South Africa's non-ratification of the United Nations Convention on Contracts for the International Sale of Goods (CISG), wisdom or folly, considering the effect of the status quo on international trade

A Research Paper submitted in partial fulfilment of the requirements of the degree of Magister Legum (LL.M) in the Faculty of Law University of Western Cape

By

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DECLARATION:

I declare that, **"***South Africa's non-ratification of the United Nations Convention on Contracts for the International Sale of Goods (CISG), wisdom or folly, considering the effect of the status quo on international trade"* 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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Date: 05 September 2011

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Professor Martin, thank you for tirelessly guiding me through the writing of this research paper. To my family I would not have managed without your encouragement and support, ndinotenda (thank you).

ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) seeks to provide a standard uniform law for international sales contracts. This research paper analyses the rationale behind South Africa's delay in deciding whether to ratify the CISG, and its possible effect on trade with other nations.

The CISG drafters hoped that uniformity would remove barriers to international sales thereby facilitating international trade. Ratification of the convention is only the beginning of uniformity; uniformity must then be extended to its application and interpretation. Not all countries have ratified the Convention yet they engage in international trade in goods: this state of affairs presents challenges since traders have to choose a national law that applies to their contract where CISG does not apply. This takes traders back to the undesirable pre-CISG era. On the other hand, those States that have ratified the convention face different challenges, the biggest one being a lack of uniformity in its interpretation. The problem of differing interpretations arises because some CISG Articles are vague leading to varied interpretations by national courts. Further, the CISG is still largely misunderstood and some traders from States that have ratified CISG exclude it from application.

South Africa can only ratify an international instrument such as the CISG, after it has been tabled before Parliament, and debated upon in accordance with the Constitution. CISG's shortcomings, particularly regarding interpretation, make it far from certain that CISG would pass the rigorous legislative process. Nonetheless, the Constitution of South Africa requires the South African courts and legislature to promote principles of international law. The paper, therefore, examines, whether the Legislature has a constitutional obligation to ratify CISG.

South Africa's membership of the WTO requires that it promote international trade by removing

trade barriers. It is, therefore, vital for South Africa to be seen to be actively facilitating international trade. Even though the trade benefits which flow from ratification are not always visible in States that have ratified the CISG, there is some doubt whether South Africa can sustain its trade relations without ratifying the CISG.

The paper shows that the formation of contracts under the South African common law is very similar to formation as set out under Part II of the CISG and if the CISG were to be adopted in South Africa, no major changes would be needed in this regard. International commercial principles as an alternative to the CISG still require a domestic law to govern the contract and would, therefore, leave South African traders in the same position they are in currently, where their trading relations are often governed by foreign laws. Ratifying CISG would certainly simplify contract negotiations particularly with regard to governing law provisions. Overall the advantages of ratification for South Africa far outweigh the shortcomings of the CISG, and ratification will assist in ensuring that South African traders get an opportunity to enter the international trade arena on an equal platform with traders from other nations.

Key Words

- United Nations Convention on Contracts for the International Sale of Goods (CISG)
- Non-ratification
- United Nations Commission on International Trade Law (UNICITRAL)
- International sales contracts
- International trade
- Trade policy
- World Trade Organisation obligations
- Constitutional obligations
- Comparative lessons
- Alternatives to CISG

Abbreviations

CISG - United Nations Convention on Contracts for the International Sale of Goods

DTI - Department of Trade and Industry

GATT - General Agreement on Tariffs and Trade

ICC - International Court of Arbitration

UNICITRAL - United Nations Commission on International Trade Law

UNIDROIT - International Institute for the Unification of Private Law

UN - United Nations

ULIS - Uniform Law on the International Sale of Goods

ULFC- Uniform Law on the Formation of Contracts for the International Sale of Goods

WTO - World Trade Organisation

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CHAPTER 1

INTRODUCTION

1.1 Parameters of the study

South Africa's non-ratification of the CISG,[1] appears to create a problem for South African traders: they appear to be at a disadvantage when entering into contracts with traders from countries that have ratified the CISG, since foreign traders will neither want to be governed by South African law, nor litigate or arbitrate in South Africa, which results from a lack of faith in the South African Law of contract.[2] Local companies feel the effects of this state of affairs when they have to litigate or arbitrate in foreign States, which in turn tends to discourage trade.

The main aim of this research paper is to examine the arguments for and against South Africa ratifying the CISG, in the light of the impact of the status quo on international trade.

In order to address the main objective, the paper will seek to attain the following specific aims:

a) Establish and critique the rationales for both ratification and non-ratification, including an examination of possible advantages and disadvantages arising from each; [3]

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1 It has also not been ratified by other major trading States such as The United Kingdom (UK), Brazil, India, Portugal and Ireland. Hofmann "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe" (2010) 22 *Pace International Law Review* 146. Murray "*CISG: Opt Out, Or Not? CISG In A Nutshell"* (2010) para 1, available at: http://www.mhandl.com/content/cisginanutshell [last accessed 3 September 2010]. It has been alleged that countries such as the UK that have not ratified the CISG create the perception that they are reluctant participants in international trade initiatives: Moss "Why the United Kingdom has not adopted the CISG" (2005-6) 25 *Journal of Law & Commerce* 485.

2 The South African Arbitration Act 42 of 1965 is widely believed to be inadequate and the recommendation is for South Africa to adopt and apply the UNICITRAL Model Law to all international arbitrations: South African Law Commission Discussion Paper 69 (1998) v. Available at: http://www.justice.gov.za/salrc/dpapers/dp69.pdf [last accessed 15 January 2010]. Traders are not recommended to choose South Africa as a place of arbitration in their international contracts: Christie RH "South Africa as a Venue for International Commercial Arbitration" (1993) 9 *Arbitration International* 165. "One of the first questions which a foreign trading entity or investor is likely to ask before doing business in or with South Africa is: What provision does South African law make for resolving international trade and investment disputes? The present answer is not encouraging." South African Law Commission Project 94 (1998) "Arbitration: An International Arbitration Act for South Africa" 23: available at: www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf [last accessed 15 January 2011].

3 See Chapter 3 sections 3.1 and 3.2.

b) Examine whether the current trading regime creates inter alia legal and financial problems for South African traders, and the extent of such problems, if any; [4]

c) Consider South Africa's constitutional obligations under section 231 and its WTO obligations in particular those obligations relating to promoting international trade; [5]

d) Examine the application of the CISG by courts in ratifying states as well as international bodies such as the International Court of Arbitration to determine whether they advance or discourage ratification. [6]

e) Examine the trade volumes between 2007 and 2010 in Argentina and Brazil to establish the effects of ratification and non-ratification respectively on trade.[7]

The origins of the CISG are analysed to understand the objective of the drafters and the purpose that the convention serves.

The research is a literature based analysis and synthesis of both primary and secondary sources. The Convention, draft versions of the CISG, case law, the Constitution of South Africa and government policy documents will make up the primary sources. A comparative analysis will also be undertaken with two developing countries, Brazil and Argentina. The secondary sources that will be used are previous works on this topic in the form of journal articles, textbooks and Internet based literature.

4 See chapter 3 section 3.2.
5 See chapter 5 section5.1 and 5.2.
6 See Chapter 4 section 4.3.
7 See Chapter 6 sections 6.1 and 6.2.

1.2 Chapter Overview

Chapter Two

The events that gave rise to the CISG are also explored. The road leading to the birth in 1980 of the CISG is surveyed, as well as South Africa's minimal involvement in the CISG making process to get an understanding of South Africa's status quo. "Status quo" refers to the current state of affairs in South Africa in which South African traders trading internationally are faced with many applicable foreign laws if they are unable to choose South African law as the applicable law.[8] The treaties that attempted unification of international sales law, such as ULIS and ULFC, are examined to put the arguments of the CISG scholars into perspective. The timeframe of this study will stretch from the late 1920s through to the birth of CISG in 1980.

Chapter Three

This chapter examines the arguments for and against ratification of the CISG. The rationales both for non-ratification and ratification are analysed.

Chapter Four

The provisions of Part II of the CISG relating to the requirements of the formation of contracts are explored and compared to the requirements of South African law.[9] The chapter also looks at the

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[8] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1996) 116 *South African Law Journal* 323.

[9] Part II has been described as having "a special status" within the CISG and has arguably the most troublesome Articles Farnsworth "Formation of Contract" Galston & Smit "(ed.)" Bender (1984) Reproduction by Pace Law School authorized by Juris Publishing 1 and 4. Available at http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html [15 November 2010]: In describing Part II's special status the author states that "When the UNCITRAL working group on sales had finished its work on the substantive sales provisions, it devoted two meetings in 1977 to formation. In addition it considered a UNIDROIT draft on the validity of contracts and decided to incorporate into the provisions on formation one of that draft's articles that dealt with interpretation"). The special status requires this paper to pay attention to its provisions to establish whether they conflict with South African requirements on formation of contracts.

range of goods covered by the CISG and whether the majority of South African exports fall within its purview.[10] The paper then proceeds to conduct an analysis of case law to establish how the CISG has been applied in practice by various courts to determine whether they advance or discourage ratification.

Chapter Five

This chapter examines the possibility that the South African Legislature is subject to obligations imposed by the objectives of the WTO as well as those of the Constitution. The chapter concludes with a review of the efforts undertaken by Parliament towards ratification from 1980 when the CISG was born until December 2010.

Chapter Six

The chapter conducts a comparative analysis of the legal positions in Brazil and Argentina and explores the alternatives available for South Africa. The advantages and disadvantages of non-ratification and ratification by Brazil and Argentina respectively, and their respective effects on trade are examined. The chapter ends with an analysis of the relevance of the Brazilian and Argentinean experiences for South Africa.

Chapter Seven

This concluding chapter of the research paper draws overall conclusions and puts forward recommendations based on the research findings.

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[10] Establishing whether the majority of South African exports would benefit from the exercise of ratification is of importance as this is arguably of most relevance to the South African traders and could be a major justification for the need for Parliament to consider the CISG for ratification.

CHAPTER 2

BACKGROUND AND ORIGINS OF THE CISG

2.1 The birth of the notion of an International Sales Law

The idea of a uniform commercial code can be traced back to as early as the 1920s when scholars, like Italian Professor Scialoja, recognised the complexities of conducting international trade between merchants with different national laws,[11] and began envisioning and calling for a commercial code among nations.[12] Ernest Rabel, who is considered as the grandfather of the CISG, argued against having domestic laws govern international transactions, and showed his preference for an international sales law by stating

> "to avoid these complications and to substitute a reasonably concise body of clear and simple written rules could not be a loss, and still less would it be a loss to have to consult only one law commented on by the courts and scholars of the world instead of innumerable different foreign legislations".[13]

In 1938 when Rabel wrote, he was advocating for nations to pay attention to and contribute towards finalisation of the International Sales Law Act, which was then still in draft form.

In the absence of the CISG, sales transactions are undoubtedly complicated by conflict of laws. According to Rabel, some complications arise from having domestic laws govern an international contract. The first complication is how to establish which aspects of the international sales contract will be governed by the laws of the place of contracting. Secondly which aspects are governed by the laws of the place of performance and lastly how to establish which court

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11 Feltham "Uniform Laws on International Sales Act 1967" (1967) 30 *The Modern Law Review* 670.

12 "In the early twenties the great Italian author tried to realise this ambitious project, but the Projet de code des obligations et des contrats, elaborated by him and other eminent Italian and French lawyers and intended to constitute a first step towards the creation of a new jus commune of Europe....": Bonell "The Unidroit Initiative for the Progressive Codification of International Trade Law" (1978) 27 *The International and Comparative Law Quarterly* 413.

13 Rabel "A Draft of an International Law of Sales" (1938) 5 *The University of Chicago Law Review* 546.

decisions and doctrines govern the contract.[14] These complications are narrowed to some extent and simplified by having a uniform international sales law apply. Llewellyn argued as far back as 1957 that it had already been "settled forever" that codifying commercial law not only works, but guarantees affordability and predictability in business.[15] Although Llewellyn's sentiments related to a national commercial code for the United States of America, this justification applies equally to an international code and has been echoed almost 40 years on by Eiselen.[16]

With the growing calls for an International Sales Law, the International Institute for the Unification of Private Law (UNIDROIT) was founded in 1926 by a Council of the League of Nations. [17] In 1930 UNIDROIT started working on proposals for an international sales law.[18] The Institute produced four drafts between 1935 and 1963. Finally a conference was held in 1964 to consider the 1963 revised draft.

2.2 The Hague Conventions

The 1964 Conference, held in The Hague, culminated in two conventions being adopted, namely, the Convention relating to a Uniform Law on the International Sale of Goods ("ULIS") and the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFC"). The ULIS and ULFC are together also referred to as the Hague Conventions. The ULIS came into

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14 See note 13 supra at 545.

15 Llewellyn "Why we need the uniform commercial code" (1957) X *University of Florida Law Review* 370.

16 Eiselen "Adopting the Vienna Sales Convention, Reflections Eight Years Down the Line" (2007) 19 *South Africa Mercantile Law Journal* 25.

17 UNIDROIT was meant to be a supplementary body of the League of Nations. After the Leagues of Nations was dissolved it was reestablished in 1940. Available at http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1034 [last accessed 10 November 2010]. Article 1(a) UNIDROIT Statute as Amended on 26 March 1993: the Institute is tasked with preparing drafts of laws and conventions to establish uniform internal law. Available at http://www.unidroit.org/mm/statute-e.pdf [last accessed 10 November 2010].

18 Ziegel "The Future of the International Sales Convention from a Common Law Perspective" (2000) *New Zealand Business Law Quarterly* 336.

force on 18 August 1972, followed, on 23 August 1972, by the ULFC.[19]

South Africa did not ratify the ULIS or ULFC and when UNICITRAL invited comments from nations regarding their positions, South Africa is noted as having stated that "the field [of international sales law] covered by the conventions is regulated reasonably and satisfactorily by either existing legislation or commercial practice".[20] South Africa did not specify the legislation to which it refers. The national legislation it could possibly have been referring to was The Sale and Service Matters Act, 1964.[21] South Africa does not currently have a particular Act dealing with sales of goods. The Service Matters Act[22] was repealed in 2008 by the Consumer Protection Act.[23] The Consumer Protection Act focuses on consumer protection in South Africa and does not appear to cover international sales of goods.[24] The second part of the reasons given by South Africa for non-ratification of the ULIS and ULFC was that existing commercial practices were sufficient. There were, however, gaps in private international law, which called for conventions such as the ULIS and ULFC to supplement the international commercial rules.

The Hague Conventions had numerous weaknesses, which a number of countries highlighted in 1969 when they were invited to comment on them.[25] Some of the weaknesses highlighted were the lack of adequate representation from developing countries, the complexity of its language and

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19 The countries that ratified both conventions were Belgium, Gambia, the Federal Republic of Germany, Italy, the Netherlands, San Marino, and the United Kingdom. Israel ratified the Sales convention only. Ndulo "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods1964: A Comparative Analysis" (1989) 38 *The International and Comparative Law Quarterly* 2.

20 Report of the Secretary-General, "International sale of goods. The Hague Conventions of 1964. Analysis of the replies and studies received from Governments" (A/CN.9/17, 3 February 1969) 10. Available at: http://untreaty.un.org/cod/avl/ha/ccisg/ccisg.html [last accessed 28 October 2010].

21 Act No. 25 of 1964.

22 Act No. 25 of 1964.

23 Act No. 68 of 2008. Consumer Protection Act, Department of Trade and Industry presentation, available at: www.dti.gov.za/parlimentary/CPB.pdf [last accessed 6 November 2010].

24 The preamble to the Consumer Protection Act provides that it is intended to "promote and protect the economic interests of consumers".

25 Report of the Secretary-General, "International sale of goods. The Hague Conventions of 1964. Analysis of the replies and studies received from Governments" (A/CN.9/17, 3 February 1969) 9-35.

breadth of its scope.[26] Some of the provisions of the ULIS and ULFC which were most problematic related to Article 1, which required States to incorporate the uniform laws into national law, the co-existence of substantive uniform laws and the rules of international law and Articles II and III relating to reservations limiting application of the conventions.[27]

2.3 UNICITRAL and the birth of CISG

In 1966, two years after the Hague Convention was adopted, the United Nations General Assembly established the United Nations Commission on International Trade Law (UNICITRAL). [28] The UN General Assembly tasked UNICITRAL with formulating an agreement to regulate international trade.[29] UNICITRAL was tasked with, inter alia: ensuring the orderly development of economic activities on a fair and equal basis; facilitating unification and harmonisation of international trade; and, working towards the elimination of legal obstacles to international trade.

