THE ATTITUDE OF OHADA LAW COUNTRIES TOWARDS THE CISG*

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ABSTRACT

Disparities in national laws are likely to result in uncertainty which, in turn, creates obstacles to international commerce. It is acknowledged that strong investment flows cannot be achieved without a secure legal and commercial environment. Mindful of such a need, states decided to harmonise sales law internationally. To this end, in 1980 they adopted the United Nations Convention on Contracts for the International Sale of Goods known as the Vienna Sales Convention or the CISG. The CISG has led a number of countries, including the Organisation for the Harmonisation of Business Law in Africa (OHADA) law states, to modernise their local sales law. However, only three of 17 countries that constitute the OHADA community have ratified the CISG. OHADA law countries give the impression of favouring a more regional approach to the unification of sales law rather than the CISG's global approach by implementing a local Commercial Uniform Act. Their indifference towards the CISG is not without consequences for commerce in the OHADA region. This article seeks to demonstrate that the lack of ratification of a universal convention, as for example the CISG, poses a danger to commercial dealings. It also intends to show that the CISG is not hostile to regional uniform sales laws of the OHADA Commercial Uniform Act type. It concludes that OHADA countries do not need to be afraid of their acceptance of the CISG and recommends that it be ratified.

Keywords: business law harmonisation, CISG, Commercial Uniform Act, OHADA law, uniform sales law

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INTRODUCTION

The current harmonisation of international sales law is one of the consequences of the establishment of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980. The CISG intends to improve uniform laws on the international sale of goods in order to give wider acceptance to international trade law. When the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966, it was recognised that disparities in national laws created obstacles to international trade. In order to prevent those obstacles, UNCITRAL was assigned the task of promoting the progressive harmonisation and unification of international trade law. Scholars (Faria 2009; Sollund 2007: 1; Butler 2006: 1) have emphasised this by saying that the role of UNCITRAL

> 'consists in unifying and harmonising international trade law … in order to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis' (Faria 2009: 5).

Because of this purpose, Castellani (2011: 28) describes UNCITRAL as 'the core body in the UN system for the modernisation and the harmonisation of international trade law'. It was under the auspices of UNCITRAL that the CISG was adopted in Vienna on 11 April 1980 as an appropriate instrument to reduce or remove legal obstacles in international commerce. Given the number of states that have ratified it – approximately 80 – and the number of available judicial decisions dealing with the CISG,[1] this convention appears to have achieved the objective of harmonising international trade law.

Despite the value conferred on its rules and principles internationally, the influence of the CISG remains less widespread in Africa[2] and, in particular, within the Organisation for the Harmonisation of Business Law in Africa (OHADA) region. This statement is justified by the fact that only three of 17 countries that form the OHADA community, namely Benin, Gabon and Guinea, are contracting states to the CISG. OHADA countries give the impression of favouring a more regional approach to the unification of sales law rather than the CISG's global approach by implementing a local Commercial Uniform Act which entered into force in 1997. Such an attitude leaves one to ask whether the CISG is hostile to regional business instruments. The answer to this question is certainly negative. In effect, when the drafters of the CISG adopted the Convention in 1980, they anticipated risks of conflict between the provisions of the CISG and those of regional business instruments of the kind of the OHADA Commercial Uniform Act. To this end they

1 The Pace Institute of International Commercial Law website currently reports approximately 2 500 cases and 10 000 case annotations dealing with the CISG. Available at <http://www.cisg.law.pace.edu/cisg/text/ caseschedule.html> (accessed 21 March 2014).

2 The CISG has been adopted in 11 African countries: Benin, Burundi, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Mauritania, Uganda and Zambia.

provided a number of provisions favourable to the co-existence of the CISG with regional sales instruments such as the OHADA Commercial Uniform Act.

In the light of what has been said thus far, the purpose of this article is to demonstrate that, by distancing themselves from the Vienna Convention, OHADA member states not only isolate themselves from the international trade community, but also place business persons from that region at a disadvantage in international commerce. Because the drafters of the CISG have provided a number of specific provisions which facilitate an easy co-existence of the Convention with regional uniform sales laws, this article concludes that OHADA member states do not need to be afraid of their acceptance of the CISG, and therefore recommends that they ratify it.

After outlining a brief framework of OHADA commercial and sales laws, this article analyses the influence of the CISG on the OHADA Commercial Uniform Act, explains the scope for a peaceful cohabitation between that Act and the CISG, and discusses the effects of OHADA states' indifference towards the CISG.

