uniform Acts has enshrined the theory of reception and transfer of property, while the Civil Code, in its article 1583, enshrines the transfer of property of goods only through an exchange of consent. According to the Cameroonian legal system,

⁴³⁰ See articles 210 and 216 of the OHADA.

the transfer of property is effective at the moment when an agreement has been made with regard to an item and a price, regardless of the payment formalities. Accordingly, the risk was in principle transferred at this time from the seller to the buyer, while in the Uniform Acts, the transfer of risk occurs, unless otherwise agreed, at the moment of the withdrawal of the goods.⁴³¹ It appears that the AUGCL's provisions are more suitable for SMEs engaging in international commerce, since this UAGCL provision not only allows the seller to secure his goods until full payment by the buyer, but also permits the buyer to be responsible for any risk regarding the goods only once these goods are in his possession and under his control.

In addition, throughout the analysis of both legal systems, the most marked difference is that the UAGCL creates, in comparison to the Cameroonian Civil Code, more legal certainty for international trade, and may also enable West and Central African SMEs to become better integrated in the international market. This legal certainty is more apparent in the OHADA. For instance, the OHADA's provisions are more comprehensible, precise and coherent.⁴³²

As far as the OHADA's comprehensiveness is concerned, one can note that the treaty is more comprehensive than the Civil Code, which does not distinguish between civil and business matters. The OHADA treaty provides worthwhile guidelines in its definition of business in article 2, which stipulates that "For the purpose of the present treaty, enter within the scope of application of business law all the rules regarding companies, the legal status of merchant, debt collection, secured transactions and enforcement measures, bankruptcy, arbitration, employment law, accounting rules, sales and transportation laws and all subjects the council of ministers, unanimously, would decide to cover in compliance with the objectives of the present treaty and the provisions of art.8 thereafter".

The Uniform Acts, by selecting the subjects included in the definition of business, clearly provide an approach that is centred on the development of the instruments needed to support productive activity, as well as to lay the foundation for better protection and capital formation.⁴³³

In terms of the coherence of the Uniform Acts, one example which may illustrate this can be found in article 10 of the treaty, which stipulates that "the provisions of the uniform acts preempt all domestic statutes for the subject they cover", regardless of whether they were enacted before or after the entry into force of the OHADA treaty. However, it is important to note that in some countries, the issue of whether the OHADA law precedes the constitutional

⁴³¹ See article 283 of OHADA.

⁴³² Beauchard and Mahutodji J V K "Can OHADA Increase Certainty in Africa?" 17 February 2011 p.16.

⁴³³ See Minutes of the meeting of the Council of Ministers of June 16-17, 2011 (see n.22).

provisions of member states in cases where both texts are in conflict also remains open, since there are only a few states⁴³⁴ which have conducted studies to identify, for all the Uniforms Acts, the texts which need to be abrogated.⁴³⁵

CONCLUSION

The purpose of this chapter was to examine the laws applicable in Cameroon to contracts of sale, as well as the OHADA's law related to general commercial matters. In the first section, the researcher provided an overview of the history of Cameroonian law, in order to show that the bijural system applicable in Cameroon originated from the colonial period, and that the law governing contracts of sale was ruled by the Cameroon Civil Code.

This chapter has also shown that in spite of the fact that Cameroon signed the OHADA Treaty, its territorial and substantial applicability encountered some difficulties, mostly in the Anglophone region, due to the fact that the part of Cameroon which was colonised by the British adopted a common law system during colonisation. Therefore, the Anglophone Cameroonians viewed the OHADA Law as having been influenced and shaped by the French system and infringing upon article 1 paragraph 3 and article 68 of the Cameroonian Constitution.

In the second section of this chapter, the researcher examined the provisions related to the formation and performance of contracts in both the Cameroonian Civil Code and the OHADA's Uniform Acts relating to General Commercial Law. A study of the formation of contracts has not been carried out with regard to the Civil Code, because this system does not expressly deal with the notions of offer and acceptance, on which this study is based. A comparison of the articles governing the performance of contracts, such as transfer of risk, lack of conformity, guarantees of the seller, and sanctions for non-performance was important to this study, because it will help to determine which law will enable Cameroonian SMEs engaging in international trade to be more successful.

⁴³⁴ Only Senegal, Guinea, and the Central African Republic have conducted such studies. Studies have been commissioned for other countries, such as Benin and Burkina Faso, but were considered to be very insufficient.

⁴³⁵ Forneris 2010 *Justice&Development* 86.

Chapter Four.

THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

4.1. INTRODUCTION

Professor Schwenger, in her brilliant statement, sounded the alarm bells on the exponential increase in the development of international trade.¹ She highlighted the fact that this exponential increase in the globalisation of trade could not strengthen international economic growth if “the legal answers in a variety of fields”² always remained insoluble. According to her, the development of international trade undoubtedly passes through the harmonisation and unification of different laws between states.³ She indicated that this need for unification must be realised, particularly in terms of the law of contracts, stating that “Contract law is at the very heart of international trade”.⁴

This study agrees with these statements, owing to the fact that to export or import goods, enterprises have to conclude and sign contracts of sale with other foreign traders.⁵ Generally, contracts of sale between a Cameroonian trader and American trader, for instance, may be governed by Cameroonian law, American law or the law of a third party.⁶ Practically speaking, in matters of international trade, the concern of the parties about the application of an unknown foreign law presents itself as a significant problem in international trade, especially when both contracting parties are from the countries with different languages and legal systems.⁷ Lawyers who draft contracts prefer to use their domestic law and working language, and a company performing in international trade prefers to use its own domestic law to govern a contract or incorporate its requirements during the drafting of the contract.⁸ In this context, it is obvious that large or powerful companies will usually impose their domestic or preferred law on their partners, given that they are economically strong.

¹ Schwenger *Regional and Global Unification of Contract* 39.

² Schwenger I and Whitebread *Legal Answers to Globalisation* 12.

³ Schwenger *Regional and Global Unification of Contract* 39.

⁴ Schwenger *Regional and Global Unification of Contract* 39.

⁵ Schwenger *Regional and Global Unification of Contract* 39.

⁶ Schwenger *Regional and Global Unification of Contract* 39.

⁷ Kilian 2011 (10) *J Transnat'l L and Policy* 217.

⁸ Bortolotti *Drafting and Negotiating International Commercial Contracts* 65.

Therefore, SMEs performing in international trade are at the mercy of large companies in this respect.⁹ With regard to the example mentioned above, the American enterprise dealing with the Cameroonian SME will have the tendency to draft the contract based on its domestic law. The problem with this is that not only will it be a system founded on common law, which is traditionally different from the civil law system on which the Cameroonian legal system is based, and Cameroonian SMEs will be compelled to pay an expert in the case of litigation, in order for the latter to study the American law and explain the contents of the contract.

It is evident that differences between the laws of states is a major concern for international trade, and one may conclude, in agreement with authors such as Schwenger, Coetzee and Gama, among others, that the harmonisation and unification of rules governing international trade is an indispensable condition for the overall development of international trade, since Coetzee and Mustaqeem de Gama state that "harmonization creates certainty and predictability which is essential for successful international trade".¹⁰ The standardisation achieved by the CISG attempts to provide a solution to the problem, by proposing a unification of the substantives rules of sales. It attempts to address conflicts of laws through the adoption of a unique law.¹¹

The Convention is currently considered to be the best tool to improve contract law, whether on a domestic, regional or international level.¹² Today, this instrument exerts a significant influence on most legislation.¹³ It is used as an inspirational source of reference for many countries which are in the process of drafting laws governing commerce. For instance, in some continents or parts of continents, such as the European Union,¹⁴ the OHADA took their base model from the CISG.¹⁵ With regard to the OHADA, one can note the indifference among many contracting states concerning the CISG, as the majority of OHADA members have not yet ratified the Convention. Among the 19 contracting states of this regional

⁹ Schwenger *Regional and Global Unification of Contract* 39

¹⁰ Coetze & De Gama 2006 (10) VJ 15- 26.

¹¹ Coetze & De Gama 2006 (10) VJ 15- 26.

¹² See Kröll, Mistelis and Viscasillas *UN Convention* 10; Schwenger and Hachem http://ius.unibas.ch/Uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf; Ferrari in *CISG* 471.

¹³ Schlechtriem 2005 (10) *Juridica International Review* 27-34.

¹⁴ See, among others, Kröll/Mistelis/Viscasillas *UN Convention* 10 Fn22; Magnus in *CISG* vs.101; Troiano in Ferrari *CISG* 348; Huber Sales Law 937 944; Lookofsky in Ferrari *CISG* 128; Magnus in Ferrari *CISG* 158-159; Witz in Ferrari *CISG* 139; Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf> and Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>.

¹⁵ Penda

http://cisgbase2015.com/index_htm_files/20_paper_Jean%20Alain%20Penda_OHADA%20and%20the%20CISG.pdf. (Last accessed: 23 November 2015).

harmonisation, only three, namely Benin, Gabon and Guinea,¹⁶ have ratified the convention. This indifference is confirmed by Ferrari', when he states the following: "Some countries simply favor a more regional – rather than a CISG's global – approach to the unification of sale laws, as they believe that this will benefit intra-regional commerce more".¹⁷ This statement may well explain why many OHADA contracting states, such as Cameroon, have not yet ratified the CISG. The non-ratification of the CISG by Cameroon cannot be justified by economic or political factors. Moreover, in the researcher's view, this is also not due to the possible negative relationship between the CISG and Cameroonian or OHADA law, because the OHADA has been based on the model of the CISG. Cameroon also has no reason to be resentful of the CISG.¹⁸ On the contrary, the CISG's provisions, as will be demonstrated within the framework of this chapter, can effectively cohabit with regional laws and improve the shortcomings of Cameroonian law, since although this international convention has still not been ratified by Cameroon, it is often applied there.¹⁹ For instance, it can be applied when parties have chosen the convention as an applicable law, or when the conflict of law has led to the convention. Thus, a closer study of this international convention will be necessary, in order to understand all its aspects.

To analyse the CISG, this chapter will first highlight its content and legal nature, before identifying and analysing the conditions that have to be met in order to apply the CISG in West and Central Africa. After this, the chapter will examine the CISG's provisions concerning the formation and performance of contracts. Among these provisions, specific articles will be focused on. With regard to the formation of contracts, the focus will be on acceptance, the period of acceptance, and counter-offers. In terms of the performance of contracts, the focus will be on articles dealing with transfer of risk, lack of conformity, guarantees of the seller, fundamental breaches of contract, and sanctions for non-fulfilment.

¹⁶ The CISG entered into force in Guinea on 1 February 1992; in Gabon on 1 January 2006; and in Benin from 1 August 2012. See CISG status at: http://www.uncitral.org/Uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, or at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>; see also Magnus in *CISG vs 4*; and Ferrari *OHADA* 79-81.

¹⁷ Ferrari in *CISG* 415, where the author deplores, in particular, the attitude of the OHADA member states towards the CISG. "What Sources of Law for Contracts for the International Sale of Goods?" 2005 (12) *International Review of Law and Economics* 314-341. Why One Has to Look Beyond the CISG.

¹⁸ Schwenzer and Hachem 2009 (57) *American Journal of Comparative Law* 457-478.

¹⁹ Herbert, Igbunugo and Adiyia 2009 (1) *INT'L Law Firm* 21-26.

4.2. LEGISLATIVE HISTORY AND LEGAL CONTENT OF THE CISG

The driving force behind the establishment of an international legal instrument which would harmonise law in the field of international trade came, on the one hand, from the Industrial Revolution of the 19th century, and on the other hand, from the inability of most legal systems to effectively address many problems resulting from the Industrial Revolution.²⁰ Indeed, apart from the fact that the existing conflict of laws approach was considered to be too risky, uncertain and insufficient to properly govern the delicate issues raised by international trade of goods contracts, there was also the related issue of most legal systems being obsolete, incomplete, fragmentary and inappropriate for responding to the new problems raised by the effects of the Industrial Revolution with regard to international transactions.²¹ Therefore, there was a need for a new international instrument capable not only of providing effective solutions to problems arising from the newly emerging economic and commercial traffic, but also to be able to provide solutions which take into account or unify existing legal systems of the world.²²

In light of the above, in 1930, under the auspices of UNIDROIT, the movement towards the unification of the rules of law for international sale of goods contract began in earnest. In 1934, the committee entrusted with this task²³ decided, based on the importance of the rules relating to the performance of contracts, to separate the rules of formation from the rules of performance of contracts.²⁴ Then, on 1 July 1964, at a meeting held at the Hague and attended by 28 representatives of States, together with observers from four States and six international Organisations,²⁵ over a period of three weeks two texts were approved, namely the Convention relating to a Uniform Law on the International Sale of Goods (ULIS), and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).²⁶

²⁰ Kröll, Mistelis and Viscasillas *UN Convention* 10.

²¹ Kröll, Mistelis and Viscasillas *UN Convention* 10.

²² Chuah *Trade* 10; Coetzee *Incoterms* 2.

²³ Eiselen 1999 (116) *SALJ* 323-334; Bonell in Bianca/Bonell *Commentary* 4.

²⁴ In reality, as noted by Kröll/Mistelis/Viscadillas in their footnote 6 of the book *UN Convention* p.3, the true reason was that "the Committee was incapable of reaching on consensus on the precise moment of the conclusion of the contract to which the Draft Project referred to in several occasions". See A/CN.9/128, Annex II, UNCITRAL YB VII (1977), pp. 103 – 104.

²⁵ See Bonell in Bianca/Bonell *Commentary* 4.

²⁶ See Butler *Guide* 1-12; Bonell in Bianca/Bonell *Commentary* 4; Eiselen *Globalization* 97; Flechtner Honnold's *Uniform Law* 5.

However, although both texts entered into force on 18 August 1972,²⁷ it is important to note that they were, universally speaking, a failure.²⁸ Indeed, the main reasons for this failure are that, apart from the fact that the diplomatic conference was attended by a small number of States, 22 of the 28 attending States came from Western European and highly developed countries²⁹. As a result, only 3 developing countries and three Eastern European countries participated in this diplomatic conference. Therefore, owing to the majority of representatives coming from Western European countries,³⁰ it is obvious that the rules adopted were more closely related to trade among countries with similar behaviour in terms of international trade. Accordingly, it was no surprise to see that many developing countries, especially those which started to emerge after decolonisation, were not interested in ratifying this text of Uniform Law, since it did not reflect their realities in international trade. The need for a new instrument that was capable of addressing the shortcomings of the Uniform Law therefore arose, hence the birth of the CISG.

4.3. THE BIRTH AND ADOPTION OF THE CISG: ITS CONTENT AND LEGAL NATURE

Owing to the limited success of the 1964 Hague Convention, the Secretary General, based on the research document prepared by Prof Schmitthoff between 1964 and 1966³¹, established on 17 December 1966, by Resolution 2205 (XXI) of the General Assembly, the

²⁷ Van der Velden *Sales* 46; Honnold *Unification* 5. For the relevance of the Hague Sales Convention, see Schlechtriem *Unification* 126.

²⁸ Kröll/Mistelis/Viscasillas *UN Convention* 3; Felemegas 2000-2001 *Review of the CISG* 115 140; Coetzee *Incoterms* 158; Wessiack <http://cisgw3.law.pace.edu/cisg/biblio/wesiack.html>. (Last accessed: 24 November 2015).

²⁹ See Kröll/Mistelis/Viscasillas *UN Convention* 3; Felemegas 2000-2001 *Review of the CISG* 115 140, Eiselen *Globalization* 97-102; Butler *Guide* 1-12, and the UNIDROIT website at: <http://www.unidroit.org/english/implement/i-64ulis.pdf>. (Last accessed: 24 November 2015). The UK's ratification was enacted by the Uniform Laws on International Sales Act 1967, which entered into force on 18 August 1968. Available at: http://www.legislation.gov.uk/ukpga/1967/45/pdfs/ukpga_19670045_en.pdf. (Last accessed: 24 November 2015).

³⁰ Bonell in Bianca/Bonell *Commentary* 4; Schlechtriem in Schlechtriem/Schwenzer *Commentary* 1; Ndulo 1987 (3) 2 *Lesotho LJ* 127 133; Oosthuizen *Rights* 12; Eiselen 1999 (116) *SALJ* 323-334; German 1995 *Review of the CISG* 117; Lehmann 2006 (18) *SA Merc LJ* 317 318; Coetzee *Incoterms* 158.

³¹ See A/6396 – Report to the Secretary General (“The Schmitthoff Study”), available at: <http://www.uncitral.org> (Last accessed: 24 November 2015).

United Nations Commission on International Trade Law (UNCITRAL).³² The UNCITRAL initially had to deal with the issue of deciding whether it should adopt the 1964 Uniform Laws or formulate a new text. However, the UNCITRAL's work, accompanied by the comments made by Prof Tunc³³ on the 1964 Uniform Laws sent to Member States, in order to receive their feedback, was rejected.³⁴ Thus, the task of making amendments to the Uniform Laws, which would take into account the interests of countries with different legal, social and economic systems,³⁵ was entrusted to a working group composed of members from 15 countries, and under the chairmanship of Prof Barrera Graf.³⁶

After working separately on the issue of formation of contracts and the obligations of the parties, which took place in January 1976 for the ULIS and January 1978 for the ULF respectively, consensus was unanimously reached to combine the two drafts in a single Draft Convention, and this was submitted to the Member States for their comments.³⁷ In the General Assembly, the UN called a diplomatic conference, which was held between 10 March and 11 April 1980 in Vienna, at which the Convention was adopted.³⁸

The new Convention, which is referred to as the CISG, is a substantive law treaty and not a conflict of laws tool.³⁹ This means that the Convention does not deal with the problem of conflict of law. It is composed of 101 articles, which are divided into 4 parts. One can see its substantive provisions in its Part II (Formation of the Contract) and Part III (rights and obligations of the parties). Part II (Articles 14- 24), which concerns the formation of contracts, deals with provisions regarding an offer, revocation, acceptance and withdrawal. Part III (Articles 28 – 88), which is the longest part of the CISG, deals with the obligations of the buyer and seller, as well as remedies in cases of breach of contract). Lastly, Part IV (Articles 89 – 101) covers the final provisions, which deal with the rules of ratification and entry into force, as well as reservations.

³² Cf. UNGA Resolution 2205 (XXI) of 17 December 1966 in UNCITRAL 1968-1970 (I) YB 65.

³³ See Tunc <http://www.cisg.law.pace.edu/cisg/biblio/tunc.html>. (Last accessed: 24 November 2015).

³⁴ See A/CN.9/31 – Analysis of replies and comments by governments on the HAGUE Conventions of 1964 1st session, 5 – 16 January 1970, New York.

³⁵ See A/7618 – Report of the United Nations Commission on International Trade Law on the work of its second session. The member States of the Working group were: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, UK, Tunisia, former USSR and USA.

³⁶ See A/7618 – Report of the United Nations Commission on International Trade Law on the work of its second session. The member States of the Working group were: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, UK, Tunisia, former USSR and USA.

³⁷ See A/CN.9/143 – Draft Convention on the formation of contracts for the international sale of goods; and A/CN.9/144 6 – Commentary on the draft convention on the formation of contracts for the international sale of goods, 11th Session, 30 May – 16 June 1978, New York.

³⁸ See Resolution 33/93, in A/CONF.97/1, at A/CONF.97/19, p.XV. The Conference was held in Vienna at the Kongresszentrum Hofburg.

³⁹ See Bridge in: Flechtner/Brand/Walter, *Drafting Contract* 65.

Part I (Articles 1 – 13) deals with the General Rules of the Conventions: Articles 1 – 5 concern the scope of application, Articles 6 – 9 explain the hierarchy of sources, and Article 7 deals with the interpretation of the Convention and methods for filling gaps. Article 8 provides standards for the interpretation of contracts and conduct of the parties, and Article 11 deals with form requirements.⁴⁰

4.4. DEFINITION OF THE SPHERE OF APPLICATION OF THE CONVENTION

To define the scope of application of the Convention involves determining the transactions which are targeted by it, and to specify the domain of substantive law that is governed by the Convention.

4.4.1. Transactions targeted by the Convention

As suggested by the title of the Convention, the subject matter relates to contracts for the international sale of goods.⁴¹ However, it does not apply to all international sales. The Convention's provisions stipulate the requirements of its applicability and that the Convention only applies to transactions which meet the identified criteria.⁴² The most important of these criteria are elaborated on in articles 1 to 6 of the CISG. They concern the territorial, substantive and temporal character of the transactions that are performed.

4.4.1.1. The substantive requirement of application

In order for the Convention to apply, a transaction has to contain three elements. It has to be a contract of sale,⁴³ international in the conventional sense,⁴⁴ and deal with goods.⁴⁵

⁴⁰ Refer to <http://www.cisg.law.pace.edu/cisg/text/principles7.html>. (Last accessed: 24 November 2015).
See also Kroll/Mistelis/Viscasillas *UN Convention* 18.

⁴¹ Lookofsky *UN Convention* 31.

⁴² CLOUT case No. 378 (Tribunale di Vigevano, Italy, 12 July 2000) see full text of the decision.

⁴³ See Arbitral Award, CIETAC, 29 March 1996.

4.4.1.1.1. Transaction as a contract of sale

Article 1 stipulates that the Convention is applied to “contracts of sale”, but the text does not directly define the concept of a sale.⁴⁶ However, courts and scholars acknowledge that this definition can be found in articles 30 and 53. In the case of *Pessa Luciano v. W.H.S. Saddlers International*, for instance, the Italian District Court of Padova, based on Articles 3, 30 and 53 of the CISG, defined a “contract of sale” as “a sale contract whereby the seller is obliged to deliver the goods, transfer the property in the goods and possibly deliver the documents relating to the goods while the buyer is obliged to pay the price and to take delivery of the good”.⁴⁷

It is worth noting that this definition, which derives from the combination of both articles, corresponds to the notion of a traditional sale, such as defined by article 1582 of the Cameroonian Civil Code, namely to deliver an item for a price.⁴⁸ Thus, one can conclude, in agreement with authors such as Mistelis, Kröll and Viscasillas, that a contract for the sale of goods is “a contract where goods are exchanged for money”.⁴⁹ However, some sales under the CISG have been expressly excluded from the scope of application of the Convention, even though they conform to the notion of a sale. The exclusions mentioned in article 2 are

⁴⁴ CLOUT case No. 281 (Oberlandesgericht Koblenz, Germany, 17 September 1993) see full text of the decision.

⁴⁵ See text under article 7 of the CISG.

⁴⁶ This has been indicated; for instance, in the CLOUT case No 106 (Oberster Gerichtshof, Austria, 10 November 1994) see full text. See also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; Kritzer/Eiselen *Contract* §84:15; Huber/Mullis *CISG* 43; Ott/Matthey *Commerce* 22; Perovi 2011 (3) *BLR* 181 182; Hugo 1999 (11) *SA Merc LJ* 1 4; Ng'ong'ola 1992 (4) *RADIC* 835; Nicholas 1989 (105) *LQR* 201 206; Ziegel, available at: <http://www.cisg.law.pace.edu/cisg/biblio/4ziegel.html>. (Last accessed: 23 November 2015); Wethmar-Lemmer *PIL* 65; see also authorities quoted in *UNCITRAL Digest* 6 Fn66.

⁴⁷ See Italy 10 January 2006 District Court Padova *Merry-go-rounds case* [<http://cisgw3.law.pace.edu/cases/060110i3.html>] (last accessed 24 November 2015); see also Netherlands 1 November 2001 *Rechtbank Rotterdam Nederland's Internationaal Privaatrecht* 2002 No. 114; Switzerland 11 March 1996 *Kantonsgericht Wallis Clay*; Italy 26 November 2002 Tribunale di Rimini *Porcelain Tableware case*, *CISG-Online* 737 (Pace); in *UNCITRAL Digest* 6 Fn68. For scholars, see Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; Huber/Mullis *CISG* 43; Ott/Matthey *Commerce* 22; Wethmar-Lemmer *PIL* 65; Perovi 2011 (3) *BLR* 181182; Hugo 1999 (11) *SA Merc LJ* 1 4.

⁴⁸ See article 1582 of the Cameroonian and French Civil Code, see also Sale of Goods Act 1979 (UK), Khan, *Loc. Cit.*, note 5, p. 954-956. This CISG's approach towards defining and characterising a “contract of sale” corroborates Article 1582 of the Cameroonian Civil Code in terms of the definition of a contract of sale.

⁴⁹ Schlechtriem/Butler *International Sales* 22; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 31; see also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 28, who describes a Contract for the sale of goods as “a contract where goods are exchanged for money.”

of three types: those based on the intention for which the goods were purchased, those based on the type of transaction, and those based on the type of goods.⁵⁰

Article 2 sets forth that the Convention does not govern the sale “by auction”,⁵¹ “on execution or otherwise by authority of law”.⁵² Those exclusions based on the types of transactions are justifiable, since they are usually subject to special regulations in terms of the applicable domestic law. In this regard, the Convention’s drafters wished to remain governed by these regulations, even if the purchaser had his place of business in a different State.⁵³ Therefore, the West and Central African SMEs operating in this field will not be discussed in this study.

In addition, sales to consumers are excluded from the sphere of application of the Convention. While the first two exclusions mentioned above explain themselves by the procedures followed for carrying out a sale, the third one justifies itself by the purpose for which the goods are bought.⁵⁴ In respect of article 2 (a), the Convention does not apply to sales where the goods are bought “for personal, family and household use”. Article 3 overbids this provision by specifying that the civil and commercial character of sales is not taken into account.⁵⁵ Only the purpose of purchasing is taken into consideration, and the exclusion of article 2 (a) refers to the intention of the buyer at the moment of the transaction.⁵⁶

However, the situation is not that simple for other transactions in the commercial arena. Today, one can observe that many enterprises use complex contracts, which involve the provision of goods to the seller’s enterprise, as well as the supplier of goods. For instance, the seller’s enterprise obliges itself to manufacture a good for the buyer, and the contract stipulates that the buyer’s enterprise must not only sell the good, but also provide the manpower or other services. Such contracts usually create a problem with regard to their classification. Are they sale contracts? Or are they just contracts for services or enterprises?

The answer to this question can be found in article 3. For purposes of the Convention, article 3 paragraph 1 describes a sale as “the contracts for the supply of goods to be manufactured

⁵⁰ See United Nations Conference on Contracts for the international Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, and Documents of the Conference and Summary Records of the Plenary Meetings of the Main Committee, 1981, 16.

⁵¹ See article 2 (b) of the CISG.

⁵² See article 2 (c) of the CISG.

⁵³ See the commentary on the drafting of convention established by the Secretariat in document of United Nations on the CISG 10 March and 11 April 1980, UN2 A/CONF. 97/19F, p.17.

⁵⁴ See Schlechtriem in Schlechtriem/Schwenzer, *Commentary* 8.

⁵⁵ Article 3 of the CISG.

⁵⁶ See CLOUT case No 992 Denmark Rettin Kobenhaven, 19 October 2007, where the Copenhagen District Court Annika Gustavsson v. LRF N.V.) Found the CISG to be applicable by virtue of article 2 (a) after establishing that the pony bought by the buyer was not purchased exclusively for personal uses.

or produced". Therefore, the sale of goods that the seller manufactures on order is governed by the Convention's provisions.⁵⁷ However, there is a restriction which stipulates that the buyer must provide "a substantial part of the materials necessary for such manufacture or production". This means that the Convention is not applicable when a "substantial part" for the manufacture or production of the goods has been supplied by the buyer. This article 3 (1) fills a gap in the Civil Code regarding complex contracts.

4.4.1.1.2. *The criteria of internationality and the place of business*

The Vienna Convention does not provide an express definition that enables one to determine the internationality of a contract for the sale of goods.⁵⁸ However, there is no doubt that the CISG only aims to regulate a contract of sale presenting an international character, owing to the title and applicability rules provided in the first article.⁵⁹ Therefore, the issue of the definition of an international contract of sale has been dealt with in article 1 paragraph 1.

In accordance with this provision, a contract for the sale of goods is international when, at the moment of the conclusion of the contract, the parties' "places of business are in different States".⁶⁰ Thus, the Convention applies to contracts for sales of goods between parties whose places of business are in different States.⁶¹

The notion of place of business is very significant to the determination of the internationality of a contract, even if one can perceive that the Convention does not clearly define it. Several

⁵⁷ To better understand this interpretation, see CISG-AC Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004 (hereafter CISG-AC Opinion No. 4). Available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html>. (Last accessed: 24 November 2015). For leading cases on this subject, see Kritzer/Eiselen *Contract* para 84:21 84-64 to 84-66; and for comments, see Brunner CVIM 91 111-112.

⁵⁸ Kroll, Mistelis, Viscasillas *UN Convention* 36.

⁵⁹ Article 1 provides that "This Convention applies to contracts of sale of goods between parties whose places of business are in different States".

⁶⁰ See USA 19 August 2010 Federal District Court Arkansas *Electrocraft Arkansas, Inc. v Super Electric Motors, Ltd and Raymond O'Gara, Individually and as Partner and Agent of Super Electric Motors, Ltd* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/100819u1.html>] (Last accessed: 24 November 2015); Canada 12 April 2011 Cour d'Appel de Québec *Frozen Lobster Tails case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/110412c4.html>] (Last accessed: 24 November 2015); Austria 17 December 2003 Supreme Court *Tantalum Powder case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/031217a3.html>] (last accessed 24 November 2015).

⁶¹ See Greece Polimeles Protodikio Athinon 2009 docket No. 4505/2009; Italy Tribunale di Padova 25 February 2004; CLOUT case No. 608 Italy Tribunale di Rimini 26 November 2002; CLOUT case No 106 Austria Oberster Gerichtshof 10 November 1994.

attempts have been made by scholars to define the notion of “place of business”. As used in article 1, this concept must be understood⁶² as referring to the permanent and regular place where one party runs its business. Schwenger and Hachem pointed out that a place of business exists only “if a party uses it openly to participate in trade and if it displays a certain degree of duration, stability and independence”.⁶³ In the same vein, Honnold stated that the notion of place of business should be interpreted as being the permanent and regular location of the trader, and should not include the temporary location used for negotiations.⁶⁴ This means that a temporary place used for the negotiation of a contract does not constitute a “place of business” in terms of the Convention.⁶⁵

According to many Courts, the term “place of business” may be defined as a “place from which the commercial activity is effectively managed”.⁶⁶ This requires a certain duration and level of stability, as well as certain autonomy. Similarly, another Court defines it as a permanent commercial organisation which is stable and is not just a mere place where only preparations for the conclusion of a contract have taken place.⁶⁷ The ICC has indicated that if there is a place of business, it must have a permanent commercial organisation consisting of premises and employees for the purpose of selling goods and services.⁶⁸

However, one can note that these definitions of “place of business” do not deal with all the possibilities which can occur in practice. In reality, most parties performing international transactions have more than one “place of business in a different State”, such as multinational enterprises. In this respect, the question that arises with regard to the practice whereby traders always negotiate their business in hotel rooms in the USA or rent an office and send a negotiator to London, who keeps the office after the negotiation, is the following:

⁶² See décision de recueil jurisprudence 746 Oberlandesgericht Graz, Autriche, 29 juillet 2004.

⁶³ See Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 37; see also UNCITRAL *Digest* 4 paragraph 5.

⁶⁴ See Honnold *Uniform Law* 63.

⁶⁵ See Flechtner *Honnold's Uniform Law* 34; see also Wethmar-Lemmer PIL 76.

⁶⁶ [Germany Oberlandesgericht Hamm 2 April 2009]; CLOUT case No. 867 [Italy Tribunale di Forlì 11 December 2008]; CLOUT case No. 651 [Italy Tribunale di Padova 11 January 2005] (see full text of the decision); CLOUT case No. 904 [Switzerland Tribunal Cantonal Jura 3 November 2004] (see full text of the decision); CLOUT case No. 746 [Austria Oberlandesgericht Graz 29 July 2004] (see full text of the decision); [Italy Tribunale di Padova 25 February 2004]; [Germany Oberlandesgericht Stuttgart 28 February 2000]; CLOUT case No. 608 [Italy Tribunale di Rimini 26 November 2002] (see full text of the decision); for a similar definition see CLOUT case No. 930 [Switzerland Tribunal cantonal du Valais 23 May 2006]; CLOUT case No. 106 [Austria Oberster Gerichtshof 10 November 1994] (see full text of the decision); for a court decision stating that the phrase “place of business” requires the parties to “really” do business out of that place, see CLOUT case No. 360 [Germany Amtsgericht Duisburg 13 April 2000].

⁶⁷ See ICC Arbitral award case No. 9781 of 2000.

⁶⁸ See A/CONF. 97/9: Official documents, p.79 article 9 No 1.

Can these locations be considered to be a “place of business” that require the application of the CISG?

According to the “*travaux préparatoire*” and the report of the CISG, neither the hotel room nor the office will be considered as a “place of business”⁶⁹In addition to the problem of many “places of business”, the Convention sets forth in its article 10 (a) that “the place of business is the one which has the closest relationship to the contract and its performance, having regard to the circumstance known and contemplated by the parties at any time before or at the conclusion of the contract”. This article stipulates that the court, in cases of numerous places of business, must find “the one which has the closest relationship to the contract and its performance”. Rightly so, in the *Milk Packaging Equipment* case, the Serbian Chamber of Commerce, in dealing with the issue of the seller’s numerous places of business, held that “the branch where negotiations were conducted; the contract signed; the machine delivered; and the payment received was the most closely connected to the contract and its performance”.⁷⁰

4.4.1.1.3. The goods

In accordance with the first article of the CISG, the Convention solely governs international contracts of sales that have “goods” as their subject matter. This word is not expressly defined in the Convention.⁷¹ However, in light of article 7 (1), the concept of “goods” should be interpreted autonomously, due to the Convention’s “international character” and the need to contribute to uniformity in its application.⁷² According to case law and the CISG, “goods” are typically items that at the moment of delivery⁷³ are moveable and tangible,⁷⁴ regardless of

⁶⁹ See report 1980 Conference, Analysis of comments and proposals, part II, B, 1 (article9)

⁷⁰ Serbia 15 July 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Milk Packaging Equipment* case [<http://cisgw3.law.pace.edu/cases/080715sb.html>] (Last accessed 24-11-2015).

⁷¹ Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31; Kritzer/Eiselen *Contract* §84:6 84-26; Butler *Guide* 2-26, Flechtner *Honnold’s Uniform Law* 55; Wethmar-Lemmer PIL 70; UNCITRAL *Digest* 6 §27.

⁷² See article 7 of the CISG; see Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 34; Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31; UNCITRAL *Digest* 6 para 27; and Perovi 2011 (3) *BLR*181 193.

⁷³ See Italy 16 February 2009 Tribunale di Forlì [<http://cisgw3.law.pace.edu/cases/090216i3.html>] (Last accessed 22-11-2015); Italy 25 February 2004 Tribunale di Padova [<http://cisgw3.law.pace.edu/cases/040225i3.html>]; Italy 26 November 2002 Tribunale di Rimini *Porcelaine Tableware* case, CLOUT case No. 608; France 26 April 1995 Cour d’Appel de Grenoble *Marques Roque v Manin Reviere* (Second hand portable warehouse shed), CLOUT case No. 152; in UNCITRAL *Digest* 6 Fn84.

whether they are solid, used or new, inanimate or alive.⁷⁵ It is correctly prescribed that human organs, artificial limbs, cultural and art objects, pharmaceuticals and similar goods will qualify as CISG goods.⁷⁶

Nevertheless, it is important to note that the notion of “goods” as items which are only tangible does not seem to be fully suited to today’s world, where technological developments allow parties to perform their contractual obligations electronically. Both the buyer and seller can do these activities via the Internet. The “buyer” may pay the price electronically, while the “seller” provides the item to the buyer by electronic means as well. This issue has been highlighted by Lookofsky, who stated the following: “suppose Merchant S in Germany supplies a computer programme to Merchant B in France. The programme, designed to facilitate the billing of customers, is properly installed in B’s computer system, but the software performs badly. It shut down repeatedly and unpredictably, arguably doing B’s business more harm than good. Can this transaction be classified as a CISG sale of good”?

The answer to this question was provided by Lookofsky himself, when he stated that “a computer program is a real and very functional thing. The fact that the software is protected by copyright does not change the nature of this invisible and intangible good”.⁷⁷ In the same vein, in the *Swiss Computer Software and Hardware* case, the Commercial Court of Zurich, by its decision, confirmed Lookofsky’s view when it held that “the purchase of software and the joint purchase of software and hardware as well constitute a sale of goods that falls within the ambit of the CISG”.⁷⁸

⁷⁴Switzerland 21 October 1999 Kantonsgericht des Kantons Zug, CLOUT case No. 328; Italy 29 December 1999 Tribunale di Pavia, CLOUT case No. 380; Germany 21 March 1996 Oberlandesgericht Köln, CLOUT case No. 168; Austria 10 November 1994 Oberster Gerichtshof, CLOUT case No.106; Italy 26 November 2002 Tribunale di Rimini, CLOUT case No. 608; in UNCITRAL *Digest 7*. See also Schwenzer/Hachem in Schlechtriem/ Schwenzer *Commentary* 35; Kritzer/Eiselen *Contract* para 84:6 84-26; Wethmar-Lemmer PIL 70. See Spohnheimer in Kröll/Mistelis/Viscasillas *UN Convention* 52; Flechtner *Honnold’s Uniform Law* 55. See cases quoted in UNCITRAL *Digest 7* Notes 85 to 89; see also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31.

⁷⁵ See cases quoted in UNCITRAL *Digest 7* Notes 85 to 89; see also Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 31.

⁷⁶ See Schwenzer/Hachem, in: Schlechtriem/ Schwenzer, *Commentary* 16.

⁷⁷ Lookofsky (2003 (13) 3 *Duke J Comp & Int’l L* 263)

⁷⁸ See Switzerland 17 February 2000 Commercial Court Zürich *Computer Software and Hardware case*; see also Netherlands 28 June 2006 District Court Arnhem *Silicon Biomedical Instruments BV v Erich Jaeger GmbH* [<http://cisgw3.law.pace.edu/cases/060628n1.html>]; see also Austria 21 June 2005 Supreme Court *Software case* [<http://cisgw3.law.pace.edu/Cases/050621a3.html>] (last accessed 22-6-2015).

4.4.1.2. The territorial and temporal scope of the CISG

As far as the territorial application of the CISG is concerned, it can be noted that this Convention provides two ways of application, namely direct and indirect applicability.

4.4.1.2.1. *The direct applicability of the CISG by virtue of its article 1(1) a*

In principle, in order for the Vienna Convention to be autonomously applied, the parties must have their place of business in different contracting states. This means that the CISG is not concerned with the law governing contracts of sale or their formation in cases where the parties have their place of business within one and the same State.⁷⁹ This means that the CISG only applies if the State in which the parties have their place of business is a contracting State,⁸⁰ even though the rule of private international law of the forum would normally have pointed towards the rules of a third country, such as the law of the State where a contract has been concluded.⁸¹

Indeed, the question that needs to be answered is that of what a contracting State is. This question is answered by articles 91(2)⁸² and 91 (3).⁸³ According to these articles, a contracting State is any State which has implemented the Convention by ratification or accession, and by its entry into force in accordance with Art. 99 (2)⁸⁴ and Art. 91 (4)⁸⁵. After

⁷⁹ Schlechtriem 2005 (4) *Law Review* 781-784.

⁸⁰ See Italy 14 January 1993 District Court Monza *Nuova Fucinati v Fondmetall International* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930114i3.html>] (last accessed 23-6-2012). In this case, the Court did not apply the CISG because, at the time the contract was concluded, only Italy was a contracting state and not Sweden. See also Italy 19 April 1994 Florence Arbitration *Proceeding Leather/textile Wear case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940419i3.html>] (CISG not yet in force in Japan when contracting).

⁸¹ See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March -11 April 1980, Official Records, Documents of the Conference and Summary Records of the of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 15. See also Kroll, Mistelis and Viscasillas *UN Convention* 24.

⁸² See Article 91 (2), which provides that this Convention is subject to ratification, acceptance or approval by the signatory States.

⁸³ See Article 91 (3), which provides that the Convention is open for all the States which are not signatory States, as from the date on which it is open for signature.

⁸⁴ According to Art 99(2), "when a State ratifies, accepts, approves or accedes to this convention after a deposit of the tenth instrument of ratification, acceptance, approval or accession, this convention, with the exception of the part excluded, enters into force in respect of that State....., on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession".

reading these articles, one can conclude that the contracting States will be all the States which have signed and ratified, accepted or approved the Convention, and which have deposited their tools of ratification, acceptance and approval with the United Nations.⁸⁶ The contracting States are also all the States which have not signed the Convention, but which have adhered to it and deposited their tools with the United Nations.⁸⁷ In spite of the simplicity with regard to the determination of the scope of application of the CISG, it enables States, through Article 92,⁸⁸ to exclude the application of certain parts of the CISG to their contracts.

This means that a contracting State which has declared that it is not concerned about the second or third part of the Convention will not qualify as a contracting State in matters related to this part of the Convention.⁸⁹ In the same vein, the Convention is not applicable to the relationship between the contracting parties whose respective places of business are situated within States which have subscribed or made reserves in accordance with Article 94.⁹⁰

4.4.1.2.2. *The indirect scope of applicability of the CISG by virtue of its article 1(1) b*

Even though the CISG is directly applicable on account of its article 1 (1) a, it also enshrines the possibility of an indirect application by virtue of its article 1 (1) b. Indeed, there are many issues which are not covered by the Convention and which have to be solved by domestic

⁸⁵ See Article 91 paragraph 4, which stipulates that “Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations”. See also comments provided by Schwenzler/Hachem in Schlechtriem/Schwenzler *Commentary* 39; Mistelis in Kröll/Mistelis/ Viscasillas *UN Convention* 36; Kritzer/Eiselen *Contract* 33-34.

⁸⁶ See Article 14 of the UN Convention on the Law of Treaties.

⁸⁷ See Article 91 (3) of the CISG.

⁸⁸ Article 92 provides that “A contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not to be bound by part II of this convention or that it will not be bound by part III of this Convention”.

⁸⁹ See In Oberlandesgericht Rostock (Germany) 27 July 1995, CISG – Online 209 (Pace), the court found that in a dispute between a Danish seller and a German buyer, the CISG was applicable except with regard to issues related to the formation of contracts.