Another important development, which had taken place earlier, was the birth in 1947 of the General Agreement on Tariffs and Trade (GATT): its main objective was regulating trade, particularly multilateral trade, and ensuring transparent and predictable rules of trade, as well as enforcing rights and expectations of traders.[30] A common objective of UNICITRAL and the GATT was facilitation of international trade. The United Nations was, therefore, on a mission to ensure coherence and uniformity in trade laws.

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[26] Ndulo "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis" (1989) 38 *The International and Comparative Law Quarterly* 4.

[27] See note 25 supra at 12-15.

[28] "UNICITRAL: The United Nations Commission on International Trade" (1986) *United Nations Publication* 3. Available at: http://www.uncitral.org/pdf/english/publications/sales_publications/UNCITRAL-e.pdf. [last accessed 15 July 2011]

[29] FAQ - Origin, Mandate And Composition Of UNCITRAL, available at: http://www.uncitral.org/uncitral/en/about/origin_faq.html [last accessed on 6 November 2010].

[30] **"**Understanding the WTO: basics the GATT years: from Havana to Marrakesh". Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [last accessed 26 January 2011].

UNICITRAL established a working group to re-examine ULIS and ULFC. Questionnaires were sent out, and based on the responses from States and other interested parties, it was concluded that the majority of nations were not in favour of the Hague Conventions.[31] UNICITRAL had, by 1978, reviewed ULIS and ULFC, and merged the two to create a draft convention. The draft was debated upon, amended and, in April 1980, finally approved as The Vienna Convention on Contracts for the International Sale of Goods (CISG). The CISG sought, in part, to correct some of the shortcomings of the ULIS and ULFC: eg, Article 7(2) of the CISG addresses the relation between the CISG and private international law by allowing courts to resort to the rules of private international law where the CISG provisions fall short. The Vienna Convention endeavours in addition to improve on the Hague conventions by having a fair participation from African and developing countries, simplifying the CISG language and limiting its scope of application. The Hague Convention was not ratified by as many States as anticipated once it came into force. On the other hand, the fact that the CISG has managed to win the confidence of over 70 countries[32] to date is testimony of its success.[33]

The apartheid regime was still in place in South Africa at the time the CISG was born. South Africa was, therefore, never an active participant in the processes leading up to the adoption of the

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[31] Historical introduction to the draft Convention on Contracts for the Inter- national Sale of Goods, prepared by the Secretariat (reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Part 1, Section B) (originally published as the introduction to document A/CONF. 97/5). Available at: http://untreaty.un.org/cod/avl/ha/ccisg/ccisg.html [last accessed 6 November 2010]. Some of the main objectives of UNICITRAL were, to name a few, the adoption with the participation of both developed and underdeveloped countries, of an international sales law which was simplified, focused, and covered some overseas shipments.

[32] Murray "CISG: Opt Out, Or Not? CISG In A Nutshell*"* (2010) para 1 available at: http://www.mhandl.com/content/cisginanutshell [last accessed 3 September 2010].

[33] "Whilst the CISG assumes importance due to its great success – evidenced not only by the number of contracting States..." : Ferrari "General principles and International Uniform Commercial Law Conventions: A study of the 1980 Vienna Sales Convention and 1988 UNIDROIT Conventions" (1997) 2 *Uniform Law Review* 452. The CISG has been described as a "worldwide success": Bonnell "Do We Need a Global Commercial Code?"(2001) 106 *Dickinson Law Review* 88.

CISG:[34] it was just an observer at a few events. Organisations such as the United Nations and Commonwealth were making efforts to impose restrictions varying from trade embargos to participation in international sport events on South Africa.[35] These restrictions limited South Africa's active participation in the CISG process as it was being led by a UN body.

2.4 Conclusions

The lack of direct participation can account for the lack of interest in ratification efforts by the government in power between 1980 and 1993 in South Africa. The fact that the observers were representatives of that government also meant that there was a lack of continuity when apartheid ended and a new government came into power more than ten years after the Vienna Convention was adopted. The focus after the abolition of apartheid was on redressing the imbalances which existed in the South African society, and the focus on business was to a large extent limited to internal national policies.

Thirty years after adoption of the CISG, however, South Africa's history alone cannot justify its non- ratification. Africa's interests during the Vienna Convention were represented by, among others Ghana and Egypt, which were part of the sixty-two States that met at Vienna.[36] The history of adoption of the CISG should assure South Africa that the process of its adoption was completed with representation from nations across the development spectrum.

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[34] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1996) 116 *South African Law Journal* 323.

[35] Barnes "International isolation and pressure for change in South Africa" *Conciliation Resources* (2008). Available at: http://www.c-r.org/our-work/accord/incentives/south-africa_1.php [last accessed 28 October 2010].

[36] Bonell "The CISG, European Contract Law and the Development of a World Contract Law" (2008) 56 *American Journal of Comparative Law* 12.

Having mapped the road leading to the birth of the CISG, it is necessary to examine the arguments advanced as rationale for CISG's ratification, as well as those arguments advanced against ratification. The next chapter undertakes this analysis.

Chapter 3

THE ARGUMENTS FOR AND AGAINST RATIFICATION

Throughout its thirty year existence the CISG has been subjected to scrutiny by scholars, many hoping that their arguments would contribute towards their government's decision whether or not to ratify CISG. This chapter examines the strengths and weaknesses of the arguments advanced by proponents of CISG ratification; it also considers how relevant these arguments are in the South African context. Thereafter, there is a similar examination of the arguments against ratification.

3.1 The rationale for ratification of the CISG

3.1.1 Introduction

Proponents of the CISG praise it for its benefits and one such supporter, Bonell, has gone as far as asserting that the CISG is "invaluable and innovative".[37] One should view the arguments in support of the CISG objectively and in context of the CISG's history and the South African requirements. For example, when analysing the innovation referred to by Bonell, one should be mindful of the fact that the CISG was born of two earlier conventions, namely, the Convention relating to a Uniform Law on the International Sale of Goods ("ULIS") and the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFC"). The CISG was an improvement on the previous conventions, but was, however, not charting completely new territory.[38]

[37] Bonell "The CISG, European Contract Law and the development of World contract law" (2008) 56 *American Journal of Comparative Law* 4.

[38] Ziegel "The Future of the International Sales Convention from a Common Law Perspective" (2000) *New Zealand Business Law Quarterly* 337.

3.1.2 Reduction of costs

Eiselen argues that the CISG as an international commercial code has not only harmonised sales law successfully, but has also, inter alia, reduced contracting costs.[39] Unification and reduction of costs seem, to be some of the core arguments for ratification. Costs are important to any business person and the prospect of spending less on the contracting process should appeal to most traders. This argument is only true for legally sophisticated traders who take the time to understand the governing law, as well as the provisions of the contract.[40] Furthermore, should the parties not agree to either of their laws then a third neutral State will be agreed on which will require both parties to engage legal advisors well versed in the law of the third nation. Such an undesirable state, Eiselen says, is removed by the CISG. This does not mean that traders will not require legal assistance at all should a dispute arise where the CISG is applicable, it only means the litigation costs are lower.

The provisions of the Convention are, however, not always simple and easy to interpret. Given that some provisions are vague and at times confusing, one would certainly need the aid of legal counsel even when contracting in terms of the CISG.[41] Despite that, even Rosett admits that litigation costs can be reduced as there is extensive provision in CISG for arbitration,[42] which is

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39 Eiselen "Adopting the Vienna Sales Convention, Reflections Eight Years Down the Line" (2007) 19 *South Africa Mercantile Law Journal* 25.

40 Cuniberti"Is the CISG benefiting anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 11.

41 Article 7 requirements of "good faith" will likely be interpreted differently in common law and civil law jurisdictions: Ziegel "The Future of the International Sales Convention from a Common Law Perspective" (2000) *New Zealand Business Law Quarterly* 338. Article 25 is particularly challenging to interpret as the Article uses both subjective and objective measures to characterize fundamental breach: Grebler "The UN Sales of Goods Convention: Perspectives on the current state play" (2007) *ASIL Proceedings* 408; Gillette & Scott "The Political Economy of International Sales Law" (2005) *New York University Law and Economics Research Paper Series*, Working Paper No. 05-02.

42 Rosett "CISG Laid Bare - A Lucid Guide to a Muddy Code" (1988) *CISG Database Pace Institute of International Commercial Law*. Reproduced with permission from 21 *Cornell International Law Journal* 16. Knieper "Celebrating Success by Accession to CISG" (2005-06) 25 *Journal of Law and Commerce* 477. Gopalan "New Trends in the Making of International Commercial Law" (2004) 23 *Journal of Law and Commerce* 127. "This is hardly surprising as ICA is a cornerstone of the autonomous contract, and unlike litigation survives on its merits as a commercial service to provide for the needs of the trading community": Amissah "The Autonomous

arguably less costly than litigation in that arbitration saves valuable time for the traders. So while legal costs are not altogether avoided, they are perhaps lower than contracting in terms of a foreign law.

3.1.3 Party autonomy

The principle of party autonomy has been praised as being one of the strong points of the CISG, justifying ratification.[43] Party autonomy is a principle of commercial law which holds that the parties have the freedom to contract in a manner which represents their interests.[44] Article 6 of CISG contains the party autonomy provision; it states that the parties may exclude the application of the CISG, derogate from or vary the effect of any of its provisions.

Ferrari seems to be of the view that the CISG is meant to supplement the principle of party autonomy, meaning it should complement the agreement between the parties and step in where the parties fail to make provision for an eventuality.[45] Ferrari's reasoning is supported by a ruling in *Ajax Tool Works, Inc. v Can-Eng Manufacturing*,[46] where it was held that

> "The CISG does not pre-empt a private contract between parties; instead, it provides a statutory authority from which contract provisions are interpreted, fills gaps in contract language, and governs issues not addressed by the contract."[47]

Contract: Reflecting the borderless electronic-commercial environment in contracting" presentation at seminar on Legal Information (Bergen, Norway: September 1997) Elektronisk handel - rettslige aspekter, Randi Punsvik ed, Nordisk årbok i rettsinformatikk (Oslo 1997) para 2.3.1.

43 Ferrari "General principles and International Uniform Commercial Law Conventions: A study of the 1980 Vienna Sales Convention and 1988 UNIDROIT Conventions" (1997) 2 *Uniform Law Review* 462.

44 Borisova "Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG" Pace Law School (2004): see http://www.cisg.law.pace.edu/cisg/biblio/borisova2.html [last accessed 19 October 2010].

45 The Convention provides solutions to problems not dealt with by the parties: Ferrari "General principles and International Uniform Commercial Law Conventions: A study of the 1980 Vienna Sales Convention and 1988 UNIDROIT Conventions" (1997) 2 *Uniform Law Review* 462.

46 Northern District, Illinois, 29 January 2003.

47 *Ajax Tool Works, Inc. v Can-Eng Manufacturing* Northern District, Illinois, 29 January 2003, para II, Validity of warranty.

There is, however, also a view that the purpose of an international instrument such as the CISG should be to anticipate contracting problems, and through its provisions offer solutions which make it more attractive than the parties using their own terms.[48] The parties should not have to supplement the convention, because the convention is lacking, or revert to it when all else fails otherwise this defeats the very purpose of its enactment. Gillette and Scott eloquently state: "The default terms in an ISL (international sales law) will be socially optimal precisely and only because they do for the parties what the parties cannot as easily do for themselves." [49] Party autonomy is advantageous in so far as it gives room for parties to choose whether or not they want the convention to apply and ties in with accepted principles of contract law as well as court decisions in South Africa.[50] It appears that the CISG fails to close the gaps where the parties' own provisions are lacking.[51] Perhaps this is in line with the principle of party autonomy. Where parties have chosen their own terms, their choice should be respected and using the CISG to fill in supposed gaps may interfere with the parties' freedom of contract.

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48 Gillette & Scott "The Political Economy of International Sales Law" (2005) *New York University Law and Economics Research Paper Series* Working Paper No 05-02, 13.

49 See note 48 supra.

50 The parties under South African law of contract have the freedom to contract and their obligations are enforceable at law. Barnard "A critical legal argument for contractual justice in the South African Law of Contracts (2006); thesis submitted in partial fulfilment of the Doctor Legum University of Pretoria. available at: http://upetd.up.ac.za/thesis/available/etd-06192006-083839/unrestricted/00front.pdf [last accessed 15 November 2010]. The principle of pacta sunt servanda lays the foundation for the doctrine of freedom of contract in the South African common law. This principle holds that promises must be kept. The courts have similarly safeguarded this doctrine of freedom of contract in a number of court decisions by holding the freedom of contract above principles of fairness see, *Bank of Lisbon and South Africa v De Ornelas and Others* 1988 (3) SA 580 (A). In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35C-E, the court upheld the freedom of contract above other values stating that contracts may not be invalidated due to "perceived notions of unjustness or.... on the basis of imprecise notions of good faith". Available at: http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2002/35.html&query=Brisley v Drotsky [last accessed 20 March 2011]. Similarly in the constitutional court case *Du Plessis v De Klerk* 1996 (3) 850 (CC) para 52, Kentridge AJ contended that the constitutional court "...cannot rewrite the common law governing private relations." Available at: http://www.saflii.org/za/cases/ZACC/1996/10.html [last accessed 20 March 2011].

51 See section 3.2.7.

3.1.4 Unified interpretation and application

A justification often given for the adoption of CISG is that it brings about a unified interpretation and application of the law. This advantage has, however, not been fully realised, particularly because there is no single court or tribunal tasked with interpretation of the CISG. Each national court is, therefore, left to interpret the convention.

Article 7 (1) of the CISG does offer some guidance with regard to interpretation. It states that

> "in the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

This guiding principle is itself a source of debate because it is considered vague. Perhaps what it means is that a homeward trend interpretation is to be discouraged.[52]

Homeward trend is a term used to explain how national courts at times interpret CISG provisions in a manner that is biased towards their domestic law, disregarding interpretations that advance CISG uniformity.[53] It is doubtful whether such a state of affairs, in which every national court is left to interpret and apply the CISG, is sustainable and the CISG might with time lose its uniformity in interpretation.

Increasingly the CISG also seems to be incorporated into other conventions, as well as being adopted by Organisations such as the International Chamber of Commerce (ICC), which have

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[52] Lord Denning MR makes the following statements in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 HL: "This art. 23, para 4, is an agreed clause in all international conventions. As such it should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany". Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1996) Reproduced by Pace Law School with permission from 116 *South African Law Journal* Part II (1996) 361.

[53] The greatest threat to effective application of the CISG is "the inability of decision-makers to distance themselves from domestic preconceptions of interpretation": Whittington "Comment on Professor Schwenzer's Paper" (2005/4) *Victoria University of Wellington Law Review* 811. A nationalistic approach may lead to forum shopping which the CISG discourages*:* Ferrari "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration*17.

incorporated the CISG in their model international sales contracts.[54] A number of the UN conventions are also interrelated with the CISG,[55] but again South Africa has chosen not to ratify most of the CISG related conventions.[56] CISG appears to be gaining more and more recognition in the International arena and making its way into other conventions; it may for these reasons alone be beneficial for South Africa to be party to it.

3.1.5 Versatility

Another of the strengths of the CISG is the fact that it applies to a vast array of goods, raw materials and manufactured goods alike.[57] Since it is evident that the South African Economic policy is aimed at expanding the export of manufactured goods,[58] the CISG may be put to good use. The CISG covers all traders, sellers and buyers as well as micro and established businesses. This makes for a very strong argument for ratification since all sectors of trade are covered.

3.1.6 Equal benefit: developed and less developed nations

One of the leading critics of the CISG, Rosett, argues that parties should opt out of the CISG, unless the alternative would be a worse off choice of law, such as one from a less developed

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[54] The Commission Vice-Chairman, Jan Ramberg (Sweden) was also the Chairman of the CISG Advisory Council from 2004- 2008.

[55] The UN Convention on the Limitation Period in the International Sale of Goods (1974), UN Convention on the Assignment of Receivables in International Trade (2001) and UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules" (2008) are some of the conventions directly related to the CISG. Global Sales Law website: http://www.globalsaleslaw.org/index.cfm?pageID=868[last accessed 10 November 2010].

[56] South Africa has not ratified the UN Convention on the Limitation Period in the International Sale of Goods (1974) nor has it ratified UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules" (2008).

[57] CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani, (April 2010) response to question 1. Available at: http://cisgw3.law.pace.edu/cisg/biblio/castellani2.html [last accessed 28 October 2010].

