THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG): IS IT TIME FOR KENYA TO CONSIDER RATIFYING IT?

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1. INTRODUCTION

One of the obstacles to the development of international trade is the divergence of legal rules among various legal systems.[1] As a result of this divergence between various national legal regimes, states are increasingly being called upon to bind themselves and their jurisdictions to take into account the need to promote uniformity in international trade.[2] International trade instruments aimed at harmonizing and regulating such trade are consequently gaining greater significance.[3] One such instrument is The United Nations Convention on Contracts for the International Sale of Goods ('CISG').[4]

This convention came into force on 1 January 1988 having been adopted at an international conference in Vienna in 1980. The purpose of the convention was to try to harmonise the law on international sale of goods so that similar rules governing international sales transactions would apply in all countries.[5] The convention was acceded to by the Republic of Uganda on 12 February 1992 and became effective in that country on 1 March 1993.[6] Although Kenya participated

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1 Bamodu Gbenga "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" *JAL* Volume 38 at 125 for example argues that the problem of diversity of laws remains a major, if indirect, obstacle to African economic development.

2 Ndulo, Muna. "Harmonisation of Trade Laws in the African Economic Community" *42 Int'l and Comp LQ* 101-118 (1993).

3 Van Houtte, Hans, *The Law of International Trade*, Sweet and Maxwell, London 1995 at 125 (The second edition of this work was published in 2002 the latest edition was however not available to the author).

4 (1980) 19 LLM 668) also commonly referred to as The Vienna Convention on International Sales and abbreviated as CISG available at: *www.uncitral.org/en/uncitral_texts/sale_goods/1980CISG.html* (accessed on 17 October 2005), (all websites references in paper last accessed 17 October 2005).

5 *Supra* note 3 and Preamble to convention.

6 *www.uncitral.org/en/uncitral_texts/sale_goods/1980CISG_status*. There are already some international decisions involving Ugandan parties were the CISG has been applied see note 100.

in the Vienna conference and signed the final act, it is yet to ratify the convention.[7] The other member of the East African Community, Tanzania has not yet acceded to the convention.[8] The convention has been ratified by a few of the COMESA member states namely Burundi, Egypt and Zambia.[9] This article seeks to briefly examine some of the potential difficulties created by the ratification of the convention in only one of the three East Africa Community member states. The article argues that there is need for Kenya and Tanzania to consider ratifying the convention to create greater certainty about the legal position in respect of interregional trade. However, such a move towards ratifying the convention must come after a proper and reasoned appraisal of the wider advantages and disadvantages of such adoption.

To put the matters into context properly, this Article shall briefly examine the reasons for the existence of the convention, its main provisions and its applicability to international trade agreements. It shall then examine the potential problems created by ratification of the convention by only some of the countries within the regional trade arrangements. An attempt to provide interim solutions available to a lawyer as ratification of the convention by Kenya and accession to it by Tanzania is awaited shall then be made. The paper does not pretend to be an in-depth analysis but will merely be a brief examination of the convention and the issues arising there from.

2. REASONS FOR THE EXISTENCE OF THE CISG

In all contracts for the international sale of goods at least two legal regimes are potentially at play- the law of the seller's country and the law of the buyer's country. Where, for example, a Kenyan manufacturer sells her goods to a Ugandan retailer, both Kenyan and Ugandan laws would affect the contract. As reference to both systems of law would be problematic, the law seeks to assign a "proper law" to the contract. The 'proper law' may be determined either expressly by the parties choice of law or through use of conflict of law rules otherwise termed private international law.[10]

7 Summary of Records of Plenary Meeting 1980 Vienna Diplomatic Conference *www.cisg.law.pace.edu/cisg/plenarycommittee/summary12.html*; also comments by Kenya's representatives Mr Mathnjuki and Mr Watitu Vienna Diplomatic Conference Legislative History *www.cisg.law.pace.edu/cisg/plenarycommittee/summary9.html*.

8 *www.uncitral.org/en/uncitral_texts/sale_goods/1980CISG_status*. Tanzania is not a signatory to the CISG.

9 *Ibid* as at September 2005, 66 countries had ratified the convention.

10 See generally Collins (ed) *Dicey and Morris The Conflict of Laws* Volume II, Sweets and Maxwell, London, 2000, at 1195-1198 and North, PM *Cheshire and North's Private International Law* (10 ed) Butterworth's London, 1979 at 195-257.

It is common, and a wise practice, for parties to international commercial transactions to explicitly choose the system of law to govern their contracts.[11] If the choice of law is clear or capable of being ascertained, English courts welcome such clauses as they bring a degree of certainty to the contract. The decision of the Privy Council in *Vita Foods Products Inc v Unus Shipping Co Limited*[12] supports the position that parties are free to submit the validity of the contract to the law of their own choosing.

In this case the defendant shipping company agreed to carry a consignment of herrings from Newfoundland to New York. Owing to negligence of the master, the ship ran ashore in Nova Scotia, and the herrings had to be unloaded and reshipped. They arrived in New York damaged and the plaintiffs, who were the consignees of the cargo, sued under the bill of lading. The bill contained an express clause that the contract should be governed by English law under which law there would be no liability. It was not clear if there would be liability under the law of Newfoundland. Although the connection of a North American shipping contract with English law was unclear, the choice of English law was upheld with Lord Wright stating:

> "Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided that the intention is expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[13]

The Court of Appeal decision in *Alitalia Airlines v Assegai*[14] suggests that the Kenyan position may be a little more restrictive. In addressing the issue of whether parties are free to incorporate the terms of any foreign law in their contract, the Court of Appeal in a unanimous judgment stated:

> "While it is well established under English common law that such a right of incorporation may be freely exercised (see Cheshire: Private International Law (5 ed) 1957 Ch 8 at 205-221) the position in Kenya is different. Neither in the pleadings nor in the trial was the jurisdiction of Kenyan courts to entertain the suit contested. And a litigant who submits to the jurisdiction of the Kenyan courts must, *ipso facto*, submit to the statutory restrictions on the exercise of that jurisdiction. Section 3(3) of the Judicature Act (Chapter 8) of the Laws of Kenya provides that the jurisdiction of the courts:
>
> 'shall be exercised in conformity with:

11 D'Arcy, Leo et al. Schmithoff's Export Trade: The Law and Practice of International Trade. Thomas, Sweet and Maxwell, London 2000 at 440.

