INTERNATIONAL BUSINESS LAW AND LEGAL CERTAINTY: THE NEED FOR SOUTH AFRICA TO ASSENT TO THE CONVENTION OF INTERNATIONAL SALE OF GOODS.

SUBMITTED BY:

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IN ACCORDANCE WITH THE REQUIREMENTS OF THE DEGREE MPHIL

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NOVEMBER 2015
DECLARATION:
I declare that, ‘International business law and legal certainty: The need for South Africa to assent to the convention of international sale of goods’ is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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ACKNOWLEDGEMENT:
I would like to express my gratitude to those who assisted and encouraged me in my research.

Firstly, my highest praise and thanks goes to my God and Lord Jesus Christ. Secondly, I would like to thank my family and friends for their endless support, ndinotenda (thank you). Lastly to Professor Lenaghan, I would further like to express my gratitude for tirelessly guiding me through the writing of this research paper.
KEY WORDS

- United Nations Commission on International Trade Law (UNICITRAL)
- United Nations International Institute for the Unification of Private Law (UNIDROIT)
- International Trade
- Legal Frame Work
- Economic Development
- Harmonisation
- legal certainty
- Developing countries
- South Africa

ABBREVIATIONS

BRICS Brazil, Russia, India, China and South Africa
CISG Convention on Contracts for the International Sale of Goods
CCL Contract Law of the People’s Republic of China
CL Contract Law
ECL Economic Contract Law
FECL Foreign Economic Contract Law
IBSA India Brazil South Africa forum
NAFTA North American Free Trade Area
OHADA Organisation for the Harmonisation of Business Law in Africa
PRC People’s Republic of China
SA South Africa
TCL  Technology Contract Law
UN  United Nations
UNICITRAL  United Nations Commission on International Trade Law
UNIDROIT  International Institute for the Unification of Private Law
ULIS  Uniform Law on the International Sale of Goods
ULFC  Uniform Law on the Formation of Contracts for the International Sale of Goods
UPICC  UNIDROIT Principles of International Commercial Contracts
USA  United States of America
WTO  World Trade Organisation
SMME’s  Small, Medium and Micro sized Enterprises
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CHAPTER ONE
BACKGROUND TO RESEARCH

1.1 INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 1980) entered into force on January 1, 1988. It comprised of eleven contracting parties namely Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States of America (USA), Yugoslavia and Zambia. The United Nations Commission on International Trade Law (UNCITRAL) drafted the CISG. Currently the CISG includes 101 articles and has eighty-three states. Among the states includes most of the great trading nations of the world. These include USA, Russia, China and 23 out of 28 members of the European Union (EU). South Africa, India and the United Kingdom (UK) are among the major states that have not acceded to the Convention. A number of the developing countries have also not yet ratified the CISG yet is assumed to be one of the most successful treaties for UNCITRAL in private international law. This is because the CISG has been accepted by states from every geographical region, every stage of economic development and every major legal, social and economic system. Countries who are signatories to the CISG are accounted for two-thirds of all goods moving in international trade and it more or less covers a majority of the world’s population.

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2 As of 5 March 2013, UNCITRAL reported that 79 states have adopted the CISGC: Table of contracting States available at: http://www.cisg.law.pace.edu/cisg/countries/cntries.html (accessed 2 August 2014).
3 The missing countries are Ireland, Malta, Portugal and the United Kingdom. However, Portugal is expected to become a member state in the near future.
The CISG was set out to create uniform rules that govern contracts for the sale of goods between buyers and sellers located in different countries therefore removing legal barriers in international trade.\(^7\) The CISG was formulated with the intention to support and develop international trade on the basis of equality and mutual benefit and to promote international cooperation and commercial relations among states.\(^8\) Numerous harmonisation attempts led by UNCITRAL, United Nations International Institute for the Unification of Private Law (UNIDROIT) have taken place to unify the international law of sale of goods thus the harmonisation phenomenon is not new.

1.2 PROBLEM STATEMENT

International Trade saw a remarkable growth during the twentieth century.\(^9\) This was due to the development of the market economy, the growth of market for manufactured goods, the rise of new markets for raw products from developing nations.\(^10\) Modern means of communication facilitated more reliable transactions for traders throughout the world, and technological advancement provided easier and faster transport of goods worldwide. Economic isolation is no longer viable for any state in this modern world owing to the interdependence of commercial markets. Therefore international trade is seen as absolutely essential in the modern economic world.\(^11\)

Along with the development of international commerce, problems have begun to emerge between countries. These have concerned how to regulate international trade when individual states enter into contract that can be governed by different


standards and usages.\textsuperscript{12} This has resulted into many encountering legal problems associated with unfamiliar systems of laws. In such circumstances, and in particular in the case of any dispute, it leads to problems for all its stakeholders such as traders, businessmen, policy-makers, lawyers and legal systems. The problem which a lawyer has to face is that he has to acquaint himself with the particulars and complexities of that particular legal system. It enables him to determine the existing legal position for issues raised up by any given international transaction, at the same time the latter has to also evolve solutions for problems of an international nature. Such situation increases the work burden and needless complexities in the trade relations and may also give rise to legal uncertainty.

Despite the fact that UNICITRAL regards CISG as one of the most successful of UNICITRALS’s harmonisation, instruments Lehman begs to differ. She is of the opinion that the success of this Convention like its predecessors, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Uniform Law on the International Sale of Goods (ULIS), in other signatory countries is exaggerated.\textsuperscript{13} One of the problems Lehman finds with the CISG is the fact that out of the 83 parties to the convention most of them are developed countries and there is a lack of participation by developing countries.\textsuperscript{14} She questions why the majority of developing countries and least developing countries have not joined the CISG. Especially most African countries if it can in fact achieve the promotion of world trade.\textsuperscript{15} She is of the view that there is a small cost in consenting to the CISG. Therefore the fact that states do not want to consent to it only leaves the reason that they do not think it will not contribute to economic growth of their country.\textsuperscript{16}

Lehman also argues that the CISG has little or no effect on the growth of trade and it has not facilitated trade amongst some countries who are parties to the CISG.\textsuperscript{17}


\textsuperscript{17} Lehman (2006) \textit{SA Merc LJ} 321.
Although trade between some countries have grown since they became parties to the Convention Lehman is not convinced that it is due to the Convention because of lack of evidence, she argues that it could be because of booming productivity or other factors.\(^\text{18}\)

Schlechtriem commentaries on the CISG went over how article 7 is one of the most criticised issues about the CISG. The author discussed how article 7 doesn't really fulfill its purpose in providing interpretive guidelines for the courts and he emphasised how important it is to distinguish between the first and second paragraph of article 7 and how each paragraph provided a separate formulas for interpretation. He did this by taking important gaps in the convention and trying to apply the three guidelines in article 7 (1) to it and explain the short comings and ambiguity of the guidelines. Schlechtriem explained that the CISG is still an ongoing process that is yet to be perfected.\(^\text{19}\)

Di Matteo, Dhooge, Greene, Maurer & Pagnattaro looked at fifteen years of CISG jurisprudence and analysed the application of the CISG and if it has achieved its uniformity purpose.\(^\text{20}\) The authors identified the methodology the CISG have provided for interpretation and analysed each of the guidelines and they discussed how the purpose is to guarantee the exclusion of domestic laws when interpreting the convention's articles. However, they view article 7 as a part of the problem due to the fact that there is no clearly expressed rule for interpretation.

Compared to Lehman and other authors, Eiselen is in favour of the CISG and is of the opinion that due to the extensive case law it contributes to the harmonisation of decisions.\(^\text{21}\) Eiselen refers to the criticism on the CISG of some commentators, namely, Kotz and Rosett. Rosett first warned that the problem with harmonisation of instruments is that it can easily become outdated and it becomes increasingly


difficult to update these instruments the more parties accept a convention.\textsuperscript{22} However, Eiselen states that this is not the problem with the Convention.\textsuperscript{23} After 25 years of its existence it only has had a few problems, such as: the inclusion of good faith as an underlying principle; specific performance as a remedy; the failure to stipulate which legal system should govern the issue of default interest; and the failure to provide properly for the problem of the battle of forms.\textsuperscript{24} However, he states that these problems proved to be less problematic than anticipated.\textsuperscript{25} Moreover, Eiselen says that the one major advantage of the Convention is the principle of party autonomy, which means that parties can decide whether they want to exclude the Convention or not.\textsuperscript{26}

Since the CISG has not been ratified by South Africa, should she accede to the convention? It remains an area that has not received local judicial interpretation and attention. This is in stark contrast to certain foreign jurisdictions that have acceded to the CISG and have widely interpreted it in the context of their domestic laws.\textsuperscript{27} It is not clear why South Africa has seemingly delayed ratification of the CISG since majority of its trading partners have acceded to it.\textsuperscript{28} It is nevertheless important to consider the likely impact of South Africa’s acceding to the CISG in so far as it represents a body with universally applicable and uniform international rules governing the sale of goods. In a nutshell, what possible benefits could be attached to the adoption of the CISG by South Africa?

\textbf{1.3 RESEARCH QUESTIONS}

This study seeks to provide answers on whether South Africa should ratify the CISG, in the light of promoting legal certainty and International trade. In order to address the main objective, the mini-thesis will seek to answer the following questions:

\begin{itemize}
\item\textsuperscript{22} Eiselen (2007) \textit{SA Merc LJ} 15.
\item\textsuperscript{23} Eiselen (2007) \textit{SA Merc LJ} 16.
\item\textsuperscript{24} Eiselen (2007) \textit{SA Merc LJ} 17.
\item\textsuperscript{25} Eiselen (2007) \textit{SA Merc LJ} 18.
\item\textsuperscript{26} Eiselen (2007) \textit{SA Merc LJ} 17.
\item\textsuperscript{27} Ndlovu PF \textit{Diamond Law: Change, Trade and Policy in Context} (2012) 244.
\item\textsuperscript{28} Wethmar-Lemmer ‘The Vienna Sales Convention and Gap-filling’ (2012) \textit{TSAR} 2 274.
\end{itemize}
1. Evaluate the current functional Legal Framework for international sale of goods in South Africa

2. Establish and evaluate the motivations for both accession and non-accession, including an examination of possible advantages and disadvantages arising from each.

3. Determine if the adoption of the CISG by South Africa will be a solution to the current problems and uncertainties that exist under South African Law with regards to the international sale of goods?

1.4 PRINCIPAL AIM AND OBJECTIVE OF THE STUDY

The aim of the mini-thesis is to state the relevance of CISG to the South African commercial sector as a way to achieve her legal certainty for its existing stakeholders involved in international trade. With a number of South African trading partners already ratified the CISG, should she follow the developed nations by acceding to the CISG? The current Legal Framework on the sale of goods in South Africa will be examined in detail and other existing alternatives that could be adopted to improve the legal certainty in international trade.

1.5 METHODOLOGY

The research is an analysis which involves study of books, electronic/internet sources, journal articles, theses and dissertations, decided cases and legislation. The Convention, draft versions of the CISG, case law and government policy documents will make up the primary sources. The study is principally examining and evaluating the literature relevant to legal and regulatory framework of international trade in South Africa. The analysis is done from the perspective of legal certainty by looking at how the international private law and domestic laws play a role in International trade.

This study also compares South Africa to Brazil and China by examining their legal framework approach on international trade. The two countries are members of the Brazil, Russia, India, China and South Africa group (BRICS). BRICS members are all

developing or newly industrialised countries. They are distinguished by their large, fast-growing economies and significant influence on regional and global affairs; all five are G-20 members.\textsuperscript{31} These countries are all deemed to be at a similar stage of newly advanced economic development and pursue more or less similar trade policies to that of South Africa particularly at the World Trade Organisation (WTO). Therefore their economic similarity to South Africa makes these countries good candidates for a comparative study with South Africa. South Africa is a developing state with unique economic needs, one of which is making itself internationally competitive in commerce. Moreover Brazil\textsuperscript{32} has recently ratified the CISG.\textsuperscript{33} China has been a member since September 30, 1986\textsuperscript{34}. The comparison will help establish the effects of their respective positions on trade. Therefore the comparative study is important in assisting to review whether South Africa must accede to the CISG taking into account how their level of development in trade through the CISG.

\textbf{1.6 CHAPTER OUTLINE}

Chapter 1 will introduce the topic of the mini thesis, the rationale for the thesis paper together with the aims and objectives of the paper.

Chapter 2 looks at the general overview of previous attempts at harmonisation of international sales law. Examines the provisions of the CISG relating to the requirements of the formation of contracts are explored and compared to the requirements of South African law.

Chapter 3 will examine the arguments for and against ratification of the CISG. The rationales both for non-ratification and ratification are analysed.

Chapter 4 conducts a comparative analysis of the legal positions in Brazil, China and explores the alternatives available for South Africa. The advantages and

\begin{footnotesize}
\begin{itemize}
  \item[31] China, Brazil, India and Russia are all deemed to be growth-leading countries by the BBVA: BBVA EAGLEs Annual Report (PPT), BBVA Research 2012: accessed 22 September 2014.
  \item[32] Brazil became the 79\textsuperscript{th} state Party to the convention. The Convention came into force for Brazil on 1 April 2014.
  \item[33] \url{http://www.uncitral.org/} (accessed 17 September 2014).
  \item[34] Zhang Y \textit{Harmonization of contract law and its impacts on China's contract law}, Modern Law for Global Commerce: Congress to celebrate the fortieth annual session of UNCITRAL (2007) 2.
\end{itemize}
\end{footnotesize}
disadvantages of non-ratification and ratification by Brazil, China respectively, and their respective effects on trade are examined. The chapter ends with an analysis of the relevance of the Brazilian, China experiences for South Africa.

