

Is South Africa ready to ratify the CISG?

Comparative study of reasons why certain countries have decided in favour or against adopting the Vienna Convention for the International Sale of Goods.

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

**Mariam Solomon
BLLMAR023
February 15, 2006
Dissertation Advisor: Professor D Christie**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

TABLE OF CONTENTS

1.	INTRODUCTION	1
1.1	<i>Rationale for Dissertation</i>	1
1.2	<i>Aims and objection of Dissertation</i>	3
2.	WHAT IS THE CISG?	5
2.1	<i>History of the Vienna Convention</i>	5
2.2	<i>Structure of the Vienna Convention</i>	7
3.	ADOPTION OF THE CISG IN THE UNITED KINGDOM	7
3.1	<i>Background</i>	7
3.2	<i>Reasons against adoption</i>	8
3.2.1	<i>Conflicting legal principles between British law and the CISG</i>	8
3.2.1.1	<i>Sphere of application and interpretation</i>	9
3.2.1.2	<i>Formation of contract</i>	10
3.2.1.2.1	<i>Revocation of an offer</i>	11
3.2.1.2.2	<i>Acceptance of an offer</i>	12
3.2.1.2.3	<i>Fundamental Breach</i>	14
3.2.1.2.4	<i>Good Faith</i>	15
3.2.2	<i>CISG is not comprehensive and does not lead to legal certainty</i>	17
3.2.3	<i>Acceptance of British law as legal doctrine</i>	19
4.	ADOPTION OF THE CISG IN CHINA	21
4.1	<i>Background</i>	21
4.1.1	<i>The origin of Chinese sales law</i>	21
4.1.2	<i>The Chinese Unified Contract law</i>	22

4.2	<i>Comparison between the Unified contract law and the Vienna Convention</i>	24
4.2.1	<i>Application of the CISG</i>	24
4.2.2	<i>The CISG is overriding the unified contract law</i>	25
4.2.3	<i>Validity of a contract</i>	25
4.2.4	<i>Formation of a contract</i>	26
4.3	<i>Comparison of the new Chinese contract law with the CISG</i>	27
4.	<i>Conclusion</i>	29
5.	ADOPTION OF THE CISG IN THE UNITED STATES OF AMERICA	30
5.1	Background	30
5.2	USA adoption of the Vienna Convention	32
6.	ADOPTION OF THE CISG IN GERMANY	35
7.	SHOULD SOUTH AFRICA ADOPT THE CISG?	37
7.1	<i>Background</i>	37
7.2	<i>Comparison between the CISG and South African law of international sale of goods</i>	38
7.2.1	<i>Sphere of application</i>	38
7.2.2	<i>Elements of a contract</i>	40
	7.2.2.1 Offer	40
	7.2.2.2 Acceptance	42
	7.2.2.3 Formation of a contract	42
	7.2.2.4 Fundamental Breach	44

7.2.2.5	Good Faith	45
7.3	<i>Reasons for adoption</i>	46
7.4	<i>Reasons against adoption</i>	48
8.	Conclusion	50
9	Questionnaire	52
10	Bibliography	53

Is South Africa ready to ratify the CISG? – Comparative study of reasons why certain countries have decided in favour or against adopting the Vienna Convention for the International Sale of Goods.

1. INTRODUCTION

1.1 RATIONALE FOR DISSERTATION

In 1996, Professor Sieg Eiselen from the Potchefstroom University for Higher Christian Education published a remarkable article about whether or not South Africa should adopt the Vienna Convention for the International Sale of Goods (CISG). He concluded that a uniform set of rules within which international sales could operate, would be beneficial for the commercial community in South Africa¹. The introduction of one applicable law of sale would oust the problems of parties to choose, which law would be applicable to their contract, as the law would be the same wherever the unified law is applicable. This would result in saving on legal costs and would remove the disputes on which law would be applicable and would result in the smooth running of international trade.² Yet, in terms of this convention little has happened and the legislator in South Africa remains silent in this respect.

The initial idea on dealing with the thesis was to conduct a field study. Based on prior scholarly writing I would have suggested that South Africa ought to adopt the CSIG and would have established arguments in favour of adoption in our country. I would have included any other findings in support of adoption, such as parliamentary reports or bills. Alternatively, in case of a negative outcome, I

¹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (367)

² Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (333)

would have established, whether in fact, it is necessary for South Africa to adopt it at all.

I approached various trade organisations, commercial law firms, businesses involved in import and export, chambers of commerce and governmental institutions related to trade, to evaluate the extent to which the CISG is known and used by the South African international trading community. For each organisation approached, I prepared a detailed questionnaire. I introduced myself and advised the organisations that I am conducting a field study on international trade, dealing in particular with the ratification of the Vienna Convention. In a short summary of the basic concept of the CISG, I explained that it provides a set of codified rules applicable to international trade and described its aim, to internationalise and unify cross border trade.

The basic questions were amongst others:

- Are you familiar with the Convention of International Sale of Goods (CISG)?
- Do you have clients involved in international trade?
- Which countries are the main trading partners of you or your clients?
- In your international trade dealings, do you exercise a choice of law? If so, is there a preference for the law of South Africa or the law of the trading partner?
- Have any of your trading partners ever requested to use the CISG?
- Do you think that the CISG would make trading between member states and South Africa easier?
- Do you think South Africa should adopt the CISG?

Further questions dealt with dispute resolution, and whether or not the CISG would provide a comprehensive set of rules to prevent disputes. I have attached a sample of a full questionnaire directed at an internationally operating foreign company.

Unfortunately, this short questionnaire where the parties had to give a short reply or simply answer with yes or no, was in most cases not returned. In many occasions it was left mainly unanswered, at times I received an indication that a particular department would not deal with the matter. To my surprise the results were unsatisfactory, mostly due to the fact that South African companies and government institutions approached, revealed a great lack of knowledge of the CISG and what it signifies. According to the Parliamentary Monitoring Group the CISG has not been ratified and it has not produced any written report on this topic. The Department of Trade and Industry has “seemingly abandoned the project with the departure of the person in charge sometime during 1999 and 2000”, as was confirmed by Professor Eiselen. Hardly any academic writings of significance were published in South Africa to date, leading to a lack of material on this topic. This resulted in the thesis being addressed in a different manner. By conducting a comparative study, I established the reasons why other countries have decided to adopt or to refrain from adopting the Vienna Convention. This will provide a conclusion on whether it makes sense for South Africa to ratify the CISG.

1.2 AIMS AND OBJECTION OF DISSERTATION

The present text of the CISG celebrated its 25th anniversary this year, and since the publication of Eiselen article when the CISG had 51 member states, a further fifteen countries have ratified the CISG into their national law. When trying to establish arguments whether or not South Africa should adopt the CISG, it may be recommendable to take a look over our borders. With the exception of the United Kingdom and Ireland all of Europe’s main trading nations have adopted the CISG. However, many developing countries, which often do not have a

modern sales law in place, have not chosen to follow this example and are not among the 66 countries having ratified the CISG³.

I will establish the grounds on which the adoption was refused in the United Kingdom, a country from which parts of the South African legislation has its origin. Focusing on the two major aspects of international sales contracts, the formation of the contract and the obligations of the parties⁴, I will present the obstacles from a common law perspective. By looking at the People's Republic of China the most important emerging market, I will demonstrate how different social, traditional and political aspects, do not necessarily have to prevent a country from implementing a new set of rules.

The mere ratification of the CISG into a country's legal system may not be sufficient. Its potential advantages will only be maximised if the application of the CISG is encouraged⁵. The reason given by the United Nations in Annexure 1 of the CISG for the importance of harmonising international economic law under the convention is:

"The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

The Federal Republic of Germany and the United States of America, equally sophisticated jurisdictions on their own, and world economic super powers, have adopted the CISG. However, in practice the usage of the CISG remains scarce in the USA. The United Nations quoted above, will be questioned, by looking at the reality of applying the CISG in the USA.

³ Jacob S Ziegel: The Future of the International Sales Convention from a Common Law Perspective – 6 New Zealand Business Law Quarterly, (November 2000), p.336 (340)

⁴ Christine Moccia: The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of Forms" – Fordham International Law Journal (1990), p. 649

⁵ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p. 9

The aim of this thesis is to compare the reasons why some of the above countries have adopted or not adopted the Convention and lastly to establish whether it is in South Africa's interest to adopt it. Should South Africa go through the process of implementing the law or should we adhere to our current way of contracting.

2. WHAT IS THE CISG?

The United Nations Convention on contracts for the International Sale of Goods (CISG) was formed to provide a set of neutral uniform rules governing the International sale of goods, thereby contributing to the furtherance of international trade⁶.

2.1 HISTORY OF THE VIENNA CONVENTION

The concept of an international sales convention governing the formation of contracts and the rights and obligation of its parties, dates back to the beginning of the last century. In 1926 the League of Nations, predecessor of today's United Nations founded the Governing Council of the International Institute for the Unification of Private law (UNIDROIT) to provide default rules for sales contracts between parties located in different countries⁷. Upon the suggestion of Ernst Rabel, a European scholar, UNIDROIT decided to establish a commission to elaborate the possibility of a uniform law. This commission published the first draft of such a uniform sales law in 1935⁸. The draft prepared by UNIDROIT had to remain on hold due to the outbreak of the Second World War but eventually formed the basis of two conventions adopted at a diplomatic conference held at The Hague in 1964. Twenty-eight states signed the final act of the diplomatic conference producing the Convention relating to a Uniform Law on International

⁶ Christine Moccia: The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of Forms" – Fordham International Law Journal (1990), p. 649

⁷ Jacob S Ziegel: The Future of the International Sales Convention from a Common Law Perspective – 6 New Zealand Business Law Quarterly, (November 2000), p.336 (337)

⁸ Franco Ferrari: Uniform Interpretation of The 1980 Uniform Sales Law – 24 Georgia Journal of International and Comparative Law (1994-1995) p. 183 (184)

Sale of Goods (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)⁹. These joined conventions did not gather many adherences and were finally ratified by less than a dozen countries. As most of the ratifying states were members of the European Union, the conventions could not be considered as presenting a global solution for a uniform set of rules¹⁰.

