AN ANALYSIS OF THE SALIENT FEATURES OF THE UN CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG) AND ITS IMPROVEMENT TO THE NIGERIAN SALE OF GOODS ACT.

BY

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1.0 Introduction

The law governing Sale of Goods in Nigeria is the Sale of Goods Act 1893 (SOGA), (Now Sale of Goods Act of 1979 after amendment in the UK) is the chief law that governs sale of goods in Nigeria; this is a statute of General Application in force in Nigeria. The rules of Common Law, including the Law Merchant which is not inconsistent with the express provisions of the Sale of Goods Act 1893 are also applicable. The study of sale of goods is only a specialized one in the sense that it is a contract involving sale of goods; otherwise it is essentially a part of the general law of contract. The Act has not therefore; done away with the general rules relating to contract hence, offer and acceptance, consideration and other elements of a valid contract must be present in a contract of Sale of Goods. Aside this, certain presumed 'safeguards' have been put in place by law to protect the interest of the buyer by implying terms concerning the standard and quality of product in commercial transaction of sale of goods in the Sale of Goods Act. Breach by the

seller of any of these terms entitles the buyer to institute an action and gets remedies for such breach. These terms impose strict liability on the seller and they are actionable perse. It is irrelevant whether the seller was unaware of the alleged defect in the goods or not.

This paper examines Sources of Sale of Goods Law in Nigeria, Creation of Sale of Goods, Elements of Sale of Goods, Implied and Express Conditions and Warranty of Sale of Goods, Importance of United Convention on International Sale of Goods and its improvement to the Nigerian Sale of Goods Act, Challenges Of Implementing CISG in Nigeria, Comparative Analysis of Nigeria, UK and Germany Sales Law, Conclusion and Recommendation.

2.0 Definition

Sale of Goods is defined in section 1(1) of the Sale of Goods Act, 1893 as: 'A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.' This means that in addition to the ordinary elements of a contract, two other elements, goods and money consideration, must also be present in a contract of sale of goods.[1] The above definition also envisages two situations namely:

a. A contract of sale, in which the property in the goods is transferred from the seller to the buyer.

b. An agreement to sell, in which the transfer of the property takes place 'in future' (at a future time), or a fulfillment of certain conditions.

A contract for the sale of goods yet to be manufactured is an agreement to sell because the property in the goods cannot pass until they are manufactured and ascertained.

That the definition of a contract of sale is recognized in terms of two transactions is indicated by section 1(3) of the Act which states that :

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell.

[1] Rufus Akpokurere Mmadu,' *Application of Implied Terms in the Sales of Goods Act to Consumer Transactions in Nigeria: between Consumers Protection and Safeguarding the Sanctity of Contracts*' <jblenet.com>jble.>3.pdf> (2014) *Journal Business Law and Ethics* Vol. 2 No. 2 pg 63-106 assessed on 25th January, 2020.

2.1 Sources Of Sale Of Goods Law In Nigeria

The law governing sale of goods in Nigeria include English Law and Statute: The Sale of Goods Act, 1893 (a statute of General application in force in Nigeria). Before Nigerian independence, various Acts of British Parliament were made for or extended to Nigeria which was a British colony. The most important mode of reception of English law was through local statutes introducing English law. In Nigeria, the Sale of Goods Act is applicable except in the states of the former Western Region where the Sale of Goods Act has been repealed and replaced by the Sale of Goods Law, 1959.[2] In order words, states of the Northern and Eastern regions and Lagos state are presently using Sale of Goods Act, 1893.

Common Law and equity: Apart from the Act, rules of Common Law, including the Merchant usage which is not inconsistent with the express provisions of the Sale of Goods Act, 1893 and doctrine of equity are also applicable. For instance, section 45 of the Interpretation Act of 1965, Cap 89 provides thus:

Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrine of equity, together with statute of general application that were in force in England on the 1st day of January, 1900 in so far as they relate to any matter within the exclusive legislative competence shall be in force in Lagos elsewhere in the Federation"

Nigerian Statute: The legislative arm of government in Nigeria is vested with the power of law making. Some commercial items that fall under the exclusive legislative list are taxation, stamp duties, bill of exchange, currency, incorporation, banking etc.