Chapter 5 is the concluding chapter of the research paper, draws overall conclusions and puts forward recommendations based on the research findings.
CHAPTER TWO

OVERVIEW OF PREVIOUS ATTEMPTS ON HAMONISATION OF INTERNATIONAL SALES LAW

2.1. INTRODUCTION

It is certain that, nowadays, countries have begun to extend their relationships with one another owing, inter alia, to modern means of transport and communication. Currently, international borders are becoming more and more irrelevant, especially with regard to international trade.\textsuperscript{35} This globalisation growth requires the elimination of barriers to trade, and one of the obstacles in this regard is the divergence of rules among legal systems and the territoriality of the law. Practically speaking, domestic laws differ from one system to another, and, within the same legal system, from one country to another. To exemplify this, in the common law legal in order to overcome these above mentioned impediments with regard to international trade, it was necessary to unify the law internationally.\textsuperscript{36} During that time a number of legal systems were outdated, incomplete, fragmentary and inadequate to govern international transactions.\textsuperscript{37} The process of unification was and still intended to simplify issues relating to international transactions by providing one global law for all international sales contracts.\textsuperscript{38}

Therefore in light of this study, this chapter will firstly address the history of hamonisation of international sales law in detail. Secondly, the chapter focuses at the development of the hamonisation process leading to the Convention of International Sale of Goods (CISG). Thirdly, the rise of the CISG is examined in detail and further its respective impact on domestic and international sales law. Fourthly, the main provisions of the CISG and the South African Law on sale of goods are examined in detail.

\textsuperscript{35} Scholte J ‘Global capitalism and the state: International Affairs’ (1997) 73 Globalisation and international Relations 427.


\textsuperscript{37} Kröll S, Mistelis L, Viscasillas PP UN Convention on contracts for the international sale of goods (2001) 161.

2.2 OVERVIEW OF THE HISTORY OF HARMONISATION

The motivation towards unification of the law of international sale of goods was started in the 1920s influenced by the master-mind of Ernst Rabel. On September 3, 1926, the International Institute for the Unification of Private Law (UNIDROIT) was established in Rome and it was instated on May 30, 1928. During the same year, Rabel recommended to work towards a unification of international sales law. On February 21, 1929, Rabel submitted his primary report on the possibilities of sales law unification. On April 29, 1930, a committee consisting of representatives from different legal systems was founded. The first draft of a uniform sales law was published in 1935. In 1936, Rabel published the first volume of his seminal work ‘Das Recht des Warenkaufs’ providing an analysis, the status quo of sales law on a broad comparative basis. In 1937, however, Rabel was forced to emigrate from Berlin to the United States, and in the next couple of years, World War II interrupted any further unification efforts. These efforts were resumed in January 1951 when the Dutch government held a diplomatic conference on the unification of sales law in the Hague. The conference established a special commission to make further progress in the unification process. This commission met several times during the 1950s and presented a first draft on substantive sales law in 1956. In the same year, efforts to create a law applicable to the formation of international sales contracts were revived by UNIDROIT and a first draft was presented in 1958. Both drafts were distributed

among governments. Their comments and ideas concerning the 1958 draft were considered in the revised draft of 1963. The 1956 draft could not be revised in time before the 1964 Conference in The Hague.

2.2.1 UNIFORM LAW ON THE FORMATION OF INTERNATIONAL SALE OF GOODS (ULFIS) and UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS (ULIS)

In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalised at The Hague. However, these first uniform sales laws did not fulfil the high hopes and expectations widely shared at the time. Although their practical relevance should not be underestimated, only nine countries became member states while important countries like France and the United States did not participate. Moreover, communist and developing nations perceived these uniform laws as favouring traders from developed Western economies and thus remained away from them as well. There was also the issue of unequal representation of countries at the drafting stage of the proposed uniform sales law. Their rules were also criticised for being based on the Romanist legal tradition and for not being adapted to the needs of modern trade hence few countries ratified. The nine, mostly European states, which ratified them, abandoned ULIS and ULFIS when the CISG appeared on the stage as a better alternative.

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47 These include: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom.
50 Schwenzer I & Hachem P (2009) *AJCL* 123.
The ULIS and the ULFIS were in effect from round about 1972 until 1990-91. Their relatively short existence was not ‘totally in vain’. A number of countries used the instruments ‘as models for new sales and contract laws, and the courts of the Belgium, Netherlands and Luxembourg (Benelux) countries, Germany and Italy applied them widely and taught others how to deal with uniform sales laws’.\(^{52}\) This implementation of both ULIS and ULF did not, however, fulfil the global unification purpose mainly because of the limited number of member countries. Nevertheless, their failure did not stop the efforts to achieve the worldwide unification of international sales law. It became evident that they would find it difficult to obtain sufficient members. The United Nations (UN) General Assembly undertook to produce their revised version, which would be more widely accepted, through the creation of the United Nations Commission on International Trade Law (UNCITRAL).\(^{53}\) This goal was achieved on January 1988 when the CISG entered into effect.

The next section will briefly focus on the further development of harmonisation process of international business trade law under the CISG.

**2.3 UNICITRAL AND THE RISE OF CONVENTION OF THE INTERNATIONAL SALE OF GOODS**

On December 17, 1966, the UNCITRAL was established. UNCITRAL continued the effort on the unification of sales law from 1968 onwards, using the Hague Conventions as a source. The commission was met with the prior task of establishing a uniform international sales law and resolving the perplexities that led to disapproval of the 1964 conventions. In the consequence of this, the UNCITRAL created a Working Group in 1968 of 14 states that would remodel the Conventions of 1964 or establish a new draft. It was imperative they provided a draft that would further a broader adoption by states irrespective of their economic, legal and social system.\(^{54}\) A draft convention on sales was concluded by the UNCITRAL Working

\(^{52}\) Lando O (2005) *AJCL* 380.


Group in January 1976. This led to the dissemination of a later draft on contract rules formation and substantive sale laws to member states of the UN in 1978.\textsuperscript{55} The Hague convention of 1964 was used as the basis in the formulation of this draft. Delegates from sixty-two nations and eight international organisations deliberated the CISG at the now well-known Vienna Conference. At its end, forty-two countries voted in favour of the Convention. On December 11, 1986, the necessary number of ten ratifications (Art. 99 CISG) was reached and the Convention entered into force on January 1, 1988.\textsuperscript{56} The official languages were Arabic, Chinese, French, English, Russian, and Spanish.\textsuperscript{57} Austria, Germany, and Switzerland agreed on a German translation in 1982 but could not, however, agree on the terminology in all respects.

Having previously mapped the road leading to the birth of the CISG, the next section will examine the CISG and its current impact on both domestic and international sales law.

### 2.3.1 Convention of International Sale of Goods (CISG)

On 10 April 1980, a conference with representatives from sixty-two countries agreed on a set of rules providing a uniform law for international sales of goods. South Africa had been excluded from international organisations and processes because of its internal race policies, and the international sanctions against it.\textsuperscript{58} Therefore South Africa did not actively participate in the establishment of the CISG although it sent observers to the conference. Despite this, however, as an important economic force on the African continent, it would certainly have played a significant role in UNCITRAL activities.\textsuperscript{59} By December 1986, the treaty was ratified by eleven States (Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic,

\textsuperscript{55} Schlechtriem P (1986) 20.
\textsuperscript{57} Arabic, English, French, Spanish, Chinese, and Russian: The CISG is however available in numerous unofficial languages available at: \url{http://cisgw3.law.pace.edu/cisg/cisgintro.html} (accessed on 02 March 2015).
\textsuperscript{58} Eiselen (1999) 116 \textit{SALJ} 323.
\textsuperscript{59} Eiselen (1999) 116 \textit{SALJ} 323.
United States of America, Yugoslavia and Zambia). Today, eighty-three states have adopted the CISG, Brazil being one of the developing countries to ratify (Effective date: April 1, 2014). Guyana is the latest state to ratify the convention on the 25th of September 2014 and a number of countries are considering ratification. Because of this success the CISG is seen as the first law of sales treaty to win acceptance on a worldwide scale. South Africa, India, Hong Kong, India, Taiwan and the United Kingdom are the only major trading countries that haven’t adopted CISG. There is no doubt about the influence of this treaty on international trade. Based on CISG current success and popularity, South Africa could reduce its current existing legal complexities and uncertainty on international sale of goods by adopting the instrument. The increased and still increasing number of ratifying states simply suggests that the convention is used by most nations when dealing with international sale transactions. Thus, irrespective of the concerns and doubts regarding the continuous existence of the CISG of it not been adopted or its rules not being practiced or applied by the sellers and buyers in states where it has been adopted. The increased number of member states contrarily indicates that the CISG is gainfully increasing in significance, adoption and practice. The convention has provided a conventional legal framework for the transactions on international sales for enterprises and nations who are at liberty to apply its rules or not.

2.3.2 Positive influence of the convention on domestic and international sales law since birth

The CISG has been regarded as a standard model for improving and transforming national laws. With states passing new or modifying old domestic laws on sale, the convention has brought to bear its influence not only on an international level but

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62 Brazil became the 79th state Party to the convention. The Convention came into force for Brazil on 1 April 2014.
64 Eiselen (1999) 116 SALJ 323.
also on a domestic level to. The quality of the convention in providing a common legal language is one of the factors that have enhanced its application into domestic laws of states. It also provides a fair, transparent and well structure systematic approach for international trade. The convention has within, well embraced obligation and remedy actions for both buyers and sellers. These actions amongst many other principles that are laid down in the convention have been admired and adopted by individual states as both international and national sales law. And outside of the European states, the CISG still exercises its influence on places like China. Considering that China was amongst the pioneer states to adopt the CISG in 1988, its drafters consequently agreed to the new commercial code and made use of legal principles and interpretations from the CISG.

At the international scope, the convention’s principles are given precedence over inconsistent domestic laws on international contract or sales law. Australia, Canada, and The United States, the North American Free Trade Area (NAFTA) countries along with some South American countries are also amongst the countries that give this precedence of the principles of international sales contract over their domestic sales or contract law. Due to the fact that dominant South Africa’s trading partners have ratified the CISG, it is thus logical to consider whether the CISG would be a solution for current existing problems and uncertainties under South African law on sale of goods.

The CISG is used as a regulation tool amongst the 24 European Union states who are members to the convention. The CISG has also impacted the development of regional trade laws through regional organisations. The aforementioned European Commission Directive regarding the implementation of the CISG rules on the obligations of the buyer and the seller into the union member states domestic legislations on the sale of consumer goods. The CISG has also assisted in the development of countries international law instruments regarding their sales law. The

Netherlands is an example of a state where the rules of the CISG has impacted the development of certain international law instruments relating to its sales and obligations law. In the Netherlands, the European Union directive on sale of consumer goods had impacted the advancement of its civil code Dutch Civil Code.\(^{69}\)

In addition to this, the OHADA (Organisation for the Harmonisation of Business Law in Africa), a union of 16 African States, has adopted a Common Sales Law which follows the CISG almost to the letter.\(^{70}\)

Although the CISG has positively impacted the international business law, it is therefore essential for purpose of study to focus on negatives accrued since inception. The next section discusses the negative effects brought by CISG.

### 2.3.3 Negative influence of the convention on domestic and international sales law to date

Although there are currently 83 contracting states approving the terms and conditions set out in the CISG, in some of the contracting states there is very little awareness of the CISG that even existed within the business community. For example in Argentina, despite overwhelming promotion effort put in place to raise awareness of the convention, it is still not so well known in business circles.\(^{71}\)

Likewise for Mexico and Croatia, the CISG had no effect on how international trading being conducted by the local businesses although the situation is slowly improving.\(^{72}\)

Furthermore, in countries such as New Zealand, Israel and Uruguay, although the CISG has been incorporated in the local national laws, however many lawyers are either not aware or have insufficient knowledge of the CISG.\(^{73}\)

Other than these countries that have ratified the CISG, there are still more than 130 countries around the world that have not yet agreed to the terms and conditions set out in the CISG. This is due to the fact that these countries preferred to have a regionalised treaty arrangement rather than a global legal system. Reasons behind

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\(^{72}\) Ferrari F (2008) 3.

\(^{73}\) Ferrari F (2008) 5.
this idea are that these countries believe a regional treaty arrangement would provide better economic outcomes for the region. This is especially true for some of the African countries, as evidenced by the sign up of the CISG in Africa, only Gabon, Benin and Guinea and other few nations\(^74\) have agreed to the CISG. In addition, some of the major countries have not yet joined the CISG, such as the United Kingdom,\(^75\) due to the lack of political support from the government.\(^76\) Contrary to UK, Japan suffered from the bubble economy, forcing high demand for economic and law reforms within the country at the time; hence Japan eventually endorsed the CISG on 1st July 2008.\(^77\)

Despite a low number of African states signatories mentioned above, the CISG popularity and worldwide use remains important to international trade law. Therefore for South Africa to raise a case for adopting the convention, the next section of study will focus on the main key provisions of the CISG, vis-à-vis those of South African Law on sale of goods.

### 2.4 Key provisions of the CISG

The CISG is an attempt to merge and harmonise the main principles governing contracts for sale from different legal traditions. It has been claimed that the CISG promotes international trade by facilitating the buying and selling of raw materials, commodities and manufactured goods.\(^78\) It is also said that it reduces uncertainty


and legal disputes.\textsuperscript{79} In this regard the preamble to the CISG evidently captures the aim and purpose of the CISG. It states that it 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.\textsuperscript{80}

The text of the CISG is divided into four parts. Part one deals with the scope of application of the CISG and the general provisions. Part two contains the rules governing the formation of contracts for the international sale of goods. Part three deals with the substantive rights and obligations of the buyer and the seller arising from contract. Part four contains the final clauses of the CISG concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the CISG to international sales where both states concerned have the same or similar law on the subject.

