SHORT DISSERTATION (DLPIL92) SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF MAGISTER LEGUM (LL.M) IN INTERNATIONAL ECONOMIC LAW AT THE UNIVERSITY OF SOUTH AFRICA

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TOPIC: THE IMPACT OF SOUTH AFRICA'S NON-RATIFICATION OF THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS ("CISG") ON ITS TRADE AS WELL AS RELATIONS WITH OTHER COUNTRIES

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DECLARATION:

I, Leoni van der Merwe (with Identity Number: 8612010140089), declare that, “The impact of South Africa’s non-ratification of the Convention on the International Sale of Goods (“CISG”) on its trade as well as relations with other countries” is my own work, that has not been submitted for purposes of 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.

Full name: Leoni van der Merwe

Date: 20 February 2017

To God all the glory.

To Mommy, Daddy and Dean - thank you for the encouragement and unconditional love.

ABSTRACT

This research analyses the impact and materiality of South Africa's choice not to ratify the CISG on its trade as well as relations with other states. As the point of departure, the broader events leading up to the creation of the CISG will be examined as well as UNCITRAL's mandate and the development of trade in the local and global context. At present, the CISG has been ratified by 85 states. The decisions by common law jurisdictions such as the UK and India not to ratify the CISG as well as the delay by Brazil and Japan will be discussed. The legal, business and political or policy reasons for and against the ratification of the CISG are investigated which focuses on aspects such as legal certainty, uniformity of laws and the reduction of legal costs. An investigation is carried out regarding the historical foundations of the South African law of contract to this framework sets the tone for a comparison between the South African law and the provisions of the CISG. Lastly, a comparison is drawn between the provisions of the CISG and the South African law with specific emphasis on the remedies of specific performance and the right to claim damages which culminates in an overall conclusion that the South African law is compatible with the CISG insofar as remedies for breach of contract are concerned.

LIST OF ABBREVIATIONS

Institute for the Unification of Private Law in Rome - UNIDROIT
United Kingdom – UK
Uniform Law on International Sale of Goods – ULIS
Uniform Law on the Formation of Contracts for the International Sale of Goods – ULFIS
United Nations Convention on Contracts for the International Sale of Goods - CISG
United Nations Commission on International Trade Law – UNCITRAL

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CHAPTER 1 - INTRODUCTION

1.1. The proliferation of international trade necessitating the formulation of a uniform, simplified body of law applicable to international sale agreements

International economic relations were initially governed by various principles drawn from customary international law, the traditions of common law and the *lex mercatoria* or law of the merchant. Since the end of World War II an increased focus has been placed on the advancement of the needs of developing states and the eradication of obstacles to international trade.[1] The proliferation of globalization as well as the introduction of the internet, and specifically e-commerce, have changed the manner in which business transactions are concluded throughout the world. The United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] was established in the 1980's to create uniformity and fairness among member states in relation to the international sale of goods and has been identified as the most successful attempt to unify a broad area of commercial law at an international level.[3] At the epicenter of the research to be conducted is the consideration of the impact of South Africa's decision not to ratify the CISG with specific emphasis on remedies available to parties in terms of the law of contract.

The CISG seeks to introduce mechanisms to allow for the eradication of barriers to trade with specific emphasis choice of law and breach of contract clauses. From as early as the 1920's measures were introduced by the Institute for the Unification of Private Law in Rome (UNIDROIT) to create a standardised sales law at an international level. The Hague Conference of 1964 saw the adoption of the Uniform Law of the International Sale of Goods (ULIS) and the Uniform Law on the Formation of International Sale of Goods (ULFIS) which were regarded as unsuccessful due to their failure to take into consideration the requirements of modern trade.[4]

Although the CISG has been ratified by 85 states, it is pertinent to mention the absence of ratifications by Hong Kong, the United Kingdom (UK), India and South Africa. Generally,

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1 John Dugard, *International Law: A South African Perspective,* 3rd ed, Juta and Company Ltd, 2005.
2 United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex I, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 (Apr. 11, 1980).
3 Harry Fletchner, 'The United Nations Convention on Contracts for the International Sale of Goods' [2009] United Nations Audiovisual Library of International Law <www.un.org/law/avl> accessed 12 April 2016.
4 Ole Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *American Journal of Comparative Law* 379.

non-ratification by states is attributed to such states not viewing the ratification of the CISG as a legislative priority as well as the possible introduction of legal uncertainty relating to the sale of goods.[5]

1.2. The South African international trade landscape and the importance of international trade for developing states

An improvement has been noted in relation to South Africa's international trade and its integration within global markets subsequent the lifting of various trade sanctions imposed from the 1960's to early 1990's due to South Africa's apartheid policies. The end of apartheid led to an increase in international trade to such a large extent that by the year 2000 international trade constituted 16 percent of the gross domestic product.[6] South Africa's biggest source of trade is Europe with 70 percent of South Africa's trading partners being European countries such as Germany, France, Italy, Switzerland. The United States of America has also been noted as one of South Africa's larger trading partners.