OHADA COMMERCIAL- AND SALES-LAW FRAMEWORK

Patterns of commercial activity have substantially influenced African history and the interaction of Africans with foreign economic operators. Recognised as one of the continents empowered with vast resources, Africa naturally attracts foreign investors. Its legal system, however, has not always favoured foreign investment: most African countries have suffered from outdated or incomplete legal systems[3] which, in addition, have varied from one country to another (Martor et al 2002: 1). The problem of the diversity of laws in Africa was likely to give rise to uncertainty which, in turn, discouraged investment. *Apropos* this, there is unanimity that strong investment cannot be achieved without a secure legal and commercial environment (Martor et al 2002: 1; Castellani 2008: 115)**.** Mindful of such a need, and in the interests of greater co-operation among African states, 14 countries from West and Central Africa[4] decided to harmonise their legal systems in the area of business law. To this end, they adopted the treaty creating OHADA in Port Louis, Mauritius, on 17 October 1993. That treaty entered into force on 18 September 1995 after a concur-

3 Before the establishment of OHADA, generally known by its French translation as *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, almost all members maintained contract laws left to them as a legacy of the colonial powers. As a result of this, contract and commercial law reflected the French Civil Code tradition, except for Guinea Bissau and Equatorial Guinea. At that time, only a few countries had adopted a new law of contracts or modified their Code of Obligations (Tchunkam 2009: 62; Fontaine 2008: 633; Coetzee & De Gama 2006: 15; Dickerson 2005: 19; Santos & Toe 2002: 359).

4 The original 14 OHADA parties were Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo Brazzaville, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo. Guinea and Guinea-Bissau joined thereafter.

rent ratification by 14 countries (art 52, s 2; Dickerson 2005: 19; Diallo 2007: 20; Mouloul 2009: 18). From 14 original members, the OHADA Treaty has currently been ratified by 17 countries, the Democratic Republic of the Congo (DRC) being the last nation to adopt it.

With regard to its ambit, OHADA is a regional organisation the purpose of which consists of providing member countries with a harmonised set of business laws by elaborating on and adopting simple and modern common rules that have been adapted to the African economic situation (art 1). Many commentators (Tumnde 2009: 1; Dickerson 2005: 17; Tchunkam 2009: 62; Martor et al 2002: 59; Diallo 2007: 19) have found in this broad ambition the intention of the organisation to make member states more attractive to foreign investors from the developed world and, consequently, to increase commercial transactions in Africa.

According to arts 5 and 6 of the treaty, OHADA has legislative power. Its statutes are prepared by the Permanent Secretariat in association with the governments of the member states. They are adopted by the Council of Ministers on the advice of the Common Court of Justice and Arbitration. These statutes are called 'Uniform Acts', and they are 'exclusively business-related' (Dickerson 2005: 20; Coetzee & De Gama 2006: 15). Up to the present time, nine Uniform Acts have been enacted under OHADA's sponsorship. These include: the General Commercial Law Act; the Corporation Law Act; the Security Law Act; the Arbitration Law Act; the Carriage of Goods by Road Act; the Bankruptcy Law Act, and the Accounting Systems Act.

As far as the Commercial Uniform Act is concerned, the OHADA Permanent Secretary (2011) has remarked that, before the adoption of the current version of that Act, matters relating to general commercial law and other connected issues were determined by the 1807 French Commercial Code introduced in the former French colonies from December 1850. Since this code did not undergo significant amendment after independence, on the one hand, and given that improvements encountered in France were not gradually extended to its former colonies, on the other, the commercial law of the Francophone countries became increasingly outdated and obsolete. In effect, until the 1980s, only a limited number of countries located in the current OHADA region had tried to modernise their law of obligations, in general, and their commercial law, in particular.[5] For almost all the other countries, commercial issues were determined by a sparse number of regulations dating back to colonial times. Being aware of the fact that a harmonised general commercial

5 That was the case with Senegal (Civil and Commercial Obligations Law of 10 July 1963); the DRC (Commercial Registry Decree of 6 March 1952 as amended by Law-ordinance No 76-025 of 7 February 1979); Burkina Faso (Commercial Activities Ordinance of 26 August 1981); Guinea-Conakry (Civil Code of 1983); Central African Republic (Commercial Regulation of 3 October 1983); Mali (Obligations General Rules Law No 87-31/AN-RM of 29 August 1987); and Congo Brazza (Commercial Laws of April 1981 and September 1990).

law should improve commercial dealings and secure economic operators in their transactions (Tumnde 2009: 31), OHADA members make it a priority to regulate trade-law matters. To this end they adopted a Commercial Uniform Act during a meeting convened in Cotonou, Benin, on 17 April 1997, after approximately four years of negotiations. That Act entered into force on 1 January 1998.

