
The United Nations Convention on Contracts for the International Sale Of Goods: A Case for Ratification by Kenya

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1. INTRODUCTION

1st January, 1988 marked a turning point in the history of the harmonization of international sales law. The United Nations Convention on Contracts for the International Sale of Goods (CISG) came into force, having been adopted on 11th April 1980 at an international conference in Vienna.¹ This convention was set out as one that would create uniform rules to govern contracts for the international sale of goods thus removing legal barriers in international trade.² The convention was intended to be the centerpiece of international harmonization of international trade law.³ Kenya participated at the Vienna Conference⁴ and eventually signed the final act of the convention on 11th April 1980.⁵ To date, however, Kenya has not ratified the Vienna Convention.

This article seeks to make a case for the ratification of the CISG in Kenya. In so doing, Part II of the paper shall examine previous attempts at harmonization of international sales law, Part III shall then look at the main provisions of the CISG, *vis-à-vis* those of Kenya's law on the sale of goods. Part IV shall attempt to put forth the case for the ratification, by Kenya, of the CISG.

2. HARMONISATION OF INTERNATIONAL SALES LAW

Early attempts at harmonization

Attempts to unify international sales law can be traced as far back as 1930 when the International Institute for the Unification of Private Law (UNIDROIT)⁶ commenced the preparation of a uniform law on the international sale of goods under the auspices of the League of Nations.⁷ A committee of experts comprising of representatives from France, Germany, England and Scandinavia was appointed and charged with the responsibility of developing a draft uniform law on sales. The committee completed the

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first draft in 1935 which was circulated through the League of Nations to governments for their comments. Most governments supported the idea of unification, although some noted that their businessmen perceived no need for unification.⁸ Based on these comments, the committee prepared and completed a second draft in 1939.

In related developments, UNIDROIT charged a committee comprised of members from Austria, France, Great Britain, Italy, Peru and Sweden to prepare a draft uniform law on international contracts. The committee completed its preliminary draft in 1936.⁹

Due to interruptions caused by the Second World War, UNIDROIT was unable to present the final drafts of the uniform law on sales and on the formation of contracts until the Hague Conference of 1964. At this conference, two draft uniform laws were presented: the Uniform Law of International Sales (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS).¹⁰ Both conventions were adopted on 25th April 1964 and came into force in 1972. The Uniform Law on International Sales has been ratified or acceded to by only nine states, of which only two are not European: Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino and the United Kingdom.¹¹ The same nine countries have ratified the Uniform Law on the Formation of Contracts.¹² It is noteworthy, that the ratifications of the United Kingdom and the Gambia were more of gestures than real commitments to the tenets of the convention in that both countries adopted the reservation that the conventions would only apply in instances where the parties made express declarations to this effect.¹³ This therefore rendered the application of the conventions to this jurisdictions very limited.

Various explanations were put forward for the poor acceptability of these conventions. Aside from the fact that the conventions had some material flaws,¹⁴ the primary reason that was advanced was the dominance by the western European states in the crafting of the conventions.¹⁵ Developing countries and the socialist bloc countries did not trust the work of the industrialized European countries. Failure by the United States to ratify the conventions was also cited as an important factor.¹⁶

The CISG

The harmonization efforts received a fresh boost in 1966 with the establishment by the United Nations General Assembly of a Commission on

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International Trade Law (UNCITRAL).¹⁷ UNCITRAL was established with the purpose of promoting “the progressive harmonization and unification of the law of international trade”.¹⁸ In contrast to the mainly European forces that shaped ULIS and UFLIS, UNCITRAL was, from the outset, comprised of a small number of members representing all political, legal and economic groupings. UNCITRAL, at its first session, established a fifteen member Working Group to determine whether the 1964 uniform laws could be modified so as to increase their acceptability or whether completely new texts should be drafted.¹⁹