12 [1939] AC 277.

13 *Ibid* at 290.

14 [1989] KLR 551.

> (*a*) the Constitution;
>
> (*b*) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in part I of the schedule to this Act, modified in accordance with part II of that Schedule;
>
> (*c*) ...'."

So despite the fact that the contract of passenger carriage between the parties had points of contact with Libyan and Italian Laws reference to such laws are excluded by the Judicature Act. It follows that the proper law of the contract in Kenyan Law.[15]

In the authors view the reason for this apparent restrictive framing of the Kenyan position was that the matter in issue was that the matter in issue was covered by statute.[16] The Court of Appeal also did not have to apply it mind to section (3)(1)(*c*) of the Judicature Act which allows for the application of the substance of common law and doctrines of equity where matters are not governed by statue. If the issues were not governed by a statute then, the positions of section (3)(1)(*c*) of the Judicature Act would have allowed reference to the common law and by necessary inference the rules of conflict of laws. These would be in favour of the position adopted by the parties. Decisions relating to choice of forum by the parties suggest that Kenyan courts would respect the parties' decision unless there is strong reason for not keeping them bound by their decision.[17]

Academicians are however not fully convinced that the approach of granting full autonomy to the parties to choose the law applicable to their agreement solves all difficulties.[18] Firstly, they argue that giving the parties full choice of law autonomy may enable them escape rules of the law that would otherwise have been applicable. Secondly it is argued that, capacity to enter into the agreement and the validity of the choice of law clause must itself be tested by a legal system and

15 *Ibid* at 551-552.

16 Certain provisions of the Carriage by Air Act of 1932 of the United Kingdom that introduced the Warsaw Convention were applicable in Kenya by virtue of section 4 of the Kenya Independence Order in Council of 1963 and section 14 of the Constitution of Kenya of 1964. See preamble to the Carriage by Air Act of 1993, Act number 2 of 1993.

17 See dicta by Madan JA in *United Insurance Company Limited v East Africa Underwriters (Kenya) Limited* [1985] KLR898 at 902 line 25-35 and decision in *Carl Rowning v Societe Navale Chargeurs Delmas Vieljeux (The François Vieljeux)* [1984] KLR 1.

18 Forsyth, CF *Private International Law* (3 ed) Pretoria. Junta and Company 1996 at 276; see also *Collins (ed) supra* at 1197.

the chosen system, it is felt, cannot perform this task.[19] Nevertheless courts generally uphold parties' selection of an applicable law.[20]

Where the parties have not made an express choice of a municipal legal regime to govern their agreement then the rules of conflict of laws otherwise known as private international law would be used to determine what the proper law of the contract is. Courts seek to determine which country's law has "the closest and most real connection with the contract"[21] and this is the law that will be applicable. In this inquiry many matters are taken into consideration including the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature of the subject matter of the contract.[22]

English courts to make the determination of the applicable law to the contract previously used two widely accepted assumptions. Firstly, if a contract was to be performed wholly in the country where it was made, it was presumed to have its closest connection with that legal system (the *lex loci contractus*). On the other hand, if the contract was to be performed in a country other than the one in which it is made, it was presumed to have its closest connection with that legal system (the *lex solutionis*).[23] This approach does not necessarily lead to the proper law because the place of contracting may be selected fraudulently in order to give validity to an otherwise invalid contract while a contract may be performed in two or more countries in which case the place of performance cannot be ascertained.[24] The assumptions were largely abandoned by English courts in favour of the wider test of the law with closest and most real connection with the contract stated by Lord Wright as follows:

English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the

19 *Forsyth ibid.*

20 See eg the recent High Court of Kenya Commercial Division rulings in *International Aircraft Group SA v Airway Kenya Aviation Limited* (Milimani) High Court case number 360 of 2004 (UR) ruling delivered on 29 September 2004 where M Kasango J accepted the provision in the parties agreement making English law the applicable law to the contract and went on to apply the Sale of Goods Act of 1979 of England and *Friendship Container Manufacturers Limited v Michell Cotts Kenya Limited* (Milimani) High Court case number 2985 of 1995 (UR) ruling delivered on 23 November 2001 where Mbaluto J upheld a clause in the bill of lading making reference to the Hague-Visby Rules and South African jurisdiction and the limitation period of 1 year.

21 Per Lord Simonds in *Bonython v Commonwealth of Australia* [1951] AC 201 at 219.

22 *Re United Railways of Havana and Regla Warehouses Limited* [1960] Ch 52 at 91 as quoted in McClean, D *Morris The Conflict of Laws* (5 ed) Sweet and Maxwell, London 200 at 323-324.

23 McClean, D *ibid*; also story, *Joseph, Commentaries on Conflict of Laws* (5 ed) (1857) Little, Brown and Co Boston, 1857 at 356-357 paragraph 233 available at *heinonline.org*.

24 McClean *ibid*.

matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the courts. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the court has to impute the intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.[25]

The East African Court of Appeal in the case of *Karachi Gas Company Limited v H Issaq*[26] adopted a position in line with the later English approach. The case arose as a result of a dispute between a Kenyan exporter and a company from Pakistan. The company from Pakistan agreed to purchase a quantity of pipes to be delivered f.o.b. Mombasa. A dispute arose when the company from Pakistan failed to obtain an import permit while the Kenyan exporter was ready to fulfil his part of the agreement. The parties had not provided for the law that would apply to their agreement. Spry JA whose judgement was specifically on the issue of the proper law of the contract stated:

> "There is nothing in the evidence to suggest that the parties ever applied their minds to the question of the law to govern their contract. That being so, the proper law is, I think, that 'with which the transaction has its closest and most real connection' ... and to determine that, it is necessary to take into account all relevant circumstances."[27]

Newbold AGP had a slightly different formulation, in his view the test to be applied was "the system of law by reference to which the contract was made or, that with which the transaction has its closest and most real connection".[28]

The High Court of Kenya in the case of *Radia v Transocean (Uganda) Limited*[29] however reintroduced assumptions regarding the *lex loci solutionis* and *lex loci contractus*. In this case the plaintiff was an employee of the defendant company which had an office in Mombasa but with its head office in Kampala, Uganda. The Uganda government passed a policy regarding employment of persons of Asian origin thus making the contract contrary to public policy in Uganda. As a result the plaintiff's contract was terminated and he sued for wrongful termination of

25 *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* [1938] AC 224 at 240.