It should be noted that, during the preparation and adoption of the 1997 OHADA Commercial Uniform Act, only one of the OHADA states – Guinea – was party to the CISG. In addition to this, there were no specific provisions dealing with commercial sales in the African Francophone region. The only rules applicable in this regard were the provisions of Title VI of Book III of the 1804 Napoleonic Civil Code that are arts 1582–1701, regulating sales contracts. Commercial sales were, in other words, regulated, at that time, by the same rules as consumer sales. It is clear that the application of civil-law rules to commercial transactions was generally inappropriate for developing economies. For that reason, as stated by the OHADA Permanent Secretariat (2011: 14),

> '[a]s most major international trading countries have … acceded to the Vienna Convention, it was essential to introduce in the positive law of the contracting states to the Treaty a law that is as close as possible to the provisions applicable now in most of the states.'

As a result of this, the rules and principles of the Vienna Sales Convention were imported into Africa so that the OHADA Commercial Uniform Act owes a significant debt to the CISG.

SIGNS OF THE CISG IN THE OHADA COMMERCIAL UNIFORM ACT

General comments

When it was adopted in 1997, the initial version of the Commercial Uniform Act had six Books, the fifth of which dealt with commercial sales. Since 2010, the Commercial Uniform Act has comprised nine Books, among which Book VIII regulates commercial sales (arts 234–302). With regard to its field of application, arts 1 and 234 of the Commercial Uniform Act provide that the Act applies to contracts of sale of goods between business persons on condition that the parties have their place of business in one of the OHADA member states or when conflict-of-law rules lead to the application of the law of one OHADA country. As can be observed, art 234 bears a strong resemblance to art 1(1) of the CISG by which

> '[The CISG] 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.'

It is evident that Book VIII of the Commercial Uniform Act is vital in matters regarding domestic sales and international sales contracts alike. Its provisions govern both national and international sales transactions; they are up to date with regard to contemporary commercial-law requirements (Coetzee & De Gama 2006: 15; Santos & Toe 2002: 361; Castellani 2008: 115; Schwenzer & Hachem 2010; Bonell 2010).

As stated earlier, Book VIII of the Commercial Uniform Act is primarily based on the CISG. Compared to the latter, that Act does not expressly define what constitutes a contract of sale (Diallo 2007: 28; Santos & Toe 2002: 339; Fieni 2012: 22). In the context of the CISG, courts[6] and scholars (Kröll, Mistelis & Viscasillas 2011: 28; Schlechtriem & Schwenzer 2010: 31; Kritzer & Eiselen 2012: s 84:15; Ott & Matthey 2010: 22; Perovi 2011: 181) have admitted that a definition of a contract of sale may be implied from the provisions of arts 30 and 53 dealing with the obligations of the seller and the buyer. Article 30, on the one hand, obliges the seller to 'deliver the goods, hand over any documents relating to them and transfer the property in the goods'. Article 53, on the other hand, requires the buyer to 'pay the price for the goods and take delivery of them'. Article 250, s 1, and art 262 of the Commercial Uniform Act duplicate arts 30 and 53 of the CISG. Accordingly, sales contracts covered by both the CISG and the OHADA Commercial Uniform Act are contracts in which the seller is bound to deliver the goods sold and transfer the property in them, and the buyer is obliged to pay the price and accept the goods.[7]

6 See Italy 10 January 2006 District Court Padova *Merry-go-rounds* case (<http://cisgw3.law.pace.edu/cases/ 060110i3.html>); Austria 10 November 1994 Oberster Gerichtshof (Supreme Court) *Chinchilla Furs* case (<http://cisgw3.law.pace.edu/cases/941110a3.html>) (both accessed 25 March 2014). Netherlands 1 November 2001 *Rechtbank Rotterdam Nederlands Internationaal Privaatrecht* 2002 No 114; Switzerland 11 March 1996 *Kantonsgericht Wallis Clay*; Italy 26 November 2002 Tribunale di Rimini *Porcelain Tableware case*, CISG-Online 737 (Pace); in UNCITRAL 2012, 6.

7 In the context of the CISG, see Italy 16 February 2009 Tribunale di Forli *Cisterns and Accessories* case, CLOUT case No 867 (<http://cisgw3.law.pace.edu/cases/090216i3.html>); Italy 11 December 2008 Tribunale di Forli, CLOUT case No 916 (<http://cisgw3.law.pace.edu/cases/081211i3.html>); Italy 11 January 2005 Tribunale di Padova *Ostroznik Savo v La Faraona soc coop arl* (<http://cisgw3.law.pace.edu/cases/050111i3.html>) (accessed 25 March 2014). Italy 25 February 2004 Tribunale di Padova, CLOUT case No 608 (<http://cisgw3.law.pace.edu/cases/040225i3.html>); Italy 26 November 2002 Tribunale di Rimini *Al Palazzo Srl v Bernardaud di Limoges SA* case (<http://cisgw3.law.pace.edu/cases/021126i3.html>); Switzerland 25 February 2002 Kantonsgericht Schaffhausen (<http://cisgw3.law.pace.edu/cases/020225s1.html>); in UNCITRAL 2012, 6.

Compared to their equivalent civil-code provisions (arts 1582–1701 of the Napoleonic Civil Code), the Commercial Uniform Act articles dealing with commercial sales contracts (arts 234–302) appear, however, to have restricted the field of application of the notion of 'commercial sales'. Such restriction results, first, from the skills required from parties who may conclude the contract, that is individual economic operators and commercial companies (arts 234 and 235(*a*) of the Act) and, secondly, to the sales contract subject-matter, which is the goods. Previously, in accordance with art 1598 of the Napoleonic Civil Code, anything subject to commercial exchange dealings could be sold, except where its alienation was legally prohibited.

In addition to the similarities indicated above, the Commercial Uniform Act has also borrowed from the CISG rules and principles regulating the formulation of contracts (arts 241–249), those determining the obligations of each party (arts 250–274) and the remedies for breach of contract (arts 281–293). That Act has also modernised the rules governing the effects of contractual agreements, namely the rules relating to the transfer of ownership and the transfer of loss of the goods bought in the same way as the CISG does. Each of these issues is briefly commented on in the following sections.

Influence with regard to the formation of contracts

The CISG is based on the offer-and-acceptance method of contracting. In contrast, the initial approach to the making of a contract under the OHADA regional law lacked specific provisions dealing with the process of contracting. This situation was the consequence of the fact that the French Civil Code, then applicable in former French African colonies, is silent on the process of contracting. The chapter on the formation of contracts has sometimes been described as the weakest section of the Civil Code. As Wéry (2012: 21) has noted:

> 'One of the weakest parts of the [Civil] Code is the one pertaining to the conclusion of contract. … There are … no provisions about what the doctrine calls the 'dynamic approach of the conclusion', i.e. the negotiation of the contract and the process of its conclusion (offer and acceptance, precontractual duties, and so on).'

Montero (2004: 61) explains that when the 1804 Napoleonic Civil Code on which the former OHADA law was based was drafted, 'the consensual agreement principle was so well-known in the Old Law that the civil code did not find it useful to regulate it expressly.'

The advent of the OHADA Commercial Uniform Act has resulted in a new approach. Influenced by the CISG, the Act is based on the offer-and-acceptance model of contracting. That Act has provided a number of requirements for the conclusion of contracts, among which is the agreement between contracting parties or, more specifically, the meeting of an offer and an acceptance.

First, the offer constitutes one of the most important steps in the process of concluding a contract. Inspired by arts 14–17 of the CISG, arts 241 and 242 of the Commercial Uniform Act make it clear that an offer must reach the offeree in order to bind the author, which means that, from the time of its being sent until it is accepted, the offer may be revoked except when it is stated that it is irrevocable.

Secondly, with regard to acceptance, arts 243–247 of the Commercial Uniform Act dealing with that topic give the impression of having duplicated arts 18–22 of the CISG. Compared to the CISG, these provisions define acceptance, determine the mode of its communication and deal with the time and the effectiveness of the acceptance. In addition, the same provisions insist on the fact that an acceptance must resemble the offer; otherwise it will amount to a counter-offer. The only major difference is that the Commercial Uniform Act does not contain a provision similar to art 19(3) of the CISG, which expressly enumerates the terms that would qualify as material modifications. Should the Act have contained such a provision, this could contradict art 245, s 2, the purpose of which is to facilitate a quick conclusion of the contract. With regard to the moment when a contact is formed, likewise, art 244, s 1 of the Commercial Uniform Act appears to have duplicated art 18(2) of the CISG by opting for the reception theory.[8] Therefore, in both legal systems a contract is formed when the acceptance reaches the offeror.

Influence with regard to the obligations of the parties

Once a contract has been legally established, the next step consists of understanding what the obligations of the parties are. In conformity with the party autonomy principle, the obligations of the parties are governed, on most occasions, by the terms they have accepted in the contract (Hartkamp 1994: 201; Morrissey & Graves 2008: 147). In the case of silence, default rules, as provided by arts 30–88 of the CISG and arts 250–274 of the Commercial Uniform Act, will govern the contract.

Generally speaking, the seller has, under the CISG (arts 30–44) and OHADA law (arts 250–261 Commercial Uniform Act), three main obligations: to deliver the goods, to deliver goods in conformity with the contract, and guarantee those goods against a third party's claims. With regard to the buyer, its obligations are also summarised, in both legal systems, in three activities: the payment of the price at the right place and time; taking delivery of the goods; and the examination of the goods in due time in order to notify the seller for lack of conformity, should that be necessary.

8 The reception theory is one of theories developed in determining the right time when a contract between people not in each other's presence is formed. That theory focuses on the delivery of the acceptance so that a contract is concluded when the acceptance is delivered to the offeror's address regardless of its receipt (Quinot 2006: 74; Eiselen 1999: 21; Owsia 1994: 551–562).

Under the chapter regarding the obligations of the parties, the influence of the CISG on the Commercial Uniform Act is evident in many ways. First, the Commercial Uniform Act has codified requirements such as those of quality, quantity, description and packaging which were formerly based on case law (art 255, s 1). The same Act has, likewise, introduced into OHADA law countries a specific documentary obligation (arts 250 and 254), established an autonomous conformity obligation distinct from the delivery, and clarified the obligation of the seller to deliver goods free from the claims of third parties (art 260 of the Commercial Uniform Act and art 41 of the CISG). Because of the influence of the CISG, similarly, the civil-law principle relating to the place for payment has changed so that it is no longer the seller who seeks out the buyer for payment, but the reverse (art 266 of the Commercial Uniform Act and art 57 of the CISG).

In contrast to the CISG, however, the Commercial Uniform Act has maintained a double warranty on the part of the seller, namely the guarantee of conformity and the guarantee against latent defects, instead of a single concept including both guarantees. The Act stipulates that the seller is liable for both patent and latent defects (arts 258 and 259; *contra* art 35 of the CISG). The Act, furthermore, does not expressly provide for the obligation of the seller with regard to intellectual property rights in the way the CISG does (art 42).

All of these situations constitute gaps that, if not filled, are likely to weaken the security and certainty of commercial dealings in the OHADA region. For greater certainty, adherence to the provisions of the CISG is recommended.

Influence with regard to remedies for breach of contract

According to art 45 of the CISG, if the seller fails to perform any of its obligations under the contract or the CISG, the buyer may exercise the rights provided for in arts 46–52 of the convention and, in addition to that, claim damages as provided for in arts 74–77. The same rights are also conferred on the seller in terms of art 61 should the buyer fail to fulfil its obligations. It is specifically stipulated that the buyer or the seller, depending on the case, is not deprived of any rights it may have to claim damages when exercising its right to any of the other remedies.

Remedies for breach of the contract of sale as summarised above are regulated under OHADA law by arts 281–300 of the Commercial Uniform Act. Inspired by the CISG, these provisions pursue the same objective as those of the Vienna Convention, with the difference that the Commercial Uniform Act remedies may be settled only in court (art 281, s 1). This differs from the private declaration provided for in art 49 of the CISG. Under the ambit of the Commercial Uniform Act, private declarations are made on the understanding that a party who makes use of such a remedy does so at its own risk (art 281, s 2). Those provisions are intended, among other things; to maintain the contract instead of annihilating it. Of course the Commercial Uniform Act has reinforced traditional remedies which include specific performance, avoid-

ance, damages and, sometimes, the reduction of the price. Beyond these, innovations introduced in this regard include the suspension of the contract, the right to demand the repair or replacement of non-conforming goods, and the fixing of an additional period of time (arts 283, 285 and 286 of the Commercial Uniform Act, similar to arts 47 and 63 of the CISG), rights which were not provided for by the previous regime. Likewise, the notion of fundamental breach, as dealt with by art 281, s 2 of the Commercial Uniform Act, is borrowed from art 25 of the CISG.

Influence relating to the transfer of property and loss

Before the advent of the Commercial Uniform Act, the transfer of possession and risk was supposed to take place concomitantly with the transfer of ownership when there is an exchange of consent. That situation was the consequence of art 1583 of the French Civil Code, which states that '[the sale] is completed between the parties and ownership is automatically acquired by the buyer as soon as they have agreed upon the thing sold and the price, although that thing has not yet been delivered nor the price paid'.

The Commercial Uniform Act has been modernised by locating the moment of the passing of property and risk at the time of delivery instead of the moment the sale is made (arts 275–280, similar to arts 66–70 of the CISG). In other words, the Commercial Uniform Act has improved the situation by fixing the transfer of property and the passing of risk time at a moment different from the conclusion of the contract, namely the date of taking delivery. It is not surprising, however, that parties postpone the transfer of ownership of the goods by virtue of the retention of title clause in order to secure the seller's claim for payment (art 276 of the Commercial Uniform Act). Such a decision is legal.

In brief, compared to the CISG, the Commercial Uniform Act is in line with contemporary commercial-law requirements. It regulates the conclusion of contracts by means of offer and acceptance, and it balances the rights and obligations of sellers and buyers. With regard to this, Magnus (2012: 4) remarks that the Commercial Uniform Act 'provides for rules on commercial sales *which widely copy the CISG*' (emphasis added). The learned author highlights the fact that 'a modified CISG has been made the sales law among and in the OHADA States'. Is this the reason why OHADA-law countries are indifferent to the Vienna Convention? The answer to this question is obviously negative because, as discussed below, the CISG contains provisions that promote its harmonious co-existence with regional sales instruments.