The above aims and purpose of the CISG does not look to harmonise the domestic commercial laws of signatory States.\textsuperscript{81} Its goal is to separate international sales from the ambit of domestic law and to create unified rules for such transactions. The CISG provides a comprehensive code governing the formation and performance of sale contracts, which fall within its scope of application, as well as the remedies available to parties. The CISG will supersede the domestic law of member States regarding matters covered in its articles. The Convention does not however exclude domestic law entirely, but reserves several issues to be determined under the applicable domestic law.\textsuperscript{82}

The CISG aims to protect the private autonomy of contracting parties. Under article 6, subject to article 12, parties are permitted to exclude the application of the CISG to their contract, or to detract from or vary the effect of any of its provisions. The provisions of the CISG bind parties from signatory states, unless they have excluded

\textsuperscript{79} Eiselen (1999) SALJ 343.
\textsuperscript{82} Articles 2-5.
or varied its provisions in whole or in part. This exclusion may be done explicitly or implicitly. In determining whether implicit exclusion applies, the will of the parties must be discerned. Article 8 of the CISG must be applied to ascertain the will of the parties.

At this point, it is important to examine and highlight the scope of application and general provisions of the CISG in light of South African domestic law on sales. These provisions include declarations or reservations, type of goods, written and oral contracts and these will be discussed in more detail below.

**2.4.1. Scope of application and general provisions**

In providing for the scope of application of the CISG, Article 1 of the CISG states 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; or (b) when the rules of private international law lead to the application of the law of a contracting State.

Arising from this, it is important to note that the CISG restricts its application to contracts between parties who have their places of business in different contracting states or to cases in which the proper law of the contract is that of a contracting state. The CISG is transaction-focused other than party-focused; its concern borders on the fact that the transaction is from one State to another State rather than the nationality of the parties, the place of incorporation of the party, or the place of its headquarters. For instance, if both parties to the contract are nationals of the same country but one party has its place of business in another country and the contract is trans-border in nature, that contract would be governed by the Convention if the features of Article 1 are present. The convention also takes into consideration parties who might have multiple places of businesses. Article 10 of the convention in making reference to this scenario, regards the place of business to be the place

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83 Parev. Prods. Co. v. 1 Rokeach & Sons, Inc., 124 F. 2d 147 (2d Cir. 1941). A form of implicit exclusion would be the choice of law from a non-contracting State.

closely associated to the making and performance of the contract. Also, in a case where a party has no situated place of business, his natural residence or home would be referred to in such a case.\(^{85}\)

Generally with the number of member states at 83 and still on the increase, it is paramount for states, individual buyers and sellers to be aware of the status of member states. There is also a need for awareness of the several reservations or declarations made by states in adopting the conventions as made possible by the final provisions of articles 90 – 96 of the convention. Cases of such reservations or declarations include; USA, China, Slovakia, and Singapore declaration of the exclusion of Article 1(1) (b) of the CISG, although, the exclusion of this article is enabled by Article 95 of the convention itself.

The CISG article 2 contains a list of some types of sales that are excluded from the scope of the convention, whether because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (sales contracts for the purchase or sell of stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity).\(^{86}\)

Contracts for sale are distinguished from contracts for services in two respects under the CISG.\(^{87}\) Firstly, a contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Secondly, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply. As regards the form of the contract, the CISG allow for written and oral contracts.\(^{88}\) These formalities such as a written contract or the signatures of the parties are not normally necessary except for

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\(^{85}\) Article 10 of the CISG.

\(^{86}\) Article 2 of the CISG.

\(^{87}\) Article 3 of the CISG.

\(^{88}\) Article 11 of the CISG: Article 11 of the CISG must however be read together with Article 12 of the CISG. Article 12 limits the application of Article 11 where a contracting state has made a declaration under Article 96 in effect seeking to exclude the application of article 11.
purchases of land or buildings. What is important is that it is clear to the court what
the parties agreed to.

In addition to the discussion on the CISG provisions above, the next section will
examine the requirements for a contract to come into existence under the CISG.

2.4.2. Part two- formation of the contract

The rules governing the formation of international sales contracts are covered under
part 2 of the CISG which is founded on the 1964 Uniform Law on Formation –
(ULFIS). This section of the CISG deals primarily with offer and acceptance and the
conclusion of the contract. It is noteworthy that the convention does not include the
concept of consideration, one that is an essential to the formation of a valid contract
under common law jurisdictions.

An offer is defined under the CISG as a proposal for concluding a contract
addressed to one or more specific persons which is sufficiently definite and indicates
the intention of the offeror to be bound in case of acceptance.\(^{89}\) A proposal is
considered sufficiently definite if it indicates the goods and expressly or implicitly
fixes or makes provision for determining the quantity or the price.\(^{90}\) If the proposal is
addressed to one or more specific persons it is to be considered merely as an
invitation to make offers, unless the contrary is indicated by the person making the
proposal.\(^{91}\) This is the common law position on offers as opposed to invitations to
treat.\(^{92}\)

On acceptance, the CISG provides that a statement made by or other conduct of the
offeree indicating assent to an offer is an acceptance.\(^{93}\) Under the CISG, an
acceptance of an offer becomes effective once the indication of assent reaches the
offeror.\(^{94}\) In relation to counter offers, the CISG provides that a reply to an offer
which purports to be an acceptance but contains additions, limitations or other

\(^{89}\) Article 14(1) of the CISG.
\(^{90}\) Article 14(1) of the CISG.
\(^{91}\) Article 14(2) of the CISG.
\(^{92}\) Pharmaceutical Society of Great Britain vs Boots Cash Chemists (Southern) Ltd 1953 (1) 482
(ER).
\(^{93}\) Article 18(1) of CIGS.
\(^{94}\) Article 18(2) of the CISG.
modifications that alter the terms of the offer materially is a rejection of the offer and constitutes a counter offer.\textsuperscript{95} However, if the reply to the offer only includes insignificant changes which do not alter the offer materially, then the reply is presumed to be an acceptance with altered terms, unless the offeror objects to the changes without undue delay.\textsuperscript{96} This contrasts with the common law position on counter offers whereby any change, whatsoever, to the original offer is deemed to be a counter offer.\textsuperscript{97}

2.4.3. Part three- sale of goods

Part 3 of the CISG is based on the 1964 Uniform Law on Sales (ULIS). It is subdivided into five chapters dealing with: general provisions, obligations of the seller, obligations of the buyer, passing of risk, provisions common to the obligations of the seller and the buyer and each will be discussed in more detail below.

2.4.3.1 Obligations and rights of the seller

The general obligations of the seller under the CISG are to deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and the CISG.\textsuperscript{98} The CISG contract law requires the seller to deliver goods that are of the right quantity, quality and description required by the contract.\textsuperscript{99} Additionally, the seller is required to deliver goods that are free of any right or claim of a third party.\textsuperscript{100}

\begin{itemize}
\item\textsuperscript{95} Article 19(1) of the CISG.
\item\textsuperscript{96} Article 19(2) of the CISG. ‘Additional or different terms relating to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. Any additional or different terms relating to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially – Article 19(3).
\item\textsuperscript{97} \textit{Hyde vs Wrench} (1840) 3 Beav. 334.
\item\textsuperscript{98} Article 30 of the CISG.
\item\textsuperscript{99} Article 35 of the CISG.
\item\textsuperscript{100} Article 41 of the CISG.
\end{itemize}
Moreover, Article 36 in regards to the non-conformity of goods places the obligation on the seller, although this obligation expires at the point where the risk of loss is carried on by the buyer from the seller. The liability on the seller also expires when the expressed or implied guarantee on the product expires. The seller also bears the liability in cases where the buyer failed to carry out a timely inspection and issue a notice of non-conformity of goods. However he can prove the seller was aware of the non-conformity. Under the remedies, for breach of contract by the seller the convention provides for the buyers remedy to substituted or repaired goods (Article 46), buyers remedy to price reduction of non-conforming goods (Article 50). Buyers’ remedy of granting additional time for performance of contract (Article 47) and buyers remedy to avoid the contract when there is any fundamental breach of contract (Article 49).  

2.4.3.2 Obligations and rights of the buyer

The primary obligations of the buyer in accordance with the CISG are his payment of the order price of the good(s) and receiving delivery of the goods. Article 53 to 70 of the CISG gives all the details on the rights and duties of the buyer. These obligations are to be carried out based on parties’ contractual agreements and the principles of this Convention. In the absence of a contractual agreement, this convention provides supplementary rules. These supplementary rules stipulate how prices are to be decided and what place and time should fulfil his obligation of paying the price. Regarding price, article 54 requires the buyer to pay for his purchase following all legal formalities mentioned in the contract that would facilitate the making of payment.

The buyer has the duty of inspecting goods delivered to confirm if they conform to quantity, quality and description based on the contractual agreement between both parties. In the case of nonconformity of goods, the buyer is to give notice of such nonconformity within a reasonable time of when he discovers it or when he is


expected to discover it. The above duties fall under the duty to inspect, give notice, and preserve goods provided in articles 38, 39 and 44 of the CISG.  

2.4.3.3 Remedies

The remedies available under the CISG are tied to and provided for after each of the obligations of the parties. Generally, the aggrieved party may require performance of the other party’s obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform to the contract. In this case the price would be reduced in the same proportion as the value that the goods actually delivered had at the time of the delivery. The CISG restricts the exercise of the remedies available in some instances. For example, if the goods do not conform to the contract, the CISG allows the seller to remedy any lack of conformity in the goods delivered as long as this does not cause the buyer unreasonable inconvenience or expense. This contrasts to the common law position where performance of the contractual obligations must occur within the stipulated time, and where none is stipulated within reasonable time.

2.4.3.4 Passing of risk

On the question of the passing of risk, the CISG provides that the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal. Where the contract relates to goods that are not yet identified, the CISG requires that the goods must first be identified to the contract before they can

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103 Article 38, 39 and 44 of the CISG.
104 The remedies of the buyer are provided for under articles 45-52 of the CISG, while those of the buyer are under articles 61-65 of the CISG.
105 Article 46 in relation to the buyer and article 63 in relation to the seller.
106 Article 45(1) in relation to the buyer and article 61 in relation to the seller.
107 Article 49 in relation to the buyer and article 64 in relation to the seller.
108 Article 50 of the CISG.
109 Article 37 of the CISG.
111 Article 69 (1) of the CISG.
be placed at the disposal of the buyer, at which point risk would then pass to the buyer.\textsuperscript{112}

\textbf{2.4.3.5 Final provisions}

The last part of the CISG deals with technical matters regarding the Convention’s ratification and questions regarding rights and obligations the Convention give rise to for the signatory states.\textsuperscript{113} However, the final provisions may also have an impact on the Convention’s applicability to a given sales contract and many of the provisions correspond to provisions that are to be found in other parts of the Convention. For example, one of the final provisions\textsuperscript{114} of the CISG states that the Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention entered into force in the contracting states, which thereby correspond to the signatory states referred to in part I regarding when the CISG is applicable to a given sales contract.\textsuperscript{115} The CISG's final provisions may thus have a significant impact on the Convention’s applicability to a particular sales contract and need consequently be considered when dealing with the CISG. The location in the final part of the Convention should therefore not distract from the fact that many of the provisions address matters, which are also to be found elsewhere in the Convention.\textsuperscript{116}

However, for purpose of study, the question arises as to whether the above mentioned provisions and applications of the CISG are compatible to South African legal frame work? Also, could it be a solution for the current legal complexities experienced by local international traders and lawyers? The next section attempts to focus on the current functional legal framework for international sale of goods in the Republic of South Africa and the possible differences to CISG provisions with the view of acceding to the convention.

\textsuperscript{112} Article 69 (3) of the CISG.
\textsuperscript{113} Article 89-101 of the CISG.
\textsuperscript{114} Article 100 the CISG.
\textsuperscript{115} Article 1 (1a - 1b) of the CISG.
2.5 South African law on sale of goods

South Africa is not a contracting party to the CISG. This translates to the fact that there is an absence of an international sale of goods legal framework in South Africa. In South Africa there is obviously no specific act on the sales of goods. This means the formation of contracts is not codified. Therefore, the requirements for a valid contract have to be derived from common law. South African’s law of property, sales, and other contracts can however be traced back to Roman law.

According to Kerr, a contract of sale is formed when parties who have the requisite intention agree together or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the res vendita or merx, available to the other, called the buyer or the purchaser, in return for the payment of a price the contract is a sale. This definition took its roots from Treasurer-General v Lippert (1883) 2 SC 172. According to Mackeurtan states that:

The 3 essentials of the contract of sale are agreement (consensus ad idem); a thing sold (merx); and a price (pretium), with a view to exchanging the thing for the price. If these exist, there is a sale. Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance.

The parties to the sale must reach agreement over the subject matter of the sale. The goods sold are also known as the res vendita or the merx. Generally, nearly anything may be sold under the South African law. The goods to be sold may be movable or immovable, corporeal or incorporeal, provided that the goods sold are capable of being sold in commerce (that is, intra commercium). Physical existence is not required for there to be a valid sale. On the other hand several goods cannot be sold under South African law. Res extra commercium are among them. Numerous rules of statutory and common law prohibit the sale of certain things, often on grounds of public policy. For example, the common law does not permit the sale of a

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119 Hamburg v Pickard 1906 (1010) TS.
person (slavery), and statute forbids the sale of human tissue,\textsuperscript{120} and of many narcotics, chemical substances and so forth.

The seller is obliged to take care of the \textit{res vendita} until the thing is made available. Each party to a contract of sale is bound by those obligations which he or she has expressly or impliedly accepted. Apart from these obligations, the law may also impose certain obligations on the parties to a contract of sale. These obligations apply to any contract of sale unless the parties have expressly or impliedly excluded them from the contract.