⁹⁰ See Article 94, which stipulates in paragraph 1 that “Two or more Contracting States which have the same or closely related to legal rules on matters governed by this convention may at any time declare this convention is not to apply to the contract of sale or to their formation where the parties have their place of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations”.

law, as determined by the conflict of law rules of the forum,⁹¹ since “the rules of international private law lead to the application of the rules of a contracting State”.⁹²

The indirect applicability of the Vienna Convention could occur when the place of business of the parties is located in different States, but without the parties necessarily being contracting parties. Although the CISG does not bind non-contracting States, it may also apply in Courts of non-contracting States, where the forum’s rules of private international law lead to the law of contracting States.⁹³ In the *Veneer Cutting Machine* case, for instance, the CISG was not yet in force in the buyer’s country, namely Germany, at the time of the conclusion of the contract, unlike in the seller’s country (USA). The German Appellate Court of Dusseldorf, by applying the PIL rules point to the USA, a contracting State, therefore applied the CISG.⁹⁴

It is important to highlight that the applicability of the CISG through article 1 (1) (b) is not as easy as it is through article 1 (1) (a), namely the autonomous principle. Addressing the indirect application of the CISG amounts to determining the exact sale law governing the contract. Wethmar-Lemmer emphasised that the important question regarding this article 1 (1) (b) is “whether the Convention would only be applicable under article 1(1) (b) if the forum is situated in a CISG contracting state or whether the phrase ‘the rules of private international law’ refers to the private international law of all states, thus including the rules of private international law of non-contracting states”.⁹⁵

⁹¹ Article 94 stipulates that “Two or more Contracting States which have the same or closely related legal rules on matters governed by this convention may at any time declare that the Convention is not apply to contracts of sale or to their formation where the parties have their place of business in those States. Such declaration may be made jointly or by reciprocal unilateral declarations”.

⁹² See Greece 2009 Multi-Member Court of First Instance of Athens Decision 22/02/2009 [<http://cisgw3.law.pace.edu/cases/092282gr.html>]; USA 20 June 2003 Federal Appellate Court [3rd Circuit] *Standard Bent Glass Corp v Glass robots Oy* [http://www.cisg.law.pace.edu/cisg/wais/db/cases2/0306_20u1.html]; France 27 June 2002 Cour d’Appel de Versailles *Sté AMS v SARL Me et SARL Qu* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020627f1.html>]; Austria 20 February 1992 District Court for Commercial Matters of Vienna *Shoes case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920220a3.html>] (last Accessed 23-6-2015). For further similar cases, see UNCITRAL *Digest* 5 Fn45. CISG’s applicability by virtue of conflict-of-law rules is also called “indirect applicability”. See in this sense, Mistelis in Kröll/Mistelis/Viscasillas *UN Convention* 37; UNCITRAL *Digest* 5 paragraph 14.

⁹³ See Marlene Wethmar-Lemmer 2014 26 (1) *SA mercantile law journal* 93-109. See also Secretariat Commentary on the 1978 Draft CISG/Document A/CONF.97/5, 14 March 1979 in Honnold *Documentary* 405; UNCITRAL *Digest* 5 para 14; Kritzer/Eiselen *Contract* §84:7 84-34, quoting Enderlein/Maskow *Commentary* 29; Schwenger/Hachem in Schlechtriem/Schwenger *Commentary* 40; Kadner 2011 (13) *YB of PIL* 165-166.

⁹⁴ See also Germany 2 July 1993 Appellate Court Düsseldorf *Veneer Cutting Machine case* [<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930702g1.html>], (last accessed 24-11-2015).

⁹⁵ Volker Behr ‘Commentary to Journal of Law and Commerce Case I; *Oberlandesgericht Frankfurt am Main*’ (1992 - 1993) 12 *Journal of Law and Commerce* 271-272 .

This question is essential for non-contracting states such as Cameroon, South Africa and the United Kingdom, since the answer to this question enables one to determine whether or not a forum in these non-contracting states is compelled to apply the Convention. Indeed, although a forum in a non-contracting state would like to assign the law applicable to a contract for the international sale of goods, the provisions of article 1 (1) (b) may lead to the application of the CISG.⁹⁶ Based on the PIL method, the court or arbitration tribunal that is asked to determine an applicable law will first apply the law of the forum, as each state has its own system of private international law to determine the law which is applicable to the contract. Following this process, a court or arbiter's rule of PIL may refer to the law of a CISG contracting state, and not the proper domestic sales law.⁹⁷

One can understand why Wethmar-Lemmer stated that "article 1(1) (b) constitutes an internal conflict rule from the perspective of the CISG contracting state".⁹⁸ Before the CISG came into effect in Germany,⁹⁹ German courts always applied the CISG when they had to deal with disputes based on contracts for the international sale of goods concluded between German buyers and Italian sellers. These German courts referred to the rules of German PIL in order to determine the law that was applicable to these disputes, as well as the law of CISG contracting states such as Italy.¹⁰⁰ Bonell and Liguori stated that whether a forum in a contracting or non-contracting state applies the CISG on the basis of article 1(1)(b)'s

⁹⁶ See Schlechtriem and Butler UN Law on International Sales. The UN Convention on the International Sale of Goods (2009) at 17 state that article 1(1) (b) is part of the national law of the member state. Schlechtriem 'Article 1' in: Schlechtriem and Schwenger Commentary on the UN Convention for the International Sale of Goods (CISG) (2005) 23 at 34 (par 37).

⁹⁷ Huber 'Scope of Application of the Convention – para 3: Rules on the Scope of Application' in: Huber and Alastair Mullis *the CISG. A New Textbook for Students and Practitioners* 41 and Schwenger and Hachem 'Article 1' in: Ingeborg Schwenger.

⁹⁸ Marlene Wethmar-Lemmer 2014 26 (1) *SA mercantile law journal* 93-109.

⁹⁹ The CISG came into force in Germany on 1 January 1991. The list of CISG contracting states may be accessed at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (visited on 4 June 2015).

¹⁰⁰ See the decisions of the *Landgericht München* (Germany), 3 July 1989: case number 6 (UNILEX), 3 (CLOUT); the *Landgericht Stuttgart* (Germany), 31 August 1989: case number 1 (UNILEX); the *Oberlandesgericht Koblenz* (Germany), 23 February 1990: case number 22 (UNILEX); the *Landgericht Aachen* (Germany), 3 April 1990: case number 24 (UNILEX); the *Amtsgericht Oldenburg in Holstein* (Germany), 24 April 1990: case number 5 (UNILEX), 7 (CLOUT) and the *Landgericht Hamburg* (Germany), 26 September 1990: case number 7 (UNILEX), 5 (CLOUT). (In this article reference will be made to UNILEX and Case Law on UNCITRAL Texts or CLOUT case numbers where available. It is, however, not possible to search the UNILEX CISG case law database by UNILEX case number only. The following Uniform Research Locator needs to be utilised: <http://www.unilex.info/case.cfm?pid=1&do=case&id=387&step=Fulltext>. The '387' in the URL refers to the UNILEX case number. The UNILEX cases referred to in this article may be accessed by substituting the '387' in the URL provided with the relevant case number. The CLOUT collection may be searched by case number at the following address: http://www.uncitral.org/uncitral/en/case_law.html).

requirements being met, the CISG is applied as the relevant set of rules for international sale of goods contracts.¹⁰¹

4.4.1.3. The possibilities of restricting the scope of application of the Convention

In principle, as mentioned above, the CISG governs all the transactions falling within its scope of application. However, the possibilities of restricting the Convention are open to parties to a contract of sale (A) and the contracting State (B).

4.4.1.3.1. *The restriction of the scope of application of the CISG by parties*

The Convention also has a suppletive character. The contracting parties may wholly or partly exclude it according to their will. They may also limit the scope of the CISG by the commercial usages to which they agreed.

4.4.1.3.1.1. *The exclusion of the Convention by parties*

Where the CISG is applicable in accordance with articles 1 to 3, the principle of party autonomy enshrined by article 6 allows the parties to exclude the CISG's application at the time of or after the conclusion of the contract. The CISG has a dispositive character, which means that contracting parties may derogate from or exclude its application.¹⁰² The option for the parties to choose to exclude the application of the CISG is governed by Arts 6, 11, and 14 – 24. These articles enshrine party autonomy and freedom of contract in the CISG. They regulate the manner in which parties exclude the CISG, if they attempt to exclude it within the

¹⁰¹ The authors have been quoted by Marlene Wethmar-Lemmer in her article entitled "The important role of private international law in harmonizing international sales law", 2014 26 (1) *SA mercantile law journal* 93-109.

¹⁰² Schlechtriem 2005 (10) *Juridica International Review* 27-34.

original contract or thereafter. Thus, the choice given to the parties does not mean that the CISG's applicability is subordinated to their will, since the Convention already applies in accordance with article 1. Indeed, the intention of the parties to exclude the CISG must be clearly determined in accordance with article 8.

A majority of commentators prefer that the parties state, within the original contract, their clear intention to exclude the CISG, such as required by article 6.¹⁰³ Although implicit exclusion has also been encouraged by some courts,¹⁰⁴ many courts are reluctant to adopt this type of exclusion if the intention of a contract is unclear.¹⁰⁵ These divergent views of courts and commentators significantly undermine the legal certainty of the CISG, since it is suitable and preferable to adopt a "single uniform standard that can be applied to determine intent to exclude at both contractual and post-contractual stages". The CISG – AC Opinion No.16 states that "it is appropriate that this existing strict standard of intent should be maintained as the single uniform standard for all exclusions at contractual and post-contractual stages, including during legal proceedings. A clear intent to exclude should be inferred before the court or tribunal is satisfied of an agreement to exclude, whether at the time the contract is formed, or post-contractually".¹⁰⁶

It has been acknowledged that a clear intent to exclude "should be inferred, for example from express exclusion of the CISG,¹⁰⁷ choice of the law of a non-contracting State¹⁰⁸ and choice

¹⁰³Enderlein & D. Maskow *Commentary*, Art. 6, at 48-49 paragraph 1.2 & 1.3 (1992) ('Enderlein & Maskow'); Schlechtriem, in Schlechtriem & Schwenger *Commentar* 68. In support of implicit exclusion: M. Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, in H. M. Flechtner *et al Drafting Contracts Under the CISG* 65; Flechtner (Ed.), J. O. Honnold, *Uniform Law for International Sales* 108.

¹⁰⁴ See, e.g. *Olivaylle Pty Ltd v Flottweg GmbH & Co KGAA* (No 4) (2009) 255 ALR 632, Federal Court, Australia, 20 May 2009 <http://cisgw3.law.pace.edu/cases/090520a2.htm>; District Court (LG) München, Germany, 29 May 1995 <http://cisgw3.law.pace.edu/cases/950529g1.html>; Bezirksgericht [Lower District Court](BG) Weinfelden, Switzerland, 23 November 1998 <<http://cisgw3.law.pace.edu/cases/981123s1.html>; Cour d'appel de Colmar, France, 26 September 1995 <<http://cisgw3.law.pace.edu/cases/950926f1.html> (in a decision criticised in this respect on appeal by the Cour de Cassation, 17 December 1996, *supra* note 4).

¹⁰⁵ Schlechtriem, in Schlechtriem & Schwenger *Commentar* 68. (noting the reluctance of courts to infer exclusion). See, e.g. International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, 218y/2011, 23 January 2012, CLOUT Abstract No 1405 <<http://cisgw3.law.pace.edu/cases/120123u5.html> (applying CISG as part of the law of Ukraine chosen in the contract, despite incorporation of GAFTA No 200 excluding CISG, on the basis that the intention to exclude must be express and clear).

¹⁰⁶ See CISG Advisory Council Opinion No 16, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html#13> (accessed on 15 – 06 – 2015).

¹⁰⁷ Viscasillas, *Abstract*, BSC Footwear Supplies Ltd v. Brumby St., Audiencia Provincial de Alicante, Spain, 16 November 2000 <http://cisgw3.law.pace.edu/cases/001116s4.html>; Mistelis, *supra* note 21.

¹⁰⁸ See, e.g., Oberlandesgericht [Appellate Court](OLG) Oldenburg, Germany, 20 December 2007 <http://cisgw3.law.pace.edu/cases/071220g1.html>; Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp., 2010 U.S. Dist. LEXIS 11884 (E.D. Cal.), 22 January 2010 <<http://cisgw3.law.pace.edu/cases/100121u1.html> ('Golden Valley case'); Easom Automation

of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application,¹⁰⁹ and should not be inferred merely from, for example, "the choice of the law of a contracting State"¹¹⁰ and choice of the law of a territorial unit of a contracting State".¹¹¹

4.4.1.3.2. *Restriction of the scope of application by the signatory states: reservations*

Articles 92 to 96 of the CISG allow any state, at the time of the deposit of their tools of ratification, acceptance, approval or accession, to carry out an unlimited number of declarations, which enable them to exclude or alter some of the CISG's provisions.

The first reservation concerning the application of the second or third part of the Convention is stipulated by Article 92. It allows states to declare that they will not be bound by either Part II (Contract Formation) or Part III (Sale of Goods).¹¹² This reserve was introduced at the request of Scandinavian states,¹¹³ in order to allow them to ratify the Convention without its

Systems, Inc. v. ThyssenKrupp Fabco, Corp., 2007 WL 2875256, U.S. District Court (E.D. Mich.), 28 September 2007, CISG-online Case No 1601 <http://cisgw3.law.pace.edu/cases/070928u1.html> ('*Easom Automation case*'); Handelsgericht des Kantons, [Cantonal Commercial Court](HG) St. Gallen, Switzerland, 15 June 2010, 2009/164,

¹⁰⁹ See Summary Records of the First Committee, 4th Meeting, 13 March 1980, UN Doc. A/CONF.97/C.1/SR.4, reprinted in Official Records UN Doc. A/CONF.97/19, at 251 para. [38]-[40] (Comments by Mr Rognlien for Norway and Mr Plantard for France).

¹¹⁰ Appellate Court (OLG) Stuttgart, Germany, 31 March 2008; Handelsgericht [Commercial Court](HG) Aargau, Switzerland, 10 March 2010, CISG-online No 2176 <http://cisgw3.law.pace.edu/cases/100310s1.html> (the Court held that « a choice of forum clause selecting a court in a CISG Contracting State would not suffice for exclusion of the CISG under Art. 6, because such a court must apply the CISG as part of its own law » (translation by U. Schroeder). See also Appellate Court (OLG) Linz, 23 January 2006, *supra* note 24, at [2.2] (overturned on appeal by Supreme Court, Austria, 4 July 2007. *Contra* Obergericht [Appellate Court] Aargau, Switzerland, 3 March 2009 <http://cisgw3.law.pace.edu/cases/090303s1.html>. (Accessed on 18 - 06 - 2015).

¹¹¹ On choice of specific domestic code or law, Oberlandesgericht [Appellate Court] (OLG) Stuttgart, Germany, 31 March 2008 <http://cisgw3.law.pace.edu/cases/080331g1.html> (commenting that were German law to apply, it should not be assumed the BGB or HGB rather than CISG applied, since 'the CISG is incorporated into German law'. Words such as 'the provisions of the BGB are applicable' would be required to denote domestic non-uniform law). *Contra* Appellate Court (OLG) Linz, 23 January 2006, [2.3] (mention of HGB (Austrian Commercial Code) in standard terms dealing with warranties was not sufficient), but overturned by the Supreme Court, Austria, 4 July 2007,

¹¹² Scandinavian states, which include Denmark, Finland, Norway and Sweden, have chosen this reservation.

¹¹³ The Scandinavian states are Denmark, Finland, Norway, and Sweden.

second part.¹¹⁴ Accordingly, none of the Scandinavian states are considered as contracting states in terms of paragraph 1 (1) (a) of Article 1, in accordance with the issues governed by Part II.¹¹⁵ However, by referring to Article 1 (1) (b) of the CISG, it is important to specify that this provision may, inter alia, lead to the activation of the Convention's Part II in a Scandinavian state¹¹⁶. Therefore, given that the reservation of this article does not bring a 100% guarantee of excluding Part II or Part III of the CISG, it will not be necessary for Cameroon, when ratifying the Convention, to make use of this reservation.

The second reservation is a federal clause that is increasingly used in international treaties. Provided by article 93 of the Convention, it allows states such as Canada, which have several areas in which different legal systems are applied to matters governed by the Convention, to declare that the Convention will apply in all or only certain of these areas. This clause facilitates the adherence of states with a federal constitutional structure to the Convention.

The third reservation is provided by article 94, which allows two or more contracting states which have the same or similar rules on the sale of goods to exclude the application of the CISG in contracts concluded between parties with places of business in different states. This reservation will be discussed in more detail in the next chapter.

The fourth reservation is set forth by article 95, which provides that "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (b) of article 1 of this Convention". The purpose of this article is to allow contracting states which are not willing to accept the applicability of CISG in respect of article 1(1) b to declare that they will not be bound by states that do not adhere to this subparagraph.¹¹⁷ This provision was submitted by Czechoslovakia during the Vienna Diplomatic Conference.¹¹⁸ The Czechoslovakian concern was the protection of

¹¹⁴ Ramberg 2009 (50) *Scandinavian Studies in Law* 257.

¹¹⁵ See Article 92 (2). See also Bernstein & Lookofsky in «Understanding the CISG in Europe» 2d ed. (2003) and Lookofsky "Understanding the CISG in the USA, 2d ed. (2004).

¹¹⁶ For instance, where a seller in Gabon offers goods for sale to a buyer in Finland and this Gabon seller revokes this offer before the Finland buyer provides his acceptance. The buyer then attempts to sue the seller based on the original offer. If the Gabon or Finland court is approached, it must consider whether Part II of the CISG or domestic contract law will apply. Whereas in accordance with article 16 of the CISG, the offer might seem revocable, it will be different with the Uniform Scandinavian rule, since this rule stipulates that every offer is binding for a reasonable time¹¹⁶. Therefore, even though Part II of the CISG cannot apply in such cases under Article 1 (1) (b) of the CISG, as already mentioned, since Gabon has ratified all of the CISG, including Part II, the Gabon seller's law should be applied by both Gabon and Finland courts, in accordance with Article 1 (1) (b) of the CISG¹¹⁶.

¹¹⁷ See Matthew & Terasaki, Editorial Remarks for 19 March 1998 Tokyo District Court.

¹¹⁸ See Document A/CONF.97/C.2/L.7, *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April 1980, Official Records, Documents of the*

special legislation which applied in Czechoslovakian courts, since they believed that the application of article 1 (1) (b) would be affected by this special law, due to the fact that through this article, the CISG and not a special domestic law could be applied.¹¹⁹ Even though there are an increasing number of CISG contracting states today, which has enhanced the applicability of the Convention through article 1 (1) (a), making recourse to article 1 (1) (b) unnecessary, it is still important to note that the practical relevance of article 95 was not meaningless, especially in the first year after the Convention's entry into force. In this regard, two major trading nations, namely the People's Republic of China and the United States of America, have made use of this reservation. However, China has since withdrawn its reservation under Article 95.

The effects of Article 95, as stated by De Ly and Bridge, are "probably the most complex"¹²⁰ and perhaps the "most challenging to understand"¹²¹ among the CISG's reservations". These effects may be examined from different perspectives, depending on the location of the forum. Four main scenarios have been envisaged by CISG – AC Opinion No. 15, and focus on whether it occurs in a forum of contracting states which have made article 95 declarations, a forum of contracting states that have not made article 95 declarations, a forum of non-contracting states, or in arbitral proceedings.

The fifth and last reservation concerns Article 96, which enables the contracting state whose legislation requires contracts of sale to be concluded in or evidenced by writing to declare that the CISG's provisions which accommodate another form than writing do not apply to a sale in which one of the contracting states has its place of business in a state which has made an Article 96 reservation. This article must be read together with Article 12 of the CISG, since Article 12 is essentially a repetition of Article 96 of the CISG.¹²² These provisions were suggested by the U.S.S.R and socialist states, which were the countries whose legislation required contract terms to be expressed in writing. They aimed to exclude the obligation under public international law to apply the Convention's freedom of form provision, which contracting states had to do.¹²³ Article 12's first sentence and Article 96 of the CISG

Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (1981) 145.

¹¹⁹ See Document A/CONF.97/C.2/L.7, *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (1981) 145.

¹²⁰ See Filip De Ly, "Sources of International Sales Law: An Eclectic Model" 2005 (25) *Journal of Law and Commerce* 1-10.

¹²¹ See Filip De Ly, "Sources of International Sales Law: An Eclectic Model" 2005 (25) *Journal of Law and Commerce* 1-10.

¹²² Honnold *Uniform Law* 23.

¹²³ See CISG Advisory Council Opinion No. 15, Para.4.2

seem to target provisions dealing with the formation of contracts, modifications of contracts (Article 29), and the provisions of Article 11, since both articles fail to clearly determine, as stated by Schroeter, “how far the effect reaches and by whom it has to be taken into account”.¹²⁴ The most important point regarding Article 96, which divided case law and legal writing, is the issue of determining which law governs the formal validity of a CISG contract, when one of the parties to the contract has its place of business in a state which has made an Article 96 reservation. In the Convention’s practical application, this point is relevant, since it provides “negative and positive” effects.¹²⁵

As far as Article 96 is concerned, this study does not think that it will cause any problem for the Cameroonian legal system if the latter decides to manifest its desire to ratify the Convention. The Cameroonian Commercial Code and Civil Code set forth the principle of freedom of evidence regarding contracts dealing with commerce. This means that a contract of sale may be proved in various ways.¹²⁶ The new OHADA law, which is now also applicable in Cameroon, in its Article 208 relating to GCL, states that the contract of sale may be written or oral, and it is therefore not subject to any requirement of form. In addition, this regional law article state, in its second sentence, that in the absence of writing, this article may be used in every possible way, including as a witness.

CONCLUSION

To summarise this section on the applicability of the CISG, it is important to note that the Convention’s purpose is not to govern all matters related to international trade. Instead, its

¹²⁴ See Schroeter 2014 *Journal of Law and Commerce* 358-361.

¹²⁵ Regarding the “negative” effect, it is important to note that Articles 12 and 96 affected contractual declarations. Indeed, although it is agreed that the effect of an Article 96 CISG reservation only applies to types of contractual declarations clearly stipulated in Articles 12 and 96, and not to others¹²⁵, it is still important to mention that both articles are unclear as to which declaration they are targeting. The wording of Articles 12 and 96 regarding a list number agreement seems, at first sight, to include any declarations made in accordance with Parts I – III of the Convention. A negative effect, as set forth by Articles 12 and 96, appears to have a universal effect in all contracting states, since the making of an Article 96 reservation by a contracting state, as mentioned in CISG – AC Opinion 15, “reduces not only its own, but all Contracting State’s obligations to apply the Convention’s freedom of form provisions”. This is because both articles link the reservation’s effect to the place of business of at least one of the parties to the sales contract in an Article 96 reservation state, and not to the location of the deciding court. As far as the “positive” effects are concerned, two schools of thought have opposing views regarding the issue of determining whether Articles 12 and 96 of the CISG have to decide what law governs the formal validity of a sales contract once their application is brought about, or whether this decision lies with the domestic rules of private international law.

¹²⁶ See Article 1347 and 1348 (1) (2) of the Civil Code.

scope of operation is limited to rules related to the formation of contracts and the obligations of the seller and buyer. The purpose of the Convention is to promote and uphold the voluntary ratification of all states, which is why one can see its flexibility at the level of its scope of operation. Even if its main goal is to ultimately harmonise all domestic laws on matters of trade, the Convention is nevertheless aware that this goal will be progressively achieved. This is why, in the drafting of the provisions regarding its applicability, the Convention has foreseen the possibility for contracting states which are not yet ready to adhere to certain provisions of the Convention to declare their reservation regarding this specific aspect.

It is important to note that the situation regarding reservations is improving every day. This change comes from the perspective from which these reservations have been drafted. Articles 92, 94, 95 and 96 have been included in the Convention in order to address specific concerns and reach a compromise among specific countries that existed at the time when the Convention's final text was adopted.¹²⁷ For instance, Article 92 was included in order to allow Scandinavian states to ratify the Convention without its Part II, bearing in mind that the legal and political situation of these countries has undergone significant changes. These Scandinavian states have recently withdrawn their Article 92 reservations. In a similar vein, it is worth noting that the reservation contained in Article 94, which provides that regionally harmonised laws can be given a limited preference over the Convention, was a great surprise, since all states which were viewed as potential candidates for this reservation opted for unreserved ratification.¹²⁸

Moreover, Article 95, whose purpose was to address the need to preserve a relevant sphere of application for certain domestic laws, and to avoid having to apply the Convention in accordance with article 1 (1) (b), has essentially lapsed today, since the respective legislation no longer exists in successor states, and article 1 (1) (a) has become the main basis for the Convention's applicability.¹²⁹ The same goes for the need to apply domestic laws of form by making a declaration, such as stipulated by Article 96 of the CISG. This article has lost its relevance, since almost none of the Article 96 reservation states still impose writing requirements on international sales contracts in their domestic laws.¹³⁰

¹²⁷ See Ramberg 2009 (50) *Scandinavian Studies in Law* 257 at 258.

¹²⁸ See CISG – AC Advisory Council Declaration No. 1, “The CISG and Regional Harmonization” Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom, adopted by the CISG – AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012, at 2.

¹²⁹ See Evans, in Bianca & Bonell “Commentary on the International Sales Law: The 1980 Vienna Sales Convention” (1987), Art 95 notes 2.2 and 2.5.

¹³⁰ See Schroeter 2014 (31) *Journal of Law and Commerce* 351-368. .

Indeed, the needs of commercial practice have encouraged the withdrawal of reservations under the CISG, because the mere mention of these reservations causes many misunderstandings between merchants, to the detriment of international trade. The practical problems caused by these reservations have become so serious that the International Chamber of Commerce (ICC) was obliged to intervene by requesting the ICC's National Committees to insist on a withdrawal of reservations.¹³¹ In the same way, the CISG Advisory Council recommends that states which have newly acceded to the Convention to do so without any declarations under articles 92 – 96 of the CISG. One can note that in recent years, the number of countries which have withdrawn these reservations has increased significantly.¹³²

4.5. THE FORMATION OF CONTRACTS UNDER THE CISG

The concepts of an offer and acceptance have traditionally been used to determine if the parties have reached an agreement. The Vienna Convention addresses these concepts in the same way as the classic theory. However, in this section, the study will focus on the notions of acceptance, counter-offer, and time limit for acceptance.

4.5.1. An acceptance

The notion of acceptance is ruled by Article 18 of the CISG. This provision defines the concept in paragraph 1¹³³ and determines when an acceptance resulting from the original offer or counter-offer becomes effective. In doing so, paragraphs 2 and 3 of the same article establish the moment at which an acceptance comes into effect. Article 19 follows article 18 by referring to the definition provided by authors of an acceptance,¹³⁴ one can conclude that

¹³¹ See Ramberg 2009 (50) *Scandinavian Studies in Law* 257 at 258.

¹³² See Baasch Anderson 2012 (7) *Journal of Business Law* 698.

¹³³ See Art 18 (1) which stipulates that "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance".

¹³⁴ Schroeter, in: Schlechtriem/Schwenzer, *Commentary* Art 20 paragraph 2 defines an acceptance as "a declaration of intent which (in principle) is not subject to any form requirement and must generally reach the offeror for it to become effective".

it is in principle the same definition as that provided by the OHADA and different domestic laws.

Under the CISG, an offer can be accepted explicitly by a statement, implicitly by conduct¹³⁵ or even by silence.¹³⁶ Thus, it has to be determined that a given conduct amounts to an acceptance, in accordance with Article 18(1).¹³⁷ In this regard, case law provides some illustration of conduct which amounts to acceptance.

4.5.1.1. Acts which indicate acceptance

In accordance with Article 18, an offeree accepts an offer by a statement or other conduct which indicates his assent to an offer. The issue of determining if that statement constitutes an assent must be interpreted in accordance with the rules provided in paragraphs 1 and 2 of Article 8. All the circumstances, including the negotiations preceding the conclusion of the contract and its performance after the conclusion, have to be taken into consideration.

Article 18 (2) stipulates that “an acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed within a reasonable time”. This paragraph stresses the time at which the acceptance becomes effective.¹³⁸ This concerns *mutatis mutandis*, both oral declarations and conduct indicating assent, which has to reach the offeror to produce an effect.¹³⁹ The approach of the CISG appears to deviate from legal systems throughout the world, specifically the Anglo-American common law system, in which the acceptance is effective at the moment when the offeree dispatches his/her acceptance¹⁴⁰ - this is referred to as “the expedition” or “mailbox rule”. The Vienna Convention seems to prefer to adopt the classical civil law approach, in which an acceptance is not completed until it reaches the offeror. In doing so, the Vienna Convention has rejected “the mailbox principle as a means of establishing when an acceptance becomes effective”.¹⁴¹

¹³⁵ Geneva Pharmaceuticals Tech. Corp. V Barr Laboratories, Inc., 789 F. Supp. 1229 (SDNY).

¹³⁶ See *Filanto S.p.A.v Chilewich Int'l Corp.*, 201 F. Supp. 2d 236 (S.D.N.Y. 1992), CLOUT Case No. 23 (14 April.1992).

¹³⁷ See Article 18 paragraph 2 of the CISG.

¹³⁸ see Article 24 of the CISG.

¹³⁹ Schroeter in *Schlechtriem/Schwenzer Commentary* 325 paragraph 24; Ferrari in *Kröll/Mistelis/Viscasillas UN Convention* 269 paragraph 13.

¹⁴⁰ See Garro 1989 (23) *Int'l L* 443 453.

¹⁴¹ See Carrara/Kuckenburg in *Felemegas Interpretation* 312; see also Murray 1988 (8) *JL & Com* 11.

Thus, only the offeree can accept the offer. The indication of assent may be in the form of an oral or written statement, or through conduct.¹⁴² With regard to acceptance by assent, Article 18 (3) attests to the legal effect of acceptance by conduct, but specifies that this kind of acceptance must be “accompanied by acts that indicate assent”¹⁴³ Certain conducts have been viewed by many courts as indicating assent, namely the buyer’s acceptance of the goods,¹⁴⁴ the third party taking delivery of the goods,¹⁴⁵ and the sending of a reference letter to an administrative agency.¹⁴⁶

4.5.2. Period for acceptance

The time period for acceptance is governed by Article 18 paragraph (2) and Article 20 of the CISG. Article 18 paragraph 2 stipulates that every offer is effective for a limited period of time only. This limitation can be derived immediately from the offer, or if an offeror has not fixed the time limit, it will be for a reasonable period of time. The time can be fixed either explicitly or implicitly. Therefore, if no time has been fixed by the offeror for acceptance, the acceptance must reach the offeror within a reasonable time.¹⁴⁷ Article 18 (2) refers to the rapidity of the means of communication employed by the offeror as a factor which must be taken into account, in order to establish a reasonable period of time.¹⁴⁸

This article consists of two paragraphs, and paragraph 1 stipulates when the period for acceptance starts to run.¹⁴⁹ The issue of how this period is calculated and when it lapses is

¹⁴² See Decision du Recueil de Recueil de jurisprudence U.S District Court, Michigan, Etats –Unis 28 Sept 2007 (Easom Automation System, Inc. v. Thyssenkrupp Fabco. Available at: <http://cisgw3.law.pace.edu/case/070928u1.html>. (Accessed on 12 - 07 - 2015).

¹⁴³ See Alban in Felemegas *Interpretation* 99.

¹⁴⁴ Switzerland 27 April 2007 Canton Appellate Court Valais *Oven case* [<http://cisgw3.law.pace.edu/cases/070427s1.html>] (accessed 16-07-2015). In this case, it was held that the buyer assented to the offer by accepting the goods, either by using or reselling them. See also Russia 2 November 2010 Supreme Arbitration Court of the Russian Federation [<http://cisgw3.law.pace.edu/cases/101102r1.html>] (accessed 11-7-2015); Germany 13 January 1993 *Oberlandesgericht Saarbrücken*, CLOUT case No. 292 (buyer’s acceptance of goods indicated assent to offer, including standard terms in letter of confirmation); reproduced in UNCITRAL *Digest* 99 Fn14.

¹⁴⁵ CLOUT Case No 193 Handelsgericht des Kantons Zurich, Switzerland, 10 July 1996.

¹⁴⁶ Federal Southern District Court of New York, United States, 10 May 2002, Federal Supplement.

¹⁴⁷ Mankowski, in : Ferrari et al. *Internationales Vertragsrecht*, Art.18 CISG paragraph 21.

¹⁴⁸ See Schlechtriem/Schwenzer, *Commentary* Art 18 paragraph 15.

¹⁴⁹ See Article 20 paragraph 1, which stipulates that “A period of time of acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from a date shown on a letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other

handled in paragraph 2.¹⁵⁰ In other words, this provision applies itself to both the period in which the revocation of the offer is excluded, and the period after which the offer will lapse.¹⁵¹ Article 21 provides an exception to this rule, by allowing, under certain circumstances, for this period to include even a late acceptance¹⁵². Therefore, Article 21, which is composed of two paragraphs, deals in its paragraph 1¹⁵³ with every late acceptance, apart from the grounds for the delay, while Article 21 (2)¹⁵⁴ deals with cases in which the lateness of the acceptance is due to a discernible delay in its transmission.

Based on this article, a contract may always be concluded, despite a late acceptance. In such cases, the offeror must simply inform the acceptor without delay, either orally or in writing, that he is considering the acceptance to be effective.¹⁵⁵ Article 21 (2) also provides for an exception to the general rule set forth in paragraph 1 in terms of the requirement for a late acceptance contained in a letter or other document. This article provides that a letter or other document can be considered as an acceptance if it can be shown that it was sent under such circumstances that if its transmission had been normal, it would have reached the offeror in sufficient time. This lateness must therefore be caused by abnormal transmission resulting from the post office, inclement weather, general strikes, or the blockage of a street. Therefore, this article clearly aims to protect the acceptor who has done everything in his power to ensure that his acceptance reaches the offeror in due time.¹⁵⁶

means of instantaneous communication begins to run from the moment that the offer reaches the offeree”.

¹⁵⁰ Article 20 paragraph 2 provides that “Official holidays or non-business days occurring during the period for acceptance are included in calculating the periods for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because the day falls on an official holiday or non-business day at the place of business of the offeror, the period is extended until the first business day which follows”.

¹⁵¹ See Schlechtriem/Schwenzer, *Commentary* Art 20 para, 1.3.1.

¹⁵² Mankowski, in : Ferrari et al. *Internationales Vertragsrecht* (2007), Art.21 CISG para. 1.

¹⁵³ Article 21 (1) stipulates that “A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect”.

¹⁵⁴ Article 21 (2) provides that “If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect”.

¹⁵⁵ Article 21 (2) provides that “If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect”.

¹⁵⁶ Ferrari, *Vendita internazionale di beni mobili* “Artt 14-24. Formazione del contratto (2006) p.153.

4.5.2.1. Beginning of the period for acceptance (para 1)

Article 20 (1) determines when the period of time fixed by the offeror starts to run through a reference date.¹⁵⁷ This provision draws a distinction between different means of communication used by the offeror. It is important to note that Article 20(1) does not give the offeror the possibility of fixing a period of time for acceptance by reference to a calendar date¹⁵⁸ or even the determination of a calendar date.¹⁵⁹ Indeed, the issue of when a period of time begins to run depends largely on the means of communication used.¹⁶⁰ Like the OHADA, this article identifies two means of communication, namely written and oral.

For written means of communication, the period begins to run from the moment that it is easy to ascertain¹⁶¹. For instance, when a telegram is used, the period of time is fixed from the moment the telegram is handed over for dispatch. If a period of time is fixed for a letter, it starts to run from a date shown on that letter.¹⁶² If a date is not determined or shown, this period of time begins to run on the date that appears on the envelope, which is normally the postmark date.¹⁶³ One can refer to the time that the offer reaches the addressee if neither the letter nor the envelope shows a date.¹⁶⁴

In addition, the second sentence of Article 20(1) deals with oral means of communication. It provides that where the period of time is fixed by telephone, telex, or other means of instantaneous communication, the period of time begins to run from the moment that the offer reaches the offeree.¹⁶⁵ This oral communication also constitutes instantaneous communication.¹⁶⁶

¹⁵⁷ See Witz/Salger/Lorenz, *Kommentar* (2000), Art. 20 paragraph 1.

¹⁵⁸ For instance, "from 26 April", or "until 12 March"

¹⁵⁹ For instance, "Until the beginning of the school year".

¹⁶⁰ Mankowski, in : Ferrari et al. *Internationales Vertragsrecht* Art.20 CISG paragraph 6.

¹⁶¹ Mankowski, in : Ferrari et al. *Internationales Vertragsrecht* Art.20 CISG paragraph 6.

¹⁶² See Schroeter, in: Schlechtriem/Schwenzer, *Commentary* Art 20 paragraph 2.

¹⁶³ See Schlechtriem/Schwenzer, *Commentary* Art 20 paragraph 2.

¹⁶⁴ Ferrari, *Vendita Internationales di beni mobili*. Artt.14-24. *Formazione del contratto* (2006), p.138.

¹⁶⁵ Murray, 1998 (8) *Journal of Law and Commerce* 632-634..

¹⁶⁶ Means of instantaneous communication can be defined as those means that allow the time of dispatch and time of receipt by the addressee to almost coincide, such as communication by radio, telefax, email, teleconference, teletext, sms, etc.

4.5.2.2. Calculation and expiry of the period for acceptance (para2)

According to many commentators, the rules contained in Article 20 (2) regarding the calculation and expiry of the period of time for acceptance must be considered as a general principle in the sense of Article 7 (2). The rules set forth by Article 20 (2) are broadly accepted, since official holidays and non-business days are included in calculating the period. This is very important, because it prevents a problem that would inevitably arise if, in international sales transactions, official holidays and non-business days were not counted.¹⁶⁷ However, Article 20(2) provides an exception by stating that the period is extended until the next business day if a notice of acceptance cannot be delivered at the place of business of the offeror on the last day of the period, because that day falls on an official holiday or non-business day at the place of business of the offeror.¹⁶⁸ Thus, the impossibility of delivering the acceptance must be caused by the fact that the last day of the period falls on an official holiday or non-business day. Therefore, the burden of proof in this regard lies with the party relying upon the conclusion of the contract.¹⁶⁹

4.5.3. The counter-offer

According to the Vienna Convention, the response to an offer is considered as an acceptance if the recipient outright agrees, and this prevents the offeree from modifying the substantial elements of an offer. Thus, the difficulty lies in determining to what extent a reply to an offer may modify the contents of a contract and qualify as a counter-offer.

Article 19 paragraph 1 of the CIGS stipulates 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”. Thus, any further element of acceptance in relation to an offer is sufficient to transform it into a counter-offer. This paragraph mentions the traditional principle known as the “mirror image rule”. The Vienna Convention, contrary to the OHADA Law, provides, in Article 19 paragraph 2, an exception to the rule of Article 19 (1). According

¹⁶⁷ See Schroeter, in: Schlechtriem/Schwenzer, *Kommentar* (German ed. 2008), Art 20 paragraph 2.

¹⁶⁸ J. Pierre/V. Pierre 1993 (20) *Southern University Law Review* 31-32.

¹⁶⁹ See Schlechtriem/Schwenzer, *Commentary* (2005), Art 20 paragraph 2.

to Article 19 (2), the reply to an offer qualifies as an acceptance if it brings some modifications which “do not materially alter the terms of the offer”.¹⁷⁰

To prevent such changes from becoming part of the contract, the initial offeror has to immediately object to these alterations, either orally or by “dispatching a notice” without delay to that effect.¹⁷¹ According to the CISG-AC Opinion No. 1, the term “oral” includes electronically transmitted sounds, and the term “notice” includes electronic communications in general.¹⁷²

If these modifications materially alter and change the offer, this response constitutes the rejection of an offer, because one cannot prove a direct link between the elements of offer and acceptance. On the other hand, if modifications exist, but do not materially alter the terms of the offer, the reply is considered as an acceptance.¹⁷³ Article 19 is very clear about this in paragraph 3, where it lists some of modifications which are presumed to materially alter the terms of an offer.¹⁷⁴

Domestic judges and international referees have considered as materially altering the terms of an offer modifications concerning the price,¹⁷⁵ payment,¹⁷⁶ quality and quantity of the good,¹⁷⁷ place and date of delivery,¹⁷⁸ and settlement of disputes.¹⁷⁹ Thus, judges have not considered certain modifications to be substantial if they do not change the substantial elements of an offer, even though they are listed among the clauses relating to Article 19 (3).¹⁸⁰

¹⁷⁰ See last sentence of Article 19(2); see also Kritzer/Eiselen *Contract* paragraph 86-67.

¹⁷¹ See the second part of Article 19(2) of the CISG.

¹⁷² The CISG-AC Advisory Council Opinion No. 1 states that the concept “notice” includes electronic communications. As explained by this Opinion, Article 19(2) aims to transform an ineffective acceptance to an effective one, unless the offeror reacts to it promptly, even electronically.

¹⁷³ See decision of OLG Hamm (Germany), where the buyer requested wrapped bacon – the seller’s reply that he would deliver unwrapped bacon was rejected, and a counter-offer was made).

¹⁷⁴ See Article 19 (3), which stipulates that “Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially”.

¹⁷⁵ See decision of the Supreme Court of Austria on 9 March 2000, available at: <http://cisgw3.law.pace.edu/cases/000309a3.html> (CLOUT-No 417) case Magellan International v. Salzgitter Handel de Federal District Court (Illinois) of 7 December 1999.

¹⁷⁶ CLOUT- No 176, available at: <http://cisgw3.law.pace.edu/cases/960206a3.html>. (Accessed on 15 - 07 – 2015).

¹⁷⁷ CLOUT-No. 291, available at: <http://cisgw3.law.pace.edu/cases/950523g1.html>. (Accessed on 15 - 07 – 2015).

¹⁷⁸ CLOUT-No. 291, available at: <http://cisgw3.law.pace.edu/cases/950523g1.html>. (Accessed on 15 - 07 – 2015).

¹⁷⁹ CLOUT No 155 decision of 2nd January 1995 of the Cassation Court, available at: <http://cisgw3.law.pace.edu/cases/950104f1.html>. (Accessed on 16 - 07 – 2015).