26 [1965] EA 42.

27 *Ibid* at 56.

28 *Ibid* at 54.

29 [1985] KLR 300.

employment in Kenya. Citing Chitty on Contracts[30] and the *Karachi Gas Company Limited* case, Sheridan J held that there is a presumption in favour of the *lex loci contraus* if the place where the contract is to be performed coincides with where it is made but this presumption may be rebutted by a stronger presumption of *lex loci solutionis*, the place where the contract is to be performed. And, in the absence of any term the proper law to be applied is the law with which the transaction has its closest and most real connection.[31]

Where no express choice of law has been made the buyer or the seller will be unable to be sure which law applies to the contract until he or she has undertaken a detailed conflicts of law analysis to determine the law with the closest relationship with the contract. The complexities of the conflict of law rules are most unhelpful in this regard.

Two conventions, The Convention on the Law Applicable to International Sale of Goods (the Hague Convention)[32] and The European Convention on the Law Applicable to Contractual Obligations (Rome, 1980)[33] seek to avoid the problem of determining what the applicable law to a contract is by indicating that the proper law, where the parties have not made an express choice, is the law of the seller's residence.[34] These conventions do not however have wide application. The Hague Convention is only applicable in a few countries while the Rome Convention is applicable only in the European Union.[35] Use of the approach adopted by these conventions is also disagreeable from a third world perspective as third world countries tend to be the buyers of finished goods from more developed countries and reference to the seller's municipal law is therefore problematic.

It is therefore immediately evident that neither the express nor the implied choice of law is an ideal solution to the problems caused as either the buyer or the seller or both of them have to make reference to a foreign system of law with which they may not be fully familiar. A naïve assumption that the law of sales will

30 *Chitty on Contracts* (23 ed) at 836 and 839.

31 *Supra* note 23 at 306-307.

32 Convention on the Law Applicable to International Sale of Goods, The Hague 1955. *www.jus.uio.no/lm/hcpil.applicable.law.sog.convention 1955.*

33 The European Convention on the Law Applicable to Contractual Obligations, Rome 1980 *www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html.*

34 Hague Convention *supra* article 3 and Rome Convention *ibid* article 4.

35 Van Houtte *supra* at 121-122; The adoption of Rome Convention in the United Kingdom has inevitably led to divergence between the law in that country and in other commonwealth jurisdictions. See North, PM *Private International Law Problems in Common Law Jurisdictions*, Martinis Nijhoff Publishers, Dordrecht, 1993 at 137-143.

be basically the same everywhere can lead to disastrous results.[36] To ease the problem business people may select, as the applicable law to the contract, the law of a stable and relatively well known jurisdiction such as England or the State of New York for common law countries or Switzerland for civil law countries.[37] This approach does not, however, solve the difficulty where one of the parties is from a common law country while the other is from a civil law country. Increasingly also, with the changes being brought about by the European Union legal regime, English law may not be readily discernable to a lawyer from a common law jurisdiction outside the United Kingdom.[38]

The best solution would be for the whole world to follow one harmonized system of contract law so that whichever municipal law that is found to be applicable to the contract, the result would be the same. The parties would thus be sure of the content of the law with regard to their contract irrespective of the applicable law and how that applicable law is selected. The CISG is such an attempt at harmonisation of the international sale of goods law.[39]

3. THE CISG

The CISG is the latest in a long line of attempts to harmonize the law on international sale of goods. Attempts at harmonization of the law of international sale of goods began in the 1930's at the International Institute for the Unification of Private International Law (UNIDROIT) in Rome.[40] This work ultimately led to the signing of two conventions on uniform laws on international sales in 1964. These conventions were however not successful as they failed to receive wide approval. They failed to sufficiently take into account the third world and Eastern Europe and, tellingly, received critical reception in the United States.[41]

36 For example, the common commercial expression "FOB" has a different meaning in English and American law. See D'Arcy, Leo et al Schmithoff's *Export Trade: The Law and Practice of International Trade supra* at 17 and 407. The differences between legal concepts in civil and common law countries can be quite wide. See Apple, JG and Deyling, PR *A Primere on the Civil Law System*, Federal Judicial Center, 1995. *www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/Civillaw.pdf* which provides an excellent introduction to the civil law system.

37 On selection of applicable law, see generally Tieder, JB Jr "Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration" *Journal of International Arbitration*, 20(4) 2003 at 393-408.

38 See eg Ogola JJ *Company Law Focus Books* Nairobi, 1997. Preface with regard to divergence in company law in Kenya and the UK.

39 See Ndulo Muna *supra* note 2 at 109-110 on Ways of Harmonisation of Trade Laws.

40 Uncitral, "Explanatory Note by the Uncitral Secretariat on the United Nations Convention for the International Sale of Goods" at 33 *www.uncitral.org/english/texts/sales/salesom.html.*

41 Van Houtte *supra*; Nicholas, B "*The Vienna Convention on International Sales Law*" 105 (1989) LQR 2001 at 202-203.

As a consequence one of the first tasks undertaken by the United Nations Commission on International Trade Law (UNCITRAL) upon its establishment in 1968 was to establish exactly what problems existed in the conventions and seek to remedy them. The result of this work was the adoption by a diplomatic Conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[42] This convention came into force on 1 January 1988 and has received wide acceptance from every geographical and economic region of the globe. Most of the world's major trading nations representing over two thirds of world trade are parties to the convention and the list of states party to the convention continues to get longer.[43] The convention has however not received wide acceptance in Africa and only nine African countries; Burundi, Egypt, Gabon, Ghana, Guinea, Lesotho, Mauritania, Uganda and Zambia are parties to the convention.[44]

The CISG is an attempt to reconcile the principles of contracts for sale from different legal traditions. A paragraph in the preamble, for example, states that the contracting states

> "*Being of the opinion* that the adoption of uniform laws which govern contracts for international sale of goods and taking into account the different social, economic and legal systems could contribute to removal of legal barriers in international trade and promote the development of international trade"[45]

A lawyer, familiar only with her own legal tradition, may therefore find some of its provisions unusual and, in some instances, contradictory to what she is used to. A rudimentary knowledge of the CISG, its applicability to international sale transactions and the differences between the CISG and local law would therefore be important in helping to determine whether a party should include it in their transaction and, at a national level, whether the country should ratify the convention making it applicable to international sales contracts in that country. The following part of this paper seeks to briefly outline the main provisions of the CISG and identify some of the key differences between its position and the common law.