Case Law/ Precedent: The court often in the course of interpreting statutes creates body of legal principles.

2.2 Creation of Sale of Contract of Sale of Goods

The creation of contract for the sale of goods is a matter governed by the general principles of contract as they exist either under the common law or as modified by statutory provisions. It follows, therefore, that a proper grounding on the basic principles of contract is a *condition sine*

[2] Ugbejeh Ernest Ogwashi, '*Law of Commercial Transactions*' <law 331.pdf> (2015) National Open University of Nigeria pg 22 assessed on 25th January 2020.

qua non to the appreciation of the principles governing the creation of the contract of sale of goods.[3] The basic principles of contract includes;

1. **Capacity to Buy and Sell:** Both parties must have capacity to make a contract of sale of goods. The capacity to buy and sell goods is governed by the general law concerning capacity to contract. And as demonstrated by the case of Labinjoh v Abake[4] one has, under the general law of this country, to differentiate between the positions under customary law and the 'received law'. In this regard, the categories of persons whose capacities are usually discussed are infants, insane persons, married women, drunkards and corporations. The proviso to section 2 of the SOGA, however, states that where necessaries are sold and delivered to an infant, or a drunken person, or a lunatic such a person must pay a reasonable price for the goods. The same proviso defines necessaries as 'goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery'.

2. **Formation of the Contract:** There must be an intention on the part of the parties to a contract for the sale of goods, to create a valid binding contract which affects their legal relationship. Therefore, an agreement that is binding 'in honour' only, will not be a contract of sale of goods. A contract of sale of goods, like any other contract, is made by the express or implied acceptance by one party of an express or implied offer made to him by the other party. The contractual rules as to offer, acceptance, the time an acceptance takes effect, mode of communication of offer, acceptance are applicable to contracts of sale of goods.

3. **Consideration:** The principles governing the doctrine of consideration also apply to contracts of sale of goods, except that the consideration for the contract of sale of goods must consist wholly or in part, of money which is called the price, otherwise the transaction is an exchange or barter. Where goods are conveyed without consideration, its amount to a gift. However, such transfer of goods will be enforceable if the agreement is under seal.

4. **Form Of Contract:** Generally, no special form is prescribed for contract for sale of goods. A contract of sale of goods may be made in writing, with or without seal or orally, or partly in

[3] M. C. Okany, '*Nigerian Commercial Law*' *African First Publishers Plc* pg 305-307.
[4] (1924) 5 NL.R. 33.

writing and partly orally, or it may be implied from the conduct of the parties. However, section 4 of the SOGA states that:

A contract for the sale of any goods of the value of N20 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

5. **Validity:** A contract of sale of goods will be invalid and void if it is illegal at common law or under any statutory provision. In other words, a contract for sale of goods which is ordinarily valid may be invalidated on ground of illegality. It is pertinent to add mistake, misrepresentation, duress, undue influence can vitiate a contract for sale of goods.[5]

2.3 Elements of Sale of Goods

i. Property

Property refers to ownership over goods, the subject matter of a sale of goods contract. It must be distinguished from mere possession which is not more than mere physical control of the goods. It is also possible for one to have possession of goods without having property over them and vice versa. In most cases, however, a person who has property over goods is also in possession. It is the law that he who is in possession of anything is the owner until the contrary is proved by he who asserts the contrary.[6]

Often, goods which are the subject of sale are stolen or destroyed, seized by government or mistakenly sold to another person. The question will naturally arise as to who bears the loss or liability arising from such occurrence or incident. Invariably, this will depend on the time at which property in the goods passed from the seller to the buyer. This will further depend to a large extent on whether the goods are specific or unascertained.

The law in this regard, attempts to answer the following questions:

a. At what point can the buyer sell the goods to another person?

b. At what point can the seller sue for the price of the goods?

[5] M. C. Okany, *op cit at footnote 3.*

[6] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

c. At what point does risk in the goods pass to the buyer?