The newly established United Nations Commission on International Trade (UNCITRAL) comprising of representatives from different political, legal and economic backgrounds was conveyed the task of promoting the harmonisation and unification of the law of international trade. UNCITRAL appointed working groups to produce drafts from 1970 onwards. In 1978 UNCITRAL combined the revisions of the ULF and the ULIS and proposed a draft officially known as the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹¹. The 1978 draft text, referred to as New York draft was composed of essentially two parts; the first part dealing with the formation of contracts and the second part describing the rights and obligations of the contracting parties and the consequences of breach of contract. The draft was presented to the UN members for comment and became the basis for a Convention held in Vienna in 1980. There, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted on April 11, 1980 after it had been embraced by 42 out of 62 participating countries¹².

However, it took another eight years until January 1, 1988 for the CISG to come into force. According to article 99 of the CISG, the Vienna Convention becomes effective one year after the required tenth state has ratified it. After the USA signed the ratification on December 11, 1986, Italy and China acceded. Today,

⁹ Jacob S Ziegel: The Future of the International Sales Convention from a Common Law Perspective – 6 New Zealand Business Law Quarterly, (November 2000), p. 336 (337)

¹⁰ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (335)

¹¹ Franco Ferrari: Uniform Interpretation of The 1980 Uniform Sales Law – 24 Georgia Journal of International and Comparative Law (1994-1995) p. 183 (185)

¹² Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 51

66 countries are using the CISG for international contracts of sale. The countries that adopted the Convention, range from developed countries such as France, United States of America, Norway and Germany to developing countries for example China, Egypt, and Mexico and include least developed nations such as Malawi, Tunisia and Uganda¹³.

2.2 THE STRUCTURE OF THE VIENNA CONVENTION

The Convention is divided into four main parts. The first part defines the Convention's sphere of application and contains provisions as to interpretations, usages and requirements of contractual form. The second part deals with the formation of the contract, the third part concerns the contracting parties substantive obligations, finally the fourth part provides the public international framework for the ratifying states.

A closer description of the most relevant, of the 101 articles will appear in the specific chapters dealing with the individual countries.

3. ADOPTION OF THE CISG IN THE UNITED KINGDOM

3.1 BACKGROUND

The United Kingdom, who itself is not in possession of a uniform law for the constituent parts England, Scotland, Wales and Northern Ireland, steered clear of adopting the CISG. Neither the fact that many of the United Kingdom's major trading partners, for example Australia, Canada, China, and the United States have acceded to the Convention, nor the fact that most of the other European Union Member States are signatories have resulted into the United Kingdom to

¹³ United Nations Commission on International Trade Law: Participation in Conventions – www.uncitral.org/english/status/status-e/htm entered on March 11, 2005

ratify. To date, the United Kingdom could not be convinced by its most important export markets that have adopted the Convention¹⁴

In 1989 and 1997, two consultation papers on the issue of entering the Convention, were published by the Department of Trade and Industry of the United Kingdom, however no steps have been taken toward its adoption¹⁵. In February 1999 a position paper was issued, stating that the Convention should be brought into national law, due to various responses that were received by the Department of Trade and Industry. Up till now, no further steps have been taken to bring the CISG into English law, although recently it has been debated, on whether the UK government should ratify the United Nations Convention.¹⁶

3.2 REASONS AGAINST ADOPTION

3.2.1 Conflicting legal principles between British law and the CISG

The English legal community argues that the ambiguity in the legislation of the CISG leads to uncertainty in the law, which is very undesirable in the tradition of commercial law. One criticism of the CISG is that it does not match up to the standard of English precision and drafting. The drafting style of the Convention is regarded as being unspecific. The reason for this is not only that a more concrete solution could not be agreed upon at the Diplomatic Conference but also that the development and application of general principles should be encouraged¹⁷. Although the CISG is a compromise between both common law and civil law systems, it does not share the common law characteristic of concrete legal solutions to resolve specific problems but is following the concept of general broad principles instead. There is a fundamental difference in the style

¹⁴ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 51

¹⁵ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

¹⁶ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

¹⁷ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p. 9 (fn.87)

of drafting of the CISG and that of English law. The emphasis of the CISG favours a more subjective approach of interpretation opposed to the objective approach of English courts¹⁸. I will discuss the most important articles of the CISG, reflecting why the United Kingdom does not show a strong desire to adopt the Convention, despite that many of their trading partners have done so.

3.2.1.1. Sphere of application and interpretation

The scope of the CISG is defined in Article 1, which provides that:

"This Convention applies to contracts of sale of goods between parties whose places of business are in different States,
 (a) when the States are Contracting States;
 (b) when the rules of private international law lead to the application of the law of a Contracting State".

It can be seen from this article that the parties of the contract shall have their places of business in different contracting states. Therefore, neither the nationality of the parties or their civil or commercial character nor the location or intended place of delivery of goods is relevant in determining the application of the CISG¹⁹.

Article 1(1)(b), not only refers to contracting states but also extends the application of the CISG further to contracts involving parties from non-contracting states when the rules of private international law lead to the application of the law of a contracting state. In the United Kingdom the point of view prevails that Article 1(1) (b) is creating a "trap for the unwary."²⁰ The Convention may apply with the parties being unaware that the contract is governed by the CISG, especially

¹⁸ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p. 9 (fn.87)

¹⁹ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

²⁰ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 59

when neither of the parties is coming from a CISG member state. This fear is unfounded, as the provisions are clear in that they may come into existence if the contracting states private international law leads to their application. Further, contracting parties have a right not to apply the provisions of the Convention to their contract, if agreed so in advance. Therefore, the trap can be prevented by the proper drafting of commercial lawyers of sale of goods contracts, whether that contract is to be used within the United Kingdom or not.

A further objection to article 1(1) (b) is that it extends the application of the Convention and thus would prevent English law to come into effect as the proper law of the contract. The objection is real. In case of a dispute arising between a party from a non contracting state and a party from a contracting state, the contract will be governed by the CISG if the rules of private international law point to the contracting state's law as the proper law of the contract²¹.

For English lawyers the desire to reduce the scope of the application of the CISG is understandable.²² Because the United Kingdom adheres to Common Law the codification in the form of the CISG does not fit into their legal system. There is a clear indication that before the United Kingdom accedes to the CISG, the sphere of application should be limited to transactions with other contracting states.

This can be achieved by a declaration according to Article 95, a provision to overcome this issue. It permits a State to ratify the CISG on the grounds that it will not be bound by Article 1(1) (b):

“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.”

²¹ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 58

²² Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 59

This would result in the possibility to revert to English sale of goods law in the instances where a party from the United Kingdom would deal with a party from a non contracting state.

3.2.1.2. Formation of a contract

When the Department of Trade and Industry in Britain, invited opinions regarding the ratification of the Convention, the Law Reform Committee of the Law Society of England and Wales recommended that the UK should not ratify. It stressed that the differences between the domestic law of sale and the CISG, would be too difficult to overcome. The Committee especially mentioned the problems relating to the application of Articles 16, 18, and 25, dealing with offer and acceptance and fundamental breach, differently to English legislation.²³

3.2.1.2.1. Revocation of the offer

The CISG differentiates between withdrawing an offer and revoking it. Whereas the former is possible before an offer becomes effective, the latter requires that the offer has reached the offeree.

Article 15 determines when an offer becomes effective:

- (1) An offer becomes effective when it reaches the offeree.
- (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16 states the requirements for revocation of an offer:

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:

²³ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 51 (57)

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

As in English law, the revocation requires that the offeror, has dispatched an acceptance. Where the difference lies in English law, is the question of an offer being irrevocable. According to article 16(2), there is no need for an explicit promise to keep open an offer and the offer may not be revoked where the offeree has reasonably relied upon the offer being irrevocable. In other words, an offer is considered as firm when it indicates a period of time for acceptance or when such period is considered reasonable. Under English law, an offer would not be irrevocable merely because the offeree needs time to investigate the feasibility of acceptance²⁴. The consequence in English law would be, "no more than an indication that after that time the offer, unless revoked, will lapse".²⁵ Thus under English law, the offeror is free to revoke the offer at any time before the offeree has accepted it. Further, unless a payment or an act is performed by the offeree in exchange for the promise to hold the offer open, the revocability of an offer is not affected by such promise.²⁶

The provision of the Convention according to English lawyers is ambiguous. The civil lawyer can treat the fixing of a time as providing an indication of irrevocability, and the Common lawyer can emphasise the need for such indication. Furthermore, the Convention does not seem to deal with other possibilities such as the offeror dying or losing legal capacity prior to acceptance.

3.2.1.2.2. Acceptance of the offer

²⁴ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom in www.cisg.law.pace.edu/cisg/biblio/azzouni.html

²⁵ B Nicholas :The Vienna Convention on International Sales Law – The Law Quarterly Review (April 1989) p. 201 (215)

²⁶ Sonia Viejobueno : Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods – 28 The Comparative and International Law Journal of Southern Africa (1995) p. 200 (206)

The prerequisites for accepting an offer are codified in Article 18:

(1) 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.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 18(1) defines acceptance by providing that only a statement or other conduct indicating assent is to be regarded as an acceptance. Thus, silence or inactivity does not in itself amount to acceptance.

The CISG departs from English law in treating all forms of acceptance alike when requiring acceptance to reach the offeror. According to article 18(2), the acceptance becomes effective when reaching the offeror, there is no exception made for a postal rule of acceptance. Thus, the usual common law "postal rule", which states that acceptance becomes effective on dispatch, is rejected because acceptance will not be effective until it reaches the offeror.²⁷ Consequently, the

²⁷ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

risk of loss of an acceptance or delay in its transmission remains with the offeree under CISG, and it passes over to the offeror under English law. Therefore the offeree has to get accustomed to enquire, whether his response has reached the offeror.²⁸

3.2.1.2.3. Fundamental Breach

The fundamental breach is codified in Article 25 CISG:

“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. “

The consequence of fundamental breach opposed to other disturbance of the contract is that the affected party has the right to declare the contract avoided opposed to being limited to claim damages or to use other remedies with the contract remaining valid.²⁹ In this article, if the breach is fundamental the aggrieved party is entitled to avoid the contract; if it is not avoided, he is remitted to a claim in damages although in appropriate circumstances he may also be entitled to seek an order for specific performance³⁰.