[58] South African Trade Policy and Strategy Framework, Discussion Document (2009) 47. Available at http://www.dti.gov.za/trade_policy/TPSF.htm [last accessed 28 October 2010].

country.[59] It is uncertain whether South Africa would be viewed as being less developed and having inferior contract laws since South Africa is not classified under the least developed nations by the WTO and UN.[60] The UN statistics section states that the Southern African Customs Union (SACU) is treated as a developed region, and South Africa is one of the core members of SACU.[61] Regardless of South Africa's classification, its contract laws may be viewed with suspicion by foreign traders and the odds will certainly be against the South African traders convincing foreign traders to make South African law the chosen law in terms of choice of law clauses in international sales contracts. Would it then not be wise to adopt the CISG and protect South African traders from unfamiliar foreign laws? Adoption would certainly seem to be a way of winning the confidence of South Africa's Western trade partners if there is a lack of faith in the South African contractual laws.

But Cuniberti argues that most of the traders are not concerned about choice of law and their contracts are often silent in this regard.[62] If traders are not concerned about choosing a governing law, then they remain exposed and they will only realise the consequence of not choosing a governing law when there is a dispute. The lack of governing law provisions in international sales contracts would be one reason for any government to ratify the convention. It is the duty of the State through the Ministry of Trade and Industry to make the South African business community aware of the convention and empower them regarding their options.

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59 Rosett "CISG Laid Bare - A Lucid Guide to a Muddy Code" **(**1988) *CISG Database*, *Pace Institute of International Commercial Law*, reproduced with permission from 21 *Cornell International Law Journal* 13. This is indicative of how some scholars such as Rosett view the laws of less developed nations.

60 WTO, Least Developed Countries available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm [last accessed 25 October 2010] UN Office for the High Representative of Least Developed Countries, Landlocked Developing Countries and Small Island Developing countries. Available at: http://www.unohrlls.org/en/ldc/related/62/ [last accessed 25 October 2010].

61 United Nations Statics Division, available at: http://www.unstats.un.org/unsd/methods/m49/m49regin.htm#developed [last accessed 25 October 2010].

62 Cuniberti "Is the CISG benefiting anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 60..

The benefits are not limited to less developed nations. Developed countries with codified contract laws also stand to benefit from the CISG. The challenge of conflict of laws still remains even for nations that have codified their contract laws. Challenges such as which domestic law governs the contract since performance of the contract is usually in different States, or which principle to apply to establish the place where the contract arose, cannot be removed by codification of domestic law.[63] Codifying contract law makes it easily accessible, since the need for reference to multiple sources such as text books and cases is reduced;[64] however, it does not seem to eliminate the challenge presented by conflicting governing law provisions in international law. Codifying national contract laws moves away from the more traditional reliance on case law and other literature, but it does not compare with unification at an international level. A codified law may make contracting at a national level easier, but has little bearing on international contracts.

The challenges presented by governing law provisions are the same for States that have codified their national contract law and those that have not and/or are less developed. Rosett's inference that contract laws of less developed countries would benefit from the CISG[65], but not developed countries is, therefore, flawed. The CISG offers parties a neutral ground and an alternative to litigating under an unfamiliar foreign law. In the absence of the CISG, the parties have to reach a compromise regarding which law will govern their agreement and one party, at least, faces the prospect of having to litigate under a foreign law should a dispute arise. Having a neutral instrument such as the CISG govern the contract is not only beneficial to those established

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63 Rabel "A Draft of an International Law of Sales" (1938) 5 *The University of Chicago Law Review* 545.

64 Uganda law Reform Commission "A study report on the codification of the law of contract" Com. Pub 7 (2004) available at: http://www.ulrc.go.ug/about_ULRC/studyReps.php [last accessed 28 October 2010].

65 Rosett "CISG Laid Bare - A Lucid Guide to a Muddy Code" **(**1988) *CISG Database, Pace Institute of International Commercial Law*, reproduced with permission from 21 *Cornell International Law Journal* 13.

companies or traders who would otherwise expend monies negotiating governing law provisions, but similarly affords protection to those up and coming micro-traders who may be oblivious to governing law provisions.[66]

3.1.7 Conclusions: ratification

Ratification seems the logical step if South African traders are to remain competitive[67] on the global market. Although contracting costs are not altogether removed by the CISG, costs are significantly lower than contracting in terms of foreign law.[68] The CISG is not a despotic instrument; it gives parties the freedom to contract in the manner that represents their intentions.[69] Its application covers a vast array of goods ensuring that all types of traders are covered.[70] A developing country like South Africa which has not codified its contract laws as well as those countries with codified systems all stand to benefit equally from ratifying CISG.[71] The challenge, however, is establishing unified interpretation among Contracting States in the absence of a single court.[72] Despite this minor inadequacy, South Africa cannot continue to ignore the role the CISG plays in international commercial law and the delay in ratification seems not to be in the best interests of its business community.[73]

The next section focuses on the possible reasons why some States have not ratified the CISG, which is necessary for a balanced analysis of the CISG.

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66 Bonell "The CISG, European Contract Law and the Development Of a World Contract Law" (2008) 56 *American Journal of Comparative Law* 5.

67 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 and 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 [last accessed 15 July 2011].

68 See section 3.1.2 supra.

69 See section 3.1.3 supra.

70 See section 3.1.5 supra.

71 See section 3.1.6 supra.

72 See section 3.1.4 supra.

73 See sections 3.1.1 - 3.1.4 supra.

3.2 Rationale for non-ratification

3.2.1 Introduction

Having examined the justification advanced for ratification, it is important to similarly examine the possible rational for non-ratification by South Africa. To begin with, the discussion addresses some of the weaknesses of the CISG that could motivate South Africa's non-ratification, in particular the interpretation challenges, lack of an amendment provision and the exclusion of validity. The analysis then moves on to setting out the South African trade policy to get an understanding of where the government's focus is and where the CISG fits in. Finally the conclusions one can draw from the weaknesses of the CISG in relation to South Africa's non-ratification are set out.

3.2.2 Interpretation challenges

Critics of the CISG argue that some CISG provisions are vague and difficult to interpret, and point to this as a major weakness.[74] This shortcoming is, however, not sufficient justification for non-ratification since a considerable body of case law on the CISG is now available, which makes interpretation easier.[75] Despite the availability of case law on the CISG, the establishment of an international court that would adjudicate over CISG matters would ensure consistency and avoid a homeward trend in the interpretation of the CISG. Furthermore, the imperfections and shortcomings of the CISG can only be addressed if the CISG is put to use, and the imperfections

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[74] Ziegel "The Future of the International Sales Convention from a Common Law Perspective" (2000) *New Zealand Business Law Quarterly* 338; Grebler "The UN Sales of Goods Convention: perspectives on the current state play" (2007) 101 *ASIL Proceedings* 408.

[75] Bonell "The CISG, European Contract Law and the Development of a World Contract Law" (2008) 56 *Am. J. Comp L* 5.

removed by being challenged before the courts.[76] South Africa is already ahead of many other developing nations in applying international law in its court decisions. The duty to do so is enshrined in the Constitution of South Africa,[77] which requires an interpretation which is consistent with international law principles. Interpretation would, therefore, not be as challenging for South African adjudicators.

It has been alleged by Bersten and Miller that another interpretation challenge is presented by the differences that exist between the different language versions of CISG, and when one is interpreting a provision one should compare the texts.[78] The differences in the CISG texts, as pointed out by Bersten and Miller, would also mean an increase in legal costs since interpreters are required to translate the various languages. If Bersten and Miller's argument is correct, then it could cause mayhem where two traders who use different languages have to interpret a provision in a dispute. However, Eiselen argues that uncertainty caused by interpretation difficulties should be considered in context. If the difficulties are less severe and can be solved by reference to the ULIS and ULFC, which preceded the CISG, then it should not be cause for much concern since application of the CISG provisions would be nothing new.[79] Eiselen's argument is in line with Article 7(2) which instructs that matters not expressly settled in the CISG are to be settled in conformity with the general principles on which it is based. The ULIS and ULFC form the foundation of the CISG and, therefore, reverting to those instruments is in keeping with its own principles.

Given that the South African Constitution requires the courts to interpret all legislation with due

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[76] Zeller "The significance of the Vienna Convention on The International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law" (2006) 17 *Stellenbosch Law Review* 471.

[77] The relevant provision is section 233 Act 108 of 1996.

[78] Bersten & Miller "The remedy of reduction of price" (1979) 27 *Am J Comp. L* 255-257; Zeller "The significance of the Vienna Convention on The International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law" (2006) 17 *Stellenbosch Law Review* 469.

[79] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" Reproduced by Pace Law School with permission from (1996) 116 *South African Law Journal* 362.

regard to international legal principles,[80]and, the CISG requires that when interpreting its provisions one have regard to its principles and to the rules of private international law,[81] interpretation should not be a challenge justifying non-ratification. South African courts should not have many challenges in applying international principles as this is already being done as required by the Constitution of South Africa. Furthermore, although the judiciary is still not yet fully electronic in South Africa[82] some of South Africa's Judges have access to Internet websites such as Pace, UNILEX and CLOUT for case references.[83] Interpretation as a challenge is slowly fading; however, the challenge for South Africa may be in trying to adjust to a new law. It maybe that most of those who will be affected by the introduction of a new convention such as the CISG may prefer the status quo rather than to have to learn a new way of applying the law.[84]

3.2.3 Failure to address validity

Another shortcoming and possible reason for non-ratification of the convention is that the convention does not deal with the question of validity of contracts.[85] Article 4(a) of the CISG states that the convention is "not concerned with the validity of the contract or of any of its provisions or of any usage". The convention does not define the term validity, but it has been suggested that this term could encompass for example, issues of "lack of capacity,

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80 Section 233 Act 108 of 1996.
81 Article 7 of CISG.
82 See Chapter 7 infra.
83 PACE available at: http://cisgw3.law.pace.edu/#treaty, UNILEX available at: http://www.unilex.info/ and CLOUT available at: http://www.uncitral.org/uncitral/en/case_law.html.
84 Pfund "Prospects for Adoption in the United States" Ch. 10 of Galston & Smit "(eds.)" *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984), 1-7: Pfund was speaking on behalf of the Federal Government before the United States of America ratified the CISG.
85 Article 4(a) the convention does not deal the validity of the contract or of any of its provisions or of any usage, Vienna Sales Convention 1980. See http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13350&x=1.

misrepresentation, duress, mistake, unconscionability, and contracts contrary to public policy".[86] The failure of the CISG to deal with validity of contracts can aggravate the inequalities of power between contracting parties: it contributes to ensuring that the less sophisticated parties remain the weaker party to the advantage of the stronger more sophisticated party.[87] This also curtails the scope of the court interventions as they cannot consider questions of validity in terms of the CISG. Parties stand to suffer huge losses should a disagreement arise, and the question of validity of the agreement has to be determined in terms of domestic law. This is a potential scare for the business community and is likely to frighten them off since one cannot be certain how a national court will interpret the question of validity. CISG's failure to deal with validity means the parties will need to supplement the CISG by providing for this eventuality in their contract. This also undermines the CISG as it fails to be the gap filling instrument it is meant to be.[88]

3.2.4 Amendment Challenges

The CISG does not have a provision to address how the instrument may be amended which is another shortcoming and possible deterrent to ratification.[89] Rosett also argues that codified instruments are often difficult to amend, and, therefore, lose their ability to stay current.[90] Most legal instruments are indeed difficult to amend; even national laws generally lay down stringent requirements to be followed for their amendment. The CISG does not have any provision addressing its own amendment. The difficulty this creates is that it is left to the United Nations

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86 Ziegel & Samson " Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" Pace Law School Institute of International Commercial Law - Last updated (February 19, 1999) available at: http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html.

87 Rosett "CISG Laid Bare - A Lucid Guide to a Muddy Code" (1988) CISG Database, Pace Institute of International Commercial Law. Reproduced with permission from 21*Cornell International Law Journal* 7.

88 See section 3.1.3 supra.

89 Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa". Reproduced with permission from (1996) 116 *South African Law Journal* 359.

90 The CISG is a "static monument": Rosett "Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 *Ohio State Law Journal* 272.

Commission on International Trade Law (UNICITRAL) to coordinate any effort to amend should a need arise. The large number of ratifying States would also make amending the CISG a complicated task. Eiselen challenges this argument; he argues that although it is true that some international instruments are difficult to amend, the CISG allows parties to an international contract to amend the instrument themselves.[91]

Amending an international instrument such as the CISG requires legal experts and the coming together of all ratifying States to debate and effect any changes. But since the CISG does not stipulate how amendments are to be carried out, no amendments have been made since its inception in 1980, meaning the shortcomings that have emerged have not been remedied.

Parties whose States apply the CISG, but are unhappy with some of its provisions, may opt-out of provisions they regard as unfavourable in terms of Article 6. It appears that the parties may derogate either orally or in writing from any provision, however, the parties should ensure that they have a shared intention to derogate from the relevant provision of the CISG and that this intention is clear.[92]

Gillette and Scott challenge the assertion that the parties to an international contract may amend the instrument themselves, and argue that the parties would incur legal costs in drafting opting-out provisions to escape being governed by unfavourable default rules.[93] Drafting opting-out provisions ultimately increases the contracting costs for the parties, thereby undermining one of

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91 "The CISG has one major advantage over most other instruments of international harmonisation: the functioning of the principle of party autonomy. It is one of the underlying principles of the CISG, as of most national laws, that in matters of contract the parties are autonomous in realising the relationships between them and that there is relatively little mandatory law that cannot be changed, modified or excluded by the parties themselves": Eiselen "Adopting the Vienna Sales Convention, Reflections Eight Years Down the Line" (2007) 19 *SA Merc LJ* 17.

92 "Article 6 CISG allows to exclude any provision of the CISG from application, and a respective agreement can be made orally under the general principle of freedom of form, Article 11 CISG"; Schlechtriem "Opting out of Merger and Form Clauses under the CISG – Second thoughts on *TeeVee Toons, Inc. & Steve Gottlieb, Inc. v Gerhard Schubert GmbH"* in Andersen & Schroeter (eds) *Sharing International Commercial Law Across National Boundaries* (2008) 423.

93 Gillette & Scott "The Political Economy of International Sales Law" (2005) *New York University Law and Economics Research Paper Series*, Working Paper No. 05-02 3.

the main arguments, in favour of ratification, viz reduction of contracting costs. In South Africa the costs for engaging an attorney familiar with the CISG would be very high since most lawyers would not be well versed in the CISG. The omission of an amendment provision is, it seems, validly identified as a weakness of the CISG.

3.2.5 A case of too many conventions?

It has been suggested that a possible reason for States not ratifying international conventions is simply that there are too many conventions requiring attention, and legislative time and expertise for drafting national legislation is not available.[94] This argument cannot be true for South Africa since the parliamentary portfolio committee system ensures that problems are promptly addressed by the relevant Parliamentary committee.[95] Secondly, if we accept that the CISG once ratified is directly applicable and, therefore, there is no model law requiring enactment into national law,[96] then it follows that the legislative process is simplified and the time and money required in ratifying the CISG is greatly reduced. Dugard is, however, of the view that, the courts in South Africa have to review each case individually in which it is claimed that the treaty is directly applicable "with due regard to the nature of the treaty, the precision of its language and existing South African law on that subject".[97] Dugard's assertion would mean that an investigation into the direct application of a treaty is required before it applies in South Africa which erodes the

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94 Griggs "Obstacles to Uniformity of Maritime Law" The Nicholas J Healy Lecture (2002) *Comite Maritime International YEARBOOK* 173.

95 Obiyo *Legislative Committees and Deliberative Democracy: The Committee System of the South African Parliament with Specific Reference to Standing Committee on Public Accounts (SCOPA)* (2007) 82. A thesis submitted in fulfillment of the requirements of the Doctor of Philosophy University of Witwatersrand. Available at: http://wiredspace.wits.ac.za/bitstream/handle/10539/2197/ObiyoRE_Chapter%203.pdf?sequence=4 [last accessed 22 January 2010].

96 Audit "The Vienna Sales Convention and the Lex Mercatoria" in Carbonneau (ed) *Lex Mercatoria and Arbitration: a Discussion of the New Law Merchant* (1998) 174.

97 Dugard *International Law: A South African Perspective* (2006) 62.

object of "self-executing" treaties.[98] Ngolele disagrees with Dugard by arguing, among others, that investigating whether the existing domestic law is adequate for a treaty to be directly applicable is not in line with the requirements of S231(4) of the Constitution.[99] Ngolele's argument seems to hold; in terms of the Constitution if international law is consistent with the Constitution, then interpretation which gives effect to the international provision is required. Despite Ngolele's arguments, however, the fact remains that there are no set guidelines in South Africa on how to determine whether a treaty is self-executing or not and the courts will have to determine each case separately".[100]

3.2.5.1 South Africa's legal system

Some have argued that South Africa has a hybrid monist legal system[101] as opposed to a pure dualist system. Monists believe that domestic law and international law are one and the same while dualists believe domestic law is separate from international law, and the latter only has force within the domestic sphere upon performance of some legislative act.[102] Hybrid - monists believe that most States like South Africa do not fit perfectly into either the dualist or monist categories with some treaties having the force of law.[103] It seems, therefore, that scholars are not agreed as to whether South Africa is dualist, meaning there is a complete separation between municipal and international law requiring adoption of an international treaty before it becomes

98 Fitzmaurice "The general principles of international law considered from the standpoint of the rule of law" (1957) 92 *Recueil des Cours* 70-80.