¹⁸⁰ Austria 9 March 2000 Oberster Gerichtshof (Supreme Court) Roofing Material case [<http://cisgw3.law.pace.edu/cases/000309a3.html>] (last accessed 16-7-2015). See also the Swiss

Among the applications of case law relating to Article 19, it is important to mention a decision of the Supreme Court of Austria, which seems to be unique. It relates to the case in which the judge found that the modifications concerning elements enumerated in paragraph 3 were not substantial or material if the parties or customers did not consider them as such.¹⁸¹ In other words, Article 19 is just suppletive or additional, and sometimes has to make room for the will of the parties or customers, who may express an opposite opinion.

In international commerce today, many enterprises deal with each other in the course of business using standard contract forms, which lead to what is referred to as the “battle of form”. The “battle of form” usually happens when enterprise A offers, for instance, to buy goods from enterprise B on its own standard terms, and B purports to accept the offer on the basis of its own standards. It is important to know what the situation is when two enterprises negotiate the terms and each party wants to contract on the basis of its own terms. Does the valid conclusion of a contract occur when the forms exchanged contain incompatible or contradictory terms? How does the CISG deal with this situation?

4.5.4. *The problem of battle of forms under the CISG*

The issue regarding the “battle of forms” has been debated at length, not only during the drafting of the CISG, but also during the discussion of Article 19.¹⁸² The battle of forms is the central focus of this article, owing to the fact that it is one of the most controversial aspects of the CISG.¹⁸³ There is a disagreement among scholars and commentators about how the problem presented by the battle of forms can be solved.¹⁸⁴ Several interpretative approaches have attempted to emphasise this issue. Among these different theories, one can identify two

Chemical Products case, whereby deviations in the amount and determination of the price were considered to be fundamental changes; and a wealth of authorities quoted by Kritzer/Eiselen Contract §86-69 86-130 in Note 2. However, see also the French Fauba v Fujitsu case, in which a purchase order that altered the price and delivery terms was considered not to have altered the offer materially. Read with interest Witz’s comments on this, where the commentator regrets that the French Supreme Court failed to discuss the fact that the price and delivery terms were expressly quoted by Article 19(3) as material alterations.

¹⁸¹ See Austria 9 March 2000 Oberster Gerichtshof (Supreme Court) Roofing Material case [<http://cisgw3.law.pace.edu/cases/000309a3.html>] (last accessed 16-6-2013).

¹⁸² See Official Records (1981), pp. 228.

¹⁸³ For an overview of where the discussion stands, see the case law, Bundesgerichtshof (Germany) 9 January 2002, CISG-Online 651.

¹⁸⁴ See Official Records (1981), pp. 288 et seq.

main approaches, namely the “last shot approach” and the “knock-out approach”.¹⁸⁵ Owing to the fact that the CISG has squarely recognised that the problem of “battle of form” fall within its scope of application, the theory advocating that this issue should be solved by domestic law will not be dealt with in this study.¹⁸⁶

4.5.4.1. The last shot doctrine

The “last shot” doctrine addresses the problem of battle of form by strictly following the rules of offer and acceptance.¹⁸⁷ According to the “last shot” doctrine, a contract is formed at the moment that one party starts to fulfill it, because performance is considered as an acceptance of the last offer.¹⁸⁸ The terms of the contract are the terms of the last submitted offer. This theory is largely based on the mirror image rule, which requires that the acceptance mirrors the offer exactly.¹⁸⁹

For instance, as indicated by White and Summers in their evaluation of the UCC, one might get a case where a seller sends the buyer an offer, and the seller’s form provides that the goods must be packed in secure bags,¹⁹⁰ and the buyer then decides to accept the offer using his own form, which is received without any objection by the offeror. B’s form states that the goods must be packed in new bags. However, a few days later, the market price of the goods drops dramatically, and the deal is no longer attractive to the buyer.¹⁹¹

In this case, the reply, together with B’s form, is not an acceptance, but is instead a rejection of the offer, and therefore a counter-offer, in accordance with Article 19 (1) and (3) of the CISG, since the contract has been materially altered.¹⁹² Due to the fact that there is material alteration, the contract is not concluded. Some commentators and Courts agree with this approach. However, if the other party responds with a form containing materially different or

¹⁸⁵ See Franco Ferrari Commentary article 19 in *Un Convention on Contracts for the International Sale of Goods (CISG)* edited by Kröll/Mistelis/Perales Viscasillas P.287-289, 2011; Magnus “Last Shot vs. Knock Out Still Battle over the Battle of Forms Under the CISG” 2007.

¹⁸⁶ See Franco Ferrari *Commentary* Article 19 in *Un Convention on Contracts for the International Sale of Goods (CISG)* edited by Kröll/Mistelis/Perales Viscasillas P.287-289, 2011; Magnus “Last Shot vs. Knock Out Still Battle over the Battle of Forms Under the CISG” 2007.

¹⁸⁷ Viscasillas <http://cisg3.law.pace.edu/cisg/text/peclcomp19.htmlv> (accessed on 17 - 07 - 2015).

¹⁸⁸ See Plitz *Standard Terms in UN-Contracts of Sale* 233-244.

¹⁸⁹ See Eiselen & Bergenthal 2006 *CILSA* 217-218.

¹⁹⁰ Viscasillas 1998 (10) *Pace Int’l LR* 97.

¹⁹¹ Viscasillas 1998 (10) *Pace Int’l LR* 97.

¹⁹² See Ulgo 1986 (12) *Rivista di Diritto Internazionale e Processuale*, 326 (a supporter of the last-shot rule).

additional terms, the counter-offer is likewise rejected and constitutes a new offer.¹⁹³ The offer is rejected and the new counter-offer is submitted back and forth, until one party finally begins to perform. This performance is considered as an acceptance of the last submitted counter-offer. This idea is supported by Article 18 (1), which stipulates that “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance”. The “last shot” doctrine does not strictly distinguish between the issues of contract formation and the terms of the contract.¹⁹⁴

However, this doctrine has been criticised for being casuistic, random and unfair, since it imposes an implied duty on the offeror to object to additional or conflicting terms.¹⁹⁵ The failure to protest, coupled with performance, result in what is viewed as a tacit consent to the terms of the last submitted offer. Nevertheless, the parties are usually not aware of the fact that their standard terms are in conflict with one another. Therefore, the “last shot” doctrine imposes on the performing party the unfair burden of an implied consent.¹⁹⁶

4.5.4.2. The knock-out rule

The knock-out rule approaches the battle of forms as a gap-filling issue and finds a solution in the general principles of the Convention, specifically in the principle of party autonomy mentioned in Article 6.¹⁹⁷ This approach strictly distinguishes between the question of contract formation and the terms of the contract. It stipulates that the performance of a contract by the parties means that the parties are in agreement on the main terms, and that all standards terms which are not in conflict will form part of the agreement. Therefore, conflicting terms are excluded and replaced by the dispositive or residual law that is applicable.¹⁹⁸

With regard to the example presented above, one can state that the reference to “new bags” in the reply does not materially alter the terms of the offer, namely “safe bags”. The contract is concluded, its terms are those of the offer, except its packing clause, which is replaced by

¹⁹³ See Fejos 2007 VJ 113-129.

¹⁹⁴ See Appellate Court Frankfurt (Germany) 24 May 2006, available at: <http://cisg3.law.pace.edu/cases/060524g1.html>. (Accessed on 19-7-2015).

¹⁹⁵ Honnold *Uniform Law* 81.

¹⁹⁶ Kaia Art.19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002. P. 1-18.

¹⁹⁷ See Plitz *Standard Terms in UN-Contracts of Sale* 233-244.

¹⁹⁸ See Cour de Cassation (France) 16 July 1998, CISG-Online 344, Amtsgericht Kehl (Germany) 6 October 1995, CISG-Online.

the packing clause contained in the acceptance: packing in news bags.¹⁹⁹ In this case, the knock-out rule appears to be relevant.²⁰⁰

4.5.5. The inclusion of standard terms under the CISG

To better understand the notion of standard terms of a contract, one can refer to Article 2.1.19 of the UNIDROIT Principles of International Commercial Contracts. According to this article, standard terms “are to be understood as those contract provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party”. Article 2.1.20 of this text goes further and provides, in its comments, that a party who agrees to the other party’s standard terms will be bound to those terms “Irrespective of whether or not it actually knows their content in detail or fully understands their implications”. In light of this article, it is clear that a standard term contract is a contract in which the terms and conditions are exclusively fixed by one of the parties, and the other party has little or no latitude to negotiate more favourable terms, and must either agree to these terms or withdraw from the contract. Usually, it is the standard terms of the party who is in a better negotiating position that govern the contract.²⁰¹

In the past, many courts held that in respect of Article 4 of the CISG, this notion should not normally fall within the ambit of the CISG. It is important to note that the question as to whether or not standard terms are included in the contract is not open to debate, since this issue is now generally recognised and accepted as falling squarely within the ambit of the Convention, and has to be decided according to the CISG’s provisions, rather than the provisions of the applicable domestic contract law.²⁰²

As per CISG Advisory Council Opinion No. 13, the issue regarding the inclusion of standard terms has to be determined according to the rules for the formation and interpretation of contracts, specifically Articles 8, 14, 18, 19 and 23.²⁰³ Based on these articles and in light of their content, as discussed in section 4.4 of this chapter, one can deduce that standard terms

¹⁹⁹ See Honnold *Uniform Law* 81.

²⁰⁰ See Lookofsky <http://cisg3.law.pace.edu/cisg/biblio/loo19.html> (accessed on 22 November 2015).

²⁰¹ See Raiser *Allgemeinen Geschäftsbedingungen* 21 – 23, 93 ; Llewellyn 1939 Harv LR 701 ; Kotz *Allgemeinen Geschäftsbedingungen* A26 – 27; Eiselen *Standaardbedinge* 25, 30 – 34, 103 – 104;

²⁰² See Netherlands District Court Arnhem 2004 <http://cisgw3.law.pace.edu/cases/040317n1.html>. For an earlier ruling that seems similar, see Netherlands District Court Zwolle, 1995.

²⁰³ See Magnus "Wiener UN Kaufrecht" Vorbem Zu Art 14 ff paragraph 1; Schlechtriem and Schwenzer *Commentary intro to Arts 14-24* paragraph 1.

should be applicable where the offeror has clearly communicated to the offeree that he wants the agreement to be subject to these standard terms, and where the offeree has agreed to the offer.²⁰⁴ The offeree must clearly indicate his refusal if he does not agree with these standard terms.²⁰⁵ The Opinion stipulates that domestic provisions and rules regulating standard terms may only be applied to standard terms if they deal with the question of validity.²⁰⁶

Indeed, one of the main concerns regarding the standard terms of a contract in international trade today is to determine whether or not those terms which are usually not the object of particular negotiations have been incorporated into the agreement between the parties.²⁰⁷

Generally, the problem regarding the incorporation of standard terms manifests itself in four different scenarios.²⁰⁸ It often happens that the contract has made provision for the incorporation clause, but did not attach the standard terms at the same time, or it may be that the contract document contains standard terms printed on the back, but without a clear incorporation clause on the front. In addition, one can always be in a situation where the standard terms are in a different language or are added *ex post facto*.²⁰⁹

With regard to the first assumption, namely an incorporation clause without the provision of standard terms, the CISG Advisory Council Opinion No. 13 clearly states that “Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of terms”.²¹⁰ This solution of the CISG appears to be different from other domestic laws, which have developed, through case law, divergent approaches to the inclusion of standard terms. For instance, the German Court²¹¹ has developed a strict approach which requires that standards terms must be included in the contract, made available to the addressee at the time of the conclusion of the contract, and

See CISG-AC Opinion No. 13 and 4.

²⁰⁵ See Schmidt-Kessel Commentary, available at: <http://cisgw3.law.pace.edu/cases/011031g1.html> (accessed on 25-7-2015).

²⁰⁶ See Schmidt-Kessel Commentary, available at: <http://cisgw3.law.pace.edu/cases/011031g1.html> (accessed on 25-7-2015).

²⁰⁷ CISG-AC Opinion No. 13 and 4; but USA 16 November 2007 Barbara Berry, SA de CV v Ken M Spooner Farms; USA 21 January 2010 Federal District Court California Golden Valley Grape Juice and Wine, LLC v Centriys Corporation et al.

²⁰⁸ Eiselen 2007 (10) *PER/PELJ* 48.

²⁰⁹ Eiselen 2007 (10) *PER/PELJ* 48.

²¹⁰ See CISG-AC Opinion No. 13 paragraph 2.

²¹¹ Germany Supreme Court 2001 <http://cisgw3.law.pace.edu/cases/011031g1.html>; Netherlands Arbitration Institute 2005 <http://cisgw3.law.pace.edu/cases/050210n1.html>. See Schmidt-Kessel Case Commentary at Germany Supreme Court 2001 <http://cisgw3.law.pace.edu/cases/011031g1.html>. See also Germany Appellate Court Celle 2009 <http://cisgw3.law.pace.edu/cases/090724g1.html>; Netherlands District Court Utrecht 2009 <http://cisgw3.law.pace.edu/cases/090121n1.html> (accessed on 21 November 2014).

that standard terms must be written in the language of the main contract. In contrast to the German Court, the American Court has adopted a lax approach which allows incorporation after the conclusion of the contract. In this regard, standard terms can be included ex post facto, without allowing for any modifications. The Austrian Court, however, has developed a moderate approach, which advocates that a clear incorporation clause in the contract is sufficient for the effective incorporation of standard terms.²¹²

4.5.6. Electronic communications under the CISG

According to Zwass, editor-in-chief of the *International Journal of Electronic Commerce*, electronic commerce means sharing business information, maintaining business relationships and conducting business transactions by means of telecommunications networks.²¹³ This means of communication is one of the most frequently used methods for enterprises to negotiate and conclude international transactions. However, law and technology increase and develop at different speeds.²¹⁴ While technology changes very fast, the process of developing new legal rules goes more slowly.²¹⁵ The realities of international trade have therefore changed significantly with the development of information technology tools.

Today, traders are increasingly making use of information technology, because of the distance factor, to negotiate and conclude their contracts, which has given birth to the term “electronic commerce” or simply “e-commerce”.²¹⁶ In fact, the use of electronic means of communication such as e-mail, SMS and the internet are clearly replacing traditional forms of communications, namely post, telex and telegram. It is only a fax which can today be integrated into other forms of electronic communication.²¹⁷ The use of these electronic communications in commerce poses some challenges in the area of contracts, however, such as the legal value and validity of electronic communications; compliance with formalities; whether or not electronic signatures are possible and valid; determining the time and place of the conclusion of the contract; the validity of automated transactions; the applicable legal system; and the evidential value of electronic records. These issues are a

²¹³ Zwass <http://www.mhhe.com/business/mis/zwass/ecpaper.html> (accessed on 28-7-2015).

²¹⁴ Verzoni 2006 (2) *Nordic Journal of Commercial Law* 1-8.

²¹⁵ Verzoni 2006 (2) *Nordic Journal of Commercial Law* 1-8.

²¹⁶ Verzoni 2006 (2) *Nordic Journal of Commercial Law* 8-12.

²¹⁷ Coetzee 2007 (1) *VJ* 11-24.

significant obstacle for the development of international commerce.²¹⁸ At the time when the Vienna Convention was drafted and adopted, these electronic means of communication, namely e-mail and the Internet had not yet been developed.²¹⁹ In order to fill the gap, the CISG –AC Opinion No.1 discusses the legal value of e-mails and other electronic communications.²²⁰ In addition, three other texts under UNCITRAL have been enacted, namely the 1996 EC Model Law²²¹, the 2001 Model Law on Electronic Signatures,²²² and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts.²²³

4.5.6.1. The legal value and formalities of electronic communications

With regard to the notion of formalities, three kinds of formalities can be identified, namely writing, signature and authentication by an official agent, such as a notary or lawyer.²²⁴ These formalities are very important, since they serve to confirm the authenticity of the documents, as provided by writing, and the identification, attribution, assent and authentication of the parties, as provided by signature.²²⁵ Within the framework of this section, which deals with international sales contracts for movable goods, the study will only examine the first two requirements.

In fact, the principle set forth by the CISG with regard to formality is that no formalities are required.²²⁶ Article 11 of the CISG recognises the principle of freedom of form, when it provides that a contract of sale “need not be concluded in or evidenced by writing”, but “may be evidenced by any means, including witness”. Through this article, the CISG does not require any particular form or special requirement for the conclusion or validity of the

²¹⁸ Eiselen 2009 (10) *International Law Review of Wuhan University* 138.

²¹⁹ Eiselen 2007 (10) *PER/PELJ* 48.

²²⁰ See CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

²²¹ UNCITRAL Model Law on Electronic Commerce (1996) adopted by UNCITRAL on 12 June 1996.

²²² The text of the UNCITRAL Model Law on Electronic Signatures was adopted on 5 July 2001.

²²³ The Convention on the Use of Electronic Communications in International Contracts was adopted by the United Nation General Assembly during its 38th session which took place in New York on 23 November 2005. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html

²²⁴ Eiselen VJ 305-318.

²²⁵ Eiselen 2007 (10) *PER/PELJ* 48. .

²²⁶ CISG-AC Opinion No 1 Electronic Communications under CISG, Commentary of Article 11 of the CISG. Available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html> (Last accessed: 24 November 2015).

contract.²²⁷ The CISG, by clearly specifying through CISG –AC Opinion No.3 that the Parol Evidence Rule is excluded from its scope of application, upholds the notion, through CISG-AC Opinion 1, that “A contract may be concluded or evidenced by electronic communications”. The UNECIC corroborates and supports the CISG’s position by confirming that “there is proper legal recognition for the use of electronic communications in this process”.

However, when the parties require formalities or want to modify their initial agreement, they must be prudent about their own standard terms. Eiselen stated that, in this case, it must “either be agreed between the parties that electronic communications will be regarded as writing and that the alternative prescribed authentication procedures will be recognized as “signature”.²²⁸ This may be true in the case of standard contracts or in the Interchange Agreement between the parties. However, when one wishes to apply this to the CISG, it appears that Article 12 of the CISG complicates the clarity of the CISG’s position in this regard. A reading of Article 12 indicates that certain contracting states of the CISG may still require writing as a formality, and not a signature.²²⁹ It is true that there would be no complications in the use of these modern applications in the conclusion, modification and termination of international sales if the courts broadly interpreted the writing requirement, such as suggested above. In cases where international sales contracts cannot be concluded by these means, other forms of contracts will therefore need to be employed.²³⁰

Moreover, with regard to authentication by means of signature, in the context of international trade, this is usually a significant problem.²³¹ For many jurisdictions, it is when the physical signature is affixed to the paper document that the requirements of signature are met.²³² As for the CISG position, the Convention does not require a signature in any case, and only allows a country to make an exception, such as Articles 12 and 96, when it applies to the formality of a contract.²³³ This means that the requirement regarding an electronic signature

²²⁷ Wang and Andersen in 2004 (8) *VJ* 145-164.

²²⁸ Eiselen 1999 (6) *Institute of International Commercial Law* 21-46.

²²⁹ Zuppi in “The Parol Evidence Rule, International Electronic Documents and the United Nations Convention on Contracts for the International Sale of Goods (CISG)” Reproduced with permission of Camilla B. Andersen & Ulrich G. Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildly, Simmonds & Hill Publishing (2008) 640-654.

²³⁰ Zuppi in “The Parol Evidence Rule, International Electronic Documents and the United Nations Convention on Contracts for the International Sale of Goods (CISG)” Reproduced with permission of Camilla B. Andersen & Ulrich G. Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildly, Simmonds & Hill Publishing (2008) 640-654.

²³¹ Eiselen 1999 (6) *Institute of International Commercial Law* 21-46.

²³² Kuner et al http://www.kuner.com/data/articles/signature_perspective.html. (Last accessed: 24 November 2015).

²³³ Eiselen 2009 (10) *International Law Review of Wuhan University* 140.

under the CISG is only relevant where the parties themselves have required this type of authentication.

Article 13 of the CISG stipulates that “writing includes telegram and telex”. This article may appear to be important as an interpretative rule aid, since it mentions at least one form of communication that is electronic, namely telex, concluding that this must to be considered as writing for purposes of formalities. However, it is worth noting that Article 13 neither provides a definition of “writing” nor the minimal requirements which have to be met in order to consider an electronic message as “writing”. This means that the word “writing” should be viewed as an interpretative rule.²³⁴ The fact that the CISG, through CISG – AC Opinion No. 1, indicates that most forms of electronic communication should be interpreted as “writing”, renders this Article 13 somewhat superfluous. If, in the traditional paper world, for instance, this term was easy to understand and referred to documents written on paper using a pencil or pen, nowadays, as pointed out by Eiselen, with the development of more modern communication technologies, this article now clearly shows some gaps. However, Article 9 of the UNECIC provides a precise and comprehensive solution to fill this gap in CISG Article 13.²³⁵

4.5.6.2. Time and place of contracting parties using electronic communication

In order to determine where and when the conclusion of a contract has taken place, especially when the parties are not negotiating with each other face-to-face, indirect forms of communication may be important for a number of issues, such as establishing the place where a tort (delict) has been perpetrated (the *lex loci delicti*), establishing when an offer becomes effective or determining when the period within which the offer must be accepted starts, establishing when an offer may be lawfully revoked without further consequences, and establishing the place where the contract was concluded (*lex loci contractus*).²³⁶ Three different approaches have been used in order to address issues relating to the time and place of the conclusion of a contract.²³⁷ The information theory suggests that a contract is concluded once the offeree has taken notice of the content of the communication. This

²³⁴ See Ferrari, in “Ferrari/ Flechtner/Brand *Draft Digest and Beyond* 209.

²³⁵ See Article 9 of the UNECIC.

²³⁶ Eiselen 2007 (10) *PER/PELJ* 48.

²³⁷ See UNCITRAL Secretariat Explanatory Note, para. 287, available at: <http://www.cisg.law.pace.edu/cisg/conference.html> (last visited August 15, 2015), paras. 173-174 (Secretariat Explanatory Note).

approach is applied to direct forms of communication, such as the use of a cell phone for negotiations. The reception theory states that a contract is concluded at the moment when the offeror receives the acceptance. This approach is applied to indirect forms of communication, such as post, email, fax and telex. This is also the approach adopted by the CISG. Finally, the dispatch or postal theory establishes the time and place in terms of when and where the offeree puts the acceptance in the post. This approach is mostly used in common law countries.²³⁸

With regard to indirect communication, Article 15 of the CISG provides that an offer becomes effective when it “reaches” the addressee. Article 24 sets forth that a message is regarded as having reached its destination when it is delivered to the addressee in person or at his place of business or mailing address. These CISG provisions raise a significant concern when they have to be applied to electronic communication, in so far as they do not make allowance for the problems associated with electronic messages. CISG-AC Opinion No. 1, in addressing these issues, has provided interpretative guidance in this regard. In accordance with Articles 15 and 16, the Opinion states that the term “reach” correlates with the point in time when an electronic communication has entered the offeree’s server.²³⁹ In the case of electronic communication, the term “reach” matches the time at which an electronic communication has entered the offeree’s server.

A reading of Article 18 (2), combined with Article 23 of the CISG, indicates that a contract comes into effect at the time that the acceptance reaches the offeror. CISG-AC Opinion No. 1, with reference to Article 18, stipulates that an acceptance will become effective when “an electronic indication of assent has entered the offer’s server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address”. A reading of CISG-AC Opinion No1 shows that the CISG does not determine the place of contracting, which has to be determined by the applicable domestic law. A clarification of this gap can be found in the UNECIC, which states that “the usual physical places of business of the parties will be decisive, and not the place where the server or other communications apparatus may be situated, which very often may be in another part of the world which has no other connection with the transaction”.²⁴⁰ This

²³⁸ See *England Henthorn v Fraser* (1892) 2 Ch 27 – 33; *South Africa Cape Explosives Works (Ply) Ltd v SA Oil and Fat Industries Ltd* 1921 CPD p. 244; *South Africa Kergevlen Sealing and Whalling Co Ltd v CIR* 1939 AD p.487.

²³⁹ Eiselen 1999 (6) *Institute of International Commercial Law* 21-46.

²⁴⁰ See UNECIC Article 10 (4); Secretariat Explanatory Note, para. 194.

establishes the principle that parties are connected to their physical place of business, rather than their virtual place of communication.²⁴¹

In many cases involving the formation of contracts today, an offer usually includes a period of time within which the acceptance must take place. However, contracts usually fail to indicate specifically when this time period commences, namely the date of dispatch or date of receipt, hence rendering these time periods ambiguous. Article 20 of the CISG distinguishes between instantaneous communication technologies, such as telephone and telex (time period begins to run upon dispatch of the message), and non-instantaneous means of communication, such as letters and telegrams²⁴² (time period begins to run when the message reaches the addressee). According to Eiselen, this distinction is not really helpful, as it does not allow for a determination of when this time period should start. The author suggests that it would be preferable to make a distinction between “real time communications where human parties are in instant contact with one another and any break in communications becomes immediately apparent. Telephone conversations, whether on land line, by cell phone or over the internet with VoIP, and communications on chat lines should be regarded as real time communications”.²⁴³ Based on this statement, he concludes that like this, all other forms of electronic communication, such as SMS, e-mail, EDI, telex and interactive transactions with an automated agent, should be regarded as not occurring in real time. This statement corroborates the CISG –AC Opinion 1, which stipulates that CISG Article 20 (1) also applies to electronic communications in real time.

CONCLUSION

The purpose of this section was to analyse the formation of contracts under the CISG in more detail with regard to the notions of acceptance, counter-offer and the period of time for acceptance. It has been noted that the notion of acceptance is governed and defined by Article 18 of the CISG, which provides a comprehensive list of the acts which indicate acceptance. The study then analysed the time or moment at which these acts or conduct are considered as an indication of acceptance by the offeree. It was also noted that the doctrines of the CISG are controversial when it comes to determining the time or moment of

²⁴¹ See Lookofsky <http://cisg3.law.pace.edu/cisg/biblio/loo19.html> (accessed on 22 November 2015).

²⁴² Verzoni 2006 (2) *Nordic Journal of Commercial Law* 1-53.

²⁴³ See UNCITRAL Secretariat Explanatory Note, para. 287, available at: <http://www.cisg.law.pace.edu/cisg/conference.html> (last visited August 15, 2015), paras. 173-174 (Secretariat Explanatory Note).

acceptance, especially with regard to e-commerce. This issue has been dealt with by articles 11, 13, 15 and 24 of the CISG, and has been clearly explained by the CISG-AC Opinion N°1.

The researcher then focused on the notion of a counter-offer under the CISG. Article 19, which governs this matter, clearly indicates that a counter-offer exists when the reply to an offer brings some modifications which materially alter the terms of the contract. In this regard, it was noted that the price, payment, quality and quantity of goods, and settlement of disputes, among others, are elements which materially alter the terms of an offer. An analysis of the notion of a counter-offer led to an examination of the notion of battle of forms. It was revealed that although this matter was the subject of much debate during the CISG's drafting of article 19, the CISG has finally recognised that this issue falls within its scope of jurisdiction. In doing so, this notion has been ruled according to the last shot rule and knock out rule.

This section concluded by examining the notion of the period of time for acceptance. It was noted that this concept is governed by Article 18(2) and Article 20 of the CISG. The study also analysed the moment at which this period of time starts to run, how it is calculated, and when it expires.

4.6. THE PERFORMANCE OF CONTRACTS UNDER THE CISG

The study of the performance of contracts involves an examination of the obligations of the seller and buyer. After concluding the contract, the next stage is to understand the content and terms of the obligations which parties, based on the principle of autonomy, have committed each other to perform. In the CISG, these obligations of the parties are defined in Part III entitled "Sale of goods". They are provided for by Articles 30 and 53. In accordance with these provisions, the seller is required to "deliver the goods (...) and transfer the property" in them to the buyer,²⁴⁴ and the buyer to "pay the price for the goods and take delivery of them".²⁴⁵ However, within the scope of this study, as mentioned in chapter 1, the study will focus mainly on the seller's obligations.

²⁴⁴ See Article 30 of the CISG

²⁴⁵ See Article 53 of the CISG

4.6.1. *The transfer of property*

The obligations of the seller are defined by Article 30 of the CISG as follows: “the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this convention”. In light of this article, one can note that the main obligation of the seller is not only to deliver a good, but to also hand over all documents relating to the goods, and to transfer the property in them. With regard to the obligation to transfer the property, it is important to highlight that although the CISG requires the seller to transfer ownership of the good sold to the buyer, it is silent in terms of how this obligation may be performed. The CISG leaves this issue of how and when the property is transferred to the seller and buyer to the law, in accordance with local conflict of laws rules.²⁴⁶ In this regard, it will be up to the domestic law to determine whether the property is transferred when the contract is concluded, and which documents may be required for the transfer of property.²⁴⁷ In a nutshell, the obligation of the seller to deliver may be examined by responding to three questions, namely where (place of delivery), when (time of delivery) and how (handing over the documents).

4.6.1.1. Place of delivery and passing of risk under the CISG

As far as the place of delivery is concerned, it is defined as a place contractually agreed upon by the parties to perform their transaction. In respect of the principle of contractual freedom, they may address this issue of the place of delivery by stipulating Incoterms,²⁴⁸ where the most used ones are the FOB and CIF.²⁴⁹ The Convention draws a distinction between a contract involving carriage (31 (a)), one where the seller has to place the goods at the buyer’s disposal at a specific place (31 (b)), and a contract in which the seller has to

²⁴⁶ See UNCITRAL *Digest* 130; Widmer in Schlechtriem/Schwenzer *Commentary* 492.

²⁴⁷ See Schlechtriem in Galston/Smit *Sales* 6-7; Widmer in Schlechtriem/Schwenzer *Commentary* 492.

²⁴⁸ “Incoterms” is the acronym for “International Commercial Terms”. They were first published in 1936, and most recently edited in 2010. See Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 400; Coetzee *Incoterms* 10 and 191; Klotz/Barrett *Sales* 63; Morrissey/Graves *Sales* 148; Lookofsky CISG 85; and Romein <http://cisgw3.law.pace.edu/cisg/biblio/romein.html>. (Last accessed 11-7-2015).

²⁴⁹ FOB means “Free on Board”; and CIF means “Freight, Insurance, and Coast”. For more detail, See authorities quoted by Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 400; see also Widmer in Schlechtriem/Schwenzer *Commentary* 491.

place the goods at the buyer's disposal at his/her own place of business (31 (c)) when the parties have no other alternative.

4.6.1.1.1. *Place of delivery*

Contracts involving carriage and non-carriage

International commerce involves the movement of goods, since the parties are always distant from each other. This means that when the buyer has already paid the price of the goods, he/she has to take ownership of the goods purchased. The seller can use different means of delivering the goods to the buyer in respect of the terms agreed upon in the contract. He may choose delivery involving carriage, or delivery not involving carriage.

In terms of delivery involving carriage, it is governed by Article 31 (a) of the CISG. This article refers to transport by a "carrier" to which the seller "hands the goods over" for "transmission to the buyer". According to paragraph (a), the seller is simply required to hand over the goods to the first carrier. It is not the seller's responsibility to arrange transport facilities such as delivery trucks, or to pay the cost of this carriage. Article 31 (a) sets forth that the seller fulfils his contractual obligation for delivery when he "hands the goods over to the first carrier for transmission". According to Article 31 (a), the Orleans Court of Appeal in France, in the case of *Ancone*, decided that the obligation of delivery of the goods, as defined by Article 31 of the CISG, had been fulfilled by the handing over at Ancone of the goods to the first carrier for transfer to the buyer, and that its performance had taken place in this town.²⁵⁰ Article 32 (2) provides that the parties may expressly or implicitly agree that the seller will make the arrangements for the carriage of goods. In this case, the seller is obliged to find "an appropriate means of transportation in the circumstances and according to the usual terms for such transportation."²⁵¹ In other words, the seller does not have to assent to conditions that are obviously dangerous and disadvantageous to the seller, such as the choice of a

²⁵⁰ See Orleans Court of Appeal, 29 March 2001, available at: <http://witz.jura.uni-saarland.de/CISG/decisions/> (Last visited 24 November 2015).

²⁵¹ See Widmer, in: Schlectriem/schwenzer, *Commentary* Art 32 para. 15.

means of transportation that is very expensive.²⁵² However, this article does not deal with the issue of who is responsible for this expense.

With regard to the delivery of the goods not involving carriage, this refers to cases where “the seller is not bound to deliver the goods at any particular place”. These kinds of deliveries are governed by Articles 31 (b) and (c) of the CISG. However, it is still important to highlight that these cases are rare in the international transaction context.²⁵³ Article 31 (b) of the CISG stipulates that the seller’s contractual obligation to deliver the goods is fulfilled as soon as he hands over these goods at the particular place agreed upon at the time of the conclusion of the contract. According to the report of the drafters of the UNICITRAL Digest, Article 31 (b) must meet three conditions in order to be applied: firstly, “the delivery such as included in the contract must not involve carriage of the goods in terms of the meaning of article 31 (a), so that it will up to the buyer to take over the goods; secondly, the goods sold must be specific goods, goods of a specific stock, or goods to be manufactured or produced; and thirdly, both parties must have known, when the contract was concluded, that the goods were located at (or were to be manufactured or produced at) a particular place”.²⁵⁴

As far as paragraph C of Article 31 is concerned, the delivery is effective “in placing the good at the buyer’s disposal at the place where the seller had his place of business at the time of conclusion of the contract”. This corresponds to the modality of a “factory sale”. Nevertheless, paragraph c requires that the contract does not have to foresee any modalities concerning the delivery and carriage, and there is no particular place where the goods have to be manufactured and produced.²⁵⁵

As a result, the seller is required to accomplish any specific tasks which will enable the buyer or his intermediary, acting in his name and on his behalf, to perform his obligation of taking possession of the goods.²⁵⁶ In this respect, the seller has to package the goods and keep them in a good condition. He is also required to inform the buyer that the goods are effectively ready, and place them at the buyer’s disposal, even if there is a term in the contract which specifies an exact date on which the buyer has to take possession of the goods.²⁵⁷ Therefore, as stipulated in Article 85 of the CISG, in cases where the buyer or his intermediary does not take possession of the goods at the moment that they are placed at

²⁵² See Widmer, in: Schlechtriem/schwenzer, *Commentary Art 32* para. 15.

²⁵³ See Flechtner *Honnold’s Uniform Law* 313 paragraph 209.

²⁵⁴ See UNCITRAL *Digest* 133 paragraph 8.

²⁵⁵ See UNCITRAL *Digest* 132 paragraph 1 and 10; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 423;

Widmer in Schlechtriem/Schwenzer *Commentary* 511; Schlechtriem in Gaston/Smit *Sales* 6-11.

²⁵⁶ See UNCITRAL *Digest* 132 §1 and 10; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 423; Widmer in Schlechtriem/Schwenzer *Commentary* 511; Schlechtriem in Gaston/Smit *Sales* 6-11.

²⁵⁷ See Articles 33 (a) and (b) of the CISG.

his disposal, the seller or carrier is required to ensure that the goods are safely stored in the meantime.²⁵⁸

The principle enshrined by Article 1609 of the Cameroonian Civil Code is that the seller fulfills his obligation to deliver the goods when he puts them at the buyer's disposal at the place where these goods found themselves at the moment of the conclusion of the contract, and this place is usually the seller's own premises. This principle, however, seems to be insufficient to respond to all the usages and practices encountered in modern international trade. The Cameroonian Civil Code is not as explicit in this regard as the CISG, which has provided detailed information regarding all the usages and practices carried out by international traders. Therefore, the modalities governing the place of delivery are more clearly explained in the CISG than in the Cameroonian Civil Code. These modalities provide much-needed information for SMEs or enterprises engaging in international commerce.

4.6.1.1.2. *Time of delivery*

The time of delivery is governed by Article 33 of the CISG, which requires the seller to deliver the goods on the date agreed on, or the date stipulated in the contract.²⁵⁹ As for the place of delivery, in accordance with the principle of party autonomy provided by Article 6 of the CISG, the parties have the freedom to determine the time for the fulfillment of their contractual obligations.²⁶⁰ Article 33 (b) requires the seller to deliver the goods within a period of time that has been contractually determined. However, in the case where the parties have not specified any time of delivery in the contract, in respect of Article 33 (c), the seller is required to deliver the goods "within a reasonable time" after the conclusion of the contract. The seller is therefore obliged to deliver the goods on time, as late delivery may amount to a breach of contract.²⁶¹

²⁵⁸ See Article 85 of the CISG.

²⁵⁹ See Article 33 (a) and (b) of the CISG.

²⁶⁰ See Articles 6 and 7(2) of the CISG; see also Widmer in Schlechtriem/Schwenzer *Commentary* 549; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 460; UNCITRAL *Digest* 137 paragraph 1.

²⁶¹ See Articles 45 and 49; see also UNCITRAL *Digest* 138 §9., CLOUT case No. 219; and similar cases in UNCITRAL *Digest* 137-138 §7; Kritzer/Eiselen *Contract* §88:42 88-75 to 88-79; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 467; Widmer in Schlechtriem/Schwenzer *Commentary* 557.

4.6.1.1.3. *Handing over of documents relating to the goods*

Documents play an essential role in the sale of goods, especially in international transactions. In the context of international trade, one can note two types of documents. On the one hand, there are documents which symbolise the goods and which are usually the real object of the sale for the parties.²⁶² On the other hand, there are documents which are of no significance with regard to the power of disposition over the goods (such as bills of lading or warehouse receipts) and their value (an insurance policy, for instance), but which are relevant to their usefulness (certificates of origin, test certificates, handling instructions). The CISG, under Article 30, requires the seller to deliver the goods, transfer the property in them and to “hand over documents relating to them”. Article 34 consolidates and supplements Article 30, by also requiring the seller to hand over “documents relating to the goods... at the time and place and in the form required by the contract”. With regard to Article 58, it requires the buyer to pay only when he has taken over the goods or “documents controlling their disposition”. CISG Advisory Council Opinion No. 11, in interpreting Articles 30 and 34, states that “the seller must hand over any document relating to the goods. Examples of documents relating to the goods include documents controlling their disposition and also other documents relating to the goods, such as commercial invoices, insurance policies or certificates, surveys report, packing list, certificates of origin, certificates of quality, and sanitary or phytosanitary certificates”.²⁶³

As per Article 34, where the seller is required to hand over all these above documents, he/she must do so at the time, place and manner agreed upon with the buyer²⁶⁴. This article is also relevant in cases where the parties have agreed that the payment should be effected by a letter of credit. In this case, this letter must list the documents needed before

²⁶² See the Vienna Conference discussions in connection with the passing of risk. *A/Conf.97/C.1/SR 32*, p.9.

²⁶³ For an exhaustive list of documents relating to goods, see CISG-AC Opinion No. 11 paragraph 1 to 6; Widmer in Schlechtriem/Schwenzer *Commentary* 561; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 476; Enderlein *Rights* 133 152-153; Butler *Guide* 4-11 12; Fiser-Sobot 2011 (3) *BLR* 196 199. See also authorities quoted in UNCITRAL *Digest* 140 footnote 2 & 3; and in Kritzer/Eiselen *Contract* paragraph 88:52. On the supply of certificates of origin and of quality, for instance, see Germany

3 April 1996 Bundesgerichtshof *Cobalt Sulphate case* [<http://cisgw3.law.pace.edu/cases/960403g1.html>] (accessed 10-8-2012).

²⁶⁴ For information on application, see Russia 6 June 2003 Arbitration proceeding 97/2002 [<http://cisgw3.law.pace.edu/cases/030606r1.html>]; Spain 12 February 2002 Appellate Court Barcelona [<http://cisgw3.law.pace.edu/cases/020212s4.html>]; Russia 11 May 1997 Arbitration proceeding 2/1995 [<http://cisgw3.law.pace.edu/cases/970511r1.html>]; and France March 1995 Court of Arbitration of the ICC (Arbitral award No. 7645), *ICC International Court of Arbitration Bulletin* 2000.

payment.²⁶⁵ However, if the parties have not agreed on the documents that must be provided before payment, CISG-AC Opinion 11 states that Article 58 must be applied. In this case, the buyer's obligation to pay the purchase price will be performed when the seller places at his disposal either the goods or "documents controlling their disposition".²⁶⁶

It is important to note that compared to the Cameroonian Civil Code, where the seller's obligation involves an obligation to deliver conforming goods, this obligation with regard to the CISG is divided into two distinct obligations for the seller, namely an obligation of delivery corresponding to the material operation of handing over the goods, and the obligation of conformity, which relates to the required quality of the goods sold. In this regard, the CISG provisions in terms of international trade regulations are more explicit and detailed as far as the seller's obligation is concerned than the domestic law. Moreover, in terms of conformity, while the Convention has adopted an unique obligation for the seller through its article 35, the Cameroonian Civil Code identifies two notions, namely that of conformity of goods and guarantee against latent defect.

4.6.2. Conformity of goods and guarantee against latent defect

It is important to emphasise that the handing over of the goods at the agreed place and time is insufficient for the seller to fulfill his obligation of delivery.²⁶⁷ The seller is also required to ensure that the goods conform to the contractual stipulations. In other words, the obligation of delivery does not only involve putting the goods sold at the buyer's disposal, but to also put at his disposal goods that correspond to the buyer's expectations.²⁶⁸ The buyer usually purchases the goods for some purpose, e.g. to consume, use or resell.²⁶⁹ The buyer's expectations regarding the goods may be frustrated if the goods do not conform to their intended use, or if a third party claims a right to possession or use of the goods in respect of a patent or other industrial or intellectual property right.

²⁶⁵ See Articles 30 and 34; see also CISG-AC Opinion No. 11 [<http://www.cisg.law.pace.edu/cisg/CISG-AC-op11.html>] (Last accessed: 24 November 2015).

²⁶⁶ Cf. Article 58 of CISG and CISG-AC Opinion No. 11 paragraph 4, 5, 6; regarding documents that do not control the disposition of the goods, see CISG-AC Opinion No. 11 paragraph 7.

²⁶⁷ See Honnold/Flechtner *Uniform Law Art.35* para.222.