We must however be aware that the above consequence would not come into effect, if the party in breach could not foresee the breach and its result could not have been foreseen by a reasonable person in the same circumstances. The ability to foresee substantial deprivation is not a requirement in English law. More

²⁸ Barry Nicholas :The Vienna Convention on International Sales Law – The Law Quarterly Review (April 1989) p. 201 (216)

²⁹ Peter Schlechtriem: Commentary on the UN Convention on the International Sale of Goods (CISG), Second Edition pg. 174: “Not only can the contract be declared avoided, delivery of substituted goods can take place in terms of Article 46(2). This article refers specifically to goods, which do not conform which constitutes to a fundamental breach. The reason being the non-complying goods often have to be returned, and the severity of the economic consequences of a substitute delivery is therefore similar to those associated with the avoidance of a contract.”

³⁰ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

over the CISG remain incomprehensive in not specifying the time at which the party in breach should have foreseen or been able to foresee the results of the breach.

Schlechtriem, has suggested that the time at which foreseeability is measured is at the conclusion of the contract although subsequent information may be relevant. Since the detriment is defined in terms of expectations of the contract, the conclusion and not the moment of breach should be used to determine the time for foreseeability.³¹

3.2.1.2.4. Good Faith

The Convention has after extensive debates³² included the obligation of the parties to observe in Article 7:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The principal of Good Faith requires from a contracting party to respect the trust received from the other party in acting reasonable, and in not breaching the contract. In other words, Good Faith presents a “general philosophy” of the

³¹ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p. 9 (fn.117)

³² Sonia Viejobueno : Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods – 28 The Comparative and International Law Journal of Southern Africa (1995) p. 200 (206)

contract focusing on the relationship between the parties.³³ The first paragraph of article 7 provides that in the interpretation of the Convention regard is to be had to, among other things, “the need to promote the observance of good faith in international trade”.

It is well known that all through the drafting of the Convention, the question of good faith was a source of conflict between the Common Law and the Civil Law. Suggestions were rejected at the drafting of the Convention that required Good Faith to be in the performance and the formation of the contracts. There are two opinions relating to Good Faith, some authors says that it should only be used as an interpretation tool and others says, that it is directed at the individual contracting parties. The latter point of view can be supported when reading Article 16(2)(b), which provides that an offer is irrevocable when the offeree could have in, “Good Faith” relied upon the offer being open.³⁴

Professor Schlechtriem argues that the substance of the rejected provision on good faith can be found in the "general principle" of reasonableness.³⁵ He further argues because a number of provisions in the Convention refer to the concept of what is reasonable, it is open to the courts to treat "reasonableness" as a general principle with which to fill what they may see as gaps in the Convention³⁶. In Germany the courts make frequent use of the Good Faith rule in article 242 of the German Civil Code also known as the "Treu und Glauben" provision, which is directed at the parties.

Common law countries were worried that the broad provisions might undermine the certainty in contracts if it is used in the Convention.³⁷ It has to be considered

³³ Paul J Powers: Defining the undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods – 18 *Journal of Law and Commerce* (1999) p 333 (336)

³⁴ Franco Ferrari: Uniform Interpretation of The 1980 Uniform Sales Law – 24 *Georgia Journal of International and Comparative Law* (1994-1995) p. 192 (192)

³⁵ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation? on http://soi.cnr.it/~crdcs/crdcs/notes_9.htm

³⁶ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation? on http://soi.cnr.it/~crdcs/crdcs/notes_9.htm

³⁷ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation? on http://soi.cnr.it/~crdcs/crdcs/notes_9.htm

that various legal systems are using the CISG, and contributing to the interpretation and definition of the Good Faith doctrine, and further contributing to such uncertainty. Therefore a Common Law lawyer may worry about the reference in article 7(2) to the general principles on which the Convention is based. The common law lawyer might conclude that such general principles create uncertainty because courts in civil law countries might adopt a similarly creative approach. It will unsettle common law lawyers if more suggestions are made that Good Faith should be applied to the formation and performance of a contract. "The interpretation of the Convention cannot be separated from the interpretation of the contract." as is argued by Professor Eörsi³⁸.

Confusion exists in courts as to whether a Good Faith obligation exists, which leads to inconsistent decisions thus affecting a uniform interpretation of the CISG. The principal of Good Faith is limited to use as a guide to interpretation of the norms and does not go further to the performance of the contract. It is a tool that demands respect and adherence and is important to establish a uniform body of contract law³⁹.

In viewing the above articles, it emerges that this principle of Good Faith has indeed attracted many different opinions. In my opinion the principle should be used as an interpretative tool instead of making it obligatory in the formation of a contract.

3.2.2 CISG is not comprehensive and does not lead to legal certainty

The Convention has not attempted to address topics, on which the opposing opinions between the common and civil law traditions are too diverging to achieve a compromise.⁴⁰ Article 4 of the CISG, expressively states that the

³⁸ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation? on http://soi.cnr.it/~crdcs/crdcs/notes_9.htm

³⁹ Paul J Powers: Defining the undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods – 18 *Journal of Law and Commerce* (1999) p 333 (353)

⁴⁰ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 *University of Baltimore Law Review* (Summer 1997) p. 51 (52)

Convention only governs the formation of the contract of sale and the right and obligations of the seller and the buyer, whereas, it does neither regulate, "the validity of the contract or any of its provisions" nor "the effect the contract may have on the property in the goods sold". These topics are dealt with exclusively in domestic sales law.⁴¹ As the Convention refrains from dealing with issues of validity of contracts and passing of property, it requires courts and arbitrators to take recourse to various domestic laws. The CISG consequently stands in contrast with its principle of creating a uniform law.

Two profound questions which Mr Justice Hobhouse answered in the negative, were, whether uniform law conventions in general and the Vienna Convention in particular are desirable? He emphasised that certainty is an important need. The CISG does not provide guidance for all aspects of an international sales contract. In these areas courts will still find it necessary to apply national sales law. Such practice would contribute to a lack of clarity regarding the predictability of an outcome of a dispute under the CISG. Hobhouse referred to a uniform convention, as a "multi-cultural compromise", which draws elements from different legal cultures. He further stated that it lacks consistency and coherence, therefore leading to uncertainty.

He compared the movement in favour of such conventions with the movement for the adoption of Esperanto as a universal language. "International commerce", he said, "is best served not by imposing deficient legal schemes upon it, but by encouraging the development of the best schemes in a climate of free competition and choice".⁴²

A further minus in the views of a Common lawyer is the fact that the parties are not very restricted to vary or exclude the provisions of the CISG.

Article 6 provides:

⁴¹ Barry Nicholas :The Vienna Convention on International Sales Law – The Law Quarterly Review (April 1989) p. 201 (207)

⁴² Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation?

“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

This will lead to the situation where parties can adjust the provisions to suit them, by excluding the whole or some of the CISG. In general, the encouragement of party autonomy might be seen as a reason for other countries to follow the CISG.

The common lawyer however, will fear that the provisions lead to ambiguity and uncertainty and will result in different legal interpretations of the contract of sale.

3.2.3 Acceptance of British law as legal doctrine

Further arguments can be found in an article by Angelo Forte who refers to the role British law and British courts play until today in resolving international, trade related disputes⁴³. As was established above in relation with the formation of contracts the differences between the CISG and English law are far reaching. According to the Law reform Committee the significant differences do not make the uniform law of the CISG more attractive to traders than the existing UK law.⁴⁴ This might have consequences for the acceptance of British law as a legal doctrine. The Committee further describes the disadvantage of any deprivation from British law as follows:

“... even slight changes of wording from that in the Sale of Goods Act result in losing the benefit of the certainty conferred by long established case law on the interpretation of the Act.”⁴⁵

CISG is an attempt to harmonise the law of sale in an international context, and it is therefore argued that it is perceived as a threat to domestic sales law and

⁴³ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 *University of Baltimore Law Review* (Summer 1997) p. 51 (57)

⁴⁴ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 *University of Baltimore Law Review* (Summer 1997) p. 51 (58)

⁴⁵ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 *University of Baltimore Law Review* (Summer 1997) p. 51 (58)

simultaneously the legal security achieved over a long period of jurisdiction regarding these matters. The Law Reform Committee argues:

"If the Convention were ratified by the UK and ... came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country."⁴⁶

"It would be foolish to abandon the known and internationally respected virtues of English law in favour of the uncertainties of the Convention"⁴⁷ this was stated by Barry Nicholas. He stated that a lot of international commercial litigation took place in London and it would not be in its best interest to abandon the internationally respected virtues of English law in favour of uncertainties of the Vienna Convention. A large amount of arbitration is dealt with in London. Members of the bar regularly practice at special sections of the High Court and particularly deal expeditiously with big commercial cases. These sections comprise of a small, but elite group of members of the bar, and they are very successful. They also deal with many international cases, and attribute to more than 50 per cent of the cases where one of the parties involved is not British, and in 30 per cent where neither of the parties is British⁴⁸. The English Common law has been very influential in dealing with sales of goods disputes successfully. Its legal principles were embraced in many countries' systems of jurisprudence. The status of English law as a source of worldwide legal reference may be threatened by the adoption of the Vienna Convention.

⁴⁶ Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 University of Baltimore Law Review (Summer 1997) p. 51 (58)

⁴⁷ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation?

⁴⁸ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation?

4. ADOPTION OF THE CISG IN CHINA

4.1 BACKGROUND

4.1.1 The origin of Chinese Sales Law

China has been chosen as an example for a country, which has introduced the CISG into national law. Similar to South Africa, China was not involved in the making of the CISG. Whereas South Africa was legally excluded from taking part in the creation of the CISG for political reasons⁴⁹, China was practically excluded as during the years of the Cultural Revolution the rule of law virtually did not exist⁵⁰ and the country did hardly participate in world trade due to socio-economic reasons. The fact that China, as a socialist country, had never developed a high level in international trade usage was considered an obstacle to join the uniform set of rules. From 1979 however, China entered a new phase in its economic development, the so-called “socialist market economy”.⁵¹ Today, although still operating under a different political system, China is a signatory state of the CISG and can provide its international trading partners with a uniform contract law⁵².