Following an initial study, the Working Group concluded that a new text, based on ULIS and UFLIS, should be prepared. The Working Group then embarked on this task and tabled a draft sales text before in 1977 and a draft formation text in 1978. After reviewing these drafts, UNCITRAL decided to consolidate the texts on the sales law and the formation law into one single text. This is the text that was placed before UNCITRAL’s diplomatic conference in March-April 1980 in Vienna. The conference was attended by delegations from sixty-two states, representing all sectors of the international community.²⁰ At the close of the conference, the present text of the Vienna Convention was adopted by a majority of forty-two of the sixty-two states.²¹ In terms of Article 99 of the Convention, the CISG came into effect on 1st January, 1988, one year after the tenth state ratified the convention.²²

UNCITRAL’s success in preparing a convention with wider acceptability is evidenced by the fact that the original eleven states for which the convention came into force included states from every geographical region, every state of economic development and every major legal, social and economic system.²³ The original eleven states were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia. As of 31st January 1988, an additional four states, Austria, Finland, Mexico and Sweden, had become members.

Today, the CISG has been accepted by sixty-nine states, representing all continents and all major political, economic and legal groupings.²⁴ The convention has been ratified by a few African countries namely: Burundi, Egypt, Guinea, Lesotho, Mauritania, Uganda, Zambia and recently, Liberia.²⁵ South Africa and Ghana are said to be in the process of considering ratification of the convention.²⁶

3. MAIN PROVISIONS OF THE CISG

The CISG is an attempt to reconcile and harmonize the main principles governing contracts for sale from different legal traditions. In this regard the preamble to the CISG clearly captures the aim and purpose of the CISG by stating as follows⁻²⁷

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of the uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

The text of the CISG is divided into four parts. Part one deals with the scope of application of the CISG and the general provisions. Part two contains the rules governing the formation of contracts for the international sale of goods. Part three deals with the substantive rights and obligations of the buyer and the seller arising from contract. Part four contains the final clauses of the CISG concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the CISG to international sales where both states concerned have the same or similar law on the subject.

At this point, it is important to briefly examine and highlight a few the provisions of the CISG in the light of Kenya's domestic law on sales. Kenya's law on sale of goods is codified under the Sale of Goods Act²⁸ and is also sourced from English common law.²⁹

Part One - Scope of Application and General Provisions

In providing for the scope of application of the CISG, Article 1 of the CISG states 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 rules of private international law lead to the application of the law of a contracting State.

Arising from this, it is important to note that the CISG restricts its application to contracts between parties who have their places of business in different contracting states or to cases in which the proper law of the contract is that of a contracting state.

The CISG contains a list of some types of sales that are excluded from the scope of the convention, whether because of the purpose of the sale (goods bought for personal, family or household 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).³⁰ Comparatively, the Sale of Goods Act places within the ambit of the definition of “goods” for purposes of a sale transaction all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.³¹

Contracts for sale are distinguished from contracts for services in two respects under the CISG.³² Firstly, a contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Secondly, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply. Kenyan law makes a similar distinction between contracts for sale and those for supply of services.³³ Generally, Kenya’s law on the sale of goods does not apply to contracts for supply of services, even where some goods may be supplied in the process.³⁴

As regards the form of the contract, both the CISG and the Sale of Goods Act allow for written and oral contracts.³⁵ The Sale of Goods Act, however, goes on to stipulate that in instances where the value of the goods is worth

more than two hundred shillings or more, the contract must be written.³⁶

Part Two – Formation of the Contract

The rules governing the formation of international sales contracts are covered under Part II of the CISG which is founded on the 1964 Uniform Law on Formation - ULFIS. Kenya's law on formation of contracts is codified in the Law of Contract Act,³⁷ but is significantly found in common law.

This section of the CISG deals primarily with offer and acceptance and the conclusion of the contract. It is noteworthy that the convention does not include the concept of consideration, one that is an essential to the formation of a valid contract under common law jurisdictions.

