

FACING THE TRUTH: AN APPRAISAL OF THE POTENTIAL CONTRIBUTIONS, PARADOXES AND CHALLENGES OF IMPLEMENTING THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) IN NIGERIA.

KENNETH I AJIBO*

ABSTRACT

Nigeria is currently not a contracting party to the United Nation Convention on Contracts for the International Sale of Goods (CISG), which governs transactions and sales of goods globally. Sadly enough, the current legal framework regulating the sale of goods in Nigeria remains the 18th century Sale of Goods Act 1893 which is arguably obsolete and out of touch with modern day business reality.

This paper argues that despite the potential practical challenges in implementing the CISG, Nigeria has a lot to gain economically by becoming a contracting party to CISG; particularly as the nation inches toward the target of becoming one of the world's twentieth largest economies by 2020.

Keywords: Private International Law, CISG, Nigeria, Goods

INTRODUCTION

The United Nations Conventions on Contracts for the International Sale of Goods (CISG) is recognized globally as an innovative instrument adopted to foster the harmonization and unification of international commercial law.¹ Its adoption is founded on the realization that a uniform and harmonious international legal order for commercial transactions cannot be achieved by interpreting laws in the light of domestic law.² The CISG has therefore been ratified and recognized by a number of major trading nations as a cardinal conventional instrument for harmonization and unification in the area of international sales law.³ Despite its shortcomings and perceived inadequacies, the CISG commands an appreciable influence over sales law across borders.⁴

Unfortunately, Nigeria is yet to ratify the CISG. This failure to ratify the CISG arguably means that Nigeria is still stuck in the primeval era of commercial regulations, as the 18th Century *Sale of Goods Act* (SGA) remains the key commercial legislation in Nigeria.⁵ This paper will discuss why this must be addressed with utmost urgency. The aim of this paper is to discuss the key contributions of the CISG to creating a more modern, uniform and fair regime for contracts for the international sale of goods. The paper discusses and

*Kenneth I Ajibo LL.B. BL. LL.M. PhD Candidate at the Law School, University of Hull, United Kingdom; email: K.I.Ajibo@2010.hull.ac.uk

¹ United Nations Convention on Contracts for the International Sale of Goods, April 10, 1980 [hereinafter 'CISG']

² John Honnold, 'The Sales Convention in Action-Uniform International Words: Uniform Application?' (1988)8 J.L. & Comm 208

³ T McNamara, 'UN Sale of Goods Convention: Finally Coming of Age?' (2003) 32 Colorado Lawyer 11 - 12

⁴ *ibid* 15

⁵ M C Okany, *Nigeria Commercial Law* (Africana –Fep Publishers Ltd 2001) 230.

analyses how the CISG aims to foster coherence and certainty in international commercial transactions and how countries such as Nigeria can benefit from transplanting the CISG best practices to domestic laws.

This paper is divided into four parts. Part I provides a historical account of the origin and development of CISG by highlighting the prominent roles played by the UNCITRAL, UNIDROIT and Hague Conventions in bringing this Convention into a reality. The shortcomings of these previous regimes which led to the adoption of CISG will be discussed. Part II will unveil some of the major pitfalls and contributions of the CISG since its inception. The paper will discuss how this Convention has fostered coherence and its efforts to modernise and further improve international commercial transactions while noting its shortcomings. Part III of this paper makes a case for the adoption of the CISG in Nigeria noting its potential challenges both before and after the adoptions. The last part is the conclusion.

1. ORIGINS AND DEVELOPMENT OF CISG

The CISG provides a uniform text of law for international sales of goods.⁶ The origin of the CISG is traceable to the ancient concept of the *Lex Mercatoria* (Law of merchant) stretching back around 500 years ago.⁷ The preparation for uniform law of sales started in 1930 at the Institute for the Unification of Private Law (UNIDROIT) in Rome.⁸ But the modern effort to internationalize this Convention was prepared by the UNCITRAL and adopted by a diplomatic conference.⁹ The adoption of these Conventions was greeted with barrage of criticisms for reflecting largely on the legal systems and economic realities of Continental Western Europe.¹⁰ The lack of wider representation of different legal background in the drafting process was a serious blow to the adoption.¹¹ Similarly, the material shortcomings of these regimes lay in the inattention to overseas shipments, the imbalance between the rights of buyers and sellers, the insensitivity to commercial practice, and the scope of their application.¹² Again, these Conventions were too complex, too abstract, artificial and vague in many

⁶ Denis Rhodes, 'The United Nations Convention on the Contracts for the International Laws of Goods: Encouraging the Use of Uniform International Law' (1992) 5 *Transnational Lawyer* 387 - 388

⁷ *Ibid* at 386-388

⁸ After the disruption of the Second World War, the drafted copy of the sales law unification was handed to a diplomatic conference in Hague in 1964 which adopted two Conventions.

⁹ United Nation Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 to promote the progressive harmonization and unification of international trade law.