In the following, I will provide an overview how China achieved this uniform law regarding the sales of goods, which shall set a possible example for South Africa to follow. Only in the late 1970s, China began to open up its economy and by doing so, they realised the need to reconstruct its trade law. As an example, up to 1978, domestic economic contracts in China had to be completed in writing, whereas oral contracts were regarded as void. The law did not provide clear and practical definitions for the terms offer and acceptance. Instead of deciding on

⁴⁹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods in South Africa – 116 South African Law Journal, Part II (1996), p.323 (324)

⁵⁰ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7

⁵¹ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7

⁵² Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (26)

the conclusion of an economic contract by establishing if one party made a discernable offer and the other party agreed with an affirmative acceptance, the court would sum up that the parties had expressed their real meaning and agreed upon the terms of contract in consensus⁵³. According to an unwritten trade usage, offer and acceptance found entrance into dispute resolution. In business, traders used the terms “FA PAN”, which is divided into “invitation to offer - XU PAN” and “firm offer - SHI PAN”, and “acceptance - JIE SHOU”⁵⁴.

When China realised that the free movement of trade was of prime importance for the development of the country it decided to construct its law to better suit trade relations between themselves and that of western countries. Under the then prevailing Economic Contract Law (ECL) of 1981, contracts were established rather than concluded through offer and acceptance and the socialist government would evaluate if the goods would be purchased at an adequate price.⁵⁵ Academic research groups involved in the process of opening their markets to the West saw an opportunity to include international and foreign usages into its new construction. In the process the CISG amongst other international economic treaties and customs became a document of guidance as it was especially constructed to deal with international business transactions.⁵⁶

4.1.2 The Chinese Unified Contract Law

Already before the CISG officially came into force in 1989, members of the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”) discussed what the advantages and disadvantages of the CISG would be. At the same

⁵³ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (26)

⁵⁴ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (26)

⁵⁵ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (26)

⁵⁶ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (27)

time, they established possibilities of ratifying the Convention⁵⁷. Before the CISG would however be introduced into Chinese law, the legislator chose to implement a domestic act dealing, *inter alia*, with the international sale of goods. On track towards introducing the CISG, China promulgated the Foreign Economic Contract Law (FECL) in 1985, the General Principles of Civil Law and the Law on Wholly Foreign-owned Enterprises in 1986, the Supreme Court's Explanations on the Application of Foreign Contract Law in 1987 and the Law on Cooperative Joint Ventures in 1988⁵⁸. At this stage, a strong opinion existed to join the Vienna Convention, with the consequence that the CISG would then become part of the sources of Chinese law. To prevent future internal conflicts between the CISG and FECL, the Chinese legislator decided to observe international trends when drafting FECL, hence achieved a high level of conformity with the CISG. Certain areas of the domestic legislation were still ruled and controlled by politics. The government claimed responsibility to fully evaluate the merits of the contracts, in this process to establish if the values of the performances exchanged are at balance the value of their own contract.⁵⁹

In 1993 China considered a unified contract law in line with its major foreign trading partners, intending to follow the growing international practice of legal unification⁶⁰. On March 15, 1999, a unified contract law was published. The most important aim of this piece of legislation was to create one piece of legislation covering foreign economic contracts, as well as domestic economic contracts. This was achieved by combining ECL, which pursuant to article 2 ECL applied to contracts between Chinese citizens and FECL, where pursuant to article 2 FECL at least one of the contractual parties had to be a foreign citizen⁶¹. In the process

⁵⁷ Ding Ding (edited by Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (28)

⁵⁸ Ding Ding (edited by Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (29)

⁵⁹ Ding Ding (edited by Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (28)

⁶⁰ Ding Ding (editor Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (26)

⁶¹ Bruno Zeller (edited by Michael R. Will): *The CISG and China* – Faculte de droit, Universite de Geneve (1999), p. 7 (14)

of coordinating the prevailing provisions into a new set of rules, again the CISG together with the UNIDROIT principles served as a role model. This resulted into a comprehensive act with more resemblance to comparable international legislation and with a much wider scope than the CISG, consisting of a total of 428 articles of which only the articles 130-175 are dealing with contracts for sales.⁶²

4.2 COMPARISON BETWEEN THE UNIFIED CONTRACT LAW AND THE VIENNA CONVENTION

When drafting FECL special attention was drawn on issues like the formation of contract and liabilities of the buyer and the seller. As mentioned above, many provision and principles contained in the FECL have an international character and are similar to the underlying principles found in the CISG. A remaining fact is however that Chinese foreign trade practice is fundamentally different to the practice of the rest of the developed world. The need to bring FECL into conformity with such practice resulted in some unique characteristics of its regulations.⁶³

4.2.1 Application of the CISG

As was shown above, the sphere of application of the UN convention is determined under article 1 CISG. Hereafter, the main criterion is that the places of businesses of the parties are in different countries. According to article 2 FECL, one party would need to be a foreign party to result into an international contract. A further criterion arises from the peculiarity that Chinese individuals are not allowed to set up economic or trading relationships with foreign parties. Hence, the contract would have to be established between “*enterprises or other*

⁶² Ding Ding (editor Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (34)

⁶³ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (28)

economic organisations of the People's Republic of China and foreign enterprises, other foreign economic organisations or individuals”.

Consequently, the reality of Chinese trade politics are limiting the transactions in which the CISG would apply to trade relationships with Chinese corporates.

4.2.2 The CISG is overriding the unified contract law

Art 6 FECL declares that any clause in an international treaty, in our case the CISG, will prevail over the law of the People's Republic of China. However, it is remarkable that in China decisions are frequently made by taking an all-embracing look at the dispute in relation to its potential outcome. Instead of restricting themselves to the application of legal provisions, judges as well as arbitrators often decide by evaluating, if a specific result would be consistent with the factual consequences for the parties.⁶⁴ It can be clearly seen that the CISG does not prevail unconditionally in China. An example of this global approach opposed to the strict obedience of legal issues in the decision by an arbitration tribunal in China is given by Bruno Zeller. A party to a sales contract was claiming damages because of non-delivery of goods ordered. According to the rules of the Vienna Convention, the claim would have been granted. Interestingly, no payment for loss of profit was awarded by the Chinese arbitration tribunal, as “the goods in question could be purchased elsewhere” and because “the price had dropped anyway”.⁶⁵

4.2.3 Validity of a contract

Under article 4 CISG, questions regarding the validity of a contract are explicitly excluded from the jurisdiction of the UN Convention. In article 9 FECL a far reaching declaration is made determining the validity of a contract.

⁶⁴ Bruno Zeller (edited by Michael R. Will): *The CISG and China* – Faculte de droit, Universite de Geneve (1999), p. 7 (15)

⁶⁵ CIETAC Award Beijing 21.9.1992, in: *Selected Works of China International Economic and Trade Arbitration Commission Awards in Sweet & Maxwell No.73* (1995), pg 296 (302)

"Contracts that violate the law or the public interests of society of the People's Republic of China are invalid."

In effect, this provision is contradicting the principle that the CISG will prevail over domestic law. Article 9 leads to a clear reduction of the sphere of application of the CISG apart from such issues that are removed from the issues of the UN Conventions according to article 4 CISG. As a consequence, even in cases where the CISG is clearly applicable, its application could be refused by a Chinese court stating that the relevant matter as a whole contravenes against the public interest according to Article 9 FECL. Such public interests determine whether a contract of sale infringes on public interest. The act, which is to be considered as private law, contains elements of public law aspects that may lead to a private contract to be set aside. It is article 9 FECL, which makes any interpretation and dispute resolution uncertain. Here it shows that the Chinese legal system is too interconnected with national politics.⁶⁶

4.2.4 Formation of a contract

A further obvious difference between FECL and the CISG can be found in the provisions concerning the formation of a contract. Article 11 CISG stipulates that the written form is not required:

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

Article 7 FECL however prescribes the mandatory written form:

"A contract is established when the terms of the contract are agreed upon in writing and signed by the parties to it."

⁶⁶ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7 (15)

To emphasise the mandatory character of the written form, MOFTEC declared not to apply article 11 CISG. In another aspect, the Chinese international trade law showed its will to compromise. The former prerequisite of having to seal internal contracts after conclusion did not appear in FECL.⁶⁷

Regarding the formation of a contract the law pertaining to economic contracts in China did not follow special steps but adhered to the established procedure of offer and acceptance, similar to the way it is stipulated in the CISG.⁶⁸

4.3 COMPARISON OF THE NEW CHINESE CONTRACT LAW WITH THE CISG

When China was ready to adopt the CISG in 1989 they followed the example of the United States of America and made a declaration in terms of article 95 CISG. Consequently, China is not bound by article 1(b) CISG and the Convention is only applicable when both places of business, of the Chinese party and of the foreign trading partner, are in CISG member countries. This reduces the sphere of application considerably. Also, as all details of international sales contracts were comprehensively covered by FECL, the application of the CISG in China remained sparse. In the first ten years that the CISG was effective, there had been only seven reported court decisions, which relied on the CISG and in which FECL was replaced.⁶⁹

This did not equally apply to international trade disputes resolved through arbitration, where claims were more regularly resolved based on the provisions of the Convention⁷⁰. In general, arbitration rather than litigation is the procedure preferred by foreign and local traders for the resolution of legal conflicts in China.

⁶⁷ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (30)

⁶⁸ Ding Ding (edited by Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (31)

⁶⁹ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7 (12)

⁷⁰ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7 (11)

Bruno Zeller describes this phenomenon in a report written about the CISG in China from a cultural point of view:

“It allows saving face, a most important facet even in the interpretation of legal issues. Thought must always be given to have a suitable Chinese partner when dealing with Chinese business. The success of many activities depends on the Chinese partner's ability to "get on" with the bureaucracy and establish good working relationships. It is difficult, or even beyond a foreigner's ability, to comprehend and work satisfactorily through these bureaucracies”.⁷¹

Apart from this cultural reasoning, one must not forget the specific advantages of arbitration. Hence, both foreign and Chinese clients regularly chose arbitrators to settle arising disputes because of the perceived greater flexibility and expertise of arbitration⁷².