The CISG is divided into four parts; Part I (article 1-13) covers the conventions sphere of application, provisions on interpretations and requirements of contractual forms. Part II (article 14-24) deals with formation of the contract; Part III (articles 22-88) covers the rules on sale of goods while Part IV (articles 89-101) governs the public international law framework.

42 *Ibid.*

43 CISG Table of Contracting States *www.cisg.law.pace.edu/cisg/countries/cntries.html.*

44 *Ibid.*

45 *Supra* preamble.

In acceding to the convention states may indicate that they will not be bound by all provisions of the convention. The reservations allowed are those expressly authorised by article 98 of the convention. Five different reservations (or declarations are authorized):[46]

(1) Territorial Applicability- a state consisting of territorial units in which different systems of law apply is allowed to confine the territorial extent of the application of the convention.[47]

(2) Only Contracts between Parties in Contracting States- a state may limit the scope of application of the convention to contracts between businesses in separate contracting states, excluding the additional category of contracts which are subject to the law of a Contracting State.[48]

(3) Exclusion of rules either about formation or about obligations- A state may declare that it will not be bound either by Part II(about the formation of the contract) or by part III (about the obligations of the parties under the contract).[49]

(4) Reciprocal Variations- two or more states with the same or closely related legal rules may at any time declare that the CISG is not to apply to contracts of sale or to their formation if the parties have their places of business in these states.[50]

(5) The CISG generally does not require contracts to be in writing. However, a state whose legislation requires contracts to be in writing may make a declaration that contracts other than in writing will not be effective when a party has its place of business in that state.[51]

These exclusions are not greatly significant in African regional trade as none of the African countries that have ratified the convention has made any declarations to exclude the Conventions applicability in any respect.[52]

APPLICATION OF THE CISG – PART I OF CISG

Article 1 of the Conventions provides that:

> "This Convention applies to contracts of sale of goods between parties whose places of business are in different States, (*a*) when the States are Contracting States; or (*b*) when the

46 Article 93-96 also New Zealand Law Commission, "The United Nations Convention on Contracts for the International Sale of Goods; New Zealand's Proposed Acceptance", (1992) at 17-18 *www.cisg.law.pace.edu/cisg/wais/db/articles/nzcc2.html.*

47 Article 93.

48 Article 95.

49 Article 92.

50 Article 94.

51 Article 12 and 96.

52 See note 6 *supra.*

rules of private international law lead to the application of the law of a Contracting State."

The key item is that the parties have their places of business in contracting states. Neither the nationality of the parties or their civil or commercial character not the location or intended place of delivery of the goods is relevant in determining the scope of application of the CISG. The issues arising from this Article in regional trade shall be addressed with reference to hypothetical cases later in this Article.

Formation of the Contract – Part II of CISG[53]

The rules governing the formation of international sales contracts are covered under Part II of the Convention. The CISG adopts the terminology of offer and acceptance that common law lawyers are familiar with. However, due to the influence of the civil law countries, it does not adopt the notion of the doctrine of consideration. Under the CISG a contract for international sale comes into existence "when the acceptance of an offer becomes effective in accordance with the provisions of the Convention".[54] It is therefore key to establish what an offer is and for how long it lasts under the Convention and then determine what acceptance is and when it is effective.

Offer

Article 14 of the Convention defines an offer as a proposal for concluding a contract addressed to one or more specific persons which is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is considered sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price.[55] Sending of price lists, catalogues and advertisements would therefore not be offers under the CISG.[56]

The offer becomes effective when it reaches the offeree.[57] The offeror may withdraw the offer if the withdrawal reaches the offeree before or at the same time as the offer.[58] The offer may be revoked at any time before acceptance is

53 See Generally Uncitral. "Explanatory Note by the Uncitral Secretariat on the United Nations Convention on Contracts for the International Sale of Goods", *www.uncitral.org/english/sales/saleson.html.*

54 Article 23.

55 Article 14.

56 Van Houtte *supra* at 127.

57 Article 15.1.

58 Article 14.2.

dispatched[59] unless the offer was indicated as irrevocable or could be considered by the offeree as irrevocable.[60] The offer will remain in force for the period indicated in the offer. It will be terminated, even if it is irrevocable, when the offeror receives a rejection.[61] If no acceptance period is indicated in the offer, the offer remains in force for a reasonable period.

Acceptance

This is defined as a statement made or other conduct of the offeree indicating assent to an offer.[62] In line with the famous common law decision in *Felthouse v Bindley*,[63] silence or inactivity does not of itself amount to acceptance.[64] However, in contrast to Kenya which adopts the common law postal rule that acceptance takes effect as soon as a properly addressed letter containing the acceptance is posted[65] under the CISG acceptance becomes effective only when an indication of accent reaches the offeror.[66] Acceptance under the CISG is not effective if the indication of assent does not reach the offeror within the time he has fixed, or, if no time is fixed, within a reasonable time.[67] Depending on the usage or practice between the parties, acceptance may be indicated by performance of an act such as dispatch of goods.[68]

A reply with additional or different conditions is not an acceptance but a counter-offer if the changes alter the terms of the offer materially.[69] Any different term in respect of price, payment, quality and quantity of goods, place and time of delivery, liability and dispute settlement are expressly mentioned as material changes.[70] If the reply to the offer only includes insignificant changes, which do not alter the offer materially, then the reply is presumed to be an acceptance with

59 Article 16.1.

60 Article 16.2.

61 Article 17.

62 Article 18.1.

63 [1862] 142 ER 1037.