¹⁰ These two Conventions were the Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). [hereinafter 'ULIS' and 'ULF']

¹¹ It seems that the problem was due to two main factors: the lack of participation by non-European countries in the process of creating ULIS and ULF, and a number of serious deficiencies in the material stipulations of the conventions. Developing countries and socialist-bloc countries did not trust the result of conventions that were drafted by mainly industrialized countries. An important factor was also that the United States failed to ratify the conventions through its lack of participation and some serious material shortcomings in them. For more on unification efforts and criticisms, see Paul Lansing, 'The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL' (1980) 18 *American Business LJ* 274; Peter Winship, 'International Sales Contracts under the 1980 Vienna Convention' (1984) 17 *Uniform Commercial Code LJ* 58.

¹² Kenneth Sutton, 'The Draft Convention on International Sale of Goods (Part I)' (1976) 23 *Business LR* 269

instances and, lastly, aimed at regional unification rather than global unification.¹³ In order to correct the above-mentioned shortcomings of these two Conventions, the UNCITRAL in 1968 established a working group so as to study and modify the regimes that would encourage a wider participation by countries of different social, economic and legal backgrounds. The outcome of this modification was the adoption by the diplomatic conference in 1980 of the CISG, which unified the modified provisions of the two prior Conventions.¹⁴

Perhaps, the legislative unification of an aspect of international sales under the current CISG appears to be the most singular achievement in the history of UNCITRAL.¹⁵ Though, it could be argued that legal unification can equally be attained through other ways, such as unifying the applicable private international law or creating model laws such as the UNIDROIT model contract law contained in the UNIDROIT Principles of International Commercial Contracts, or restatements of the law such as the Uniform Commercial Code.¹⁶

There are a number of benefits derivable from international unification of commercial laws, that warrant some discussions. Firstly, unification is the combination of two or more legal provisions in order to attain a single system.¹⁷ Reduction of risk in order to achieve legal certainty and predictability in commercial relations is the bases of legislative unification. However, in view of the difficulties in achieving a complete unification in private law especially in commercial sales, proponents of legislative unification limited their efforts in aspect of international commercial law such as this law of sales.¹⁸ The development of the CISG is viewed as the single most essential type of contract in international trade relationship and one, which is formulated in order to attain a particular result that would be desirable by the parties since complete unification in international sales was difficult.¹⁹ The experience of conventional unification projects appears to show that it is a very difficult, time-consuming and expensive task, which seems to demonstrate that statutory instruments may not always be the most appropriate method of achieving greater uniformity or unification in international commercial transactions.²⁰

Secondly, the need for a unified law of international sales arises in the first place from the fact that law is arguably territorial in nature. It only has the force of law within specified national boundaries, and in principle no other

¹³For further criticisms of these earlier regimes 'ULIS' and 'ULF', see M L Zionitz, 'A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?' (1980) 2 Northwest Journal of International Law & Business 146-7

¹⁴ The CISG came into force in 1988 which embraced countries from different legal systems. As of May 2013, 79 countries have ratified the regime. However, UK, Nigeria, India and South Africa are yet to ratify this regime. For more on this, see UNCITRAL Website at <<http://www.cisg.law.pace.edu/cisg/countries/entries.html>> accessed on 06/08/13.

¹⁵ Munro Ndulo, 'The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' (1989) 38 International and Comparative LQ 1, 2-4

¹⁶ *ibid* 12-20

¹⁷ 'Functional uniformity or unification' must be differentiated from "absolute" or "strict uniformity." It is closer to the concept of "harmonization" in that the goal is to lessen the legal impediments to international trade. See UNCITRAL Website at <<http://www.cisg.law.pace.edu/cisg/countries/entries.html>> accessed on 06/08/13.

¹⁸ Ernst Rabel, 'Draft of an International Law of Sales' (1935) 5 Univ of Chicago LR 543

¹⁹ *ibid*

²⁰ Author Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 American Journal of Comparative Law 683, 683-4

state is bound to acknowledge or apply it.²¹This is also the reason why choice-of-law or conflicts rules have developed in order that legal relationships that have ensued within one legal jurisdiction may be acknowledged and enforced by the courts of another jurisdiction.²²This invariably leads to the situation where at least one of the contracting parties is faced with the application of a foreign legal system of which it may have no knowledge, and it may even be uncertain which legal system will apply to the relationship of the parties because of uncertainties in the conflicts rules.²³In view of this problem, unified law in international sales under CISG appears to be crucial in its efforts to modernize international commerce.²⁴

Thirdly, despite the development of the choice of law or conflict of rules to regulate relationship between parties within one legal system which may be acknowledge by the courts of another jurisdiction, the problem of uncertainties in the conflict of rules still remains. This is because the conflicts rules of some countries placed more emphasis on the law of the place of contracting while others attached more importance to the law of the place of performance of contracts; and it is even much difficult to point out in some legal systems.²⁵The unification of the law of international sales under CISG was considered as an imperative to reduce these difficulties occasioned by the choice of law problem in contract and commercial cases where no international unified system exists.²⁶ Most conventional instruments for unification provide for party autonomy and freedom of contract.²⁷

Furthermore, though the existence of standard contracts and usages cover part of international commercial sales and some contract relations by reducing the force of national law, it does not cover all aspects of contracts formation, the rights and duties of the parties or the available remedies. A harmonised and unified law of international sales under CISG would appear to be valuable tools to close the vacuum still not covered by the standard terms and usages and even where such law does not exist in some domestic legal framework such as in e-commerce and mobile equipment.²⁸Moreover, most national laws of sales are not always compatible with the application in international sales because it has been formulated to cover domestic trade only.²⁹ Again, in view of the business complexities across-borders, special concerns apply to international sales that demand special legislations. Arguably, a harmonised law of international sales under CISG is important to reduce the need for frequent forum shopping.³⁰

²¹ John Honnold, 'The New Uniform Law for International Sales and the UCC: A Comparison' (1984) 18 *International Lawyer* 21 -22

²² *ibid* 26

²³ Francis Gabor, 'Stepchild of the New *Lex Mercatoria*: Private International Law from the United States Perspective' (1988) 8 *Northwestern Journal of International Law & Business* 538,540-1;

²⁴ *ibid* 550

²⁵Rabel (n 20) 546.