An offer is defined under the CISG 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.³⁸ A proposal is considered sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity or the price.³⁹ If the proposal is addressed to one or more specific persons it is to be considered merely as an invitation to make offers, unless the contrary is indicated by the person making the proposal.⁴⁰ This is the common law position on offers as opposed to invitations to treat.⁴¹

On acceptance, the CISG provides that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.⁴² Acceptance, as is the case in Kenya,⁴³ may therefore be made expressly or by implication. Silence, however, does not under the CISG⁴⁴ and under Kenyan law amount to an acceptance.⁴⁵

Under the CISG, an acceptance of an offer becomes effective once the indication of assent reaches the offeror.⁴⁶ Generally this is the position in Kenya, with the exception of acceptance by post in which case, under common law, the acceptance is deemed to be valid once the letter of acceptance duly stamped and addressed is posted, irrespective of whether or not it was received by the offeror.⁴⁷

In relation to counter offers, the CISG provides that a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications that alter the terms of the offer materially is a rejection of the offer and constitutes a counter offer.⁴⁸ However, if the reply to the offer only includes insignificant changes which do not alter the offer materially,

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then the reply is presumed to be an acceptance with altered terms, unless the offeror objects to the changes without undue delay.⁴⁹ This contrasts with the common law position on counter offers whereby any change, whatsoever, to the original offer is deemed to be a counter offer.⁵⁰

Part Three – Sale of Goods

Part III of the CISG is based on the 1964 Uniform Law on Sales - ULIS. It is subdivided into five chapters dealing with: general provisions, obligations of the seller, obligations of the buyer, passing of risk, provisions common to the obligations of the seller and the buyer.

Obligations of the parties

The general obligations of the seller under the CISG are to deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and the CISG.⁵¹ Both the CISG and the Sale of Goods Act require the seller to deliver goods that are of the right quantity, quality and description required by the contract.⁵² Further, under both laws, the seller is required to deliver goods that are free of any right or claim of a third party.⁵³

Regarding the quality of the goods, the CISG requires the buyer to inspect the goods and to give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it.⁵⁴ In contrast, Kenyan law applies the “buyer beware” (*caveat emptor*) rule.⁵⁵ Under this rule, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. A few exceptions are provided to this rule.⁵⁶

Regarding the obligations of the buyer, both the CISG and the Sale of Goods Act require the buyer to pay the price for the goods and take delivery of them.⁵⁷

Remedies

The remedies available under the CISG are tied to and provided for after each of the obligations of the parties.⁵⁸ Generally, the aggrieved party may require performance of the other party’s obligations,⁵⁹ claim damages⁶⁰ or avoid the contract.⁶¹ These remedies are available under the Sale of Goods Act.⁶² The buyer also has the right to reduce the price where the goods delivered do not conform to the contract.⁶³ In this case the price would be reduced in the same proportion as the value that the goods actually

delivered had at the time of the delivery. In contrast, the Sale of Goods Act requires that goods of the stated description or sample be delivered and does not provide for a set-off where the goods do not match the description or sample provided.⁶⁴

It is noteworthy that the Sale of Goods Act gives the unpaid seller certain remedies which the CISG does not capture.⁶⁵ These are real remedies which are remedies available to the seller against the goods themselves, which are analogous to a form of security for payment of the price.⁶⁶ The seller is allowed, in default of payment to exercise a possessory lien where the goods are still in his possession.⁶⁷ Where the goods are in transit and have not reached the buyer, the seller may exercise the right of stoppage in transitu⁶⁸ which would allow him to take possession of the goods thus giving him the opportunity to exercise the possessory lien. In the event of failure to make payment where a possessory lien has been exercised, the seller may resell the goods to a third party and the third party acquires a good and better title than that of the original buyer.⁶⁹

The CISG restricts the exercise of the remedies available in some instances. For example, if the goods do not conform to the contract, the CISG allows the seller to remedy any lack of conformity in the goods delivered as long as this does not cause the buyer unreasonable inconvenience or expense.⁷⁰ This contrasts to the common law position where performance of the contractual obligations must occur within the stipulated time, and where none is stipulated within reasonable time.⁷¹

Passing of risk

On the question of the passing of risk, the CISG provides that the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal.⁷² On this matter, the Sale of Goods Act ties the passing of risk to the transfer of property by providing that “the goods remain at the sellers risk until the property therein is transferred to the buyer”.⁷³ This is irrespective of whether delivery has been made or not.