99 Ngolele "The content of the doctrine of self execution and its limited effect in South African law" (2006) 31 *South African Yearbook of International Law* 151.

100 Dugard *International Law: A South African Perspective* (2006) 62.

101 Sloss "The Role of Domestic Courts in Treaty Enforcement - A Comparative Study" (2009) Cambridge University Press -Excerpt 6. Available at SSRN: http://ssrn.com/abstract=1326711 [last accessed 23 January 2010].

102 Fitzmaurice "The general principles of international law considered from the standpoint of the rule of law" (1957) 92 *Recueil des Cours* 70-80.

103 Sloss "The Role of Domestic Courts in Treaty Enforcement - A Comparative Study" (2009) Cambridge University Press - Excerpt 5. Available at SSRN: http://ssrn.com/abstract=1326711 [last accessed 23 January 2010].

applicable[104] as Dugard argues, or a hybrid monist, as Sloss, argues. It is critically important to establish which system South Africa fits into as it can determine whether the CISG would apply directly soon after ratification or only after incorporation into domestic law. Keightley questions the meaning of "self-executing" as used in s231(4), but argues that it is more likely that the meaning is that after ratification of a convention no further act of Parliament is required when a convention is self-executing.[105] An existing law that permits the government to meet its international duties under the treaty without any further legislative incorporation into municipal law, results in that treaty being described as self-executing.[106] The question of self executing Conventions still seems unsettled in South Africa and should perhaps be investigated further by Parliament should the CISG ever come before it for consideration.

3.2.6 Failure to create trade

Lehman argues that the CISG "is not a trade creating instrument" and "does not assist developing countries 'develop' ".[107] This is a weak argument because the CISG was never intended to create trade, but was enacted to remove the barriers to trade by simplifying and unifying international sales contracts.[108] Contrary to Lehman's assertion that the CISG does not assist developing countries "develop" the CISG does offer up and coming businesses a fair platform to engage in international trade in goods without protracted contract negotiations. Simplification of the contract

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104 Dugard *International Law: A South African Perspective* (2006) 43.

105 Keightley "Public international law and the final constitution" (1996) 12 *Southern African Journal on Human Rights* 413.

106 Dugard *International Law: A South African Perspective* 3ed (2006) 62.

107 Lehman "The United Nations Convention For the International Sale of Goods: Should South Africa Accede?" (2006) 18 *SA Merc LJ* 321.

108 Annotated text of the CISG available at: http://www.cisg.law.pace.edu/cisg/text/preamble.html. Felemegas "An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law" (2007) produced under the auspices of *The Institute of International Commercial Law of the Pace University School of Law* 4. Available at: http://www.cisg.law.pace.edu/cisg/biblio/felemegas14.html [last accessed 23 January 2011].

process is an attractive prospect for businesses or traders who cannot afford to engage legal advisors. Trade creation falls within the sphere of the WTO, and applies at a State level. The CISG on the other hand once ratified applies horizontally between individuals. The preamble of the CISG, or any other international instrument, cannot encompass all its objectives but serves only to point to some of the main principles.[109] If trade creation results from use of the CISG then it is a welcome occurrence, but its main principle remains unification.

3.2.7 *Lack of compelling default provisions*

Gillette and Scott argue that "the CISG has failed as an international sales law".[110] Their argument is that because contracts are often incomplete, for various reasons, an international sales law should have default provisions to fill in the gaps. The absence of default provisions increases costs as parties have to draft and negotiate their own acceptable provision. Gillette and Scott's argument is, however, only valid assuming that business traders do in fact spend time going through the CISG and evaluating its contents. The question arises: are most traders really interested in spending time on the detail of the contract? It seems that there are many unsophisticated buyers and sellers who do not have time to negotiate either governing law provisions or learn the content of the applicable law and often only consider these matters when a dispute arises.[111] If this is the case then South African traders are really not concerning themselves with the contracts they are currently signing and the government needs to step in and ratify the CISG to protect them. Even though the CISG indeed lacks default provisions it cannot be a reason enough to justify non-

[109] Felemegas "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation" (February 2001) *Pace University Essay* available at: http://www.cisg.law.pace.edu/cisg/biblio/felemegas-pre.html [last accessed 27 October 2010].

[110] Gillette & Scott "The Political Economy of International Sales Law" (2005) *New York University Law and Economics Research Paper Series*, Working Paper No. 05-02 at 16.

[111] Cuniberti"Is the CISG benefiting anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 11.

ratification in South Africa in the absence of other considerations.

3.2.8 *Business interest versus government interests.*

Rosett argues against ratification, stating that government officials may have interests that conflict with those of business persons for whom the treaty is meant.[112] By this Rosette means that political interests both internal and external often conflict with practical business needs. An example is the manner in which consensus was reached during the drafting process, which required ratifying nations to make compromises based not only on their business interests but also based on political interest. Internally, if we examine the South African government's economic policy framework it is clear that the government has as its priority Broad Based Black Economic Empowerment (BBBEE),[113] and has not undertaken the process of ratifying the CISG, which may be beneficial to traders. This is an example of internal political interests conflicting with business interests.

Government's trade is regulated largely by multilateral and regional treaties under the WTO, as a result of which there is no real need for the government to push for ratification of the CISG for its own purposes. However, if viewed in context the government will see that it is unsophisticated traders, who are likely to be from disadvantaged groups, the very persons targeted by the BBBEE, who would benefit from ratification. As has been shown, the CISG fails to provide default provisions that the majority of affected parties would choose due to its vague provisions that is often a reflection of the policy objectives of government officials.[114]

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[112] Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 *Ohio State Law Journal* 270.

[113] South African Trade Policy and Strategy Framework, Discussion Document (2009) available at http://www.dti.gov.za/trade_policy/TPSF.htm [last accessed 28 October 2010].

[114] The CISG addresses the issue of gap filling in Article 7. Where a gap exists which is not dealt with by the CISG provisions, the answer is to be found in the general principles on which the CISG is based or in the rules of private international law.

The South African government's trade policy and strategy framework reveals that South Africa is a strong proponent of multilateral relations which are necessary to address the challenges of globalization.[115] South Africa has established both multilateral and regional trade agreements as part of the WTO and a member State of the UN.[116] Most of South Africa's agreements under the WTO have been in relation to the trade in goods, and recently focused on services.[117]

The imbalances caused by apartheid spread across the realm of rights denying black people[118] not only civil and political rights but also socio-economic rights. The socio-economic sector is now the focus of the South African government. The previously disadvantages individuals had no access to economic resources under apartheid resulting in black people not having the same opportunities in advancing their businesses. Perhaps the government's focus on redressing these imbalances could be the reason why the Department of Trade and Industry (DTI) has not paid much attention to the CISG.

South Africa is a supporter of the Doha Round of the WTO negotiations,[119] which seeks to open markets for goods from developing countries. South Africa supports such WTO trade initiatives and is focused on these initiatives and perhaps has decided to stall ratification, rather than trying to rush through the process without first establishing the link with its other initiatives which also seek to support and facilitate the trade in goods between merchants. The DTI is also cognizant of

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[115] Rashad "Mainstreaming trade into South Africa's National development strategy" (2007) *African Trade Policy Center* produced with the support of the United Nations Development Programme (UNDP) ATPC Work in Progress No. 51, Economic Commission for Africa 9. Available at: http://www.uneca.org/atpc/Work%20in%20progress/51.pdf [last accessed 11 April 2011] The South African trade policy and strategy framework (April 2010) 17.

[116] Meyer *et al.* "Bilateral and Regional Trade Agreements and Technical Barriers to Trade: An African Perspective", (2010) *OECD Trade Policy Working Papers*, No. 96, 11.

[117] See section 4.2.1.

[118] In this context used to refer to all non-white races under apartheid and in terms of the Population Registration Act No 30 of 1950.

[119] Rashad "Mainstreaming trade into South Africa's National development strategy" (2007) *African Trade Policy Center* produced with the support of the United Nations Development Programme (UNDP), ATPC Work in Progress No. 51, Economic Commission for Africa, 10. Available at: http://www.uneca.org/atpc/Work%20in%20progress/51.pdf [last accessed 11 April 2011].

the misalignment between itself and Parliament, itself and civil society and itself and universities and research institutes.[120] This lack of coherence may be one of the reasons why the CISG has slipped through the cracks and is not mentioned in any of the DTI's policy documents, rather than a conflict between their interests.

3.*2.9 Conclusions: non-ratification*

As has been shown, the Constitution of South Africa favours interpretations which are aligned to international principles[121] meaning that if the CISG is ratified in South Africa the interpretation challenges experienced in other jurisdictions would be kept to a minimum. The argument that the CISG has failed to create trade does not hold since it has been seen that the CISG's main purpose is to streamline international contracts in the sale of goods.[122] For South Africa in particular, trade creation falls within the DTI sphere of operation which negotiates trade agreements under the WTO.

The weaknesses of the CISG which would indeed present a challenge even in the South African context are the instruments' failure to deal with questions of validity, amendment and compelling default provisions.[123] The lack of validity, amendment and compelling default provisions is potentially a scare for traders who would then have to incur legal costs should these issues ever arise.[124] For those parties who would feel sceptical about the few weaknesses of the CISG, it should be pointed out that the parties would still have a choice to either introduce gap filling provisions or exclude altogether the CISG from application. What should be realised by the government is that for South Africa's BBBEE policies to flourish the focus should be widened to

[120] The South African trade policy and strategy framework (Nov 2009) Section 1, 5.
[121] See section 3.2.1 supra.
[122] See section 3.2.6 supra.
[123] See sections 3.2.3, 3.2.4 and 3.2.7 supra.
[124] See note 124 supra.

encompass international instruments such as the CISG which would simplify international trade not only for the previously disadvantaged individuals but for all South African traders alike. Questions about whether or not the CISG is a self –executing instrument can only be addressed once parliament is presented with the instrument for consideration.[125]

3.3 Conclusions

The rationale for non-ratification is not convincing in the context of South Africa.[126] Whether or not the South African law of contract is sophisticated enough to be chosen as a governing law by foreign traders is debatable. If, however, the perceptions about South African law are unfavourable then ratification is the answer. The arguments against ratification do not seem to have deterred the over 70 countries that have to date ratified the CISG.[127] The major portion of the initial 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[128] and the benefits to be drawn from ratification for the South African business far outweigh the shortcomings presented by the CISG as an instrument. [129]

The next chapter focuses on contract formation, scope and application under the CISG and South African law.

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[125] See section 3.2.5 supra.

[126] See sections 3.2.1 – 3.2.7 supra.

[127] Murray "CISG: Opt Out, Or Not? CISG In A Nutshell" (2010) para 1 available at: http://www.mhandl.com/content/cisginanutshell [last accessed 3 September 2010].

[128] The advantages of the CISG are more obvious to traders than to lawyers: Nottage "Who's Afraid Of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan" (2005) 36 *Victoria University of Wellington Law Review* 840. The main advantages are stated as "legal certainty, the lowering of transaction costs, the suitability of the CISG for international trade, the balancing of the interests of the parties, as well as the policy reasons": Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" (2007) 19 *SA Mercantile Law Journal* 25. Leyens "CISG and Mistake: Uniform Law vs. Domestic Law The Interpretative Challenge of Mistake and the Validity Loophole" (2003) *Clive M. Schmitthoff Essay Competition*, Pace University School of Law available at: http://www.cisg.law.pace.edu/cisg/biblio/leyens.html. See Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa (1996) 116 *South African Law Journal* 369; Hondius "CISG and a European Civil Code Some Reflexions" (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 112. Moss "Why the United Kingdom has not adopted the CISG" (2005-6) 25 *Journal of Law & Commerce* 485.

[129] See section 3.1.5 supra.

CHAPTER 4

ASPECTS OF THE CONTENT AND APPLICATION OF THE CISG

The chapter is divided into three parts which cover formation, scope and application. The first part of this chapter examines the requirements for a contract to come into existence under the CISG and the scope of the CISG's application by virtue of the range of goods to which it applies. The purpose of the analysis is to establish how this compares to the requirements laid down by South African law and the extent of any similarities and divergences. Examining which goods are covered by the CISG in the second part of the chapter is equally important to establish whether the majority of South African imports and exports would fall within the CISG ambit. The final part of the chapter analyses case law to determine how the CISG is applied in practice, to confirm the ambit of its application.

4.1 The CISG requirements for the formation of contracts

Part II, ie Articles 14-24, of the CISG provides rules on offer and acceptance and a comparison of these provisions with the requirements in South Africa is necessary to establish whether there are differences that would drastically change how contracts currently come into existence in South Africa if CISG were ratified.[130]

[130] Grebler "The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?" (2005-06) 25 *Journal of Law and Commerce* 468. Jurists have for centuries compared their own domestic laws with international laws before attempting to adopt the principles of a foreign law.

4.1.1 The offer and its revocation

An offer is the basis of a contract; it initiates the process which eventually results in a contract. Article 14(1) CISG provides the following definition: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer..." The CISG's definition of an offer in Article 14 (1) largely resembles the definition under South African law in which it has been defined as "declarations of intention...often characterised as an invitation to create obligations". [131] Most importantly the offer must be "complete and definite".[132] The differences between the CISG and South African law, as will be shown, exist in relation to revocation and counter-offers.

Articles 15, 16 and 17 address the revocability of an offer. Under the CISG, an offer becomes irrevocable if the offeree relies on it.[133] The court in *Geneva Pharmaceuticals Technology Corp v Barr Laboratories* [134] held that Article 16 (2) (b) of the CISG did not expressly require that the offeror must have foreseen the offeree's reliance and does not expressly require that the offeree's reliance be detrimental to him or her. This, therefore, means that an offeree enjoys a great deal of protection under the CISG.

In South Africa an offer is revocable at any time provided it has not been accepted; upon acceptance revocation is not possible as a contract then comes into being.[135] It is possible in South Africa for an offer to be made irrevocable, but only where the offeror has contracted with

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131 Van Huyssteen, Van der Merwe and Maxwell *Contract Law in South Africa* (2010) 81.
132 See note 132 supra at 82.
133 *Geneva Pharmaceuticals Technology Corp. v Barr Laboratories Inc. et al.* U.S District Court, S.D., New York, 98 Civ. 861, 99 Civ. 3607, USA, 2002.
134 See note 134 supra.
135 Gibson, (ed) *South African mercantile and company law* (2003) 32; Christie *The Law of Contract in South Africa* 5(ed) (2006) 32; Kerr *The Principles of the Law of Contract* 6ed (2002) 74. "An offeror who has not communicated to the offeree his decision to revoke - may upon acceptance - be held liable on objective grounds": Van Der Merwe, Van Huyssteen, Lubbe and Reineke *Contract: General Principles* (2007) 60. Dubois (general editor) *Wille's Principles of South African Law* 9ed (2007) 744; Van Huyssteen, Van der Merwe and Maxwell *Contract Law in South Africa* (2010) 82.

the other party to keep the offer open for a specific time.[136] The CISG seems to afford an offeree who has not yet accepted the same protection afforded against revocation that South Africa law affords a person who has concluded a contract. This makes for a very good argument for ratification since traders get protection earlier on in their contract negotiations under the CISG than would be the case under South African law.

If a written offer is modified by the offeree and then returned to the offeror, the CISG deems this to be a rejection and counter-offer.[137] Similarly, under South African law an acceptance must be clear, final and unambiguously worded.[138] If the acceptance invites the offeror to submit any reasonable amendments it is a counter-offer and not a final acceptance.[139] In *NV Boco v S.r.l. Lenzi Egisto*[140] NV Boco (buyer) had ordered some fabrics for the manufacture of slippers from S.r.*l.* Lenzi Egisto (seller) by means of a fax on the basis of samples sent to the buyer by the seller. The seller could not provide one of the fabrics ordered and instead offered an alternative fabric which the buyer rejected. The inability of the seller to provide the one specific fabric ordered by the buyer as well as the late delivery of some of the available fabrics resulted in a

[136] *Anglo Carpets (Pty) Ltd v Synman* 1978 (3) SA 582(T).

[137] Article 19(1) CISG "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."

[138] Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract: General principles* (2007) 60." …If the acceptance is not unconditional but is coupled with some variation or modification of the terms offered, no contract is constituted.": Dubois (general editor) *Wille's Principles of South African Law* 9 (ed) (2007) 742.