64 Article 18.1.

65 See *Dunlop v Higgins* (1848) 1 HL Case 38; *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 Exd 216, CA; *Henthon v Fraser* [1892] 2 Ch 27,CA and *Rugnath Gokaldas and Co v MR Ghai and Sons* 12 KLR 124, *Busoga Millers and Industries Limited v Purshottam Patel* 22 EACA 384.

66 Article 18.2.

67 *Ibid.*

68 Article 18.3.

69 Article 19.1.

70 Article 19.1.

altered terms, unless the offeror objects to the changes without undue delay.[71] This contrasts with the common law position that to constitute acceptance the assent to the terms of the offer must be absolute and unqualified.[72]

Obligations of Buyer and Seller – Part III of CISG

Part III of the Convention covers the obligations of the buyers and sellers in contracts falling under the convention in detail. The key area of distinction in these obligations from the perspective of the common law is in the area of remedies.

Central to the system of remedies under the CISG is the concept of "fundamental breach". It is a pre-requisite of the avoidance of the contract by either party. It is also the basis for the buyer's right to require delivery of substitute goods in case of non-conformity.[73] Article 25 of the CISG provides that:

> "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same circumstances would not have foreseen such a result."

This test approximates to the German test of whether the injured party can be said to have further interest in the performance of the contract.[74] It has similarities to the test pronounced by Lord Diplock in *Hong Kong Fir Shipping Company Limited v Kawasaki Kisen Kaisha Limited*.[75]

Where there is failure to perform the main remedies available to the parties include request for specific performance, avoidance of contract, price reduction or damages. There are some notable areas of distinction with what a common law lawyer is used to:

Specific Performance

In most systems outside the common law, specific performance is considered the logical remedy for breach of contract. Performance is what has been promised and

71 Article 19.2.

72 *Halsbury's Laws of England* (3 ed) Volume 8 Butterworth, London 1954 at 75 "A letter containing a warranty that a mare is quiet in double harness is not acceptance of an offer requiring a warranty the she is quiet in harness" (*Jordan v Norton* (1938) 4 M and W 155). See also Hodgin, RW *Law of Contract in East Africa*, Kenya Literature Bureau, Nairobi, 1975 at 31 who indicates it would not be enough to pay KShs 6 000 in notes of KShs 100 for an offer asking for KShs 6 000 in notes of KShs 10.

73 Articles 46, 49, 51, 64, 72, 73.

74 Nicholas *supra* at 219.

75 [1962] 2 QB 26 (CA) whether the breach deprives the injured party of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain ...".

it is performance that is required. Damages are in principle only a substitute.[76] In contrast to the common law, the principle remedy under the CISG is therefore specific performance. The CISG however preserves the common law position by providing that courts are not bound to enter judgement for specific performance unless the court would do so under its own law in respect of similar contracts not governed by the CISG.[77]

Seller's Right to Cure

Where a breach has occurred, the CISG encourages the seller to keep his contractual promises by offering him the express right to cure his mistakes. The seller has a right to cure "any failure to perform his obligations" including a failure to deliver conforming goods.[78] Unlike under English common law where the seller can only exercise this right before the time fixed for performance,[79] under the CISG the right may even be exercised after the time for performance has lapsed provided that it will not cause the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.[80] The right to cure is however subject to the buyer's right to avoid the contract for fundamental breach.[81]

Nachfrist

The CISG provides that the buyer, when he is not sure whether a breach committed by the seller is to be classified as 'fundamental', with an option of putting the seller on notice that he should fulfil his obligations within a reasonable period of time.[82] The buyer may not during this period, resort to any remedy for breach of contract unless the buyer has received notice from the seller that he will not perform with the fixed period. This remedy is derived from German law and is usually termed *Nachfrist* notice. If the failure remains unremedyed on the expiry of the notice, the other party is entitled to avoid the contract regardless of whether the breach is fundamental or not. Although the common law has no direct equivalent of the *nachfrist* notice, the doctrines of waiver and estoppel in English law do have some similarities to it.[83]

76 Nicholas *supra*.

77 Article 28.

78 Article 37.

79 *Halsbury's Laws of England supra* at 163–164.

80 Article 37.

81 Nicholas *supra* at 224.

82 Article 47(1).

83 Nicholas *supra* at 225.

Reduction in Price

The CISG entitles the buyer in case of non-conformity of the goods, to reduce the price "in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at the time"[84]. This remedy allowing the buyer to reduce the price is a civil law remedy and has no equivalents under the common law although some parallels may be drawn with remedies under the Sale of Goods Act.[85]

Although the CISG eliminates the doctrine of consideration and contains some concepts particularly remedies that are not utilized in the Kenyan common law, it is not so radically different from the Kenyan position as to be impossible to implement. Codification of the law in the CISG also has the advantage over the uncodified Kenyan contract law.

4. Scope of Application of CISG

The CISG applies to contracts for the international sale of goods. It therefore does not apply to contracts where the preponderant part of the obligations of a party is the supply of labour or other services.[86] Certain types of sales are also excluded from the Convention either because of the purpose of the sale (goods bought for personal, family, or house hold use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity).[87] As the Convention only covers sales contracts, contracts that are ancillary to an international sale contract such as distribution agreements, contracts of carriage and insurance and letters of credit are not covered by it.[88]

For the CISG to apply, the sale of goods must be *international.* A sale is international when the parties have their *place of business in different states.*[89] This fact of having the place of business in different states must appear clearly from the contract, from dealings between the parties or from information disclosed by the

84 Article 50.

85 Section 31 of the Kenyan Sale of Goods Act (Chapter 31) Law of Kenya provides that where a buyer accepts goods of a smaller or greater quantity he must pay for them at the "contract rate". See *Guest, AG Benjamin's Sale of Goods*, Sweet and Maxwell. London, 1974 at 279 paragraph 620 on operation of similar clause under the repealed English Sale of Goods Act.