Where the contract relates to goods that are not yet identified, the CISG requires that the goods must first be identified to the contract before they can be placed at the disposal of the buyer, at which point risk would then pass to the buyer.⁷⁴ This can be likened to a sale of future or unascertained goods under the Sale of Goods Act, in which case property would only pass once the goods are ascertained and where they are unconditionally appropriated to the contract.⁷⁵

4. THE CASE FOR ADOPTION OF THE CISG IN KENYA

Should Kenya ratify the CISG?

This section of the paper seeks to make a case for ratification of the convention. Before doing so, let me start by stating that arguments have been put forward, by several commentators, against the ratification of the CISG.

One commentator has argued that the compromise character of the proceedings that led to the CISG forced the drafters to place emphasis on formulations that were acceptable to everyone rather than confronting issues that divide legal regimes.⁷⁶ This resulted in an “apparent” as opposed to “real” unification of international sales law.

It has further been said that the underlying differences between the parties to the CISG have led to conflicting interpretation and application of the unified law by the various legal systems.⁷⁷ Another reason put forward against the adoption of the CISG is that it creates an unnecessary divergence between domestic law on sales and the applicable law on sales. In addition, it has been argued that it leads to legal uncertainty due to the CISG’s broadly formulated rules.⁷⁸ It has also been argued that international trade has developed very successful trade practices and usages which make unified law in this field unnecessary and in fact irrelevant.⁷⁹

That aside, many arguments have been advanced for the ratification of the CISG. Consideration will now be given of the reasons why Kenya should ratify the convention.

1. Certainty as to applicable law in international trade

In any international sales transaction, a minimum of two legal systems are involved: that of the seller’s country and that of the buyer’s country. The question that the rules of private international law have had to grapple with, over the years, is which of the laws should be applicable where a dispute arises and where provision for this has not been made by the contract between the parties. Say for instance a Kenyan buyer wishes to purchase a fleet of vehicles from Japan. In the event of a dispute, leaving the question of the forum aside, should Kenyan or Japanese law be applied in the resolution of the dispute?

In determining the applicable or “proper law” of the contract, various approaches have been used. English courts, for example, have largely relied on the *lex loci contractus* (the place where the contract was made) and the *lex loci solutionis* (the place of performance of the contract) to determine the law applicable to an international sales contract.⁸⁰ A further test for the determination of the proper law was enunciated by Lord Wright as the law with which the contract has the closest and most real connection.⁸¹ In determining the law with the closest and most real connection regard must be had to the place of contracting, the place of performance, the place of residence or business of the parties and the nature of the subject matter of the contract.

The test of “the law with which the transaction has the closest and most real connection” was applied by the East African Court of Appeal in the case of *Karachi Gas Co. Ltd v H. Issaq*.⁸² In the Kenyan case of *Radia v Transocean (Uganda) Ltd*,⁸³ however, the *lex loci contractus* was called upon to determine the proper law. This demonstrates the lack of uniformity in the application of the rules of private international law in Kenya.

The rules of private international law create an unnecessary amount of uncertainty and complexity in determining the applicable law. A businessman would be at the mercy of the courts to determine the law applicable where a dispute arises. The situation may be compounded, where as was the case in *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co*⁸⁴ the court found that two different laws were to be applied to two limbs of the contract.

A Kenyan businessman needs to conduct businesses in an environment that offers certainty, security and simplicity. The CISG seeks to do just that by creating uniform rules to govern international sales.⁸⁵ As one commentator has stated-⁸⁶

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

The rules encompassed in the CISG were developed with international sales in mind as opposed to domestic laws (ours included) which are crafted to serve within the confines of one particular state.⁸⁷ In addition, unlike the ULIS and ULFIS the CISG is formulated in a simple structure and in easy to understand terms.⁸⁸ The CISG has been described as being “simple yet

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complex enough to deal adequately with the intricacies of international trade".⁸⁹

Better still, the CISG is available in six official languages, which are listed as being as authoritative as the English version. This would therefore ensure that language barriers between Kenyan businessmen and their non-English speaking trading partners are rendered irrelevant by providing a common understanding of the transaction, the rights and obligations of the parties and the remedies available.