[139] *Van Aardt v Galway* (1539/2005) [2010] ZAECGHC 62 (10 August 2010) para 10. The Supreme Court of Appeal held per Olivier AJ in *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* (304 / 98) (2001) SCA 36; SA 133 (A) para 19, that where a counter offer is made by the offeree which places a duty on the offeror to respond but the offeror fails to respond then such silence constitutes acceptance of the counter offer. Available at: http://www.saflii.org/za/cases/ZASCA/2001/36.html [last accessed 27 February 2011].

[140] Appellate Court Gent 8 November (2004) [2001/AR/1982], Pace Law School, available at: http://cisgw3.law.pace.edu/cases/041108b1.html.

The Court says: "As to the non-delivery of the specific fabric, the matter concerned whether an agreement had in fact been reached under the provision of Art. 23CISG. The Court considered that the sending of samples cannot be considered as an offer under Art. 14 (1) CISG and that the actual offer was therefore made by the buyer when it placed the offer for the specific fabric. Since the seller did two counter-offers (Art. 19 (1) CISG) and the buyer refused both (Art. 18 (1) CISG), no contract had been concluded between the parties (Art. 23 CISG), and as a consequence, no contractual breach was possible. Therefore the Court concluded that whereas the buyer was not entitled to damages, the seller was entitled to the full payment of all the invoices. The Court also awarded interest on the sums due (Art. 78 CISG), calculated according to the Belgian statutory rate."

disagreement between the buyer and seller which culminated in the parties coming before the Court. The Court held in this case that, where a counter-offer is rejected no contract comes into place, and that the sending of samples cannot be regarded as an offer. The buyer had rejected the alternative fabric and as a consequence there was no agreement on that specific fabric. The buyer's contention that the seller had breached the contract was therefore dismissed by the court. The courts, in terms of both international law and South African law,[141] it seems, will not easily find that an offer is revocable where the offeree has accepted the offer or in any way relied on the offer.

4.1.2 Acceptance

An acceptance is what ultimately gives rise to a contract. An acceptance under South African law is defined as "... an assent by the person to whom the offer is made to be bound by the terms contained in the offer."[142] Under the CISG an acceptance is similarly defined as "A statement made by or other conduct of the offeree indicating assent to an offer...".[143] A number of Articles elaborate the terms of acceptance under the CISG,[144] resulting in acceptance only becoming effective when the offeror is informed of it. This is in line with both the will theory which focuses on the subjective intention of the parties to be bound[145] and information theory[146] which holds that a contract arises when the offeror is informed that his offer has been accepted. The courts in

[141] In *Maada v member of the Executive Council of the Northern Province for Finance and Expenditure and Another* (JA34/01) 2003 ZALAC 2 at 33 Zondo JP states that "The general principle in our law is that an open offer - that is one which the offeror has not bound himself to keep open for a specified period - can be withdrawn at any time before it is accepted." Zondo JP also referred to *Philips v Aida Real Estate (Pty) Ltd* 1975 (3) SA 198 (A) at 207H and *Lowe Morna v Commission for Gender Equality* 2001 22IJL 352 (W)) available at: http://www.saflii.org/za/cases/ZALAC/2003/2.html [last accessed 25 November 2010].

[142] Dubois (general editor) *Wille's Principles of South African Law* 9ed (2007) 744. Acceptance is also defined as "a declaration of will which indicates assent to the proposal contained in the offer and which is communicated to the offeror": Van Der Merwe, Van Huyssteen, Lubbe and Reineke *Contract: General Principles* (2007) 61.

[143] Article 18(1) CISG

[144] The relevant Articles are 18, 19 20, 21 and 22.

[145] Bhana, Bonthuys and Nortje *Student's Guide to the Law of Contract* 2ed (2009) 7.

[146] Van Der Merwe, Van Huyssteen, Lubbe and Reineke *Contract: General Principles* (2007) 55.

South Africa seem to have moved away from the principle that a contract is concluded only when the acceptance is communicated to the offeror. It seems an acceptance may occur without it necessarily being communicated to the offeror.[147] It has long been a principle of the South African law that a contract is only concluded when the offeree notifies the offeror of acceptance and consequently no contract arises if there is no notification of acceptance.[148] Unless an offeror waives his right to be notified of the acceptance, it will be presumed that the contract will be concluded when the offeror becomes aware of the acceptance.[149]

In *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd,*[150] the Supreme Court of Appeal held, per Scott JA, that in the case of a contractual document accompanied by a signed offer an inference will more readily be drawn, in the absence of any indication to the contrary, that the mode of acceptance required is no more than the offeree's signature.[151] Pretorius and Ismail criticize the decision arguing that "...if mere signature is sufficient, then the contract would rest on a generally objective basis as opposed to consensus..."[152] This criticism seems to overlook that if the parties have agreed a specific manner of acceptance then consensus is reached at the point the offeree accepts the offer in the prescribed manner. Signature implies assent to the contents of a document as such consensus is reached when the offeree affixes his signature on the document.

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147 *McCain Frozen Foods (Pty) Ltd v Beestepan Boerdery (Pty) Ltd* 2003 (3) SA 605 (T). In this case the offeree had signed an offer but not communicated it to the offerror. A clause in the contract stating that "the contract must be accepted and confirmed (signed)…" was vague and required the court to interpret whether the offeree should have communicated his signature or acceptance to the offeror. The court held that, the offeror had indicated the method of acceptance (that is, signature), and it was therefore not necessary for the offeree to communicate its acceptance to the offeror (612E).

148 Pretorius and Ismail "Notification Of Acceptance And The Conclusion Of A Contract: *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA): Cases" (2010) 31 *Obiter* 177.

149 *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597D.

150 2009 (2) SA 504 (SCA) 16A Available at: http://www.saflii.org/za/cases/ZASCA/2008/131.html[last accessed 25 November 2010].

151 2009 (2) SA 504 (SCA) 11.

152 Pretorius and Ismail "Notification Of Acceptance And The Conclusion Of A Contract: *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA): Cases" (2010) 31 *Obiter* 180.

4.1.2.1 Late Acceptance

In terms of Article 18(2) CISG an acceptance is not effective if it does not reach the offeror within the fixed time or within a reasonable time if no time has been fixed. However, Articles 21(1) and 21(2) CISG provide an exception to Article 18(2). Article 21(1) requires the offeror who receives a late acceptance, and is prepared to condone the late acceptance, to inform the offeree that the late acceptance is effective. Failure to so inform the offeree will have the effect of a rejection of the offeree's late acceptance. Article 21(2), on the other hand, states that if a letter or other writing containing a late acceptance shows that it was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect. Article 21(2) relates to acceptances that are late due to transmission problems, but would otherwise have been accepted within the fixed time. Article 21(2) is an exception to Article 18(1) since an offeror's silence constitutes acceptance of the offeree late acceptance resulting in the contract being established.[153] In a decision by the ICC Court of Arbitration in 1994, the arbitrator, held that an offer cannot be accepted after the time for acceptance has expired, unless the offeror orally informs the offeree without delay that it considers the late acceptance as effective.[154] This decision confirms Article 21(1) CISG which clearly states that a late acceptance is effective if the offeror communicates its effectiveness to the offeree.[155]

[153] Article 18(1) States that "…Silence or inactivity does not in itself amount to acceptance."
[154] 7844/1994 The ICC International Court of Arbitration Bulletin Vol.6/N.2 - November 1995, 72-73.
[155] "Article 21(1) gives the offeror a choice. He can decide that he does not want to be bound to a contract, in which case he need do nothing. Or he can decide that he wants to be bound to a contract, in which case he must without delay so inform the offeree or dispatch a notice to that effect." Farnsworth E A, in Bianca-Bonell *Commentary on the International Sales Law* (1987) 190 available at http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb21.html [last accessed 25 November 2010].

In South Africa the general proposition is similar to that set out under Article 18(2) CISG that an offer lapses if not accepted within the prescribed time.[156] However, in *Manna v Lotter & Another*,[157] Griesel J held that this proposition is too widely stated and may potentially be misleading.[158] In the more recent decision in *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd*,[159] the Supreme Court of Appeal held that where an offeree failed to communicate his acceptance to the offeror on time, but had signed the contract in time the contract was valid.[160] Pretorius and Ismail argue that there is clear authority for the proposition that an assumption such as the one made by the Court should not be lightly made as it contradicts the principle that notification is required for a contract to arise.[161] Furthermore, it seems that the offeror may rely on the late acceptance but not the offeree, since his late acceptance is viewed as a counter offer.[162] These decisions are exceptions to the general position in South Africa which is that an offer lapses if not accepted in time which is a similar position under Article 18(2) CISG.

4.1.3 Conclusions: formation

The CISG has four parts: Part I focuses on the sphere of application, Part II formation, Part III sale of goods, and part IV passing of risk. It is, however, Part II formation which is of significant importance to a State considering ratification particularly because, the provisions may have an effect of "displacing domestic rules" should a State not make any reservations.[163] This is

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156 Kerr *The Principles of the Law of Contract* 6ed (2002) 74.
157 2007 (4) SA 315 (C).
158 Pretorius *General Principles of the Law of Contract* (2007) 469.
159 2009 (2) SA 504 (SCA).
160 (2009) 2 SA 504 (SCA), 508F.
161 Pretorius and Ismail "Notification Of Acceptance And The Conclusion Of A Contract: *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA): Cases" (2010) 31 *Obiter* 180.
162 Christie *The Law of Contract in South Africa* 5ed (2006) 48.
163 Honnold Excerpt from *Uniform Law for International Sales under the 1980 United Nations Convention*, 3ed (1999) 232. Reproduced by Pace Law University with permission of the publisher, Kluwer Law International. Available at http://www.cisg.law.pace.edu/cisg/biblio/ho29.html [last accessed 26 November 2010].

particularly noteworthy because it may tend to deter traders from using CISG as they would need to learn a new way of concluding contracts. The South African position regarding formation of contracts is to a large extent similar to the CISG position. The general principles governing offer and acceptance are very similar with subtle differences largely attributable to the courts interpretations. The subtle differences in interpretation could possibly be due to the fact that each contract is unique and effect is given to the parties' intention even if this may result in findings that may seem to deviate from the general principles.[164] It is, therefore, clear that the principles concerning offer and acceptance under the South African law of contract would not require major changes should the CISG be adopted in South Africa. However, should there be opposition to the formation rules under the CISG South Africa can always make a reservation in this regard.[165]

An examination of the nature of goods covered by the CISG now follows to establish the extent to which CISG would be relevant to the South African exports and imports.

4.2 Range of goods covered by the CISG

Traders in South Africa would want to know whether the goods they import from or export to other nations will be covered by the CISG. The relevance of the CISG to South African goods is key in winning the business community's vote in ratification efforts.

4.2.1 Article 3[166]

Article 3 elaborates which goods fall under the CISG. The CISG generally covers a wide range of

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[164] *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* may seem to have changed the principle of notification of acceptance but the decision should be seen in the context of the parties and their circumstances.

[165] "The Scandinavian countries all ratified, subject to an Article 92 reservation, whereby they declined to accede to the CISG formation rules (Part II) entirely": Lookofsky "Harmonization Of Private Law Rules" (1991) 39 *The American Journal of Comparative Law* 405.

[166] Article 3 CISG: (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

goods including raw and manufactured goods.[167]

Statistics show that mineral products and agricultural produce are among the top exports from South Africa with manufactured goods ranking among the top South African imports.[168] The agricultural sector will likely cover a vast array of the produce of the South African farmers, who are up and coming traders. Article 3(1) states that "Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production." The farm produce and minerals are exported mainly in their raw form and the limits imposed by Article 3(1) are likely to have minimal effect on these industries. However, the DTI is focusing on exporting manufactured goods as the South African economy expands.[169]

Article 3(2) limits the application of the CISG by stating that the CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services". The operative words in the two subsections of Article 3 are "substantial" and "preponderant". These words will have to be assessed in the light of the contract as a whole, as well as the principle that when in doubt the CISG's application is preferred.[170] In accordance with Article 7 "substantial" and "preponderant" will have to be interpreted in a manner consistent with the principles of the CISG. It has been suggested by the CISG Advisory Committee that when interpreting the words "substantial" and "preponderant"

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[167] "…according to article 3(1) CISG, agreements for the supply of goods to be manufactured or produced are considered contracts of sale."Appellate Court Gent (*NV A.R. v. NV I.*) 2001/AR/0180 at 5.2 available at: http://cisgw3.law.pace.edu/cases/020515b1.html [last accessed 29 November 2010].

[168] South African Department of Trade Statics: http://www.thedti.gov.za/econdb/raportt/defaultrap.asp [last accessed 13 December 2010].

[169] South Africa's Economic Transformation: A strategy for Broad Based Black Economic Empowerment (2010) 4. Available at: http://www.dti.gov.za/bee/bee.htm [last accessed 12 December 2010].

[170] CISG-AC Opinion no 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG), 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid, para 1.2. Available at: http://www.cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146 [last accessed 11 April 2011].

under Article 3(2) CISG, primarily an "economic value" criterion should be used, and an "essential" criterion should only be considered where the "economic value" is impossible or inappropriate to apply taking into account the circumstances of the case".[171] What is important is that an overall assessment of the transaction should be made to determine whether it is indeed a sales contract.

In South Africa the services sector is comparatively open and South Africa made trade commitments under the Uruguay Round of the WTO.[172] These trade commitments set out how and in relation to which products or services it intends opening or liberalising its markets. However, trade in services is still at a lower level than trade in goods. As such the South African traders will not need to worry substantially about Article 3(2). Perhaps with an increase in exports of manufactured goods Article 3(1) may affect the traders but it is probably the more established businesses that in any case have access to legal advice.

4.2.2 Conclusion: range of goods

The majority of goods exported and imported by South African traders fall within the scope of the CISG. The goods covered include unrefined raw materials as well as manufactured goods which would mean both new and established businesses would be included.

The next section examines the application of the CISG in practice.

4.3 Application of CISG in practice

South Africa as a common law State, relies largely on court decisions where there is no legislation governing a particular matter. South Africa does not currently have specific legislation governing

[171] See note 171 supra para 2 & 9.
[172] South African Trade Policy and Strategy Framework, Discussion Document (2009) 38. Available at: http://www.dti.gov.za/trade_policy/TPSF.htm [last accessed 16 January 2011].

the sales of goods and the validity of contracts is established mostly in terms of common law.[173] The new Consumer Protection Act 68 of 2008 which came into effect in March 2011 will, to a certain extent, have some bearing on the sale of goods locally in South Africa,[174] however, its impact, if any, on international sales still remains to be seen.

The question of whether traders would be able to exclude the CISG from application once a State ratifies the CISG will be discussed in the first section (4.3.1) with reference to a few court cases. Since no single procedure is available for bringing a CISG case before the courts, it is also important to examine whether the parties have any obligations to request its application when they bring a matter before a court. The discussion will then move on to exploring the CISG's standing as the lex mercatoria (section 4.3.2), which will determine whether it is automatically applicable to international sales contracts which in turn could be beneficial for South African traders as they would be able to invoke CISG despite non-ratification. The third section (4.3.3) analyses "the homeward trend": how ratifying States currently apply the CISG in relation to their domestic laws and whether Article 7 CISG requirements are being observed. Finally (section 4.3.4) the restriction Article 95 CISG places is analysed in relation to case law to understand how it would affect South African traders who may wish the CISG to apply to their contracts by invoking Article 1(1)(b).

4.3.1 Can the CISG be expressly excluded?

The discussion now focuses on express exclusions, this examination is essential to determine

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[173] Laemmli *Transfer of Ownership in International Sales of Goods* LLM minor dissertation (2007) UCT lawspace at: http://hdl.handle.net/2165/318 . Dubois (general editor) *Wille's Principles of South African Law* 9ed (2007) 65: An important feature of South African law, is that a large part of the rules and principles particularly of the law of obligations and property law are not contained in legislation and therefore governed by common law. Van Der Merwe, Van Huyssteen, Lubbe and Reineke *Contract: General Principles* (2007) 60.

[174] Suppliers will be held liable for any harm whether or not they were negligent if the goods they sold were defective, unsafe or proper instructions were not given by the supplier: s 61 of Act 68 of 2008. Available at: http://www.hahnlaw.co.za/Consumer%20Protection%20Act%2068%20of2008%20(29%20April%202009).pdf [last accessed 27 January 2011].

whether South African traders would still have the option of excluding the CISG after ratification in line with the principle of party autonomy. Exclusion may result from choice of forum or from an express agreement by the parties to exclude specific provisions.[175] However, the choice of law of a non-contracting state does not constitute an express exclusion:[176] this was shown in a case before the Italian tribunal.[177] The case involved a Slovenian seller who entered into a contract with an Italian buyer for the supply, on a regular basis, of rabbits with certain genetic qualities, raised by the seller using rabbits supplied by a third party. The contract contained a clause stating that the contract was to be governed by the "laws and regulations of the International Chamber of Commerce of Paris, France". No other choice of law clause was present. The Tribunal held that the CISG was still applicable. The Tribunal cited Article 1(1)(a) as the reason why the CISG was applicable: the parties had their places of business in two different contracting States at the time of conclusion of the agreement.[178] The Tribunal further found that reference to the "laws and regulations of the International Chamber of Commerce" did not amount to an implied exclusion of the CISG.