²⁶⁸ See Gaffi 2003 *International Business Law* 341; Lookofsky *CISG* 85

²⁶⁹ Widmer in Schlechtriem/Schwenzer *Commentary* 561; Piltz in Kröll/Mistelis/Viscasillas *UN Convention* 476;

4.6.2.1. Criteria for non-conformity

The CISG resolves the issue of non-conformity of the goods by describing what discrepancies in the quantity or quality of the goods entails, as well as by making provision for situations in which the goods are not contained or packaged as required by the contract.²⁷⁰ The lack of conformity is defined by Article 35(1)²⁷¹ of the CISG, and refers to any discrepancy between the quality, quantity or packaging of the delivered good and what is specified in the contract. It also lays down forth, in paragraph 2, particular rules regarding the normal and special usage of the goods. In light of this article, one can observe that the CISG has adopted a unified concept of non-conformity.²⁷² Therefore, any non-conformity of the goods delivered by the seller means that the goods do not conform to the contract. The issue of lack of conformity is dealt with by the CISG according to both subjective and objective criteria.²⁷³

4.6.2.1.1. Subjective criteria for non-conformity

In terms of Article 35 (1) of the CISG, the seller must deliver goods that meet the specifications of the contract with regard to their description, quality, quantity and packaging.²⁷⁴ This means that the goods conform to the contract when they are appropriate to the “quantity, quality and description”, and are well packaged, such as agreed by the parties in the contract.²⁷⁵ In this regard, many scholars and case law have deduced that Article 35 is based on a normalised concept of “lack of conformity”, which dislocates comparable concepts under domestic law. This amounts to stating that the CISG does not draw a distinction, unlike many domestic laws. For instance, the Cameroonian Civil Code separates the issues of “hidden defects”, (*vices cachés*) and “apparent defects” (*vices*

²⁷⁰ See Honnold/Flechtner *Uniform Law* 220.

²⁷¹ See Art 35(1) “The seller must deliver goods which are in the quantity, and description required by the contract and which are contained or packaged in the manner required by the contract”.

²⁷² See Decision of Tribunal Cantonal de Sion – Switzerland, No. CI 97 288, dated 29.06.1998; Maley, Kristian, 2009 (12) *Int’l trade & Bus. L. Rev.* 82-86.

²⁷³ See Kroll Chapter II Article 35 Obligations of the seller p.489.

²⁷⁴ See Plitz, *Internationales Kaufrecht* 5-28; Tribunal Cantonal du Valais (Switzerland) 28 October 1997 (second hand bulldozer), CISG-Online 328 (Pace) at 4b.

²⁷⁵ For application, see Australia 6 August 2010 Supreme Court of Victoria *Delphic Whole saler(Aust) (Pty) Ltd v Agrilex Co Ltd* [<http://cisgw3.law.pace.edu/cases/100806a2.html>] (accessed 1-8-2012); Italy 11 December 2008 *Tribunale di Forli* [District Court] *Mitias v Solidea Sr* [<http://cisgw3.law.pace.edu/cases/081211i3.html>] (Accessed 10-7-2012).

apparent); the English sales law separates “conditions” and “warranties”; and the American law “express” and “implied warranties”. In contrast, that the CISG determines the lack of conformity primarily by examining and understanding “what characteristic of the goods are laid down in the contract by means of the quantitative and qualitative descriptions”.²⁷⁶

Thus, quantitative conformity depends on the nature of good, based on whether or not it relates to a specific type of good. Indeed, determining the quantity of goods should be pose any problems when it concerns a specific good or countable item, as the delivered goods must obviously be those specified in the contract. In this respect, it was decided by the Court of Koblenz in Germany that a shipment of goods containing less than the quantity specified in the contract constituted a lack of conformity in accordance with article 35 (1).²⁷⁷ The Court noted that a lack of conformity includes both quality and quantity. However, with regard to unidentified goods, it is very important that the parties specify the quantities which have to be delivered, such as weight, volume, metres, etc. In this regard, one Court found that if one type of the delivered plastic PVC contained a lower percentage of a certain substance than the percentage agreed upon in the contract, then the seller had breached his/her obligation to deliver conforming goods.²⁷⁸

With regard to “quality”, it is important that the seller delivers goods which correspond to the required physical condition, as well as legal requirements.²⁷⁹ Therefore, a lack of conformity will occur when the goods do not correspond to the agreed criteria, such as stipulated in the contract. This even applies to a situation in which the goods delivered by the seller are of a higher quality than that stated in the contract.²⁸⁰ It is clear that the determination of conformity become delicate when the lack of it refers to characteristics or descriptive elements to which the parties did not agree in the contract. In such cases, the parties may refer to article 35 (2),²⁸¹ which provides that the goods have to be able to fulfill their normal usage.

²⁷⁶ Schwenger in Schlechtriem/Schwenger *Commentary* 571; see also Flechtner 2007 (64) *Bepress* 2-3; Flechtner *Funky Mussels* 4; Neumann 2007 (11) 1 *VJ* 81; Hyland <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html>; Henschel *Conformity* 147; Krusinga *Non-Conformity* 29.

²⁷⁷ CLOUT case No 282 (Oberlandesgericht Koblenz, Germany, 31 January 1997)

²⁷⁸ Decision of Landgericht Paderbon – Germany, No 7 O 147/94, dated 25.06.1996.

²⁷⁹ Kröll in Kröll/Mistelis/Viscasillas *UN Convention* 495; Schwenger in Schlechtriem/Schwenger *Commentary* 572-573; Henschel *Conformity* 156. For instances of cases relating to variances in the quality of goods, see Henschel *Conformity* 156-158.

²⁸⁰ See Butler Guide 4-20; taking support from Switzerland 27 January 2004 District Court Schaffhausen [<http://cisgw3.law.pace.edu/cases/040127s1.html>]

²⁸¹ Article 35 (2) specifies that except in cases where the parties have agreed otherwise, the goods have to be fit for the purpose for which goods of the same description would ordinarily be used.

4.6.2.1.2. Objective criteria for non-conformity (fitness for ordinary purposes)

Article 35 (2) describes the implied norms which bind the seller, even in the absence of express norms stipulated in the contract. In other words, this paragraph provides a certain number of objective criteria that have to be observed and respected by the seller, in order to describe the conformity of the goods in cases where specifications related to description, quality, quantity or packaging of goods have not been expressly stipulated in the contract.

The first criterion of Article 35 (2) (a) stipulates that the goods delivered must be “fit for the normal purpose of use of similar goods”. In practice, goods are often ordered through a general description, without any further indication as to their future use.²⁸² The Secretariat Commentary on the 1978 Draft supported this view when he asserted that “the normal expectation of persons buying the goods of this contract description” is relevant for the standard. This means that the goods must have the normal qualities required from goods of the type described in the contract.²⁸³

Two opposing theories have been proposed in order to determine non-conformity. The first is the theory of average quality test, which is well-known in civil law countries, and the second is the merchantability test, which is applied in common law countries.²⁸⁴ Taking into account the legislative history of the Vienna Convention, neither of these theories has been adopted by the CISG.²⁸⁵ It has been stipulated that non-conformity should be determined on a case-by-case basis with reference to the parties’ intention, and the quality of the goods sold should be of a reasonable standard. The buyer is entitled to expect that the goods delivered possess certain basic qualities that make them usable for their ordinary purpose, even if the contract does not include an express provision to this effect.²⁸⁶

The case law of the CISG has highlighted some decisions in this respect along the same lines. The decision of the Cassation Court in France was that wine which is adulterated by the addition of a high quantity of sugar, resulting in an augmentation of the alcohol content,

²⁸² See Magnus, in *Staudinger Kommentar* Art.35 paragraph 15

²⁸³ See Secretariat Commentary on 1978 Draft, Art.33 (now Art.35) para. 2; Mullis, in: Huber/Mullis, *The CISG* 107.

²⁸⁴ See plitz, *Internationales Kaufrecht* 5-33; Oberlandesgericht Rostock (Germany), 25 September 2002 (Frozen foods), CISG-Online 672 (Pace).

²⁸⁵ See Bianca, in Bianca/Bonnel, *Commentary* Art.35 para.2.2.

²⁸⁶ Penda

http://cisgbasel2015.com/index_htm_files/20_paper_Jean%20Alain%20Penda_OHADA%20and%20the%20CISG.pdf. (Last accessed: 23 November 2015)..

was not fit for its ordinary purpose.²⁸⁷ In the same vein, the Bundesgerichtshof Court of Germany found that a special type of wax that was sold did not conform to the industry standards that were known and applied by both parties.²⁸⁸

The second criterion regarding conformity is in relation to particular purposes, , as specified in article 35 (2) (b), requires the seller to deliver goods which are “fit for a particular purpose” to be expressly or implicitly made known to the seller at the time of the conclusion of the contract”.²⁸⁹ Similarly, the Cour d’Appel de Grenoble in France found that “because the seller delivered some metallic elements which could not be used for the reassembling of the second hand hanger as agreed upon by the parties”. The Court held that there was a lack of conformity, as the seller knew at the time of contracting that such metallic element had to be used for that particular purpose and was not fit for it. The reading of this paragraph shows that it is necessary for the seller to be informed about the special purpose. This information should be shared at the time of the conclusion of the contract, so that the seller will know the exact content of his obligation with regard to the conformity of the goods. Article 35 (2) (b) enables ambiguities to be reduced for the buyer in all cases where the seller did not explicitly give his consent to the purpose transmitted by the buyer.²⁹⁰ The seller must, however, be able to deduce the particular purpose from the information that is shared between the parties.²⁹¹

In addition, the requirements of article 35 (2) (b) do not apply if “the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment”. This sentence is the necessary limitation to the buyer’s right to unilaterally determine the exact reliance of the contract. With regard to the reliance element, the Bundesgerichtshof Court in Germany found that in the usual case, a buyer cannot reasonably rely on the seller’s knowledge of the importing country’s public law requirements or administrative practices relating to the goods, unless the buyer indicates such requirements to the seller.²⁹² The Court therefore concluded that mussels with cadmium levels exceeding the recommendations of German health regulations did not transgress the requirements of article 35 (2) (b), since there was no evidence that the buyer had mentioned this regulation to the seller.²⁹³

²⁸⁷ Decision of Court de Cassation – France, No 173 P, dated 23.01.1996.

²⁸⁸ See decision of Bundesgerichtshof – Germany, No. VIII ZR 121/98 dated 24.03.1999.

²⁸⁹ See Schwenger, in : Schlechtriem/Schwenger, *Kommentar*, Art.35 para.9.

²⁹⁰ See CLOUT case No 84 (Oberlandesgerichtshof Franckfurt a.M., Germany, 20 April 1994).

²⁹¹ See CLOUT case No 84 (Oberlandesgerichtshof Franckfurt a.M., Germany, 20 April 1994).

²⁹² CLOUT case No 123 (Bundesgerichtshof, Germany, 8 March 1995).

²⁹³ Idem

The third criterion is related to article 35 (2) (c), which requires that goods must “possess the qualities of goods which the seller has held out to the buyer as sample model”, in order to conform to the contract.²⁹⁴ In other words, the goods delivered are required to have the same qualities as the sample or model, such as defined in the contract. However, in cases of conflict between article 35 (2) (b) (buyer’s special purpose of use) and article 35 (2) (c) (sample model), the latter will prevail, owing to the fact that the buyer could not rely in this case, or it could not be reasonable for him/her to rely, on the seller’s skill and judgment.²⁹⁵ The case law has applied this criterion of conformity in many situations.²⁹⁶

The fourth criterion requires that the goods delivered must be “contained in packaged in the manner required by the contract”. The seller is obliged to package the goods, not only when the goods are dispatched, but also when he only has to place them at the buyer’s disposal for collection by the buyer. Thus, the seller fails to perform his obligation if the goods are not packaged according to the usages required in the particular sector of the market.²⁹⁷ One court found that the seller is responsible for non-conformity due to the lack of or inadequate packaging, if the goods reached the buyer in a bad condition as a result.²⁹⁸

4.6.2.1.3. Legal criteria for conformity: third-party rights and the claims guarantee

The seller’s obligation to deliver a conforming good is not only discharged when he has delivered the goods that were sold, but also when the goods delivered are, in terms of Article 41, “free from any right or claim of a third party”.²⁹⁹ This obligation is known within the

²⁹⁴ See Landgericht Berlin (Germany), 15 September 1994, Unilex.

²⁹⁵ See Schlechtriem/ Schwenger, *supra* note 14, 539.

²⁹⁶ See for instance, Decision of Landgericht Berlin – Germany, No. 102.0.181/98, dated 25.05.1995; Decision of U.S. Courts of Appeal, 2nd Circuit, No 95-7182, 95-7186, dated 06.12.1995.

²⁹⁷ See, among others, Kröll/Mistelis and Viscasillas *UN Convention* 10 Fn22; Magnus in *CISG vs.101*; Troiano in Ferrari *CISG* 348; Huber Sales Law 937 944; Lookofsky in Ferrari *CISG* 128; Magnus in Ferrari *CISG* 158-159; Witz in Ferrari *CISG* 139; Schwenger/Hachem <http://ius.unibas.ch/uploads/publics/6248/201109131645024e6f6c6e5b746.pdf> and Bonell <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html>.

²⁹⁸ Decisión of COMPROMEX, Comisión para la protección del Comercio Exterior de México, No. M/21/95, dated 29.04.1996.

²⁹⁹ For an illustration, see Germany 21 March 2007 Appellate Court Dresden *Stolen Automobile case* [<http://cisgw3.law.pace.edu/cases/070321g1.html>] (Accessed 21-8-2012). *A propos* of this, a car sold was seized because it had been stolen. The court found the seller to be liable for two breaches, namely the inability to transfer property in the car, and the failure to deliver a car that was free from third party claims.

Cameroonian Civil Code as the “warranty against dispossession”³⁰⁰ and under the UAGCL rules as the “guarantee”.³⁰¹ In light of the CISG, this duty of the seller to guarantee the goods against legal defects, in contrast to the Cameroonian Civil Code, covers two areas, namely the guarantee against third party property rights, and the guarantee against third party intellectual property rights.

4.6.2.1.3.1. Guarantee against third party property rights

The issue regarding legal conformity refers to the right and claim of third parties in relation to the sold goods. This is governed by Articles 41-43 of the CISG. Article 41 obliges the seller to ensure that the goods he puts at the buyer’s disposal are exempt of all rights or claims by a third party.³⁰² Although under Article 4 (b) of the CISG, the matter concerning “the effect which the contract may have on the property in the goods sold” is excluded from the scope of application of the CISG, Article 41 makes it clear that the issue regarding third party rights and claims is governed by the CISG. Article 41 requires the seller to deliver goods that guarantee the enjoyment and use of the buyer, without having to worry about any claims by another person who alleges himself to be the true owner of the goods. In this regard, Flechtner stated that “ the seller must transfer to the buyer the property in (good title to) the goods, so that the buyer can enjoy the use of what it purchased without interference from another claiming to be the true owner of the goods”.³⁰³

4.6.2.1.3.2. Guarantee against third party intellectual property rights

³⁰⁰ See For Cameroonian Civil Code: Articles 1625 to 1640 CC

³⁰¹ See Articles 260 and 261 of the UAGCL.

³⁰² For an illustration, see Germany 21 March 2007 Appellate Court Dresden *Stolen Automobile case* [<http://cisgw3.law.pace.edu/cases/070321g1.html>] (accessed 21-8-2012). *A propos* of this, a car sold was seized because it had been stolen. The court found “the seller liable of two breaches, the inability to transfer property in the car, and the incapacity to deliver a car free from third party claims”.

³⁰³ Flechtner Bepress 8-9; see also Etier/Rauda <http://www.cisg.law.pace.edu/cisg/biblio/raudaetier.html> (accessed 21-8-2012). In the *Automobile case*, a German seller and an Italian buyer dealt with a second hand car. After delivery, the car was seized by the Italian police because it had been registered first in Italy and was recorded as stolen. Following the seizure, the car was given back to the first owner. The court inferred that the seller was unable to transfer ownership of the car to the buyer. See Germany 22 August 2002 District Court Freiburg *Automobile case* [<http://cisgw3.law.pace.edu/cases/020822g1.html>] (accessed 21-8-2012).

In terms of Article 42, the seller's obligation consists of delivering goods that are free from third parties' intellectual property rights or claims.³⁰⁴ This obligation is subject to three main restrictions. Firstly, the seller is only responsible if the third party's right or claim is one "of which at the time of the conclusion of the contract the seller knew or could not have been unaware". In this case, it is the buyer who bears the burden of proof. Secondly, the seller is only liable if the third party's right or claim is based on a state legislation, in accordance with Article 42 (1) (a) (b), and the third restriction is based on the principle relating to the taking over of risk, which means that the seller is not responsible if the buyer "knew or could not have been unaware" of the third party's right or claim during the conclusion of the contract, or that this right results from the fact that the seller has respected the technical specifications, such as "technical drawings, designs, formulations or other such specifications", that were provided to the seller by the buyer himself.

Article 41, combined with Article 42 of the CISG, show that the seller does not ignore his conformity obligation if the third party claim was known to the buyer.³⁰⁵ Article 43 deals with the buyer's duty to denounce the legal default of goods in a reasonable time from the moment when he becomes aware or ought to have become aware of the right or claim.³⁰⁶ Article 42, by emphasising the obligation of the seller to protect the buyer's right with regard to intellectual property, upholds the principle of legal conformity. Broadly speaking, this has considerable scope in the political sphere,³⁰⁷ as the problem of intellectual property has increasingly become a concern for all countries. It is the seller's obligation to guarantee that the goods sold do not violate regulations relating to intellectual property, and he must therefore respect any provisions regarding this domain.³⁰⁸

Article 42 seems to be more favourable to the seller than Article 41, because the application of the latter is more restrictive.³⁰⁹ According to this article, the seller is not required to guarantee protection for all countries in the world. He is only required to deliver goods that are free of all claims based on the State in which the resale or usage of the goods will take place.³¹⁰ Thus, the seller will not be liable in the case where the place of resale or use of the goods was not mentioned at the time of the conclusion of the contract.³¹¹ In this context, the

³⁰⁴ See Lookofsky 2000 (29) *Kluwer Law International* 92-96.

³⁰⁵ See Lookofsky 2000 (29) *Kluwer Law International* 92-96.

³⁰⁶ See Ferrari, in : Ferrari et al. *Internationales Vertragsrecht* 320.

³⁰⁷ See Magnus, in : Staudinger *Kommentar* 265.

³⁰⁸ Magnus, in : Staudinger *Kommentar* Art.42 para.7.

³⁰⁹ See Article 42 in UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods. 8 June 2004.

³¹⁰ See Article 42 in UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods. 8 June 2004.

³¹¹ See Article 42 in UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods. 8 June 2004.

Tribunal de Grande Instance de Versailles found that the seller must deliver the goods free of any claim by a third party based on industrial property or other intellectual property that he knew or could not have been unaware of at the time of the conclusion of the contract, but that the seller is not required to perform this obligation if, at the time of the conclusion of the contract, the buyer knew or could not have ignored the existence of a third party claim.³¹²

4.6.3. Examination and notice of conformity

The examination of conformity is ruled by Article 38 of the Vienna Convention. This article, which consists of 3 paragraphs, focuses on the time when the examination should take place.³¹³ Article 38 (1) defines the general rule that the examination must be done “within as short a period as is practicable in the circumstances”. Article 38 (2) provides a special rule for cases which involve the carriage of goods, so that the examination can be deferred until the arrival of the goods at their destination.³¹⁴ Article 38 (3) contains a special rule applicable in cases where the buyer redirect goods while they are transit, or redispaches goods before having a reasonable opportunity to examine them.³¹⁵

Indeed, in accordance with Article 38 (1) of the CISG, the buyer may examine the goods himself or have the examination done by his employees or other persons. In certain cases, he may have recourse to experts, in order to carry out tests on complicated machinery. Thus, the parties usually agree on the method of examination that will be used. In this case, based on Article 6, they may exclude the Convention, which means that they do not opt for an Article 38 application, or vary the effect of any of its provisions. In order to resolve any conflict regarding the issue of examination, business enterprises should take these matters into consideration, since there is no general answer to what the best method of examination is, or when it should take place.

Article 38 does not define the standard for required examination - however, in general, it is acknowledged that the examination must be “reasonable” under the circumstances. In this regard, Professor Lookofsky suggested that “the intensity of the examination required is a matter governed-but-not-settled by the convention and that the matter could be settled appropriately in accordance with the general CISG principles of “reasonableness” as

³¹² Tribunal de Grande Instance de Versailles, 23 November 2004, CISG-France. P.4, n°42.

³¹³ See Magnus, in Honsell, *Kommentar* 263.

³¹⁴ See Magnus, in Honsell, *Kommentar* 264.

³¹⁵ See Magnus, in Honsell, *Kommentar* 266.

provided in Article 7 (2)". Therefore, the buyer's duty to examine the goods is determined according to the kind of goods. The examination should normally not be laborious or strenuous for the buyer. The buyer's duty after delivery, especially in an international trade context, is a heavy task, which is why he is protected against latent defect. In this case, the situations which may occur in international trade are manifold, and each court must make its decision based on the circumstances of the case.

4.6.3.1. Time period for examination

Article 38 (1) stipulates that the buyer must "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstance". Thus, when the buyer takes the responsibility to examine the goods, he has to do it with diligence and within a short period of time. In addition, after this examination, he has to give notice to the seller "within a reasonable time after he has discovered it or ought to have discovered it", as provided in Article 39.

The case law and arbitral sentence show that this notion of "within as short a period as is practicable in the circumstances" is variable and is *per se* flexible enough to allow for divergences.³¹⁶ Therefore, one finds different examination periods in the case law, ranging from one day to one month after delivery.³¹⁷

In contrast, examinations have been found to be untimely in many situations, for instance three or four months after delivery. In this case, it was judged to be late, as the lack of conformity was easily detectable, but was only found three months after delivery.³¹⁸ Thus, certain judges allow a very short period of time to the buyer. Several judges have set a period of three to four days as the time limit for examining non-perishable goods, and eight days for the detection defects.³¹⁹ In general, this detection has to be made later, within ten to

³¹⁶ See the decisions quoted by Witz *Les premières applications jurisprudentielles du droit uniforme de la vente internationale-Convention des Nations Unies du 11 Avril 1980*, LGDJ, 1995, n°62, p.88.

³¹⁷ See for instance Decision of Landgericht Aachen – Germany, No 41 O 198/89, dated 03.04.1990: (the same day for delivery); Decision of CIETAC China International Economic and Trade Arbitration Commission, dated 00.00.1995: (few days); Decision of Schweizerisches Bundesgericht, No. 4C.144/2004, dated 07.07.2004: (three days). Decision of Oberlandesgericht Koln – Germany, No 18 U 121/96, dated 21.08.1997: (one month).

³¹⁸ See CISG-Online 116, immediate examination; Arbitral Award, ICC 8247, June 1996.

³¹⁹ See CISG-Online 193 – One week for counting plus a few days for notice.

fifteen days after delivery, for perishable goods.³²⁰ In light of these cases, one can note that the CISG does not provide for an exact period of examination. This one month period could simply be viewed as a starting point. Thus, one can deduce, based on this case law that the Convention aimed to encourage the buyer to act as quickly as possible, in order to enable the seller to take all necessary measures to defend his own interests. For instance, the seller may return goods to the third party involved in the sale, such as its own suppliers or carriers.

Even if the Convention does not define what it means by a reasonable time,³²¹ It appears that the notion of “reasonable time” has been considered by judges as “a delay of as short a time as possible” with regard to the notion of “prompt examination”.³²²

In terms of contracts involving the carriage of goods, Article 38 (2) states that the period in which goods must be examined begins to run only upon their arrival at their destination. This article applies regardless of which party has concluded the contract. Therefore, even if the contract of carriage has mentioned that the carrier must examine the external condition of the goods before taking them over, the latter cannot act as a buyer’s agent in this regard. The carrier in this case only has the role of conveyer of goods from the seller to the buyer.

Article 38 (3) clarifies the period of time for the examination of goods which have been redirected in transit or redispached. Redirected goods are those goods which, while in transit, are redirected to another destination before reaching the originally intended destination. This article states that the period of time for the buyer’s examination as a rule begins to run when the goods have reached at their new destination³²³ and goods are redispached when the buyer when the buyer redispaches them after they have been received at the destination.

4.6.3.2. Time period for giving notice

Article 39 (1) stipulates that the buyer must send the notice to the seller within a reasonable time after he “discovered the lack of conformity” or “ought to have discovered” it. The issue of

³²⁰ Heuze *Vincent la vente internationales de marchandises* 271

³²¹ See CLOUT case No.319 (Bundesgerichtshof, Germany, 3 November 1999); Oberster Gerichtshof, Austria, 27 August 1999, available at: <http://www.cisg.at/22399x.htm>. (Last accessed: 24 November 2015).

³²² See CLOUT case No.81 (Oberlandesgericht Dusseldorf, Germany, 10 February 1994) see full text of the decision; CLOUT case No 251 (Handelsgericht des Kantons Zurich, Switzerland 30 November 1998).

³²³ See Appellationshof Bern (Switzerland) 11 February 2004 CISG-Online 1191 (Pace).

when the buyer ought to have discovered the lack of conformity is determined by Article 38, as being “within as short a period as is practicable in the circumstances”.³²⁴ One can note that one period is followed by the other, which means that it is important to distinguish between these two periods, in order to avoid taking irrelevant factors into account when determining each period.³²⁵

There is no better example to illustrate the difference between the period for examination and the period for giving notice than the case where a defect is easily detectable. This will affect the time during which the non-conformity ought to have been discovered, but not the time subsequently taken to give notice. In a case involving the sale of a device for a paper machine, where the device was delivered on 7 April 1993, and as early as 26 April 1993, the device caused a total loss, the buyer gave notice of the lack of conformity seven weeks after the total loss occurred, the Bundesgerichtshof German Court held as follows: “A commencement of the examination and notice period under Articles 38 (1) and 39 (1) cannot yet be assumed at the time of the total loss”. The Court highlighted that the examination period and notice period must be clearly distinguished and must not be combined into one total period. The Court asserted that the buyer had to allow a period of approximately one week after discovery of the symptoms of defects before acting, followed by a period of two weeks for the expert’s investigation. A “regular” one month notice period would then follow, in order for the notice to be timely.³²⁶

According to Article 39 (1) and in light of this case law, the reasonable time within which the buyer must give notice starts at the moment when the buyer has actually discovered or ought to have discovered the lack of conformity.³²⁷ Thus, the determination of whether the buyer ought to have discovered the non-conformity relies on the circumstances and who the buyer is. Thereafter, if the sale concerns, for instance, complicated machinery, it may be necessary to engage an expert to examine the goods, which might of course require a longer time to do.³²⁸ A lack of conformity which is not recognisable upon proper examination must be made known by the buyer within a reasonable period after he actually determines this or should

³²⁴ See Article 39 of the CISG.

³²⁵ See Witz and Nerve 2000 (19) *ICC Bulletin* .

³²⁶ See this decision Bundesgerichtshof (Germany) 7 April 1993n, (New Zealand mussels), CISG-Online 144 (Pace).

³²⁷ See CLOUT Case No. 310 (Oberlandesgericht Dusseldorf, Germany, 12 March 1993) See full text of the decision)

³²⁸ See CLOUT case No.81 Oberlandesgericht Dusseldorf, Germany 10 February 1994) See full text of the decision.

have done so. This means that the buyer has the burden of proving that the defect was latent and not discoverable upon examination.³²⁹

In addition, when the sale involves seasonal goods, more rapid notice of the lack of conformity is needed.³³⁰ In any event, the notice must normally be given within the two-year period provided in paragraph two of Article 39, even if a defect is discovered subsequent to this period. Notice of the lack of conformity must therefore be dispatched at the latest date which would enable the seller to receive the notice within the 2 year period, if the means of communication that was chosen functioned properly.³³¹ It is, however, important to note that the two-year cut-off period applies if a lack of conformity was undetectable upon proper examination and the buyer was unable to detect it.³³²

The cut-off period start to run only when the goods are actually handed over to the buyer.³³³ This refers to the date of the physical handing over of the goods and not the date of receipt of the title documents. It is important to note that the two-year period specified in Article 39 (2) is not the equivalent of the reasonable time for a notice, as specified in Article 39 (1).³³⁴ It has been held by a Court that the two-year period for notice under Article 39 (2) applies only when the Article 39 (1) period is not shorter. The cut-off period therefore symbolises a clear end under the flexible and variable time standards in Article 39 (1).³³⁵

It is evident, based on the above, that the CISG's provisions with regard to the seller's obligation to deliver the goods are clearer and more detailed than the Cameroonian Civil Code. The CISG divides this obligation into two distinct obligations, namely the obligation of delivery, which consists of the physical handing over of the goods, and the obligation of conformity, which means ensuring that the goods sold meet quality requirements. On the other hand, under the Cameroonian Civil Code, as examined in the previous chapter, this obligation of delivery is confused with that of handing over the physical goods and the fitness for ordinary purpose. As far as the conformity of goods is concerned, the Cameroonian Civil Code is governed by a dualist regime, which draws a distinction between the obligation of conformity and the guarantee against latent defect, which governs the regime and time

³²⁹ See Oberster Gerichtshof, Austria, 27 August 1999, available at: http://www.cisg.at/1_22399x.htm

³³⁰ See CLOUT case No. 123 (Bundesgerichtshof, Germany, 8 March 1995).

³³¹ See Tribunal Commercial de Bruxelles, Belgium, 5 October 1994, Unilex ; CLOUT abstract No. 256 (Tribunal Cantonal du Valais, Switzerland, 29 June 1998).

³³² See Tribunal Commercial de Bruxelles, Belgium, 5 October 1994, Unilex ; CLOUT abstract No. 256 (Tribunal Cantonal du Valais, Switzerland, 29 June 1998).

³³³ See Cour de Cassation (France), 8 April 2009, Société Ceramiche Marca Corona (floor tiles), CISG-Online (Pace).

³³⁴ See Oberster Gerichtshof (Austria) 19 December 2007 (laminated glass), CISG-Online 1628 (Pace).

³³⁵ See Honnold/Flechtner, *Uniform Law* 258.

period of action. In contrast, the Convention has adopted a unitary regime for the obligation of conformity. In substance, as per Article 35, the goods have to meet the specifications of the contract in terms of their description, quality, quantity, packaging and fitness for ordinary purpose.

4.6.4. Passing of risk under the CISG

The moment at which the risk passes is defined in Articles 66-70 of the CISG, and differs according to the type of delivery. Generally speaking, when one examines the different solutions to the problem of the passing of risk in other legal systems, one may observe three starting points for the passing of risk, namely the moment of conclusion of the contract,³³⁶ the moment of the passing of ownership,³³⁷ and the moment of handing over the goods.³³⁸

4.6.4.1. Passing of risk in cases involving the carriage of goods

The passing of risk in sales involving the carriage of goods is governed by Article 67 of the Convention. This article establishes two rules: the first relates to the hypothesis in which the seller and buyer do not agree that the goods must be handed over at a particular place,³³⁹ and the second is when they have identified a specific place. Article 67 (1) of the CISG states that “the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale”. Therefore, as pointed out by Coetzee, “the buyer thus bears the transit risk from the moment the goods are handed to the first carrier”.³⁴⁰ This means that the seller is released of his obligation and the risk passes to the buyer as soon as the seller places the goods at the first carrier’s disposal.³⁴¹ However, if the parties have mentioned a specific place or port where the goods are to be delivered,

³³⁶ See the Swiss law

³³⁷ The connection between the passing of risk and ownership applies in Cameroon law, French law (Civil Code) and the English Sale of Goods Act (Hager, in Schlechtriem, Fachtagung, and p.388).

³³⁸ In the CISG, OHADA, and the Uniform Commercial Code of the United States (Hager, in Schlechtriem, Fachtagung, p.389).

³³⁹ See Schlechtriem/schwenzer, *Commentary* 472.

³⁴⁰ Coetzee *Incoterms* 239.

³⁴¹ See Hager in Schlechtriem <http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html>. (Last accessed 22-11-2015).

Article 67 (2) provides that “the risk does not pass until the goods are handed over to the carrier at that particular place or port”. One can note that, in both cases provided by Article 67, the risk passes from the seller to the buyer “when the goods are handed over to the ... carrier”. This CISG provision may raise a significant concern linked to the determination as to whom or what qualifies as a carrier.

Nowadays, it is common, in international transactions, for the seller to have his own means of carriage. Thus, the question arises as to how to analyse the passing of risk in the case where the seller provides his own means of transport and personnel. Nicholas, in responding to this issue, asserts that the goods should be transported by an independent carrier, adding that sales involving the carriage of goods by the parties themselves should not be included in the scope of Article 67.³⁴² In the same vein, several courts have reached the same conclusion. It follows therefore that a third party should be responsible for the carriage. Hager shares this view when he asserts that in order for the risk to pass to the buyer, the carriage should be done by an independent carrier and not by the seller’s own personnel.³⁴³ Hager concludes that the handing over of the goods is effective when the goods are in physical custody of the carrier.³⁴⁴ This was confirmed by a decision of the Swiss Supreme Court in 2008, in the case where a machine had been damaged by falling off a forklift just before being loaded onto a truck. The Court stated the following: “when the contract involves carriage of goods, the risk pass to the buyer when the goods are handed over to the first carrier for transmission to the buyer. This stage was not reached in this case”.³⁴⁵

According to the above author, the notion of freight forwarder should also be included in the definition of a first carrier. Therefore, a freight forwarder is considered to be a first carrier and the risk should pass to the buyer from the moment when the goods are handed over to him.³⁴⁶ However, Flambouras criticised this approach by making a distinction using the “criterion of liability”. He stated that the freight forwarder should not be considered as a first carrier if he simply commissions the operation of transportation and excludes his liability.³⁴⁷ However, if he takes part in the carriage of the goods, thereby accepting liability, then he should be regarded as a first carrier.

One can also imagine the case where the first rule is applied to multi-modal transport, i.e. in cases where the goods are carried by more than one mode of carriage - for instance, where

³⁴² See Bonell in Bianca and Bonell *Commentary* 488.

³⁴³ See Hager in P. Schlechtriem *Commentary* 450.

³⁴⁴ See Hager in P. Schlechtriem *Commentary* 451.

³⁴⁵ See Summary of Swiss case law on the CISG from 2008 until March 2013.

³⁴⁶ See Hager in P. Schlechtriem *Commentary* 453.

³⁴⁷ See Flambouras <http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html> , (accessed on 28/11/2015).

the goods are loaded onto a train or truck and carried to a nearby port, and then shipped to another port in the buyer's country.³⁴⁸ In this situation, and in accordance with the above approach, the risk will pass from the time that the goods are handed over to the first carrier, which in this case is when they are loaded onto the train or truck.³⁴⁹

The rule in the second sentence of Article 67 (1) does not pose any particular problem, since it applies in the situation where the parties have agreed on the handing over of the goods at a specific place. In such a case, the risk will not pass when the goods are handed over to the first carrier, but when they are handed over to the carrier at the agreed place. In the case involving the sale of steel profiles by an Italian seller to a Spanish buyer, the Court decided that after taking into account the type of contract, the risk had passed to the buyer, according to Articles 31 and 67 of the CISG, from the moment that the goods were loaded onto the ship at the port of origin.³⁵⁰

The third sentence of Article 67 indicates that the Convention does not connect the passing of risk with ownership, when it stipulates that the fact that the seller has retained any documents with which he is able to control the disposition of the goods does not prevent the risk from passing.³⁵¹ Lastly, according to Article 67, the risk can be split in three cases: firstly, the case where the seller uses his own truck or other means of transportation for a part of the way; secondly, the case in which he is obliged to hand over the goods to a carrier at a particular place; and thirdly, where the goods are linked to a particular contract only after they have been shipped.³⁵²

In the case of sea transport, it is sufficient to place the goods alongside the ship, provided that the carrier has taken the goods into his custody.

³⁴⁸ See Fmlambouras <http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html> , (accessed on 28/11/2015).

³⁴⁹ See Fmlambouras <http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html> , (accessed on 28/11/2015).

³⁵⁰ See CLOUT Database, Case Abstract no 247, Spain 31 October 1997 Appellate Court Cordoba, Available at: <http://www.uncitral.org/english/clout/abstract/abst-24.pdf>. (Last visited 24 November 2015).

³⁵¹ See Bonell/ Bianca and M. J Bonnel, *Commentary*, 497, G Hager and M. Schmidt-Kessel in P.456

³⁵² See G. Hager and M. Schmidt - Kessel in P. Schlechtriem and I. Schwenzer, *Commentary*, 932.

4.6.4.2. Passing of risk for goods sold in transit

Passing of risk at the time of the conclusion of the contract

A sale during transit is regulated by Article 68 of the CISG. This article deals with the situation where the contract of sale is concluded when the goods have already been handed over to an independent carrier. In this case, Article 68 (1) stipulates that the risk for goods in transit (rolling, floating, flying goods) passes immediately (*ex nunc*)³⁵³ to the buyer from the time that the contract for the sale in transit is concluded³⁵⁴. The existence of this provision may raise significant practical problems, as it will evidently be difficult, even impossible, to establish the moment at which the damage or loss took place, especially in the case where the goods are forwarded in containers³⁵⁵. It will be difficult, for instance, for the seller to prove that the risk had already passed to the buyer, if he wants to discharge himself from this responsibility³⁵⁶.

Passing of risk at the time of the handing over of the goods to the carrier

The second sentence of this article, which is regarded as a compromise provision in relation to the first sentence, stipulates that the risk passes retroactively (*ex tunc*) from the moment that the goods are handed over to the carrier³⁵⁷ "if the circumstances so indicate". This suggests that the buyer bears the risk from the moment at which the goods are transferred to the carrier who delivered the documents incarnating contract of carriage.³⁵⁸ As an exception, the second sentence of Article 68 enshrines a retroactive (*ex tunc*) passing of the risk. However, this article specifies that this retroactive passing of the risk ought to apply only in favour of a seller having acted in good faith. Accordingly, the third sentence provides that the loss or damage is at the risk of the seller if, at the time of the conclusion of the contract of sale, he knew or ought to have known that the goods had been lost or damaged, and did not disclose this to the buyer.³⁵⁹

³⁵³ Honnold and Flechtner *Uniform Law for International Sales* 529.

³⁵⁴ Honnold and Flechtner *Uniform Law for International Sales* 529.

³⁵⁵ See Heidelberg <http://www.cisg.law.pace.edu/cisg/biblio/romein.html>. (Last accessed: 24 November 2015).

³⁵⁶ Hager et al *Commentary*, 934.

³⁵⁷ Nicholas B in Bianca and Bonell *Commentary*, 499

³⁵⁸ Hager et al *Commentary* 934.

³⁵⁹ Hager et al *Commentary* 934.

4.6.4.3. Residual cases

The Convention, after dealing with cases involving the carriage of goods and sale of goods in transit, focuses in Article 69 on residual cases, which are those which are not governed by the previous article. In other words, this article handles cases not falling within the scope of Articles 67 and 68. According to Article 69(1), the risk will pass at the moment that the buyer takes over the goods, or if he does not do so in due time, from the time that the goods were placed at his disposal and he failed to take delivery.

4.6.5. *The Incoterms and their importance*

This study has explored, in the above, how the CISG deals with the passing of risk according to different methods of delivery. According to Article 6 of the CISG, the parties may nevertheless choose to exclude, in whole or in part, the provisions of the CISG, and to elect their own rules to govern the risk associated with their transactions. The parties can modify the place where the risk passes, either directly or indirectly, by agreeing to apply a trade clause which is different from Articles 66 – 69 of the CISG. Besides, in international commerce today, parties prefer to choose Incoterms rules as a law which will govern contracts in matters regarding the transfer of risks and costs. The Incoterms can be defined as International Commercial Terms. They were created by the ICC in 1936 for the purpose of harmonising and unifying international transactions,³⁶⁰ and are standard approval rules in the international commerce world. As such, their designation is universally recognised. Their role and importance is to define the seller and buyer's obligations during international commerce, especially with regard to the means of delivery and the division of costs and risks.³⁶¹ Furthermore, to be responsible for goods implies logistics, the choice of carriage, costs, and

³⁶⁰ Eisemann *INCOTERMS and the British Export Trade* 1965 114 115-116. The first edition of INCOTERMS was approved by the Berlin Congress in 1935. They were published the following year; they are therefore known as INCOTERMS 1936. The definitions contained therein include Ex Works, FOR, FOT, free (named port of shipment), FAS, FOB, C&F, CIF, Freight or Carriage Paid to, Free or Free Delivered, Ex Ship and Ex Quay.

³⁶¹ Ramberg *Incoterms 1980* in Schmitthoff C M ed (The transnational law of international commercial transactions Deventer, Kluwer, 1982).

all the risks, such as damages, losses and robbery. Thus, the Incoterms determine, without any ambiguity, when and who must assume the carriage of the goods.³⁶²

The parties must clearly incorporate their intent to use the Incoterms into their contract, and specify the chosen Incoterms rules, including the agreed place.³⁶³ The choice of Incoterms is an integral part of commercial negotiations, and parties engaging in international commerce must always include these trade terms in their contract.³⁶⁴ This must be done according to the organisational capacities of enterprises, means of carriage, and the level of service that enterprises would like to provide to their customers or receive from their suppliers, etc. Furthermore, the Incoterms chosen must be suitable for the forwarded goods as a mode of carriage.³⁶⁵ For the optimal application of the INCOTERMS, the contracting parties are required to specify the place or port with maximum precision. In addition, the use of Incoterms requires them to take certain precautions into consideration, such as a thorough knowledge of the meaning of each Incoterms and its abbreviation, and the use of Incoterms variants, in order to avoid any confusion which could arise from a misinterpretation (for instance, FOB USA).

The ICC provides all the Incoterms that can be used for any mode of transport.³⁶⁶ It divides them into two groups. The first group, which is the biggest, contains seven Incoterms, and the second consists of four Incoterms.³⁶⁷ The ICC chose to start its Incoterms 2010 rules by presenting trade terms that can be used by any mode of transport, and then complete these rules by providing trade terms for sea and inland waterway transport.³⁶⁸ The first letter of each trade terms indicates in which group it belongs.

It is important to note that the first function of INCOTERMS resides in a distribution of the carriage costs, and its second aim is to define the place of transfer of risk. Its third function, which is undoubtedly the most important in the current international commercial environment, is a determination of the seller's delivery obligation.³⁶⁹ One may conclude that it relates to the standards enabling the seller and buyer to rapidly agree, without ambiguity, on the modalities

³⁶² Malfliet http://www.cutn.sk/Library/proceedings/mch_2011/editovane_prispevky/Malfliet-163-179.pdf. (Last accessed: 24 November 2015).

³⁶³ Cutler C A *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* 185.