86 Article 3.

87 Article 2.

88 P Winship, "*Private International Law in the UN Sales Convention*" (1988) Cornell Int'l LJ 487.

89 Article 1; for interpretation of this Article, see generally Ferrari, F "Cross Reference and Editorial Analysis Article 1", *www.cisg.law.pace.edu/cisg/text/cross/cross-1.html.*

parties at any time before conclusion of the contract.[90] The nationality of the parties is not taken into account.[91]

It follows that it is not necessary that the goods be delivered across a border, or that the offer and acceptance take place in different countries in order to bring a sale within the scope of the CISG.[92] The key element is that the parties have *their place of business in different states.* In addition, one of two other conditions must be fulfilled:

(*a*) The state in which the parties reside must have accepted the CISG *or*

(*b*) The rules of conflict of laws (private international law) of the court hearing the suit lead to the application of the law of a contracting state.[93]

The CISG, however, fully recognises the principle of party autonomy or freedom of contract and the parties may exclude its application or derogate or vary its effect.[94] It is necessary that the parties make a positive act to exclude the application of the Convention. Silence would make the CISG applicable.[95] The CISG also does not apply to the capacity of the parties to enter into the contract, the formal validity of the contract, the transfer of ownership and the legal effects of the contract in respect to third parties. Conflicts of law rules determine the applicable municipal regime in these areas.[96]

A number of hypothetical scenarios may be examined to illustrate the applicability of the Convention where the parties have not specifically selected the applicable law or excluded the applicability of the CISG to their transaction.

Scenario 1

An Egyptian manufacturer (Egypt acceded to the CISG on 1 December 1982 with no reservations and it came into force in that country on 1/1/1988)[97] sells goods to a Ugandan retailer (Uganda acceded to the CISG 12 February 1992 with no

90 Article 1.2.

91 Article 1.3.

92 Van Houtte *supra* at 127 paragraph 1; Nicholas B "*The Vienna Convention on International Sales Law*" 105 (1989) LQR 201 at 205.

93 This particular provision is controversial and the Convention allows a country under article 95 when acceding to the Convention to refuse to be bound by this provision. A number of countries, including the United States have made this reservation. The COMESA countries that have acceded to the Convention have all done so without reservation.

94 Article 6.

95 Nicholas *supra* at 208.

96 P Winship, "*Private International Law in the UN Sales Convention*" (1988) Cornell Int'l LJ 487.

97 *Supra* note 6.

reservations and it came into force on 1 March 1993).[98] The CISG is applicable as both parties are from contracting states.[99]

A recent German court decision in a case between a Ugandan buyer and German seller of used shoes illustrates this position.[100] In this case, the plaintiff (buyer) was a Ugandan society with its place of business in Kampala, Uganda. Following an Internet advertisement, it placed an order with the defendant (seller), a German Company, for 360 bags of used shoes at a price of 30,750 Euro C and F Mombasa, Kenya. After the goods had arrived and the buyer had paid the last instalment of the purchase price, the buyer received the original bill of lading and transported the goods to Kampala, Uganda.

The goods arrived and were examined by the Uganda Bureau of Standards who declined to allow the import holding that the goods were unacceptable for the Ugandan market. The buyer brought this claim in Frankfurt, Germany contending that the bags contained "defective and unusable shoes, among them high-heel women's shoes, inline-skates and shoetrees". The Frankfurt Court held that "the CISG is applicable to the present dispute as the contract is for the sale of goods and the parties have their places of business in different States which are parties to the Convention (article 1(1)(*a*) CISG). The Federal Republic of Germany has been a party a party since 1 January 1991, Uganda since March 1993".[101]

The court then proceeded to analyse the case on the basis of the CISG and dismissed the Ugandan buyer's claim for failure to examine the goods and give notice of non-conformity of the goods with a reasonable period of time as required by article 38(1) of the CISG. The defendant had argued that the goods should have been examined in Mombasa. The German court was unconvinced by the plaintiff's contention that it would have been unreasonable to fly to Mombasa to examine the goods and opening the goods in Mombasa may have resulted in Kenyan customs duties being payable.

Scenario 2

A Ugandan manufacturer (contracting state) sells goods to a Kenyan retailer (non-contracting state). A dispute arises and a suit is filed in Kenya. As Kenya is not a contracting state, the Kenyan conflict of laws rules would have to be examined to determine the substantive contract law applicable to the transaction. Following the

98 *Ibid.*

99 The Argentinean case of *Elastar Sacifia v Bettcher Industries* where the Argentine Court held in a contract between an Argentinean buyer and a seller from Ohio USA that the CISG applied because both Argentina and the US had acceded to the CISG is illustrative.
See *www.cisg.law.pace.edu/cisg/wais/db/cases2/910520al.html.*

100 Decision of the District Court (*Landgericht*) *Frankfurt* (*Main*) case number 12/26 0264/4 available at *www.cisg3.law.pace.edu/cases/050411g1.html* German case citation does not identify parties to proceedings.

101 As summarised by translator.

English tradition, the applicable law would be that of the country with "the closest and most real connection with the contract".[102] We may make the assumption, for purposes of this illustration, that the court would find that the law with the closest connection to the contract is that of country of performance. [This assumption will be used for all the following illustrations]. If the goods bought are to be delivered in Kenya (performance) the CISG would not be applicable – Kenya not being a contracting state. Kenyan contract law would then apply to the transaction.

If, however, the goods are to be delivered in Burundi (Burundi acceded to the CISG on 4 September 1998 with no reservations and it became effective on 1 October 1999)[103] the CISG would be applicable as the conflict of law rules, following the assumption made, would point to the applicability of the law of the country of performance Burundi.[104]

Scenario 3

A Kenyan manufacturer sells goods to a Ugandan retailer to be delivered in Kampala. A dispute arises and the suit is brought before a Kenyan court. The conflict of law rules in Kenya, following the English tradition would point to the law of the country with "the closest and most real connection to the contract". This, following our assumption, would be the place of performance - Uganda. The CISG would be applicable. If the delivery was to take place in Tanzania then the CISG would not apply as Tanzania is not a contracting state.

Scenario 4

A Kenyan manufacturer sells goods to a company registered in Kenya but with its main place of business in Uganda. The goods are to be delivered in Uganda. A dispute arises and a suit is brought before a Ugandan court. The conflict of law rules, following the English tradition, would point to the applicability of Ugandan law as the law with the closest connection with the contract-place of performance under the assumption we are making. The CISG would apply, notwithstanding that both companies are "Kenyan" companies.[105]

Given the infinite nature of the permutations in the increasingly complicated regional trade, it is immediately evident that ratification of the Convention in a few

102 See Lord Wright *Mount Albert Borough Council v Australian Temperance and General Assurance Society* [1938] AC 224 at 240 note 25 *supra, Radia v Transocean (Uganda) Limited supra* note 29 and *Karachi Gas Company Limited v H Issaq supra* note 22.