²⁶Author Rosett, 'Critical Reflections on the United Nations Conventions on Contracts for the international Sales of Goods' (1984) 45 *Ohio State L.J* 265 269

²⁷CISG (n 1) art 6; Art 5 of UNIDROIT Convention on Agency in the International Sale of Goods 1983; Art 3 of UN Convention on the Use of Electronic Communications in International Contracts, 2005

²⁸UNCITRAL Model Law on Electronic Communications in International Contracts (2005); UNIDROIT Convention on Security Rights in Mobile Equipment, Cape Town, 2001.

²⁹Rosett (n 28) 274

³⁰F Juenger, "What's Wrong With Forum Shopping?", (1994).16 *Sydney L. Rev* 5-13

2. STRUCTURE AND CONTENTS OF CISG

CISG as a multilateral treaty for uniform international sales law is a binding document to all the member parties although reservation is permissive in the Convention.³¹ Treaties are major sources of international law and are considered as a "hard law."³² For a treaty-based rule to be a source of law, rather than simply a source of obligation, it must either be capable of affecting non-parties or have consequences for parties more extensive than those specifically imposed by the treaty itself.³³ Since the drafters of the CISG were aware of the increasing number of substantive uniform law conventions and, thus, of the possibility of different uniform law Conventions being applicable to the same contract, they, like the drafters of other recent substantive uniform law Conventions, introduced a provision, designed specifically to deal with this potential conflict of conventions. Accordingly, article 90 of CISG "does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement". Article 90 of CISG clearly constitutes one of the reasons why courts of contracting States to the CISG, too, may have to take into account sources of international law other than the CISG.³⁴

The CISG is divided into four main parts: Part one (articles 1-13) contains rules on its sphere of applications (chapter 1, articles 1-6), and a number of general provisions. Chapter II, (articles 7-13); Part two (articles 14-24) deals with the formation of the contract; Part three (articles 25-88) deals with the rights and obligations of the parties and it is subdivided into (five) chapters. Part four (articles 89-101) contains the details on ratification, with possible reservations against certain parts or provisions of the Convention and with the entry into force of the Convention.³⁵ Article 1 of the Convention makes it applicable between parties who have their place of business in different States which are contracting states or when the rules of private international law lead to the application of the law of a contracting state.³⁶ This means that where just one state is a contracting state and the other is not, the CISG would not be applicable to the case.³⁷

The CISG is transaction-focused other than party-focused; its concern borders on the fact that the transaction is from one State to another State rather than the nationality of the parties, the place of incorporation, or the place of its headquarters. For instance, if both parties to the contract are nationals of the same country but one party has its place of business in another country and the contract is trans-border in nature, that contract would be

³¹For more on reservations see CISG (n 1), arts 89- 101.

³²Article 38(1)(a) of the ICJ, which uses the term "international conventions", concentrates upon treaties as a source of contractual obligation but also acknowledges the possibility of a state expressly accepting the obligation of treaty to which it is not formally a party.

³³Article 38.1(b) of the ICJ Statute.

³⁴ For further discussions on the conflict of conventions in the area of private law, see C Brière, *Les conflits de conventions internationales en droit privé* (2001).

³⁵ T Kiely, 'Harmonisation and the United Nations Convention on the Contracts for the International Sale of Goods' (2003) *Nordic Journal of Commercial Law* 4 at <http://www.njcl.fi/I_2003/article3.pdf> accessed on 21/08/13

³⁶CISG (n 1) art 1(1) (a)

³⁷ Roy Goode, *Commercial Law* (3rd edition London: Penguin, 2004) 914

governed by the Convention if the features of article 1 are present.³⁸ As regards article 1(1) (b) with respect to when rules of private international law leads to the application of the law of contracting state, article 95 creates a reservation by stating that state may opt-out and not to be bound by it.³⁹ The Convention states that ‘in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.’⁴⁰ This means that the CISG interpretation is autonomous and international in character and not in the sphere of national laws.⁴¹

3. DEBATES ON THE PITFALLS AND THE CONTRIBUTIONS OF CISG IN INTERNATIONAL TRADE

Firstly, it has been argued that the validity of the belief that the law or certain parts of it need to be unified by legislative framework do not have any relevance in the global business practice.⁴² Instead, unification should emanate from direct business experience of the parties in sales transactions.⁴³ For instance, Rosette argued that the legislative unification of an aspect of international commercial law such as the CISG is not relevant since international trade practices have developed successful usages and practices which make the unified law especially in international sales unnecessary and can only serve to weaken the existing practices.⁴⁴ Rather, the harmonization of international instruments should be from business experience instead of a “purely technical debate on some piece of legislation” in the midst of a diplomatic conference.⁴⁵ It argued that soft law offers this business experience more than the technical debate because it places a higher premium on the real world encounter of business practice.⁴⁶