2. The provisions of the CISG may already apply to Kenyan traders

One very interesting fact is that the CISG may already apply to contracts involving Kenyan businessmen despite the fact that Kenya has not ratified the convention. Article 1 of the convention stipulates that the CISG may apply to a sales contract between parties whose places of business are in different states not just when the states are contracting states⁹⁰ but also when the rules of private international law lead to the application of the law of a contracting state.⁹¹

Assume, for example that a Kenyan businessman contracts with a Ugandan trader for the sale of some commodities. If a dispute were to arise and the proper (applicable) law were found to be the law of Uganda, article 1 of the CISG provides that the CISG would apply. This would be the case even though Kenya has not ratified the convention. This puts the Kenyan trader in a somewhat awkward situation where he is bound by a convention that his country has not ratified and with which he may be hardly familiar.

Practically, therefore, as more states continue to ratify the CISG, it will become more and more applicable to transactions involving Kenyan traders. Ratifying the CISG before this eventuality would ensure that greater awareness is created within the country on its provisions and on the emerging case law.

3. Kenya's trade partners

Surveys conducted by the Central Bureau of Statistics indicate that within Europe, Kenya is primarily engaged in trade with Finland, France, Germany, Italy, Netherlands and the United Kingdom.⁹² In America, Kenya's main trading partners are the United States of America and Canada.⁹³ Of these countries, only the United Kingdom has not ratified the CISG.

The fact that the majority of our main trading partners have ratified the convention is a compelling reason for Kenya to consider ratifying the convention. As mentioned above, in trading with these countries, depending on the rules of private international law, Kenyan businessmen would be subjected either to the different domestic laws of each of these countries or to the provisions of the CISG itself. The Kenyan businessman needs to be assured of the law to which he may be subjected.

4. Regional integration and the need for a harmonized law on trade

Within the region, Kenya is a member of both the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA). Enhancing trade between the member states is an objective of both organizations. Bearing in mind that each of the member states has its own domestic law on sales, there is need to consider one harmonized sales law in both of these organizations.

The CISG, it is submitted, would adequately serve as a unified sales law for the EAC and COMESA and would create the necessary legal framework to facilitate regional trade.

At present, the CISG has been ratified in one of the EAC states (Uganda) and in three of the twenty-three COMESA states (Burundi, Egypt and Zambia).⁹⁴

5. Not too foreign considering our law on contract and sales.

It would not be possible for any uniform law or convention to fully satisfy the desires of one state. The drafting of conventions is a give and take exercise which results in a law that may differ somewhat with the domestic laws of the negotiating states. The CISG is no exception to this. From a Kenyan point of view (and in fact from a common law point of view) the provisions of the CISG are not at great variance with our local law on sales.⁹⁵ It would therefore not be unduly prejudicial for the CISG to be applied to a contract in which a Kenyan businessman was involved as opposed to the application of a foreign law that is fundamentally at variance with Kenyan law. This is the essence of harmonization of law.

6. Participatory process in which we were represented and even signed the convention.

As mentioned above one of the major reasons for the poor acceptability of the ULIS and ULFIS was that they were highly unrepresentative.⁹⁶ UNCITRAL sought to remedy this defect by ensuring broad representation at the Vienna Conference that oversaw the signing of the CISG. Unlike the previous uniform law, the first signatories to the CISG were from virtually all parts of the globe – America, Europe, Asia, Africa. This was a true reflection of the participatory and representative process. It is not clear why Kenya, having been represented at the conference and having even signed the convention at the close of the conference, has yet to ratify the CISG. It is interesting to note that South Africa, though not represented at the conference, has been considering the adoption of the CISG in light of its increasing importance.⁹⁷