Even though the buyer bears the risk of accidental loss once sale is \textit{perfecta}, the seller still has a responsibility for the thing sold. The general rule is that the seller must take care of the \textit{res vendita} from the date of completion of the sale until it is made available to the buyer or delivery is affected. This means that seller will be liable for any damage caused by his fraud or negligence, but not for accidental damage caused independently of any negligence on his/her part.

In most contracts of sale under South African law, the purchaser acquires ownership of the \textit{merx} upon completing of the contract of sale. However, it is imperative to remember that the seller’s ownership of the \textit{merx} is not a requisite of a contract of sale. Therefore, the sale of a thing not owned by the buyer can be the subject of a valid contract of sale. In this case, the seller does not undertake to make the buyer the owner of the article but undertakes to give him vacant possession. The issue of ownership, however, is an important incidence of a sale\textsuperscript{121} even though a contract of sale does not automatically result in ownership being transferred to the buyer. This is due to the fact that ownership does in fact pass in most contracts of sale. To transfer ownership, certain formalities are required, depending on whether the thing is movable or immovable. Usually, in order to transfer ownership of a thing, it is not only necessary that it is physically delivered by the owner, but also that the owner has the intention of transferring the right of ownership to the buyer and the buyer has the intention of becoming the owner of the thing in question.\textsuperscript{122}

\textsuperscript{120} Section 60 of the National Health Act 31 of 2003.
\textsuperscript{121} Section 25 of the Constitution of the Republic of South Africa Act 1996.
\textsuperscript{122} Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein 1980 (3) SA 917 922F (A)
From the above section, the South African law on sale of goods is similar and
dissimilar to the CISG provisions in some aspects. Such includes that the CISG
specifically permits a breaching party to cure defective performance. Under South
African law a party does not have a right to cure, but may attempt to do so before the
innocent party cancels the contract. A careful examination of the rights and duties of
the parties revealed that the CISG matches South African law. South African law
recognises that a valid contract is concluded when parties indicate a method by
which a price may be determined. It does not however recognise a contract that
does not fix a price or indicate the manner of determining a price. Generally, the
CISG largely mirrors South African law with respect to the duties, and the
corresponding rights, of the buyer and the seller.

South Africa is a nation referred to be ‘a getaway to Africa’ considering its financial
system stability, natural resources, political and economic accomplishment in and
out of Africa.123 Also, in addition to being one of the top exporting and importing
country in Africa, it is among the most economically active countries.124 Therefore,
with growth on country demands on international trade and also with sale of goods
laws not codified, consideration for CISG accession is essential. This would assist in
filling the gap and solving the existing uncertainties on International sales
transactions between South African traders and the CISG parties.

2.6 CONCLUSION

In a nut shell, it is evident from the chapter that with the increase in the international
trade demands, the need to harmonise International trade law became inevitable.
Harmonisation of the International trade tracks back to early 19th century where the
UNIDROIT committed to the development of a commercial code applicable to the
world trade. A lot of research work went into the drafting of the code regarding
present-day legal systems and current trade customs and usage. In addition, broad

123 Jacobs HE ‘Political and Economic Stability in South Africa ‘ Journal of Foreign Policy Issues:
(accessed on 25 April 2015).

124 There are 20.1 million economically active people in South Africa : available at:
http://www.timeslive.co.za/local/2014/10/27/there-are-20.1-million-economically-active-
participation was encouraged to ensure that a comprehensive piece of law was compiled, which fostered the interests of socialist and capitalist, western and non-western, developed and developing countries alike.

ULIS and ULFIS were known to be first product of the unification process though the conventions were said to have failed to gain the world acceptance. This was attributed to the fact that the Asian countries and developing nations did not partake in their formation. Therefore there was no worldwide participation. Additionally the chapter criticised the ULIS and ULFIS because they were believed to be containing legal traditions and economic realities of Western Europe and were seen as a product of the legal scholarship of Western Europe. The downfall of the ULIS and ULFIS paved way for the drafting of the CISG. The CISG was believed to be a product of the UNCITRAL. Many developing countries including China and South Africa sent representatives and actively participated in the creation of the CISG. As a result of this adequate representation and consultation, the CISG did not encounter the same criticism as it predecessors.

To conclude, the CISG only applies to the contracts of goods where parties have their places of business in two different states, and where either or both states are members of the CISG, or where one of the states is a member state to the CISG and the rules of private international law point to the application of the laws of that member state. CISG regulates only the formation of contract of sale and the rights and obligation of the traders arising from a contract. The Convention specifically excludes sales out of its scope as opposed to SA contract of sale on goods. CISG embraces party autonomy. South Africa is not a member state to the CISG and her law on sale of goods is not codified. South African parties are free to choose the law applicable to their contract in addition to their freedom to choose the CISG as law governing their contract.

Interestingly, a substantial portion of South Africa's trade partners have ratified the CISG and still refuses to accede to it. What reasons can the country give for not taking such action? Owing to the fact that majority of its trading partners are signatories to the CISG, it is necessary to consider the reasons for and against this convention so as to determine whether it would be in the interest of South Africa to
join the growing number of signatory states. The next chapter will explore the arguments for and against ratification of CISG by South Africa.
CHAPTER THREE
RATIONALE FOR AND AGAINST THE RATIFICATION OF THE CONVENTION
BY SOUTH AFRICA

3.1. INTRODUCTION

The previous chapter reviewed the history of harmonisation on International trade law, the development of the CISG and South African domestic approach on contracts on sale of goods. As mentioned above South Africa has not yet ratified or acceded\textsuperscript{125} to the CISG Convention and its contract on sale of goods is not codified. However South Africa takes the recognition of and respects the ambitions and goals of the CISG convention. This respect for the CISG convention in South African law is manifested in the provisions of other related international law applicable in South Africa which calls for the CISG convention aims to be borne in mind\textsuperscript{126} when a court is dealing with such international trade law. With that in mind and part of this study objective, this chapter seek to explore the potential advantages of CISG to the South African commercial sector as a way to achieve her economic development plans and International legal certainty for its traders on sale of goods. Furthermore, this chapter will look at the arguments against the CISG ratification in South Africa.

3.2 THE RATIONALE FOR ADOPTION OF CISG IN SOUTH AFRICA

With references to articles that have been written and published since birth and development of the CISG, this section will critically examine a few reasons that have been put forward to support the accession of the CISG in South Africa. These reasons were formulated in the view of solving the current complexities and achieving legal certainty in international transactions faced by South African stakeholders.


\textsuperscript{126} The South African Legislature has stated in the Convention on Agency in the International Sale of Goods Act 4 of 1986 that the aims of the CISG Convention should be borne in mind; Schedule of the Agency Act 1986 an instrument which can be said is related to the CISG Convention. It has also been submitted that a further sister Act to the CISG Convention is the Convention on the Limitation Period in the International Sale of Goods, New York (1974).
3.2.1 Legal certainty of International Sales and cost reduction

It is strongly suggested that ratification of the CISG in South Africa would provide a platform for achieving improved legal certainty and cost reduction of the countries trans-border trade transactions/relations and agreements. The provision and assurance of legal certainty brought by the CISG would assist in curbing the rise of disputes. This would ensure the fact of a dispute is what is investigated rather than the wasting of time on the legal complexities when disputes do arise.

Although, the convention makes use of some unclear terms in making provisions and rules for indefinite situations that may arise during trans-border trade. It would be impossible to draft up a fair and flexible legal regulation for sales not bearing in mind these uncertain situations, even though these vague terms used may give rise to dispute itself. The existences of these unclear terms or conditions are not only common to this convention, as most domestic sales law use them in explaining situations where specific rules would apply. In further justification, the CISG is a convention drafted clearly to portray a good balance of precision and flexibility. Therefore, the terms used by the convention are to create and enhance the legal certainty of South Africans engaging in International trade relations.

As regards to cost reduction, the structure of the CISG aims at promoting international trade through cost reduction of trans-border trade transactions that would enable the efficiency and growth of international trade. The most common barrier confronting importers and exporters in South Africa and other nations are the issues of the foreign laws of the other party to an international contractual agreement where the contract happens. In ratifying this convention, South Africa would not only

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129 Vague terms such as those in; article 7(1) ‘the observance of good faith in international trade’, article 18(2) ‘unless the circumstance indicate otherwise’, and article 33(c) ‘a reasonable time after the conclusion of the contract’, etc.

130 Eiselen (1999) *SALJ* 323.

be a member of a convention in which its major trade partners are already members. She will also be a member of a convention that provides a standard legal language that would consistently reduce its cost of seeking legal knowledge or dispute resolution. With that, it creates more awareness and confidence to South African traders thus leading to legal certainty on international sales transactions.

Conversely, despite the above mentioned reason, the current provisions of CISG are already applying to traders\textsuperscript{132} in South Africa. This is because they trade with CISG states therefore the section below will discuss in detail how South African traders are informally affected.

3.2.2. The provisions of the CISG may already apply to South African traders

One exciting fact is that the CISG may already apply to contracts involving South African businessmen even with the fact that South Africa has not acceded to the convention. Article 1 of the convention specifies that the CISG may apply to a sales contract between parties whose places of business are in different states not just when the states are contracting states\textsuperscript{133} but also when the rules of private international law lead to the application of the law of a contracting state.\textsuperscript{134}

Assume, for example that a South African businessman contracts with a Brazilian dealer for the sale of some merchandise. If a dispute were to arise and the appropriate (applicable) law were found to be the law of Brazil, article 1 of the CISG provides that the CISG would apply. This would be the case even though South Africa has not ratified the convention. This puts the South African trader in a somewhat awkward situation where he is bound by a convention that his country has not ratified and with which he may be hardly familiar.

Practically, therefore, as more states continue to ratify the CISG, it will become more and more applicable to transactions involving South African traders. Ratifying the CISG before this eventuality would ensure that greater awareness is created within

\textsuperscript{132} Eiselen (1999) \textit{SALJ} 341. This same principle applies to the United Kingdom and any other State that has not yet ratified the CISG, but who trades with signatory States.

\textsuperscript{133} Article 1(1) (a) of the CISG.

\textsuperscript{134} Article 1(1) (b) of the CISG and Laszlo R ‘Area of Operation of the International Sales Conventions’ (1981) 29 \textit{American Journal of Comparative Law} 513.
the country on its provisions and on the emerging case law. In addition to the CISG provisions presence to South African traders, it has also gained much popularity and usage globally.

3.2.3. The success and worldwide practice of the CISG

The CISG has attained a high success rate as the first international sales harmonisation attempting to unify the several laws binding international transactions.\textsuperscript{135} CISG remains the second most adopted treaty in the field of international trade law, after the convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the ‘New York Convention’).\textsuperscript{136} In these terms alone, it is difficult to deny that the CISG is a success, and one that is becoming more evident as States join it at regular pace. The convention has met resounding acceptance around the globe. At present, the CISG member states potentially account for 80 percent of global trade and production of goods as parties/member states to the convention.\textsuperscript{137} In addition to this, South African major trading partners such as Russia, China\textsuperscript{138} and Brazil are contracting states to the CISG. China is arguably one of Africa’s major trading partners.\textsuperscript{139} The CISG has been pivotal to the development of China’s foreign trade and its economy. This was due to the fact that China’s courts and arbitral institutions could now apply a more specific legal regime to International sale of goods disputes. This subsequently increased the level of confidence of China’s trading partners as they relied on the country’s legal system. As a result South Africa business people either willingly or unwillingly will not come under the influence of a convention that they have no clue about or is their country making plans to be part of the convention. Furthermore, one major issue that should be considered is the fact that the convention can be applied as a usage of trade

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\item \textsuperscript{136} United Nations, Treaty Series Vol 330 38.
\item \textsuperscript{137} Schwenzer I & Hachem P The CISG - A Story of Worldwide Success in J Kleinemann CISG Part II Conference (2009) 119.
\item \textsuperscript{139} China in the heart of Africa – available at: \url{http://www.un.org/africarenewal/magazine/january-2013/china-heart-africa#sthash.wSGruQDi.dpuf} (accessed on 20 March 2015).
\end{itemize}
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which invariably makes it applicable to the contracts as domestic law even when neither party is from a contracting state.\textsuperscript{140}

The CISG currently has about 3,064 courts, and arbitral proceedings handled and handed down from over 50 jurisdictions. The convention’s database provides about 2500 full articles of commentaries, articles, and books on the CISG and related subjects.\textsuperscript{141} The above achievements of the convention after 34 years of its existence are good enough reasons. They have served as a case for adoption amongst scholars such as Eiselen and Glebler in the academia promoting the CISG’s adoption in South Africa and other developing states of the world. However the general acceptance by the world should not be the sole reason for South Africa ratifying the CISG but should be compatible to South Africa’s needs to reduce legal uncertainties under South African Law.

Adding to the above mentioned motivation, South Africa should strive for a well-balanced, attainable and fair legal system on international sales transactions to achieve its future goals.

\textbf{3.2.4. Simplicity, practicability, and equality}

In order for South Africa to consistently, sustain its leading position as one of the African economic giants it would need to develop its legal system to an extent where its environment would stimulate wealth redistribution and economy diversification.\textsuperscript{142} South Africa needs to improve a legal system that would provide full economic security for its small, medium and micro sized enterprises (SMMEs). As small medium and micro sized enterprises, especially in developing countries like South Africa, have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of the CISG. Small, medium and

\textsuperscript{140} ‘Arbitration tribunals may imply the CISG into a contract dispute as evidence of international custom or trade usage.’

\textsuperscript{141} Convention’s database available at: \url{http://www.cisg.law.pace.edu} (accessed on 28 May 2015).

micro sized enterprises constitute the backbone of a modern and balanced economy. They support economic diversification and may therefore significantly contribute to achieving sustainable growth. Moreover, they may play an important role in addressing those structural problems affecting developing countries. The CISG may be instrumental in making this role effective. However, In order to achieve such, the country needs to provide or adopt simple, reasonable, and fair rules or legislation for participants in both domestic and international trade.