103 *Supra* note 6.

104 See eg *Asante Technologies, Inc v PMC-Sierra Inc* United States Federal District Court [California] 27 July 2001 *www.cisgw3.law.pace.edu/cases/010727o1.html.*

105 See *Ashute Industries case ibid.*

but not all of the COMESA and East African Community countries leads to uncertainties as to the law applicable to interregional transactions. Where both parties have their places of business in contracting states matters are clear. However, where one party has its place of business in a non-contracting state reference has to be made to conflict of law rules. Unfortunately this is not an area of law which is well developed in East Africa. Even under English law, prior to adoption of the Rome Convention, the objectivity of outcomes was not always certain.[106]

5. SHOULD OTHER EAST AFRICAN STATES RATIFY THE CONVENTION?

As the convention is ratified in more and more states the difficulties cited above are likely to diminish.[107] This forms a very compelling reason for the countries which as yet have not ratified the Convention to do so. However, policy makers may consider this simplistic approach -everybody else has signed it let us sign it too- as an unreasonable basis for a country to accede to the convention.

A more reasoned approach was that put forward by Professor JD Feltham in 1981 when considering whether the United Kingdom should ratify the CISG.[108] Prof. Feltham argued that the decision would be dictated firstly by its main trading partners and if a substantial number become parties to the Convention and if its provisions are generally accepted by them.[109] As Uganda, a number of COMESA countries as well as large trading nations such as the United States, China, Germany and Japan have acceded to the CISG, this argument favours the position that Kenya should ratify and Tanzania accede to the CISG.[110] Given that the countries in the COMESA region have different systems of law the CISG also offers a neutral system of law to govern contracts and it could easily achieve wide acceptability if lawyers and commercial people are made aware of its existence and provisions.

Feltham's second argument was that given that the CISG tries to bring together the laws from various nations with various legal traditions, it contains defects and ambiguities and these drawbacks should be weighed against the benefits

106 The formulation "closest and most real connection to the contract" can lead to subjective outcomes.

107 Azzouni, Ahmad. "The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom" *www.cisg.law.pace.edu/cisg/biblio/azzouni.html.*

108 Feltham, JD "The United Nations Convention on Contracts for the International Sale of Goods" [1981] JBL 346.

109 *Ibid* at 360.

110 The New Zealand Law Commission adopted this argument in advising that New Zealand should adopt the CISG because states which participated in more than half on New Zealand's external trade had already become parties. *supra* note 46 at paragraph 126.

of using a developed and certain contract law framework like the common law. Feltham argued that much would depend on the views of the commercial and legal communities which would have to work with the CISG.[111] If this approach were taken Kenya and Tanzania may be justified in not adopting the CISG as within East Africa, the common law system is clear to most lawyers and commercial people who may not be equally aware of the provisions of the CISG. This argument would however only hold if trade is confined to the three East African countries. As soon as one considers the wider region with countries such as Rwanda, Burundi and Egypt with their different legal traditions then the strengths of the argument against adoption of the CISG diminish.

In considering whether various jurisdictions should adopt the Convention many arguments have been fronted for adopting it and many cited in opposition to its adoption.[112] Among the most compelling arguments advanced in favour of adopting the CISG include the fact that having one law regime applicable to international sale of goods would simplify the legal environment within which international sales operate by having one set of internationally applicable rules. As a corollary to this advantage is the fact that the uniform approach, independent of the intricacies of private international law, would also reduce the number of foreign legal systems that would potentially be applicable to the international sale of goods agreement.

These arguments are compelling from a Kenyan perspective as the adoption of the CISG provides reference to one growing system of law and avoids the debates on exactly what the applicable law would be in particular cases as illustrated by the examples given earlier in this paper.

Strong arguments however also exist against the adoption of the CISG. The greatest disadvantage is that adoption of the CISG in a particular country creates major problems of divergences developing between the rules regulating domestic contracts and those regulating international contracts. Instead of divergences between rules of different countries, the problem of divergences is shifted to the domestic arena. The adoption of the CISG also leads to legal uncertainty as lawyers and traders get used to the new rules. The effect of this problem will however be diminished over time as people get used to the new rules. Other arguments against its adoption include the legal uncertainty caused by the CISG's broadly formulated rules and loss of flexibility for legal development with the law having been

111 Feltham *supra* at 361.

112 See eg Eiselen Sieg "Adoption of the Vienna Convention for the International Sale of Goods (CISG) in South Africa" *116 South African Law Journal* Part II (1996) 323-370 and New Zealand Law Commission *supra* note 46.

fossilised in a code.[113] In Kenya, with the relatively underdeveloped international trade law these arguments are not compelling particularly when legally developed common law jurisdictions like Australia and New Zealand have adopted the Convention.

In the writers view, Kenya (and Tanzania) should also critically consider these positions and decide whether to adopt the CISG in order to increase certainty in international trade transactions between countries in the sub-region. Particular attention should be paid to the weight of those disadvantages of adopting the CISG that are not of a transient nature.

6. WHAT ABOUT THE INTERIM PERIOD?

What then are parties entering into interregional contracts to do as they await ratification by more states? As indicated above, one of the principles of the CISG is party autonomy provided for in article 6. The parties are therefore free to choose the law applicable to their transaction. They may derogate from any of the provisions of the CISG or from all its provisions. However, as seen above, the provisions of article 1 of the CISG provide that the conflict of law rules of the chosen law may be looked at in determining the applicable legal regime and this may still lead to the application of the CISG.

If one, for example, considers scenario 2 given above, where the Ugandan manufacturer sells goods to a Kenyan trader and the goods are delivered in Burundi. Where the agreement provides that Kenyan law is to apply to the contract; it may be argued that Kenyan law means all Kenyan law including its conflict of law rules. Kenyan conflict of law rules, following English tradition, would require the application of the law of the country with the closest and most real connection with the contract. Assuming this is the place of performance-Burundi, where the CISG is applicable, the CISG would apply to the contract. The parties would therefore have inadvertently made the CISG applicable to their agreement even though their preferred choice of municipal legal regime (Kenya) does not itself apply the CISG. This problem would cause unimaginable difficulties especially to a party who may not even have heard of the CISG.