5. CONCLUSION

It is not clear why Kenya, and other African states for that matter, have not ratified the CISG despite having signed the final act of the convention at the conclusion of the Vienna Convention. What is clear, however, is that Kenya's participation in the international business arena has continued to grow tremendously in recent years.⁹⁸ Kenya's traders have increasingly relied on international instruments that regulate certain aspects of international sales such as the Incoterms (which are designed for the interpretation of trade terms⁹⁹ and the Uniform Customs and Practice (on payment in international sales)¹⁰⁰ to facilitate international trade. This is evidence enough of the need, in Kenya, for specific rules to guide international sales. Ratification by Kenya of the CISG would fill the gap in the law governing international sales.

Undoubtedly, before any such ratification by Kenya there is need for the Government, through its relevant departments, and Parliament to carefully consider the provisions of the CISG *vis-à-vis* our domestic law on sales. An extensive awareness campaign amongst all interested parties would also be necessary.

Endnotes

- ¹ Abbreviated as the CISG and also referred to as the Vienna Convention. Available at <<http://www.uncitral.org/english/texts/sales/CISG.htm>>. All internet sites on this paper were last accessed on 9th March 2006.
- ² *ibid.* see the preamble to the Convention.
- ³ D'Arcy Leo *et al.*, 2000, *Schmittoff's Export Trade: The Law and*

- Practice of International Trade*, Sweet and Maxwell, London, p. 688.
- 4 Records of the proceedings of the Vienna Conference indicate that Kenya was represented by a Mr. Mathanjuki. Available at <<http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary>>.
- 5 For a full list of the countries that signed the CISG see <<http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary12.html>>.
- 6 A body founded by the League of Nations in 1926 that is in existence even today. See generally: <<http://www.unidroit.org>>.
- 7 Sieg Eiselen, 1996, "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" in 116 Part II *South African Law Journal*, p. 332. This decision was influenced by the presentation, at the first meeting of UNIDROIT, of a proposal by Professor Ernst Rabel, a German comparativist, suggesting the feasibility of and desirability for a uniform law of sale.
- 8 For more on the history see: Winship Peter, 1984, "The Scope of the Vienna Convention on International Sales Contracts" in Galston & Smit eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender.
- 9 *ibid*, p. 1-7.
- 10 In full: The Convention Relating to a Uniform Law on the Formation of Contracts for International Sale of Goods, July 1, 1964, Annex I (Uniform Law on the Formation of Contracts for the International Sale of Goods), 834 U.N.T.S. 171, 185 (1972); Convention Relating to a Uniform law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on International Sale of Goods), 834 U.N.T.S. 109, 123 (1972).
- 11 See: <<http://www.unidroit.org/english/implement/i-64ulis.pdf>> for the status of ULIS.
- 12 See: <<http://www.unidroit.org/english/implement/i-64ulf.pdf>> for the status of ULFIS.
- 13 Eiselen Sieg, note 8 above, p.335
- 14 These included: the scope of application, imbalance in the rights of the buyers and the sellers and complexity of the conventions.
- 15 1968 UN Yearbook, p. 838.
- 16 Winship Peter, 1984, "International Sales Contracts under the 1980 Vienna Convention" in 17 *Uniform Commercial Code LJ*, p. 58. The United States cited the reasons of failure to participate in the making of conventions and material defects in the conventions.
- 17 See generally UNCITRAL's website <<http://www.uncitral.org>>.
- 18 UNCITRAL's mandate available at <<http://www.uncitral.org/uncitral/en/about/origin.html>>.
- 19 Kasteley Amy, 1988, "Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention" in 8 *Northwestern Journal of International Law and Business*, p. 578-582.
- 20 See note 5 above on Kenya's representation at the conference.
- 21 See note 6 above for the list of signatories.
- 22 As provided for under article 99 of the CISG. The final acceptance of

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the CISG was delayed because many states waited for the ratification by the United States before committing themselves. The United States acceded to the CISG on 11th December, 1986.

²³ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on Contracts for the International Sale of Goods, available at <<http://www.uncitral.org/english/texts/sales/CISG.htm>>.