Bearing in mind the existing complexities of the international trade environment, the country would need to adopt advanced legislation to help handle such existing complications. The CISG, therefore, suits such required legislation as it currently receives wide acceptance as an advance legislation dealing with international sale of goods.\textsuperscript{143} It is a convention developed specifically to curb the complexities of international trade as the drafters bore in mind its usages and practices while drafting the convention. If ratified in South Africa, the convention would enable a levelled playing field between South African businesspersons engaging in foreign trade with persons from other jurisdiction.

\textbf{3.2.5. The CISG is well developed, easily accessible and available in several languages}

The writing of the CISG is not only available in six authentic languages. It also has been translated into several others. This translation is broad and covers all articles of the convection. A number of court decisions, arbitral awards as well as scholarly literatures are either written or translated into English and other international languages. They are readily accessible, not only in various books and journals but also electronically.\textsuperscript{144} The abundance of legal materials on the CISG means that lawyers, judges and arbitrators have access to the necessary information and are able to apply the CISG in a predictable and uniform fashion.

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\textsuperscript{144} Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, available at: \url{http://www.uncitral.org/uncitral/en/case_law.html} (accessed 28 March 2015) which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application.
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Many law schools and institutions around the world teach the CISG to their students. Knowledge on the law is spread in this way, which means that lawyers from developing countries such as South Africa also have the opportunity to study the law on the CISG. ‘Better accessibility of the CISG saves time and costs, and makes the result of cases more predictable.’

3.2.6 CISG as a model of national sales laws improvement

International trade is an area that is regularly developing, largely through the invention of new technologies that continue to shape the trading environment. To keep up with these developments, both national and international rules require constant modification to meet these needs. The CISG reflects a balanced law that is well-researched, fairly recent compared to other national laws, and provides for international usages and customs. For a CISG contracting state, the CISG provides a solution to outdated laws and any need for constant revision. As for national laws, the CISG is regularly used as the basis for legal reform of domestic laws of sale. It has been used in revising the American, German, Dutch and Chinese sales and contract laws, to name but a few.

3.2.7 Leadership role in regional integration

Some countries in the world are considered major absentees from CISG, such as the United Kingdom, India and South Africa. The role that these countries play within a specific region or in the world may have great impact on other states. For example, South Africa is the leading economic power in Southern Africa. This forces South Africa to run its domestic business and interact with its neighbours in ways that improve national economies in the region. Many of these southern African countries have weak and fragile economies, exacerbated by their inexperience and under capitalisation in international commercial arena. This opens the way for them to be exploited by stronger traders. A great number of developing countries enter into

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145 In South Africa specifically, postgraduate courses in international law trade generally have a component on the CISG even though South Africa is not party to the Convention. Examples of such universities are Stellenbosch University, University of Cape Town and University of Pretoria.


trading relationships with experienced developed countries,\textsuperscript{148} which give the stronger party the opportunity to determine which laws apply to contracts, and there is an excellent chance that this will be the law of a foreign state. This entails legal costs and requires a great deal of time for familiarisation with this foreign law.\textsuperscript{149}

If CISG were in place, the African states would better served. The CISG applies to a contract if the other party is a signatory country and the rules of private international law require it. This result in legal certainty and a reduction in money and time spent. The developing countries would better served under a unified law applicable to international sales contracts, as this would remove the hurdles presented by foreign law. If South Africa ratifies the CISG, it is believed that the flow of trade will take place smoothly. African states national will thus develop. The drafter made great efforts to reflect and protect the interest of developing countries but despite their efforts, the CISG has achieved a low rate of ratification in the developing world. There is a belief that it is internal efforts that result in economic growth in African states and therefore all measures must be taken to reach this goal of sustainable growth.

Adoption of the CISG is regarded as the right starting point. The economically stronger parties would not be able to take advantage of the weaker developing parties. Therefore, its acceptance by South Africa might well encourage neighbouring countries to take steps towards the ratification of CISG.\textsuperscript{150} This would safeguard even more trade practices for South Africa and southern countries. This suggests that the influential position and leadership role that a country has in a region gives rise to the acceptability of the CISG in the eyes of other countries in that region.

\textbf{3.2.8 Party autonomy to contract}

The CISG has been drafted in such a way as to allow the maximum level of party autonomy. As a result, most of the CISG’s articles may be modified or excluded to fit

\textsuperscript{148} Eiselen (1999) \textit{SALJ} 355.


\textsuperscript{150} Eiselen (1999) \textit{SALJ} 356.
the given transaction.\textsuperscript{151} However, the CISG is not without constraints. The Code specifically enforces particular formalities onto the formation of a contract.\textsuperscript{152} Where there is a departure from the CISG’s required formalities; the CISG will override the contract. In addition, where the contract is silent on a certain necessary point, the CISG will fill in the \textit{lacuna.}\textsuperscript{153} Of great importance to smaller traders is the CISG’s balanced approach to the buyer and to the seller. Certainly no party is favoured by the Code and therefore weaker parties are in a stronger position than what they would normally be in under domestic law. Although it is possibly impossible to protect the weak party entirely from the bargaining power of the strong party, the CISG does attempt to distribute rights and duties evenly to level the legal playing field.

A further benefit is that parties may remedy any shortfall innate in the CISG by contracting around such problem areas in their private contract.\textsuperscript{154} Unfortunately stronger parties have also utilised the freedom given under the code to completely exclude the application of the CISG.\textsuperscript{155} On the whole however parties are benefited by the entrenched principle of party autonomy

\textbf{3.2.9 Aid in negotiations}

The CISG has been written in such a manner to make it easy to read and to understand. Contracting parties benefit from this balanced and neutral code which assists them at the time of negotiation.\textsuperscript{156} It is largely free of technical legal language in order that ordinary traders may utilise it. Since the CISG is drafted appropriately for international trade transactions,\textsuperscript{157} unless stated otherwise, it applies to every contract of international sale. With its application, parties focus in negotiations can

\begin{enumerate}
\item Article 6 of CISG.
\item Article 2 of the CISG.
\item Eiselen (1999) \textit{SALJ} 349.
\item Bonell MJ,‘The UNIDROIT Principles in Practise: The Experience of the First Two Years’ (1997) 34 \textit{Uniform Law Review} 38.
\end{enumerate}
be on commercial aspects of the transactions such as price, date, mode of delivery, size of product and quantity specifications. The CISG therefore provides a comprehensive checklist, which inexperienced traders may use during negotiations to ensure that all aspects of the pending contract are addressed.  

In addition, disputes over choice of law are avoided and the battle of forms is less prominent. Relying on the CISG to deal with the legal details of a contracts prevents and disagreement and as a result a more productive trading contract can be conducted.  

3.2.9.1 Conclusion: Arguments for ratification

In summary, the above few discussed points and achievements of the Convention after 34 years of its existence are sufficient reasons. Ratification seems to be a logical step if South African traders are to remain competitive on the global market. Such reasons included Legal certainty, cost reduction, success and worldwide practise of CISG, simplicity, practicability and equality of the CISG, party autonomy and aiding negotiations. These reasons have served as a case for the adoption amongst scholars in the academia promoting the CISG’s adoption in South Africa and other developing nations. The reasons suggested that the current legal problems and complexities facing South Africa could be minimised by acceding to the convention. However, although the CISG is seen as the solution to current South Africa problems, there is also a need to look at the disadvantages. Therefore the next section focuses on negatives that could accrue to South Africa from acceding to the CISG.

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159 Eiselen (1999) SALJ 351.

160 Economists have a number of indicators that are used to show a country’s competitiveness some of the indicators include consumer price indices, export unit values, the relative price of traded goods to non-traded goods. Marsh & Tokarick ‘Competitiveness Indicators: A Theoretical and Empirical Assessment’ IMF Working Paper No. 94/29; Cass Business School Research Paper (1994) 1. Available at SSRN: http://ssrn.com/abstract=883467; (accessed on 15 August 2015).

3.3 THE RATIONALE AGAINST RATIFICATION OF CISG IN SOUTH AFRICA

Despite the above mentioned potential benefits, the CISG has also been criticised for its incompleteness, shortfall and inability to create uniformity among other things. Therefore, with also references to a few articles that have been written and published since birth and development of the CISG, this section will discuss a few reasons that have been put forward to discourage the accession of CISG in South Africa. These reasons include the ambiguity of CISG article 7, language problems, legal uncertainty, and inflexibility, the cost of familiarising, multiple conventions and the opting out provision and all discussed in more detail below.

3.3.1 Ambiguity in Article 7 of the convention compromises uniformity

The provisions of the 7th Article of the CISG have given rise to matters which have been a regularly discussed and thought to be limiting uniformity.\textsuperscript{162} The issues raised are essential to the success or failure to the convention simply because the article in question is regarded as the most important provision of the convention.\textsuperscript{163}

The article stipulates that:

Article 7 (1): ‘In the interpretation of the Convention, regard is to be given to its International character and to the necessity to promote uniformity in its use and the observance of good faith in international trade.’\textsuperscript{164}

Article 7 (2): ‘Questions regarding matters governed by this Convention which are not expressly resolved in it are to be resolved in compliance with the common principles on which it is founded or, during the absence of such principles, in compliance with the law applicable by virtue of the rules of private international law.’\textsuperscript{165}

\textsuperscript{165} CISG Article 7.
The deficiencies in this article emanate from the ambiguity identified on two key issues; the absence of a definition of good faith and the manner of determining the application of good faith. The above deficiencies give rise to the question of where and who has the duty of good faith. Precisely also, the above issues have led to legal and scholarly controversy on whether Article 7 is directed towards the obligation of parties to the sale of goods contract to act in of good faith. There is also the controversy on whether article 7 is directed to the observance of good faith in judicial and scholarly interpretation of the convention. Therefore, with no definition of good faith and answer to other questions, the provisions of Article 7 is understood differently and given various interpretations.\textsuperscript{166} As a consequence of compromises, the CISG is a convention with many gaps. Because there are many aspects of the law of international sale it does not cover, the CISG can be described as an incomplete law.\textsuperscript{167}

### 3.3.2 Language problems

The CISG is issued and made available in six equally legitimate but different official languages.\textsuperscript{168} The objective of the production and availability of the convention in these many languages is to allow maximum adoption amongst its member states. However, the concern here against uniformity of the convention lies in the possibility of an accurate and precise translation of the convention from the original language it was drafted in to any other language. According to Sheaffer, despite any advantage brought by the providing the convention in multiple languages, these multiple language drafts greatly deter the goal of uniformity.\textsuperscript{169} The multilingual regime of the CISG has continually experienced instances of inaccurate or imprecise replication of the terms of the convention into various languages. A well-known example of one of such inaccurate or imprecise replication instances was the typographical error of the Argentinean version of the CISG at adoption.\textsuperscript{170} Not only member states have been found guilty of having differences in translating the convention from its original text to

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  \item \textsuperscript{166} Kee C & Muñoz E (2009) 27.
  \item \textsuperscript{167} Schwenzer I & Hachem P (2009) 5.
  \item \textsuperscript{168} The six languages are- English, French, Russian, Chinese, Arabic, and Spanish.
  \item \textsuperscript{169} Sheaffer C (2007) \textit{CJICL} 27
  \item \textsuperscript{170} Sheaffer C (2007) \textit{CJICL} 27
\end{itemize}
other national languages, but also differences in scholarly translation and interpretation are been recorded under this regime.\textsuperscript{171}

3.3.3 Misapplication of the CISG by courts (Homeward trend)

The misapplication of the CISG rules by courts as an issue leading to the failure of the conventions goal of uniformity stems from certain ambiguous and deficient provisions of the convention. The convention renders no provision for an international court or successive/hierarchical structure of interpretation. Without this court or structure courts, can refuse to accept judicial decisions or precedents from other foreign courts but rely instead on familiar national laws that may be unfavourable to foreign parties.\textsuperscript{172}

3.3.4 Legal uncertainty

The structures that provide the CISG flexibility and adaptability similarly result in legal Uncertainty. The broad terms, novel vocabulary, and lack of comprehensive definitions results in the CISG failing to provide clarity regarding its meaning.\textsuperscript{173} Parties are therefore left to determine, from the presently limited body of law on the CISG, which direction the court may take.

It is essential and unavoidable that the CISG will have a certain amount of legal uncertainty, due to the civil-law nature in which it was drafted.\textsuperscript{175} The existence of legal uncertainty is not in issue. What is in issue is the point at which the extent of the uncertainty contravenes the positive goal of flexibility.\textsuperscript{176} The true concern is therefore whether the legal uncertainty revealed in the CISG is within acceptable boundaries to function effectively. The failure of the ULIS and ULF saved the CISG with regard to legal uncertainty. Many principles employed in CISG have been in place in countries that ratified the ULIS and ULF. Feedback and commentaries were

\textsuperscript{171} Sheaffer C (2007) CJICL 27.
\textsuperscript{172} Sheaffer C (2007) CJICL 27.
\textsuperscript{174} Eiselen (1999) SALJ 362.
\textsuperscript{176} Eiselen (1999) SALJ 362.
published on the CISG’s precursors. Many lessons learned from these reports were taken into account at the time of drafting the CISG. Therefore, the question of the CISG’s lack of legal clarity was rendered less serious by the fact that it was preceded by ULIS and ULF. This suggested that the extent of legal uncertainty in the CISG is acceptable and is not an impediment to it ratification.