According to the European Union Commission, international trade allows developing states such as South Africa to enhance competition, facilitate export diversification, increase product quality, encourage innovation, expand their choices therefore lowering prices, boosts development and reduces poverty.[7]

1.3. Purpose of research

The effect of South Africa's non-ratification of the CISG is to be considered in this research by means of a comparison between South African law and the CISG so as to gauge the overall effect of South Africa's non-ratification of the CISG on its international trade relations. This research was undertaken firstly, due to the importance of trade for South Africa in its role as Africa's commercial dynamo as well as due to the author residing in South Africa and having a keen interest in its trade relations.

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[5] Shishir Dholakia, 'Ratifying the CISG – India's Options' (Singapore International Arbitration Centre Conference, Singapore, 22 – 23 September 2005).

[6] *Nations Encyclopedia* < http://www.nationsencyclopedia.com/economies/Africa/South-Africa-INTERNATIONAL-TRADE.html#ixzz4DjvHHEMK> accessed 14 April 2016.

[7] '10 Benefits of trade for developing countries' (European Commission) <ec.europa.eu/trade> accessed 29 April 2016.

After taking into consideration the purpose, ambit and exclusions of the CISG as well as the current membership of the CISG, a comparison will be drawn between the remedies available to parties in terms of the South African law of contract as compared to the provisions of the CISG. An overall conclusion will then be reached regarding the effect of South Africa's non-ratification of the CISG taking into consideration the South African law of contract.

1.4. Overview of chapters

Chapter two will explore the role of the United Nations Commission on International Trade Law (UNCITRAL) in the creation of the CISG, the overall purpose of the CISG and its sphere of application and the arrangement of the sections of the CISG. Chapter three sets out the current status of membership of the CISG and a list of top five states involved in CISG court and arbitral proceedings as at 25 January 2016. The reasons for and against non-ratification of the CISG by states such as the UK, India, Japan and Brazil are also considered. Chapter four examines the arguments put forward for and against the ratification of the CISG and Chapter 5 compares the remedies available to parties in the event of breach of contract in terms of the South African law and the CISG. Lastly, Chapter 6 provides an overall conclusion based on the research conducted and puts forward a recommendation regarding the future of transactions by South Africa, with other states, relating to the international sale of goods.

CHAPTER 2 - Relevant provisions of the CISG

2.1. The role of United Nations Commission on International Trade Law in the creation of the CISG

Resolution 2205 (XXI) of the United Nations General Assembly passed in 1966 gave rise to the idea to create a body to promote the harmonisation of international trade law amongst states[8]. Resolution 2205 gave rise to the Report of the Secretary General in relation to the Progressive Development of the Law of International Trade which contained, as a recommendation, the creation of a single body to promote the unification of international trade law at a global level.

UNCITRAL was established to serve as the primary body to create consistency and uniformity amongst states in relation to international trade law. Such creation of consistency and uniformity would enable states to participate more freely in global trade therefore leading to economic and social growth, which would lower the overall cost of doing business amongst states.

The mandate of UNCITRAL is as follows:

a) Coordinating the work of the organizations active in this field and encouraging cooperation among them.
b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws.
c) Preparing or the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field.
d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of law of international trade.
e) Collecting and disseminating information on national legislation and modern

[8] Sridhar Patnaik and Fabrizio Lala, 'Issues of Harmonisation of laws on international trade from the perspective of UNCITRAL: The past and the current work' [2006] Selected Works of Dabiru Sridhar Patnaik <http://works.bepress.com/sridhar/10/> accessed 18 May 2016.

legal developments, including case law, in the field of law of international trade.

f) Establishing and maintaining a close collaboration with the United Nations on Conference of Trade and Development.
g) Maintaining liaison with other United Nations organs and specialized with International trade.
h) Taking any other action it may deem useful to fulfil its functions.[9]

Taking the above into consideration, the creation of the CISG has enabled UNCITRAL to further its mandate with specific emphasis on Articles b), c),d),e), f) and g).

2.2. Purpose of the CISG

According the CISG explanatory note:

"The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing exchange costs."[10]

2.3. Arrangement of sections of the CISG

The CISG is structured to rationally encompass the pre-contracting, contracting and the post contracting phases between parties. The pre-contracting phase forms part of Part 1 and details the sphere of application of the CISG as well as its interpretation provisions. Part 2 sets out the contracting phase between parties with specific emphasis on the formation of a contract taking into consideration the offer and acceptance. Part 3 details the initial aspects of the post contracting phase and provides guidance in respect of the obligations of parties, performance, the termination or variation of the contract, delivery of goods or documents, breach of contract and damages. Lastly, Part 4 explains the applicability of the CISG in relation to contracts entered into prior to the CISG's inception as well as arrangements pertaining to membership.

[9] United Nations General Assembly Resolution 2205 (XXI), A/6594 (Dec. 17, 1966).
[10] 'Explanatory note: United Nations Convention on Contracts for the International Sale of Goods' <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 29 May 2016.