SCOPE FOR PEACEFUL COHABITATION BETWEEN THE CISG AND THE COMMERCIAL UNIFORM ACT

It is evident that the Commercial Uniform Act does not conflict with ratification of the Vienna Sales Convention by OHADA-law countries. There are specific provisions within the CISG which accord with its coexistence with other regional uniform sales laws just as Book VIII of the Commercial Uniform Act does. These provisions include arts 6, 90, 92 and, mainly, art 94.

Although a situation in which the CISG is excluded is rare in practice owing to its modernity and suitability for international contracts (Brunner 2013: 112), its art 6 allows contracting parties to opt in or out of any provision of the CISG.[9] This means that, even if countries located in the OHADA region come to ratify the Vienna Sales Convention, traders established in the region will retain their freedom to choose the law governing their contracts. They could, therefore, select the CISG freely or not do so. If they exclude the CISG from their transactions, the provisions of Book VIII of the Commercial Uniform Act will apply because, by reference to art 10 of the OHADA Treaty, all Uniform Acts are mandatorily applicable in every OHADA country.

Article 90 of the CISG relates to any conflict between conventions. It states that the CISG 'does not prevail over any international agreement which has already been or may be entered into'. In so ruling, the provision under consideration entails that, where the seller and buyer have their respective place of business in member countries of a regional convention containing matters dealt with in the Vienna Convention, the applicability of the CISG is displaced in favour of that regional sales instrument. The only condition required is for sellers and buyers to be established in states which are party to those regional agreements. Commentators (Ferrari 2012: 79; Kröll, Mistelis & Viscasillas 2011: 1191; Schlechtriem & Schwenzer 2010: 1174; Flechtner 2009: 694) have said, in this regard, that the purpose of art 90 is to avoid any conflict between the CISG and, among other agreements, regional sales instruments.

It was mentioned in section 2 above that Book VIII of the Commercial Uniform Act deals with commercial sales matters identical to those of the CISG. If OHADA members were, therefore, to adopt the Convention, that Book would continue to have the force of law for contracts concluded between trade partners situated in the OHADA community. For those contracts negotiated with parties established outside the OHADA region, however, the CISG will apply.

Article 92(1) authorises contracting states to exclude one or the other of the Convention's two main Parts, meaning Part II dealing with the 'Formation of Contract' or Part III governing 'The Rights and Obligations of the Parties'. Consistent with

9 OHADA law does not provide for such an option. In the OHADA legal system, all Uniform Acts are directly and compulsorily applicable in any member state pursuant to art 10 of the OHADA Treaty.

this provision, a country may declare, at the time of accession, that a regional instrument such as the OHADA Commercial Uniform Act, will prevail over the CISG for matters relating either to the formation of contract or to the rights and obligations of parties. Of course, an art 92(1) reservation may sometimes be inadequate to guarantee the application of a regional instrument, because art 92(2) denies the status of CISG member states to countries which have made use of the reservation. This is the case simply because nations which have exercised the right provided by art 92 are considered to be non-CISG contracting states, and the CISG may still prevail over the Commercial Uniform Act with regard to countries belonging to both OHADA and the CISG – as, for example, Benin, Gabon and Guinea. Even though the CISG may govern in respect of the part not excluded, nevertheless, where conflict-of-law rules lead to the application of the law of a reservation country, domestic commercial law, constituted by Book VIII of the Commercial Uniform Act, will apply.

Finally, art 94(1) allows CISG member states with the same or closely related legal rules to declare that the Convention will not apply to contracts concluded between parties established in such countries. Applied to the OHADA area, art 94(1) approves the exclusion of sales contracts governed by Book VIII of the Commercial Uniform Act from the application of the CISG. As Castellani (2008: 115) has stated, art 94(1)

> 'is particularly important as it provides reassurance that under Treaty law and the CISG provisions, OHADA Acts and the CISG are fully compatible and their interaction ensures maximum harmonisation both at the global and at the local level'.

Ferrari (2012: 94) adds to this by saying that art 94(1) is 'the most relevant CISG provision', much more so than arts 90 and 92(1), because it allows the declaration to be made 'at any time' during or after accession.

Succinctly, then, in keeping with art 94(1), OHADA countries may agree legally to prefer the Commercial Uniform Act to prevail among themselves and apply the CISG only to contracts concluded with parties from outside the OHADA community. From the provisions discussed above, it is clear that OHADA countries would not have to fear accession to the CISG. The Commercial Uniform Act and the CISG may, and can, legally be a good match.