### 3.3.5 Stationary and inflexible

All forms of legal code, regardless of whether they are national or international have a tendency to come to a standstill and restrict the development of law. Rosette states that the CISG does not cater for change, amendment or modification of its provisions. He states that because of this problem, the CISG is ill equipped to deal with new challenges that might arise in the future The CISG is drafted to complement and accommodate international trade practices and usage. Like all other laws, the CISG was written against a background of specific socio-economic conditions at a specific time. According to Schlechtriem as quoted in Wethmar-Lemmer (The Vienna Sales Convention and Gap-Filling), the CISG is based on the knowledge, needs and experience that the drafter had in 1980. The drafters could not have foreseen the new technical and economic developments we experiencing to date. This means that specific articles may become obsolete and inessential and may act as a hindrance to the development of sales in a country. National Laws are designed with the capacity to be altered if such legislation proves to be unsuitable for what it was drafted for. Given the number of countries that have ratified the CISG, changing its contents presents a problem. This is because all contracting states have to agree to the proposed changes before any modification can take place. Non-unanimous agreement on the changes results in the code being

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static of different versions of the code being in place at the same time. This would harm the goal of uniformity within international trade.

3.3.6 Opting out provisions

The CISG tries to accommodate different interests. As a result, it does not only include compromised provisions but also provisions that permit parties to exclude it completely or derogate from some of its provisions. For example, Article 6 of the CISG states that, ‘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 generates clear challenges in whether the goal of uniformity will be achieved and depends on whether parties choose to opt-out of the convention or not. Such an optional approach, though consistent with the principle of party autonomy, hampers the purpose of the CISG. It is an unpretentious concern that, where the parties do not exclude the convention completely, they might choose to exclude the application of Article 7 which is a key provision in attaining uniformity under the convention.

Apart from exclusions and derogations by parties to the contract, the CISG permits contracting states various powers to exclude portions of the convention by making declarations or reservations. These options are provided for in Articles 92 through 96 of the convention. Article 92 basically allows contracting states to exclude more than two thirds of the convention, whereas other provisions within this category, such as Articles 95 and 96, allow for the exclusion of specific provisions. Instead they also allow contracting states to declare that the convention no longer applies where the parties to the contract have their places of business in contracting states with similar sales laws as in the case of Article 94, or that it applies only to some of its territorial units as provided for under Article 93. These provisions divert from the goal of uniformity because whilst a state might have ratified or acceded to the convention, exclusions might be attached to such ratification or accession in the form of declarations and reservations. Therefore, the convention applicable in one contracting state could actually be different from the convention applied in another contracting state and hence different from the original text.

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A party to a contract where the convention applies or a court applying the CISG must therefore first determine which of its provisions apply and which have been excluded. This opens up the CISG to fragmentary harmonisation where parts of its provisions would be applicable combined with national law for the parts to which these contracting states have made a declaration or reservation. Apart from this, a contracting state may denounce the convention which essentially could complicate the legal environment because practitioners regularly have to keep track of developments in relation to states participation. There is no doubt that this creates uncertainty and unpredictability because it contradicts the underlying uniformity that the drafters aspired to create.\textsuperscript{187} It should, however, be noted that lately there is a trend to denounce Article 92 declarations which has been led by the Nordic countries. This will increase the level of uniformity in the application of the convention.

### 3.3.7 The cost of familiarisation

Another reason put forward against adoption of the CISG in certain jurisdiction is the cost, time and effort required to become familiar with the convention. Some developing countries are not quite familiar with CISG and the costs of learning CISG are perceived to be higher. Such costs, however, as Flechtner argues, are ‘start up’ costs, and are required as an initial investment.\textsuperscript{188} In jurisdiction such as China and Germany, study of the CISG is compulsory therefore traders and jurists tend to be less unfamiliar with the convention. Therefore the learning costs are perceived to be lower among legal practitioner. As soon as such an investment is made in CISG knowledge, the CISG can be in use for a long time.\textsuperscript{189}

\textsuperscript{187} Sheaffer C (2007) CJICL 477.
3.3.8 Effective trade practices and standard contracts already available

International trade existed before the CISG, ULIS, or ULF were drafted. The business world operated on familiar standard term contracts, which ruled all facets of international trade practice. These standard terms were established and proven reliable over years of use. They are thus trusted, while the new organisation signalled by the introduction of the CISG was unfamiliar and therefore not trusted by traders. Sceptics argue that there is no need for the unifying endeavours of the CISG because the international trade arena is already unified through the use of reliable standard term contracts. It is true that standard term contracts have proven successful in achieving stability in the international trade market. This is not disputed and there is further no need for the CISG and standard term contracts to be mutually exclusive. Critics have failed to recognise the usefulness of the CISG in situations where standard terms are not used or where they have shown themselves to be inadequate.

Many traders have rendered the CISG redundant by excluding its application and relying on trade practices in their contract. These traders have chosen to rely solely on standard term contracts. This is unfortunate given that the convention often covers more facets of trade than the standard terms and trade practices do. Its inclusion in standard contracts could help when a dispute arises that is outside the bounds of the standard contract. Many disputes may arise over matters that are not covered by standard terms or by trade practices given that every individual contract is accompanied by possibly unique circumstances. It is in relation to these unique circumstances that the CISG would be useful. When parties however elect to exclude the application of the CISG, the individual circumstances of the contract that
are not covered by trade practice or standard terms are referred to domestic law.\textsuperscript{196} The CISG, trade practices, and standard term contracts should therefore act together to cover every legal eventuality in international trade agreements.

It is also imperative to remember that when parties are left to rule the standard terms of their contract the party with the stronger economic capacity will apply superior bargaining power to enforce their interests. This situation is not favourable for the development of international trade, which requires competitive bargaining. Bargaining can only be competitive when boundaries are established to place parties on a fairly equal standing. This can be ensured to a greater extent through the use of the CISG.

\textbf{3.3.9 Multiple conventions lead to confusion}

It is vital that unifying attempts should support the simplification of the international trade arena and not add to its already complicated nature. Generally where there are numerous conventions in place attempting to unify the same area it will undoubtedly lead to confusion.\textsuperscript{197} However, this is not necessarily the case with international trade law because ULIS and ULF are no longer in active use. While the UCC is often applied to international sale contracts, this option is dependent upon the parties concerned and is not automatically applicable.\textsuperscript{198} Therefore the CISG is the only unifying Convention and thus no confusion on the part of traders could arise. In fact, the CISG dramatically reduces the number of applicable legal systems in any single

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\item The CISG would replace the need to refer to parties’ individual domestic laws. Instead, parties could refer to the terms of the CISG when trade practices and standard term contracts leave a gap.
\item Eiselen (1999) \textit{SALJ} 363 : This is evident concerning the law of the sea, which is controlled by the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules. Multiple bodies of rule lead to uncertainty concerning which would be applicable in any given situation.
\item Parties would have to elect to apply the UCC to the sale contract. If the UCC is not applied, the domestic law selected by the parties will apply. The CISG will apply automatically to a contract entered into between parties from signatory States. It will be excluded only if expressly agreed upon. Therefore, the CISG and the UCC are not conflicting conventions. Parties will have to deliberately agree to apply the UCC and to exclude the CISG. No confusion could therefore result because the parties would have had to bring their minds to bear upon the matter before entering into the contract.
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international trade transaction.\textsuperscript{199} If both parties are from states that have ratified the CISG, then no unfamiliar foreign domestic law will have to be contended with in the instance of a dispute arising. This would be of great benefit to South Africa in the event of the government deciding to ratify the CISG. Therefore the CISG does not further complicate the international trade arena, but in fact simplifies it. The only point of concern is the ellipses in the CISG to cover all aspects of the contractual relationship.\textsuperscript{200} In such instances parties may have to rely on domestic laws. However, as mentioned above, disputes in these circumstances rarely arise in practice and thus the CISG is largely effective in its attempts to simplify international trade contracts.\textsuperscript{201}

3.3.9.1 Conclusion: The case against ratification

In short, this section took a closer look at few shortfalls of the CISG that could arise if South Africa ratifies the CISG. With references to the past articles and writings referred above, the CISG is believed to be an incomplete body of law and many courts do misinterpret its provisions. It is available in different languages and its ambiguous vocabulary is to be interpreted in national courts and by arbitral tribunals according to similarly ambiguous rules of interpretation. These matters pose great challenges to the application of the convention in South African courts and in practice. Other reasons suggested that, although a number of countries have adopted the CISG, it is believed that a number of merchants have rendered the CISG redundant by excluding its application and depending on trade practices in their contract. Therefore, from the negative reasons mentioned, the question arises whether the CISG is insufficient or, rather is it incapable of solving the existing problems under the South African law with regards to international sale of goods?

\textsuperscript{200} Lavers RM (1993) IBL 10-11.
3.4 Conclusion

As shown above, arguments against ratification do not seem to have discouraged over 83 countries that have to date ratified the CISG. The CISG, like any other body of law has its flaws, but should not be viewed in isolation. Rather should try to get a better understanding of its principal goal and intentions. The CISG has without doubt grown in stature and a number of countries have accepted it. It is becoming the normal international trade law considering the number of countries agreeing to the CISG and controls two thirds of world trade. South Africa should therefore pay attention to the positive global movement toward the CISG.

However, the CISG is not flawless and is labelled as incomplete body of law, its inability to grow and adapt and multiples of languages and interpretation styles. This part of criticism of the CISG has now become irrelevant due to increased use of the CISG and availability of court decisions. Most scholarly arguments are now certainly leaning towards ratification and the benefits to be drawn from ratification for the South African business far outweigh the shortcomings presented by the CISG as an instrument. South Africa needs to assent to the CISG as its solution to current legal problems on international transactions and also encourage fellow developing countries to ratify. With a few major developing nations already adopted the CISG and it is therefore imperative to explore and learn from them.

The next chapter examines the positions in two developing BRICS countries, Brazil and China that have endorsed the CISG to establish the effects on their respective positions on trade and assess the lessons for South Africa from the Brazilian and Chinese experience as to date.
CHAPTER FOUR
INTERNATIONAL SALE OF GOODS CONTRACTS IN BRAZIL AND CHINA: A COMPARATIVE ANALYSIS TO SOUTH AFRICA

4.1. INTRODUCTION

Despite a number of benefits of Convention of International Sale of Goods (CISG) mentioned above in the previous chapter, only Russia, China and Brazil among the Brazil, Russia, India, China and South Africa (BRICS) nations have ratified the CISG to date. Given the BRICS countries close cooperation, one would expect all the members to have ratified. Therefore, it is important for the study to consider the respective positions among them on CISG status. It will be useful to investigate the reasons put forward by these states for their differing positions. BRICS nations have been arguably regarded as part of the most growing economies in the past decade. 202

The BRICS countries have developed their diplomatic relations and formed coalitions outside the economic realm. To name a few examples, one can point out the role of Brazil and India in the Doha negotiations, the India Brazil South Africa forum (IBSA) between India, Brazil and South Africa, India and China. These negotiations sought to defend common interest on environment and climate issues among the countries, besides the participation of BRICS countries in the G-20.

However, it is essential to note that the relationships defined above create consequences and the needs that go beyond the economic scope. It is clear that a closer economic cooperation among BRICS countries in the future is inevitable. Consequently it becomes necessary to study the legal framework of the group members, especially regarding to international business contracts, in order to remove barriers to economic integration within the BRICS. For the purpose of the mini thesis, to assess whether CISG will be a solution to South Africa’s current legal complexities on International sales. This part will focus only on Brazil and China from

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BRICS countries. They are the two South Africa’s largest trading partners, China ratified the CISG when it was established in 1981 and Brazil followed suit in 2013.

Firstly, this section focuses at the Brazilian contract on sale of goods; explores the perceived benefits and drawbacks of ratification of CISG by Brazil. Secondly, the law on sale of goods in China is explored along with its respective advantages and disadvantages of ratifying CISG. Thirdly, the section concludes with an analysis of the relevance of Brazilian and Chinese experiences in relation to South Africa and whether their respective experiences can influence accession of CISG by South Africa.

4.1.1 Brazil contract law on the sale of goods

Brazilian law on the sale of goods underwent a complete overhaul, with the entry in force of a new Civil Code (New Civil Code), on January 11, 2003. The new civil legislation replaced the Civil Code of 1916 as well as the Commercial Code of 1850, which became obsolete in view of the profound changes that occurred during the last century in the social and economic relations within Brazilian society. During such period, several hundred amendments were introduced in the former codes and an equally great number of special laws have been enacted. These laws dealt with a myriad of aspects of societal relations, for example family, intellectual property, real property, civil liability, and companies, to cite just a few. In spite of that, principles of contract law in the field of sale of goods remained nearly untouched over the life of the old Civil Code (with the conspicuous exception of the Consumers' Defence Code, enacted in 1990).

The development of the sales law on goods was advanced further internationally to cater for global contracts of sale of goods when Brazil joined CISG.

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4.1.2 Convention of the International Sale of Goods in Brazil

On March 4, 2013, Brazil acceded to the CISG and became its 79th Contracting State. Brazil’s accession to the CISG was a major step towards harmonisation of rules applicable to import and export transactions involving Brazilian parties. CISG brought more certainty with respect to the law applicable to contracts, reduced transaction costs and allow parties to better manage their risks. The CISG was entered into force in Brazil on April 1, 2014 pursuant to Article 99(2) of the Convention. Therefore, after April 1 2014, international trade transactions with Brazil were more straightforward. The Brazilian law also provides arbitration and it is found under the Brazilian arbitration Law (Law No. 9.307/1996). This law is clearly inspired by UNCITRAL Principles.

Given, the developments of Brazil international sales law and certainty to applicable law on international contracts under CISG outlined in the above paragraph, South Africa could benefit from adopting CISG seeing that they share some of the trading policies. However, at this point it is essential to examine Brazil motives looking that they took long to adopt the CISG although they were pioneers during the drafting period.