²⁴ See: <http://www.uncitral.org/uncitral/en/uncitral.texts/sale_goods/1980CISG-status.html> on the status of the CISG.

²⁵ For more on the CISG in Africa see: <<http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=658>>. (Liberia ratified the CISG on 16th September, 2005)

²⁶ *ibid.*

²⁷ Preamble to the CISG – <<http://www.uncitral.org/english/texts/sales/CISG.htm>>.

²⁸ Chapter 31 of the Laws of Kenya.

²⁹ English common law is recognized as a source of law in Kenya *vide* the the Judicature Act, Chapter 8 of the Laws of Kenya, section 5.

³⁰ Article 2 of the CISG

³¹ Section 2(1) of the Sale of Goods Act, Chapter 31 of the Laws of Kenya.

³² Article 3 of the CISG.

³³ Common law classifies contracts for supply of services into contracts for skill and labour and contracts for labour and materials.

³⁴ See the decisions in *Dodd v Wilson* (1946) 2 All ER 691 and *Perlmutter vs Beth David Hospital* 123 NE 2d 792 (1955).

³⁵ Article 11 of the CISG, Section 5 of the Sale of Good Act. Article 11 of the CISG must however be read together with Article 12 of the CISG. Article 12 limits the application of Article 11 where a contracting state has made a declaration under Article 96 in effect seeking to exclude the application of article 11.

³⁶ Article 6(1) of the CISG. This provision reads as follows: “A contract for the sale of goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.” The cases of *Choitram vs Lazar* (1959) EA 157 and *Leslie and Anderson v Kassam Jivraj & Co* (1950) 17 EA 84 revolved around this matter

³⁷ Chapter 23 of the Laws of Kenya.

³⁸ Article 14(1) of the CISG.

³⁹ *ibid.*

⁴⁰ Article 14(2) of the CISG.

⁴¹ *Pharmaceutical Society of Great Britain vs Boots Cash Chemists (Southern) Ltd* (1953) 1All ER 482.

⁴² Article 18(1) of CISG.

⁴³ See Hodgin, R., (1997) *Law of Contract in East Africa*, Kenya Literature Bureau, Nairobi, p. 31-33.

- 44 Article 18(1) of CISG.
45 The case of *Felthouse vs Bindley* (1862) 142 ER 1037 sets out this rule.
46 Article 18(2) of the CISG.
47 *Dunlop v Higgins* (1848) 1 HL Cas 38; *Household Fire and Carriage Accident Insurers Co v Grant* (1879) 4 Exd 216, CA; *Busonga Millers and Industries Ltd v Purshottam Patel Fraser* 22 E.A.C.A. 384 and *Rugnath Gokaldas and Co v M.R. Ghai and Sons* 12 K.L.R. 124.
48 Article 19(1) of the CISG.
49 Article 19(2) of the CISG. Additional or different terms relating to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. Any additional or different terms relating to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially – Article 19(3).
50 See for example the case of *Hyde vs Wrench* (1840)3 Beav. 334.
51 Article 30 of the CISG.
52 Article 35 of the CISG and sections 15 and 16 of the Sale of Goods Act.
53 Article 41 of the CISG and section 14(b)&(c) of the Sale of Goods Act. The CISG extends this right to include rights based on industrial property or other intellectual property.
54 Articles 38 and 39 of the CISG.
55 Section 16 of the Sale of Goods Act.
56 Section 16 (a) – (d) of the Sale of Goods Act.
57 Article 53 of the CISG and section 28 of the Sale of Goods Act.
58 The remedies of the buyer are provided for under articles 45-52 of the CISG, while those of the seller are under articles 61-65 of the CISG.
59 Article 46 in relation to the buyer and article 63 in relation to the seller.
60 Article 45(1) in relation to the buyer and article 61 in relation to the seller.
61 Article 49 in relation to the buyer and article 64 in relation to the seller.
62 See sections 49-54 of the Sale of Goods Act.
63 Article 50 of the CISG.
64 Section 15 and 17 of the Sale of Goods Act.
65 See section 39 of the Sale of Goods Act for the definition of an unpaid seller.
66 Guest, A. *et. al.*, eds., 2003, *Benjamin's Sale of Goods*, Sweet & Maxwell, London, p. 739-816.
67 Section 41 of the Sale of Goods Act.
68 Section 44 of the Sale of Goods Act.
69 section 47 of the Sale of Goods Act.
70 Article 37 of the CISG.
71 Treitel Guenter, 2003, *The Law of Contract*, Sweet & Maxwell, London, p. 753-758.