The China International Economic and Trade Arbitration Commission (“CIETAC”) gained popularity in settling disputes with foreign elements with a rapid increase in cases handled on a yearly basis.⁷³ Although reliable reports on how often CIETAC applied the CISG are lacking because of confidentiality restraints, it can be concluded that CIETAC played an active role in expanding the influence of the CISG in China.⁷⁴ Not only did this help arbitrators, attorneys and traders to gain a sound knowledge about the aims of the convention and the definitions of its terminology. The arbitration tribunal CIETAC learned how to combine the CISG with FECL when deciding on international trade disputes.⁷⁵ As it is provided for in the CISG, the CIETAC tribunal applied the CISG whenever the parties having

⁷¹ Bruno Zeller (edited by Michael R. Will): *The CISG and China* – Faculte de droit, Universite de Geneve (1999), p. 7 (11)

⁷² Ding Ding (edited by Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (31)

⁷³ Ding Ding (edited by Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (32)

⁷⁴ Ding Ding (editor Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (32)

⁷⁵ Ding Ding (editor Michael R. Will): *China and CISG: Theory and Practice* – Faculte de droit, Universite de Geneve (1999), p. 25 (32)

their place of business in different contracting states did not make usage of choice of law. The provisions of FECL were only applied if the CISG would not be applicable according to the rules of private international law⁷⁶. Moreover FECL would be applied in such situations where the CISG would not provide solutions to the particular conflict, for example when questions about the validity of a contract would arise.

4.4 CONCLUSION

As any other piece of legislation the terminology of the CISG is somewhat slack. It is feared that this may lead to interpretations of the CISG that are based on national economic, legal and political orientations of the relevant member country.⁷⁷ In the case of China it appears that the introduction of the CISG has lead to more legal certainty and especially into predictability for the foreign trader. A growing number of decisions not only of arbitral tribunals but in recent years of courts indicate that the uniform law of the CISG is subject to a uniform interpretation. One must however keep in mind that China is a developing nation, which has a more fragile trade system in place which still has not a clearly defined position within the political system. Although the gap in interpreting the CISG is becoming smaller compared to the developed nations, it can not be said that the CISG has an overriding effect over domestic law. As can be seen from court decisions frequently combining the CISG with the domestic law, it seems that the CISG has merely a modifying effect. Considering the strong influence of the Communist Party it is obvious that the interpretation of the CISG remain within the confines of politics⁷⁸.

⁷⁶ Ding Ding (editor Michael R. Will): China and CISG: Theory and Practice – Faculte de droit, Universite de Geneve (1999), p. 25 (32)

⁷⁷ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7

⁷⁸ Bruno Zeller (edited by Michael R. Will): The CISG and China – Faculte de droit, Universite de Geneve (1999), p. 7 (13)

5. CISG IN THE UNITED STATES OF AMERICA

5.1 BACKGROUND

In 1966 the UN General Assembly began the UN Commission on International Trade Law (UNCITRAL), to enhance and promote the development of international trade. When UNCITRAL finished the work, the UN General Assembly convened a diplomatic conference to consider the draft text of the UNCITRAL. The UNCITRAL text was adopted by the conference, and on 10 April 1980, 53 states signed the Final Act of the conference⁷⁹. The United States was a member state of UNCITRAL from its establishment, they were appointed as one of the working group's fourteen members, on the international Sale of Goods. In deciding on whether to ratify the CISG, the United States had regular consultations with the Secretary of State's Advisory Committee on Private International Law. Members of the committee are representatives of US legal organisations interested in private international law, such as the National Conference of Commissioners on Uniform State Laws, the American Bar Association (ABA) and eight other organisations⁸⁰.

Before adopting the CISG, the United States of America has already been a member of UNCITRAL (United Nations Commission on International Trade Law). The USA was also elected to become a member to join the working group on international sale of goods by UNCITRAL. A study group consisting of about twenty contract and sales law professors and other experts, leading private attorneys, counsel for Fortune 500 corporations and representatives of the National Foreign Trade Council⁸¹ were charged with assisting this working in finding solutions for the unification of international sales law. Their focus was to ensure that the experts that were participating on behalf of the United States, on

⁷⁹ S F Hancock, Jr : A Uniform Commercial code for International Sales? We have it now – 67 New York State Bar Journal (1995) pg.21

⁸⁰ P H Pfund : Prospects for Adoption in the United States – Galston & Smit (Editors): International Sales : The United Nations Convention on Contracts for the International Sale of Goods (1984) pg 10-2

⁸¹ P H Pfund : Prospects for Adoption in the United States – Galston & Smit (Editors): International Sales : The United Nations Convention on Contracts for the International Sale of Goods (1984) pg 10-2

the UNCITRAL's Working Group meetings, had a realistic understanding of what international sales entail. A very comprehensive report prepared by Peter Winship from the ABA was the basis on its endorsement⁸², as their report recommended that the United States should ratify the Convention. Recommendations were also made by Professor Allan Farnsworth and Professor John Honnold, who formed part of the United States delegation and who were very active in drafting the UNICITRAL text, that the United States should adopt the International Sales Convention, the CISG. Together with the input of the committee, the delegation recommended that the United States sign and ratify the Convention⁸³.

The International Sales Convention then became effective in 1988 after the tenth member state has ratified it, and provided substantive law for international commercial sales. It is limited in its entirety, in that it does not apply to consumer sales or to sales-related claims for death or personal injury. Apart from the substantive measure found in the CISG, there are three procedural counterparts created through the work of the United Nations agency, UNCITRAL, namely, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award in 1958 (the New York Convention), the Model Law of International Commercial Arbitration and the UNCITRAL Arbitration Rules in 1985.⁸⁴

After the signature of the Convention in the United States, there was a need to bring the CISG to the attention of the potentially affected and benefited parts of the private sector in their country⁸⁵. Peter Winship from the ABA quoted "I can recall discussions in the Advisory Committee about how best to do this, the problem being that the CISG, by covering international sales generally, does not stand to affect a narrow and specialized area for which any single close-knit or

⁸² P H Pfund : Prospects for Adoption in the United States – Galston & Smit (Editors): International Sales : The United Nations Convention on Contracts for the International Sale of Goods (1984) pg 10-3

⁸³ S F Hancock, Jr : A Uniform Commercial code for International Sales? We have it now – 67 New York State Bar Journal (1995) pg.22

⁸⁴ S F Hancock, Jr : A Uniform Commercial code for International Sales? We have it now – 67 New York State Bar Journal (1995) pg.20

⁸⁵ P H Pfund : Prospects for Adoption in the United States – Galston & Smit (Editors): International Sales : The United Nations Convention on Contracts for the International Sale of Goods (1984) pg 10-4

organized interest group exists in the United States". Through publishing his article in an issue of the ABA Journal, he embarked his educational process, and reaching throughout the United States, approximately 350 000 attorneys. John Honnold produced the most thorough available analysis and background study of the Convention. CISG awareness was enhanced by the showcased panel discussion of it at the ABA's annual meeting in Atlanta⁸⁶. Due to the absence of any opposition to ratifying the CISG, and very good reasons to harbour it in the United States, increased the decision of acceding to the Convention.

5.2 USA adoption of the Convention

Just over five year after the Convention became effective it was accepted by forty-three countries. Now it is binding in the United States and most of its trading partners. Once adopted and despite the efforts of ABA, the history of the CISG after 1988 in the United States cannot be described as a success story.

Article 1 of the Convention, provides that:

"This Convention applies to contracts of sale of goods between parties whose places of business are in different States,
 (a) when the States are Contracting States;
 (b) when the rules of private international law lead to the application of the law of a Contracting State".

The United States is one country that has made use of this article. They made such a declaration on the grounds that the application of Article 1(1)(b) would lead to their own law being displaced more often than that of the non-Contracting State⁸⁷. In a Letter of Submittal by the Secretary of State to the President of the United States, the reason stated for the recommendation that a declaration should be made under article 95 was this:

⁸⁶P H Pfund : Prospects for Adoption in the United States – Galston & Smit (Editors): International Sales : The United Nations Convention on Contracts for the International Sale of Goods (1984) pg 10-4
⁸⁷ Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom www.cisg.law.pace.edu/cisg/biblio/azzouni.html

"If United States law were seriously unsuited to international transactions, there might be an advantage in displacing our law in favour of the uniform international rules provided by the Convention. However, the sales law provided by the Uniform Commercial Code is relatively modern and includes provisions that address the special problems that arise in international trade."

Firstly, the point of view of North American jurists is that the provisions of the Uniform Commercial Code (UCC) are departing from common law, and are closer to civil law tradition in some instances.⁸⁸

Secondly, the cases that were actually decided on grounds of the articles of the CISG, remains scarce and it has been revealed that in the majority of large sectors of the economy, traders have explicitly excluded the application of the CISG in their contracts⁸⁹. Their motive in doing so is that the traders rather rely on their detailed standard form contracts already in use. There are however more structural reasons for the CISG not being frequently applied in the USA.

It is of importance to recognise that the United States has already harmonised its domestic legislation dealing with business transactions throughout its fifty states. The UCC is a uniform act dealing extensively with the sale of goods in paragraph 2 thereof, and is often considered as a modern and successful alternative to the CISG⁹⁰. The overriding philosophy of the UCC is to allow people to make the contracts they want, but to fill in any missing provisions where the agreements they make are silent. The law frequently distinguishes between merchants who customarily deal in a commodity and are presumed to know well the business they are in and consumers, who are not. It also seeks to discourage the use of

⁸⁸ Angelo Forte: *The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom* – 26 *University of Baltimore Law Review* (Summer 1997) pg. 58

⁸⁹ Alison E. Williams: *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International (2000-2001) p.9 (19)

⁹⁰ Alison E. Williams: *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International (2000-2001) p.9 (19)

legal formalities in making business contracts, in order to allow business to move forward. It has been argued that legal formalities discourage litigation by requiring some kind of ritual that provides a dividing line that tells people when they have made a final such as, formation and readjustment of contracts, general obligation deal they could not be sued over. The UCC is very comprehensive and deals with topics and construction of a contract, performance, breach and remedies.

The preference of traders in using the UCC opposed to the CISG, is that they are already familiarised with its usage. Although the CISG is in many aspects similar to paragraph 2 of the UCC, which deals in the sale of goods, there are some significant differences since the CISG is a combination of common and civil law⁹¹. A particular difficulty for traders that are used to the procedure and terminology of the UCC which has its foundation in common law, is the lack of precedent under the CISG. Without such guidance North American practitioners realise a great uncertainty which creates unnecessary risk⁹². Still the CISG cannot be ignored by American law professionals any longer.