³⁶⁴ Jiménez G *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally* Ramberg *Guide to Incoterms*.

³⁶⁵ Schmitthoff *The Law of International Trade* 219.

³⁶⁶ See <http://www.iccwbo.org>. The ICC is an internationally organised interest group which represents thousands of companies in more than 130 countries.

³⁶⁷ Ramberg *Understanding and Practical use* 125.

³⁶⁸ Ramberg *Understanding and Practical use* 125.

³⁶⁹ Malfliet http://www.cutn.sk/Library/proceedings/mch_2011/editovane_prispevky/Malfliet-163-179.pdf. (Last visited: 24 November 2015).

of their transactions. INCOTERMS standards do not define the transfer of property, but rather the transfer of risk, various expenses, and means of carriage.³⁷⁰ Therefore, West and Central African SMEs engaged in international trade are obliged to know the function and meaning of each Incoterms.

4.6.5.1. Structure and content of Incoterms 2010

In the new INCOTERMS 2010, the total number has been reduced from what it was in 2000. DAT and DAP have replaced four of the Incoterms 2000 rules: DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay) and DDU (Delivered Duty Unpaid).³⁷¹ The new Incoterms 2010 has also eliminated the concept of delivery “over the ship rail” or “past the ships rail” for the FOB, CFR, and CIF.³⁷² One of the biggest differences between Incoterms 2010 and Incoterms 2000 is that the former has recognised electronic means of communication as being the same or equivalent to paper communication when the parties have agreed to such in their contract.³⁷³ The new rules of Incoterms also recognise that they can be used instead of domestic sales contracts.³⁷⁴ This is a significant change, which may fill a gap in much of the domestic laws, such as in the case of Cameroon, where the law is silent and even confused regarding the transfer of risk in international commerce. Moreover, although the delivery provisions of Incoterms 2010 are similar to those of Incoterms 2000, it is important to note that under the new Incoterms 2010, in order to more closely reflect modern commercial reality and avoid costly disputes over when exactly the goods pass the “ship's rail”, the seller’s duty is now to place the goods “on board the vessel”, rather than over the ship’s rail at the loading port, such as pointed out by the buyer.³⁷⁵

There are 11 INCOTERMS divided into two distinct groups, namely 7 multimodal INCOTERMS (EXW, FCA, CPT, DAT, CIP, DAP, DDP) and 4 maritime INCOTERMS (FAS, FOB, CFR, and CIF). In addition, concerning departure sales, there are 8 INCOTERMS

³⁷⁰ Malfliet http://www.cutn.sk/Library/proceedings/mch_2011/editovane_prispevky/Malfliet-163-179.pdf. (Last visited: 24 November 2015).

³⁷¹ Ramberg *Understanding and Practical use* 125.

³⁷² Ramberg *Understanding and Practical use* 125.

³⁷³ Nteg <http://procurementandsupplies.blogspot.com/>. (Last accessed: 24 November 2015).

³⁷⁴ Nteg <http://procurementandsupplies.blogspot.com/>. (Last accessed: 24 November 2015).

³⁷⁵ Ramberg *Understanding and Practical use* 125.

dealing with principal carriage, and the goods travel at the buyer's risk according to the following rules:³⁷⁶

Multimodal INCOTERMS – sale at departure: EXW/ FCA/ CPT/ CIP.

Maritime INCOTERMS – sale at departure: FAS/ FOB/ CFR/ CIF.

In terms of arrival, there are 3 INCOTERMS dealing with principal carriage- the goods travel at the seller's risk according to the following norms and Multimodal INCOTERMS – sale at arrival: DAT/ DAP/ DDP.

Classification of the Incoterms 2010 according to mode of transport.

Any Mode of Transport	Sea and inland waterway transport
EXW, FCA, CPT, CIP, DAT, DAP, and DDP	FAS, FOB, CFR, and CIF

4.6.5.2. Passing of risk and cost under Incoterms 2010

With regard to the only E-term, EXW (Ex Works), this Incoterms, which is valid for all types of carriage, is the one which gives more responsibility to the buyer regarding the carriage of his goods.³⁷⁷ The only responsibility of the seller is to put the goods at the buyer's disposal, and to package the goods on his own premises.³⁷⁸ It is up to the buyer to accomplish all the administrative procedures linked to customs, the delivery of documents to the customs department, as well as at the import and export points, and to effect a tax payment at the import and export stage.³⁷⁹ Carriage logistics refers to the type, company, carriage and insurance, which are the buyer's duty.³⁸⁰ This Incoterm may only be advantageous to large enterprises, since they have the financial means to pay the experts (finance, international

³⁷⁶ Ramberg *Understanding and Practical use* 125.

³⁷⁷ Chevalier calls EXW 'l'Incoterm de la paresse', the Incoterm for lazy traders, see D. Chevalier, "Incoterms – bien les connaître pour mieux les utiliser" Le MOCI 2003, 88.

³⁷⁸ Ramberg *Understanding and Practical Use* 96

³⁷⁹ Chevalier D, "Incoterms - bien les connaître pour mieux les utiliser", Le MOCI 2003, 89-90.

³⁸⁰ Chevalier D, "Incoterms - bien les connaître pour mieux les utiliser", Le MOCI 2003, 89-90.

commerce, customs and carriage, international logistics), who may reside overseas.³⁸¹ In this regard, they are able to negotiate the margins taken by the seller or supplier for each service that they provide. However, for SMEs, the enormous tasks and costs involved in logistics will be disadvantageous to them.

FCA (Free Carrier): This is also valid for all modes of carriage, and is where the buyer appoints and pays the main carrier. The passing of cost and risk occurs at the time when the carrier takes over the goods. It is important to highlight that the place of delivery has an impact on the obligations of loading and unloading the goods. If the delivery has taken place at the seller's premises, he has the obligation to load the goods.³⁸²

CPT (Carriage Paid To): This Incoterms means that the seller must pay the carriage cost until the specified destination, and the seller must pay the insurance. The passing of risk takes place when the goods are handed over to the first carrier³⁸³.

CIP (Carriage and Insurance Paid To): According to this Incoterm, the seller must hand over the goods to the carrier appointed by him, and must also pay the necessary cost of the carriage to convey the goods until the agreed place. This means that the buyer must bear all further risk and costs which may occur after the goods have been delivered. Obviously, it is up to the seller to clear the goods through customs at the final port. The seller must also provide insurance against the risk of loss or damage of the goods during carriage. It is important to highlight that the seller is only required to take out an insurance policy for the goods on a basis of minimum cover³⁸⁴.

DAT (Delivered at Terminal): The seller is discharged of his obligation of delivery when he delivers the goods at the named port terminal³⁸⁵ or agreed place. The seller bears the risk linked to the conveyance of goods and unloading at the terminal port or agreed destination. The export formalities are carried out by the seller – however, the latter does not have any obligation regarding customs formalities at the import point³⁸⁶.

DAP (Delivered at Place): This Incoterms, which is a new rule that came into existence on January, 1, 2011, has replaced the following Incoterms: DDU, DES, and DAF. The seller

³⁸¹ Malfliet http://www.cutn.sk/Library/proceedings/mch_2011/editovane_prispevky/Malfliet-163-179.pdf. (Last accessed: 24 November 2015).

³⁸² Ramberg *Understanding and Practical Use* 119.

³⁸³ Ramberg *Understanding and Practical Use* 120.

³⁸⁴ See Ramberg 2009 (50) *Scandinavian Studies in Law* 257 at 258.

³⁸⁵ Terminal here means all places, covered or not, such as a quay, storage room, or pack of containers.

³⁸⁶ See CISG – AC Declaration No. 1, “The CISG and Regional Harmonization” Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom, adopted by the CISG – AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012, at 2.

fulfills his obligation of delivery, and the risk passes to the buyer when the seller puts the goods at the buyer's disposal at the agreed place. The seller here bears the risk related to the conveyance of goods until their destination.³⁸⁷

(DDP) (Delivered Duty Paid)³⁸⁸: This Incoterms, contrary to the EXW, designates a maximum obligation of the seller. The seller here accomplishes almost all of the transactions or tasks, including customs clearance at the import point, and also pays the costs of the required tax duties. The transfer of costs and risk passes from the seller to the buyer when the seller delivers the goods to the buyer. It is the buyer who supports the costs and risk at the unloading stage. The use of this Incoterm is impossible if the seller is not able to obtain an import license, either directly or indirectly

The group for transport by sea and inland waterways includes FAS (Free Alongside Ship). According to this Incoterm, the seller performs his obligation by placing the goods alongside the ship, and it is his obligation to clear the goods for export. Therefore, the risk will pass from the seller to the buyer at the moment that the seller places the goods alongside the ship.³⁸⁹

CFR (Cost and Freight): This Incoterms requires the seller to pay the carriage cost until the shipment port, as well as to load the goods onto the ship. He must also pay for the customs clearance of the goods at the export level. As for the buyer, he must pay the insurance costs and the cost for carriage of the goods from the arrival port to his own premises. The transfer of risk here takes place when the goods are loaded onto the ship at the shipment port.³⁹⁰

The FOB Free on Board (Named port of shipment): This is one of the oldest trade terms used in international trade, and is almost the same rule as in Incoterms FAS and FCA. The only difference is that instead of placing the goods alongside the ship, the seller will deliver the goods by placing them on board the ship. This means that the seller has to have the goods wrapped, choose the carriage company, and pay the costs of insurance (robbery, losses, deterioration, etc) until the forwarding place or port chosen by the buyer. The customs declaration and tax costs are also supported by the seller. The buyer takes over the goods and bears the risk from the moment that the seller has put the goods on board the vessel. Therefore, the buyer will be responsible for the choice of company, and the forwarding to and unloading of the goods at his own premises. He must pay the insurance costs from the arrival of the goods on the vessel to the last stage of the delivery. This

³⁸⁷ See Schlechtriem/Schwenzer, *Commentary* Art 18 paragraph 15.

³⁸⁸ See Ramberg 2009 (50) *Scandinavian Studies in Law* 260 at 262.

³⁸⁹ Ramberg *Understanding and Practical Use* 170

³⁹⁰ Schmitthoff *The Law of International Trade* 276.

Incoterms is normally used in international commerce (import and export). This may be understood by the fact that the responsibilities of both parties are relatively equal, and therefore allows the sharing of risks, costs and tasks between both parties. It will even be appropriate for SMEs engaged in international trade in West and Central Africa to rely on this Incoterm when they conclude their contracts, with reference to the transfer of risk.

CIF (Cost, Insurance and Freight)³⁹¹: This Incoterms means that the seller must take care of the goods until the arrival port. The cost, insurance and freight are covered by the seller. The responsibility of the seller is more important here than that of the buyer.

4.7. REMEDY FOR NON-PERFORMANCE

The Convention provides three basic remedies, namely specific performance, damages and avoidance of the contract.

4.7.1. Remedy regarding specific performance

The CISG clearly indicates that specific performance is the primary remedy available to both the buyer and the seller. The general purpose of this remedy is set out by Articles 46 and 62 of the CISG, which stipulate that each party is entitled to claim specific performance from the other³⁹² for the fulfillment of his obligation. However, it is important to note that this remedy concerning specific performance is only possible if the Court applies it in accordance with its own domestic law, as specified in Article 28 of the CISG.³⁹³ This article is a compromise between the civil law and common law systems. The reason for this is that Articles 46 and 62 are dominated by the civil law approach, due to the fact that Anglo-American law does not generally provide the remedy of specific performance in the context of most sales

³⁹¹ Idem P. 200 – 202.

³⁹² Muller-Chen, in : Schlechtriem/Schwenzer, *Commentary* Art. 46 paragraph.1

³⁹³ Article 28 of the CISG provides that " If, in accordance with the provisions of 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".

contracts.³⁹⁴ Thus, the fact that Article 28 contains a conflict of law provision referring to the rules of the forum on specific performance, and granting them priority over the Convention, significantly limits the availability of specific performance as stipulated by the CISG for domestic law, since domestic law rules on the requirement of performance vary from jurisdiction to jurisdiction.³⁹⁵

4.7.1.1. Buyer's right to require specific performance

Article 46 (1) expresses the buyer's right to require performance in cases of non-delivery of the goods by the seller, and paragraphs 2 and 3 of the same article provide remedies for specific claims for performance where the seller has delivered goods which do not conform to the contract.³⁹⁶ The right of the buyer to demand the seller to perform are covered under Articles 30 to 34, as well as Articles 41 and 42.³⁹⁷ This obligation includes the obligation to produce, procure or deliver the goods at the place or time required by the contract, as well as to deliver the goods free from any third party claims. Koskinen states that "The buyer's right to require performance under Article 46 (1) is at hand in situations where the seller has totally failed to perform, i.e. non-delivery".³⁹⁸ This paragraph 1, which gives the buyer a right to claim specific performance from the seller, enables him to avoid legal action for damages, which cost money and usually take a considerable period of time.³⁹⁹ Article 46 states that the claim process will depend on the type of breach, since this article deals with three situations of breach. While Article 46 (1) deals with a general right that a buyer has to ask for the seller's performance of any due obligation, Article 46 (2) and (3) deal with the replacement and repair of non-conforming goods.

Indeed, under the CISG, except for the cases governed by Articles 46 (2) and (3), Article 46 (1) grants a general right to the buyer to require the seller to fulfill its due obligation. Thus, the buyer has the right to ask that the goods are delivered, and that the seller provides the bank with guarantees in terms of the contract. Therefore, the buyer may have recourse,

³⁹⁴ See Huber, in: MunchKommBCG (2007), Art. 46 para. 2; Magnus, in: Ferrari/Flechtner/Brand, "Draft Digest and Beyond (2003), pp. 325 et seq.

³⁹⁵ Muller-Chen in: Schlechtriem/Schwenzer *Commentary* (2010), Art.28 para. 2. For more information about these different approaches, see for instance Herman, "Specific Performance: A Comparative Analysis" 2003 (7) (Edinburgh Law Review 194).

³⁹⁶ See Article 35 of the CISG.

³⁹⁷ See Articles 30, 34, 41 and 42 of the CISG.

³⁹⁸ See Koskinen <http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html>. (Last accessed: 24 November 2015).

³⁹⁹ See Lookofsky <http://cisg3.law.pace.edu/cisg/biblio/loo19.html> (accessed on 22 November 2015).

subject to Article 28, to the courts' assistance, in order to ensure that the seller fulfills his performance obligation. However, his right to require specific performance cannot be fulfilled when, for instance, the contract deals with a unique good which cannot be replaced. Paragraph 1 of Article 46 also limits the buyer's right to claim specific performance when the latter has already used a means which is inconsistent with this specific performance. Such an inconsistency exists when the buyer has avoided the contract, as well as when he has reduced the price in accordance with Article 50 of the CISG.

Nevertheless, the buyer is allowed to combine a claim of specific performance with a reparation claim. For instance, in the case of late performance, the buyer who has already claimed the performance obligation may afterwards choose a different route, such as avoiding the contract if all the requirements for avoidance are met. The right to require specific performance in virtue of Article 46 (1) need not be applied within a particular period of time, except if it is done within the normal period of time foreseen by the applicable domestic law, or inasmuch as the latter can be applied by the CISG. Article 46 (1) only requires the buyer to clearly indicate that he is claiming any due contractual obligation, but does not fix the time period for giving notice in this regard. However, paragraphs 2 and 3 of Article 46 limit the time period within which the buyer can claim reparation.

4.7.1.2. Right to require delivery of a substitute and repair of the goods

Under Article 46 (2) of the CISG, the buyer has the right to claim a substitute or repair of the goods if three conditions are met. Firstly, the seller must have delivered non-conforming goods; secondly, the non-conformity must constitute a fundamental breach of contract; and thirdly, the buyer must have requested a replacement within a reasonable period of time. The question as to whether or not the goods show non-conformity must be determined by referring to Article 35 of the CISG, as well questions relating to a reasonable time period to give notice and fundamental breach.

In sum, this paragraph grants the buyer the right to claim the delivery of substitute goods when the goods delivered do not conform to the contract, and the non-conformity must constitute a fundamental breach.⁴⁰⁰ When the breach is not fundamental, the buyer has recourse to request a repair, price reduction or damages.⁴⁰¹ Thus, in cases where the lack of

⁴⁰⁰ See Lookofsky <http://cisg3.law.pace.edu/cisg/biblio/loo19.html> (accessed on 22 November 2015).

⁴⁰¹ See Lookofsky <http://cisg3.law.pace.edu/cisg/biblio/loo19.html> (accessed on 22 November 2015).

conformity does not constitute a fundamental breach, the buyer may require the seller to repair the defect.⁴⁰² This reparation may include making an addition to the goods, completing the delivery or addressing change that need to be made. In this case, the buyer can claim a rebate of price or damages.⁴⁰³ The Vienna Convention provides that the reparation of a lack of conformity is possible if “this is not unreasonable taken into account all the circumstances”.⁴⁰⁴ In other words, the obligation concerning the reparation may be denied by a judge if it appears to be unreasonable under the circumstances.

Therefore the establishment of conformity or reparation constitutes a right for the buyer, but the enforcement of this right does not have to be unreasonable, particularly for the seller. Therefore, the aim of this remedy is not to sanction or punish the guilty party, but to establish a legal and economic balance, i.e to allow the seller to repair the goods and to recover the interest expected from the contract.⁴⁰⁵ To entitle the buyer to claim for the delivery and sale of specific goods means that the seller has to make a new offer of goods which conform to the contract substitute delivery means that the seller delivers other goods which are in conformity with the requirements of the contract, as required by the Convention.⁴⁰⁶

In this case, the seller has to bear the costs of the substitute delivery, even if under the original contract, it had been the buyer’s responsibility to cover the costs of transportation. The main reason for this policy is due to the fact that the CISG considers that the issue of substitute delivery only arises because the seller did not properly fulfill his obligation under the original contract.⁴⁰⁷

With regard to the repair of goods, article 46 (3) grants the right to the buyer to require the seller to remedy the lack of conformity by repair. This article stipulates that this request for repair must be made either in conjunction with the notice given under article 39, or within a reasonable period of time.⁴⁰⁸ This paragraph specifies, however, that this repair must be reasonably priced. Indeed, if the costs of the repair claimed by the buyer are deemed to be considerably highly than the costs of a substitute or the advantage which the buyer will gain from this repair, this will be considered as unreasonable.⁴⁰⁹

⁴⁰² See CLOUT case No 346 (Landgericht Mainz, Germany, 26 November 1998).

⁴⁰³ See CLOUT case No. 125 (Oberlandesgericht Hamm, Germany, 9 June 1995) see full text of the decision).

⁴⁰⁴ See CLOUT cases No 225 (Cour d’appel, Versailles, France, 29 January 1998) see full text of the decision.

⁴⁰⁵ See Huber in: MunchKommBGB (2007), Art. 46 para 54.

⁴⁰⁶ See Muller-Chen, in: Schlechtriem/Schwenzer *Commentar*, Art.46 para. 40.

⁴⁰⁷ See Muller-Chen, in: Schlechtriem/Schwenzer *Commentar*, Art.46 para. 40.

⁴⁰⁸ See article 46 (3) of the CISG

⁴⁰⁹ See Magnus, in: Staudinger *Kommentar*, Art. 46 para 40.

This rule highlights the Vienna Convention drafters' aim to protect the interests of the seller, by preventing the application of any remedy from placing him in a precarious legal situation. Therefore, the purpose of this remedy is not to punish the party at fault, but to establish a legal and economic balance of sale, i.e. to enable the debtor to repair the goods and the creditor to get what he expected and paid for.⁴¹⁰

Article 47, through the Nachfrist rule, enables the buyer to grant an additional period of time of reasonable length for the seller to perform his obligation. This additional time must be reasonable, which means that it must be sufficient in order to enable the seller to perform his obligation properly.⁴¹¹ According to the commentary of this article, the reasonable time limit takes the circumstances of lateness into account. This rule is very important because it gives the seller a second chance to fulfill the contract.⁴¹²

Lastly, the price reduction is implemented in cases where the goods do not conform to the contract. Regardless of whether or not the price has been paid, the buyer may reduce the price in proportion to the difference between the value of the goods actually delivered, on their delivery, and the value that they would have had at such time, had they conformed to the contract, provided that the lack of conformity is proved in due form and time.⁴¹³

It is important to emphasise that much of what was discussed above concerning the buyer's right to request performance also applies to the seller's right to compel performance under Article 62. Because there are fewer buyers' obligations, Article 62⁴¹⁴ concerning the rights of the seller is conceptually simpler than Article 46. Like Article 46, Article 62 recognises that the seller's primary concern is to ensure performance⁴¹⁵.

⁴¹⁰ See Magnus, in: Staudinger *Kommentar*, Art. 46 para 40.

⁴¹¹ Koskinen <http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html>. (Last accessed: 24 November 2015).

⁴¹² See Muller-Chen, in : Schlechtriem/Schwenzer, *Commentar* Art.47 para.3

⁴¹³ Dale (Paper presented at the Ljubljana seminar 28-29 June 2013).

⁴¹⁴ Article 62 provides that "The seller may require the buyer to pay the price, take delivery or perform his other obligations unless the seller has resorted to a remedy which is inconsistent with this requirement".

⁴¹⁵ Dale (Paper presented at the Ljubljana seminar 28-29 June 2013).

4.7.2. Remedies involving damages

Gahan defines damages as “the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong”. Damages are governed by the CISG through Articles 74 to 76.⁴¹⁶

4.7.2.1. System of damages under the CISG

Article 74 establishes the basic principles regarding the recovery of damages for breach of contract, but does not provide any specific instructions or criteria for calculating damages.⁴¹⁷ It is a mirror of the general principle of full compensation and consists of a dual purpose: to provide a mechanism for injured parties to obtain relief, and to only allow the recovery of foreseeable losses, which grants traders the ability to calculate and limit their contracts.⁴¹⁸ In other words, Article 74 purports to place the aggrieved party in the same economic position that it would have been in had the breach not taken place.⁴¹⁹ Instead, it grants the Tribunal the authority to establish the claimant’s “loss... suffered... as a consequence of the breach”, based on the circumstances of the particular case.

Indeed, in order for the judge to apply Article 74, he has to determine that the party, such as stipulated by Articles 45 and 52, has failed to perform an obligation arising from the contract.⁴²⁰ The Tribunal does not need to establish if the breach is willful or negligent in order to apply Article 74. The remedy of damages is easily available, regardless of the fault of the breaching party.⁴²¹

The party claiming damages under Article 74 has the burden of proving that there was a breach of contract, that it suffered damage as a result of the breach, and that the damage was foreseeable.⁴²² Thus, the party in breach may only carry liability if it is proven that not all the requirements concerning liability exemption have been met in accordance with Article

⁴¹⁶ See Articles 74 to 76 of the CISG.

⁴¹⁷ See Secretariat Commentary on 1978 Draft, Art. 70 (now Art.74) Para. 4.

⁴¹⁸ See Gotanda 2005 (37) *Georgetown Journal of International Law* 95-140.

⁴¹⁹ See CISG - AC Opinion no.6.

⁴²⁰ See Bacher 2008 *Szecskey Ügyvédi Iroda* 15-21.

⁴²¹ See CLOUT case No. 553, Provincial Court of Barcelona, Sixteenth Division, 826/2003, available at: <http://www.uc3m.es/cisg/sespan31.htm> .

⁴²² See Bacher 2008 *Szecskey Ügyvédi Iroda* 15-21.

79.⁴²³ Therefore, Article 74 allows the aggrieved party to claim damages as long as they “do not exceed the loss which the parties foresaw or ought to have foreseen at the time of the conclusion of the contract”. It is important to note the burden of proof with regard to foreseeability has been the subject of much debate. In the CISG Advisory Council Opinion no 6, it is highlighted that the right approach would be for the aggrieved party to prove the foreseeability of the damages, and it therefore states that it cannot be presumed that the party in breach foresaw all damages, unless he can prove otherwise.⁴²⁴ Thus, the aggrieved party has the burden to prove “with reasonable certainty that it has suffered loss, it has also to prove the extent of loss without necessary do it with mathematical precision”.⁴²⁵

With regard to foreseeability and the so-called contemplation rule, one can note that the CISG provides, in the second sentence of Article 74, that only foreseeable losses are recoverable. This provision states that “*Damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.*” The important factor that the CISG relies on in order to determine foreseeability is the party’s knowledge. In light of this article, the Convention requires both subjective and objective elements in respect of foreseeability. These elements are introduced by the words “foresee” or “ought to have foreseen”. The subjective standard of foreseeability highlights that a party can only foresee some of the results if it has knowledge of relevant facts and issues enabling it to foresee such results. As far as the objective standard of foreseeability is concerned, no foreseeability can be imputed to the party without taking into account what knowledge that person had or ought to have had. Thus, foreseeability consists of both subjective and objective standards, and knowledge is either actual or presumed.

Therefore, Article 74 sets forth the general rule for the calculation of damages, and other articles, such as Articles 75 and 76, supplement it by providing more specific rules for measuring loss, and in certain cases where the contract has been avoided. These articles work in accordance with Article 74.⁴²⁶

Article 75 recognises the aggrieved party’s right to engage in a substitute transaction when a contract has been avoided. Under this article, an award of damages requires that the aggrieved party must have avoided the contract, and after this avoidance, the aggrieved

⁴²³ See Bacher 2008 *Szecskey Ügyvédi Iroda* 15-21.

⁴²⁴ See CISG-AC Opinion n°6.

⁴²⁵ See CISG-AC Opinion n°6.

⁴²⁶ See John Gotanda in UN Convention on Contracts for the International Sale of Goods (CISG) *Commentary* 991

party must have engaged in an actual substitute transaction⁴²⁷. Lastly, the substitute transaction must be reasonable in both manner and amount of time after the avoidance. Damages are therefore only compensable under Article 75 if, in the case of breach of contract by the buyer, the seller sold the goods, or in the case of breach of contract by the seller, the buyer has purchased replacement goods and the substitute transaction was reasonable under the circumstances⁴²⁸. This means that an aggrieved party who wishes to claim damages must act as a “careful and prudent businessman⁴²⁹”. It is up to the injured party to bear the burden of proving that it has met all these requirements. Damage is measured by the difference between the price of the substitute transaction and the contract price.⁴³⁰

With regard to Article 76, damages can be calculated based on the current price of goods, when the aggrieved party has avoided the contract without entering into a resale or cover purchase.⁴³¹ Like Article 75, the aim of Article 76 is to allow the aggrieved party to calculate the damages of an avoided contract abstractly, without having to show concrete proof of actual loss.⁴³²

The Tribunal may only grant damages under Article 76 if the following requirements have been met: the contract must be avoided, there must be a current price for the goods, no substitute transaction can have taken place as per Article 75, and there must be a price fixed by the contract.⁴³³

To summarise, it is evident that Article 74 determines the basic principles concerning recovery and the calculation of damages, while Article 75 gives a specific rule governing the calculation of damages for contract avoidance. With regard to Article 76, it adopts the “market price” test measure for damages.⁴³⁴ Lastly, Article 77 imposes upon the aggrieved party a duty to mitigate damages.⁴³⁵

⁴²⁷ See Handelsgericht Aargau (Switzerland) 26 September 1997, CISG-Online 329 (Pace).

⁴²⁸ See CISG article 75 of CISG.

⁴²⁹ See Schwenger, in Schlechtriem/Schwenger, *Commentar* Art.75 para. 5.

⁴³⁰ See Schwenger, in Schlechtriem/Schwenger, *Commentar* Art.75 para. 5.

⁴³¹ See Oberlandesgericht Hamburg (Germany) 28 February 1997, CISG-Online 261 (Pace).

⁴³² See Kantonsgericht Zug (Switzerland) 21 October 1999, CISG-Online 491.

⁴³³ See Schwenger, in Schlechtriem/Schwenger, *Commentary* Art. 76 paragraph 1.

⁴³⁴ See Schwenger, in Schlechtriem/Schwenger, *Commentary* Art. 76 paragraph 1 .

⁴³⁵ See Gotanda 2007 *Hague Academy of International Law* 172-175.

4.7.2.2. Calculation of damages under Articles 75 and 76

Both Articles 75 and 76 lay down the methods for calculating damages from the moment that a contract has been avoided.⁴³⁶ As previously mentioned, it is important, in order to prevent any confusion, for the principles which govern the calculation of damages to be stipulated in Articles 74 to 76. Briefly, the aggrieved party acting in respect of Article 74 may recover both the actual losses suffered and the net gains. On the other hand, Articles 75 and 76 provide the aggrieved party with the means to measure damages when a contract has been avoided. More specifically, Article 75 provides a method for calculating damages when the aggrieved party avoided the contract and proceeded to a substitute transaction, and Article 76 enables the abstract calculation of damages in respect of some of the conditions when the aggrieved party has avoided the contract, but has not entered into a substitute transaction.

As indicated in CISG-AC Opinion No. 8, neither Article 75 nor Article 76 is a replacement for Article 74. Rather, both Articles 75 and 76 must be considered by the aggrieved party as an alternative method for calculating damages in cases where a contract has been avoided.⁴³⁷ Thus, both Articles 75 and 76 do not interfere with Article 74, but are supplements to it. Both articles attempt to give the aggrieved party a variety of choices regarding the best way of claiming damages in his specific case. Moreover, Articles 75 and 76 allow the aggrieved party to recover any further damages under Article 74, if he deems that his expectations have not been fully met by the substitute transaction (Article 75)⁴³⁸ or the difference between the price fixed by the contract and the current price (Article 76).⁴³⁹

However, it is important to highlight that the use of Articles 75 and 76 may sometime not place the aggrieved party in a better position, especially when the contract had been performed properly. For instance, under Article 75, it is usually difficult for the aggrieved buyer, having avoided the contract and resold the goods, to claim damages for both the difference between the contract price and the price of the cover purchase, as well as the profits lost in the subsequent resale. In this regard, in the German case of *LG Munchen*

⁴³⁶ See Articles 75 and 76 of the CISG.

⁴³⁷ See CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76. Para 1.2.

⁴³⁸ According to CISG-AC Opinion No 8, "Further damages under Article 75 may include, inter alia : costs associated with the substitute transaction, loss caused by the delay in locating a substitute transaction; loss due to a change in the interest rates or in the currency exchange rate between the date that the transaction was supposed to have occurred under the contract and the substitute transaction; cost to a seller of an unsuccessful tender of goods or their necessary storage; and cost associated with the failed transaction".

⁴³⁹ According to CISG-AC Advisory Council Opinion no 8, "Further damages under Article 76 "may include inter alia additional losses, lost profit".

(Furniture case), the Tribunal held that the party could not “claim compensation for loss of profit because it did not incur such loss”. The Tribunal added that “The damages that occurred merely comprise the price of the substitute furniture which was more expensive than under the parties’ original sales contract”.⁴⁴⁰

It is important to note that, in virtue of Article 75, the recovery of damage requires, for instance, in the case of the breach of the contract by the buyer, that the seller has sold the goods, or in the case of a breach by the seller, that the buyer has purchased substitution goods, and also, according to the second sentence of Article 75, that the substitute transaction made by the aggrieved parties was reasonable under the circumstances.⁴⁴¹ The last sentence stipulates that damages may not be calculated under Article 75 in the event that the aggrieved party’s substitute transaction was unreasonable.⁴⁴² In this case, damages may be calculated as per Article 76 or Article 74. This means that a Tribunal sitting in a case regarding damages based on Article 75 must *in limine litis* determine if the substitute transaction was “reasonable”.⁴⁴³

This last sentence may pose a problem when it comes to determining a reasonable time that must be observed by the aggrieved party after avoidance of the contract. According to the Secretariat Commentary, the time period for reasonable substitute transactions begins to run when the aggrieved party declares the contract to be avoided,⁴⁴⁴ and the CISG-AC Opinion No. 8 adds that “the duration of the reasonable time window for instance for the goods having a fluctuation market price will depend inter alia on the existence and variability of a market for the goods”.

Under Article 75, when the contract has been avoided and the “buyer has bought goods in replacement or the seller has resold the goods”, an aggrieved party is entitled to recover as damages the difference between the contract price and the price of the substitute transaction.⁴⁴⁵ The aim of Article 75, such as mentioned in CISG-AC Opinion No. 8, “is to ensure that the aggrieved party will receive the benefit of the bargain of the avoided contract

⁴⁴⁰ See Germany, LG München (Furniture case), 6 April 2000, CISG-Online.ch 665, English translation, available at: <http://cisgw3.law.pace.edu/cases/000406g1.html>. (Last visited 24 November 2015).

⁴⁴¹ See H. Stoll & G. Gruber In Schlechtriem & Schwenger, *Commentary Art 74*; Honnold, *Uniform Law* 219.

⁴⁴² See Arbitral Award, ICC 8128/1995 (Chemical fertilizer case), CISG-Online.ch 526, English translation available at: <http://cisgw3.law.pace.edu/cases/958128i1.html>. (Last accessed 24 November 2015)

⁴⁴³ CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76. Para 2.4.1.

⁴⁴⁴ See Secretariat Commentary, art. 71 [draft counterpart to CISG art. 75], available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html>. (Last Accessed: 24 November 2015).

⁴⁴⁵ See Oberlandesgericht Hamburg (Germany) 28 February 1997, CISG-Online 261 (Pace).

if the aggrieved party mitigates its damage by engaging in a substitute transaction".⁴⁴⁶ In this regard, the contract price which must be taken into consideration in order to calculate damages in accordance with Article 75 must be explicitly or implicitly fixed into the avoided original contract or the price, such as determined under Article 55 of the CISG.⁴⁴⁷

In contrast, under Article 76, an aggrieved party is "entitled to recover as damages the difference between the price fixed by the contract and the current price". This article, which provides an alternative method of calculating damages is described as an abstract method for calculating damages, in contrast to the concrete method for measuring damages provided in Article 75,⁴⁴⁸ may be used to calculate damages even if the requirements of Article 75 have not been met. Moreover, Article 76 stipulates that the prerequisite for damages to be calculated is that the contract price must have been fixed explicitly or implicitly, in contrast to Article 75, which permits the contract price to be determined in accordance with Article 55 of the CISG.⁴⁴⁹ Article 76, on the other hand, simply states that for the calculation of damages, the contract goods have a "current price".⁴⁵⁰ A current price refers to the price usually charged for the sale of goods of the same kind and on comparable terms. The location where a current price must be determined is the place where the delivery of the goods should normally take place.⁴⁵¹ However, if no current price exists at the place of delivery, the current price should be determined at a place which is a reasonable substitute.⁴⁵² According to Stoll and Gruber, this substitute place is reasonable when it is a location that is physically closest to the place where the transportation costs have been fixed.⁴⁵³

⁴⁴⁶ CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76 paragraph 2.1.2

⁴⁴⁷ See CISG art. 55. See Stoll & Gruber art. 75.

⁴⁴⁸ See Kantonsgericht Zug (Switzerland) 21 October 1999, CISG-Online 491.

⁴⁴⁹ See Summary of Records of Meetings of the First Committee, 37th Meeting, Consideration of the Report of the Drafting Committee to the Committee, Article 71 and 72 [became CISG article 75 and CISG article 76], 7 April 1980, available at:

<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting37.html>. (Last visited: 24 November 2015).

⁴⁵⁰ See Official Comment to UNIDROIT Principles, art. 7.4.6 ("This will often, but not necessarily, be the price on an organised market.").

⁴⁵¹ See Official Comment to UNIDROIT Principles, art. 7.4.6 ("This will often, but not necessarily, be the price on an organised market.").

⁴⁵² See Official Comment to UNIDROIT Principles, art. 7.4.6 ("This will often, but not necessarily, be the price on an organised market.").

⁴⁵³ See Summary of Records of Meetings of the First Committee, 37th Meeting, Consideration of the Report of the Drafting Committee to the Committee, Article 71 and 72 [became CISG article 75 and CISG article 76], 7 April 1980, available at:

<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting37.html>. (Last visited: 24 November 2015).

4.7.3. *Termination or avoidance of contracts as the ultimate remedy*

The related issue of the termination of a contract is governed by both Articles 25 and 26 of the CISG. Article 25 defines the notion of “fundamental breach”, which is presented as a prerequisite for the avoidance of the contract. The CISG foresees a remedy of avoidance of contract in four different situations: in case of the seller’s breach of contract (article 49 of the CISG), in cases of the buyer’s breach of contract (article 64 of the CISG), in cases of an anticipatory breach (article 72 of the CISG), and in cases of the breach of an installment sale (article 73). Indeed, according to the CISG, the possibility of breaching a contract is bound to the buyer and seller in cases of the existence of a fundamental breach, and the party who is entitled to terminate the contract must give notice of avoidance in respect of Article 26 of the CISG.⁴⁵⁴

4.7.3.1. Fundamental breach

The notion of fundamental breach is clearly defined by Article 25 of the CISG, which presents this notion as the first prerequisite which the Tribunal must determine in order to pronounce an avoidance of the contract.⁴⁵⁵ This article sets forth a definition of “fundamental breach” which is less than precise, since the definition makes it hard to predict exactly when a breach will be considered as “fundamental” or what types of behaviour will be viewed as resulting in a “fundamental breach”.⁴⁵⁶ Thus, the terms of Article 25 allow this study to highlight two characteristics of the notion of fundamental breach: the injury caused must be fundamental, and it must be foreseeable by the party at fault.⁴⁵⁷

The CISG does not define “detriment” or “substantial deprivation”. The UNCITRAL Secretariat’s official commentary on the 1978 draft stated that “the determination whether the “detriment” is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to

⁴⁵⁴ Art.25 provides that “A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”.

⁴⁵⁵ See Mullis 1998 (18) *Anglo-Swedish Studies in Law* 326-333.

⁴⁵⁶ See Treitel, in: Guest, Benjamin’s *Sale of Goods* 116-118.

⁴⁵⁷ See Andrea Bjorklund *Commentary* 337.

which the breach interferes with other activities of the injured party”.⁴⁵⁸ Indeed, the focus of the inquiry will be on determining whether there has been a substantial deprivation of what the aggrieved party expected to receive under the contract. If such a deprivation is established, the aggrieved party will have incurred a detriment.⁴⁵⁹

The Oberlandesgericht Frankfurt (Germany) Tribunal, on 17 September 1991, found that “A breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, interest in the fulfillment of the contract ceases to exist as a consequence of the breach contract”.⁴⁶⁰ And on 15 September 2000, the Bundesgericht Tribunal in Switzerland held that for a breach to be fundamental, it must “concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties”.⁴⁶¹

The second condition, which concerns foreseeability, requires that to qualify as fundamental, the results of the breach must have been foreseeable to the defaulting party or “to a reasonable party of the same kind in the same circumstances⁴⁶²”. The foreseeability requirement in Article 25 is similar to the foreseeability requirement with respect to damages found in Article 74. In practice, the question of foreseeability should only arise if the parties have not sufficiently described what issues are indispensable to them during the course of the performance of the contract.⁴⁶³

The element of foreseeability is considered by examining objective elements, such as the circumstances of the contract and contractual economy, as well as by considering a person of the same quality being placed in the same situation as the default party.⁴⁶⁴ The documents handed over by the parties during the negotiations or the usages established between them could also serve as evidence. For instance, if the buyer clearly indicated the necessity for prompt delivery, the seller’s lateness will be viewed as a fundamental breach, and the latter must therefore understand that the time limit is fundamental to the contract.⁴⁶⁵

⁴⁵⁸ Secretariat Commentary on 1978 Draft, Art.23 (now Art.25) para 3.

⁴⁵⁹ See Koch, in Felemegas (ed), *An International Approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* 126.

⁴⁶⁰ See Oberlandesgericht Frankfurt (Germany) 17 September 1991, CISG-Oline 28 (pace).

⁴⁶¹ See Bundesgericht (Switzerland) 15 September 2000, FCF S.A v Adriaafil Commercial S.r.l. (Pace).

⁴⁶² See Schroeter, in : Schlechtriem/Schwenzer *Commentary* Art. 25 paragraph 5.

⁴⁶³ Schroeter, in: Schlechtriem/Schwenzer, *Commentary* Art. 25, para 30.

⁴⁶⁴ Schroeter, in: Schlechtriem/Schwenzer, *Commentary* Art. 25, para 30.

⁴⁶⁵ See Ferrari, 2005 (25) *Journal of Law and Commerce* 489 -499.

4.7.3.2. Notice

The CISG further requires that the party who is planning to avoid the contract must give notice of this avoidance in respect of Article 26. It is clear that this provision of the CISG distinguishes itself from its predecessor, namely the ULIS, which provided for the automatic termination of a contract⁴⁶⁶. This requirement of notice avoids the problem of having to determine the date on which the termination is effective once there has been a breach.⁴⁶⁷

This article also distinguishes the CISG from the Cameroon Civil Code. The Cameroon system does not grant unilateral notice of termination by an aggrieved party, but requires that avoidance be declared through a court decision.⁴⁶⁸ Article 26 does not impose any specific requirements regarding the form that this notice must take, but simply requires that notice has to be communicated to the other party by appropriate means, which may include either written or oral notification.⁴⁶⁹

This article is silent regarding the time period in which the notice of avoidance must be made. It is obvious, based on the commentaries on Articles 49 and 62 that one has to refer to both these articles, which require that a declaration must be made within a reasonable period of time, in order to determine the period in which notice must be given.⁴⁷⁰

In fact, the purpose of the CISG is to reduce the number of cases in which the contract can be terminated or avoided on grounds of a fundamental breach. Since the effectiveness and certainty of legal transactions are essential to international trade, it is important that breach of contract is only accepted in specific cases, in order to preserve the effective completion of the legal transaction.⁴⁷¹

Therefore, avoidance of the contract will only operate in cases of fundamental breach. Of course, such breach has to be resulting in substantial, obvious and notable damage, which leads to the deprivation of what was expected pursuant to the provisions agreed to in the

⁴⁶⁶ Magnus 2005 (25) *The Journal of Law and Commerce* 423-426. See also Art 49 and 64 of the CISG.

⁴⁶⁷ Magnus 2005 (25) *the Journal of Law and Commerce* 423-426.

⁴⁶⁸ See Schlechtriem 2005 *Juridica International* 27-32.

⁴⁶⁹ See Oberster Gerichtshof (Austria) 6 February 1996, CISG-Online 224 (Pace).