Secondly, it has been argued that the international trade practices have developed sufficient and very successful practices and usages which make unified law in this field not only unnecessary but an unwarranted meddling that can only serve to undermine the existing position.⁴⁷ For example, Hobhouse equally believes that contractually incorporated terms and usages are preferable as a means of harmonization because the formal instruments such as convention and even principles drafted by the experts often do not take proper account of the commercial needs of countries and parties.⁴⁸ Perhaps, this argument appears to be tenable especially when one considers the instruments produced by the International Chamber of Commerce (ICC) such as the

³⁸ *ibid* 918

³⁹ This reservation had been used by Chile, Argentina, and China. For more see Rosett (n 28) 10.

⁴⁰ CISG (n 1) article 7(1)

⁴¹ *ibid*

⁴² Roy Goode, 'Harmonization, Unification and Internationalization' in Ross Cranston & Roy Goode (eds) *Commercial and Consumer Law-National and International Dimensions* (1993) 1, 5-6

⁴³ R Speidel, 'Symposium Reflections on the International Unification of Sales Law' (1988) 8 *Northwest Journal of International Law & Business* 535

⁴⁴ Author Rossett, 'The International Sales Convention: A Dissenting View' (1984) 18 *International Lawyer*, 445

⁴⁵ *ibid* 450

⁴⁶ *ibid* 452

⁴⁷ Author Rosett, 'CISG Laid Bare: A Lucid Guide to a Muddy Code' (1988) 21 *Cornell International LJ* 585

⁴⁸ J Hobhouse, 'International Convention and Commercial Law: The Pursuit of Uniformity' (1990) 106 *LQR* 531.

Uniform Customs and Practice for Documentary Credits, which arose as a commercial practice and is based on actual risk in business.⁴⁹ It is believed to be a good example of an international export payment since it represents a clear independent undertaking, which relieves importers and exporters of considerable risk.⁵⁰ The ICC harmonised international letter of credit practice in the UCP, which merely gave form to the banking practice. It is “frequently cited as the foremost example of how international business self-regulation can be more efficient than treaties, government regulation or case law. Indeed, the UCP has been described as the most successful act of commercial harmonization in the history of world trade with the UCP [500] currently observed by banks in approximately 180 countries”.⁵¹

Moreover, it seems that language barriers coupled with the series of negotiations, conferences and drafting of international Conventions are often time cumbersome, lengthy and costly process. For instance, it took about twenty years for CISG to come into force which is arguably considered as the greatest achievement of the UNCITRAL.⁵² Despite the time and costs involved, one had expected that the Convention would be broad enough to cover all aspect of international sales but this is not the case. The CISG excluded consumer sales from its scope and attempted what may be arguably regarded as a vague difference between a contract for sale of goods and contract for services.⁵³ Conventional harmonization is also difficult to amend as a result of its rigidity, which may not be good for changing commercial practices that are supposed to be flexible. Perhaps, there is need for trade-off between flexibility and certainty in commercial law and commercial men within appreciable limits may prefer the former.⁵⁴

Furthermore, sceptics believe that the formal unification of international sales under the CISG involves countries from different legal systems such as common law, civil law, developed, developing and socialist backgrounds which hardly agree on issues. The level of harmonization may be excessively limited and the differences may be difficult to reconcile. These irreconcilable differences most of the time lead to compromise leaving the major issues unresolved.⁵⁵ For instance, in a bid to produce a legislative unification in international sales, the CISG does not cover some important issues relating to the validity of contract, payable interest rate, set-off and pre-contractual liability. Arthur Rossett believes *inter alia*:

The difficulty with many of these apparent compromises is that they simply do not resolve the problem, which they purport to address. They do not reflect two parties having yielded part of their positions to each other for the sake of agreement, but rather two sides agreeing to give the appearance by verbal formula, which does not provide a meaningful guidance in concrete situation.⁵⁶

⁴⁹ *ibid* 541

⁵⁰ *ibid* 560-65

⁵¹ G Jimenez, ‘The International Chamber of Commerce: Supplier of Standards and Instruments for International Trade’, (1996) *I Unif Law Rev* 284, 286, 292.

⁵² Hobhouse (n 50) 540.

⁵³ CISG (n 1) articles 2, 3

⁵⁴ Micheal Bridge, *The International Sale of Goods: Law and Practice* (2nd ed, New York, USA: Oxford University Press, 2007) 239

⁵⁵ *ibid* 26.

⁵⁶ Rossett (n 49) 10-26.

It could be argued that as a result of these compromises the United Kingdom has refused to adopt the Convention. Perhaps, it could equally be that the refusal to adopt it may be the UK's reliance on Sale of Goods Act 1893 which has remained the same for many decades.⁵⁷ However, recent research shows that the UK is seriously contemplating ratifying the Treaty to increase the country's commercial relations with other signatories in the Convention.⁵⁸ Despite these seemingly arguments on the pitfalls of the legislative unification, it is still the opinion of the article that the CISG remains an important international instruments that has the potential to foster coherence in unifying trade rules in general as well as hugely crucial in modernising commerce especially in international sales transactions in particular which warrants some discussions.