To alert lawyers and judges of the importance of knowing and understanding the CISG, Albert Kritzer of Pace University Law School, summarized the following:

"The scope of the UN Sales Convention is quite significant. In the United States, for example, for transactions it covers it replaces the greater part of Article 2 of the Uniform Commercial Code. Moreover, because the Convention contains a Book-of-the-Month Club feature (it is automatically applicable unless one elects otherwise), it can apply without a conscious election on the part of contracting parties. Nevertheless, few practitioners are even aware of the existence of this Convention or the revolution in legal thinking it mandates. Nor do they have experience in the techniques

⁹¹ S F Hancock, Jr : A Uniform Commercial code for International Sales? We have it now – 67 New York State Bar Journal (1995) pg.21

⁹² Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p.9 (19)

of interpreting and applying it in the international setting for which it is designed. One consequence is that lawyers dealing with problems of international commercial law too often are not prepared to furnish proper counselling to their clients⁹³."

Practitioners have realised that arbitration tribunals are frequently reverting to *lex mercatoria* in their decisions. *Lex mercatoria* in general describes principles and practices as well as international trade usage. The CISG being the only truly global sales act, may often be referred to when defining these principles⁹⁴. Thus the CISG may enter a contract, from which it was originally excluded, through the back door. Finally the risk of uncertainty feared by common law practitioners has to be considered unfounded due to the growing amount of literature and decision dealing with the CISG.

6. APPLICATION OF THE CISG IN GERMANY

On 1 January 1991, the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) came into force in Germany⁹⁵. Even before the ratification, there were already court decisions in which the UN Sales Law was applicable as foreign law according the rules of private international law. These decisions by German courts indicated a noticeable difference in the acceptance of this uniform sales law compared to the first attempt to unify the sales law for international contracts for the deliver of goods by the so-called Hague Sales Laws. Although these rules came into force in Germany in 1974, German courts were reluctant in certain cases to recognise the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of

⁹³ S F Hancock, Jr "A Uniform Commercial code for International Sales? We have it now. Statement of Albert H. Kritzer, Executive Secretary of the Institute of International Commercial Law in a proposal for an "Electronic Access Program of the Institute of International Commercial Law at the Pace University School of Law" dated March 31, 1994.

⁹⁴ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) p.9 (20)

⁹⁵ Peter Schlechtriem: Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany, *Juridisk Tidskrift* (1991/92) p.1

Contracts for the International Sale of Goods (ULF). The opposition against these uniform sales laws became obvious when the president of the German court of appeal revealed that he advised parties to exclude the application of the Uniform Sales Law and to rather use the German Civil (Bürgerliches Gesetzbuch) or Commercial Codes (Handelsgesetzbuch)⁹⁶.

Still, German courts gathered extensive experience in interpreting the Hague Sales Law and had no particular problem in applying the CISG after 1991. In fact, the bulk of case law stems from German court decisions⁹⁷. The German Professor Peter Schlechtriem explained in the early 90s that the reluctance towards applying the United Nations Uniform Sales Law would no longer exist. He stated that the UN Convention is widely acknowledged and already many legal articles were published in legal journals. Furthermore, he stressed the fact that the German Supreme Court, when dealing with issues in the German Civil Code, has from time to time quoted from the United Nations Convention for definition purpose⁹⁸. Thus, the UN Convention has been widely accepted amongst businesses and within the legal community, which is growing familiar with the CISG.

Up to date, parties are frequently advised to exclude the CISG in contract clauses, in particular by professional bodies such as trade associations.⁹⁹ For such an exclusion clause to be effective, it has to be expressly stated by the parties to the international commercial contract. It has to be doubted whether a reference to the applicability of German law made in the standard terms and conditions presented by one party is sufficient to exclude the CISG. First of all,

⁹⁶ Peter Schlechtriem: Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany, *Juridisk Tidsskrift* (1991/92) p.2

⁹⁷ Alison E. Williams: Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom – Review of the Convention on Contracts for the International Sale of Goods (CISG), *Kluwer Law International* (2000-2001) p.9 (20)

⁹⁸ Peter Schlechtriem: Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany, *Juridisk Tidsskrift* (1991/92) p.2

⁹⁹ Peter Schlechtriem: Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany, *Juridisk Tidsskrift* (1991/92) p.3

such standard forms may lead to a “battle of the forms”¹⁰⁰ if the foreign trade partner is using contradicting standard forms, calling for the application of his domestic law. Secondly, German law regulating standard form contracts to such clauses is rather strict and may not be upheld by German courts. This leads to a great uncertainty as to the applicable law.¹⁰¹ An attempt to derogate from the CISG in favour of domestic law must be explicit and clear and cannot simply be implied by the circumstances, according to article 6 CISG, subject to article 12 CISG.

The application of the CISG is clearly accepted and used in Germany. The CISG represents an improvement with regard to most domestic laws, by regulating in a single document the formation and interpretation of the sales of international contracts and the rights and obligations of the parties to it.

7. SHOULD SOUTH AFRICA ADOPT THE CISG?

7.1 BACKGROUND

South African law has been described as a “distinct legal system with its own peculiar traditions”¹⁰². It is commonly referred to as Roman-Dutch law, as it has its foundation in the Roman and the Dutch legal systems. The “pre-codial civil

¹⁰⁰ In terms of the “mirror image” doctrine of contract law, acceptance comes in the form of an expression of intention, when it assents to the terms proposed by the offeror in his offer without variation. When the terms of the offer are amended, it turns the offer into a rejection of the offer and a counter offer.

Courts used methods to mitigate the severity of the mirror rule. Despite the courts attempts, the impact of the mirror rule on the negotiations prior to the formation of the contract has raised some issues especially where both parties resort to their own printed form, which has been referred to as “the battle of the forms”. Here for example, the buyer sends his printed purchase order in response to the seller’s catalogue and the seller responds by sending his printed acknowledgement.

Sonia Vlejobeuno : Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods (1995) pg 227 (212).

¹⁰¹ Peter Schlechtriem: Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany, *Juridisk Tidsskrift* (1991/92) p.3

¹⁰² Clement Ng’ong’ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, *4 African Journal of International and Comparative law* (1992) pg 835 (837)

law"¹⁰³ was enriched by English common law. The law system of South Africa today, is equally referred to as common law, as it is, like English law not altogether codified. Codification could be described as a comprehensive version of the law in writing that has the force of legislation.¹⁰⁴ Instead of a codified legal system, South Africa has adopted a system predominantly relying on case law and judicial precedents. Unlike other countries, the South African general law of contract is not dealt with by legal statutes and it equally does not possess a sales code.

There is no body of separate South African law principles that is applicable to international sales contracts. The principle of our law of contract will generally apply where the sale is of an international character. Regarding international sales the general principals, not written down in code form, will rule the contract. Due to the international elements involved in such a contract of sale, common principles may be significant, thus require particular attention.¹⁰⁵

7.2 COMPARISON BETWEEN THE CISG AND SOUTH AFRICAN LAW OF INTERNATIONAL SALE OF GOODS

7. 2.1 Sphere of application

Article 1(1) is determining the scope of application of the CISG. It states that the Convention applies to contracts of sale of goods between parties whose places of business are in different states, when the states are contracting states or when the rules of private international law lead to the application of the law of a contracting state. The provision reduces the sphere of application to international sales. Because South Africa has not adopted the Convention, an international sales contract concluded between a South African and a foreign trader will only

¹⁰³ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (836)

¹⁰⁴ Duard Kleyn, Frans Viljoen: The Beginners guide for law students, second edition, (1998) pg 29

¹⁰⁵ J.P. van Nierkerk, W.J. Schulze: The South African Law of International Trade: Selected Topics, first edition (2000) pg 42

be governed by the CISG, where the rules of private international law have indicated the foreigner's national system of law as law and the Convention has been adopted in this system. Alternatively, it applies, where the parties have agreed to have their contract ruled by the convention that means where they practiced their choice of law. South Africa is not a signatory to the Convention, therefore, should the rules of private international law indicate that South African law is applicable; the Convention can only be used where the parties have chosen it to govern the contract.

In terms of Article 1(1) of the CISG, the Convention deals exclusively with sale of goods. Thereby it does not give a definition of "Sale" or of "Goods". When analysing the provisions of the Convention in its entirety, the definition of sale may be concluded by the obligation of the parties. "Sale", is referring to the "exchange for merchandise for a price"¹⁰⁶, the description of sale is therefore corresponding to that under South African law. The law of sale in South Africa, applies to virtually every commercial right which include land, movables and incorporeal¹⁰⁷. The sphere of application of the CISG is not as comprehensive. It appears under the Convention that the concept of "goods" is the same as in English law which refers to tangible and movables things. Consequently article 2 (d) and (f) of the Convention, excludes the sales of stocks, shares, investments securities, negotiable instruments, money and electricity from the sphere of application. Under article 2(e) of the CISG, ships, vessels, hovercrafts or aircrafts are excluded from the ambit of the Convention. In paragraph 2(a) it excludes consumer sales and under 2(b) auctions are also excluded.

When drawing a distinction between a contract of sale and a contract for skill, labour or work, the Convention relies on the fact on who the supplier of the goods

¹⁰⁶ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (839)

¹⁰⁷ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (840)

are. When the party who does the labour, at the same time, is the supplier of the goods, then the contract is regarded as a contract of sale, according to article 3(1) of the Convention. Under article 3(2), however that is not the case, where the substantial part of the obligation of the party is to be seen in supplying labour or other services. In South African law the attempt is made to compare the value of the materials with the value of the work. There is no indication given how these values should be compared¹⁰⁸. Issues such as fraud, duress, illegality, mistake and contractual capacity fall outside the scope of the Vienna Convention and are dealt with by applying the national laws of the country. The CISG also does not cover the issue of liability of the seller for death or personal injury caused by the goods sold to any person. However liability of the seller, for loss or damage caused by goods sold is dealt with in article 5¹⁰⁹.

7.2.2 Elements of the contract

Parties usually go through a process of negotiation when deciding on factors of price of goods and delivery of the goods by the seller. Thus to establish if a contract has been validly concluded, the principles of what offer and acceptance are, need to be established. In terms of our contract law, which is including international sales contracts, a legal obligation comes into force, at the place where a contract is concluded and at the time when the acceptance of the offer takes place¹¹⁰.