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- ⁷² Article 69(1) of the CISG.
- ⁷³ Section 22 of the Sale of Goods Act.
- ⁷⁴ Article 69(3) of the CISG
- ⁷⁵ See sections 18 and 20(e)(i) of the Sale of Goods Act.
- ⁷⁶ Rosset Arthur, 1984, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" in *45 Ohio State LJ*, p. 270.
- ⁷⁷ Elisabeth Hayes Patterson, 1986, "United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination" in *22 Stanford Journal of International Law*, p. 278-279.
- ⁷⁸ Eiselen Sieg, note 10 above, p.328.
- ⁷⁹ Eiselen, Sieg, note 10 above, p. 329, quoting a German commentator Hans Grossmann-Doerth, 1930, *Das Recht der Ueberseekauf*, p. 67.
- ⁸⁰ See generally: Clarkson C.M.V. & Hill J., 1997, "*Jaffey on Conflict of Laws*" Butterworths, London.
- ⁸¹ *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* (1938) AC 224 at 240. see also *Bonython v Commonwealth of Australia* (1951) AC 201 at 219
- ⁸² (1965) EA 42.
- ⁸³ (1985) KLR 300
- ⁸⁴ (No.2) (1989) 1 *Lloyd's Rep* 608. In this case, the transaction involved two contracts. The proper law of one of the contracts was held to be English law, while the proper law of the other, was the law of New York. The court was of the view that this distinction would still have applied even though the transaction had been in the form of a single contract.
- ⁸⁵ See the preamble to the CISG, note 28 above.
- ⁸⁶ Ernst Rabel, 1938, "Draft of an International Law of Sales" in *5 University of Chicago LR*, p. 546.
- ⁸⁷ Eiselen Sieg, note 10 above, p. 339.
- ⁸⁸ One of the criticisms against ULIS and ULFIS was that they were unnecessarily complex.
- ⁸⁹ Kazauki Sono, 1984, "Uncitral and the Vienna Sales Convention, in *18 International Lawyer* 7,p. 13. see also Kazauki Sono, 1986) "The Vienna Sales Convention: History and Perspective" in Petar Sarcevic & Paul Volken eds., *International Sale of Goods: Dubrovnik Lecturers*, Oceana, Ch. 1, 1-17, p. 14, where the author states that a reading of the CISG reveals that "the Convention is clear and easy to understand and, most importantly, it will be realized that the rules are after all full of common sense and spelled out in businessmen's language."
- ⁹⁰ Article 1(1)(a) of the CISG.
- ⁹¹ Article 1(1)(b) of the CISG. For more on this provision see: Reczei Laszlo, 1981, "Area of Operation of the International Sales Conventions" in *29 American Journal of Comparative Law*, 513-522.
- ⁹² statistics available from the Central Bureau of Statistics, 2006, Ministry of Planning and Development at <http://www.cbs.go.ke/>. See for example: import statistics available at this site.

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- ⁹³ *ibid*
- ⁹⁴ <<http://www.unisa.ac.za/Default.asp?Cmd=ViewContentID=658>>
- ⁹⁵ for more details see part III above.
- ⁹⁶ See Part II above.
- ⁹⁷ See note 26 above on the status of the CISG in Africa.
- ⁹⁸ See note 96 above.
- ⁹⁹ Incoterms 2000, ICC Official Rules for the Interpretation of Trade Terms, ICC Publication No. 560, New York.
- ¹⁰⁰ Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce.