The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States

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A. Preface

This paper will make the case for more widespread African adherence to the United Nations Convention on the International Sale of Goods, 1980 ("CISG") on the ground that it represents an effort through the United Nations system to make available harmonised rules on the international sale of goods which are intended to have an international and universal reach. The paper begins with an introduction which briefly examines the origins of CISG and proceeds to discuss the relevance of CISG to Africa. It ends with a recommendation to African States to accede to, or ratify, the Convention.

B. Introduction: The Origins of the Convention on International Sale of Goods

One of the recitals of the United Nations Convention on the International Sale of Goods, 1980 is:

> "THE STATES PARTIES TO THIS CONVENTION [...] BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of the international trade [...]" (emphasis added).

Of course, we all know that the international body that assisted the States Parties to the Convention in their endeavour to attain these objectives of the removal of barriers in international trade and the promotion of the development of international trade was the United Nations Commission on International Trade Law "UNCITRAL". UNCITRAL was established by a General Assembly resolution of 17 December 1966, as a result of an initiative by the Hungarian Government.

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The Permanent Representative of Hungary to the United Nations submitted a *note verbale*[1] requesting an inclusion in the agenda of the nineteenth session of the United Nations in 1965 the following item: "Consideration of steps to be taken for progressive development in the field of private international law with a particular view for promoting international trade." In an explanatory memorandum that accompanied this request, the Hungarian Permanent Representative argued that, though the provisions in the Charter of the United Nations required the General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification and the General Assembly had attained great achievements in respect of public international law, UN organs had not till then handled the progressive development of private international law. He continued:[2]

> "For the present purposes what is meant by 'the development of private international law' is not so much an international agreement on the rules of the conflict of laws as applied by national courts and arbitral tribunals as rather an unification of private international law mainly in the field of international trade (e.g. unification of the law on the international sale of goods or on the formation of contracts). Recently the United Nations has undertaken special efforts towards the development of international trade, having regard particularly to the general interest of the community of nations in the advancement of the developing countries. A thorough study of the legal forms of international trade, their possible simplification, harmonization and unification, would be well suited for this purpose. Governments, learned societies and international organizations have thus far done commendable work in this field. This work, however, is done mostly on a regional basis and practically without the participation of representatives of the greatly interested States of Africa and Asia."

The Hungarian Government thus urged that the proposed item be included on the agenda for the nineteenth session of the United Nations. The Hungarian Government succeeded in initiating UN work on the unification of substantive private international law. A General Assembly resolution was passed in December 1965[3] which requested the Secretary-General to submit a comprehensive report, surveying work in the field of unification and harmonisation of the law of international trade and considering which United Nations organs and other agencies might be given responsibility for work in this area. The eventual establishment of UNCITRAL is traceable back to this initiative of Hungary. What needs to be stressed is that, right from the outset, this initiative dwelt on the need to bring

1 *See* United Nations Commission on International Trade Law Yearbook, Vol. 1 (1968-1970), United Nations, New York 1971, p. 5.

2 *Id*.

3 General Assembly (GA) Res. 2102/20, 20 December 1965, in United Nations Commission on International Trade Law Yearbook, Vol. 1 (1968-1970), p. 18.

the representatives of Africa and Asia into the shaping of the law that was to be the outcome of this harmonisation and unification process.

The UN General Assembly resolution which established UNCITRAL in 1966[4] prescribed its object as: "the promotion of the progressive harmonization and unification of the law of international trade" in accordance with the provisions of the resolution. One of the recitals of the resolution makes reference to the need to secure broader participation in the process of harmonization and unification of the law of international trade. It was thus to UNCITRAL that fell the task of organising a broader participation in the processes that eventually led to adoption of CISG. UNCITRAL did not start from scratch. Work had been done on the unification of the law of international sale of goods prior to its establishment. However, this work could not boast of the broad participation that the UN General Assembly was insisting on in 1966.

Right from the outset, Africa played an important role in the new organisation. For example, Ghana had the privilege not only of being elected one of the initial members of UNCITRAL, but also its representative then, Ambassador Emmanuel Kodjoe Dadzie, was elected its first Chairman.[5] I also had the privilege of being elected Chairman of UNCITRAL in 1978 and presiding over the session of UNCITRAL at which the rules on formation of contracts of international sales were adopted.

UNCITRAL at its very first session in 1968 adopted as one of its priority items of work: the international sale of goods. It formulated this item of work as follows:[6]

> "International sale of goods:
> (a) In general;
> (b) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;
> (c) Different legal aspects of contracts of sale like:
> i) Limitations;
> ii) Representation and full powers;
> iii) Consequences of frustration;
> iv) *Force majeure* clauses in contracts."

To pursue this work item, UNCITRAL decided at its second session in 1969 to establish a Working Group, composed of Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, USSR, the United Kingdom and the Unites States of America. It will be noticed that three African countries were members of the Group. The remit of the Group was to consider, *inter alia,* the comments and suggestions by States in order to ascertain which modifications of

4 GA Res. 2205/21, 17 December 1966.
5 *Id*., p. 73.
6 *Id*., p. 77.

the existing texts on uniform rules governing international sale of goods might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose.

The existing texts on uniform rules governing international sale of goods were, of course: the Uniform Law on the International Sale of Goods (Corporeal Movables) ("ULIS"); and the Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables) ("ULF"). Both uniform laws had been adopted at the Diplomatic Conference on the Unification of Law governing the International Sale of Goods, convened by the Government of the Netherlands at the Hague in April 1964. The uniform laws were based on drafts prepared by the International Institute for the Unification of Private Law (which is usually referred to as "UNIDROIT"). UNIDROIT was established in 1926 by a multilateral treaty within the orbit of the League of Nations. It has been reported that UNIDROIT's work on international sale of goods contracts was initiated as a result of a suggestion by Ernst Rabel to Vittorio Scialoja, President of UNIDROIT in 1928.[7] UNIDROIT has, since then, achieved outstanding work in the area of the unification of private law; however, it has never succeeded in truly reflecting the whole world in the manner that the United Nations system has. Africa has always been either grossly underrepresented or not represented in its councils.

This fact was manifested in the extent of the representation that the Government of the Netherlands was able to achieve in the Diplomatic Conference that it convened in April 1964. Twenty-seven States signed the Final Act of that Conference. Of these, twenty-two were European; three Latin-American and two Asian. None was African. From these facts, one can understand why UNCITRAL resolved to ascertain what modifications of the texts adopted at the Hague might render them capable of wider acceptance by different countries with different heritages. At the deliberations at the Second Session of UNCITRAL in 1969 on the unification of the rules on international sale of goods, many representatives expressed the view that UNCITRAL's decision to consider ULIS and ULF did not imply that the Commission should limit itself to giving an opinion merely on whether their texts were satisfactory or not. They considered that though UNCITRAL should take full account of what ULIS and ULF had achieved, UNCITRAL should regard itself as being at liberty to chart a new course if the Hague texts were found to be unacceptable to a substantial number of States.[8] In sum, two schools of thought emerged at UNCITRAL with regard to the Hague texts: one view was that the texts were suitable and practicable instruments and a significant contribution towards the unification of law. Accordingly, there was no need to revise them before being put to test in practice. The second view was that the Hague texts did not correspond to contemporary needs and realities and that it was therefore necessary to review them before they could be more widely applied. Protagonists of this latter view pointed out that the 1964 Hague Conference had been attended

7 *See* P. Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods,* 1st edn., Oxford, 1998, p. 1.

8 *See supra* note 4, p. 97.

by only twenty-eight States and that none of them was a developing country.[9] It was in consequence of the interplay of these two schools of thought that UNCITRAL decided to establish its Working Group on the international sale of goods ("The Working Group on Sales").

CISG is largely the result of the meticulous work done by this UNCITRAL Working Group on Sales. One of the first issues tackled by the Working Group was on the sphere of application of the proposed uniform law. The issue was whether the UNCITRAL draft should follow the approach of Article 2 of ULIS which directed the tribunals of contracting States to apply the Law to international sales without regard to the relationship between the sales transaction in question and a contracting State. This approach may be referred to as the universalist approach by which the uniform law is applied without the need to establish any relationship between the transaction and the *forum* state of the litigation, where it is a contracting state. The Working Group did not accept this approach, but modified it to combine the system of applying the law only when the places of business of both parties are in the territories of contracting States with the system under which the law is applied when the rules of private international law point to the application of the law of a contracting state. This combined system is what was eventually embodied in CISG. Thus CISG is applied to only sales transactions where there is a real connection between the transaction and a contracting State.

CISG eventually came into force on 1 January 1988.

C. The Relevance of CISG to Africa

The fact that a real connection between an international sale of goods transaction and a contracting State needs to be established before the CISG is applicable provides the first reason why African States need to ratify or accede to the CISG. If African traders and commercial lawyers are to get the benefit of the uniform rules of CISG, then African States will need to become contracting States. A further advantage of CISG, which should be of interest to African States, is that it minimises resort to the perplexing rules of private international law. Where the places of business of both parties are in the territories of contracting states, then private international rules are bypassed and the uniform rules of CISG are applied automatically.

Secondly, the concepts embodied in the CISG make for flexibility of the contractual system that is set out in it. This flexibility should commend it to African cross-border traders, African lawyers and African States. Moreover, CISG enables access by African cross-border traders to a system of modern harmonised rules. Through the practice of an increasing number of states and the scholarly as well as practical professional attention of an equally expanding pool of lawyers of many nationalities, this system of rules has now become, in effect, part of a *lex mercatoria*. Africa cannot afford to be isolated from this universal movement.

9 *See supra* note 4, p. 98.

The flexibility of the contractual system embodied in CISG will be illustrated in this paper by presenting an overview of its system of remedies. Under the CISG, if a seller fails to perform any of his obligations under the contract of sale or under the convention, the buyer may:

1. Require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement (Article 46(1));
2. Require, in appropriate circumstances, delivery of substitute goods, provided that the goods' lack of conformity with the contract constitutes a fundamental breach of contract and the buyer makes the request for substitute goods in conjunction with the notice that the convention requires to be given by a buyer who discovers a lack of conformity in the goods or the request is made within a reasonable time after such notice (Article 46(2));
3. Require the seller to repair any lack of conformity of the goods, unless this is unreasonable having regard to all the circumstances (Article 46(3));
4. Give a *Nachfrist* notice, or, in other words, fix an additional period of time of reasonable length for the seller to perform his obligations (Article 47);
5. Declare the contract avoided, if the seller's failure to perform his obligations under the contract or convention amounts to a fundamental breach or the seller fails to deliver the goods within an additional period of time fixed by the buyer in a *Nachfrist* notice;
6. Reduce the price "in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time";
7. Finally, claim damages in accordance with the provisions of the convention.

Conversely, if a buyer fails to perform his obligations under the contract or convention, the seller may:

1. As appropriate, require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement (Article 62);
2. Give a *Nachfrist* notice fixing an additional period of time of reasonable length for the performance by the buyer of his obligations (Article 63);
3. Declare the contract avoided if the buyer's breach amounts to a fundamental breach or the buyer fails or refuses to perform during the *Nachfrist* period.

A prominent feature of this remedies regime is the primacy it accords to specific relief, in contrast with the common law approach of ordinarily only giving, to the party whose contract of sale has been breached, damages or damages combined with the right to repudiate. Under CISG, the innocent party can insist on performance by the party in breach. In other words, specific performance is more widely available under the convention than under the common law. This is a manifestation of the influence of civil law doctrines which take the maxim *pacta sunt servanda* more seriously than the common law. The common law is content to

grant substitutional relief. In other words, the value of the promised performance is given to the innocent party in money (i.e. damages). In recognition of this common law approach and by way of a compromise, Article 28 of CISG was included in the convention. It provides as follows:

> "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

In other words, if the forum of the dispute is a common law court, it will not have to grant specific performance of a contract of sale, where under its national rules such specific relief would not be available. Article 28 is illustrative of the many compromises between civilian and common law approaches in the CISG. This is a feature of the convention which should commend it to African States composed, as they are, of both common law and civilian jurisdictions.

Another illustration of the features of CISG which should make it attractive to African States is the freshness of some of its approaches, at least from the standpoint of a common lawyer. Its Article 50 provides as follows:

> "If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price."

This article lays down a non-judicial remedy distinct from the remedy of damages, which is separately provided for. The buyer may resort to it unilaterally, without a prior judicial adjudication, but if the seller considers that it has been invoked wrongfully, he may go to court to challenge the price reduction or the quantum of it. The non-judicial character of the remedy of reduction of price is the main difference between it and the remedy of damages. A buyer may only claim damages and, unless and until a court or arbitral tribunal has accepted this claim, the damages remain unliquidated. However, a claim to reduce the price is liquidated by the buyer's unilateral quantification of it, subject always to any challenge in the courts. This a quick and handy remedy in the hands of a buyer in an international sales transaction and provides further evidence of the flexibility of the contractual regime embodied in the CISG.

The final illustration that this paper will offer on the flexibility of the remedies regime contained in CISG is the idea of the *Nachfrist* notice. From a common law standpoint, the introduction of Articles 47 and 63, derived from the German law notion of *Nachfrist,* is a refreshing innovation that places a flexible remedy in the hands of a party to an international sale of goods transaction.

Nachfrist is a German law idea according to which if a party is in breach, the innocent party may set him an additional period of time within which he should perform his obligations. If at the end of this additional period of time, the party in breach has still not performed, then the innocent party may terminate the contract by avoidance. In CISG, the *Nachfrist* idea is adopted in relation to delivery by the seller and also the buyer's obligation to pay the price and take delivery.

If the seller fails to deliver on time, this will not necessarily constitute a fundamental breach, within the meaning of CISG. He will thus not be entitled to avoid the contract without more. He can only avoid the contract if the non-delivery has caused him detriment substantially depriving him of his expectation under the contract and if this substantial detriment was foreseeable. Where a buyer is uncertain whether the non-delivery has caused him such substantial foreseeable detriment, he can resort to Article 47 to "fix an additional period of time of reasonable length for performance by the seller of his obligations." The consequence of fixing such additional period for performance is that the buyer acquires the right, pursuant to Article 49(1)(b), to declare the contract avoided, "if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed."

Similarly, the seller may, pursuant to Article 63, "fix an additional period of time of reasonable length for performance by the buyer of his obligations." The seller may then declare the contract avoided, pursuant to Article 64(1)(b) "if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of Article 63, perform his obligation to pay the price or take delivery of the goods or if he declares that he will not do so within the period so fixed."

D. Recommendation to African States Regarding the CISG

Africa needs to increase its intra-African as well as extra-African trade as part of its development strategy. Discerning African politicians have been stressing that what Africa needs is trade and not aid. As some particular African trade economists have observed:

> "Most African countries and their citizens now fully appreciate and recognise the need for integrating into the global economy and the multilateral trading system especially through effective involvement in WTO Agreements and negotiations."[10]

They go on to assert that:

10 *See* B. Onguglo & A. Murigande & E. Mburu, *Preparing African Countries to benefit from continuous International Trade Negotiations and Complex Agreements,* p. 3, available at <www.uneca.org/aec/documents>.

> "The demand for trade negotiations support by African countries also arises from the growing importance of international trade as an engine of growth and development, accounting for an important and, in some countries, increasing share of their domestic wealth creation. In 2004 for example, the share of exports of goods and services in gross domestic product (GDP) was about 28% for the world as a whole, 23% for developed countries, and 43% for developing countries. This ratio was 36% in the case of African countries in 2004 as compared to 26% in 1995."[11]

An important factor in any successful African trade expansion would be the establishment and maintenance of an appropriate legal framework. CISG is an available element in this appropriate legal framework. It is in this context, that I would like to make a strong recommendation to African Governments to ratify or accede to the CISG, as appropriate. The CISG is a legal framework that was made universally acceptable through the instrumentality of UNCITRAL. African States have from the outset played an active role in UNCITRAL and therefore its products deserve legitimacy in the councils of Africa. There is indubitably a nexus between development and meaningful reform of the legal framework for international trade.[12] African States would thus be well advised to consider the products of UNCITRAL.

This paper has traced the origins of CISG in ULIS and ULF, whose texts were deliberately transformed in the councils of UNCITRAL, from their original Eurocentric focus to make the resulting product more universally acceptable. This universal ambition and aspiration of the framers of CISG and the participation of representatives of African and other developing countries in the transformation process are a strong argument in favour of its adoption by African States. Another reason for African States to join the harmonisation movement represented by CISG is the sheer kinetic energy that has been generated in the past couple of decades towards universality in cross-border sale of goods law, manifested in the ratification and accession process of the CISG.

The current parties to CISG include the following States whose significance in world and African trade is undoubted:[13] Argentina, Australia, Austria, Belarus, Belgium, Canada, Chile, Cuba, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, Lebanon, Mexico, Netherlands, New Zealand, Norway, Poland, Republic of Korea, Russian Federation, Serbia, Singapore, Spain, Sweden, Switzerland, Turkey, Ukraine and the United States of America. The African States which have so far ratified or acceded to the Convention are: Benin, Burundi, Egypt, Gabon, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia. Ghana has signed the Convention, but has not yet ratified it. There are, in all, 77 parties to the Convention. It behoves those of us who are

11 *Id*., p. 6.

12 *Cf*. L. Castellani, International Trade Law Reform in Africa, in P. Sarcevic *et al.* (Eds.), *Yearbook of Private International Law,* Vol. X, Munich 2008, p. 548.

13 *See* Status 1980 United Nations Convention on International Sale of Goods, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.htm>.

Africans here to leave this Conference fired with a desire to persuade our governments to ratify or accede to the CISG.