2.4. Sphere of application of the CISG

Article 1 of the CISG stipulates that:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) When the States are Contracting States; or
(b) When the rules of private international law lead to the application of the law of a Contracting State;

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract; and

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.[11]

By virtue of its application to transactions between parties in differing states, the CISG aims to provide an internationally recognised set of legal rules applicable to the sale of goods therefore reducing the costs associated with determining the correct forum should a dispute arise amongst parties in future.

2.5. Matters excluded from the ambit of the CISG

Article 2 of the CISG stipulates that:

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the

[11] United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex I, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3, 19 I.L.M. 668 (Apr. 11, 1980).

seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft; [or]

(f) of electricity.[12]

2.6. Conclusion

The development of the CISG as a result of the identification of a need for greater uniformity of the international sales law provides an indication of the commitment of the international fraternity to promote trade. The fairness and legal certainty that the CISG seeks to achieve by placing contracting parties on equal footing needs to be considered holistically by taking into consideration the overall purpose of UNCITRAL to promote the uniform application of international trade instruments as well as the trade needs of states. It stands to reason as to whether, in the future, the sphere of application and exclusions in relation of the CISG, as contained in Articles 1 and 2, respectively, will require revision to meet the needs of the constantly evolving international business community.

[12] n *11.*

CHAPTER 3 - Membership of the CISG and reasons for and against ratification of the CISG

3.1. Current status of membership to the CISG and cases heard in relation to the CISG per country

As at 18 June 2016, there are 85 member states to the CISG.[13]

To date, the five countries with the highest number of cases heard in relation to the CISG are depicted in Table 1, below, of a total of 3 152 recorded court and arbitral proceedings.

Table 1: Highest number of cases heard in relation to CISG per country

JURISDICTION	NUMBER OF CASES
Germany	534
China	432
Russian Federation	305
Netherlands	268
Switzerland	212

Bahrain (01/10/2014), Brazil (01/04/2014), Congo (01/07/2015), Guyana (01/10/2015) and Madagascar (01/10/2015) are the most recent states to adopt the CISG.[14]

3.2. Non-members to the CISG

Notable non-members of the CISG are South Africa, Hong Kong, the UK and India. The aforementioned countries have been regarded by the author as "notable" due to their overall global economic competitive standing as contained in the World Economic Forum's Global Competitiveness Report (2015), which considers the competiveness landscape of

[13] As at June 2016, the following countries were recognized as members of the CISG: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Congo, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxemborg, Madagascar, Mauritania, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Turkey and Uganda as per 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)'.

[14] n 13.

140 economies by taking into consideration factors such as productivity and prosperity.[15]

a.) UK

Although the UK's Department of Trade and Industry in 1989 and 1997 issued consultation papers in favour of the accession to the CISG, such accession is yet to take place. Various reasons have been put forward regarding the delay of the UK in ratifying the CISG, namely:

i.) The ratification of the CISG has been regarded as a matter that is not a legislative priority by the UK.[16]

ii.) The introduction of principles in the CISG that are not recognised in the UK has been attributed by many legal scholars as one of the reasons for the delay in ratifying the CISG[17]. Article 50 of the CISG allows for the reduction of the purchase price of goods should it become apparent that the goods that are delivered do not conform to what was stipulated in the contract. The right to reduce the price of goods that do not conform to the conditions of the contract is not recognised in the UK and many other common law jurisdictions.

A further principle that is not recognised in the UK is the opportunity afforded by Articles 47 and 63 of the CISG to the seller and buyer, respectively, to receive additional time for performance. From, a practical perspective, such reprieve granted to either party could influence the materiality of a breach of contract that could be alleged at a later stage.

iii.) Lastly, a general reason provided for the UK not being party to the CISG is the preferred application of the English Sale of Goods Act 1893. Although there is a school of thought that argues that the Sale of Goods Act was initially developed more than a century ago and is there unable to adequately address the legal

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[15] World Economic Forum, The Global Competitiveness Report 2015-2016 http://reports.weforum.org/global-competitiveness-report-2015-2016/ <accessed 9 June 2017>.
[16] Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005) 25 *Journal of Law and Commerce* 483.
[17] Beverley-Claire Oosthuizen, *An Investigation into the CISG's Compatibility with South African Law* (unpublished LLM dissertation, Rhodes University 2008).

needs posed by modern international trade relations, there is a converse view that the Sale of Goods Act 1893 provides more legal certainty when compared to the CISG.

b.) India

Various reasons have been put forward regarding India's delay in ratifying the CISG, namely:

i.) India's decision not to ratify the CISG is largely attributed to the legal certainty created by the Indian Sale of Goods Act 1930 which is supported by robust case law and is largely based on the, tried and tested, English Sale of Goods Act of 1893.

ii.) The language contained in the CISG has been described as imprecise. Rossett has described the use of the CISG as:

"…language which, first of all, is foreign in regard to the law of contract and therefore has no clearly defined meaning and, secondly, is too wide and inexact and therefore leads to uncertainty…".[18]

3.3 States that adopted the CISG after a lengthy period of time

a.) Japan

On 1 August 2009, Japan adopted the CISG approximately 30 years after it came into force. Japan's Ministry of Foreign affairs stated in a press release that it was anticipated that the CISG would remove uncertainty regarding the law applicable to trade between Japanese parties and those of other contracting states and would facilitate international trade involving Japanese parties.[19] One reason put forward for the delay in Japan's

[18] Arthur Rossett, 'Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 *Ohio State Law Journal* 265.
[19] Gerald Paul McAlinn, 'Japan and the United Nations Convention on Contracts for the International Sale of Goods (Part 1)' (2010), 24 *The Japan Commercial Arbitration Association Newsletter*. <http://www.jcaa.or.jp/e/arbitration/docs/news24.pdf> accessed 29 May 2016.

adoption of the CISG was due to Japan not viewing a harmonised international sales law regime as a priority due to it having sufficient bargaining power globally. A further reason for the delay in adoption was attributed to Japan's business community being weary of the CISG bringing about uncertainty and increasing the risk exposure insofar as international contracts are concerned. Largely, early reservations regarding the application of the CISG have made way so as to promote trade between Japan in the international arena.

b.) Brazil

On 1 April 2014, the CISG came into force in Brazil. Various questions have been put forward regarding Brazil's tardiness to adopt the CISG due to Brazil's involvement in the Vienna Diplomatic Conference of April 1980, which was pivotal to the approval of the final text of the CISG. Prior to the adoption of the CISG, the Brazilian courts have often made reference to principles contained in the CISG while applying Brazilian law as was seen in the Rio Grande do Sul Court of Appeals, Special Appeal number 758.518/PR[20] where the court made reference to the duty of parties to a contract to mitigate against losses which is aligned to Article 7 of the CISG which requires parties to observe good faith in their dealing with each other when engaging in international trade.

According to Eiselen, legal, business and policy reasons can be put forward in a case for and against the ratification of the CISG.[21]

3.4. Reasons for the ratification of the CISG

a.) Legal reasons

Simplification, reasonableness, equity, unified interpretation, cost, an overall law of sale that is improved and the provision of legal certainty have been identified as legal reasons for the adoption of the CISG.

i.) Unified interpretation and application

Of all the reasons provided in favour of ratification of the CISG, a unified interpretation and

[20] Ana Carolina Beneti, 'Trade Promotion and Legal Certainty: Brazil Adopts the CISG' [2014] Latin Arbitration Law <http://www.latinarbitrationlaw.com/trade-promotion-and-legal-certainty-brazil-adopts-the-cisg/> accessed 29 May 2016.

[21] Sieg Eiselen, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa', (1999) 116 *South African Law Journal* 323.

application, thus leading to the reduction of contracting costs, is seen as a great advantage to states. Practically, parties do not have to spend large amounts of money communicating with their legal teams as well as fellow-contractors in different countries (across differing time zones) so as to reach consensus on matters already falling within the ambit of the CISG.

The author acknowledges that a unified interpretation and application of the CISG will not always be practically possible due to the fact that "uniform words will not bring about uniform results", as stated by Honnold.[22] According to Article 7 of the CISG, the international character of the convention as well as the need to promote uniformity are to be taken into account during interpretation. In the matter of *Fothergill v Monarch Airlines*[23], the House of Lords stipulated that the reasoning of international case law shall be granted certain weight. In taking the above into consideration, it can therefore be deduced that a certain degree of subjectivity will be applied when interpreting and applying the CISG internationally.

ii.) Simplification, reasonableness and equity

The overall simplification of language and legal concepts brought about by the CISG have been lauded by those in favour of its ratification. According to Oosthuizen:

> South African lawyers have at their disposal commentaries on the CISG, available in various languages spoken in South Africa. In addition, the cases adjudicated upon the CISG are available in English from UNCITRAL and in UNILEX. Another source available to South African lawyers is the Internet page hosted by the Pace University Law School, which houses references to various works published on the CISG. There is thus a great deal of contemporary information that is easily accessible to aid interpretation and application of the CISG. This in turn fosters an environment of legal certainty.[24]

In a global context the CISG is has been officially translated into Arabic, French, Spanish,

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[22] John Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application' (1988) 8 *JL & Com* 207.

[23] [1980] 2 All ER 696 (HL).

[24] Beverley-Claire Oosthuizen, *An Investigation into the CISG's Compatibility with South African Law* (unpublished LLM dissertation, Rhodes University 2008).

Chinese and Russian and is available in many unofficial translations.

iii.) Legal certainty and one internal law to contend with

The CISG has provided legal certainty and has therefore furthered UNCITRAL's mandate in promoting ways of ensuring uniform interpretation of certain matters within the ambit of international trade law.