Party autonomy gives the parties freedom to choose the governing law for their contract, "but in so doing they must opt for a particular domestic law".[179] Principles of international commercial contracts are incorporated into the contract if the parties refer to them in the contract, but only serve, at most, to bind the parties in so far as they are not in conflict with the applicable domestic

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[175] Ferrari"Specific topics of the CISG in the light of judicial application and scholarly writing" (1995) 15 *Journal of Law and Commerce* 91. Available at: http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html [last accessed 17 March 2011].

[176] Ferrari"Specific topics of the CISG in the light of judicial application and scholarly writing" (1995) 15 *Journal of Law and Commerce* 90.

[177] *Ostroznik Savo v La Faraona soc. coop. a r.l.* Tribunale di Padova - Sez. Este, 2005, available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=Abstract[last accessed 20 October 2010].

[178] Article 1 (1)(a) The Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States.

[179] See note 178 supra para iv.

law.[180] If no domestic law was chosen then the Court would have to determine which one applies. Despite this, however, the clause "laws and regulations of the International Chamber of Commerce of Paris, France" was found to be too vague and was excluded.

An example of exclusion by agreement can be seen in a decision in the USA by the Court in *Easom Automation Systems Inc v ThyssenKrupp Fabco Corp*[181] where it was found that exclusion of the convention in terms of Article 6 needs to be in the form of an express statement that the CISG does not apply, and a mere choice of law of a non-contracting State does not amount to implied exclusion of the CISG.[182] The arguments in favour of implied exclusion were based on the practice of international trade;[183] however, the courts have now pronounced in favour of express exclusion. The requirement that the exclusions be express is necessary to ensure that the parties consciously assent to any exclusion.

Exclusion may also be by choice of forum;[184] however, this choice of forum is not enough, two conditions must also be met: firstly the parties must make it clear that they intend the domestic law of the country in which the forum is situated to apply, and secondly, the forum must not be located in a CISG member state.[185] It is clear from the above that there are a number of ways in which the parties can exclude the CISG from application. However, where an exclusion is ambiguous and not express, the courts have a tendency to maintain that the CISG applies.

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[180] See note 178 supra.

[181] Southern District Court, Eastern District of Michigan, 06-14553, (2007) WL 2875256. Available at: http://cisgw3.law.pace.edu/cases/070928u1.html [last accessed 28 October 2010].

[182] Courts that have reviewed this provision have held that the parties must expressly opt out of applying the CISG to their agreement. See *BP Oil Int'l* 332 F.3d at 337; *Asante Techs Inc. v PMC-Sierra Inc* 164 F.Supp.2d 1142, 1150 (N.D.Cal.2001) ("A signatory's assent to the CISG necessarily incorporates the treaty as part of that nation's domestic law."). See also *Ajax Tools Works Inc. v Can-Eng Manu. Ltd.* 2003 U.S. Dist. LEXIS 1306, 8.

[183] Murphy "United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law" (1998) 12 *Fordham Int'l L.J.* 739.

[184] Brand "*Non-convention Issues in the Preparation of Transnational Sales Contracts"* (1988) 8 *Journal of Law & Commerce* 167.

[185] Ferrari"Specific topics of the CISG in the light of judicial application and scholarly writing" (1995) 15 *Journal of Law and Commerce* 91.

4.3.2 What procedure, if any is to be followed in order for a court to apply CISG?

An examination of whether there is a particular procedure to be followed by parties who want the courts to apply the CISG is important in determining whether this deters or encourages ratification.

The starting point for most courts seems to be Part I CISG, its sphere of application, which establishes whether CISG is applicable to the case before a court. In *Société Anthon GmbH & Co v SA Tonnellerie Ludonnaise*[186] the applicability of the CISG came under the spotlight. The question which came before the Court of Appeal was whether the parties could be presumed to have excluded the CISG, when both were from contracting States, but they had not requested the application of the CISG when their dispute came before the court a quo. The French Court of Appeal held that French law was applicable since the parties had not requested the court to apply the CISG in the Court a quo.[187] The position taken by the court in this instance stands to deter support for ratification as it places the burden of requesting CISG application on parties. Encouragingly, the decision was later reversed by the Supreme Court which, in its ratio decidendi, cited the "international character" of the contract and the fact that the parties never expressly excluded the CISG.[188] Applicability it seems from the foregoing case would first be established in terms of the requirements of Article 1 after which the court would then move on to examine the remaining Articles of Part I in particular whether the parties excluded the CISG or any of its provisions in terms of Article 6.

[186] Cour de cassation T 08-12.399(2009) available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1491&step=Abstract. Vincze (2009) case translation available at http://cisgw3.law.pace.edu/cases/091103f1.html [both last accessed 7 November 2010].
[187] See note 187 supra under abstract at http://www.unilex.info/case.cfm?pid=1&do=case&id=1491&step=Abstract
[188] See note 187 supra under abstract.

In the "*Aluminium Foil Film Wrap case*"[189] involving parties from CISG contracting States, namely Switzerland and Germany, the tribunal stated that the application of the CISG was based on the fact that the parties had not excluded the CISG in terms of Article 6. In this case the parties did not request application of the CISG. This decision would find favour among CISG proponents as it streamlines the court process for the parties.

The fact that the CISG requires the parties to expressly exclude it from operation should indicate that this choice is left to the parties and no further requirement is needed to establish its applicability where this exclusion is absent, and no other law has been chosen in the contract.[190] The decisions of the tribunals in the *"Aluminium Foil Film Wrap case"* and the Supreme Court's decision in *Société Anthon GmbH & Co v SA Tonnellerie Ludonnaise* are, therefore, consistent with Articles 1(1)(a) and 6.

It appears from the cases just examined that establishing application is a process requiring the courts to establish in terms of Part 1 CISG whether CISG is the applicable instrument. This is a streamlined process which encourages ratification as it places no further obligations on parties.

4.3.3 Application as a new lex mercatoria

In order to ascertain whether the courts may apply the CISG regardless of whether or not traders are from contracting States we examine the concept of the "new lex mercatoria". The lex mercatoria has been described as "a set of autonomous commercial customs, which initially materialized in the form of trade usages and practices, but were ultimately codified in national

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189 Available at http://cisgw3.law.pace.edu/cases/031020s1.html and also at CISG-online.ch website <http://www.cisg-online.ch/cisg/urteile/957.pdf>; Internationales Handelsrecht (5/2005) 206-214 [last accessed 7 November 2010].

190 Bonell "Commentary on the International Sales Law" (1987) xv-xvii *Giuffrè: Milan* 1.1 available at http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb6.html [last accessed 7 November 2010].

laws and international conventions".[191] Like Mazzacano, Eiselen is in support of the view that the CISG is a new lex mercatoria.[192] Davidson is of the view that the lex mercatoria is useful in avoiding conflict of laws and is a convenient way of applying precedents from statutory instruments such as the CISG.[193] Gabor agrees with the argument that the CISG is part of the new lex mercatoria, but argues that domestic unification efforts are required for its functioning in the domestic setting.[194] If one accepts Mazzacano's arguments that the new lex mercatoria is autonomous then Gabor's assertion that domestic unification efforts are necessary cannot be accepted. Mazzacano and Gabor's assertions can, however, be reconciled: if the CISG is to be applied as part of the lex mercatoria its autonomy is of utmost importance for the parties to be assured of its fairness. However, before this application can happen in the domestic setting unification efforts are needed to make adjudicators aware of the CISG to enable them to apply the CISG either directly or as part of the new lex mercatoria.

The CISG has been applied as a new "lex mercatoria" in an award by the International Court of Arbitration (I.C.C.).[195] In that case the contract did not state the applicable law, and the arbitral tribunal held that the CISG was applicable to the contract because the CISG is part of the general principles of international commercial practice and accepted trade usages.

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[191] Mazzacano "The *Lex Mercatoria* As Autonomous Law" *Comparative Research in Law and Political Economy, Research Paper* 29/2008, Vol. 04 No. 06 (2008) i. Available at http://www.comparativeresearch.net/jsp/abstract.jsp?paperid=100000079 [last accessed 6 November 2010]. Mazzacano regards that the lex mercatoria is a "self-contained and self-maintaining" autonomous law that exists outside of any State: the CISG fits the definition.

[192] Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" (2007) 19 *SA Mercantile Law Journal 14.*

[193] Davidson "The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database" (2002) para 17. Available at: http://www.cisg.law.pace.edu/cisg/biblio/davidson.html#*[last accessed 8 December 2010].

[194] Gabor "Stepchild of the new lex mercatoria: private international law from the international law perspective" (1988) 8 *Northwestern Journal of International Law & Business* 560: "Thus, the creation of order in the form of a federal unification is an essential step forward in the effective implementation of the new *lex mercatoria* in the United States".

[195] ICC Court of Arbitration, case 7331/1994 in *ICC International Court of Arbitration Bulletin* (1995) n 6, 73.

If the CISG is applied as the lex mercatoria then it could also be applied to contracts of an international character between South Africa and other States which have not contracted into CISG. The CISG requires governments to ratify it to make it a part of their national laws.[196] One of the major arguments advanced by opponents of the lex mercatoria is that it lacks governmental authority.[197] Perhaps the CISG, as this new lex mercatoria, has lost part of its autonomy and is subject to State interference at some level. What is important for South Africa is that there is already an ICC precedent where the CISG was applied not through choice of the parties, but as a principle of international commercial law. It is the duty of the International Court of Arbitration to ensure that its decisions are enforced in national courts where the parties do not comply[198] and hopefully this will mean that the decision of the I.C.C will be confirmed by national courts.

4.3.4 The "homeward trend".

Two cases will be examined in order to provide insight into the "homeward trend" even in States that have ratified the CISG. States which adopt this practice appear not to be meeting the requirements imposed by Article 7.[199]

In *Brown & Root v Aerotech Herman Nelson Inc et al* [200] both parties were from CISG ratifying States.[201] The buyer was a U.S. company which had purchased 282 portable heaters as well as other goods and services from a Canadian seller. The U.S.A. company claimed that the Canadian seller had acted fraudulently by misleading it with regard to the state of the heaters and this,

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[196] Goode "Usage and Its Reception in Transnational Commercial Law" (1997) 46 *I.C.L.Q.* 2.
[197] Lando "The rules of European Contract Law" (1999) Reproduced by Pace University from "Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code", Working Paper Legal Affairs Series, JURI 103 E, 133.
[198] International Court of Arbitration available at: http://www.iccwbo.org/court/arbitration/id4590/index.html [last accessed 12 December 2010].
[199] See section 3.1.4 supra.
[200] The Court of Queens Bench of Manitoba (2002) MBQB 229. Available at http://www.osgoode.yorku.ca/cisg/cases/brownroot.htm [last accessed 7 November 2010].
[201] The United States ratified the CISG on 11 December 1986 and Canada ratified on 23 April 1991.

among other arguments, entitled the U.S.A. buyer to rescind the contract.[202] The Appeal Court in reaching its decision did not apply the CISG and there is only one reference to Articles 38 and 49 of the CISG.[203] The Court instead refers to domestic cases and law.[204] This case is a typical example of the homeward trend and a violation of Article 7.

The decision in *Italdecor v Yiu's Industries*[205] is yet another example of a nationalistic approach.[206] In this case an Italian buyer entered into a contract with a Hong Kong seller. The buyer then alleged a breach by the seller due to late delivery and brought an action before an Italian court claiming avoidance of contract. The Judge was unable to establish the applicable Hong Kong law and, therefore, decided to apply Italian law which, in turn, resulted in the application of the CISG since Italy has ratified the CISG. The Court, however, did not refer to any other CISG decisions and in addressing the issue of late delivery did not deal with all elements required by Article 25 CISG on fundamental breach.[207] The Court's approach in establishing fundamental breach was clearly in terms of the domestic Italian requirements of fundamental breach and not Article 25 CISG. Where the CISG applies the domestic courts should interpret in a manner that is consonant with the principles of the CISG.

In the two aforementioned cases the courts did not elaborate on any of the CISG requirements and how they related to the cases. It is evident that the homeward trend is very much a reality which courts will have to guard against in their interpretations if they are to promote the CISG's continued use and unification efforts.

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202 See note 201 supra at 33.
203 See note 201 supra at 95.
204 See note 201 supra at 87.
205 *Italdecor v Yiu's Industries (H.K) Limited (1998)* Appellate Court Milan [translation available] Available at: http://cisgw3.law.pace.edu/cases/980320i3.html [last accessed 11 December 2010].
206 Romito "CISG: Italian Court and Homeward Trend" (2002)14 *Pace International Law Review* 186.Available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1194&context=pilr [last accessed 11 December 2010].
207 The judge did not deal with the requirement of foreseeability. See note 206 supra at 196.

The available case law suggests that, the majority of the judges will determine the applicability of the CISG based on whether the parties are from Contracting States or not as well as with reference to the intention stated in the parties contract. The homeward trend undermined the aims and objectives of CISG and courts should avoid following it.

4.3.5 Article 95 reservations

We now examine a case which highlights the risk traders from non-ratifying States face when they contract in terms of the CISG with parties from ratifying States that have made an Article 95 reservation.

An Article 95 reservation by a Contracting State excludes Article 1(1)(b) CISG meaning that the CISG cannot be applied by invoking the rules of private international law of the Contracting State. Application of CISG is limited to instances where both parties are from Contracting States (Article 1(1)(a)), as opposed to being applied by virtue of one of the parties being a Contracting State that did not enter an Article 95 reservation.[208]

In *Prime Start Ltd. v Maher Forest Products Ltd* et al [209] the plaintiff was a British Virgin Islands corporation, while the defendants were American corporations. The United States has ratified the CISG,[210] whereas the British Virgin Islands and the United Kingdom have both not. The plaintiff argued that the fact that all parties have not ratified the CISG is irrelevant, citing Article 1(1)(b). Plaintiff argued that in accordance with the principles of private international law Canadian, United States or Russian law could all apply, and that all three of these are Contracting States. The plaintiff's argument then concluded with the statement that "the CISG applies regardless of the

[208] Honnold "*Uniform Law for International Sales under the 1980 United Nations Convention*" 3ed (1999) 35.
[209] Internationales Handelsrecht (6/2006) 248-252.
[210] This happened in 1986: UNILEX Contracting States available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13351[last accessed 7 November 2010].

fact that the Plaintiff' was from the British Virgin Islands which was a non-contracting State".[211] However, the Court disagreed with plaintiff and held that the CISG did not apply. This was because the United States, upon ratification of the CISG, invoked a reservation as per Article 95 of the Convention,[212] which excluded Article 1(1)(b) from operation in the US.

Traders are likely to face a similar situation where they contract with a party from a State which entered a reservation excluding Article 1(1)(b). This creates a difficult prospect for traders from non-ratifying States, like South Africa, since they have to investigate whether an Article 95 reservation exists before proceeding to contract in terms of the CISG with a party from a Contracting State.

4.3.6 Conclusion: application

Where the CISG applies it is clear from case law that the parties should expressly exclude otherwise, if vaguely excluded, the courts will still apply it.[213] It has also been shown that no further requirement is placed on the parties for the CISG to apply where an express exclusion in terms of Article 6 is absent.[214] The CISG seems indeed to be part of the new lex mercatoria and although requiring some level of state interference it still is important for it to retain its autonomy.[215] The homeward trend counters the uniformity of the CISG and should be discouraged.[216] Lastly, for parties from non- Contracting States, it is important to take the time to

[211] See note 210 supra.
[212] Article 95 provides that: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."
[213] See section 4.3.1 supra.
[214] See sections 4.3.1 and 4.3.2 supra.
[215] See section 4.3.3 supra.
[216] See section 4.3.4 supra.

investigate whether an Article 95 reservation exists before assuming that the CISG will apply through Article 1(1)(b).[217]

4.4 Conclusions

Similar general principles apply to the formation of contracts under both CISG and South African law.[218] The South African practice in this regard would not need any major alterations to fit in with CISG, save for the courts' interpretations. The majority of South African imports and exports currently fall within the parameters of Article 3; therefore, most of the South African traders would be covered by the CISG.[219] Traders from CISG ratifying States have to expressly exclude the CISG from application, in order not to have the legally sophisticated traders taking advantage of the less sophisticated traders.[220] The protection offered by the CISG in this regard is unquestionable. However, the homeward trend is to be avoided if the protection afforded by the CISG is to be fully realised. Traders can be assured that the CISG will apply once their State has ratified the CISG and it is equally desirable for South African traders to have this protection as they cannot fully rely on the CISG being applied as a new lex mercatoria.