4.1.3 Motivation for adopting the convention

Brazilian representatives participated actively in the drafting of the CISG during the seventies and also participated in the Vienna Diplomatic Conference of April 1980, which lead to the approval of the final CISG text. Therefore, it was only fair that they could adopt the convention. Glebler was on the opinion that Brazil would benefit from adopting the CISG. He stated that there were no major inconsistences between the Brazilian New Civil Code provisions and the CISG. Since the CISG does not

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209 Código Civil [C.C.] Law n. 10.406 (Braz.).
regulate domestic trade of goods, Brazilians would not have to revoke or replace their internal rules in order to accommodate international legal practises.\textsuperscript{211} He argues that nothing in the CISG rules seems to offend fundamental principles of national contract law so as to incur the repeal by the Brazilian legal community.\textsuperscript{212} Thus far, none of the Brazilian scholars have given any formal criticism on CISG.\textsuperscript{213} Glebbler also noted that the Brazilian community started to see the need and the importance of conformity to international legal standards in foreign trade and eventually accepted it.\textsuperscript{214} Brazilian scholars have thus far written about CISG and have given very positive remarks.\textsuperscript{215}

The adoption of the CISG by Brazil was believed to most certainly favour commerce with Brazilian parties and it placed the country at the same level as its partners in trade. State members of the CISG are responsible for more than 90\% of the world trade and over 50\% of the Brazilian exports have been directed to China, Russia, United States, Argentina, Germany, Netherlands, Japan, Venezuela, Belgium, Italy and recently South Africa. Most of these countries are signatory to the CISG. Also, more than half of Brazilian imports come from United States, China, Argentina, Germany, Japan, Italy, France and Mexico again all countries which are part of the CISG.\textsuperscript{216} Neto also believed that the move to adopt the CISG by Brazil was an important step towards wider economic and legal integration.\textsuperscript{217}

\textsuperscript{211} Grebler (2005) \textit{JLC} 475.
\textsuperscript{212} Grebler (2005) \textit{JLC} 475.
\textsuperscript{213} Grebler (2005) \textit{JLC} 475.
\textsuperscript{214} Grebler (2005) \textit{JLC} 476.
\textsuperscript{215} Grebler (2005) \textit{JLC} 475.
Having considered the reasons that led to adoption of CISG in Brazil, it is also reasonable to look at the current benefits received from adoption and assess whether South Africa can make a case for ratification.

4.1.4 Benefits derived from Brazil's accession to the convention

In terms of trade and globalisation, Brazil has had a positive implication since adopting the CISG. With the growing importance of Brazil in the international market for commodities and industrialised goods, the accession to a system of uniform and international rules has contributed to providing the legal certainty and predictability that globalisation requires. As a direct consequence, foreign private parties may feel safer and less doubtful when performing contracts on the international sales of goods with Brazilian parties.

Before Brazil's accession to the CISG, there was significant uncertainty with respect to the law applicable to international trade transactions involving Brazilian parties.\(^\text{218}\) Currently, traders in South Africa are facing such problems and complexities under South African law and there is need for a solution to remain competitive globally. Since Brazil was among the few countries that did not fully respect the party's right to choose the law applicable to their contracts, the determination of the governing law was only made in a potential lawsuit. This was performed by a judge, according to conflicts of laws rules of the forum.\(^\text{219}\) International contracts for the sale of goods perfected with Brazilian parties would potentially be subject to one of three different legal regimes.\(^\text{220}\) This would be the Brazilian domestic sales law, the other party's state domestic sales law and the CISG.

Taking into account the possible differences among these regimes, indecision as to the applicable law led to uncertainty as to the outcome in the event of a lawsuit. If the governing law and the outcome in a future lawsuit were uncertain, parties would want to include in their agreements provisions regulating all the possible scenarios. This position in turn resulted in possible higher transaction costs. Transaction costs


\(^{219}\) Aguiar AS (2011) 2.

\(^{220}\) Aguiar AS (2011) 2.
are costs incurred by the parties during the negotiation phase in order to manage their risks and come to an acceptable agreement.

However, after April 1 2014, when Brazil's accession to the CISG became effective, there was reduced uncertainty with respect to the law applicable to contracts between Brazilian parties and parties from other contracting states.\textsuperscript{221} This was due to the fact that the convention always governed, subject to the party’s right to opt out of the CISG under Article 6 of the convention. Consequently, in these situations, transaction costs were reduced. This could be the case to traders in South Africa if the convention is implemented in the country. Majority of these traders will be aware of the applicable law adopted by their trading partners in other countries. In addition, the CISG applied to transactions involving Brazilian parties and parties from CISG non-contracting states where, in the event of a legal dispute, the conflict of laws rules of the forum point to the application of the law of a CISG contracting state (also subject to the parties’ right to opt out of the convention). Therefore, the uncertainty will be confined to transactions between Brazilian parties and parties from CISG non-contracting states in which the conflict of laws rules of the forum.

The chart below illustrates the situations in which the CISG was applied to transactions involving parties from Brazil after April 1, 2014:\textsuperscript{222}


The fact that Brazil's ratification of the CISG prevented the Brazilian domestic sales law from regulating the parties' affairs did not mean that Brazilian parties were at a disadvantage. It is true that Brazilian businesspersons and their lawyers have to get acquainted with the CISG rules, which may increase transaction costs after ratification. However, in the long run, these costs may decrease or become non-existent. In fact, Brazilian parties would benefit from the application of the CISG to their international commercial contracts. This is because it is a more modern and adequate rule to current international trade transactions than the Brazilian domestic sales law. Moreover, the CISG would only be applicable to international transactions; thus, domestic contracts for the sale of goods would continue to be regulated by the Brazilian 2002 Civil Code.

The next section will focus on possible negative experiences in Brazil after ratifying the CISG, which is necessary for a balanced analysis of the CISG for South Africa to make a case for adoption.

### 4.1.5 Drawbacks from accession

Despite the improvements brought by the convention, the country still faces several challenges. Perhaps the most challenging ones are firstly to convince Brazilian private parties that the CISG is a secure and good option for international contracts. Secondly, the Brazilian court prepares thoroughly on how to apply the convention,
taking into consideration the existing differences with the Brazilian legislation and the actual expectation that international jurisprudence become a source of interpretation of the convention.

Nevertheless from the above analysis, it can be safely assumed that the CISG convention provides more solutions than problems to Brazil in the context of international sale of goods. Importantly, based on Brazil position, South Africa should expeditiously move to ratify the CISG convention. This makes logical sense considering that Brazil and South Africa are big trading partners. Furthermore, for the purpose of study to promote a case for South Africa accession to CISG, the next section focuses on the trade relations between the two BRICS countries.

4.2 Brazil trade relations with South Africa

Brazil and South Africa describe each other as strategic partners and the largest leading economies in their regions across the south Atlantic. Their trade relations in the recent past have signalled the possibility of new deeper partnership. Bilateral trade increased form $659m in 2002 to $2.6 billion in 2011 and Brazil remains South Africa’s largest trading partner in Latin America. In the future both nations want to improve relations to create more business opportunities and reinforce the protection of new common interests through global forums that deal with imperative issues on the international agenda. Ties between the two nations were established recently during major historic moments for both countries due to the end of apartheid in South Africa and the re democratisation of Brazil. Traditionally there has been always trade between Latin America and Africa but Brazilian companies working in areas of construction and service have in recent times started doing more business on the African continent. Nowadays, Brazil is promoting the internationalisation of its companies and Africa has the potential to become a key player in this expansion. South Africa has been considered to be the gateway into the African continent hence Brazil is deepening its economic relations with her. Therefore with the strong

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relationship developing between the two nations, South African traders are left exposed when dealing with international sales transactions because they are not acquainted and aware of the applicable law. As a consequence of CISG ignorance among traders, South Africa is most likely to lose its competitiveness on the global market therefore, the need to assent.

In addition to the Brazil status on international sale of goods analysis, the next section will seek to explore China’s position in international business law on sale of goods.

4.3 Chinese contract law: Historical outline

Before the enactment of a unified contract law in 1999, contract law in China was principally contained in three separate laws, each dealing with a specific area of the law of contract. The three mainstays of Chinese contract law were the Economic Contract Law (ECL) of 1981 applicable to domestic economic contracts, the Foreign Economic Contract Law (FECL) of 1985 applicable to economic contracts between domestic and foreign parties, and the Technology Contract Law (TCL) of 1987. And finally the above three contract laws were united as one law, namely the Contract Law of 1999 (CL).

With the entry into force of the CCL in 1999, the ECL, FECL and TCL were revoked. Article 1 CCL expressed the purpose of the new, uniform law on contract law: ‘This law was formulated in order to protect the lawful rights and interests of contract parties, to safeguard social and economic order, and to promote socialist modernisation’. This new contract law was needed to support China’s transition from a centrally planned economy to a socialist market economy and to facilitate economic growth. The CCL aimed to facilitate international economic, trade and technological cooperation by incorporating rules consistent with international practices into Chinese law. This reflected the subtle and incremental shift in recent years to a model based more on international practice and international treaties’ that could be seen in the reform of Chinese law. In the CCL, this can be observed in many provisions which were clearly influenced by international instruments such as the CISG and the UNIDROIT Principles of International Commercial Contracts.

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(UPICC). The CCL also aimed at providing contracting parties with more protection, and provide them with more freedom and flexibility in their contractual relations', 227 while at the same time providing ‘legal means and bases for the governmental regulation of contracts so as to protect the interests of the state and the public’. 228

In addition to the history and developments of Chinese contract laws outlined briefly above, it is essential for the purpose of the study to examine the rise of the CISG in China and motivations behind adoption. This analysis would further assist in determining whether South Africa should raise a case for CISG adoption based on China’s experience.

4.3.1 Convention of International Sale of Goods in China

China signed the CISG on September 30, 1981 and ratified it together with US and Italy on 11 December 1986 229 after deciding to follow the reform and opening-up policy. It was one of the eleven contracting states to ratify the CISG. The People’s Republic of China (hereinafter ‘PR China or ‘China’ (PRC)) approved the CISG with two declarations under Article 95 and Article 96 CISG. 230 China entered an Article 95 declaration was to not be bound by Article 1(1) (b), thereby disallowing the invocation and application of the CISG through domestic choice of law rules. The Article 95 would also prevent the application of CISG on a non-contracting state. Article 96 was China second declaration on general subject that China ‘does not consider itself bound Article 11 as well as the provision of the convention relating to content of Article 11’. The CISG entered into effective on January 1, 1988 allowing

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228 Ling B Contract Law in China (2002) 15.


230 The reservation is worded as follows: ‘The People’s Republic of China does not consider itself bound by article 11 as well as the provision of the Convention relating to the content of article 11.’ This declaration by China is a requirements-as-to-form declaration that is like the Art. 96 declarations taken by various other countries, but its language is not as encompassing. This difference in declaration language would seem to be without significance regarding the effect of the declaration.
Chinese people to open up and to follow an international standard of rules of market economy. Arbitration is available in the republic and is regulated by the 1994 Arbitration Law of the Peoples Republic of China.\textsuperscript{231} This Law is clearly inspired by the UNCITRAL Model Law.

The next section explores in detail the motivations that led CISG ratification in China.

**4.3.2 Motivation for adopting the convention**

From the very beginning China involved itself into the preparation of Vienna Convention on Contracts for the International Sale of Goods. The PRC delegation, led by Mr Li Chih-min attended the 1980 Diplomatic Conference in Vienna. Chinese delegations were an active participant in the drafting process.\textsuperscript{232} The experience gained during the process of drafting the CISG were used during the legislative works on Chinese domestic civil law. Not only some legal institutions were regulated in similar way, but also general principles of the CISG were implemented into Chinese civil law.

The drafters decided to harmonise the CCL with the CISG for several reasons, from which one of the most important is decreasing transaction costs of cross border transactions. This would have been significantly greater if Chinese domestic legal systems were very different from the international uniform instruments.\textsuperscript{233} Also the understanding of the CISG in China would be better, since Chinese judiciary will be able to draw, in essence, on the same principles.\textsuperscript{234} On the other hand, understanding of the CISG would be helpful for a business person in understanding fundamentals of the Chinese Contract Law.\textsuperscript{235} So the disputes arising between


\textsuperscript{234} Zeller B (2006) SLR 466.

\textsuperscript{235} Zeller B (2006) SLR 466.
Chinese parties and the fellow BRICS counterparts may be similar to those arising between Turkish seller and Swiss buyer. Since Turkey has generally the same civil code as Switzerland. It was felt that the CISG was prepared under the participation of PRC among various other countries and regions representing to the largest extent a world-wide participation. It was felt that different opinions and voices were heard and different interests were represented and balanced in the Convention.

The CCL and the CISG have a lot of common principles including: principles of autonomy, binding character of contract, good faith, and formation of contract: offer and acceptance, authority of agents.

Based on Chinese motives to adopt the CISG, South Africa should consider acceding to the CISG in an effort to eradicate its current Legal complexities. However the motivations could perhaps be insufficient to make a case but the actual experiences. Therefore the next section will explore how China has benefited from adopting the CISG as to date.

4.3.3 Benefits from accession

China is one of the few countries in Asia to have adopted the CISG and has the experience in courts and tribunals of CISG. She has made significant contribution to the interpretation of CISG through court and arbitral tribunal decisions than any other Asian country with more than sixty cases reported so far. However a number of Asian courts and tribunals do lack expertise on the CISG; this makes it more likely that CISG cases will be governed outside Asia or by arbitrators outside Asia. This experience would continue for as long as Asia lacks the expertise on the CISG. With China being one of the leaders in the region already ratified the CISG, more countries need to follow suit by joining the convention and gain expertise through the

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236 art. 2, 3, 4 and 12 CCL.  
237 art. 8 CCL.  
238 art. 5 CCL.  
239 art. 9, 10, 11 CCL.  
240 art. 396, 400, 402, 414 CCL.  
241 According to the Pace Law School CISG Database, only a few Asian cases are not from the People's Republic of China--a case or two each from Japan, Vietnam and Chinese Taipei for example, i.e. countries or regions that are not parties to the CISG.
help of China.\textsuperscript{242} If most Asian countries become parties to the CISG, there will be more and more arbitration cases on the CISG, and the CISG arbitration business would increase in Asia as the expertise by arbitrators and litigant’s increases.