EFFECTS OF DISTANCING FROM THE CISG

It was stated in section 3 above that the geographic sphere of application of the OHADA Commercial Uniform Act is conditional upon whether a party is established in the territory of an OHADA member state. That sphere is currently limited to 17 member countries. Of course, in terms of art 53 of the Treaty, OHADA is an open organisation, the membership of which is open to any African Union (AU) member state that is not an original signatory to the treaty. The same provision adds that the

membership status is also extended to non-AU member countries invited to accede by the common consent of all the existing parties.

Despite such a comprehensive stated ambition, this is, however, yet to happen. As a result, OHADA remains a regional community, the law of which is at present limited to 17 member countries, whereas the Vienna Convention is a universal instrument applicable currently in 80 countries. It is obvious that, considering the prestige that the Convention enjoys worldwide, it ought to be preferred by every country. It is, therefore, to be regretted that only three of the OHADA countries are contracting states to the CISG, leaving 14 still outside the Treaty. The indifference of OHADA members towards the CISG confirms Ferrari's (2008: 415) opinion that 'some countries simply favour a more regional – rather than the CISG's global – approach to the unification of sales law, as they believe that this will benefit intra-regional commerce more'. The learned author deplores, in particular, the attitude of the OHADA member states towards the CISG.

It is clear that international sales are in need of a legal system that can apply within a large sphere of influence rather than being limited to some countries only. The fact that many OHADA countries choose to distance themselves from the CISG is, therefore, not without consequences for commerce in the OHADA region. By adopting such a stance, OHADA members isolate themselves from the international trade community and place dealers from that region at a disadvantage in international commerce.

Similarly, the fact that many OHADA countries have not yet acceded to the Vienna Sales Convention does not completely exclude the applicability of the CISG to sales contracts concluded with parties established in that region. As mentioned in section 3 above, art 1 of the Vienna Convention offers two ways in which the CISG should be implemented, namely through either its autonomous or its indirect applications. As far as the second method is concerned, art 1(1)(*b*) of the CISG envisages the possibility of the CISG applying in non-contracting states when 'the rules of private international law lead to the application of the law of a Contracting State'. The application of art 1(1)(*b*) above then puts traders in a position where they could be bound by a Convention to which their countries have not yet acceded and which they may also not know about. Owing to the fact that the determination of conflict-of-law rules may be complex, OHADA countries would do well to ratify the CISG.

CONCLUSION

The OHADA Commercial Uniform Act has the merit of updating all previous provisions dealing with commercial sales in the OHADA region, and is more favourable for the work of legal innovation. Inspired by the CISG, the Commercial Uniform Act has significantly improved the law of sale in the OHADA region, law which was, for a long time, based on colonial regimes. This improvement does not, however,

conflict with an eventual ratification of the CISG, which is nowadays considered to be the world sales law. Because the lack of ratification of a universal convention, as for example the CISG, has the potential to put commercial dealings in danger, on the one hand, and because the CISG has provided specific provisions that favour its coexistence with regional sales instruments, on the other, it is the strong recommendation of this article that OHADA countries now consider ratifying the Vienna Sales Convention in order to promote greater legal security.

REFERENCES

Bonell, MJ. 2010. The CISG, European contract law, and the development of a world contract law. Available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell4.html> (accessed 20 March 2014).

Brunner, C. 2013. Contrat de vente soumis à la CVIM. In S Marchand, C Chappuis & L Hirsch (eds) *Recueil de Contrats Commerciaux: Modèles en Français et en Anglais Commentés Selon le Droit Suisse.* Bâle: Helbing Lichtenhahn.

Butler, A. 2006. *A Practical Guide to the CISG: Negotiations through Litigation*. New York: ASPEN Publishers.

Castellani, LG. 2008. Ensuring harmonisation of contract law at regional and global level: The United Nations Convention on Contracts for the International Sale of Goods and the role of UNCITRAL. *Revue de Droit Uniforme* 13: 115–126.

Castellani, LG. 2011. The contribution of UNCITRAL to the harmonization of international sale of goods law besides the CISG. *Belgrade Law Review* 3: 28–38.

Coetzee, J & De Gama, M. 2006. Harmonisation of sales law: An international and regional perspective. *VJ* 10: 15–26.

Diallo, M. 2007. *La Vente Commerciale en Droit OHADA.* Paris: ARNT.

Dickerson, CM. 2005. Harmonizing business laws in Africa: OHADA calls the tune. *Columbia Journal of Transnational Law* 44: 17–73.

Eiselen, S. 1999. Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980. *EDI Law Review* 6: 21–46.

Faria, JAE. 2009. Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage? *Unif L Rev* 5–34.