⁴⁷⁰ See the Commentary of Peter Huber Art. 49 and Gary F. Bell

⁴⁷¹ Magnus 2005 (25) *the Journal of Law and Commerce* 423-426

contract. In this regard, the Spanish case law has clearly adopted the notion of an action for termination based on fundamental breach.⁴⁷²

According to Spanish case law, “the breach of what was agreed be serious fundamental, without being sufficient to claim a breach of ancillary or supplementary obligations which, not being decisive, do not prevent the creditor from obtaining the economic result which led it to enter into the contract”.

CONCLUSION

The above study of the performance of contracts under the CISG focused on certain issues, such as the transfer of property and passing of risk, non-conformity and guarantee against latent defect, as well as remedies in cases of the non-performance of contracts.

In terms of the obligations of the parties, the CISG requires specific rules as to the effects of international contracts of sale. Firstly, the seller obliges himself to deliver conforming goods. This means that he is required to deliver the goods and guarantee their conformity. It has been noted that the CISG, through its articles 30 and 35, gives the seller two obligations: the obligation to deliver the goods and hand over the documents, and the obligation of conformity. As far as the obligation of conformity is concerned, this study has highlighted that the handing over of the goods at the agreed place and date stipulated in the contract is insufficient to absolve the seller of his obligation of delivery. The latter must also ensure that the goods conform to the contractual stipulations. In the framework of this study, it has been noted that the Convention establishes the subjective and objective conformity of goods, as well as the fact that these goods have to be free of any claim by a third party, which refers to their legal conformity.

Concerning the remedies provided by the CISG in cases of the non-performance of contracts, this study has shown that every remedy was subjected to a soft approach by the Convention. One can note that the remedies provided by the CISG not only aim, for the most part, to reconstitute the interests of the aggrieved party by requiring the sanction of the party at fault, but also attempt to ensure contractual economy, by ensuring that its rules aim to optimise the economic utility of contracts. The CISG adopts a dualist approach regarding the non-performance of contracts. On the one hand, each remedy is provided in order to protect

⁴⁷² Navarra 2007 (27) PACJ 231-265;

the creditor's interests, and on the other hand, its application does not have to place its debtor in a critical situation. For instance, with regard to specific performance, the CISG foresees two aspects to this remedy. It may be requested not only by the creditor, but also by the debtor, to anticipate this non-performance. Thus, the game of choice of remedies is not only between the creditor and debtor, but also involves proposing a competing remedy.

CHAPTER CONCLUSION

After examining the matters that govern the CISG, it is important to summarise its principles and characteristics. This examination of the CISG's provisions allows one to understand relevant solutions retained by the Convention and assess their real importance and unique future. It is evident that international contracts of sale constitute a very important element of the relationship between traders engaging in international commerce. Within the framework of this study, two traditional criteria have been identified for determining an international contract. This relates to both legal and economic aspects. According to legal criteria, a contract has an international character when it adheres to the legal norms emanating from several states. Indeed, this study has shown that the legal criteria focus in principle on an analysis of the contractual relationship between the parties, the subject and the cause, in order to verify if there is any link to the domestic law. In other words, an international contract implies international elements in terms of the place of its conclusion and the nationality of the parties.

In spite of the debate raised by some scholars concerning the question of the qualification of a contract, the Vienna Convention is very clear, in paragraph 3 of the first article, that "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this convention". Moreover, Article 1 paragraph 1 stipulates that if the place of business of the parties is in different States, this will determine the application of the Convention.

This study has noted that the Convention rests on the principle of consensualism. It enshrines the will of the parties as the primary source of the contract, such as expressed in Articles 6, 11 and 29, as well for the form and modification of the contract. Indeed, the Convention relies on a certain degree of pragmatism. It empowers the parties to find the most appropriate solution for their situation. According to the CISG approach, the parties are required to respect their obligations stipulated in the contract, and to preserve the contract as

far as possible. The rules regarding a fundamental breach are aimed at ensuring the substantive performance of the contract, since it is the purpose of the parties at the moment of the conclusion of the contract. However, the avoidance of a contract is regarded by the CISG as a remedy which has to be used by the parties as a last resort. One can note that the Convention avoids unilaterally favouring one of the contracting parties. Instead, it attempts to establish a balance between the seller and buyer's duties, by taking the particular interests of each party into account.

One may conclude that the Convention's drafters have broadly succeeded in adapting the proposed solutions to the needs and practices of international commerce. Today, the CISG constitutes the expression of one of the most widely agreed upon set of rules by operators in international commerce, which means that it can rightly be considered as a veritable "lex mercatoria". However, besides the advantages of the Convention for international commerce, it is also important to highlight its significance with regard to domestic law rules relating to sales. The Convention does not claim to govern all contracts and trade matters, even those which often fall within its scope of application. It still fails to achieve complete unification of laws, which is its main purpose, and therefore leaves room for the application of regional and domestic law. It is true that the fact that the CISG has been drafted by taking various conceptions of each system of law into account has made it more attractive. It is inspired by different legal systems and has taken the best from each, in order to respond better to the needs and challenges of international commerce.

Therefore, it will benefit the domestic law to make use of this international tool. Especially in comparison with the Cameroonian Civil Code, this study has seen that the Convention presents many advantages, since its provisions are clearer and more suited to the needs of international commerce. Cameroonian SMEs, by applying the CISG, which has laws which are applicable in cases of litigation, will therefore have greater protection against certain issues related to domestic law, but which are not suited to modern international commerce. This is because many domestic laws of sale have been drafted based on national or regional realities or problems. For instance, with regard to the Cameroonian Civil Code, the CISG is more appropriate for Cameroonian SMEs, since the domestic law is silent on or vague about many issues. As such, one can note that the Civil Code does not clearly deal with rules regarding the formation of contracts, while the CISG is more explicit in this regard.

Chapter Five.

COMPARATIVE STUDY OF THE OHADA LAW AND CISG: IMPACT ON WEST AND CENTRAL AFRICAN SMEs

5.1. INTRODUCTION

The CISG and OHADA both have the purpose of regulating business law, specifically to unify, harmonise and correct this area of law¹. Indeed, as the study has already shown, the CISG, which is a convention of international law, applies to international sale contracts, while the OHADA, which is a regional law, aims to regulate commercial sales within West and Central African countries.² Thus, the Convention is an international law and the OHADA is a regional law.³

Any enterprise engaging in international business needs to choose reliable business partners, as well as a governing body of law. Therefore, SMEs in West and Central Africa engaging in international business must be sufficiently aware of the provisions of both texts, in order to develop their contracts.⁴

It is erroneous to believe, based on article 10 of the OHADA, which has a mandatory character, and the OHADA's direct application to all OHADA member states,⁵ that any enterprise operating in the OHADA area does not have to concern itself with Vienna Convention regulations.⁶ Lack of awareness of both these regulations by West and Central African SMEs engaging in international trade may result in some surprises for them, such as the CISG's application in cases where these SMEs rely on the applicability of the OHADA, and have therefore shaped their contracts on the sole basis of this regional law.⁷

¹ Magnus in *CISG* 15.

² Ferrari 2002 (51) *Int'l Comp. L.Q.* 689-707.

³ Magnus in *CISG* 18.

⁴ Kinfaek, Akinboade 2011(17) *ICBE-RF* 1-53.

⁵ See Article 10 of OHADA Uniform Acts.

⁶ See Article 10 of OHADA Uniform Acts.

⁷ Ferrari 2008 (123) *European Law Publishers GmbH, Munich* 121-179

The study of both texts in previous chapters of this study has shown that the “Acte uniforme sur le droit commercial général” (AUDCG) has been greatly inspired by the Vienna Convention.⁸ This amounts to stating that SMEs in West and Central Africa do not need to worry about the application of the CISG and OHADA, since the OHADA is virtually a copy of CISG. Certain authors go so far as to state that regional unification efforts seem to be superfluous, based on the fact that the majority of the OHADA’s provisions are justified in terms of the CISG.⁹

Based on this statement, one could surmise that a comparative study of these two texts seems to be irrelevant. However, in the context of this study, this assertion is not quite true, because during the examination of both texts in the previous chapters, it was noted that although only three OHADA member countries have ratified the Vienna Convention,¹⁰ the CISG may be applied in certain States, such as Cameroon, Senegal, etc., which have not yet ratified the Convention.

With regard to the provisions of both texts, even though one can note many convergences, it is also true that there are differences between both texts, which may be prejudicial to SMEs operating in West and Central Africa to some extent.¹¹ It is also important to note that the OHADA’s lawmakers did not just copy and paste all the CISG’s provisions.¹² In other words, the OHADA lawmakers were only inspired by the CISG.

The question as to why this study has decided to compare these two particular texts can be answered with reference to the research problem.¹³ It is because there are legal ties between the two legislations.¹⁴

Therefore, if the CISG may apply in such countries as Cameroon, even though the country has not yet ratified the Convention, it is important to compare both legislations, in order to determine, with regard to the operating mode of SMEs, which one is most suitable for these

⁸ Douajni 2004 (3) *Cameroonian Review of Arbitration* 26.

⁹ See ICC Court of Arbitration, Arbitral award n.6281, *Journal du droit international* 1989, 1114. See Kahn *Convention de Vienne du 11 Avril 1980*.

¹⁰ These Three Countries are Benin, Gabon and Guinea.

¹¹ Ferrari *CISG* 8.

¹² Feneon A <http://www.ohada.com/doctrine/ohadata/D-10-59.html>. (Last visited 21 November 2015).

¹³ The research problem in this study was to examine both legislations (CISG and OHADA) in order to determine their scope of application, and which legislation would be best suited to SMEs in West and Central Africa engaging in international trade.

¹⁴ The research problem in this study was to examine both legislations (CISG and OHADA) in order to determine their scope of application, and which legislation would be best suited to SMEs in West and Central Africa engaging in international trade.

SMEs¹⁵. Indeed, although there are some similarities between the two texts, as already mentioned, their substantive content is different in certain aspects.

It is also important to interrogate the applicability of both tools, since certain OHADA members have adhered to other international tools. It is therefore important to determine how these international tools are applied to OHADA member states. The following sections of this chapter will analyse the possibilities of the application of the CISG in the OHADA space, as well as examining the similarities and differences of both texts. This will help to determine, based on the operating mode of SMEs, whether these similarities and differences have a positive or negative influence on SMEs.

5.2. POSSIBILITIES FOR THE APPLICATION OF THE CISG IN THE OHADA SPACE

Given that the Vienna Convention does not impose itself on non-contracting states such as Cameroon,¹⁶ the reasons which may justify or legitimate its application in Cameroon or other OHADA states which have not yet ratified the Convention have to be found in the OHADA system. There are two assumptions which can justify the application of the CISG in OHADA area, particularly in Cameroon, namely the choice of the parties and the method of conflict.¹⁷

5.2.1. *The choice of rules of law*

The choice made by parties regarding rules of law is based on the principle of autonomy of will. This principle enables the parties to submit their contract to the appropriate rules of law.¹⁸ In this regard, the parties need to determine how to find out which law is applicable to

¹⁵ See the question relating to the research problem in the Introduction section.

¹⁶ See article 1(1), which governs the CISG.

¹⁷ The application of the CISG in non-contracting states has been studied by certain authors, for example, V. Lacyr De Aguiar Vieira, Thesis "La Convention des Nations Unies sur les contrats de vente internationale de marchandises et son applicabilité au Bresil".

See also Witz Claude "the first's case law applications of the Uniform Law on international sale" Convention des Nations Unies du 11 Avril 1980 p.25.

¹⁸ See the Hague Conference on Private International Law on Choice of Law in International Contracts Development Process of the draft instrument of February 2011, available at: www.hcch.net/upload/wop/genaff2011pd06e.pdf. (Last accessed: 26 November 2015).

the substance of a dispute.¹⁹ This issue is dealt with in the OHADA by both the OHADA Arbitration Act and the Rules of Procedure of the OHADA Court.

Under the Act, “the tribunal must decide the merits of the case in accordance with the law elected by the parties”, and the Act further stipulates that “laws of a seat or a jurisdiction cannot prevail over the law chosen by the parties”. The Rules of Procedure of the OHADA Court provides that “in the absence of a choice of the applicable law by the parties the arbitral tribunal will choose the applicable law on the grounds of the conflict rule that it considers appropriate, taking into account, always the rules of international law”.²⁰

Both these Acts clearly enshrine the principle of the parties’ autonomy to select the law which will govern their contract.²¹ In other words, the OHADA Law does not preclude parties which are not contracting states of the CISG from choosing the CISG’s provisions as the law which will govern their future contracts. The parties normally have to express their choice at the moment of the conclusion of the contract, and may therefore choose the law of a state which is a contracting state of the CISG, even though they do not have a place of business in that state.

For instance, two enterprises which have their place of business in the OHADA space – for example, one situated in Cameroon and the other in Ivory Coast, can by virtue of the principle of autonomy choose the CISG or the rules of a contracting state of the CISG as the rules which will govern their contract. This choice will ultimately depend on the interests of both enterprises.

In the context of international commerce, parties usually prefer to submit their contract to legal sources that conform the most to the international context. In this regard, they often perceive a regional law to regulate regional issues, and therefore not to be sufficient to deal with issues relating to international commerce.²²

¹⁹ See the Hague Conference on Private International Law on Choice of Law in International Contracts Development Process of the draft instrument of February 2011, available at: www.hcch.net/upload/wop/genaff2011pd06e.pdf. (Last accessed: 26 November 2015).

²⁰ See Mouhamed K and Hossane Kone www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014-ohada. (Accessed on 26 November 2015).

²¹ See Mouhamed and Kone www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014-ohada. (Accessed on 26 November 2015).

²² Sarcevic *Regional Unification the CISG and 32*.

5.2.2. *Private international law*

The second possibility for the application of the Vienna Convention in the OHADA space may be found in private international law. Article 1.1.b relating to the Vienna Convention stipulates that the Convention is applicable when the rules of private international law lead to the application of the law of a contracting state. The scope of this provision is significant, since it indicates that the power of the Convention over OHADA Law depends on the Cameroonian judge who is dealing with the matter at hand.

The question that can be asked here is whether or not the Cameroonian judge has to apply the Convention when the rules of private international law choose the law of a contracting state of the Convention, such as Germany. This issue is complex and the subject of much debate. If the tribunal of the contracting states of the CISG must apply the Convention through article 1.1.b, it is mostly because they have to respect and enforce this article, which retains its binding effect.²³ The issue is more sensitive when it relates to non-contracting states such as Cameroon.²⁴ Even if some international arbitrators express their wishes to promote the CISG with regard to its indirect scope of application, it is worth remembering that the CISG cannot compel Cameroonian judicial authorities, which are not a contracting party of the CISG, to follow the rules provided by article 1.1.b of the CISG.²⁵ However, even though it is correct that a non-contracting state does not have an international law obligation to give effect to a convention it is relevant to highlight that within the article 1(1)(b) construct, correct application of the proper law does require the forum to apply the CISG if its applicability criteria are met. It is important to also highlight that Cameroon does not have special rules of private international law, as in the cases of Italy and Switzerland.²⁶

The Cameroonian legal system has adopted the classic method of conflicts of law.²⁷ The Civil Code regroups the important rules of contract law, which include articles concerning civil contracts and the formation of contracts. These rules apply the law of foreign states when determining the rights and obligations of parties, the law of the state with regard to the conclusion of contracts, based on the type of contract, and the law of the state where the

²³ Perovi 2011 (3) *Belgrade Law Review* 188-195.

²⁴ Neumayer, Ming, Dessemone *Convention de Vienne sur les contrats internationale: Commentaire* 325.

²⁵ Nguyen *La Convention de Vienne de 1980 sur la Vente Internationale de Marchandises et le droit Vietnamien de la vente* 125.

²⁶ Coetze & De Gama 2006 (10) *VJ* 15.

²⁷ Heuze *La vente Internationale* 76

offerer is located when determining the place and moment of conclusion of contracts between parties who are distant from one another.²⁸

Therefore, the CISG will be applicable in the OHADA space, particularly in Cameroon, if the law applicable to the contract is determined by the Cameroonian judge according to its rules, and based on whether or not the countries involved are contracting states of the Convention.²⁹ For instance, the Cameroonian judge can choose the law of country where the contract is performed as being applicable to a contract between a Cameroonian buyer and French seller. In this case, the CISG will be applicable because the place of the performance of the contract is France, and France is a member state of the Convention.³⁰

The CISG can also be applicable in Cameroon in the case where the contract is signed at the international fair of Brazil between parties from two non-contracting states, such as a Cameroonian buyer and Japanese trader. The Cameroonian, by dealing with the form of contract, will refer to Brazilian law (country of the conclusion of the contract), namely the Vienna Convention, since Brazil is a member state of the CISG.³¹

In light of the above discussion, the CISG may be applicable to Cameroon through the game of conflict of law, either when the contract is concluded in a contracting state, or when one of the contracting parties has its place of business in a contracting state.

It is important to note that this method can have some limitations pursuant to Article 95 of the CISG,³² which allows contracting states who are not willing to agree on the applicability of the CISG pursuant to 1(1) (b) to declare their intention to not be bound by this subparagraph. Certain countries, such as China, USA, Singapore, the Czech Republic, etc., have used this opportunity.

5.3. THE OHADA AND CISG: SIMILARITIES, DIFFERENCES AND IMPACT ON SMEs

²⁸ Heuze *La vente Internationale* 7.

²⁹ Henseler P & Partners Duesseldorf www.hp-legal.com. (Last accessed: 26 November 2015).

³⁰ See Decision held by Argentina Tribunal Camara Nacional de Apelaciones en lo Commercial (Second Instance Court of Appeal) in the case Mayer Alejandro v. Onda Hofferle GmbH & Co., 24 April 2000.

³¹ See list of contracting states available at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. (Last accessed: 26 November 2015).

³² Article 95 stipulates that "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (b) of article 1 of this convention".

The OHADA law, as previously mentioned, was greatly inspired by the CISG. It reproduces almost all the significant provisions regarding the obligations of the seller and buyer. The focus of this section will be on certain points which are either not dealt with by the Convention, or are dealt with separately within the OHADA law.

5.3.1. The formation of contracts

5.3.1.1. Acceptance

With regard to the determining the moment of the conclusion of a contract, the Vienna Convention and OHADA Law both indicate that a contract is concluded at the moment when acceptance reaches the recipient.³³

Both systems embody the receipt theory in order to localise a contract. According to this study, the receipt theory establishes a balance between both parties' interests, namely the offeror and offeree. This theory necessarily recognises the recipient's right to revoke his acceptance, as long as it has not yet been received by the offeror.³⁴ (According to the emission theory, this right does not exist, as once the contract is concluded at the moment of acceptance emission, neither party can return to their initial declaration of will).

The recipient has a hesitation right comparable to that of the offeror. Both parties are therefore allowed to revoke their assent before it reaches the addressee. The offeror and the offeree are thus treated the same way.³⁵ In this regard, it is important to note that the right to revoke of one party does not harm the interests of the other, as long as the offer or acceptance has not yet been received by the addressee.

With regard to acts constituting acceptance, both legislations recognise that acceptance can be shown explicitly or by other conduct indicating assent. Both legislations also clearly stipulate that silence or inactivity does not in itself amount to acceptance.³⁶

³³ See Article 244 of OHADA and Article 18 of CISG.

³⁴ Garro 1989(23) Int'l L 443-483.

³⁵ See Gomez *le Nouveau Droit de la Vente Commerciale en Afrique* 163.

³⁶ See Article 18 (2) of the CISG and Article 241 (1) of the OHADA.

Concerning the process of determining the moment and place at which an acceptance is effective and the contract is considered to be made, both legislations have adopted and followed the reception theory. It is understandable that neither legislation wishes to leave the formation of a contract at the mercy of the offeree, but to rather give equal rights to the offeror and offeree.³⁷

However, it has been noted during the study of both texts that neither of them have included provisions dealing with the notion of electronic commerce. Even if one notes that both texts have highlighted the principle of freedom of form regarding the conclusion of contracts,³⁸ it remains true that with the advanced technology today, certain types of deliveries, such as signed documents in an envelope by ordinary mail (“snail mail”) have made way for electronic files. It is therefore important to determine and prove the moment at which these electronics files or e-mail reached the recipient.³⁹ The receipt theory is unclear in this regard.

It is the CISG, through CISG–AC Opinion No 1, which has attempted to provide some clarification regarding this issue. The CISG – AC Opinion No 1 provides that an e-mail reaches the addressee as soon as it enters the addressee’s server. It adds that it is irrelevant to determine whether or not the addressee has read the email.⁴⁰ This solution seems to be very dangerous for SMEs, however, which have opted for this method based on their structure and operating mode.

Indeed, this solution seems to be better suited to large companies which have a well-organised structure and complete formal and written mechanisms to verify that information has been transmitted and received, in comparison to SMEs, whose management is centralised in the hands of the owner. Thus, the use of this type of communication requires a special department that is in charge of this aspect.

Contrary to the CISG, the Uniform Acts does not give any indication regarding the calculation and expiry of the period of time for acceptance.⁴¹

³⁷ See Gomez *le Nouveau Droit de la Vente Commerciale en Afrique* 163-

³⁸ See Article 11 of the CISG and Article 240 of the OHADA.

³⁹ See Hill, Simone WB http://www.jlisjournal.org/BackEds/vol12_1.html. (Last accessed: 26 November 2015).

⁴⁰ See CISG – AC Opinion no 1 « Electronic Communications under CISG » 15 August 2003.

⁴¹ See Art. 20 Para 2, which stipulates that “official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last on the last day of the period because that days falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows”.

5.3.1.2. Counter-offer

Following the CISG, Article 245 of the Uniform Acts points out that a reply to an offer which purports to be an acceptance, but which contains additional or different terms which do not materially alter the terms of the offer, constitutes an acceptance. This provision shows the pragmatism of the text's authors, and their aim to protect ill-formed contracts.

However, unlike the CISG, the Uniform Acts does not clearly indicate the additional or different terms which are considered to alter the terms of an offer materially.⁴² This solution adopted by the Uniform Acts aims to favour the conclusion of a contract, but its generality may raise the problem of enforcement.⁴³

In addition, by not clearly identifying the elements which materially alter the terms of an offer, the Uniform Acts wishes to exclude rigour, which will needlessly weaken a sale operation.⁴⁴ However, it is obvious that it gives a broad power to the Court or judge to determine whether or not a reply to an offer constitutes an acceptance.

This is not advantageous to SMEs. Firstly, this study has shown in chapter 2 that some SMEs, specifically those in Cameroon, import products more than they export, which means that they are often⁴⁵ in a buyer' or offeree position. Therefore, these SMEs have to be able to determine whether or not their acceptance of an offer with additional or other modifications is included in the elements enumerated by Article 19 of the CISG. This means that an offeree who takes the initiative to reply to an offer with additional terms is not able to determine whether or not these additional terms materially alter the terms of the contract.

Secondly, the fact that the Uniform Acts does not clearly address the issues of battle of form and the inclusion of standard terms of contracts is very dangerous, and may pose a serious problem for SMEs engaging in international trade, because these are two important issues that are increasingly used by enterprises in international trade. In fact, the tendencies today are for most enterprises to deal with each other by using their own standard form of

⁴² Art 19 Para 19 al.3 of the CISG stipulates that additional or different terms relating, among other things, to price payment, quality or quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes, are considered to materially alter the terms of a contract.

⁴³ Gomez *la vente Commercial* 165.

⁴⁴ Gomez *la vente Commercial* 166-167.

⁴⁵ See the figure indicating the evolution of exportation and importation by Cameroonian SMEs.

contract.⁴⁶ The main purpose of any enterprise doing business is to achieve the most benefit by limiting risks through the terms of the contract.⁴⁷ In doing so, many enterprises engaging in international trade, especially those in the seller position, often reduce their risk or disclaim their responsibility concerning certain of their obligations, such as warranties on goods, fitness for purpose, time limit, remedy and conflict of law.⁴⁸

The characteristics and operating mode of many SMEs in West and Central Africa show that they are very exposed and at the mercy of unreliable sellers. For instance, if a Cameroonian SME sends a purchase order for a model D-83 computerised measuring device to a German enterprise, the purchase order will clearly describe the product ordered, price, and delivery date. The German enterprise then replies with its acknowledgement form, which includes a statement disclaiming implied guarantees, such as the implied guarantee of fitness, and reduces the time limit for the warranty of the goods for a particular purpose. This acknowledgement form also contains a clause which mentions that the sole and exclusive remedy in the case of a breach will be the repair or replacement of defective parts during the warranty period. The seller also includes a clause stating that in the event of a dispute, the parties agree to settle it through arbitration.

The point here is that these boilerplates are usually ignored by many purchasers and the seller's own people.⁴⁹ It is not the terms of the contract that parties consciously consider when they conclude a contract. When the party as a buyer forms a contract, he invariably focuses on the product, price, and delivery terms.⁵⁰ This is quite normal, given that the parties are usually merchants, not lawyers. Traders want to do business and do not therefore have time to pay more attention to boilerplates, as lawyers would do.

In terms of the example above, it is clear that the Cameroonian SME has not agreed with any boilerplate terms, such as stipulated by the German enterprise.⁵¹ Therefore, based on the mirror image rule, as advocated by the Uniform Acts of the OHADA, which requires that acceptance has to exactly match the terms of the offer, a contract such as this one would appear to have been violated by the German enterprise.

⁴⁶ Kessler http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers. (Last accessed 27 November 2015)

⁴⁷ See FindLaw Small Business Law blog «Using Boilerplate Contracts? 3 legal Risks» 17 June 2013. Available at: www.blogs.findlaw.com/free_enterprise/2013/06/using-boilerplate-contracts-3-legal-risks.html. (Accessed on 27 November 2015).

⁴⁸ See FindLaw Small Business Law blog «Using Boilerplate Contracts? 3 legal Risks» 17 June 2013. Available at: www.blogs.findlaw.com/free_enterprise/2013/06/using-boilerplate-contracts-3-legal-risks.html. (Accessed on 27 November 2015).

⁴⁹ See James *Respecting Boilerplate* 8.

⁵⁰ See James *Respecting Boilerplate* 8.

⁵¹ See Nancy and Kim *Boilerplate and Consent* 28.

However, the mirror image rule, such as advocated by the Uniform Acts of the OHADA, is no longer automatically applicable in international trade.⁵² One can note that section 2-207 of the Uniform Commercial Code, which can be considered the general international law governing all contracts of the sale of goods, has clearly recognised that parties often ignore boilerplate (printed) clauses. It stipulates that “a definite expression of acceptance operates as an acceptance even though it contains different or additional terms”. Thus, this supports the fact that the CISG has squarely recognised that the problem of “battle of form” falls within its scope of application.⁵³ The fact that the OHADA is silent on this important point leaves many SMEs engaging in international trade, which have chosen the OHADA as an applicable law, at the mercy of large enterprises.

In the same vein, the fact that the OHADA does not deal specifically with the notion of the inclusion of standard terms of contracts does not render it effective as a regional legislation that is able to solve any problems which may arise between actors engaging in international trade, and who have chosen this regional instrument as an applicable law. In addition, the Cameroonian Civil Code has remained silent on this important point. It is rather the outline of Act No 2011/012 of 6 May 2011 on Consumer Protection. This Act, in its Article 6, requires that these standard terms shall be drawn up in French and English, in a visible and readable format that can be viewed easily by any person. Paragraph 3 of the same article specifies that parties to the contract should each receive and keep an exemplary of the texts or documents. This Cameroonian provision seems to have a similar purpose to the CISG provision, since its aim is to ensure that both parties have actually read and acknowledged the terms of the contract.

5.3.1.3. Time limit for acceptance

With regard to the time limit for acceptance, both texts indicate that this period of time begins to run based on two means of communication, namely written and oral, or instantaneous and non-instantaneous communication. In terms of the written means of communication, the period of time begins to run from a moment that it is easy to ascertain this communication, and the period of time for oral means of communication begins to run from the moment that the offer reaches the offeree.

⁵² See Richard, Paciaroni and Jason *K&L Gates* 18.

⁵³ Fejos 2007 (11) VJ 113-129.

Both texts also provide that if no time limit has been fixed by the offeror, this limit should be determined within a reasonable time. However, contrary to the OHADA, the CISG provides rules for the calculation and expiry of this period of time.

CONCLUSION

comparison of the CISG and OHADA shows that important rules relating to the formation of contracts of sale exist in both systems. By adopting a similar definition of acceptance, the CISG and OHADA attempt to specify the institutions of both legal acts, in order to ensure that the contract formation process establishes a balance between the contracting parties. For instance, among the different theories of acceptance available, the Convention and Uniform Acts have retained the receipt theory, which grants the offeree a hesitation right comparable to that provided to the offeror. With regard to the acts which constitute acceptance, this comparative study has also shown that both legislations are in agreement about the fact that acceptance can be made explicitly or implicitly. However, in terms of e-commerce, this study has found that the receipt theory, as stipulated in both texts, has not yet been able to clarify the time at which an email, for instance, reaches the recipient.

In addition, with regard to counter-offers, one can note that both texts have adopted the same approach by stipulating that acceptance constitutes a counter-offer if the response by the offeree contains additional terms which materially alter the terms of a contract. However, in contrast to the OHADA Law, the Convention has listed the elements which are considered to materially alter the terms of an offer. In the same vein, this study has clearly demonstrated why it is dangerous for SMEs in West and Central Africa, due to the fact that the OHADA has been silent concerning the issue of battle of forms.

5.3.2. The performance of contracts

5.3.2.1. Transfer of ownership and transfer of risk

The question of transfer of property is governed by Articles 275 to 280 of the Uniform Acts of the OHADA. These articles broadly refer to the Vienna Convention's provisions. However, contrary to the CISG, the Uniform Acts introduces a remarkable innovation, in that it takes the notion of transfer of property into account. The CISG, like most international texts, does not deal fully with this matter pursuant to article 4 (b).⁵⁴ The UNCITRAL Secretariat, in his commentary during the 1978 drafting of the CISG, addressed this issue by arguing that it will be difficult to provide a uniform rule in this regard, owing to the divergences among various national legal systems. He added that it is unnecessary to deliberate on this matter, given that both the ULIS and CISG already regulated the effects linked to the passing of risk.⁵⁵

This commentary by the UNCITRAL Secretariat is supported by Professor Philippe Kahn's viewpoint. The latter author contended that the transfer of property is dominated by domestic law rules, which usually privilege the *lex rei sitae*, whereas by their very nature, goods often change quickly the place of situation. Therefore, it is difficult to immediately determine whether the transfer of property is complete or effective, which makes it fairly logical for the CISG to leave this matter in the hands of domestic law.⁵⁶ Professor Alan Farnsworth, contrary to both the UNCITRAL Secretariat and Professor Philippe Kahn, highlighted political factor as the main reason why the CISG did not want to rule on this issue completely. He contended that it was the "price paid by the Convention's sponsors for its acceptance by the adopting reason".⁵⁷

Thus regardless of the theories or reasons presented by different authors, this study has to admit that the CISG only governs the contractual effects of the transfer of property, and excludes its proprietary effect. The contractual effects of the transfer refer to the rights and

⁵⁴ Article 4(b) stipulates that "This convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: b) the effect which the contract may have on the property in the good sold.

a – the validity of the contract or of any of its provisions or of any usage;

b – The effect which the contract may have on the property in the goods sold".

⁵⁵ Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁵⁶ Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁵⁷ Farnsworth 1988 (21) *Cornell Int'L L.J* 441.

obligations of each party relating to the property of the goods, and to determining whether the seller has the duty to transfer goods to the buyer, or whether he is responsible for defects in the quality of the goods. In contrast, the proprietary effect excluded by the CISG refers to the validity of the transfer and its consequences for the proprietary rights of the seller and buyer, as well as any related third party. This means that the CISG has considered the property issue only for the purpose of determining the rights of the buyer and seller regarding third parties, and vice versa. The CISG prefers to govern the contractual effects of the transfer of property and leave the proprietary effects in the hands of the domestic legal system. It is clear that this option of the CISG's co-existence with domestic law obscures and undermines the CISG's uniformity goal.

Article 30 of the CISG, which highlights that the seller must deliver the goods, and transfer the property in the goods, only enables one to determine whether the seller has a duty to transfer titles to the goods to the buyer, or whether the seller is liable to the buyer for defects in the quality of the goods. It is obvious that these are both essential obligations of the seller, without which there cannot be any sale.⁵⁸ However, the question as to whether the seller has the power to pass a goods title to a buyer or which acts are required for the transfer of property is not dealt with, since this question is excluded from Article 4(b) of the CISG. This means that the CISG only requires the transfer of property, but does not specify how this property must be transferred. This may lead to several concerns, one of which is to ensure that the seller has actually performed his essential obligation to transfer the property to the buyer.

The fact that the CISG does not define the notion of property might lead to some litigation, since the concept of property is interpreted differently by different legal systems.⁵⁹ For instance, under English common law, property may mean either general property (or ownership or title), or special property (possession), and both of these are difficult to explain.⁶⁰ In contrast, with regard to the French civil law system, as well as the OHADA and Cameroonian system, property means ownership.⁶¹ The relationship between ownership and possession is therefore quite clear. Ownership includes three rights: the right to possess, to use, and to dispose of assets. Possession is regarded as being "included" in ownership.⁶²

⁵⁸ See Enderlein in P Sarcevic and P Volken <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> (Last visited on 27 November 2015).

⁵⁹ See Enderlein in P Sarcevic and P Volken <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> (Last visited on 27 November 2015).

⁶⁰ Schmid and Hertel 2005 *European Private Law forum* 100-103.

⁶¹ See Battersby and Preston 1972 (35) *Modern Law Review* 268.

⁶² Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

The statement which seems to justify the reasons why the CISG does not govern this matter may consequently appear to be controversial⁶³ and insufficiently convincing, because if it is true that each domestic law has included rules dealing with this issue, it also remains true that these domestic rules are different from each other, and in turn undermine the main purpose of the CISG, namely that of uniformity.⁶⁴ It is universally acknowledged that the CISG's paramount goal is the uniformity of different legal systems, and the fact that the text leaves such important matters as the transfer of property to be governed by domestic law obviously creates some problems when the contract is governed by the CISG or the rule of private international law.

In our modern society today, no one can deny that the main concern with regard to international trade is certainty.⁶⁵ The seller wants to make sure that he will receive his full payment, and the buyer wants to make sure that he will receive goods of the agreed quality in exchange for payment. Therefore, restricting this issue to domestic law will perhaps be very easy for both the seller and buyer performing within a national market to achieve, since not only do they know each other well, but problems regarding transfer of property will also be easy to resolve if they occur.⁶⁶ For instance, two Cameroonian SMEs or West and Central African SMEs performing in the same area will not have any problem if the issue regarding how the goods will be transferred needs to be settled by the Courts. However, the issue may become complicated in the context of international commerce, when the seller and buyer are located in different countries with different social values and legal systems.

It is important to note that the issue of transfer of property is in practice often governed by the rule of private international law. The rule of private international law only deals with the problem by determining which domestic law will be applicable.⁶⁷ It is evident that choosing the correct domestic law will create some problems in cases where the parties have elected the CISG as the applicable law, without also providing domestic laws which will govern the property transfer. This will lead to the problem of the approach that will be used by the Court to decide which law is applicable to the issue of property. It is obvious that the Court of each country will have to decide on this issue based on its own country's legal system, and the

⁶³ The current practice of the Courts thus far shows that there is a crucial need for such uniform rules. The best example used by many Courts is the lack of conformity in the practice of retention of title clauses, as these clauses are often used in international trade and have a very significant function, since they serve as security for the seller of his own goods, and protect sellers who sell goods on credit and by means of installments.

⁶⁴ See Yildirim <http://www.cisg.law.pace.edu/cisg/biblio/yildirim.html>. (Last visited on 27 November 2015).

⁶⁵ Sabari 2012 SSRN 1.

⁶⁶ Idem

⁶⁷ See Juenger 2005 *Duke Law School* 1-28.

solution will therefore differ according to the country.⁶⁸ While certain states determine the transfer of property based on *lex situs*, others do so based on *lex locis actus*.⁶⁹

In this regard, one can surmise that the absence of regulations on the transfer of property under the CISG not only considerably affects its main goal, which is that of uniformity, but also creates the problem of conflict of law. This problem has considerably undermined the uniformity and certainty of the CISG.

Moreover, the fact that the CISG provides a uniform rule on the passing of risk, without providing a similar uniform rule on the transfer of property, leads to an interaction with the CISG's rule on the transfer of risk. In fact, under the CISG, the risk passes to the buyer at the time of delivery, i.e. either when the goods are at the buyer's disposal or when the goods are handed over to the first carrier.⁷⁰ This study has determined, as indicated above, that under the Cameroonian legal system, property passes at the time of the conclusion of the contract. This means that both provisions are quite different. However, in the case where a German seller agrees to sell goods to a Cameroonian buyer, and the CISG is applied to their contract, and the rule of private international law leads to the Cameroonian legal system governing the issue of property transfer, it is clear that the property will pass to the buyer before even the risk. This legal system therefore seems to protect the buyer. Vesser states this approach creates "inequality" between the seller and the buyer, since the fact that the seller has to bear the risk from the time of conclusion of the contract to delivery is unfair. In this respect, one may think that the Cameroonian SME, which is in the position of buyer, will be advantaged by this provision. However, this might not be the case if the rule of private international law leads to the application of an English domestic law to govern this issue, since if the seller reserves the right of disposal, the property will not pass to the buyer, notwithstanding the delivery of the goods to the buyer.

Based on this analysis, under the CISG and rules of private international law, property may pass to the buyer either before or after the passing of risk. The above case shows that the incompatibility of the CISG when there is a uniform rule on the transfer of risk leads to uncertainty among the parties about the time of the passing of risk, as it may happen before, during, or after the passing of risk. These problems considerably undermine uniformity, certainty, and the international market environment, especially with regard to third party complexities, such as title conflict and insolvency.

⁶⁸ Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁶⁹ Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁷⁰ See Article 66 of the CISG.

Trends in international trade today show that many enterprises operating as sellers opt to include retention of title clauses in their contracts, as these clauses help them to secure their own goods and protect them in cases where goods are sold on credit and in the form of instalments.⁷¹ For instance, in the case where a German enterprise sells and delivers goods to a Cameroonian SME on credit, and the latter declares bankruptcy before paying the whole purchase price, this Cameroonian buyer may have other creditors in Cameroon. One of these creditors, such as a bank, in order to receive payment, might then approach a court and request that the goods sold under the contract are placed in liquidation, while the German seller requests the return of the goods based on the retention of title clause. It is clear that in such a case, the Cameroonian judge will have to determine whether or not the retention title clause is valid, and whether or not the property in the goods has passed to the Cameroonian buyer.

Bearing in mind the fact that Article 4 stipulates that the CISG “is not concerned with the validity of the contract or of any of its provisions”, such as the retention title clause in the above example, and with “the effect which the contract may have on the property in the goods sold”, one may question how the judge will expect to fill a gap *intra legem* in the CISG. Even though Article 7 (2) of the CISG sets forth the way in which *praeter legem* will be filled and defined, the fact remains that this article cannot apply to a gap *intra legem*.⁷² Many authors⁷³ and case law⁷⁴ have suggested that the judge has to resolve the issue according to the relevant applicable law. Therefore, one can understand why there is a strong need for such a uniform rule.

Furthermore, the fact that Article 41 provides that the seller must deliver the goods free from any right or claim of a third party does not in itself guarantee that the buyer becomes the actual owner of the goods. Through this article, one can merely note that the buyer only has a personal right in the goods, i.e. he cannot defend his property right against a third party’s claim, except via the seller.⁷⁵ This means that the buyer’s ownership depends on the seller’s performance of his obligation under Article 41. The buyer is therefore never certain of his

⁷¹ Sabari 2012 SSRN 1.

⁷² See Ferrari in «Gap-Filling and Interpretation of the CISG: Overview of International Case Law »2003 (7) VJ 90-91.

⁷³ See Lookofsky <http://www.cisg.law.pace.edu/cisg/biblio/1004.html> see also Ferrari in “PIL and CISG: Friend or Foes? P.99. See also Boghossian, Nayiri <http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>

⁷⁴ See <http://www.uncitral.org/pdf/english/clout/digest2008/article004.pdf> “The effect of a sales contract on the property in the goods is left to the applicable national law, to be determined by the rules of private international law of the forum. The Convention does not govern the validity of a retention of title clause” UNCITRAL’s Digest on the Case Law on the United Nation Convention on the International Sale of Goods”, p.18.

⁷⁵ See Bridge *Personal Property Law* 65.

ownership whenever there is a third party claim.⁷⁶ In such cases, he is obliged to return to the seller and request him to protect his interests. This amounts to stating that what the buyer receives from the seller is less than ownership. In light of the structure and operating mode of SMEs, especially those in Cameroon, it will be fairly impossible for them to use this method.

This article may be regarded as conflicting with Article 30, which provides that the seller has an obligation to transfer property to the buyer.⁷⁷ Therefore, one can think, as stated by Tran Quoc Thang, that the CISG is “treacherous”, since it “promises” more than it can actually deliver. This may be very dangerous for SMEs engaged in international trade, since this would mean that the seller is located in a foreign country. Therefore, the buyer may find it very difficult to contact and request the seller to perform his obligations, especially after some time has passed since the sale took place. Furthermore, it will not be obvious to this buyer to easily locate the seller, particularly if the latter has changed his place of business, closed down his business or gone bankrupt. As a result, by excluding or partially governing the property issue, the CISG create more problems in terms of expenses for the parties, instead of facilitating international trade by standardising domestic laws.⁷⁸

In return, Article 283 relating to the OHADA stipulates that unless otherwise agreed between the parties, the transfer of ownership takes place from the moment when the buyer takes delivery of the goods sold.

With regard to the obligation of guarantee provided by the Uniform Acts, it is comparable to that of the Vienna Convention, owing to the fact that it also stipulates that the seller must deliver the goods free of any third party claims, unless the buyer has agreed to take the goods under such conditions.⁷⁹ The buyer is then obliged to pay the agreed price and take delivery of the goods.

⁷⁶ Quoc Thang Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁷⁷ Quoc Thang Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁷⁸ Quoc Thang Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>. (Last visited on 27 November 2015).

⁷⁹ See article 230 of AUDCG.

5.3.2.2. Transfer of risk

This issue is explained in more detail in the CISG than in the OHADA. Indeed, there is a whole chapter in the third part of the CISG which deals with the passing of risk. It is evident that the determination of the moment of passing of risk remains an important question in practice, especially when it relates to a transaction which goes far beyond the boundaries of a country.⁸⁰ During the study of the CISG and OHADA in relation to the passing of risk, one can note that the OHADA's articles, notably Articles 277 to 280, are very similar to Articles 66 to 69 of the Vienna Convention.