A carefully drafted choice of law clause specifically excluding the CISG and the conflict of law rules may be considered. A clause along the following lines may be useful

113 Eiselen Sieg *ibid.*

> "The construction, validity and performance of this contract shall be exclusively governed by the laws of Kenya, without giving effect to the conflict of law rules requiring the application of the substantive laws of any other jurisdiction, provided, however, that the United Nations Convention on Contracts for the International Sale of Goods shall in no way apply to the construction of the Contract. The Parties expressly state their intention that the laws of any country other than Kenya, shall not, under any circumstances apply in any way to the construction validity or performance of the Contract."[114]

The parties may also specifically adopt the CISG as the applicable law to the particular contract. This approach will create certainty. However, it would require that the parties are familiar with the provisions of the CISG and in particular the subtle differences between the CISG and the provisions of their own domestic legal regime.[115]

7. CONCLUSION

The applicability of the 1980 United Nations Convention on the International Sale of Goods in Uganda but not in Kenya and Tanzania creates potential difficulties with regard to the law applicable in inter-regional contracts for sale of goods. It had been predicted that the Convention would be the predominant law in force around the globe in a very short time.[116] This prediction appears to have come true as the CISG is "rapidly becoming one of the most successful multi-lateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems".[117]

The growing numbers of countries adopting the CISG mean that Kenya and Tanzania may eventually be isolated. There is much to be said for Kenya and Tanzania adopting the CISG in order to bring certainty in the area of regional trade law and also as to be in line with international trends. However, the decision on whether to accede to the Convention must be made in an informed manner against objective criteria. Given the familiarity of local lawyers with the common law and the relative lack of knowledge about the CISG, it would perhaps be wise

114 This is the authors formulation derived from Crawford, B. Blair "Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods" 8 Journal of Law and Commerce 187-205 (1988) *www.cisg.law.pace.edu/cisg/biblio/crawford.html* and Winship. Peter "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners" 29 International Lawyer 525-554 (1995) *www.cisg.law.pace.edu/cisg/biblio/winship.html.*

115 See *Azzouni supra* for discussion of differences between CISG and Common law of contract.

116 Murfy, Maureem T "United Nations Convention on Contracts for the International Sale of Goods" 12 Fordham Int'L LJ 734 (1988-9) at 727.

117 Ronald A Brand and Harry M Flechtner "Arbitration and Contract Formation in International Trade: First Interpretations of the United Nations Convention" 12 JL and Com 239 (1993).

to have specific studies undertaken by the Law Reform Commissions in the two countries on whether the adoption of the CISG, at the present time, is appropriate. Attention should also be focused on scholarly writing and training of law students on the CISG so to develop familiarity with its concepts.[118] In the interim it is useful for the local lawyers to acquire a rudimentary knowledge of the provisions of the CISG as it is possible for the CISG to be inadvertently applicable to a contract with international dimensions without the parties or their advisors being aware of it or intending it to apply.[119]

"Conservatism, routine, prejudice and inertia" have been cited by the UNCITRAL Secretariat as the primary constraints to development and acceptance of international trade instruments.[120] It is worth some introspection as to whether this is true of the application of the United Nations Convention on International Sale of Goods (CISG) in the East African region.

118 Dodge, William S "Teaching the CISG in Contracts" *50 Journal of Legal Education* (March 200) 72-94 *www.cisg.law.pace.edu/cisg/biblio/dodge.htm* gives some comfort as it shows that the problem of unfamiliarity with the CISG is common even in the United States. See also Ndulo Muna note 2 *supra* at 118 who suggests that to encourage harmonisation of law, law school curricula in Africa should be designed to encourage regional thinking and foster regional goals.

119 The Pace University maintains a comprehensive web site on the CISG at *www.cisg.law.pace.edu* that is very useful.

120 UNCITRAL Secretariat, "The Future Role of UNCITRAL – Promoting Wider Awareness and Acceptance of Uniform Texts," in Uniform Commercial Law in the Twenty First Century – Proceedings of the Congress of the United Nations Commission on International Trade Law (New York, 1992) 249-259 at 252.

CASE NOTE

Omwanza Ombati*

Abu Chiaba Mohamed v Mohamed Bwana Bakari, Ahmed HS Mraja and ECK[1]

[1] Precedent – Convening a bench of seven – Overruling precedent – Principle of stare decisis *– Whether High Court bound by decisions of the Court of Appeal.*

[2] Service of election petition – Whether Moi v Kibaki *addressed mode of service or time of service.*

[3] Statutory interpretation – Section 20(1)(a) of the National Assembly and Presidential Elections Act (Chapter 7) of the Laws of Kenya.

Facts

This was an election petition filed by Mohamed Bwana Bakari on the 27 January 2003, at the Mombasa Court Registry enumerating various election malpractices, alleged to have taken place before and during the General elections of 2002. Faced with the challenge to the validity of his election as a Member of Parliament for Lamu East Constituency the appellant took out a notice of motion under section 20(1)(*a*) of the National Assembly and Presidential Elections Act on the ground that the first respondent was not served within 28 days after the date of the publication of the result of the Parliamentary Election in the Kenya Gazette of 3 January 2003.

The application was premised on the fact that it was not served personally on the applicant within 28 days after the results were announced, a matter which was conclusively determined in *Moi v Kibaki*.[2] The full facts of the case are succinctly set out in the decision of Omolo JA who authored the judgment for the Court. Indeed a reader would find herself in an intricate position for the Court does not accede to the fact that it was overruling the judgment of the *Moi v Kibaki*. At page 4 of the unreported ruling in the *Moi* case, the Court of Appeal consisting of a bench of five judges held that following amendments to section 20(1)(*a*) of the National Assembly and Presidential Elections Act[3] the only way of serving an election petition was by way of personal service.

* Advocate of the High Court of Kenya.

1 Civil appeal number 238 of 2003.

2 Civil appeal number 172 of 1999.

3 Chapter 7 of the Laws of Kenya. These amendments were brought by the Statute Law (Repeals and Miscellaneous Amendments) Act 1997.