From a practical perspective, when states ratify the CISG, it becomes part and parcel of their domestic law therefore parties are able to rely on laws that are not alien to them should a dispute arise. The CISG therefore ensures that parties are on equal footing in their dealings with each other as no party's domestic law is viewed as more superior than the next. Furthermore, the CISG does away with the array of foreign laws that a party would have to contend with, in the ordinary course of doing business globally, should a dispute arise therefore promoting greater legal certainty.

iv.) The success of the CISG

The overall acceptance of the CISG by the international community, specifically by those trading nations identified as having the most influence, has been used as an indication of the overall success of the CISG. Furthermore, the increase in case law relating to the CISG is used to suggest how much it has become part and parcel of the concept of a 'living trade law'.

b.) Business reasons

The acknowledgment of party autonomy, a focus on commercial aspects of transactions, improved competition and a renewed importance of international trade have been identified by as business reasons in the case for the ratification of the CISG.[25]

i.) A focus on the commercial aspects of transactions

From a practical perspective, the CISG has allowed parties an opportunity to pay increased attention to the commercial aspects of transactions, without the necessity of reaching consensus regarding the elements already contained in the CISG therefore leading to an increased focus on the commercial relations between parties. The CISG

[25] n 21.

creates a neutral basis for purposes of the transaction and therefore does away with the perception that either party is more favoured than the next.

ii.) Party autonomy

The CISG allows parties an opportunity to tailor the provisions of the CISG to meet their specific requirements and allows for the balancing of the requirements of the CISG and the terms of the contract. Although the CISG is not a 'perfect' framework for the entering into of international contracts for the sale of goods, the convention allows the parties an opportunity to use both the convention as well as their standard contract terms to reach consensus.

iii.) Checklist for international negotiations

Parties could utilize the provisions of the CISG to create a checklist to be consulted during negotiations. This would allow parties that are inexperienced, insofar as international trade is concerned, an opportunity to ensure that all aspects relating to their specific transaction are addressed and have been considered.

iv.) Improved competition

The creation of a uniform sales law allows those seeking to enter into international sales agreements an opportunity to assess the various options at their disposal as well as the risks and advantages of such options which would ultimately promote competition as parties would vie to make goods available. Eiselen[26] articulates the view that parties to the CISG would be regarded as equal contracting parties and would therefore have a larger incentive to be more competitive as they would approach contracting from a similar vantage point.

c.) Policy reasons

Lastly, the inclusive process utilised to create the CISG as well as its broad acceptance by the international fraternity have been cited as policy reasons in favour of ratifying the CISG.

i.) The inclusive and participative process utlised to create the CISG

[26] n 21.

One of the criticisms leveled in respect of the ULIS and the ULFIS was that these instruments were created as a result of interactions between parties in Western Europe and therefore did not take into consideration the social, political, economic and legal considerations of other parties, specifically those considered to be developing states. Conversely, the inclusive, consultative process utilized in the drafting of the CISG has been viewed as one of the many reasons of the convention's success to date.

ii.) Broad acceptance by the international fraternity

Although not in isolation, the number of countries that have accepted the CISG has been put forward as one of the reasons to ratify the convention. Broad acceptance of the CISG by the international fraternity has led to its wider, regular application as well as an increase in case law. Although the mere acceptance of the CISG and the increase in related case law should not be used as a sole indication of a reason to ratify the CISG, it does serve as an indication of the international community's intention to obtain tangible benefits from the application of the convention as well as the reliance places by the international community of the CISG's contents.

3.5. Reasons against the ratification of the CISG

a.) Legal reasons

Various legal reasons have been provided to oppose the ratification of the CISG namely, a lack of underlying principles, an artificial distinction between national and international transactions, a convention that is viewed as rigid and differences in interpretation on account of parties speaking various languages.

i.) Multitude of languages and interpretational approaches

One of the reasons provided to oppose the adoption of the CISG is that it makes use of language that is not well-known within the area of contracts; which has led to differing interpretations of its principles. Furthermore, the numerous languages used by contracting parties and a lack of clear definitions would lead to various courts around the world being unable to interpret the provisions of the CISG uniformly. The duty placed on the courts to ensure that the provisions of the CISG are interpreted with uniformity in mind was articulated by Lord Denning MR:

"It would be absurd that the courts of England should interpret it differently from the courts

of France, or Holland, or Germany… We must, therefore, put on one side our traditional rules of interpretation. We ought, in interpreting this convention, to adopt the European method…"[27]

Although Lord Denning MR's approach is correct, his viewpoint should be expanded upon even further so as not to only take into consideration the European method, but the methods and needs of developing and developed states, alike.

ii.) Artificial distinction between national and international transactions

A further legal reason put forward against the ratification of the CISG is that it seeks to create an artificial distinction between national and international transactions which would frustrate the efforts made to promote international trade and globalisation. Although this critique is true in certain respects, it is pertinent to take the overall objective of the CISG, to promote international trade relations, into account at all times.

iii.) Static and unchangeable monument

A criticism has been voiced that the CISG does not contain any provisions relating to its modification so as to meet the needs of a constantly changing international trade dispensation, economic outlook, technological advancements as well as general legal trends observed globally. From a practical perspective, technological advancements allowing for more efficient and effective ways of doing business will, in future, require innovation specifically relating to the manner in which contracting is carried out as it is unlikely that the CISG that was drafted in the 1980's would be able to withstand the requirements of constantly evolving business requirements.

The rigid nature of the CISG is somewhat mitigated by its 'fairly general and flexible formulations'.[28] Although the drafters of the CISG have placed an, albeit invisible, onus on the domestic judiciary to interpret the provisions in the spirit in which it was intended so as to unify the law relating to international sales; the question has to be posed whether this is too great an ask from the courts in developing states?

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[27] *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 (HL).

[28] n 21.

iv.) Legal uncertainty

It has been argued that the vagueness and novelty of the terms embodied in the CISG are not congruent with the view that the convention promotes simplicity. The general, broad nature of the wording of the CISG is said to promote legal uncertainty which would ultimately lead to increased fees to seek legal advice relating to interpretation.

The author is of the view that the vagueness of terms contained in the CISG could be advantageous to a certain extent as it would circumvent the need to constantly update the convention in the future.

b.) Business reasons

With regard to business reasons against the ratification of the CISG, its irrelevance due to the use of trade practices and the prevalence of standard contracts has been identified.

i.) Irrelevance due to trade practices and standard contracts

Due to most branches of international trade utilizing standardized trade terms already addressed by the CISG, various questions have been raised regarding the overall need for the CISG. The exclusion of the CISG from standard contracts by numerous parties leads to the inference that standard terms and practices of parties have rendered the CISG irrelevant.

c.) Political reasons

The inefficiency of uniform laws as well as the use of foreign solutions to well-known problems have been identified as political reasons against the ratification of the CISG.

i.) Utilising foreign solutions to well-known problems

Rosett argues that the problems that the CISG seeks to address were adequately addressed by the Uniform Commercial Code, which renders the CISG unnecessary.[29] However, although the principle of autonomy grants parties leeway so as to tailor sales contracts to meet their requirements, it has been recognized that in certain instances parties fail to include some or all of the elements addressed by the CISG.

[29] Arthur Rossett, 'The International Sales Convention: A Dissenting View' (1984) 18 *International Lawyer* 445.

ii.) Inefficiency of uniform laws

Rosett has expressed the view that the attempt to unify substantive rules of law relating the international sales law has meant that the judicial and social contexts within which the international sales law is applied have fallen by the wayside thus leading to an inconsistent application of the CISG.[30]

3.6. Conclusion

Although the broad acceptance of the CISG by 85 states can be used to gauge the overall success of the CISG in the international trade fraternity, it is pertinent to understand the reasons and rationale of certain states for delaying or rejecting their ratification of the CISG. Reasons put forward by states such as the UK or India for not ratifying the CISG could be used as the foundation for future improvements to be made to the CISG. Furthermore, reasons provided for non-ratification could be used by participating states to create awareness regarding some of the issues that they could potentially face when concluding international sales agreements.

Inasmuch as numerous reasons can be put forward in favour of the ratification of the CISG, specifically in a South African context, it remains prudent to also consider the legal, business and political reasons provided against ratification. It has been noted with interest that the matters pertaining to legal certainty and uniformity of laws have been used as both reasons for and against ratification of the CISG which could be indicative of the overall legal and trade maturity of states in terms of their domestic laws as well as in the international community. Participating states and non-member states of the CISG are required to continuously interrogate the reasons provided globally for and against the ratification of the CISG to ensure that their interactions in the international trade arena result in legal certainty, decreased legal costs and robust competition.

[30] n 29.

CHAPTER 4 - Comparison between the South African law of contract and the provisions of the CISG with specific emphasis on the remedies for breach of contract

4.1. The origins of South African law of contract

The Roman-Dutch law, as introduced by the Dutch East India Company, forms the basis of the South African law of contract. Of particular importance is the Roman law as it pertains to obligations with specific emphasis on the distinction between natural and civil obligations. According to Thomas, van der Merwe and Stoop:

"…the term contract signified in classical Roman law a juridical act based on the agreement of the parties. This agreement was aimed at the creation of one or more obligations between them."[31]

In terms of Roman law, unlike the present day, a distinction was drawn between contracts and agreements as the view was subscribed to that a mere pact or agreement between parties did not give rise to a contract with obligations and that an additional element, the *causa contractus* or cause of the contract, was required for an agreement to be viewed as an enforceable contract. Three different causes were recognized, namely *contractus re, contractus verbis and contractus litteris* that referred to contracts that were underpinned by an agreement as well as the transfer of a thing, formal words or formal writing, respectively. The *contractus consensu* was the exception as it was underpinned by an agreement and no further action. The contractus consensu arose as a result of the increasing commercial needs of those within the Roman society. Agreements that did not fall within the ambit of the four causes, stipulated previously, were regarded as not actionable.