These articles provide rules that are applicable in various situations: goods involving carriage, goods sold in transit, or sales requiring the seller to deliver the goods to a specific place agreed upon in the contract. After examining both texts with regard to rules for the passing of risk, one can say that the fundamental idea of both is that the risk depends on the contracting party which is in a better position to take precautionary measures to prevent the fortuitous disappearance of the goods or to remedy the unfortunate economic consequences of such an event.⁸¹

Both texts provide that the risk passes from the seller to the buyer, in relation to sales involving the carriage of goods, at the moment when the seller hands over the goods to the first carrier.⁸² This passing of risk is perfectly understandable, since the seller, by handing over the goods to the carrier, no longer has control of these goods. From the time of delivery, the buyer might not have physical control over the goods, but these goods are under his legal control, and he may therefore take any necessary measures to prevent the goods from being damaged- for instance, by underwriting an insurance policy.⁸³ It is worth noting that the OHADA and CISG provisions are quite different from the Cameroonian provisions, notably in Article 1583 of the Civil Code. As mentioned in chapter 3 of this study, according to the Cameroonian legal system, the transfer of property follows the transfer of risk. Consequently, the risk passes to the buyer as soon as the contract is made, even if the seller has not yet handed over the goods to the buyer.

Indeed, the principle of solo consensus governing the transfer of risk and provided for by the Cameroonian legal system may appear to be very dangerous in terms of international

⁸⁰ See Flambouras 2001 *Institute of International Commercial Law* 87-149.

⁸¹ See Seymour 2008 *Queensland Law Student Review* 27-35.

⁸² See Article 67 of the CISG and Article 277 of the OHADA.

⁸³ See Kritzer *The Transfer of Risk under the UN Sales Convention 1980 (CISG)*77-95.

commerce, especially for enterprises in the buyer position. This article has been provided by the Cameroonian domestic law in order to hinder sellers from conducting a so-called “double sale” to the detriment of the buyer, and to protect the seller by providing a warrant for him to be paid as soon as the contract is made. This article may appear to be dangerous for the buyer engaging in international trade, since although he may easily take any measures to get possession of the goods when it relates to national sales, the same is not true for international sales, where the parties are located in different countries. In this case, it will be difficult for the buyer to take any measures in order to get possession of the goods. Therefore, it is the view of this study that SMEs cannot rely on this provision when negotiating their contracts.

With regard to goods sold in transit, the study of both texts has shown that they have adopted the same conception. According to both texts, the risk passes from the seller to the buyer when the contract of sale for goods in transit is concluded.⁸⁴ It has been noted in chapter 4 that this provision was the subject of considerable controversy and extensive discussion during its adoption. The protesters against this provision were developing countries, especially those which import more than they export.⁸⁵ This is to be expected, because it seems that this provision has serious implications for the buyer.⁸⁶

The OHADA provision seems to copy this CISG provision, without first determining whether or not it reflects the enterprise’s realities within the continent. It has been shown in chapter 2 of this study that in terms of the international business environment, African SMEs have imported more than they exported.⁸⁷ This means that these SMEs are more in the buyer position than the seller position, and this provision is therefore not advantageous to them.

In addition, with regard to the INCOTERMS, it is important to note that the Uniform Acts does not decline itself in the INCOTERMS question that in practice are the rules which usually govern the transfer of risk between international traders.⁸⁸ However, the OHADA does not provide sufficient commentaries in order to establish an interaction between both instruments.⁸⁹ It would be beneficial for the OHADA’s drafters to include the possibility of having recourse to these usages, which play a significant role in international commerce. Indeed, as highlighted by certain authors, it was due to the concern about harmonisation

⁸⁴ See Article 68 of the CISG and Article 279 of the OHADA.

⁸⁵ Schlechtriem *Uniform Law* 38.

⁸⁶ Ziegel www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html.65. (Accessed on 27 November 2015).

⁸⁷ See the figure indicating the importations and exportations of Cameroonian SMEs.

⁸⁸ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 120.

⁸⁹ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 120.

and security that the ICC introduced, in 1936, a series of universal commercial terms destined to be included by parties in their contracts.⁹⁰ Although the OHADA and CISG do not refer to trade terms, many commentators have concluded that the CISG risk rules is consistent with the INCOTERMS.⁹¹

The first similarity between these two instruments is their approach towards risk. According to the CISG, INCOTERMS, and OHADA, “risk” means any accidental loss or damage to goods which is not caused by an act or omission by either of the parties. Moreover, these three instruments refer to price risk, rejecting the range of regulations for the risk of non-performance. The three texts also provide for different arrangements according to the type of transportation, by distinguishing between shipment and delivery contracts. However, in contrast to the Cameroonian Civil Code, which links the passing of risk to the transfer of physical control, both the OHADA and CISG deal separately with these notions.⁹²

A few similarities exist between Articles 67 and 69 of the CISG, Articles 277 and 278 of the OHADA, and the so-called “modern” INCOTERMS. It appears that the drafters of the Convention and OHADA have copied the basic notion of risk being transferred on the handing over of the goods to a carrier from the modern INCOTERMS. With regard to the modern trade terms, one can note that according to FCA, CPT and CIP, risk passes on delivery to a carrier, which may be linked to the “first carrier” in Article 67(1) of the CISG and Article 277 of the OHADA. The CIF term, which is used for sales in transit, stipulates that the risk passes to the buyer from the time of shipment. This provision is broadly similar to Article 68 of the CISG and Article 280 of the OHADA.

Nevertheless, it is also important to highlight the fact that there are some differences between these three texts, especially with regard to the traditional maritime trade terms FOB, CIF and CFR. Indeed, under these INCOTERMS, risk passes when the goods pass the ship’s rail at the place of loading, whilst the CISG and OHADA set forth that risk may pass when the goods are handed over to the first carrier, which is not always the vessel, but can also be an inland carrier. The moment that risk passes, in accordance with the CISG and OHADA, is not as well defined as in the case of the FOB terms. The FOB clearly explains that “crossing the ship’s rail” means that the goods are to be loaded onto the vessel, whereas under the CISG and OHADA, the obligation to hand over to a carrier could also apply to handing over the goods to a warehouse or storage terminal operated by the carrier. This

⁹⁰ Gomez *Un Nouveau Droit de la vente Commercial en Afrique* 120.

⁹¹ Bridge «The transfer of risk under the UN Sales Convention 1980 (CISG), in *Sharing International Commercial Law across National Boundaries Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday*” p. 77, 105 2008.

⁹² See articles 67, 68 and 69 of the CISG and 278,279 and 280 of the OHADA.

handling within the boundaries of a carrier's facilities will therefore also be at the risk of the buyer, which is contrary to the mercantile customs on which the FOB is based.

The FOB terms can be compared with the second paragraph of Article 67 of the CISG, which provides that "risk will only pass when the goods are handed over to the carrier at the agreed upon port of shipment". One may note that this article is in line with the FOB trade term, since it also refers to a port of shipment. Delivery is made on board the vessel at the agreed port, as required by the FOB term. However, some commentators have suggested that paragraph 2 should not be linked to the FOB term, owing to the fact that Article 67 only provides for the passing of risk in the case where the seller arranges for the transportation goods. When would it where it is the buyer who is designated by the parties to elect the ship to make arrangement for transportation and the risk is transferred to him and fails to do so?

This means that in most contracts governed by the CISG, the parties have agreed on the trade terms. However, these trade terms tend to be interpreted differently from country to country, region to region, or one branch of trade to another. It is therefore important for this study to examine the interaction between trade terms and the provisions of the CISG and OHADA laws that regulate delivery and the passing of risk.

5.3.2.3. The interaction between Incoterms and the OHADA and CISG

Article 6 of the CISG, which enshrines the principle of party autonomy, grants parties the freedom to "derogate from or vary the effect of any of its provision", or even to exclude the application of the CISG from their contract. This means that it allows parties to depart from Articles 66-70, either by deviating from the effect of a particular rule or merely excluding a provision and replacing it with their own regulation. Therefore, it is important to determine whether the incorporation of the INCOTERMS in a contract governed by the CISG constitutes a total exclusion of CISG risk rules, or merely a partial derogation from such rules. In other words, is there any possibility for the parallel application of the INCOTERMS and CISG risk rules?

In this regard, there is a difference of opinion among scholars. The so-called "traditional" view contends that trade terms should replace CISG risk rules in toto,⁹³ owing to the fact that

⁹³ See Lookofsky *Understanding the CISG in the USA* 57 and Bernstein & Lookofsky *Understanding the CISG in Europe* 73, where they mention that the risk regime of the Convention is "wholly"

INCOTERMS is already complete in terms of the passing of risk, and there is therefore no need to supplement them with provisions from the CISG.⁹⁴ Some scholars, such as Berman and Ladd,⁹⁵ go so far as to assert that trade terms may exclude the Convention as a whole, because according to them, the CISG risk rules are so different from the trade terms and documentary sales that the use of trade terms may logically be considered as an implied exclusion of Articles 66 to 70 of the Convention. In order to support their statement, they highlight the shortcomings of Article 66 of the CISG, stating that this article only concerns sales in which the goods have been taken over by the buyer directly from the seller, while the reality today is that the majority of international sales are conducted as documentary sales.

In addition, these authors indicate that Article 67 of the CISG only applies to cases of transshipment from one carrier to another at an intermediate point, and not where the seller hands the goods over to a carrier at an intermediate point.

Even though Berman and Ladd's argument seems, at first glance, to be valid, it is important to note that this argument does not stand up to critics. Firstly, their interpretation of Article 66 is too restrictive, as it is universally acknowledged that this article operates as a general provision regarding the passing of risk under the CISG. Secondly, it is also generally accepted that trade terms do not displace the Convention in toto,⁹⁶ because this INCOTERM, as the study has mentioned above, also has a limited scope of regulation. Therefore, referring to a specific INCOTERMS is insufficient to determine the full legal relationship between the parties in a sale contract. If the Convention were to be supplanted as a whole in order to incorporate the INCOTERMS, this would mean that the parties would have to rely on the governing law in order to address points that are not ruled by the INCOTERMS. This study has shown that it is not always easy to determine the governing law by applying the rules of private international law, and the inability of domestic laws to address the needs of

displaced by trade terms. The latest worldwide edition, Lookofsky *Understanding the CISG* 99, however, states that the effect of expressly incorporating trade terms is "that the Convention's own risk-regulating regime is effectively displaced." Whether or not this signifies a change in meaning of the extent to which trade terms may displace the CISG rules, however, is not clear.

⁹⁴ See Hellner *The Vienna Convention and Standard Form Contracts* in Sarcevic & Volken (eds) *International Sale of Goods: Dubrovnik Lectures* (1986) 343 makes a similar statement in connection with Art 31 of the CISG, which deals with the delivery obligation. In light of the link between delivery and the passing of risk in INCOTERMS, this statement can also apply to the regulation of risk. See, however, Erauw "Observations on Passing of Risk" in *The Draft UNCITRAL Digest and Beyond* 305, who is of the opinion that such a view is exaggerated.

⁹⁵ Berman and Land 1988 (21) *Cornell Int'l LJ* 437.

⁹⁶ See Schlechtriem "Article 6" in Schlechtriem-Schwenzer *Commentary* paragraph 12; *CE v CD & AR* (Belgium District Court Kortrijk 19 April 2001 - bread bags case) Available at: <http://cisgw3.law.pace.edu/cases/010419b1.html> (accessed 01-06-2009) and <http://www.law.kuleuven.ac.be/ipr/eng/cases/2001-04-19.html> (accessed 02-06-2009); Austria Supreme Court 22 October 2002 [1 Ob 77/01g] (gasoline and gas oil case) Available at: <http://cisgw3.law.pace.edu/cases/011022a3.html> (accessed 31-07-2009).

an international sale transaction complicates the matter even further. Thus, this study is of the view that if the incorporation of INCOTERMS was to result in the exclusion of the CISG where the latter is the governing law, it would have a considerable negative impact on the economic effectiveness of a contract, and would also not reflect the real intention of the parties to the contract when they decide to make use of trade terms. In this regard, it is important to emphasise that for the parties, it is more important, and the purpose is to regulate aspects regarding delivery, passing of risk and ancillary obligations in respect of trade usage, and not to exclude the CISG as the governing law of the contract.

Furthermore, and in contrast to the abovementioned view, another opinion is that the INCOTERMS do not displace the CISG rules on delivery and risk in toto, but only to a limited extent.⁹⁷ This opinion argues that the CISG and INCOTERMS complement each other.⁹⁸ It is contended that the interpretation of Article 6 of the CISG, which provides the possibility to “derogate from” or “vary the effect”, should be viewed as implying differences between the INCOTERMS and CISG risk rules. Therefore, it advocates that the CISG rule should be deviated from, modified, altered or supplemented by the INCOTERMS.⁹⁹ This means that the

⁹⁷ See Erauw “Observations on Passing of Risk” in *The Draft UNCITRAL Digest and Beyond* 301 states that trade terms “partly derogate from the CISG” and that they “opt out of some aspects of the rules on the passing of risk.” Perales Viscasillas “Comments on the Draft Digest” in *The Draft UNCITRAL Digest and Beyond* 287 is of the view that “the use of trade terms does not entirely displace the CISG rules on the passing of risk.” See also Bridge “A Law for International Sales” 2007 (37) *Hong Kong LJ* 17-38, for his view that a contractual reference to a trade term does not present a clear enough indication of an intention to exclude the CISG rules. Moreover, because most contracts contain a trade term, such exclusion would make the “extensive treatment of risk in the CISG in five articles a rather pointless business if the rules in question are to be applied only in a small minority of cases.” For a critical analysis of Bridge’s view, see Singh & Leisinger “A Law for International Sale of Goods: A Reply to Michael Bridge” 2008 (20) *Pace Int’l L Rev* 161-188. They indicate that according to the Secretariat Commentary, the drafters were aware of the fact that, in practice, the risk rules would be applicable in very few cases. It is therefore their opinion that trade terms replace the Convention’s rules on risk.

⁹⁸ Schlechtriem “Article 6” in *Schlechtriem-Schwenzer Commentary* para 12 makes it clear that “a reference to INCOTERMS does not exclude but merely supplements the Convention.” According to Honnold *Uniform Law* paragraph 76, the Convention and trade terms have complementary roles; “each performs a function that cannot be well served by the other.” See also Perales Viscasillas “Comments on the Draft Digest” in *The Draft UNCITRAL Digest and Beyond* 288-289, who is of the view that the CISG may operate as “an aid to the interpretation of the agreed term or to fill gaps in the INCOTERMS, particularly where there is no express reference in the parties’ agreement to the application of the ICC text.” Bridge “The Transfer of Risk” in *Sharing International Commercial Law across National Boundaries* 87-88 is also of the opinion that it will be “safer” if the CISG rules were still to apply when a trade term is used “so that they do least damage to established commercial expectations”. See, however, Goodfriend 1984 (22) *Colum J Trans L n* 14, who argues that trade terms constitute trade usage, which is to prevail over the CISG’s rules. See also 7 2 2 *supra* for a discussion on trade usage and the CISG and 6 5 3 *supra* for the inconsistency between traditional trade terms and the CISG risk rules.

⁹⁹ See Enderlein & Maskow *Uniform Sales Law* 257 are of the view that the “broader angle of vision” of the CISG rules on risk encourages a supplementary and complementary function for the INCOTERMS. According to Erauw “Observations on Passing of Risk” in *The Draft UNCITRAL*

rule does not have to be excluded in whole, but its effects can be modified or supplemented in as much as the trade terms may be inconsistent with the CISG rule.¹⁰⁰

In the researcher's view, the INCOTERMS and CISG risk rule are complementary and can operate together in order to fill gaps. Therefore, the incorporation of INCOTERMS into the contract does not mean the substitution of the CISG in total. The INCOTERMS only displace the risk rules in part, and for the rest, the INCOTERMS and CISG rule will function together. Besides, the ability of the INCOTERMS and CISG to supplement each other is not only limited to the issue of risk. It has been mentioned in this study that INCOTERMS fail to regulate all aspects of a sales contract - they are more focused on the primary obligation of the parties linked to delivery and risk, and do not, for instance, provide rules for the formation or breach of a contract. Thus, in order for the INCOTERMS to be effective, they must be supplemented either by parties' agreement or by the governing law of the contract.¹⁰¹

To illustrate this interaction between the INCOTERMS and the CISG, one can refer to the case of a breach of contract. Indeed, although the INCOTERMS do not provide for breach of contract,¹⁰² there is an unavoidable interrelationship between the trade terms and certain provisions of the CISG. Under the INCOTERMS, a delivery which does not take place at the agreed time and place will normally constitute a breach of the contract, by considering the parties have not stipulated for such an event, one will extent and considering that it will be the remedies by the governing law which will regulate that part.¹⁰³ In the same vein, one can look at the case of the delivery of non-conforming goods. It may appear that the risk passes

Digest and Beyond 293, the CISG provisions complement and work in tandem with the INCOTERMS. Since the INCOTERMS do not constitute a code of law, Grewal 1991 (14) *Loy LA Int'l & Comp LJ* 105-106 is of the opinion that the Convention provides "a body of law within the framework of which trade terms can apply." Berman & Ladd 1988 (21) *Cornell Int'l LJ* 434 agree that INCOTERMS do not solve all problems pertaining to the passing of risk. They are contract terms and their meaning therefore depends on interpretation in the light of some body of law. This means that they are to be supplemented by the governing law of the contract. For similar comments, see also Piltz INCOTERMS and the UN Convention Parts 1, IV & V. 122 Schlechtriem "Article 6" in Schlechtriem-Schwenzer *Commentary* paragraph 12; Honnold *Uniform Law* paragraph 74-76. See, however, Bonell "Article 6" in Bianca-Bonell *Commentary* paragraph 2 1-2 3 for a more restrictive view. He only refers to total and partial exclusion of the Convention. However, it should be noted that Bonell does not refer to INCOTERMS in his discussion of art 6. The only reference to INCOTERMS is in his discussion of arts 8(2) and 9(1) CISG, where they are referred to in the context of implied terms.

¹⁰⁰ See Bridge "The Transfer of Risk" in *Sharing International Commercial Law across National Boundaries* 90, who argues that an implied agreement on INCOTERMS results in an implied modification of art 67(1) CISG "in so far as Article 67(1) CISG is inconsistent with INCOTERMS."

¹⁰¹ Gabriel 2001 (5) *VJ* n 3; *Texful Textile Ltd v Cotton Express VJ Textile Inc* 891 F Supp 1381 (CD Cal 1985). Piltz INCOTERMS and the UN Convention Part I; Dalhuisen Dalhuisen on *International Commercial, Financial and Trade Law* 114.

¹⁰² See Ramberg ICC Guide to INCOTERMS 2000 12. The B5 clauses of INCOTERMS, however, provide for the premature passing of risk in certain cases of breach.

¹⁰³ Honnold Honnold *Uniform Law* 171.

to the buyer in accordance with the trade terms, but that the seller infringed upon his obligation to deliver conforming goods. In this regard, one can note that there is an interrelationship between non-conformity and the passing of risk in so far as Article 36 stipulates that conformity must be established at the moment that the risk passes from the seller to the buyer.¹⁰⁴

However, even though the A1 clause of INCOTERMS entails the buyer delivering goods that are “in conformity with the contract of sale and any other evidence of conformity which may be required by the contract”, it is worth noting that no mention is made about alleviation for the buyer if he does not fulfill his obligation. Furthermore, the A7 clause of INCOTERMS stipulates that the failure by the seller to give sufficient notice to the buyer that the goods have been delivered in respect of A4 constitutes a breach of contract by the seller. In this case, one can again note that there is no specific stipulation in INCOTERMS regarding the effects of such failure. In the absence of any contractual provision regarding a breach by the seller, it is logical that such breach is dealt with in respect of the CISG’s remedies for breach, as described in Articles 45-52 and 74-77 of the CISG.

In the same vein, there are situations where the INCOTERMS can supplement the CISG risk rule. There are some issues ruled by the INCOTERMS that the CISG fails to regulate. For instance, under the INCOTERMS, risk normally passes on delivery, as indicated by the A4 clauses.¹⁰⁵ The B5 clauses, however, establish that the risk can be transferred from the seller to the buyer even before the seller has fulfilled his delivery obligations.¹⁰⁶ This may happen when the buyer fails to perform as he should in respect of the B7 clause, by assisting the seller in delivering the goods, or where the buyer fails to take delivery of the goods in terms of clause B5 of the INCOTERMS. In addition, in the case of the D-terms, it is provided that “the buyer should clear the goods for import within an agreed time to enable the seller to embark on the carriage of the goods”.¹⁰⁷ In the case of the DDU and DDP terms, clause B5 provides that “the buyer should carry any additional risks and costs connected to such failure”. Under the F-terms, for instance, it is stipulated that “the buyer should nominate the

¹⁰⁴ See CLOUT Case No 253 (Appellate Court Lugano Cantone del Ticino Switzerland 15 January 1998), available at: <http://cisgw3.law.pace.edu/cases/980115s1.html> (accessed 11-05-2014). In this case, the seller sold cocoa beans, which had to contain a specified amount of fat and a minimum level of acidity, under a CIF contract. Tests conducted after their delivery in Italy revealed that these values were not as certified. The court, however, found that it was impossible to determine whether the goods were already defective when handed over to the carrier, ie when the risk passed to the buyer.

¹⁰⁵ See INCOTERMS 2000 (the official rules) Introduction 9 for a discussion on the concept “delivery” as used by INCOTERMS.

¹⁰⁶ See Ramberg *Guide to INCOTERMS 2000*.

¹⁰⁷ See Clause B2.

carrier and accept the delivery from the carrier as agreed”.¹⁰⁸ According to B5, the buyer must bear all additional risks of loss or damage of the goods if he fails to meet any of these requirements.

Therefore, comparing the INCOTERMS’ provisions to those of the CISG, particularly those governing risks, one may observe that except for the provision in Article 69 (1), which provides for the passing of risk in the event of the buyer’s failure to take delivery,¹⁰⁹ the Convention generally fails to deal with the premature passing of risk. Indeed, the fact that the Convention does not provide carriage instructions in due time leads one to conclude that the CISG fails to deal with the buyer’s default.¹¹⁰ Therefore, by providing for the premature passing of risk, the INCOTERMS may supplement the CISG’s risk, owing to the fact that it is an additional encouragement for the buyer to assist the seller in performing his obligation to ensure the proper and timely delivery of goods.

In addition, the INCOTERMS may also supplement the CISG with regard to documentary sales.¹¹¹ It is important to note that although the CISG enshrines and validates the practice of documentary sales, it does not attempt to define or regulate it. When one scrutinises the CISG articles which govern this issue, one may conclude that the Convention only deals with documentary transactions accidentally. For instance, Article 30 states that “the seller must deliver the goods, hand over any documents relating to the goods and transfer the property in the goods as required by the contract and the Convention”. Similarly, Article 34 stipulates that “the seller has to hand over the documents relating to the goods at the time, place and in the form required by the contract” In light of these articles, it is worth noting that not only

¹⁰⁸ It is important to note that under the C-terms, there is a similar obligation on the part of the buyer if he is entitled to determine the date for shipment of the goods or the port of destination.

¹⁰⁹ See, however, the problems with this rule envisaged by Bridge “The Transfer of Risk” commented by Coetze “in *Sharing International Commercial Law across National Boundaries* 99-101. His criticism relates to uncertainties surrounding the time within which the buyer has to take delivery after having been notified that the goods are placed at his disposal. He argues that art 69(1) is not very clear on this aspect. Firstly, unlike art 69(2), it does not state explicitly that the buyer should be aware that the goods are placed at his disposal. One has to gather this requirement from the second paragraph. The time within which the buyer must respond is a variable time, depending on the circumstances of the case. It is his argument that any variable time defining breach is bound to create problems, especially if it is connected to a rule on the passing of risk. He is of the view that the rule, as it stands at the moment, only benefits the seller’s insurer and is against the policy that risk should follow control. He is, furthermore, of the view that to demand a fundamental breach by the buyer, or to require an art 63 notice, which makes time of the essence, would be more effective in this context. Although Bridge’s arguments are not totally without merit, it must be remembered that the rule in art 69(1) is consistent with the rule in the B5 clauses of INCOTERMS, and therefore confirms general trade practice”.

¹¹⁰ De Vries 1982 (17) *Eur Trans L* 527-528. Enderlein & Maskow *International Sales Law* 277 regard it as “useful if the INCOTERMS were supplemented by the Convention” in cases where the buyer fails to nominate the carrier.

¹¹¹ See, in general, Berman & Ladd 1988 (21) *Cornell Int’l LJ* 425-426; Berman & Kaufmann “The Law of International Commercial Contracts (Lex Mercatoria)” 1978 (19) *Harv Int’l LJ* 221 237-243.

does the Convention not state what the term “documents” includes, but it does also not indicate the consequences of a violation of the seller’s obligation to hand the documents over.

Finally, in the context of sales in transit, it is common practice in the field of international commerce to use the CIF or CFR trade terms, since the Convention does not provide for documentary sales and trade terms in itself. It is therefore clear that INCOTERMS could supplement the CISG’s provisions in this regard.¹¹²

INCOTERMS deals only with issues regarding the obligations of parties towards each other according to incorporated terms, and does not deal with whether or not, in terms of commercial practice, it is either common or prudent for a party to take certain measures, even if he did not have an obligation to do so.

5.3.3. Conformity of goods and guarantee against latent defect

The CISG defines the notion of non-conformity with reference to the quality, quantity and packaging of the delivered goods.¹¹³ The Uniform Acts is an amalgamation of the Cameroon Civil Code and Vienna Convention in this regard. Article 255 of the OHADA repeats the Convention’s provisions, which define conformity to include the notion of hidden defects.¹¹⁴

The obligation of guarantee includes a warranty against eviction and hidden defects. Therefore, Article 260 reproduces the notion of hidden defects, such as provided by the Civil Code. The OHADA law on sales reproduces the byzantine distinctions in which the

¹¹² See Coetzee in its commentary footnote page 315 in “INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk” states that “when INCOTERMS 2000 (the official rules) Introduction 15 points out that the word “afloat” should be added in cases where the goods are sold whilst at sea. Difficulties of interpretation might, however, arise. One possibility would be to maintain the ordinary meaning where risk passes on shipment. In that case, the buyer might assume the consequences of events that occurred before he entered into a contract of sale. The other possibility would be to let risk pass when the contract of sale in transit is concluded. The ICC rules suggest that the meaning would depend on the governing law of the contract. If the Convention is the governing law, this would mean that art 68 CISG will determine the point when risk passes for sales in transit”.

¹¹³ See Article 35 (1) of the CISG

¹¹⁴ See Article 255 of OHADA Uniform Act Book VIII

Cameroonian judge is confronted with domestic law, owing to the duality of action involved in guarantees against hidden defects and the handing over of conforming goods.¹¹⁵

In this regard, the OHADA, Cameroon Civil Code and CISG are agreed on the fact that the seller is responsible for any lack of conformity which occurs at the moment of the transfer of risk to the buyer. The notion of non-conformity in these texts includes physical and legal conformity. Like the Vienna Convention, the Uniform Acts and Cameroon Civil Code emphasise three aspects of conformity, namely subjective conformity, objective conformity, and legal conformity.¹¹⁶

5.3.3.1. Subjective criteria for non-conformity

In terms of physical defects, the three texts require the seller to deliver goods that meet the specifications of the contract in terms of their description, quality, quantity and packaging. These exigencies regarding the conformity of goods are based on the principle of dispute prevention, since these texts indicate the elements on the basis of which physical conformity has to be assessed: quality, quantity, and packaging.¹¹⁷ This is the traditional mode of control with regard to conformity, which aims to protect the buyer, and West and Central African SMEs engaging in international sales must therefore always specify the characteristics of the goods in the contract, in order to be protected by this provision. Given the operating mode of SMEs, this provision is advantageous and protects them.

However, it is important to highlight that the fact that the CISG has opted for a unique concept in this regard is something that can separate both texts. Indeed, although the UAGCL has copied the Vienna Convention on this point, it has muddled its conformity solutions by combining conformity requirements with those of guarantee against hidden defects. In international sales contracts, this situation may have to be addressed. Therefore, this study is of the view that the CISG's provision is clearer and more advantageous for SMEs than those of the other texts.

¹¹⁵ Gomez *la Vente Commerciale* 165.

¹¹⁶ See Article 35 (1) of the CISG and Article 255 of the CISG.

¹¹⁷ See Article 35 (1) of the CISG and Article 255 of the CISG.

5.3.3.2. Objective criteria for non-conformity

All three legal systems require the seller to deliver goods which are fit for their ordinary purposes. However, the difference between them lies in the fact that the CISG has opted for a unique concept in relation to the notions of conformity and latent defects. It is all the same important to determine why the OHADA Law, which has been significantly influenced by the CISG, and which is supposed to improve Cameroonian domestic law, has still indirectly maintained the same distinction. On the other hand, the French law, which has inspired many West and Central African countries' Civil Codes, has abandoned this distinction and espoused the CISG unitary approach, which is obviously more strongly connected with the international sale of goods.¹¹⁸

5.3.3.3. Legal criteria for conformity and guarantees

With regard to legal non-conformity, although the Vienna Convention does not deal with the effects that the contract may have on the sold property or goods, it does not exclude, like the OHADA and Cameroon Civil Code, the case of claims by third parties.¹¹⁹ These texts govern legal conformity, which is considered to be a supplement to the rule of transfer of property, in order to protect the buyer against any third party claim. The three texts advocate that in order for the seller's liability to be established, the claim of a third party must result from this third party's allegation of a right to the goods. This right may be based on a principal right, such as a pawn or warrant, or on a personal right, such as a usage right.

In fact, under the CISG, Cameroonian Civil Code and UAGCL, the seller has the responsibility to deliver goods that are free from any defects in title. The difference between these three legal systems is that the CISG's provisions in relation to third party intellectual property rights and claims do not have an accurate equivalent in Cameroonian or UAGCL law. It is ruled by domestic laws in the context of a general warranty against eviction. In the area of international sales, this situation appears to be unfavourable to the seller, owing to

¹¹⁸ See ICC Arbitration Case No. 6653 of 26 March 1993 *Steel bars case* [<http://cisgw3.law.pace.edu/cases/936653i1.html>] (accessed 10-8-2012). See also See France 15 May 1996 Appellate Court Grenoble *Thermo King v Cigna Insurance case* [<http://cisgw3.law.pace.edu/cases/960515f1.html>] (accessed 10-8-2012). In this case, the court stated that the Vienna Convention disregards the notion of "hidden defects".

¹¹⁹ See Articles 41 to 43 of the CISG and Article 260 of OHADA Law.

the specificity of intellectual rights. It would have been wise, for security purposes, for the UAGCL to adopt a specific rule similar to Article 42 of the CISG.

5.3.4. Consequences of the knowledge of lack of conformity by the seller

The Uniform Acts and Cameroon Civil Code do not deal with this issue,¹²⁰ whereas pursuant to Article 40 of the CISG, the seller cannot prevail himself of the provisions of Articles 38 and 39 when the lack of conformity relies on facts or a situation that he knew about or could not have been unaware of, and which he did not disclose to the buyer.¹²¹ Contrary to the Vienna Convention, the Uniform Acts and Cameroon Civil Code do not provide for a warranty against any claim of a third party based on industrial property or intellectual property.

An analysis of this article seems to indicate that the Vienna Convention protects the seller more than the buyer.¹²² It includes many provisions which tend to protect the seller or exonerate him from liability.¹²³ Once again, based on an assessment of West and Central African SMEs, one can note that many of these enterprises engaging in international trade are buyers, which means that they import more than they export. Therefore, during their transactions, they will have limited protection from the CISG's provisions. In essence, this provision has been tailor-made for large enterprises which manufacture goods, and which are generally in the seller position, rather than the buyer position.

5.3.5. Examination of goods and notice of non-conformity

As far as the examination of goods and notice of non-conformity are concerned, Articles 38 – 39 of the CISG and Article 270 of the Uniform Acts oblige the buyer to examine the goods purchased within as short a period of time as is practicable under the circumstances. When the buyer decides to proceed to the examination of goods, he is required to carry this out with diligence and within a reasonable period of time.¹²⁴ With regard to the examination of

¹²⁰ See Gomez *la Vente Commerciale* 165.

¹²¹ See Article 40 of the CISG.

¹²² See Landgericht Landshut (Germany) 5 April 1995 (sport clothing), CISG-Online 193 (Pace).

¹²³ See Baash-Andersen (2005) (17) *VJ* 341; Garro 2006 (25) *Journal of Law and Commerce* 253.

¹²⁴ See Article 38 of the CISG and Article 270 of the OHADA.

defects, both texts state that the buyer must carry this out “within as short a period as is practicable in the circumstances”, and if he detects any defects during this process, he must give notice to the seller within a reasonable time from the moment he has discovered or ought to have discovered it.¹²⁵

The principle of reasonable time from the moment when the buyer has discovered or ought to have discovered a latent lack of conformity is provided by both texts. They address the question of the buyer’s obligation to examine the goods for a hidden or latent lack of conformity that was not perceivable during the first inspection, by requiring the buyer to give notice of a lack of conformity “within a reasonable time after the buyer discovered or ought to have discovered it”.¹²⁶

The interpretation of “reasonable” depends on the nature of the goods and transaction. Thus, goods with a perishable character involve a much shorter period of time than non-perishable goods.¹²⁷ One can assume that the CISG and OHADA’s drafters wanted to encourage the buyer to act as quickly as possible, in order to enable the seller to take any necessary measures to safeguard his own interests - for instance, to return in timely time against the eventual liable third party, such as its own suppliers or carrier. However, on this point, it is the Vienna Convention which provides case law facilitating the determination and application of this rule.¹²⁸

Nevertheless, both texts diverge on the issue of the period within which notice of lack of conformity should be given. While the CISG has opted for a compromise between short and long time limits according to the specific case, by adopting a two-year limit, the UAGCL has opted to adopt a shorter period of one month or a year, depending on whether the non-conformity is patent or latent. In the view of this study, the short periods for giving notice provided by the UAGCL cannot be favourable for the buyer, especially when this latter is situated in a developing country. Such buyers, because of a lack of use or technical knowledge of certain machinery, are often unable to immediately examine these complex goods. Besides, in the context of the CISG, this concern was raised at the time of the drafting of this provision. The CISG’s two-year limit was considered to be too drastic, especially for so-called developing countries”.¹²⁹ The fear of the CISG’s drafters regarding these provisions

¹²⁵ See CLOUT case No. 251 (Handelsgericht des Kantons Zurich, Switzerland, 30 November 1998).

¹²⁶ See Article 39 (1) of the CISG.

¹²⁷ See CLOUT case No 319 (Bundesgerichtshof, Germany, 3 November 1999).

¹²⁸ See “UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods” A/CN.9/SER.C/DIGEST/CISG/38 of the United Nations Commission on International Trade Law 8 June 2004.

¹²⁹ See Canellas 2005/2006 (25) *JL & Com* 261 262. See also Honnold (ed), “Documentary History of the Uniform Law for International Sales. The Studies, Deliberations, and Decisions that Led

were that “they might act as a booby trap for the unwary not so sophisticated buyer and thus disadvantage parties from these countries”.¹³⁰ This is why the CISG permits the buyer having a reasonable excuse for not giving notice to not lose all remedies for non-conformity, only the right to avoid the contract and damages for loss of profit under the CISG.¹³¹ In addition, the CISG, through Article 44, stipulates that this buyer may still reduce the purchase price. It is nevertheless astonishing that the Uniform Acts of the OHADA, which is more concerned with this issue of the examination and notice provisions, since all its member states are situated in developing countries, does not include such a provision as that in Article 44 of the CISG. Thus, under the UAGCL, the buyer loses all remedies and has to pay the full purchase price, without being able to use his goods, even though this latter has a reasonable excuse for not giving notice. This issue is well illustrated by the case of a German seller (defendant) and a Ugandan buyer. In this case, the buyer, a company based in Kampala (Uganda), initiated legal proceedings at the German Regional Court of Frankfurt in order to obtain reimbursement of the purchase price, as well as of the cost incurred, on the grounds that the shoes delivered by the German seller did not conform to the quality stipulated in the contract. The seller, in his own defence, argued based on Article 39 of the CISG that the plaintiff had failed to give notice of the non-conformity of the goods in sufficient time. Although the buyer had clearly tried to justify his delay in giving notice, arguing that it was impossible for him to examine the goods in Mombassa, owing to the international regulations pertaining to freight and customs, as the containers had been sealed in Germany, the Court all the same found that the notice of lack of conformity had not been given within a reasonable time by the buyer. Therefore, this latter lost his right to rely on the non-conformity of the goods under Article 39 of the CISG. The Court added that “examining the goods more than three weeks after the receipt of the bill of lading, the plaintiff did not meet the condition of article 38 (1) as the non-conformity of the shoes could have been detected without any effort by merely taking a random sample”.¹³²

In this regard, if it is true that it is important for the buyer to inform the seller as quickly as possible of any non-conformity of goods, it is also true that SMEs engaging in international commerce must be very careful with regard to this provision. Particularly in the case of SMEs operating in Cameroon, this means that these enterprises need to improve their communication technology.¹³³ The seller is always overseas, which makes it impossible for

to the 1980 United Nations Conventions with Introductions and Explanations”, Deventer 1989 (cited as: “Documentary History”. 320 para 32 et seq; 345 et seq.

¹³⁰ See Ingeborg Schwenzer in *Regional and Global Unification of Sales Law* 7.

¹³¹ See Honnold (ed), *Documentary History* 130.

¹³² See German 11 April 2005 Landgericht (District Court) Frankfurt (Used shoes case), available at: <http://cisgw3.law.pace.edu/cases/050411g1.html>. (Accessed on 27 November 2015).

¹³³ Bello, Oloua and Ayissi 2012 (2) *British Journal of Management & Economics* 60.

the buyer, after the examination of the goods, and owing to a lack of suitable means of communication, to quickly inform the seller of the lack of conformity. As a result, the buyer may lose his right to get a substitute or claim damages.¹³⁴ In this regard, the case of the German shoe-buyer may support this assertion. In this case, an Italian shoe manufacturer sold shoes to a German buyer, who received only a partial quantity of the goods promised in terms of the contract. On the basis of this partial delivery, the buyer, after making a phone call to the seller to inform him of this, decided to suspend payment until full delivery of the agreed quantities of shoes. The Court held that a partial delivery does not constitute a fundamental breach, and the buyer failed to avoid the contract. In addition, the Court held that the phone call to the seller to ensure prompt delivery of the full quantity of goods did not fix a specific time for performance. Therefore, the buyer did not fulfil the requirements of Article 47(1) of the CISG.¹³⁵ This article clearly indicates that, in an international context, it will be very difficult for the buyer to prove or remedy any inconvenience relating to the lack of conformity by means of communication.

5.4. REMEDIES FOR NON-PERFORMANCE

If the term “remedy” was very familiar to the jurist Anglo-Saxon, it may have appeared strange to the homologous civilist, who usually preferred to use the term “sanction”. The CISG’s drafters therefore preferred to use the term “remedy”, while the OHADA Law preferred to use the term “sanction”. In the context of this study, there is no difference between these two terms. A “remedy”, like a “sanction”, refers to the measures which are taken in cases of any failure of performance by either party. In the framework of this section, the term “remedy” will be used.

With regard to both legislations, the remedies provided for the non-performance of contracts appear to be the same: specific performance, reduction of price, damages and avoidance.

¹³⁴ Pursuant to 38 of the CISG and Article 270 of the OHADA, the buyer must examine the goods within as short a period as is practicable in the circumstances.

¹³⁵ See (German): [cisg-online.ch http://www.cisg-online.ch/cisg/urteile/385.htm](http://www.cisg-online.ch/cisg/urteile/385.htm); Forum des Internationalen Rechts/The International Legal Forum 2 (1977) 161-166; [1996] Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre (IPRspr) No. 145; Unilex database <http://www.unilex.info/case.cfm?pid=1&do=case&id=292&step=FullText>.

5.4.1. Remedy regarding specific performance

In terms of specific performance, whether one is dealing with the Civil Code, OHADA or CISG, it is important to note that this remedy appears to be the first remedy which parties are invited to use, before considering other available remedies, notably damages or avoidance of contract. In doing so, these texts seem to be more in line with the civil law than the common law approach.¹³⁶ These texts place specific performance in the first position, before other available remedies.¹³⁷ On the other hand, in common law jurisdictions, the primary remedy for a breach of contract is the claim for damages, and the common law Court only grants specific performance in exceptional circumstances.¹³⁸ However, in light of Article 28 of the CISG, one may state that the Convention nevertheless seeks to find a balance between common law and civil law, by allowing a court applying the Convention to refuse to enter a judgement for specific performance if they would do so under their own law.¹³⁹ Except for this particularity, the OHADA and CISG texts generally rely on the idea that the Court has to preserve the non-avoidance of a contract before considering termination.¹⁴⁰ This approach is obviously similar to the Cameroonian legal system.

In order to claim specific performance, these texts provide two remedies, namely substitution and reparation, in cases of non-conformity of the goods. Article 46 (2) of the CISG stipulates that the buyer may only require a substitute if the lack of conformity constitutes a fundamental breach.¹⁴¹ However, if this lack of conformity does not constitute a fundamental breach, the buyer may require the seller to repair this lack of conformity.¹⁴² This reparation will then consist of the delivery of a part which had not been delivered originally. In this regard, it is important to highlight a divergence between these texts. Indeed, contrary to the Vienna Convention and the Cameroon Civil Code, where the ability to substitute a good belongs to the buyer, the Uniform Acts provides that the right to obtain a substitute of the goods belongs to the seller. Thus, the onus is on the seller to evaluate the need for a substitution of the goods.¹⁴³ The buyer may not force the seller to perform this act.

¹³⁶ See Magnus, in: Ferrari/Flechtner/Brand, *Draft Digest and Beyond* 325.

¹³⁷ See Article 1184 para. 2, Article 1610 Code Civil (French Civil Code) and Zimmermann *The new German Law of Obligations* 770.

¹³⁸ See Muller-Chen, in: Schlechtriem/Schwenzer, *Commentary Art. 28 paragraph.2*. See also Herman, (2003) 5 *Edinburg Law Review* 7.