Since China has acceded to the CISG, the number of foreign laws that Chinese Law has to contend within the international market has significantly reduced, specifically when the CISG applies the conflict rules that would normally come into operation in international contracts are excluded. In cases where the CISG is not applicable in terms of Art (1)(a), and there is no choice of law clause by the parties, the applicable law will be determined in terms of rules of private international law/conflict of law rules.\textsuperscript{243} China in my own opinion has reduced the number of legal systems that will have to compete with it as the applicable law of contract. Furthermore, majority of China’s trade partners such Brazil, Russia and the European Union states have already ratified the Convention thus bringing a degree of legal trade certainty amongst them.

With attention to the above advantages of CISG, South Africa could promote legal certainty by ratifying the CISG even though it has its disadvantages.\textsuperscript{244} The next section focuses on the negatives experienced by China since adopting CISG.

4.3.4 Drawbacks from accession

The CISG is believed that it does not take into account non-Western legal traditions hence majority of Asian countries have slowly adopted the instrument. In China, some practitioners are uncertain whether the CISG is legally advantageous to Chinese parties to trade agreements on goods. Some indicate that the choice of CISG must be made on case by case basis. Others indicate that foreign parties


\textsuperscript{243} Booysen H Principles of international Trade as a monistic system (2003) 574.

\textsuperscript{244} Under the present climate, an obstacle to ratifying the CISG could be that it threatens the distinct African identity. South African, along with the rest of Africa, is attempting to achieve an African Renaissance, where African identity is not compromised. The Code may be perceived as a largely western solution, which is unwelcome.
would be more likely to select CISG as a choice of law and/or choice of forum because of their unwillingness to select Chinese Law.\textsuperscript{245}

Even though some traders in China are experiencing difficulties with CISG applicable law, its perceived advantages seem to be more compared to the negatives. Therefore, considering the growth in trade among the BRICS nations, awareness on CISG must be spread to promote legal certainty especially in the case of South Africa. The next section looks at the trading relationship between the two regional leaders.

\textbf{4.4 China trade relations with South Africa}

Prior to the fall of apartheid in South Africa economic and political relations between South Africa and China were officially non-existent and unofficially antagonistic. Official relations between the PRC and South Africa were established in January 1998. The dismantling of the apartheid regime in South Africa and the fall of the Soviet Union in the early 1990s opened up the probability of official relations being established between the PRC and South Africa. Before the 1990s South Africa had a close official relationship with the government in Taiwan for strategic and economic reasons.

As from 2009/10 China was South Africa’s second largest trading partner.\textsuperscript{246} In December 2010, South Africa was invited to join China in BRICS group of emerging economies.\textsuperscript{247} With the invitation, it was expected that South Africa would expand its trade relations with other BRICS countries, including China. Some analyst saw the BRICS relationship as potentially competing with South Africa’s relations with the

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IBSA Dialogue Forum.\textsuperscript{248} In July 2010 the South African publication Business Day reported that 45 percent of SAB Miller’s growth would come from its China operations by 2014. The anomalous growth of South African media company Naspers in 2009 was largely owed to its stake in the Chinese company Tencent.\textsuperscript{249} Increasingly the South African government, inspired by China’s success in reducing poverty and promoting economic growth, is looking to China for policy ideas and inspiration in its efforts at promoting growth.\textsuperscript{250}

South Africa’s natural resources, market size and political stability attracted Chinese businesses. South Africa is arguably also seen as a trigger and convenient base from which China can expand its influence to other countries in the region; this is particularly the case for industries which require sound and reliable governance structures, such as financial services for instance. China’s imports from South Africa are still mostly raw materials, while South Africa imports manufactured goods. However it has been pointed out that the trade between the two sides has been unbalanced but measures have been put to change the pattern by the South African officials.\textsuperscript{251}

South Africa has formulated structural policies and entered into bilateral trade and investment agreements aimed at achieving specific trading patterns in favour of South Africa. South Africa, which has better a manufacturing capacity than other African countries, has more competitive advantages vis-à-vis China. South Africa can attract Chinese investment in the production sector. In that way, South Africa can change the pattern and instead of only offering raw materials, it can export semi-finished or manufactured goods\textsuperscript{252}. Adopting the CISG would also assist South Africa in changing the existing and unfavourable trading pattern between the two countries. Additionally, CISG would impart confidence among South African traders and other

\textsuperscript{248} Brewster D \textit{India’s Ocean: the Story of India’s Bid for Regional Leadership} (2014)
\textsuperscript{249} Faeeza B ‘South Africa and China in awkward embrace’ \textit{Mail & Guardian} July 20 2012 3.
\textsuperscript{250} Faeeza B ‘South Africa and China in awkward embrace’ \textit{Mail & Guardian} July 20 2012 3.
stakeholders when dealing with Chinese traders. Ultimately, the choice of law will be common in both countries therefore creating a degree of legal certainty on international transactions.

Furthermore, the next section will look at the lessons South Africa could derive from the past experiences of Brazil and China with the view of acceding the CISG.

4.5 Lessons for South Africa

South Africa became part of the BRICS nations group in December 2010 after the Chinese President wrote a letter to Jacob Zuma inviting him to the BRICS heads of state meetings. South Africa was believed to be sharing the same political and economic views with the other fellow BRICS countries. However when compared to other BRICS nations, South Africa is by far the smallest in economic output. Currently South Africa is trading with the major members of the BRICS. China is believed to be the second largest trading partner of South Africa and Brazil considered as the strategic partner and the largest leading economies in their regions across the south Atlantic. Although South Africa has not acceded to CISG, China and Brazil continued to be South Africa leading trading partners. This perhaps suggests that the impact of the CISG will not necessarily affect the trading volumes if South Africa ratifies. However the current experiences of Brazil have shown that acceding to the CISG would help South Africa improve its trade legal certainty when dealing with parties contracted to the CISG. Brazil trade with CISG signatory states is on an increase and its traders have slowly become aware of the CISG. This development has lifted the Brazil traders’ confidence when dealing with International transactions. With South African traders in a state of limbo, they could do with the


use the CISG since there is no codified law put in place in South Africa for international transactions.

Brazil and China are the leading political and economic countries in their respective regions and their neighbours view them as role models or rather as pace setters. Similarly South Africa is in the same situation, countries in the Southern African development Community (SADC) region perceive South Africa as their leader because of strong economic and political stature. Both Brazil and China have acceded to the CISG and the other regional countries are following suit. This move would promote effective regional trading in the long run if ratified. If most southern African countries become parties to the CISG, there will be more and more arbitration cases on CISG and the CISG arbitration business would increase in Africa as the expertise by arbitrators and litigant’s increases. South Africa will benefit immensely because this would boost CISG awareness and stimulate trader confidence during most of international sales contracts. Moreover, it will promote legal certainty and most of legal complexities in South African legal framework on sale of goods would be reduced.

4.6 Conclusion

From the above comparison it is evident that ratifying the CISG bears a great deal of advantages in modern international business. A careful examination on Brazil and China revealed that global success in international business law lies on the knowledge of the applicable law on contracts. CISG has proved to be a solution to international problems that South Africa is currently facing. Brazil and China have shown the importance and the need to become part of the global economy and remain competitive. Practically speaking looking at the experiences of Brazil and China and advantages of the CISG, it is irrational for South Africa not to become part of CISG.

In a nutshell, this mini thesis has examined the history of harmonisation on international business law, origins of the CISG, its strengths and weaknesses, the CISG provisions and formation requirements, the analysis of the relevance of Brazil and China’s experiences to South Africa and the lessons from Brazil and China. Having considered the abovementioned, the next chapter summarises the main
arguments advanced in the paper and concludes it by putting forward a recommendation for South Africa to assent to the CISG.
CHAPTER 5
CONCLUSION

The aim of the mini thesis was first to evaluate the harmonisation of international business law and the current functional legal framework for international sale of goods in South Africa.\textsuperscript{256} Secondly, to evaluate the benefits and drawbacks that are inherent in the application of the CISG convention and lastly to determine whether the adoption of the CISG by South Africa would be a solution to the current complications and uncertainties that exist under South African law.\textsuperscript{257}

From the analyses above on international sale of goods law, it was revealed that South Africa is among the developing countries that are not contracting states to the CISG and its law on sale of goods is not codified.\textsuperscript{258} This evidently explains that South Africa does not have a defined act on the sales of goods. Thus, the requirements for a valid contract have to be derived from common law. However, due to several jurisdictions around the world, stakeholders involved in international sale of goods often find themselves in unfamiliar situations thus leading to legal uncertainty.

South Africa needs to boost its national economy through foreign trade and exports.\textsuperscript{259} To achieve that, South Africa should ratify the CISG in order to develop a climate of trust through which stronger commercial relations maybe be formed with foreign nations. International trading contracts are often fulfilled over long distances and mostly via sea transport therefore provides plenty of possibilities for breach of contract to take place.\textsuperscript{260} In such cases, trading partners may find it more reasonable and convenient to deal with a country that is subject to the same law they fall under. Moreover in such circumstances, South Africa might be required to sacrifice some of the convenience of its national law in order to achieve legal certainty with regards to these international sales transactions.

\textsuperscript{256} Refer section 1.3
\textsuperscript{257} Refer section 1.3
\textsuperscript{258} Refer section 2.5
\textsuperscript{259} Refer section 2.5
\textsuperscript{260} Refer section 2.1
Further elucidated in the mini thesis was the second objective aimed at evaluating the advantages and disadvantages that are inherent in the application of the CISG convention and manifesting upon ratification of the CISG Convention. These advantages included that majority of South Africa’s trading partners had already adopted the CISG\(^{261}\) and the CISG principles are applying already in the country therefore legal trade certainty would be achieved.\(^{262}\) However some of the issues raised against the CISG suggested that the convention is incomplete,\(^{263}\) unable to create uniformity among other things\(^{264}\) and also rigid to deal with new challenges that might arise in the future.\(^{265}\)

Having reflected these suggestions, the conclusions expressed below can be drawn. It can be safely assumed that the CISG convention offers more solutions than problems in the context of international sale of goods. Therefore, South Africa should move to ratify the CISG convention. It is an example of international law that advocates principles of equity, fairness and promotes comity.\(^{266}\) The CISG is not trying to replace domestic law or govern trade through its own legal principles alone.\(^{267}\) There are certain aspects of sales contracts to which the CISG needs to be applied in domestic law, and it approves the use of existing trade uses and customs. The CISG supports a framework that encourages a unified international trade law irrespective of the political, social and economic conditions of contracting states.\(^{268}\) All these principles are essentially reflective of constitutional principles in South African law.

It is therefore submitted that South African international trade would benefit from the formal adoption of the CISG convention. Every individual signatory state will benefit from this International convention, provided that they all support and participate in the project. There is a great likelihood that CISG will become law for the trading

\(^{261}\) Refer section 3.2.3  
\(^{262}\) Refer section 3.2.2  
\(^{263}\) Refer section 3.3.9.1  
\(^{264}\) Refer section 3.3.1  
\(^{265}\) Refer section 3.3.5  
\(^{266}\) Refer section 3.2.4  
\(^{267}\) Refer section 3.2.  
\(^{268}\) Refer section 3.2.4
nations which was made by them. Therefore it is up to South Africa to decide whether to join this global project, which has already gathered such momentum.

Similarly, it can be seen that adoption of the CISG would boost South African stakeholder’s self-confidence during trade.\textsuperscript{269} CISG will assist in ensuring that South African traders get an opportunity to enter trade arena on an equal platform with traders from both ratifying and non-ratifying states. The respective experiences of Brazil and China under the CISG indicated how important this instrument has been to its stakeholders in that regard.\textsuperscript{270} It has shown that there were no major inconsistencies between CISG and both China and Brazil domestic law on sale of goods.\textsuperscript{271} South Africa domestic law on sale proved indifferent to the CISG as well.\textsuperscript{272} Therefore ratification and implementation of the convention by South Africa would provide a strong foundation for the continuous development of South Africa’s private sector. Nonetheless, there is still much work and cooperation required from international stakeholders in order to achieve the goal of uniformity.

5.1 Recommendations

It is the recommendation of this study that South Africa take the necessary roadmap to become part of the CISG and complete the ratification process. It is also important that, during the accession process, steps be taken to encourage other neighbouring countries to accept the CISG. This would allow application and unification throughout the whole Southern Africa region rather than limiting to Lesotho and Zambia who have already ratified. This will create the necessary legal framework within which international trade in the region can be developed and promoted by removing any unnecessary obstacles in a region where many businesses are either new in international trade or would like to become participants. This step alone will, of course, not trigger the African resurgence hoped for, but will be a significant building block in the process of creating the conditions within which it can take place and flourish.

\textsuperscript{269} Refer section 3.9.1
\textsuperscript{270} Refer section 4.5
\textsuperscript{271} Refer section 4.1.3
\textsuperscript{272} Refer section 3.2.2
Furthermore, the CISG should be made a large part of the syllabus in all South African mercantile law institutions. Currently, part of the CISG is being taught and in this way, training the South African lawyer from an infant age on the CISG. Such measures would therefore produce legal experts who are well grounded in the convention. This would make South Africa a more attractive venue for international commercial arbitration and litigation as well as giving South African lawyers greater ability to advice internationally on sale of goods matters.
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