Ferrari, F (ed). 2008. *The CISG and its Impact on National Legal Systems*. Munich: Sellier European Law Publishers.

Ferrari, F. 2012. CISG and OHADA sales law or the relationship between global and regional sales law. In U Magnus (ed) *CISG vs Regional Sales Law Unification with Focus on the New Common European Sales Law.* Munich: Sellier European Law Publishers.

Fieni, P. 2012. Droit commercial général dans l'espace OHADA: Etude comparative de l'ancien et du nouvel Acte Uniforme. *Actualités Juridiques Edition Economique* 3: 22–50.

Flechtner, HM (ed). 2009. *Honnold's Uniform Law for International Sales under 1980 United Nations Convention*. Austin: Kluwer Law International.

Fontaine, M. 2008. Explanatory note to the preliminary draft OHADA Uniform Act on Contract Law. *Unif L Rev* 13: 633–662.

Hartkamp (ed). 1994. *Towards a European Civil Code*. Dordrecht: Martinus Nijhoff Publishers.

Kritzer, AH & Eiselen, S (eds). 2012. *International Contract Manual Vols 4 and 5*. West: Thomson Reuters.

Kröll, S, Mistelis, L & Viscasillas, PP (eds). 2011. *UN Convention on Contracts for the International Sale of Goods (CISG)*. München: CH Beck Hart Nomos.

Magnus, U (ed). 2012. *CISG vs Regional Sales Law Unification with Focus on the New Common European Sales Law*. Munich: Sellier European Law Publishers.

Martor, B, Pilkington, N, Sellers, DS & Thouvenot, S. 2002. *Business Law in Africa: OHADA and the Harmonization Process*. London: Eversheds.

Montero, E. 2004. La formation du contrat depuis le code civil de 1804: Un régime en mouvement sous une lettre figée. In P Wéry (ed) *Le Droit des Obligations Contractuelles et Le Bicentenaire du Code Civil*. Brussels: La Charte.

Morrissey, JF & Graves, JM. 2008. *International Sales Law and Arbitration – Problems, Cases and Commentary*. Austin, TX: Wolters Kluwer Law & Business.

Mouloul, A. 2009. Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA). Available at <http://www.ohada.com/fichiers/newsletters/ 1556/ Comprendre-l-Ohada-en.pdf> (accessed 19 March 2014).

OHADA Secretariat. 2011. Uniform Act relating to General Commecial Law. Published with the Collaboration of Feneon. Available at <http://www.jurisint.org/ohada/pres/pres.02.en.html#NA-NII> (accessed 25 March 2014).

Ott, Fr & Matthey, P. 2010. *Le Commerce International des Marchandises*. Brussels: Bruylant.

Owsia, P (ed). 1994. *Formation of Contract – A Comparative Study under English, French, Islamic and Iranian Law*. London: Kluwer Academic Publishers.

Perovi, J. 2011. Selected critical issues regarding the sphere of application of the CISG. *Belgrade Law Review* 3: 181–195.

Quinot, G. 2006. Offer, acceptance and the moment of contract formation. In H MacQueen & R Zimmermann (eds) *European Contract Law – Scots and South African Perspectives.* Edinburgh: Edinburgh University Press.

Santos, AP & Toe, JY. 2002. *Ohada – Droit Commercial General.* Bruxelles: Bruylant.

Schlechtriem, P & Schwenzer, I. 2010. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Oxford: Oxford University Press.

Schwenzer, I & Hachem, P. 2010. The CISG – A story of worldwide success. Available at <http://ius.unibas.ch/uploads/publics/6248/20110913164502_4e6f6c6e5b746.pdf> (accessed 20 March 2014).

Sollund, M. 2007. The UN Convention on Contracts for the International Sale of Goods. Article 7(1) – The interpretation of the Convention and the Norwegian approach. *Nordic Journal of Commercial Law* 1: 1–40.

Tchunkam, JD. 2009. La distinction droit civil – droit commercial à l'épreuve de l'OHADA: Une prospective de droit matériel uniforme. *Unif L Rev* 14: 57–93.

Tumnde, MS, Idris, MB, Matipé, JAP, Yakubu, JA & Dickerson, CM. 2009. *Unified Business Laws for Africa: Common Law Perspectives on OHADA*. London: GMB Publishing.

UNCITRAL. 2012. *Digest of Case Law on the United Nations Convention on the International Sale of Goods*. New York: United Nations Publications.

Wéry, P. 2012. Book II, 'Contracts and Other Juridical Acts', of the draft common frame of reference from a Belgian perspective. In V Sagaert, ME Storme & E Terry (eds) *The Draft Common Frame of Reference: National and Comparative Perspectives.* Cambridge: Intersentia.