This chapter has focused on addressing the concerns likely to be raised by traders regarding formation, scope and application of the CISG in practice. The next chapter directs its attention to the possible obligations that the government of South Africa has regarding ratification.

[217] See section 4.3.5 supra.
[218] See sections 4.1 supra.
[219] See section 4.2.1 supra.
[220] See section 4.3.1 supra.

CHAPTER 5

POSSIBLE WTO AND CONSTITUTIONAL OBLIGATIONS TO RATIFY

The previous chapter attempted to address those aspects of the CISG that have a direct impact on the ordinary business person engaged in trade. The current chapter examines the possible obligations imposed on the South African government, as a member of the WTO, as well as its legislative mandate imposed by the Constitution of South Africa. The Constitution of South Africa is the supreme law and cornerstone of its democracy;[221] any law inconsistent with it is invalid. The CISG has to be shown to be consistent with the constitution's values before it can apply in South Africa. The WTO's objective is liberalisation of trade which is enforced through its various agreements signed by Member States.[222] South Africa would, therefore, need to examine whether the CISG is aligned with the WTO objective of trade liberalisation before the CISG is ratified. Finally having considered the possible WTO and legislative obligations we examine what the legislature has done to date since the CISG came into being.

5.1 WTO trade objectives and South Africa's obligations as a Member State

The 1998 Trade Review Report by the WTO Trade Review Body noted that a major element of South Africa's Growth, Employment and Redistribution (GEAR) strategy was trade liberalization.[223] It was, at that time, important for South Africa still emerging from apartheid to send the message within the WTO that the ANC government was opening its markets in terms of the WTO requirements. The Department of Trade and Industry has in the past used a metaphor known as the "butterfly strategy" to describe its trade policy. The "butterfly strategy" metaphor

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[221] Chapter 1 section 2 Constitution of the Republic of South Africa 108 of 1996.
[222] Rose "Do We Really Know That the WTO Increases Trade?" (2004) 94 *The American Economic Review* 99 Available at: http://www.jstor.org/stable/3592771 [last accessed 26 November 2010].
[223] Trade Policy Review - Republic of South Africa - Report by the Secretariat, WTO website: http://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm [last accessed 28 October 2010].

has South Africa being the "the head of the butterfly with the rest of Africa as the body of the insect".[224] The metaphor encapsulates how South Africa viewed itself as the leader in African affairs with the rest of Africa supporting it. South Africa, however, does not seem to have done justice to this metaphor when it comes to the CISG. It is certainly not a leader, but is rather lagging behind fellow African countries like Zambia, Lesotho, Ghana and Burundi, to name a few, who have ratified the CISG.

Every State party in the World Trade Organisation (WTO) is required to adopt trade policies that not only cater for its economic prosperity and development, but that also honour its multilateral and regional obligations. Furthermore, all Member States are required to refrain from adopting protectionist policies that hinder trade.[225] South Africa is focused on reviewing its trade policy since 1994, clarifying and defining the contribution of trade to the economic development agenda and clarifying how trade complements and supports the National Industrial Policy Framework.[226] The trade policy forms the basis of South Africa's policy statement to the WTO's Trade Policy Review Body. The trade policy does not address ratification of the CISG and when this WTO body conducts its review on South Africa it would be important for other nations within the WTO to understand South Africa's views on ratifying the CISG. The Department of Trade and Industry's medium term strategic framework for the period 2010 to 2013 also does not seem to contain the ratification of the CISG as one of its aims. [227] Instead as part of its legislative

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[224] Alden & Soko "South Africa's economic Relations with Africa: Hegemony and Discontents" (2005) 43 *Journal of Modern African Studies* 369.

[225] Suzuki "MFN Principle and Global Trade Liberalization" Graduate School of Arts and Sciences The University of Tokyo: Preliminary Draft (March 20, 2006) Prepared for delivery at the 47th Annual *International Studies Association Convention*, March 22-25, 2006, San Diego, California 2. Available at: http://www.allacademic.com//meta/p_mla_apa_research_citation/0/9/8/4/4/pages98445/p98445-1.php [last accessed 6 November 2010].

[226] Department of Trade & Industry "South African Trade Policy and Strategy Framework" v. Available at http://www.dti.gov.za/trade_policy/TPSF.htm [last accessed 28 October 2010].

[227] Department of Trade & Industry "Medium- term strategic framework" (2010- 2013) 12. Available at : www.info.gov.za/view/DownloadFileAction?id=120326. [last accessed 15 July 2011].

programme it states that it will provide for the application in the Republic of the Convention on Agency in the International Sale of Goods.

A cornerstone of the WTO framework is the Most Favoured Nation (MFN) principle. This principle holds that no country should discriminate against its trading partners and other WTO Member States.[228] The MFN principle achieves non-discrimination by stipulating in Article 1 of the GATT that nations should extend unconditionally any favour or advantage relating to customs duties, charges or rules to other WTO contracting States.[229] The MFN principle is concerned mainly with preventing discrimination based on tariffs and customs duties imposed by member States on foreign products and services.[230] This principle does not concern itself with how individual traders structure their agreements. Once governments have negotiated their regional agreements governing how goods will be taxed when they enter each other's territory, what happens thereafter is between traders. The CISG enters the picture when the traders are negotiating a contract.

The provisions of Article XXIV of the GATT allow Member States to enter into regional trade agreements (RTA's), preferential trade agreements (PTA's) and customs unions (CU's); there has been a proliferation of these. These arrangements each impose separate obligations on States; these obligations sometimes conflict with each other or lack coherence, resulting in a major challenge to the world trading system. Traders may prefer to trade with traders from countries which have also ratified the CISG at the expense of South African traders where there is no existing trade agreement between the two countries. Trading with a trader from a country with

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[228] Article 1 General Agreement on Tariffs and Trade 1994.
[229] Das *Regionalism in Global Trade* (2004) 95.
[230] Article I General Agreement on Tariffs and Trade 1994 available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#GATT94. Article II General Agreement on Trade in Services available at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleII.

which one's own State has a trade arrangement would be more streamlined than one without.[231] In the absence of such trade agreements the CISG may play this role. The obligation imposed by the WTO on South Africa by virtue of its membership requires it to open its markets and promote trade. Although ratification of the CISG is not the sole indication of trade liberalisation, the CISG similarly aims, among other things, to promote trade and remove the barriers to trade and as such States that have ratified the CISG are in a way advancing the principles of both the CISG and WTO.

South Africa seems to be failing in its obligation to advance the WTO objectives, but an examination of South Africa's obligations in terms of its national Constitution is needed before criticising its stance. The following section focuses on South Africa's legislative mandate regarding international conventions.

5.2 Obligations on legislature in terms of the Constitution

The Constitution of South Africa although being an internal document is the source of the South African government's authority and ratifying a convention such as the CISG has to be done within the framework of the Constitution.

Section 44 (1) of the Constitution invests Parliament with National legislative authority. That section states that Parliament has the power to, inter alia, pass legislation with regard to any matter.

The power to ratify international agreements and impliedly conventions such as the CISG is set out in s231, which provides that the executive is responsible for negotiating and signing all

[231] Countries which trade under the WTO have the benefit that most barriers to trade, eg technical standards to be used on goods have already been negotiated at a multilateral level. RTAs then use the multilateral agreements as a basis for their negotiations. In the absence of a RTA, PTA or Economic Partnership, parties have to negotiate for every eventuality in their contracts which is not an easy task.

international agreements, however, in terms of section 231(2) only after approval by the two houses of Parliament, the National Assembly and the National Council of Provinces, will an agreement bind the Republic. Both houses of Parliament will have to ratify the CISG before it will bind the Republic, even if the executive signs it without legislative approval.

Section 231(4), in its turn, states that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. A self executing provision or treaty means that the provision or treaty applies directly without any need to pass through the legislative approval process.[232] Section 233 is consistent with the requirement set out under Article 7 of the CISG as s233 similarly provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The CISG will have to go through the rigorous process laid down by the Constitution of South Africa before it can be ratified. Once tabled for consideration in Parliament the portfolio committee[233] responsible for international conventions will review it and add comments before sending it back to Parliament, where it will be considered before it is passed or rejected.

What has not been answered till now is what has been done thus far by the South African Parliament with regard to ratification of the convention. The next section tries to answer this question to get a sense of the task at hand.

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[232] Ngolele "The content of the doctrine of self execution and its limited effect in South African law" (2006) 31 *South African Yearbook of International Law* 141. Also see section 3.2.5 supra.

[233] Committees are established in terms of Rules of Parliament, The Constitution or national legislation. See http://www.parliament.gov.za/live/content.php?Category_ID=147[last accessed 13 December 2010].

5.3 Parliamentary efforts thus far in relation to CISG

The Department of Trade and Industry in its medium term strategic framework for the period 2010 to 2013 states that part of its legislative programme is to "provide for the application of The Convention on Agency in the International Sale of Goods".[234] This convention was enacted into South African law as Act 4 of 1986,[235] three years after it was adopted by the International Institute of the United Nations Organization for the Unification of Private Law (UNIDROIT).[236] It seems that even though the Convention on Agency has been law since 1986 in South Africa, it was not being applied hence the undertaking by the Department of Trade to ensure its application in future.[237] The Convention on Agency is intended to supplement or complete the CISG.[238] Its sphere of application is, therefore, very limited and the CISG is still required in the Republic to govern sales contracts. Despite this, however, there is no mention of the CISG in the Department of Trade and Industry's framework document.

The CISG has not been tabled before the South African legislature for consideration since its enactment in 1980.[239] This situation is not peculiar to South Africa, but Knieper in his analysis of the different reasons provided by some former Soviet countries, which have not ratified the CISG, argues that, there is generally no outright resistance or opposition to ratification, but rather a lack

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234 The Department of Trade and Industry "Medium Term Strategic Framework (2010-2013)" at 12. Available at : www.info.gov.za/view/DownloadFileAction?id=120326. [last accessed 15 July 2011].

235 The Act is listed at: http://www.legalb.co.za/SA/SA-Nat-List-Date-1986.html [last accessed 6 November 2010].

236 It will be remembered that UNIDROIT laid the foundation for the CISG when it spearheaded the adoption of the ULIS and ULFC in 1964.

237 Article 1(1) Convention on Agency in the International Sale of Goods, Geneva (1983), Unidroit website: http://www.unidroit.org/english/conventions/1983agency/1983agency-e.htm [last accessed on 6 November 2010]. This Convention applies where one person, the agent, has authority or purports to have authority, to conclude a contract of sale of goods with a third party, on behalf of the principal. Article 1(3) Convention on Agency in the International Sale of Goods, Geneva (1983). This convention is, however, limited to governing only the relations between the principal and agent on the one hand, and the agent and third party on the other.

238 Bonell "The 1983 Geneva Convention on Agency in the International Sale of Goods" (1984) 32 *The American Journal of Comparative Law* 717.

239 Inquiries with the Senior Procedural Officer in the Research and Parliamentary Practice National Assembly Table revealed that no record exists, within the archives located at the Parliament, of the CISG having been considered by parliament. Inquiries with the DTI referred me to the Convention on Agency in the International Sale of Goods as well as to the CISG Advisory Council.

of knowledge about the CISG and a lack of civil society lobbying for ratification in parliaments.[240] Although civil society does not play a similar role in South Africa's parliament with regard to ratifying conventions, Knieper's arguments relating to ignorance and lack of knowledge is of relevance in South Africa. Since the Department of Trade and Industry plans to implement the Convention on Agency, it would be desirable if the Convention on Agency be used in conjunction with the CISG as the Convention on Agency acknowledges the CISG in its opening declarations and states that it takes cognizance of the objectives of the United Nations Convention on Contracts for the International Sale of Goods. It is the responsibility of the Department of Trade and Industry and the relevant Parliamentary Portfolio Committee to table the CISG for consideration and kick start a debate on its relevance to the South African trade.

5.4 Conclusions

South Africa's obligations in terms of the Constitution require it to promote international principles.[241] Even though the Constitution of South Africa does not place any obligation to adopt conventions, application of the CISG principles is simpler where it is a part of the South African law.[242] In failing to consider the role the CISG plays in international commerce, and trade, South Africa is neglecting these duties.[243] Parliament should, through the legislative process, be left to decide whether or not the CISG would be beneficial to South Africa: the democratic process laid down by the Constitution of South Africa must be followed. Similarly the WTO seeks its member States to remove barriers to trade and although the CISG does not necessarily aim to create

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[240] Knieper "Celebrating Success by Accession to CISG" (2005-06) 25 *Journal of Law and Commerce* 480.
[241] See section 5.2 supra.
[242] See section 4.3 supra.
[243] Promotion of international principles as enshrined under s233 of Act 108 of 1994 and ratification, negotiating and signing of international agreements (s231(1) Act 108 of 1994) among others.

trade[244] it is an instrument which streamlines trade in goods thereby advancing the WTO objectives. [245]

The next chapter analyses the position in two developing countries, Argentina that has ratified the CISG and Brazil that has not, to establish the effects of their respective positions on trade, and assess the lessons for South Africa from the Argentinean and Brazilian experience.

[244] See section 3.2.6 supra.
[245] See section 5.1 supra.

CHAPTER 6

EXPLORING THE ALTERNATIVES –THE EXPERIENCES OF BRAZIL AND ARGENTINA

Brazil and Argentina are developing countries which pursue more or less similar trade policies to that of South Africa particularly at the WTO.[246] Brazil has not ratified the CISG while Argentina is a ratifying State. Their economic similarity to South Africa makes these two countries good candidates for a comparative study with South Africa. The Brazilian and Argentinean experience will be related to South Africa in an attempt to see if there are any lessons to be deduced.

6.1 Effects of Non-ratification in Brazil

At the time of writing this paper, Brazil has still not ratified the CISG.[247] Brazil is a major trading State and is member, inter alia, of the Common Market of the Southern Cone (MERCOSUR), Coalition of agricultural exporting nations, lobbying for agricultural trade liberalization (CAIRNS) and the Latin American Integration Association (LAIA).[248] Trade volumes will be used to measure the effects of ratification or lack thereof on trade. Most of the available literature largely focuses on trade policies to measure the effects on trade growth however trade volumes as a measure of trade growth has been largely neglected.[249] Trade volumes as a measure of trade

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[246] South Africa, Brazil and Argentina are all members of the G-20 which is a coalition of developing countries at the WTO pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries (not to be confused with the G-20 group of finance ministers and central bank governors, and its recent summit meetings). Available at http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm. [last accessed 15 July 2011].

[247] UNILEX website, Contracting States: http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13351&x=1 [last accessed 7 November 2010].

[248] WTO website: http://www.wto.org/english/thewto_e/thewto_e.htm [last accessed 7 November 2010].

[249] Yanikkaya H Trade Openness and Economic Growth: A Cross country empirical investigation (2002) 72 *Journal of Development Economics* 59.

growth are more reliable than relying on trade policy measures which are very diverse.[250] There have been numerous calls for Brazil to ratify the CISG,[251] with a website having been set up to encourage the government to ratify the CISG and also to make the business and legal community aware of the CISG.[252] These efforts seem to be ineffective.

An overview of the trade between Brazil and the United States of America, a CISG ratifying State shows that trade in goods has been growing between the two countries for the past 5 years.[253] Trade with another of its major trading partners, China, a CISG ratifying State is also on the increase, and Brazil reported that China is now its biggest trading partner.[254] It seems, therefore, that both the US and China's trade with Brazil is on the rise yet they are both signatories of the CISG and Brazil is not.

Brazil is South Africa's largest trading partner in Latin America with exports between January 2010 and June 2010 reported at over 2,5 million rand.[255] Both countries are keen to promote South-South trade, and Brazil and South Africa consider each other strategic partners co-operating at multilateral forums such as the World Trade Organisation.[256] Even though both countries have not ratified the CISG, scholars in Brazil are actively rallying for the ratification of the convention.

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[250] Dollar & Kraay *"Institutions trade and growth" (2002)* A paper prepared for the Carnegie-Rochester Conference Series on Public Policy 5. Available at www.worldbank.org/research/growth [last accessed 10 December 2010].

[251] "There is no doubt that Brazilian companies would benefit from the application of the CISG" CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani, April 2010, response to Question 2, "It appears, however, that time is ripe for the Brazilian adhesion to the Convention"; Grebler "The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?" (2005-06) 25 *Journal of Law and Commerce* 47.