1. Offer

An offer is made with the intention of creating an obligatory relationship on certain or ascertainable terms, coupled with an expression of will, with another (the addressee), so as to enable him to establish a contract by accepting the

¹⁰⁸ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (840)

¹⁰⁹ J.P. van Nierkerk, W.J. Schulze: The South African Law of International Trade: Selected Topics, first edition (2000) pg 73

¹¹⁰ J.P. van Nierkerk, W.J. Schulze: The South African Law of International Trade: Selected Topics, first edition (2000) pg 43

offer as it was made.¹¹¹ An offer is constituted by a declaration of intention and must set out the essential and material terms of the contract. An offer further has to be a “firm” offer, which results in advertisements in not being regarded as firm offers. Advertisements, accordingly also if goods are offered for sale by one party on a webpage or in a printed publication (pamphlets), may depending on its wording be construed as an invitation¹¹² to potential clients to conduct business with them. The respondent to the advertisement will make an offer to purchase a certain product, which the advertiser will be able to accept. Intention of the advertiser is of great importance, for there can only be an offer when there is intention on the seller or advertiser to create a binding contract¹¹³.

Article 14 of the CISG states that the most important criterion to establish the difference between an offer and a mere invitation, is the “intention” to be bound. It also emphasizes the need for an offer to be directed at one or more specific persons. The position under the CISG and South African law herein is therefore identical. Equally the views of the different bodies of law resemble each other regarding the requirement that an offer needs to be “sufficiently definite”. There is however a divergence regarding the enumeration of the *essentialia*¹¹⁴. Whereas under South African law a contract only referring to the payment of fair or reasonable price is too vague and therefore void¹¹⁵, under article 55 of the CISG the contract may be valid. The provision stipulates that a contract not expressly or implicitly determining a price, maybe valid if the parties have

¹¹¹ Schalk van der Merwe & Others: Contract General Principles fifth impression 1999 pg 42

¹¹² CGEE Alsthom Equipments et Enterprises Electrique, South African Division v GKN Sankey (pty) Ltd (1987 (1) SA 81 (A) : Here the court had to decide on whether an invitation that was sent by telefax constituted an offer. The wording in the telefax read that “the order has been awarded to yourselves”, the court held that the offer had legal effect, because it had been made with the intention to be accepted and to result into a contract, it also created an agreement between the parties, the court further concluded that the parties had intended that the contract be binding between them.

¹¹³ J.P. van Nierkerk, W.J. Schulze: The South African Law of International Trade: Selected Topics, first edition (2000) pg 44

¹¹⁴ Clement Ng’ong’ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (847)

¹¹⁵ Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd 1972 (3) SA 663

impliedly referred to the price generally charged at the time of the conclusion of the contract¹¹⁶.

II. Acceptance

Acceptance is a declaration of will which indicates assent to the proposal contained in the offer. An essential element of an acceptance is the intention to enter into obligations with the offeror.¹¹⁷ For a contract to be formed, acceptance must be unequivocal and unconditional, it should not be unclear or vague or should not result in a rejection coupled with a counter-offer¹¹⁸. Further, the offer must be open for acceptance, must be by a person to whom it was addressed and must be in conscious response to that offer. Where parties deal with written agreements then acceptance would take place in the manner of signature of the telegram, telex or e-mail, it can take the form of electronic signatures.

III. Formation of a contract

South African law of contract states that a contract is concluded when and where the parties involved have reached consensus about the consequences they want to create in the contract and that they want to be legally bound by such a contract. This is referred to as the so called "information" or "communication" theory, and this rule is concerned with where and when a contract actually comes into existence. This rule applies where the parties are actually or presumed to be in each other's presence, for example where parties accept an offer via telephone¹¹⁹ or where they are physically present in the same place when the

¹¹⁶ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (848)

¹¹⁷ Schalk van der Merwe & Others: Contract General Principles fifth impression 1999 pg 48

¹¹⁸ ¹¹⁸ J.P. van Nierkerk, W.J. Schulze: The South African Law of International Trade: Selected Topics, first edition (2000) pg 44

¹¹⁹ Should a South African seller in Cape Town telephonically accepts an offer from a German buyer in Berlin to purchase certain goods from the seller, the contract will be, according to South African law, be concluded in Berlin because that is where the acceptance of the offer was made to the seller.

offer is accepted¹²⁰. The “expedition” theory refers to where and when the letter of acceptance was both written and posted¹²¹. Although these principles are authority in our law, much debate on the issue and possibility of further judicial exceptions cannot be excluded¹²². Due to modern communication tools used in international trade, like e-mail or telefax, South African international trade law still does not provide a final answer to the question of when and where a contract is concluded.

According to article 23 of the CISG the acceptance of an offer equally results in the conclusion of the contract. Article 18 (2) determines that the acceptance becomes effective “at the moment the indication of assent reaches the offeror”. It is therefore required that the declaration reaches the offeror, the Convention has thus adopted the “reception” or “arrival” theory to determine when and where a contract comes into existence¹²³. This is of remarkable consequence for a party wishing to withdraw the acceptance declaration. Whereas the party cannot do so according to the “expedition” theory once the letter of acceptance has been posted, the CISG provides a solution for retracting an acceptance already on the way to the offeror. Article 22 of the CISG expressly allows the withdrawal of an offer, especially providing logical results when a posted acceptance is retracted by a faster way of communication.¹²⁴ The CISG provides a solution which is more practicable than the theory provided under Roman Dutch law.

The South African law has not achieved to provide adequate certainty regarding the formation of a contract. This applies especially in the context of international

¹²⁰ J.P. van Nierkerk, W.J. Schulze: *The South African Law of International Trade: Selected Topics*, first edition (2000) pg 45

¹²¹ Should a South African seller in Port Elizabeth make a postal offer to sell goods to an American buyer in New York, which the latter accepts by way of a letter of acceptance, the contract of sale between them is, according to South African law, concluded in New York and at the time when the letter was posted there.

¹²² J.P. van Nierkerk, W.J. Schulze: *The South African Law of International Trade: Selected Topics*, first edition (2000) pg 46

¹²³ Clement Ng’ong’ola: *The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale*, 4 *African Journal of International and Comparative Law* (1992) pg 835 (851)

¹²⁴ Clement Ng’ong’ola: *The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale*, 4 *African Journal of International and Comparative Law* (1992) pg 835 (851)

transactions where time and place of the conclusion of a contract often differ. In this respect the articles 14 to 17 of the CISG provide are more accurate, provide a greater certainty and as a result lead to international uniformity.

IV. Fundamental Breach

According to Article 25 CISG a breach is defined as being fundamental if:

"...it results in such a 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".

The essence of a breach of contract is malperformance, which consist of a breach of a promise to perform properly and timeously in terms of the contract¹²⁵. A broader concept of malperformance is that of infringement, here a party infringes the other party's personal right.

In South African law we distinguish between five forms of breach of contract. They are mora debitoris (delay by the debtor), mora creditoris (delay by the creditor), repudiation, positive malperformance and prevention of performance. In South Africa a contract can be cancelled when the breach is serious enough to justify the cancellation. The judiciary has established various examples of what could be considered serious. "The breach must go to the root of the contract, must affect the vital part or term of the contract, or must relate to a material or essential term of the contract" when applying judicial discretion it is established "whether the breach is so serious that it would be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance"¹²⁶.

¹²⁵ Schalk van der Merwe & Others: Contract General Principles fifth impression 1999 pg 235

¹²⁶ Schalk van der Merwe & Others: Contract General Principles fifth impression 1999 pg 255

V. Good faith

South African law, which is not codified, requires any contract of sale to be a “bona fide contract, resting on consent.”¹²⁷ This means, that in the creation of contracts, consensus or reasonable reliance of consensus must be reached between the parties. Through the bona fide requirement Good Faith becomes part of our legal system. It can mean one of two things. Either Good Faith can be treated as a value or a principle, which must be given concrete content by way of specific applications. Good Faith could also be regarded as imposing a general duty on the parties, when performing the contract or when exercising any rights arising from the contract. The latter approach from the Roman-Dutch Civil law tradition has not been accepted within the law of contract in South Africa. There is no general duty of Good Faith; instead there are legal concepts in place for example “public policy” and “public interest”, which have incorporated this principle in our law¹²⁸.

As a principle it did not become an independent requirement, creating an individual duty of the parties to international sales contracts, because of opposition from Common law countries. However, it was introduced through the back door as an interpretation tool.¹²⁹ Common law practitioners do not afford the Good Faith principle much importance, because they were worried that the broad provisions might undermine the certainty in contracts.¹³⁰ Civil law practitioners have high regard in the principle of Good Faith when applying the Convention.¹³¹ The CISG may be thought of as a mixed system of law; certain principles are derived from the Common Law, others from the Civil Law principles. It draws on both of these traditions for the formulation of its provisions

¹²⁷ Clement Ng’ong’ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (842)

¹²⁸ Schalk van der Merwe & Others: Contract General Principles fifth impression 1999 pg 234

¹²⁹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (358)

¹³⁰ Barry Nicholas: The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation?

¹³¹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (358)

in its aim to achieve harmonisation of international commercial law¹³². The Good Faith concept is largely a compromise, similarly as it is in the CISG, which was negotiated between developing and developed, capitalist and socialist, and civil- and common-law countries.¹³³

The principle of Good Faith seems to be unclear in exactly which context it should be applied in our country. It has been suggested that it should be taken into account in the process of interpreting contracts¹³⁴. Good Faith is seen as one of the problematic parts of the Convention, and through many discussions on what is meant by the principle, it was introduced as an interpretative tool in the Convention¹³⁵.

7.3 REASONS FOR ADOPTION

There are many benefits for South Africa, should the government decide to become a member of the Convention of International Sale of Goods.

Due to the law of South Africa being uncodified, we mainly rely on legal precedents and case law. This results into disagreements regarding the scope and exact content of major rules and principles. The codified document, in which the CISG takes form, seems to be a clearer and simpler method in dealing with international sales law. The existence of such a code contributes to a collection of explicitly stated rules¹³⁶.