In terms of South African law, the requirements for concluding a contract are as follows: there must be consensus between parties, the parties must have had the serious intention to create rights and obligations, the parties must possess the contractual capacity to enter into the agreement, the necessary formalities (as prescribed by law) must be adhered to,

[31] Thomas, van der Merwe and Stoop, *Historical Foundations of South African Private Law*, 2nd ed, LexisNexis Butterworths 2000.

the stipulated contractual obligations must be physically possible and the agreement must be lawful.

In a South African context and in an era of increased consumer activism, the role of the courts and the legislature in contracts has changed so as to provide those entering into contracts with increased protection to safeguard against the terms of unfair contracts. Certain pieces of legislation such as the National Credit Act 2005 and the Consumer Protection Act 2008 aim to create equilibrium between the rights and obligations of the debtor and creditor insofar as contracts are concerned.

4.2 A comparison between the remedies for breach of contract in terms of South African law and the CISG

As a point of departure, it would be pertinent to refer, firstly, to Article 45 of the CISG that provides as follows:

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

The principles set out in Article 45 indicate no difference between the provisions of the CISG and the principles of South African law, which allows a party to claim damages as well as exercise the remedies available in the event of breach of contract[32].

[32] CJ Nagel, *Commercial Law*, 2nd ed, LexisNexis Butterworths 2000.

i.) The interplay between Articles 46 and 28 of the CISG

Article 46(1) of the CISG stipulates that the buyer may ask the seller to perform in terms of the contract, unless the buyer has called for a remedy that is not consistent with this requirement. The aforementioned article is to be read in conjunction with Article 28 of the CISG, which prevents a court from calling for a judgement for specific performance if that court's domestic law does not allow for this practice in relation to similar contracts of sale that are not governed by the CISG[33]. When a further interpretation is conducted, Article 28 of the CISG seeks to build a proverbial bridge to cater for instances in certain jurisdictions where the remedy of specific performance is the preferred method used by the buyer in the event of breach of contract in comparison to other instances where domestic law dictates that the remedy of specific performance is a last resort of the buyer. Article 28 strikes a balance between the provisions of the CISG and the nuances that could be contained in the domestic laws of member states insofar as the law of contracts is concerned.

In South Africa, the general view is that specific performance can be claimed by a party as a primary remedy; it must however be emphasized that the court still has a discretion to decide whether such specific performance should be granted or not. Eiselen makes reference to *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) where the court emphasized its discretion relating to the granting of claims for specific performance.[34] In the matter of *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A), it was decided that the court would use its discretion not to grant an order for specific performance if the result thereof would be unjust or contrary to legal or public policy. According to Nagel, each individual claim for specific performance must be assessed on its own merit, taking into account the circumstances of each case.[35] Taking the above into consideration, the inference can therefore be drawn that neither the South African law of contract or the CISG allows for absolute claims in respect of specific performance.

Articles 46(2) and 46(3) of the CISG allow a buyer to request the delivery of substitute goods if the lack of conformity is tantamount to fundamental breach of contract or to

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[33] Sieg Eiselen, 'A Comparison of the Remedies for Breach of Contract under the CISG and South African Law' [2001] CISG Database, Pace Institute of International Commercial Law < http://www.jus.uio.no/pace/en/html/a_comparison_of_remedies_for_breach_of_contract_under_cisg_and_south_african_law.siegfried_eiselen.html> accessed 29 May 2016.

[34] n 33.

[35] CJ Nagel, *Commercial Law*, 2nd ed, LexisNexis Butterworths 2000.

request that the lack of conformity of goods be remedied by repair, depending on the reasonableness of the circumstances of each matter. When comparing Articles 46(2) and 46(3) of the CISG to South African law of contract, it is evident that the South African laws relating to specific performance are wide enough to make provision for requests for the delivery of substitute goods or for repairs as made by the party instituting the remedy.

ii.) Avoidance or Cancellation of the contract

Section 49 of the CISG stipulates that:

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in the case of non-delivery, 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 46 or declares that he will not deliver within the period so fixed.

The South African law provides the aggrieved party with numerous remedies to enforce once a breach of contract has been established, with termination of the contract being one of the options available. A distinction is made between major breach, that allows for the termination of the contract by the aggrieved party should they elect to do so, and minor breach, that allows the aggrieved party to introduce a claim for specific performance or to request damages. In comparison, the CISG requires that parties reach consensus regarding the importance of the contract's obligations as such a ranking of importance will determine the fundamentality of the breach of contract.

Article 49(2) of the CISG seeks to strike a balance between the rights of the buyer and seller by reserving the avoidance of contracts to the following instances:

a) where there has been late delivery of goods, the buyer has the right to declare the contract avoided within a reasonable time after he has become aware that the delivery has been made; or

b) where there has been any breach of the contract other than late delivery and within a reasonable time after the buyer knew or ought to have known of the breach of contract or after the expiration of any additional period of time allocated in terms of Article 47, or after the seller has declared that he will not perform his obligations within such and additional period or after the expiration of any additional period of time indicated by the seller in accordance with Article 48, or after the buyer has declared that he will not accept performance.