Firstly, it could be argued that the drafters of the CISG have succeeded in creating a set of rules, which is fairly simple, yet complex enough to deal adequately with the intricacies of international trade which has helped to modernise commercial transactions. Arguably, there is no doubt that the international trade field is a fairly complex environment and therefore needs refined rules to deal with such complexity.⁵⁹ The situation without CISG is that there may be a number of applicable rules playing according to the whims of private international law and/or the bargaining strength of the parties. With the acceptance of the CISG, the playing field would appear to be levelled a little bit in that there would only be one set of rules that will be applicable which encourage legal certainty. Again, these rules have been specifically developed with international trade and its usages and practices in mind, unlike many domestic law of sale.⁶⁰

Secondly, proponents believe that CISG has improved and widen the ambit of world trade relations. The CISG does, though, at first glance seem simpler than it really is. However, with so many interest groups represented, it was ensured that the structuring of the rights and duties of parties favoured neither seller nor buyer, leading to a code, which is arguably as well balanced as any code of sale.⁶¹ Perhaps, this balance ensures a fair distribution of rights, duties and risks in general. The present formulation and structure is also much simpler than the earlier unifications regimes such as in ULIS and ULF, which has substantially reduced the criticisms that were leveled at those earlier conventions of being unnecessarily complex and obscure.⁶² Thirdly, the unification framework under CISG has further allayed the fears from developing countries, which trailed the earlier unification regimes of unnecessarily favouring the sellers of manufactured goods in the industrialised countries.⁶³ It could be argued that the current unification regime under CISG

⁵⁷ But see the *Sale of Goods Act 1979*, as amended by the *Sale and Supply of Goods Act 1994* and the *Sale and Supply of Goods to Consumers Regulations 2002*. See N 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 Rev145.

⁵⁸ Elisabeth Patterson, 'United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination' (1986) 22 Stanford Journal of International Law 278-9

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *ibid* 293

⁶² *ibid* 296.

⁶³ J Honnold 'The New Uniform Law for International Sales and the UCC: A Comparison' (1984) 18 International Lawyer 21 - 22

has placed both sellers and buyers from different legal background in equal bargaining process, which has arguably fostered coherence in applying unifications rules. Perhaps, this has the potential to further improve and deepen the modernisation of international trade relations.

Moreover, it could be argued that the unification under CISG demonstrates that most of the cases decided in the common-law countries either by interpreting general rules, interpreting by analogy or relying on general principles and applying them to specific facts is certainly not beyond the capabilities of the courts where this Convention applies.⁶⁴ Nor has the fact that civil-law countries do not adhere to the *stare decisis* principle prevented them from giving adequate consideration to cases that have already been decided.⁶⁵ The number of excellent commentaries that are available in an ever-increasing number of languages under CISG; the availability of the documentation leading up to the Convention and the collections of court decisions also ensure that courts and tribunals are in a position to inform themselves readily of all the necessary materials to attain the goal of unification under CISG.⁶⁶

Furthermore, the paper believes that CISG is based on the principle of party autonomy in that most of its provisions may be modified or excluded to suit the needs of the parties.⁶⁷ This arguably provides a great deal of flexibility to the parties, who can accept, change or reject the provisions of the Convention to suit their needs.⁶⁸ Again, in a case where there is a variance between the CISG and the terms of the contract, the latter will receive priority. This leaves parties with the freedom to shape the contract according to their specific requirements. The CISG is then only used to fill those gaps for which the parties made no provision. Where there is a difference in the bargaining positions of the parties, the CISG provides a good basis for the weaker party to establish a more neutral arrangement for the contractual relationships in that the CISG is neutral and does not give precedence to either buyer or seller.⁶⁹ Any shortcomings in the CISG or legal uncertainties may be addressed in the contract concerned. This accords with the aims of the Convention to provide the legal basis or framework for sales where needed without unnecessarily imposing itself.⁷⁰

4. ADOPTION OF CISG IN NIGERIA

This section of the paper will specifically highlight the potential benefits of CISG in Nigeria if adopted. Nigeria is currently not a contracting party to the CISG, which indicates that there is an absence of an international sale of goods legal framework in the country. *The Sale of Goods Act 1893*, which is the current legal framework for the sale of goods in Nigeria, is arguably too archaic to grapple with the modern international sales issues constantly popping up for considerations.⁷¹ Again, the rules of private international law may equally be too

⁶⁴ *ibid* 26.

⁶⁵ *ibid* 30.

⁶⁶ *ibid* 31-40.

⁶⁷ CISG (n 1) art 6

⁶⁸ Honnold (n 65) 26.