¹³⁹ See Article 28 of the CISG.

¹⁴⁰ See Herman, (2003) 5 *Edinburg Law Review* 7.

¹⁴¹ See UNCITRAL, *Digest of Case Law on the CISG* (2008), Art. 46 para. 13.

¹⁴² See Article 46 (3) of the CISG.

¹⁴³ See Article 283 of Book VIII of OHADA.

In fact, according to the Uniform Acts of the OHADA, the buyer can only invoke, within the time limits provided by Articles 258 and 259, the non-conformity of the delivered goods. He cannot, however, compel the seller to substitute the goods. The latter only has the right of information, while the power to suggest a substitution of the goods belongs to the seller, who performs this at his own expense. The OHADA, through its Article 283 and 257, reverses the right to claim specific performance, which may have implications for SMEs, particularly Cameroonian SMEs. Bearing in mind that many Cameroonian SMEs, as shown in Chapter 2 of this study, import more than they export, this means that in many cases, these SMEs are in the buyer position. Therefore, in terms of the OHADA's provisions, West and Central African SMEs will suffer as a result of the non-conformity of goods, even if they have the possibility of immediately remedying the situation. One may therefore question why the Uniform Acts has provided this article, since this provision seems to protect the party at fault more than the party which is the victim.

In the international sales context, the delivery of non-conforming goods always causes great injury to the buyer, as even if the seller must substitute the defective goods or pay damages, this process always takes a long time, given that the seller is overseas. In cases of non-conformity where the seller agrees to substitute the goods, the process will take a long time, since the buyer will have to return the defective goods to the seller before the latter can substitute and resend the goods. Since this transaction is often performed by sea, it may take more than 3 weeks to reach the addressee. Even if the expenses are covered by the seller, it is nevertheless clear that the fact that the buyer will not be able to satisfy all his customers may result in the loss of certain costumers, who will turn to other domestic suppliers.

It is important to note, in matters of international sales, that the risks are enormous when the buyer receives defective goods. It is not the same situation, however, when the seller is located in the same country as the buyer, in which case the substitution will not be difficult and there will not be considerable damages for the buyer. In this study's view, the law will have to be very strict towards the seller, in order to ensure that the delivered goods always comply with contractual stipulations. In this respect, the OHADA attempted to solve this problem by giving the buyer to have these defective goods substituted, at the expense of the seller. Thus, it is clear that the OHADA included this provision in order to avoid the buyer, due to the bad faith or slowness of the seller or carriage, having to sustain great losses. Therefore, one can conclude that the OHADA provision in this respect may be more advantageous for the buyer.

The Vienna Convention brings various restrictions to the possibility for the buyer to require specific performance. In order for the buyer to require such performance from the seller, the buyer must comply with the time limit of notification stipulated in Articles 39 and 43.¹⁴⁴ He must indicate his desire to claim performance within a reasonable period of time from the moment of this denunciation. This buyer must also return the defective goods to the seller. The Vienna Convention provides that this reparation is claimed by the buyer only if it is reasonable under the circumstances.¹⁴⁵ It is clear that the fact that the CISG opens the way for parties to claim specific performance is advantageous for enterprises which are in the buyer position, because they may be certain of recovering their losses. One can note a few differences between the provisions of the CISG and OHADA in this regard, even if some similarities may be observed. However, the difference that is important to highlight here is that both texts address the right to claim specific performance in different ways. Nevertheless, it is important to emphasise that this remedy is rarely used by parties in practice. Instead, parties prefer to rely on avoidance and damages, or only damages.

This provision of the OHADA considerably reduces the buyer's power to claim specific performance, and once again appears to protect the seller.

5.4.2. *The avoidance of contracts*

The avoidance of a contract is a real headache for traders engaging in international commerce. It appears to be a delicate or sensitive remedy, as no other remedy, such as specific performance, price reduction, and damages has the same incisive effect. Regardless of whether it is the seller or the buyer who has breached the contract, it is important to highlight that both incur risks, since the risk of damages, even loss, are always high when the goods are already overseas. In the seller's case, he must either retransport these goods at his own expense or attempt to resell them in the foreign market. However, he often does not know this market well, and this sometimes leads to the declaration of avoidance. It is the same for the buyer who is attempting to breach a contract - the effects may also be fatal for him, especially if he has already resold the goods and now faces claims for damages from his debtor due to non-delivery, lateness of delivery, or violation of other duties. In this regard, one may question whether the different legislations, by providing rules of avoidance, take into account the risks that may be incurred by both seller and buyer.

¹⁴⁴ See Articles 39 and 43 of the CISG.

¹⁴⁵ See Muller-Chen, in: Schlechtriem/Schwenzer, *Commentary*, Art.46 para.39.

5.4.2.1. Requirements for avoidance established by legislation

5.4.2.1.1. *Fundamental breach*

Like the CISG, through Articles 25 and 49, the Uniform Acts also considers the breach of contract in cases of a fundamental breach. Indeed, the CISG grants the remedy of avoidance where the seller or buyer has fundamentally breached the contract.¹⁴⁶ The fundamental breach presents itself as an effect of non-performance of a contractual obligation of the other party, which causes the aggrieved party to lose interest in the contract. Thus, in view of the purpose for which the parties have entered into the contract, a party is allowed to declare the contract avoided if the other party fails to perform his obligation by fault or negligence.

Both texts set up as a requirement for the termination of a contract the existence of serious misconduct by one of the contracting parties. While the CISG uses the term “fundamental breach”.¹⁴⁷ OHADA law prefers to use the term “gross misconduct”.¹⁴⁸ In spite of this difference in choice of terminology choice, “fundamental breach” and “gross misconduct” actually represent the same principle in substance. Indeed, both notions have the criterion of substantial deprivation as a common denominator.¹⁴⁹

Thus, even though both texts require the existence of substantial deprivation to terminate a contract, it is important to note that substantial deprivation is not viewed in the same way. In fact, according to Article 25 of the CISG, the fundamental breach notion deems itself to be comparable with the expectations of the aggrieved party.¹⁵⁰ Therefore, what the CISG takes into account in determining a fundamental breach is not the seriousness of the fault, but the results and effects of this default. A slight fault may cause an important injury, such as the contract’s loss of its “raison d’être”, or the fact that it can no longer achieve its initial purpose.¹⁵¹

¹⁴⁶ See Articles 49 and 64 of the CISG.

¹⁴⁷ See Article 25 of the CISG.

¹⁴⁸ See Article 281 of Book VIII of OHADA.

¹⁴⁹ See EBATA
https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/10367/ebata_rodrigue_2012_memoire.pdf (Last visited 27 November 2015).

¹⁵⁰ See Koch *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods* Review 271.

¹⁵¹ See Koch *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods* Review 271.

Therefore, when the delivered goods do not correspond to any requirement set forth by the buyer in the contract, it relates to a fundamental breach. In the same vein, however, if a Cameroonian buyer ordered a particular machine from a German seller, and a technical fault, although slight, renders this machine unable to be used by the buyer as he intended, this latter may obtain an avoidance of contract. The CISG seeks to establish the extent to which the breach of contract infringes upon the economic purpose envisaged by the contract.

In terms of the OHADA law, in contrast to the criterion of substantial deprivation, the assessment of injury relies on the aggrieved party's own consideration. The OHADA law thus proceeds by value inversion. Indeed, it is not what the aggrieved party had a legitimate right to expect from the transaction which will be taken into consideration, but rather his own expectations. The creditor's interests here will be established beyond the contract.¹⁵² Thus, the reason for which it has traded with its partner will rely on personal elements exceeding the framework of the Convention. Obviously, the objective element will always be present, but it will be diminished.

The Article 281 criteria provides the basis for a new methodology to assess the seriousness of non-performance. This article has a moralising effect on the parties, owing to the fact that it requires both the judge and the parties to prove serious misconduct based on the global context.

By dealing with the avoidance of a contract in an extra-judiciary way, the CISG differs from the OHADA system, in which it is up to the judge to pronounce avoidance. It is true that the parties, when shaping their contract, may include an express avoidance clause in the contract of sale in the OHADA area. Thus, the Uniform Acts privileges the intervention of the judge to avoid a contract. In terms of the Uniform Acts, a party may request the appropriate Court, in the case of a failure by the other party to perform any of its obligations, to compel the other party to perform its obligation,¹⁵³ or to declare the avoidance of the contract if, before the date of performance of the contract, it is obvious that the other party will commit a fundamental breach¹⁵⁴.

¹⁵² Ziegel www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html,65. (Accessed on 27 November 2015).

¹⁵³ See Article 245 of the OHADA.

¹⁵⁴ See Article 246 of the OHADA.

5.4.2.1.2. Unilateral termination

If the failure by the seller or buyer to perform any of his obligations constitutes a fundamental breach within the additional period of time fixed, the buyer¹⁵⁵ or seller¹⁵⁶ may declare the contract to be avoided. Article 71 of the CISG gives a right to the parties to suspend the performance of an obligation if, after the conclusion of the contract, it becomes apparent that one party will not perform a substantial part of its obligations.¹⁵⁷

Like the OHADA, the CISG includes the right to avoid a contract when there has been a fundamental breach or when the additional period of time has been granted to the buyer to pay or to take delivery.

Firstly, one of the elements which separates these legislations relates to the means for terminating a contract. While the Cameroonian domestic law, through its article 1184, views the judge as the only authority which may declare a termination of the contract, the OHADA and CISG also include the judge, but at a different stage. In the Cameroonian Civil Code, the submission of the case to the judge by the creditor is a prerequisite for all contract terminations. The aggrieved party cannot take his own initiative to terminate a contract, without the authorisation of the judge. With regard to the OHADA and CISG, the creditor plays an active role and will not have to wait for the judge's decision before deciding what measures he wishes to take against the debtor. Thus, the Cameroonian buyer who received perishable goods too late from his supplier will have the right to terminate the contract. This desire for termination should nevertheless be submitted to the judge by the party who takes the initiative in this regard.

One can observe here that the judge always intervenes, but in comparison to the Cameroonian Civil Code, the moment of his intervention with regard to unilateral termination differs. In other words, there is no relation to control *a priori*, whereas in the OHADA and CISG, the party who takes the initiative submits the case to the judge as a "fait accompli", and the control of the judge is exerted *a posteriori*. Therefore, contrary to paragraph 3 of Article 1184 of the Civil Code, which establishes judiciary termination as a principle, the OHADA and CISG grant unilateral termination to a creditor, while conferring upon the judge the power of control over all eventual abuses of the parties. One may therefore conclude that unilateral termination has a subsidiary character, as it is a process which weakens the

¹⁵⁵ See Article 49 of the CISG.

¹⁵⁶ See Article 64 of the CISG.

¹⁵⁷ See Carter *Suspending Contract Performance for Breach* 485.

contract but remains surrounded by the law. It is understandable that the OHADA and CISG drafters wanted to consider the distress which a creditor may experience when his expectations of the contract are not met. It is therefore normal that the creditor takes his own initiative to terminate a contract.

This OHADA and CISG solution is comprehensible and according to the requirements of the international market, it is clear that it will not be beneficial for enterprises such as African SMEs. Based on their characteristics and operating mode, the prerequisite of taking the matter before the Court will weaken SMEs, since they are not structured companies, as well as slowing down their activities, since the international market demands rapidity and promptitude in the performance of contrast. Thus, the Cameroonian buyer who has received perishable goods too late from his French seller has the right to envisage terminating the contract. In such a case, this will be motivated by the character of perishable goods, which constitutes a fundamental breach.

5.4.2.1.3. *Notice*

Article 26 of the CISG provides that the avoidance of a contract is effective only if notice is given to the other party. In terms of this article, the CISG does not permit automatic termination of the contract. It is clear that even though the CISG entitles the creditor to declare the contract avoided, it nevertheless specifies that this creditor is always required to inform the debtor that he wishes to exercise his right of avoidance. Therefore, a creditor who requests the avoidance of the contract must, as a precondition, declare the contract to be avoided by a notice to the debtor, so that the latter does not have any doubts regarding the intentions of the requesting party.¹⁵⁸ This CISG provision is quite similar to the OHADA provision which, through its Article 281, requires notice to be given before avoiding the contract. Like the CISG, the OHADA does not stipulate a legal time period for the creditor to give notice. Both legislations refer to a reasonable time period, and indicate that the precise length depends on the circumstances of each case. Therefore, both legislations aim to give a broad power of appreciation to the Court.

¹⁵⁸ See Article 26, Germany 22 July 2004 Appellate Court Dusseldorf, abstract available at: <http://cisgw3.law.pace.edu/cases/040722g1.html> (seller denied avoidance for lack of notice) in contrast, see China 8 April 1999, CIETAC Arbitration proceeding, available at: <http://cisgw3.law.pace.edu/cases/990408c1.html> (seller properly declared avoidance based on notice).

Moreover, the CISG and OHADA have adopted a process of free communication. There are no stipulations regarding the form of the notice, as long as the information is conveyed to the offeree. Thus, the notice can be given orally, in writing, or electronically. Neither of the legislations have included any specific content requirements. It is important to note that both texts have established a two-tiered notice structure, which distinguishes between a notice of non-conformity and a notice of avoidance. However, both texts clearly indicate that the notice of avoidance, under Article 26, must be clear and unequivocal. The aggrieved party must clearly state that not only has he a legitimate complaint about the debtor, but also that he intends to avoid the contract.

5.4.3. Damages

Any non-performance of some obligation by one of the parties, which causes injury to the other party, is susceptible to the granting of damages to the aggrieved party by means of pecuniary compensation. This provision is the same in the Vienna Convention and the OHADA.¹⁵⁹ This remedy is the most practised one in international commerce, since it is open for any breach of contract, whatever its nature or seriousness. In this regard, the right for the creditor to claim damages is regardless of the usage of other remedies at its disposal, notably specific performance or the avoidance of the contract.¹⁶⁰

With regard to the general principles of damages, the CISG, through its Article 74, embodies two important principles, namely the principle of full compensation, and contemplation rules. The Uniform Acts and Cameroonian Civil Code also embody the principles of full compensation and contemplation rule. Indeed, the principle of full compensation, as mentioned in the previous chapter, means that the aggrieved party must recover a sum equal to his loss, including loss of profit, but the awarding of damages must not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.

This principle of full compensation is awarded to both the buyer and the seller. The CISG and OHADA, as well as the Cameroonian Civil Code, grants damages to the buyer in cases where the latter has proceeded to the substitution of the goods, owing to the fact that the seller has failed to deliver conforming goods, such as stipulated in the contract. It relates to

¹⁵⁹ See Article 74 of the CISG and Articles 291 to 293 of Book VIII of OHADA.

compensation for the expenses incurred by the unsatisfied creditor, due to the fault of his debtor. In this case, an owner of a Cameroonian SME may, due to the non-performance of his contracting partner, take the initiative of purchasing a substitute for the goods or reselling the goods to recover the costs he has incurred.

The purpose of the CISG, OHADA and Cameroonian Civil Code is to protect and reward a pugnacious and reactive creditor for his efforts to obtain somewhere else, what he has a right to expect from his original partnership. The purpose of this provision is justified by the "state of necessity". Therefore, the damages awarded to the buyer in the case of the purchase of substitute goods following the seller's delivery of defective goods will be equal to the difference between the contract price and the price for replacement transactions, as long as this claim process is initiated within a reasonable time and in a reasonable manner.

However, the positions of the OHADA and CISG mark a departure from the Cameroonian Civil Code, in its Article 1144. Indeed, while the Uniform Acts and the CISG are more liberal in allowing the creditor to take any initiative in order to substitute a good, the Cameroonian Civil Code requires the creditor, before proceeding to any purchase of a substitute, to obtain judiciary authorisation and, if necessary, to give notice to the debtor, while the CISG only requires the aggrieved party who claims damages based on the substitute purchase to first avoid the contract, i.e give notice to the other party in case of a fundamental breach. Indeed, one may think that both the OHADA and CISG wish to free themselves from all formalism and give free reign to the creditor. This measure may be very advantageous for West and Central African SMEs, whether they are in a seller or buyer position, as it enables them to avoid substantial negative effects. Moreover, given that the Cameroonian legal system is characterised by slowness, this requirement for the seller to go before the judge will result in the loss of time.

However, it is important to highlight that this provision may appear to be dangerous when the debtor has a valid defence for this non-performance. In this case, the creditor will fail to claim damages. The debtor, for instance, may present a liability exemption, showing that he is not responsible for the non-delivery, or even prove that the creditor has failed in his obligation to mitigate expenses. However, Article 79 of the CISG requires the seller to notify the buyer of the exemption. Thus, SMEs must be very careful, since the substitution purchase of goods before approaching the Court does not always assure them of receiving full payment.

In addition, the fact that both legislations, namely the OHADA and CISG, allow the creditor to take any possible measures to replace an item, even before the pronouncement of

termination of the contract by the judge, is surely relevant and justified by the “state of necessity” and creditor’s protection, since this enables him to reduce the loss by the judge pronouncing the termination of the contract and then awarding him damages. However, it is also important to note that the creditor also faces risks, because not only does he often not know precisely when the contract will be avoided, but it may also happen that the judge does not pronounce the termination in his favour. Perhaps in order to avoid this risk, the Cameroonian Civil Code has required the creditor to first obtain the authorisation of the judge before proceeding to the purchase of a substitution. Thus, Cameroonian SMEs will be sure to recover damages as soon as the Court has taken a decision.

It is worth noting that in the international context, where the parties are distant from each other, this provision will be irrelevant, and may therefore have a negative effect on enterprises, especially SMEs, since the requirement to give notice and take the debtor to court will obviously take a long time. Even if the creditor can wait, it is unlikely that his creditors will do so, as the market requires quickness, respect for agreed dates, and reliability. Therefore, it will be better to give the creditor an opportunity to fix the debtor’s fault himself, since this will be like “killing two birds with one stone”, i.e. not only will it maintain the reliability of his creditor, but he will also be able to return to his debtor and make him pay for his fault. The OHADA and CISG provisions in this regard may therefore be suitable for West and Central African SMEs.

With regard to the contemplation rule, one can note that the CISG provides, in the second sentence of Article 74, that only foreseeable losses are recoverable. One may observe that the approach of the CISG, OHADA and Civil Code regarding the notion of foreseeability is virtually the same. All these legal instrument purpose

The CISG provides two easy methods to calculate damages. The first is calculation according to a cover transaction¹⁶¹ and the second is calculation according to the market price.¹⁶² In contrast, the AUDCG only allows for the calculation of damages according to a concrete cover transaction.¹⁶³

With regard to the method of calculation of these damages, one may note that this matter is governed by Articles 75 and 76 of the CISG. Both articles provide the aggrieved party with an alternative method for assessing damages. Article 75 provides a method for calculating damages in cases where the contract is avoided by the aggrieved party and the latter has proceeded to a substitute transaction Article 76 applies when the aggrieved party has

¹⁶¹ See Article 75 of the CISG.

¹⁶² See Article 76 of the CISG.

¹⁶³ See Article 292 (2) of the OHADA Uniform Act.

avoided the contract without entering into a substitute transaction. Therefore, one can note that the purpose of Articles 75 and 76 is to supplement Article 74. The claiming of damages under Article 74 requires this aggrieved party to prove with a specified level of certainty that it suffered a loss, and this may necessitate, as stated by Schlechtriem, that the latter “open its book means... i.e. disclose its internal calculation, its customary and other business connections”.¹⁶⁴ On the other hand, Articles 75 and 76 do not require such disclosures.

It is important, however, to highlight that this recovery of damages under Articles 75 and 76 should not provide the aggrieved party with a windfall. It will therefore not place the aggrieved party in a better position than it would have been if the contract had been performed.

Article 75 of the CISG provides that according to the circumstances under which the buyer has bought the goods in substitution or the seller has resold the goods, an aggrieved party “may recover the difference between the contract price and the price in the substitute transaction as well as and further damages recoverable under Article 74”. This article considers the contract price as being the price fixed in the contract or the price determined by Article 55 of the CISG. This provision seems to be fair to the parties, because it allows the aggrieved party to be compensated and recover the exact amount of its loss.

One can note that the OHADA, through Articles 292 and 296, and the Cameroon Civil Code, in Article 1149, pursue the same objective as Article 75 of the CISG. It is all the same important to specify that even though all three tools define the criteria for awarding damages, only the CISG has clearly set forth the formula to calculate this damage. The OHADA and Cameroonian Civil Code have integrated this into the principle of full compensation, by giving the judge latitude to determine the damage in different cases. This may appear to be dangerous, however, since the discretionary power of the judge may sometimes be excessive and inaccurate. As highlighted in chapter 2 of this study, the Cameroonian legal system is susceptible to corruption, it will be better for the parties to be familiar with the criteria for calculation of damages, instead of leaving this to the judge’s discretion.

The CISG goes even further by providing, through its Article 76, another alternative for the aggrieved party to calculate damages, even if the latter has not met the requirements under Article 75. Article 76 requires that the contract must explicitly or implicitly fix the price of the goods, contrary to Article 75, which allows the contract price to be fixed under Article 55. Article 76 provides for abstract calculation, specifying the fact that the current price does not

¹⁶⁴ See Schlechtriem <http://www.cisg-online.ch/cisg/FS%20Hellner.pdf> (Last visited 28 November 2015); see also CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74 (Spring 2006).

mean that there will be an official or unofficial market quotation for the goods in question. Thus, determining a current price requires an objective basis for establishing the value of the goods, and is not possible when the goods' value is based on subjective needs.¹⁶⁵

The duty to mitigate damages is provided and embodied by both texts.¹⁶⁶ This is very important, particularly in the international business environment. However, the difference between both texts is that the duty to mitigate damages in the OHADA only applies in cases of a fundamental breach, whereas in the CISG, whether a breach is fundamental or not, the mitigation of damages applies only to the remedy of avoidance.¹⁶⁷ Article 77 of the CISG and Article 266 of Uniform Acts give the aggrieved party a mandatory obligation to mitigate its loss, including loss of profit, which results from a breach, by taking such measures as are reasonable under the circumstances. The fact that the

CONCLUSION

Despite the fact that there are some differences in terms of some of the concrete rules between these texts, this study has noted that there are no contradictions between them regarding the performance of contracts. Both systems are complementary. Moreover, the OHADA's drafters considered the CISG as an important source of inspiration when they drafted the new OHADA Law relating to general commerce, especially with regard to the rights and obligations of the seller and buyer. The CISG's contributions to Book VIII of the OHADA Law are therefore very evident. Thus, it has been noted that although the OHADA provisions concerning the transfer of property of goods are based on the CISG's provisions in this regard, the Uniform Acts did not exclude, as the CISG did, the notion of the effect of transfer of property. It has been demonstrated that the fact that the CISG has excluded this notion not only considerably undermines its success in terms of uniformity, but also exposes the parties, especially the buyer, to undesirable surprises during the performance of the contract. With regard to the passing of risk, this study has shown that the OHADA provisions

¹⁶⁵ See Arbitral Award, ICC 8740 (*Russian coal case*), 1 October 1996, CISG-Online.ch 1294. The Comment to the UNIDROIT Principles Article 7.4.6 explains that "current price" is the price determined in comparison with the price that is generally charged for the same or similar goods or services. Evidence of the current price may be obtained from professional organizations and chambers of commerce, among other sources. See Official Comment to UNIDROIT Principles art. 7.4.6 ¶ 2. Although the PECL provides for the recovery of damages equal to the difference between the contract price and current price, it does not define this term in the text or in the comments and notes.

¹⁶⁶ See Article 77 of the CISG and Article 293 of Book VIII of the OHADA.

¹⁶⁷ See Article 77 of the CISG and Article 293 of Book VIII of the OHADA.

have simply copied the CISG's provisions, without even verifying if these provisions will enable African enterprises to achieve growth in the international commercial environment. In terms of non-conformity, it has been noted that although the Vienna Convention does not deal with the effects that the contract may have on the sold property, it is not silent, like the OHADA, on claims of third parties. This study has revealed that, contrary to the Uniform Acts, the CISG includes the warranty against any claim of a third party based on industrial or intellectual property.

Lastly, with regard to remedies, this study has found that in general, the remedies provided in both texts are similar, namely specific performance, damages, termination of contracts, and price rebate. Thus, it has been shown that both texts aim to ensure contractual economy, by ensuring that their rules optimise the economic utility of contracts. The approach of both texts concerning performance expresses itself in the dualist approach of each remedy. On the one hand, each remedy is provided to protect the creditor's interests, and on the other hand, in order to ensure that its application does not place the debtor in a critical situation. The game of choice is no longer only in the hands of the creditor.

Chapter Six.

GENERAL CONCLUSION AND RECOMMENDATIONS

6.1. GENERAL STATEMENT AND THE PURPOSE OF STUDY

6.1.1. Statement with regard to SMEs and their internationalisation

The purpose of this study was to examine both the CISG and OHADA legislations, in order to determine which one would be best suited to the unique features of SMEs in West and Central Africa, which are engaging in international trade. Since SMEs are the main topic of this study, it was important to analyse this subject by studying the role, importance and operating mode of SMEs. In doing so, it was established that many countries in the world define SMEs based on quantitative criteria.¹⁶⁸ It emerged from these definitions that the number of employees and turnover rates are the fundamental criteria for defining SMEs. Nevertheless, this study has noted that these criteria are insufficient to fully define SMEs, hence qualitative criteria that define the characteristics of these SMEs were also examined.¹⁶⁹ It was emphasised that SMEs are characterised by centralised management, low levels of specialisation, simple, informal internal and external information systems, and intuitive, implicit and short-term strategies.

This study has also shown the importance of these SMEs by highlighting that they are the engine of economic growth, and are essential for a competitive and efficient market. Furthermore, in spite of the constrained environment in which they operate, which is characterised by corruption, inadequate managerial and entrepreneurial skills, lack of information and communication technologies, a hostile regulatory environment, and a lack of marketing skills and market knowledge, SMEs have a very important role to play in economic growth and poverty alleviation.¹⁷⁰

¹⁶⁸ See Chapter 2 Section 2.2 for definitions of SMEs by different legislations in the world.

¹⁶⁹ See Chapter 2 Section 2.3.

¹⁷⁰ See Chapter 2 Section 2.5.

The study of their operating mode and internationalisation was carried out by firstly examining different approaches to the mode of internationalisation, namely the stages approach, network approach, innovation model, economic approach, and resources and competences approach. The examination of these different approaches showed that each one, although explaining the best way for enterprises to enter the foreign market, also has a few weaknesses. In terms of the internationalisation process of Cameroonian SMEs, this study has shown that this is achieved mainly by indirect exportation, direct exportation, partnerships or joint ventures, and direct investment.¹⁷¹

6.1.2. Remaining gaps to be filled by SMEs and proposals

It is worth noting that nowadays, the trend shows that while the majority of SMEs can only operate in the local market, a number of them wish to access foreign markets, in order to ensure their survival.¹⁷² It appears that the commitment decision of these SMEs depends on several criteria. The U-model indicates that an enterprise should seek to know the market well, through gradual learning, in order to be able to take a series of incremental decisions based on this learning.

Thus, whatever mode of internationalisation is used by these SMEs, namely direct exportation, indirect exportation, joint ventures or partnerships, or direct investment, it is important to recognise that the business environment of each foreign market is defined by its own configuration of regulatory, administrative and cultural dimensions, as well as policies, which poses a tremendous challenge to the SMEs exporter, investor or future network partner, and this challenge involves both complexity and risk dimensions, for which exporting SMEs are generally ill-prepared, especially those in West and Central Africa. This is because these SMEs, as the study has shown, are less well-resourced than large firms for meeting globalisation challenges.¹⁷³

Nevertheless, this study is of the view that by reducing the various impediments, there will be no reason why SMEs cannot make a significant contribution beyond their domestic borders. There are a few examples that clearly show that small firms can now successfully operate

¹⁷¹ See Section 2.6 of Chapter 2.

¹⁷² See OECD (2009), "Top Barriers and Drivers to SMEs Internationalisation", Report by the OECD Working Party on SMEs and Entrepreneurship, OECD12–15.

¹⁷³ See Yong Cao, Hartung and Forrest *International Journal of Business and Management* 23-45.

internationally.¹⁷⁴ This success is based on improvement of factors such as technology for communication and management; better awareness and education of managers; reduction of language barriers (English as lingua franca in much of the world, etc.), and knowledge of different laws.¹⁷⁵

6.1.3. Statement with regard to competition and in legislations between state laws and proposals

With regard to this last criterion, namely the competition and differences in legislations between state laws, this study sought to examine the OHADA and CISG, in order to determine which one would be most appropriate for those SMEs operating in West and Central Africa. In doing so, the researcher also analysed the Cameroonian legal system, since the study focused specifically on SMEs in Cameroon. The study of the Cameroonian legal system has shown that four main periods in the history of Cameroon have contributed to shaping its legal framework.¹⁷⁶ In this regard, the fourth Cameroonian period was marked by the introduction and implementation of the OHADA, which was a great task, especially in the Anglophone part of Cameroon. Anglophone Cameroon levelled strong criticism regarding the implementation of the OHADA, particularly during the early stages of the harmonisation process. The researcher, with regard to these problems, which impede the implementation of the OHADA in Anglophone Cameroon, recommends the following:

Firstly, with regard to constitutional problems, it is clear that the fact that French is the unique working language of the OHADA is “regrettable, a mistake, an error and oversight,”¹⁷⁷ and is obviously a weakness of this system. However, in the view of this study, it was only the way to proceed when the OHADA was introduced 18 years ago. It would have been too laborious, tedious and costly to establish the OHADA as a bilingual system of business law. However, given that the OHADA is now recognised as a great success for Africa,¹⁷⁸ the time has come for this regional instrument to mellow into a genuinely bilingual or multilingual system of business law, in order to bring about more stability, prosperity and peace throughout

¹⁷⁴ See Wignaraja (2003) Promoting SME exports from developing countries. Report prepared for OECD, accessed on 31 May 2007 from: [//www.oecd.org/dataoecd/12/54/20167784.pdf](http://www.oecd.org/dataoecd/12/54/20167784.pdf).

¹⁷⁵ Wignaraja (2003) Promoting SME exports from developing countries. Report prepared for OECD, accessed on 31 May 2007 from: [//www.oecd.org/dataoecd/12/54/20167784.pdf](http://www.oecd.org/dataoecd/12/54/20167784.pdf).

¹⁷⁶ See Chapter 3 Section 3.2.

¹⁷⁷ See Idrissa Kere Director of Legal Affairs of the Permanent Secretariat. Representative of the Permanent Secretariat at the OHADA Seminar held in Buea in September 2003.

¹⁷⁸ See Mouloul in *Understanding*.

Africa.¹⁷⁹ In this regard, the best way will be to amend the infamous Article 42 of the treaty to incorporate at least English, in addition to French, as the working language of the OHADA. Moreover, the English versions of the U.A.s must have the same official value as the French versions, since it is the purpose of the OHADA uniform laws to encourage international business people to invest in member states. It has been demonstrated that English is an important language of business throughout the world, and an English translation would therefore undeniably contribute to the Treaty's stated objectives of encouraging the foreign investment and commitment of many Anglophone countries.¹⁸⁰

With regard to the problem of transfer of sovereignty, this study suggests that the composition of the Council of Ministers, which is considered to be a supranational body which has adopted the OHADA uniform legislation, is modified. This Council should be composed of at least two parliaments from each member state and a Minister of Justice from each member state. Preferably, at least three representatives from each country having the power to legislate on matters governing business obligations should be incorporated into the Council of Ministers, since the member states of the OHADA have different authorities in charge of enacting laws governing business.¹⁸¹ In Cameroon, for instance, this power belongs to the parliament, while in Togo or Mali the situation is different.¹⁸²

Furthermore, in order to boost national adherence to the OHADA, donor assistance should be encouraged, in order to enhance the participatory capacity of national lawyers and advisers.¹⁸³ This will help to involve national lawyers in the drafting of Uniform Acts, since the success of legal reform initiatives has always depended on the full participation of local lawyers and stakeholders.

This study examined the applicability of both texts. It emerged from this examination that although many member states of the OHADA have not yet signed the Convention, they have not been spared from the application of the CISG. In other words, the CISG may find its application in the OHADA space by the judge applying the private international law rule of the forum, or through the choice of the parties.

In addition, this study has established that the scope and sphere of applicability of both texts differ in some respects. The researcher has emphasised that while the UAGCL, for instance, is limited to sales contracts between professional traders, the CISG, although it does not

¹⁷⁹ See Tumnde et al *Unified Business Laws for Africa: Common Law Perspectives on OHADA*169.

¹⁸⁰ See Tumnde et al *Unified Business Laws for Africa: Common Law Perspectives on OHADA*169.

¹⁸¹ See Tumnde et al *Unified Business Laws for Africa: Common Law Perspectives on OHADA*169.

¹⁸² See Tumnde et al *Unified Business Laws for Africa: Common Law Perspectives on OHADA*169.

¹⁸³ See Tumnde et al *Unified Business Laws for Africa: Common Law Perspectives on OHADA*169.

cover consumer goods, includes sales contracts with non-traders, such as members of learned professions. This means that the scope of application of the CISG is wider in terms of transactions than the UAGCL. Based on this, this study may confirm the hypothesis which states that the CISG's provisions have an impact on the OHADA's sphere. Therefore, West and Central African SMEs engaging in international commerce have to take this into consideration when they shape or conclude their contracts, in spite of the fact that have not yet ratified the Convention.

The study of the applicability of both texts has demonstrated that the criterion of place of business is essential for determining the applicable law as per the CISG. Therefore, it is important to highlight that a contract concluded between two Cameroonian SMEs may very well find its application not in the OHADA but in the CISG, since it is sufficient that the place of business of the other party is located in a state that is a signatory of the Convention. This is because neither the Convention nor the OHADA take the nationality of the parties into consideration, but rather the place of business being located in different states.

A comparative study of these texts with respect to the formation, performance and non-performance of business contracts for sales was conducted in this study, which showed that there are both similarities and differences between these texts. However, on the whole, their approaches are very different on certain points, and this may lead to legal uncertainty.

Firstly, with regard to the formation of contracts, both the Convention and the OHADA clearly define the constitutive elements of this notion. The Cameroon Civil Code, however, does not include any provisions relating to this. The comparison of the OHADA and CISG demonstrates that both systems have similar rules relating to the formation of contracts of sale. By adopting almost identical definitions of notions such as acceptance and counter-offers, the OHADA and CISG attempt to specify the regime of both legal acts, in order to ensure that the formation of contracts achieves a balance between the pre-contractual parties. For instance, both texts embody the receipt theory in order to localise a contract. Thus, recognising the offeree's rights immediately serves his interests, without undermining those of the offeror. This is why the study has determined that the receipt theory is more appropriate for SMEs than the emission theory.

The CISG provides more detailed rules than those of the OHADA on certain important points regarding the formation of contracts. For instance, with regard to the notions of counter-offer and electronic communication, the CISG, contrary to the OHADA, provides detailed information about certain significant matters, such as the battle of forms,¹⁸⁴ inclusion of

¹⁸⁴ See Section 4.4.1.3 of Chapter 4.

standard terms of the contract¹⁸⁵ and electronic communication.¹⁸⁶ These points are very important within the framework of international transactions. The fact that the OHADA does not deal with these important questions may be very dangerous for parties whose contracts are governed by the OHADA. It is therefore important for West and Central African SMEs to be aware of this aspect when they conclude their contracts. However, in the researcher's view, the CISG, in order to prevent larger enterprises from dominating SMEs, must adopt the knock-out rule as the rule governing the battle of forms. This rule is mindful of the organisation and structure of SMEs, which are often unaware of the importance of the battle of form, and will at least protect them, since this rule addresses the issue separately.

This study also suggests that the OHADA should accelerate the process of the implementation of the OHADA Uniform Act on Contract Law. The draft has already been prepared and submitted to the OHADA Permanent Secretariat since September 2004. This text, contrary to the Uniform Act relating to Commercial Sales, responds to this issue and is more complete. It is difficult to understand why the Council of Ministers has not yet ratified it, whereas the draft responds to several important issues, as mentioned above.¹⁸⁷

In terms of the performance of contracts, some of the relevant issues have been examined in the three legislations, namely transfer of property, transfer of risk, lack of conformity, and guarantees. It emerged from this study that there are some differences between the Cameroonian Civil Code and both the OHADA and CISG. For instance, regarding the notion of transfer of property, the Cameroon legal system has adopted the principle of solo consensus, which requires that the creditor becomes the owner of goods at the moment of the conclusion of the contract, and the risk of transfer passes immediately to the creditor. According to the Cameroon Civil Code, the transfer of risk follows the transfer of property. However, this study has shown that the approach of Cameroonian domestic law is quite different from both the OHADA and CISG. With regard to the OHADA, the transfer of property is effective when the buyer takes possession of the goods.

The CISG has only governed contractual effects, which refers to the rights and obligations of each party relating to the property of the goods, but excludes issues relating to the

¹⁸⁵ See Section 4.4.2 of Chapter 4.

¹⁸⁶ See Section 4.4.1.3 of Chapter 4.

¹⁸⁷ The draft of this text has been prepared by Marcel Fontaine. "Following preparatory work and broad consultations with African experts and specialists; in particular on the occasion of a series of visits to nine OHADA member States, Professor Fontaine completed a preliminary draft Uniform Act on Contract Law, accompanied by an Explanatory Notes. These texts were transmitted for consideration by the UNIDROIT Secretariat to the OHADA Permanent Secretariat in February 2005". Available at: <http://www.unidroit.org/legal-cooperation-and-research/121-legal-cooperation-and-research-scholarships/516-preparation-by-unidroit-of-a-draft-ohada-uniform-act-on-contract-law>.

proprietary effect. This silence of the CISG regarding this important matter clearly obscures and undermines its initial purpose of uniformity. It is clear, as the researcher has highlighted, that the OHADA is more effective in this regard, and may be more suitable for SMEs. However, this study suggests that it is now time for the CISG to incorporate and fully govern this notion of transfer of property, as its exclusion considerably undermines the CISG's main objective of unification.¹⁸⁸

With regard to the transfer of risk, it has been noted that both the OHADA and CISG, unlike the Cameroon Civil Code, have determined that the transfer of risk depends on various situations, including cases dealing with goods involving carriage, goods sold in transit, or goods requiring the seller to deliver them to a specific place agreed upon in the contract. This study has found that the fundamental idea of both texts regarding the transfer of risk is that the risk relies on the party which is in a better position to take precautionary measures to protect the goods. Therefore, this provision, with regard to the operating mode and structure of SMEs, does not undermine their development. On the contrary, it protects them.

The researcher has also established that with regard to the INCOTERMS, the OHADA does not provide any commentaries on them, while in reality, the INCOTERMS are usually the rules governing the transfer of risk. This notion has been more developed and commented on by the CISG. This study has attempted to determine some of the similarities and differences, as well as interactions between these legislations and the INCOTERMS. In doing so, it was concluded that in spite of some noticeable differences, both texts are complementary and can operate together, in order to reduce transaction costs.

In terms of the lack of conformity and guarantees, the important difference between these three legislations lies in the knowledge of this lack of conformity by the parties. Indeed, neither the Uniform Acts nor the Cameroon Civil Code have included any provisions in this regard. It is the CISG, through its Article 40, which governs this issue by depriving the seller of his right when the lack of conformity concerns facts or a situation which he knew about or ought to have known about, and did not disclose to the buyer. The CISG aims to protect the buyer against the bad faith of the seller, which is only fair. This important point makes the CISG advantageous for SMEs and protects them, since they are usually in the buyer position. The three legislations provide that the examination of these goods must be carried out in a reasonable time from the moment when the buyer has discovered or ought to have discovered the lack of conformity.

¹⁸⁸ See Quoc Thang <http://www.cisg.law.pace.edu/cisg/biblio/thang.html>.

From a general point of view, regarding the remedies that are provided in the CISG, OHADA and Cameroonian Civil Code in case of the non-performance of a contract of sale, the three texts are similar, and provide the following remedies: specific performance, damages, and the termination of the contract.

This study realised that the remedies for breach of contract are virtually the same in the two instruments. Termination of the contract, in both texts, requires that the breach of contract is fundamental. This study noted that the main difference between the two systems is the procedure used to provide a remedy to the aggrieved party. The Uniform Acts and Civil Code leave the appreciation of fundamental breach at the judge's discretion, whereas the CISG clearly defines when the breach can be regarded as fundamental.¹⁸⁹ In this regard, the study is of the view that the provision included in the CISG is fairer and therefore protects SMEs. Since the OHADA and domestic law leave the determination of fundamental breach to the judge's discretion, this means that it will vary from case to case, depending on the judge. This obviously creates uncertainty and an undesirable climate, which is less favourable for international commerce.

In addition, with regard to damages, it has been noted that the CISG covers this notion in more detail than the UAGCL. For instance, the duty to mitigate damage is discussed in the UAGCL only in cases of fundamental breach. Furthermore, it was noted that only the CISG has provided a formula to calculate damages. The UAGCL, on the other hand, leaves the determination of this damage to the judge's discretion. In this regard, this provision is dangerous for SMEs, especially those in developing countries with high levels of corruption.

Finally, one may nevertheless conclude that the purpose of the OHADA was to bring member states' legislations closer to those that apply in the sphere of international commerce, in order to facilitate exchanges between economic operators in member states, but also between those operators or enterprises situated outside of the OHADA space. This means that the purpose was to establish and enact laws which will favour and protect African enterprises engaging in international commerce. This study has noted that the OHADA's UAGCL, especially in its revised form, clearly attempts to copy the CISG in order to align itself with international commerce requirements, by seeking to respect its regional and sub-regional specificities.

The second hypothesis of this study can also be confirmed, namely that the OHADA's UAGCL is based on the CISG approach. However, with regard to the examination of both

¹⁸⁹ See Article 25 of the CISG, and Article 281 of the UAGCL of the OHADA.

texts, this study has shown that the CISG seems to be more appropriate to SMEs for the following reasons:

Firstly, the CISG seems to have addressed and regulated all the important issues regarding international commerce, and has discussed these issues in more detail than the OHADA. With regard to the formation of contracts, for instance, the CISG has dealt with important issues, while the OHADA has remained silent on matters such as the problem of battle of form, formation of contracts using electronic communication, and the inclusion of standard terms.

Secondly, the CISG has given more attention to the interplay of certain international instruments with the CISG than the OHADA has - for instance, the INCOTERMS.

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