Taking the above into consideration, it is evident that both the CISG and South African law have introduced mechanisms to ensure that the avoidance or cancellation of a contract, on account of breach of contract, takes place after careful consideration of the circumstances of each matter. It can even be alluded to that both the CISG and the South African law promote the notion of collaboration between parties to allow all parties an opportunity to engage with each other prior to invoking a claim on the basis of breach of contract.

iii.) Price reduction, early delivery or excess delivery and the suspension or retention of payment

Article 50 of the CISG allows a buyer to reduce the price of goods in the same proportion as the value of the goods that were actually delivered, at the time of delivery. It must be noted that if the seller is able to remedy his/her breach as per Articles 37 or 48 of the CISG or if the buyer refuses to accept performance by the seller then the buyer may not reduce the price. From a South African law perspective, Eiselen highlights the *actio quanti minoris* as being similar to Article 50 of the CISG.[36] The *actio quanti minoris* allows the buyer to reduce the price of goods to be paid where the goods delivered by the seller are defective.

Generally, in terms of South African law, in the event of a performance date being fixed for the benefit of the creditor, then it is presumed that performance can only take place on the chosen date. Should performance take place earlier than the stipulated performance date, then the creditor would be allowed to request that performance takes place as per the contract. Similarly, Article 52(1) of the CISG affords the buyer a discretion to allow or refuse the earlier delivery of goods all of which must be done against the backdrop of the principle of good faith as set out in Article 7 of the CISG, as per Eiselen.[37] Although

[36] n 33.
[37] n 33.

Eiselen's viewpoint as set out previously seeks to promote the spirit and purport of the CISG in theory, it stands to reason as to whether parties with differing commercial and legal views will apply the principle of 'good faith' in an objective manner.

Article 7 of the CISG stipulates that:

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

As was the case with goods that are delivered early, the CISG grants the buyer a discretion, in the event of the delivery of excess goods, to take delivery or not. The CISG does indicate that sellers are to refrain from forcing buyers to take excess goods; furthermore, should the buyer elect to take the excess goods, he/she is required to pay for same. In terms of the South African law, a buyer has a discretion to accept excess goods delivered by the seller.

Article 71 of the CISG allows a party to suspend its obligations in relation to a contract if it becomes apparent once the contract is concluded that the other party will not be in a position to meet a substantial part of its obligations. A suspension of obligations in this instance will not amount to a breach of contract. Article 71 of the CISG can be compared to the South African law principle of *the exceptio non adempleti contractus* where a party to a reciprocal contract, who is meant to receive performance is entitled to withhold such performance should the other party be unable to perform. In the matter of *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA (A), the court noted that:

a.) in instances of reciprocal contracts, the defendant, in principle, always has the right to withhold performance; and
b.) the judicial discretion of the courts may be utilized to relax the principle of reciprocity as well as the right to withhold performance. The court may also order the defendant to pay a reduced contract price.

CHAPTER 5 – Conclusion and recommendation

Although the CISG has been both lauded and criticized for its efforts in the unification of the principles relating to the international trade law, one fact that cannot go unnoticed is that the CISG has led to robust debate between academics, traders and legal professionals alike with the common purpose of ensuring that the laws governing international trade remain vigorous and are able to meet the demands of constantly evolving economic, technological, legal and social landscapes across various territories.

The comparison between the CISG and the remedies available in terms of the South African law, as set out above, has indicated that inasmuch as the CISG is a world-class instrument that is applied by some of the largest trading nations, the remedies provided for in the South African law are congruent with those contained in the CISG. From a practical perspective, the wide amount of discretion afforded to parties in terms of both South African law and the CISG could serve to promote robust negotiations and engagements between parties on the one hand and could introduce a degree of uncertainty and frustration on the other hand.

Although South Africa is not a party to the CISG, it remains pertinent for legal professionals and traders in South Africa to ensure their understanding of the implications and application of the CISG due to South Africa's role as a powerhouse in Africa as well as in the rest of the international trade arena. Furthermore, a thorough understanding of the application of the CISG will, proverbially, allow South Africa to keep the door open should it decide to ratify the CISG in the future.

Taking the above into consideration, this research has demonstrated that the impact of South Africa's non-ratification of the CISG is not material, at the present moment, due to the robust nature of the remedies provided in terms of South African law. South Africa's decision not to ratify the CISG therefore has a minimal impact on its relations with other states, specifically members to the CISG, due to the fact that the remedies offered to parties in terms of South African law are, mostly, aligned to the provisions of the CISG.

RECOMMENDATION

It would remain pertinent for South Africa to periodically reassess its decision not to ratify the CISG given the current local and global economic projections, new trends in the legal

fraternity, technological advancements and opportunities for business development.

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