⁶⁹ Sieg Eisenlen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1999) 116 *South African Law Journal* 323-370

⁷⁰ *ibid*

⁷¹ The *Sale of Goods Act 1893* as a pre-1900 English Statute of General Application may be too antiquated to grapple with the conduct of modern international business transactions. See N

recondite and cumbersome to bring a plausible and unambiguous solutions to trans-border business disputes; thus it will be imperative to bring in the provisions of an updated legal instrument such as the CISG, to perform a -filling and unification of sales laws role and trenchantly see to justice being done in accordance with international yardsticks in Nigeria.⁷² Secondly, the adoption of CISG in Nigeria may not only encourage legal certainty in applying uniform rules but would arguably open up smaller and medium size businesses for global competitions which has the potential to improve the rating of Nigeria's global competitiveness in transnational businesses through the increase in the volumes of trade.⁷³

Thirdly, it could be argued that some of the country's major trading partners are contracting states to the CISG.⁷⁴ As a result, Nigeria's businesses either consciously or unconsciously come under the provisions of the CISG because the Convention can be applied as a usage of trade which invariably makes it applicable to contracts as domestic law even when neither party is from a contracting state.⁷⁵ Arguably, China which is the Africa's major trading partners in general and Nigeria in particular is a notable example of how implementing the Convention can be good for business.⁷⁶ The CISG has been pivotal to the development of China's foreign trade and its economy. This was basically on account of the fact that the China's courts and arbitral institutions could now apply a more specific legal regime to international sales of goods disputes which have arguably increased the level of confidence of China's trading partners as they rely on the country's legal system.⁷⁷ The effect of this has been that it made the business partners more comfortable and willing to make increasing business deals with China.⁷⁸ Nigeria could take a cue from China by transplanting the CISG best practices to her domestic laws which has a potential to improve the nation's economy as she inches towards meeting her 'vision 2020 target' as one of the world's twentieth largest economies.

Moreover, it is argued that CISG has the potential to operate as a worthy catalyst for development, revision and interpretation of domestic laws in Nigeria.⁷⁹ A case in reality is that the Convention has been used as a model for modification of a number of national laws such as in Germany, the Netherland, Estonia, and China.⁸⁰ CISG principle has been very much pivotal in guiding the drafting process even in the regional bodies.⁸¹ For instance, OHADA, a union of 16 African States, has adopted a Common Sales Law

Nwafor, 'Whither the CISG? Case for Its Acceptance in Nigeria' at <<http://ssrn.com/abstract=2193316>> accessed on 18/08/13

⁷² *ibid* 5

⁷³ *ibid* 9

⁷⁴ D Workman, 'Niger Trade Opportunities: Top Export-Import Partners plus Merchandise Products & Possibilities' at <http://www.international.suite101.com/artcle.cfm/nigeria_trade_opportunities> accessed on 17/08/13

⁷⁵ CISG (n 1) art 1 (a) (b)

⁷⁶ Workman (n 76) 18.

⁷⁷ *ibid* 20

⁷⁸ *ibid* 25

⁷⁹ P Huber and A Mullis, *The CISG: A New Textbook for Students and Practitioners* (Salliers, German: European Publishers, 2007) 12

⁸⁰ *ibid* 29

⁸¹ *ibid* 12

which almost follows the CISG to the letter.⁸² It is argued that the Convention has the potential to be compatible with the commercial needs of developing countries such as Nigeria and also seems to offer a sound basis for sales transaction between Anglophone countries and Francophone countries in Africa.⁸³

Again, the Convention has met remarkable acceptance internationally. Currently, the CISG has 79 Contracting States among its signatories covering more than 70 percent of the world trade and production of goods; and more than 50 leading exporters and importers in world merchandise.⁸⁴ Also, around 1,300 Courts and Arbitral decisions decided under CISG have been handed down from 32 judicial institutions and more than 6,500 academic publications exist in 24 languages.⁸⁵ This is in addition to the several conferences and other forms of academic discourse dealing with the Convention, especially, the CISG-AC.⁸⁶

5. POTENTIAL CHALLENGES IN IMPLEMENTING CISG IN NIGERIA

Although scholars have argued that Nigeria could benefit immensely by ratifying the CISG; arguably, none of these academic arguments have provided in greater detail the potential difficulties and challenges that could affect the possible implementation of the CISG even if adopted in Nigeria.⁸⁷ This section will attempt to discuss some of these potential impediments with possible solutions. In Nigeria, treaties such as CISG do not automatically have the force of law even if adopted because the Nigerian law expressly provides that before a treaty between Nigeria and another State (s) shall have the force of law it must be domesticated into law by the National Assembly. Hence, until a treaty has been domesticated in Nigeria, it cannot be applied within the country.⁸⁸

The Nigerian constitution adopts a dualist approach to distinguish municipal law from international law.⁸⁹ The forces of international law and municipal law are manifested in the two major theories: Monism and Dualism. On the one hand, Monism maintains that there is a unity between municipal law and international law in the relationship in which international law is superior.⁹⁰ Under monism, self-executing treaties become enforceable in municipal realm, on its own force, even without the need of domestications.⁹¹ Dualism, on the other hand, contends that non-self-executing treaties require

⁸²I Schwenzer, C Fountoulakis, and M Dimsey *International Sales of Law* (New York, USA, Routledge-Cavendish, 2007) 10-32

⁸³ *ibid* 20

⁸⁴ <<http://www.cisg.law.pace.edu/cisg/countries/entries.html>> accessed 0n 12/08/13