The CISG provides one set of domestic rules, which are internationally accepted leading to the simplification of international sales operations. The style of drafting the CISG is easier for traders without a legal background to grasp. Even though

¹³² Angelo Forte: The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom – 26 *University of Baltimore Law Review* (Summer 1997) p. 51 (52)

¹³³ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 *South African Law Journal*, Part II (1996), p. 323 (358)

¹³⁴ See Lubbe 1990 *Stell R 7*; *Contract General Principles*, fifth impression pg 234

¹³⁵ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 *South African Law Journal*, Part II (1996), p. 323 (358)

¹³⁶ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 and Sales law of Southern Africa, 7 *African Journal of International and Comparative Law* (1995) pg 227 (228)

the input of lawyers will still be necessary, the trader will have a clearer idea of what to expect when entering an international transaction.

The majority of South Africa's trading partners are already signatories to the Convention. It may be expected that the adoption of South Africa will enhance the country's attractiveness as a trading partner and smoothen its trade flow.

The frequent scepticism heard in common law countries such as South Africa that a single code cannot provide sufficient legal certainty, has been eliminated by the number of available case law and commentaries on the convention. There is only one Convention which creates uniformity on an international level, thereby eradicating the complication that would be created by various competing conventions, by adhering to one Convention international trade is being simplified.

The Convention incorporates the legal principles on which a far reaching international consensus has been achieved. Legal doctrines such as party autonomy, freedom of contract or foreseeability are well established in South Africa and its major trading partners, thus the CISG does not create the challenge of introducing a revolutionary set of rules.¹³⁷ At the same time the language used in the articles of the CISG does not deter from the terminology South Africa is already familiar with, which means that its introduction would not pose a challenge for South African scholars and practitioners in this respect.¹³⁸

To incorporate the Convention into our country would lead to legal certainty. The CISG was especially designed to provide guidance and solutions for international business transactions. The founding fathers realised the significance of obeying to international trade practice and usages making the CISG a most modern instrument for dispute resolution.

¹³⁷ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (368)

¹³⁸ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (853)

Of equal importance for South Africa as an emerging market economy, is the fact that fellow developing nations were involved in the drafting of the Convention. The CISG may therefore provide more adequate rules in a South African environment, than the prevailing sales law having its roots in the Roman Dutch system.

At present stage, traders from South Africa will frequently have to adapt their contracts to the rules of the CISG, when dealing with traders from such economies that have adopted the Convention. Should South Africa equally adopt the CISG, these traders would not have to enter unknown territory. They will however, be relieved from dealing with legal systems of member states that have signed the Convention but have declared an exemption according to Article 95 of the CISG. This will result in reduction of a number of foreign legal systems applicable in international contract of sale¹³⁹. The fact that so many countries are members of the CISG will render the need for establishing the applicable legal system according to the complicated rules of private international law obsolete. This will result in effective arbitration and litigation solutions, which will ultimately result in lower legal fees.

7.4 REASONS AGAINST ADOPTION

Article 4 of the CISG, declares that the Convention only governs the formation of the contract of sale and the right and obligations of the seller and the buyer. It does not deal with issues, such as the validity of a contract or the passing of property, which are left to the ambit of domestic law. This reduction in application is intended because the inclusion would interfere too much with areas of law where the member states claim the sole competence. As discussed above, the convention excludes underlying principles of a sale of goods contract and prevents itself from becoming a comprehensive tool to solve conflicts regarding frequently reoccurring issues. The drafting of the Convention seems to be

¹³⁹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (368)

compromising in style and therefore it is not comprehensive in its entirety. The CISG consequently does not achieve full “utility as a source of law for international trade exchanges.”¹⁴⁰

The CISG is a fairly new set of rules with a large number of difficulties and divergences from South African law. The various articles of the CISG deal with most legal issues relating to international sales but it is absent of certain important elements. Issues such as fraud, duress, illegality, mistake and contractual capacity is not covered by the Convention, nor does it deal with issues of liability of the seller for death or personal injury caused, by the goods sold to a party.

Many new terminologies are introduced from a large pool of international case law which has been developed in international courts and arbitral tribunals. Among these bodies no particular hierarchy exists. At the same time, these bodies are not obligated to properly reason their decisions, the principle of *stare decisis* is not commonly adhered to¹⁴¹. This will lead to foreign solutions being used to resolve problems which are not creating certainty.

The question is whether there is a need for South Africa to ratify to the Vienna Convention. The terminology and interpretation of the CISG is not always entirely clear and understandable for traders. These circumstances make it unfavourable for traders who might face unpredictable results and for lawyers who might still be unaware of the ambiguous provisions of the Vienna Convention. A further concern is that the codification of legal principles in the form of the Convention will lead to the law not being flexible, thus it cannot adapt to suit a particular case with a specific unique problem.

¹⁴⁰ Clement Ng'ong'ola: The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale, 4 African Journal of International and Comparative law (1992) pg 835 (841)

¹⁴¹ Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323 (368)

On the other hand, the CISG is a modern set of rules, which is including various legal systems and is particularly taking common trade usage into consideration. Although being vague in its drafting style and not fully satisfactory in covering certain aspects, it has grown into a reliable tool to govern international business transactions. It provides a legal framework, in which the unification of international trade rules may be achieved. Legal uniformity encourages traders to enter markets they previously were unfamiliar with.

8. CONCLUSION

In theory, the CISG might have a greater number of advantages compared to its disadvantages. In practice, it is still a new set of rules that has to be incorporated into our legislation. South Africa, which is a growing and seemingly stable economy, has still to battle with a domestic market, dominated by a great gap in wealth distribution. It will still take some time until the internal trade will be running smoothly. The lack of exposure of the vast majority of South African traders to the international markets needs to be acknowledged. Our traders would have to familiarise themselves with a new set of international trade rules. Legal practitioners would have to educate themselves on the codified legal system of the CISG and would need to be trained in its application. Especially on issues such as the rights of their clients, who are involved in international trade, the legal community would need to receive guidance.

In conducting my research, I came to the conclusion that a great lack of interest in adopting the Vienna Convention exists in our country. I determined that this deficiency of interest can be primarily accounted to the non awareness of the CISG itself. Professor Sieg Eiselen has, since the publication of his paper¹⁴², attempted, without avail, to initiate the project of South Africa's adoption of the CISG. This gave me an indication that the CISG is not even on the agenda at present stage. There seems to be very little support for it to be presented into our

¹⁴² Sieg Eiselen: Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa – 116 South African Law Journal, Part II (1996), p. 323

country and it may take years until the Vienna Convention will be broadly welcomed into our international trade law.

SAMPLE QUESTIONNAIRE

1. Are you familiar with the Convention of International Sale of Goods (CSIG)?
2. Do you have clients involved in international trade?
3. Which countries are the main trading partners of you of your clients?
4. Are many of your trading partners members of the CISG?
5. In your international trade dealings, do you exercise a choice of law? If so, is there a preference for the law of South Africa or the law of the trading partner?
6. Does the CISG provide a comprehensive set of rules to prevent disputes?
7. In your experience, are trade disputes resolved easier with the CISG?
8. Have any of your trading partners ever requested to use the CISG?
9. Do you think that the CISG would make trading between member states and South Africa easier?
10. What do you think of the fact that South Africa is not a member of the CISG?
11. Do you think South Africa should adopt the CISG?

BIBLIOGRAPHY

Textbooks:

- D Kleyn, F Viljoen : “*Beginner’s Guide for Law Students*” (1995)
- JP Van Niekerk, WG Schulze: “*The South African Law of International Trade: Selected Topics*” first edition (2000)
- Van der Merwe, Van Huyssteen, Reinecke, Lubbe, Lotz “*Contract General Principles*” first edition 1993

Articles:

- Sieg Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa “ 116 South African Law Journal, Part II (1996)
- Jacob S Ziegel “The Future of the International Sales Convention from a Common Law Perspective” – 6 New Zealand Business Law Quarterly, (November 2000)
- Christine Moccia “The United Nations Convention on Contracts for the International Sale of Goods and the “Battle of Forms” – Fordham International Law Journal (1990)
- Alison E. Williams “Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom” Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001)
- Franco Ferrari “Uniform Interpretation of The 1980 Uniform Sales Law” 24 Georgia Journal of International and Comparative Law (1994-1995)
- Angelo Forte “The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason for the United Kingdom” 26 University of Baltimore Law Review (Summer 1997)
- United Nations Commission on International Trade Law “Participation in Conventions” available online at <http://www.uncitral.org/english/status/status-e/htm> (last visited on March 11, 2005)

- Ahmad Azzouni: The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom
www.cisg.law.pace.edu/cisg/biblio/azzouni.html (last visited on November 17, 2005)
- Alison E. Williams “Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom” Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001)
- B Nicholas “The Vienna Convention on International Sales Law “ The Law Quarterly Review (April 1989)
- Sonia Viejobueno “Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods” 28 The Comparative and International Law Journal of Southern Africa (1995)
- Paul J Powers “Defining the undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods” 18 Journal of Law and Commerce (1999)
- Barry Nicholas “The United Kingdom and the Vienna Sales Convention: A Case of Splendid Isolation?” available online
http://soi.cnr.it/~crdcs/crdcs/notes_9.htm (last visited on November 17, 2005)
- Bruno Zeller (edited by Michael R. Will): “The CISG and China” Faculte de droit, Universite de Geneve (1999)
- Ding Ding (edited by Michael R. Will): “China and CISG: Theory and Practice” Faculte de droit, Universite de Geneve (1999)
- Sylvain Boll e “The Theory of risks in the 1980 Vienna Sale of Goods Convention” available online
<http://www.cisg.law.pace.edu/cisg/biblio/bollee.html> (Last visited January 25, 2005)
- Stewart F. Hancock, Jr “A Uniform commercial code for international sales? We have it now” 67 New York State Bar Journal 20-23, 36 (1995)
- Peter H Pfund “ Prospects for Adoption in the United States” The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender (1984)

- Peter Schlechtriem “ Uniform Sale Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany” *Juridisk Tidsskrift* (1991/92)
- Clement Ng'ong'ola “ The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of a contract of Sale” 4 *African Journal of International and Comparative law* (1992)
- JP Van Niekerk, WG Schulze “The South African Law of International Trade: Selected Topics” SAGA legal publications CC, Pretoria 2000