[252] CISG-Brazil.net. Available at: http://www.cisg-brasil.net/page_10.html [last accessed 7 November 2010].

[253] *U.S. Census Bureau, Foreign Trade Division, Data Dissemination Branch, Washington, D.C. 20233,* "The U.S. goods trade balance with Brazil went from a deficit of $1.0 billion in 2007, to a surplus of $2.5 billion in 2008. U.S. goods exports grew 33.6% in 2008 to $32.9 billion. U.S. imports from Brazil grew 18.8% to $30.5 billion" *Brazil US Business Council, http://www.brazilcouncil.org/information-brazil/policy-trade-economy* [last accessed 7 November 2010].

[254] Trade Policy Review Body, World Trade Organisation, Brazil (WT/ TPR//S/212) (2009) xi.

[255] Exports to Brazil between January 2010 and September 2010 are at 4 041 145: Department of Trade and Industry, Trade Statics.Available at http://www.thedti.gov.za/econdb/raportt/RgbC12.html [last accessed 11 December 2010].

[256] See http://www.southafrica.info/business/trade/relations/trade_southamerica.htm [last accessed 7 November 2010].

Brazil has a civil code which governs contracts and there are a number of differences between the civil code and the CISG, particularly regarding formation of contracts.[257] These differences could possibly be the reason why Brazil has not seen the need to ratify the CISG, but this is highly unlikely since neither the legal nor political sectors have presented opposition to the CISG. A speculative reason which seems more probable than not is that it is simply not a priority for the Brazilian government.[258] For a developing country like South Africa, this too could be the reason as it has more pressing needs than ratification of Conventions. Even though Brazil has not ratified the CISG, this does not seem from the trade volumes to have a measurable negative effect on its economy. Brazil appears to be continuing to trade with its major trading partners such as the U.S.A. and China who are CISG signatories. Given Brazil's seemingly growing trade in goods, non-ratification does not seem to have much effect on trade.

[257] Some discrepancies exist regarding formation of contracts between the Civil Code and CISG. Under Article 25 CISG an aggrieved party may terminate a contract where there has been fundamental breach however in Brazil the Civil Code Article 475 allows the aggrieved party to terminate upon occurrence of a breach without the need to prove that the breach was fundamental. Grebler "The UN Sales of Goods Convention: Perspectives on the current state play" (2007) *ASIL Proceedings* 411. "The Convention permits the reduction of the price if the goods or its quantity do not conform to the contract, if they become unfit for their intended use or if their value is affected by a defect (Article 50). The Brazilian Civil Code only allows the reduction of the price in the case of hidden defects (Articles 441 and 442)." Dolganova & Lorenzen "The Brazillian adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods" (2008) Revised version of a paper originally written in Portuguese entitled *"O Brasil e a Adesão à Convenção de Viena de 1980 sobre Compra e Venda Internacional de Mercadorias"*, which was presented at the 73rd Biennial Conference of the International Law Association in Rio de Janeiro para 4.3.1. Available at http://www.cisg.law.pace.edu/cisg/biblio/dolganova-lorenzen.html#** [last accessed 10 December 2010].

[258] Dolganova & Lorenzen "The Brazillian adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods" (2008) Revised version of a paper originally written in Portuguese entitled *"O Brasil e a Adesão à Convenção de Viena de 1980 sobre Compra e Venda Internacional de Mercadorias"*, which was presented at the 73rd Biennial Conference of the International Law Association in Rio de Janeiro para 4.3.2. Available at http://www.cisg.law.pace.edu/cisg/biblio/dolganova-lorenzen.html#** [last accessed 10 December 2010].

6.2 Effects of Ratification in Argentina

Argentina ratified the CISG on 19 July 1983 and it became effective on 1 January 1988.[259] Despite having ratified the CISG in 1983, the CISG is still largely unknown within their business circles, although much work has been done to create awareness.[260] One of the efforts undertaken to encourage the study of the CISG in Argentina is the conducting of international arbitrations moot attended by the business community, academics and bar associations.[261] The anomaly of CISG being unknown even though it has been ratified, is undesirable since the CISG is supposed to serve the business community. Ratification is pointless if the convention will not be put into use by the traders. Argentinean cases involving CISG are also few and far between.[262] It has been reported that there still seems to be a homeward trend in Argentinean courts when interpreting the CISG.[263]

Argentina is the second largest Latin American importer of South African goods according to the Department of Trade and Industry statics.[264] It is part of the MERCUSOR trade agreement and, therefore, forms part of the South-South trade strategy with South Africa.[265] Three of the top five countries that trade with Argentina are all CISG signatories, who also happen to be the largest countries that trade with Brazil, a non CISG signatory.[266]

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[259] See UNILEX Contracting States note 248 supra.
[260] Ferrari *The CISG and Its Impact on National Legal Systems* (2009) 3.
[261] The Argentine Chamber of Commerce organized a Moot on International Arbitration and International Sale of Goods, among commercial organizations, bar associations and universities of countries of Mercosur in 1999. See note 261 supra at 4.
[262] Only 10 cases having been reported on the UNILEX website and 7 on CLOUT. UNILEX available at: http://www.unilex.info/ [last accessed 7 November 2010]; CLOUT is available at: http://www.uncitral.org/uncitral/en/case_law.html [last accessed 7 November 2010].
[263] See note 261 supra at 5.
[264] The number of exports to Argentina is recorded to be 602 851 between January 2010 and September 2010, Department of Trade and Industry, trade statics. Available at http://www.thedti.gov.za/econdb/raportt/RgbC12.html [last accessed 11 December 2010].
[265] The South-South trade is trade between developing nations which promotes import and export among the developing counties.
[266] USA, China, EU are the largest importers of Argentinean products after Brazil. The USA, China, EU, Argentina and Japan are the top five importers of Brazilian products, available at:

It is quite significant that ratification, if not followed up by effective educational and awareness campaigns, will not yield as much benefit. Similarly, ratification on its own will not achieve much if the courts do not apply the CISG in their decisions and adopt an international interpretation where they do apply it. The business community should be the primary aim of any awareness campaigns to sensitise the country to the CISG.

6.3 Conclusions

The experience of Brazil seems to suggest that non-ratification has little or no bearing on trade volumes between States. Brazilian trade with CISG signatory States is on the increase. On the other hand Argentina a signatory of the CISG also seems to be doing well in its trade with CISG signatory States like the U.S.A and non-signatory States like Brazil. The trade benefits of CISG are not immediately apparent from the statistics.

Scholars in Brazil have lobbied more actively for the ratification of the CISG than those in South Africa. A website has been set up to represent the fight for the CISG. In South Africa there does not appear to be any active lobbing for the CISG. Apart from Professor Eiselen's work, very little has been written by South African scholars about the CISG. The lack of scholarly articles on the CISG may be an indication that there is a general ignorance of its existence rather than opposition to the CISG.[267]

Argentina's ratification and educational process on CISG does not seem to have led to significant

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http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=AR [last accessed 7 November 2010].

[267] Lutz disproves the notion that the scarcity of CISG case law in common law countries indicates that these countries have misgivings about the CISG and attributes the lack of CISG application to ignorance stating "…often common law lawyers are more ignorant and unfamiliar with the CISG than judges." Lutz "The CISG and common law courts: Is there really a problem?" (2004) 35 *Victoria University of Wellington Law Review* 711. Available at http://www.victoria.ac.nz/law/documentation/VUWLR%20PDFS/35(3)/Lutz.pdf [last accessed 10 December 2010].

awareness of its existence within the business community. This would imply that there is little use of the CISG since the traders are not aware of it. The homeward trend, which the courts have shown is quite undesirable and counters the harmonisation of international sales law. Furthermore, Argentina has not enacted or incorporated the CISG into its domestic law and still uses its own civil code, and there are conflicts between the two laws. The lesson for South Africa is to avoid the homeward biased approach after ratification but rather to start drawing from the knowledge of local experts to bring the CISG to the South African Business community.

The paper has analysed the origins of the CISG, its strengths and weaknesses, the formation requirements, the obligations imposed by the constitution the relevance of the CISG in world trade and the lessons from Brazil and Argentina. Having considered the aforementioned the next chapter summarises the main arguments advanced in the paper and concludes it by putting forward a recommendation for South Africa to ratify the CISG.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

The CISG, although not comprehensive,[268] and at times challenging to interpret,[269] is still a complex instrument which would serve the business community well in the drafting of international sales contracts. Its complexity notwithstanding, the CISG uses language that is simple enough for traders to understand without taking extensive legal advice, but with sufficient depth not to compromise its legal meaning.[270] A few vague provisions tend to detract from the certainty and comprehensiveness of CISG, but as has been argued the imperfections of texts may be improved on through experience.[271]

There are strong scholarly arguments both for and against the application of the CISG,[272] therefore, a decision whether or not South Africa adopts CISG boils down to weighing the pros and cons and deciding what is best for South Africa. Many of the arguments against adoption, such as the failure of the CISG as a trade creation instrument,[273] are difficult to sustain when we consider that the principle purpose of the CISG is unification of international sales law; not trade creation, but rather trade promotion. [274]

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[268] See section 3.2 supra.
[269] See section 3.1.3 supra.
[270] See section 3.2.3 supra.
[271] Zeller "The significance of the Vienna Convention on The International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law" (2006) 17 *Stellenbosch Law Review* 471.
[272] Nottage "Who's Afraid Of The Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan" 36 *Victoria University of Wellington Law Review* (2005) 840. The advantages of the CISG are more obvious to traders than to lawyers; Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" (2007) 19 *SA Mercantile Law Journal* 25; Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 *Ohio State Law Journal* 269; Osbourne "Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980" (2006) LL.M Thesis, University of Hull, who concludes that due to the compromises made during the drafting process, the text is inconsistent and many variations of the CISG exist between nations. See also section 3.1 supra.
[273] See section 3.2.6 supra.
[274] See section 3.2 supra.

South Africa's membership of the WTO must incline it towards ratification of CISG, not necessarily for its trade benefits, but as an assurance to the majority of its trading partners that it supports initiatives to facilitate trade.[275] There is authority for the view that CISG rules form part of international trade usages which can be used to fill the gaps where no specific trade custom exists.[276] If this is so, the CISG may already be applicable, as a new lex mercatoria, to those sales transactions that rely solely on international trade usages, and that some of the South African traders' contracts may already be subject to the CISG.[277]

Creating awareness is a critical step in preparing for ratification as well as in changing a nation's views about the CISG. In Argentina, even though universities and bar associations created a high level of awareness of the CISG prior to its ratification, the same awareness is lacking in the business circles.[278] The local courts in Argentina have, however, not applied the CISG in a uniform manner and interpretation shows a homeward trend.[279] Homeward trend interpretation would be unlikely if South Africa adopted CISG given that the South African courts are enjoined by section 233 of the Constitution to apply international law when interpreting national law.

The generally accepted view is that courts should interpret the CISG in an autonomous manner which divorces it from domestic laws.[280] With sources aplenty on the interpretation of CISG there is no reason for courts to follow a homeward trend in their interpretation of it.[281] The CISG Advisory council could be an important source of assistance for lawyers; it could be a first stop in

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[275] See section 5.1 supra.
[276] Audit "The Vienna Sales Convention and the Lex Mercatoria" in Carbonneau (ed) *Lex Mercatoria and Arbitration: a Discussion of the New Law Merchant* (1998) 179. Available at *http://cisgw3.law.pace.edu/cisg/biblio/audit.html* [last accessed 11 December 2010]
[277] See section 4.3.4 supra.
[278] Ferrari *The CISG and Its Impact on National Systems* (2009) 3.
[279] See section 6.2 supra.
[280] Salama "Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application" (2006) 38 *The University of Miami Inter-American Law Review* 231.
[281] See section 3.2.2 supra.

the search for opinions before engaging in further comparative legal research. Professor Ramberg, Chair of The CISG Advisory Council (2004-2008) states that in some countries, academic writings as well as statutory law and court decisions are sources of law, and as such most courts would be assisted by the CISG Advisory Council in getting a consolidated opinion on a topic.[282] South Africa's own Professor Eiselen is secretary of the CISG Advisory Council, and the Department of Trade and Industry can tap into his expertise. CLOUT is also another valuable resource for CISG decisions, [283] which when used in conjunction with other resources like PACE, will assist courts in their interpretation of the CISG. Eiselen argues that material on the CISG is easily available on the Internet; however, it is not clear how many Judges in Africa have reliable Internet access. Even though the Department of Justice's 2009-2010 Annual report alludes to having made its intranet and Internet more efficient,[284] a recent study on South Africa's judicial system seems to show that the South African judiciary is still, a long way from becoming fully electronic.[285] Although not directly applying to accessing CISG material a partially electronic justice system means some of the lawmakers will inevitably not be able to reference CISG related electronic material. Over the past two years the Internet has become faster and more accessible to many South Africans.

It is encouraging that with most sources on the CISG being electronic, the majority of the South

[282] Interview with Professor Jan Ramberg, Chair, CISG-Advisory Council, November (2005), Philadelphia, USA, CISG Advisory Council website: http://www.cisgac.com/default.php?ipkCat=129&ifkCat=136&sid=163 [last accessed 7 November 2010].

[283] CLOUT, UNICITRAL's own official database, on its own does not supply as much information. One would expect CLOUT, as the official website, to be a one stop shop for information relating to the CISG. This would contribute to ensuring easy access to case law thus ensuring uniformity in interpretation. UNCITRAL website: http://www.uncitral.org/ [last accessed 18 January 2011].

[284] See note 287 infra at 62 and 63.

[285] Erasmus "The Challenge of the Information Society: Application of Advanced Technologies in Civil Litigation and Other Procedures" available at: http://ruessmann.jura.uni-sb.de/grotius/english/Reports/SouthAfrica.htm [last accessed 7 November 2010].

African courts in South Africa have some access to the Internet and intranet.[286] The fact remains though that there is no central database from which national courts can draw case law. This is undesirable and further weakens the case for uniform interpretation. Perhaps the UN needs to consider how interpretation may be made consistent by publishing hard copies of CISG case law in volumes and distributing them to all signatory States.[287]

In South Africa awareness among the Bar associations, law societies, law schools and the business community would most likely be raised significantly if the CISG came before Parliament, since the South African legislative process generally enjoys wide coverage. What is required is the initial drive for the CISG to be tabled before Parliament to initiate, what one hopes will be, a well balanced debate. Whether it is because of the weaknesses of the CISG that South Africa has not ratified the convention, is uncertain. It could be that ratification is simply not a priority for the South Africa government at this stage of its development.[288] South Africa's trade policy has been focused on redressing the imbalances of the past.[289] Conventions on commercial matters such as the CISG that require ratification do not present with any degree of urgency and, therefore, lack the attention they may have enjoyed from government.

The CISG is certainly an improvement on the earlier Hague conventions and should be viewed in light of this history.[290] The refocus on trade in manufacturing goods means that South African raw

[286] "During the period under review, management and maintenance of the Internet were undertaken." Department of Justice and Constitutional Development 2009/2010 Annual Report 62. Available at: http://www.justice.gov.za/reportfiles/anr200910/anr2009-2010_part2.pdf[last accessed 7 November 2010].

[287] CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani, (April 2010) response to question 4. Available at: http://cisgw3.law.pace.edu/cisg/biblio/castellani2.html [last accessed 7 November 2010].

[288] The CISG has given way to more urgent matters such as "housing, healthcare, education HIV/AIDS, poverty and employment." Oosthuizen "Rights Duties and Remedies under the United Nations Convention on Contracts for the International Sale of Goods: An investigation into the CISG's Compatibility with South African Law" (2008) A thesis submitted in fulfilment of the requirements of the Degree for Master of Laws, Rhodes University 4.

[289] See section 3.2.8 supra.

[290] See section 2.2 supra.

and manufactured goods would be covered by the CISG.[291] Formation of contracts under Part II of the CISG is more similar than different to formation under South African law.[292] This means lawyers and traders in South Africa would not need much of an adjustment with regard to how their contracts come into being. Despite all the positive elements of the CISG, the trade benefits which flow directly from ratification are not immediately apparent.[293] What is certain is that the contracting process under the CISG is likely to be more streamlined and there are more benefits for the South African business community than disadvantages to ratifying the CISG, particularly the certainty as to the applicable law which it brings.[294]

Overall the advantages of ratification for South Africa far outweigh the shortcomings of the CISG, and ratification will assist in ensuring that South African traders get an opportunity to enter the international trade arena on an equal platform with traders from both ratifying and non-ratifying States. Ratification at the earliest available opportunity is strongly recommended.

[291] See section 4.2.1 supra.
[292] See section 4.1 supra.
[293] See sections 6.1 and 6.2 supra.
[294] See section 3.3 supra.

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