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷For more on earlier work on CISG adoption in Nigeria, see Uche Anyamele, 'The CISG: A Proposal for Nigeria' at <<http://www.cisg.pace.edu/cisg/biblio/anyamele.html>> accessed on 18/09/2013; Nkeiruka Maduekwe, 'The CISG and Nigeria: Is There a Meeting Point' at <www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car14...> accessed on 18/09/13

⁸⁸ s. 12 (1) of the Nigerian Constitution 1999 (as amended) provides that 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

⁸⁹*ibid*

⁹⁰Malcom Shaw, *International Law* (Fifth edition, Cambridge, Cambridge University Press 2003) 20-200

⁹¹*ibid*

municipal legislations after the adoption.⁹² Dualism, it has been argued, results from the mere desire of states to preserve their internal governance and policies from influences dictated from afar on the guise of international law.⁹³ The weight of judicial decisions from Court of Appeal to Supreme Court favours the view that implemented treaties are, with the exception of the constitution, of higher status than other laws in Nigeria.⁹⁴ In the case of *General Sani Abacha v Chief Gani Fawehinmi*,⁹⁵ the Nigerian apex court equally stated that a treaty (African Charter) is superior to municipal legislation but below the constitution and whenever there is a conflict between a treaty and the Nigerian constitution, the constitution will prevail.⁹⁶ Applying this to the context, it means that if CISG is ratified in Nigeria and perhaps domesticated as municipal laws, the Convention would be much superior to other local enactments perhaps even the applicable Sale of Goods Act in Nigeria because of its international strength. Arguably, the difficulty could arise where a provision of law that applies to Nigeria by way of extension of colonial authority, which relates to commercial transactions conflicts with CISG or where the nation's constitution itself through its interpretations appears to be in conflicts with the Convention. On the authority of the Gani's Case, the constitution would prevail as against the CISG.

Similarly, with reference to international agreements, every treaty in force is binding upon the parties to it and must be performed by them in good faith. This principle of *pacta sunt servanda* is related to good faith, while *pacta sunt servanda* does not equate with good faith, it entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its municipal (domestic) law as justification for a failure to perform her international obligations under the binding treaty provisions such as CISG. This means that it would be out of place for Nigeria simply to rely on her municipal provision such as her constitution as a basis not to carry out any obligation should the country decide to ratify and perhaps domesticate the CISG as municipal laws.⁹⁷ Arguably, the Nigerian government might need to reconsider the provision of s. 12 of the constitution in view of the recent Supreme Court decision if the CISG is adopted.⁹⁸

Moreover, it has been argued that firms in developing countries such as Nigeria cannot compete against foreign counterparts without the protection

⁹²ibid

⁹³ There are other approaches wherein international treaties are domesticated in Nigeria. One approach relates to treaties entered into by British colonial administrations and extended to Nigeria by virtue of the colonial authority. An example is the Warsaw Convention made applicable to Nigeria by virtue of the Carriage by Air (Colonies, Protectorate and Trust Territories Order 1953). Another approach for domesticating treaties into Nigeria is when provisions of treaties are used as templates for Nigeria statutes without the necessity of making obvious reference to treaties. Examples include the *Carriage of Goods by Sea Act* and *Child Rights Act* enacted by some states in Nigeria. For more see A O Enabuele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigeria Courts' (2009) African JICL 326-41

⁹⁴ *Oshvire v British Caledonian Airways Ltd* (1990) 7NWLR (pt, 163) 607; *UAC (NIG) Ltd v Global Transport S.A* (1996) 5 NWLR (pt. 448) 291,229

⁹⁵(2000) SC No 45/1997

⁹⁶ ibid

⁹⁷*Trendex Trading Coy Ltd v CBN* [1977] 2 W.L.R. 356; see also Vienna Conventions on Laws of Treaties 1969, articles 26, 27, 46.

⁹⁸ *General Sani Abacha v Chief Gani Fawehinmi* (2000) SC No 45/1997.

afforded by tariffs and non-tariff barriers.⁹⁹ At least in theory, this argument remains widespread and convincing in many developing countries, nevertheless, it cannot stand on theoretical grounds alone, but must be tested against empirical evidence. Recent and ongoing researches conducted at the level of countries, industries, and individual firms have given rise to a growing body of evidence, much of it suggesting conclusions precisely the opposite of the infant-industry protection arguments.¹⁰⁰ Although, in reality, if the CISG is adopted which has the potential to increase the foreign direct investments (FDIs) in Nigeria (if the trade barriers are eased off) because of the volume of business transactions daily, it is still doubtful whether the smaller and medium size industries would be able to compete favourably with these multinational firms in the local markets. At the extreme, these fledgling industries in Nigeria could even collapse because the business environment might not be enabling for them since these bigger firms can afford to sale their products cheaper as a result of their economies of scales. Arguably, the Nigerian government cannot afford to allow these young industries to collapse because of its potential impact to both the economy and the public such as job losses. It is suggested that this problem could be reduced if the government continues to support these smaller and medium size industries in the country through subsidies, subventions and grants to enable them compete in international trade if the CISG is adopted.

Furthermore, another potential challenge confronting legislative unification such as CISG in Nigeria is that in bid to attain uniformity some essential aspects of sales transactions have been omitted or not far enough in sales transactions which could lead to application of national laws or private international laws on contract of sales. For instance, CISG does not deal with consumer sales and neither provided a clear approach on payable rate of interest and even the difference between a contract for sale of goods and contract for services does not go far enough under the Convention.¹⁰¹ This means that if the CISG is ratified in Nigeria and parties in trans-border commercial disputes have chosen Nigerian courts for the resolutions of their disagreements, both the courts, legal practitioners and international traders would have to struggle to determine if CISG or Sale of Goods Act or even private international law could be applied side by side. In view of the fact that both the Nigerian courts and traders are used to existing trade usages and practices, applying CISG side by side with other laws whether local or international has the potential to confuse both the courts and commercial lawyers. As a result of this, it is suggested that massive training and education for both the courts and legal practitioners are crucial on how these laws can be applied together in the courts and commercial tribunals where CISG does not cover a particular transaction if adopted.

Arguably, a further problem that could potentially frustrate the adoption of CISG is that the previous international trade agreements such as WTO rules may not have yielded the desire economic growth in Nigeria. On account of that, the Nigerian government might have some doubts about the potential benefits of acceding to this Convention. However, the author thinks that this is a hollow assertion because Nigeria has substantially made trade progress after

⁹⁹D Avinash, and V D Norman. *Theory of International Trade: A Dual, General Equilibrium Approach*. (Cambridge: Cambridge University Press.1980) pp 10- 30

¹⁰⁰ibid 39

¹⁰¹CISG (n 1) arts 14-25, 78

joining the WTO through the increase in the volumes of trade, nevertheless, recent research demonstrates that Nigeria's increasing barriers to trade limit the benefits from its participation in the multilateral trading system.¹⁰² It is argued that while the protection of the local industries may be necessary to encourage local growth, liberalization reforms, through the simplification of its import duties (including its tariff structure) are equally crucial for growing the nation's economy if the Convention is ratified.¹⁰³

6. CONCLUSION

This paper has discussed the potentials and practical benefits Nigeria stands to reap from ratifying the CISG. As the country strives to become one of the largest economies in the year 2020, adopting the CISG could be a positive step in that direction; the Convention could help open up smaller and medium size businesses in the country to enable them compete in this globalised world. Again, Nigeria as a major economic powerhouse and investment destination in western African sub-region needs to maintain its regional economic power and status by ensuring that its commercial laws are amenable to the region as a whole and to the wider international community.¹⁰⁴ The facilitation of international trade in the region is an important step in the development and regeneration of the economies in the region. Unified sales law can play an important part in making it easier for businesses in the region, which are often inexperienced and undercapitalized, to get involved in international trade. The removal of unnecessary trade barriers, such as the intricacy and cost of dealing with potentially different applicable legal systems, is of prime importance.

Equally, the adoption of the CISG by Nigeria will also lead to greater legal certainty in international trade relations and negotiations. The codified nature of the rules, the simplicity of their formulation, the exclusion of conflicts intricacies and foreign law, and the availability of sources, all help to create greater legal certainty for importers and exporters.¹⁰⁵ Where there is greater legal certainty, there is less chance of disputes, and where disputes do arise, the courts and tribunals can concentrate on the factual basis of the dispute rather than the legal intricacies. An important feature of the CISG is that it is based on the principle of party autonomy in that most of its provisions may be modified or excluded to suit the needs of the parties.¹⁰⁶ This provides a great deal of flexibility to the parties, who can accept, change or reject the provisions of the Convention to suit their needs. This leaves parties with the freedom to shape the contract according to their specific requirements.¹⁰⁷ The CISG is then only used to fill those gaps for which the parties made no provision. This accords with the aims of the Convention to provide the legal basis or framework for sales where needed without unnecessarily imposing itself. That the CISG will in any event govern the transaction may assist the parties in avoiding unnecessary conflict about peripheral issues such as choice-of-law clauses.¹⁰⁸ If the parties can concentrate on the main issues on hand -- price, quality, delivery times, guarantees and so

¹⁰² WTO, *Trade Liberalization Should Improve Nigeria's Macroeconomic Performance* May 2005 at <<http://www/wto.org>> accessed on 20/09/13>

¹⁰³ *ibid*

¹⁰⁴ Nwafor (n 73) 10

¹⁰⁵ Eisenlen (n 71) 207

¹⁰⁶ CISG (n 1) art 6

¹⁰⁷ Eisenlen (n71) 375

¹⁰⁸ *ibid* 380

forth -- and not waste time on bickering about choice of law, then the CISG has already served an important purpose.¹⁰⁹

The potential challenges that might work against the adoption and implementation of CISG in Nigeria are surmountable as discussed in the paper. In view of that, Nigeria can go ahead and join the league of other contracting states under the CISG. To address concerns that certain provisions of the CISG may pose to Nigeria, a way forward might be to make some reservations to those contentious provisions to limit their application in Nigeria.¹¹⁰ For example, Scandinavian States (Denmark, Finland, Norway and Sweden) have all made article 92 declarations; the limited effect of these declarations is that - in respect to matters governed by CISG Part II (Formation of Contract) - the Scandinavian States are not Contracting States within article 1(1)(a).

¹⁰⁹ *ibid* 389

¹¹⁰ For more on declarations and reservations see CISG (n1) arts 92-98.