1. Unascertained Goods

By section 16 of the Act, where unascertained goods are sold to the buyer, ownership thereof is not transferred to the buyer unless and until the goods are ascertained. Thus if something is yet to be done by or on behalf of both parties before the goods are delivered, property in the goods will not be transferred until the particular thing is done. Thus where goods are to be sold by measurement, the stipulation of measurement and of delivery at a particular place renders the sale conditional and incomplete until occurrence of those events.

2. Specific Goods

In a contract for the sale of specific ascertained goods, the property in the goods passes from seller to the buyer at such time (if any) as the parties to the contract expressly or implied stipulate in the contract of sale. However, if the parties fail to stipulate the time at which the property is to pass, recourse must be had to certain rules laid down by the Act for this purpose namely:

a. In an unconditional contract of the sale of specific goods which are in a deliverable state, the ownership of the goods is transferred to the buyer when the contract is made notwithstanding that the time payment is to be made or both are expressly postponed by the contract. Once the goods have been put in such condition that the buyer is bound to take them, they are in a deliverable state.

b. In a contract for the sale of specific goods to which the seller has to do something to put them in a deliverable state, ownership of such goods does not pass to the buyer until such thing is done and the buyer has notice thereof.

c. In a contract for the sale of specific goods which are in deliverable state, but which the seller has to weigh, measure, test, or do some other acts or things for the purpose of determining the price; ownership does not pass to the buyer until such act or thing is done and the buyer has notice thereof. This rule only applies if the act is to be done by the seller and the price to be paid is dependent upon such act of the seller.

d. When goods are delivered to the Buyer on ‘approval’ or ‘on sale’ or ‘return’ or other similar terms, the ownership of the goods is transferred to the buyer:

1. When he communicates his approval or acceptance to the seller or does any other act adopting the transaction.

2. Where he does communicate his acceptance or approval to the seller if he retains the goods, without giving notice of rejection, beyond the time (if any) fixed for rejection, or if no time is fixed, then beyond a reasonable time. However, this arm of Rule 4 will only apply if it is the buyer who retains the goods i.e. where the detention is done by the buyer himself. In Re Ferrier, the goods delivered 'on sale' or 'return' within one week, were retained, by a third party beyond the time fixed. It was held that the property had not passed to the buyer under Rule 4 (b).

In a contract for the sale of unascertained or future goods sold by description, the ownership of goods passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract by either party with the express or implied assent of the other; the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.

ii. Parties

Parties to a Sale of Goods transaction refers to the seller and the buyer as the two parties to a sale of goods transaction are called. The seller is a person who sells or agrees to sell goods while buyer is a person who buys or agrees to buy goods.

iii. The Price

Much as sale of goods transaction is a typical contract, a given difference applied to it. With respect to a typical contract, the consideration, could be money, or money's worth, some forbearance or a qui pro quo. However, in sale of goods transaction the consideration must be money called the price. This of course implies the exclusion of trade by barter. Nonetheless the price could be partly money and partly goods.

By section 8 of the Act the price may be fixed:

a. By the contract; or

b. Be left to be fixed in a manner to be agreed; or

c. May be determined by the course of dealing between parties; or

d. Where no price is fixed as above, by payment of reasonable price depending on the circumstances of the case.[7]

[7] Ugbejeh Ernest Ogwashi,*op cit at footnote 2*.

The section obviously envisages a situation where a contract of sale has been finally concluded. Thus in May & Butcher Limited v R[8], A agreed to sell goods to Y at a price agreed at a later date. There was a provision in the agreement that parties would further discuss the price to be paid. The Court held that the parties were still negotiating and therefore no contract had been concluded.

iv. The Goods

Section 62 defines goods:

All personal chattels other than things in action and money and include emblements, industrial growing crops and things attached to or forming part of the land which are greed to be severed before the sale or under the contract of sale.

From the above definition, it is clear that money (except those that are no longer legal tender and therefore constituting collector's item) real property and right of action are not goods. However, even if accepted as goods, it is necessary to classify them for the purpose of passing of property. Thus, goods are classified by the Act as follows:

1. **Existing Goods:** These are goods owned and possessed by the seller at the time of the contract of sale. E.g. particular furniture.

2. **Future Goods:** These are goods to be manufactured or acquired by the seller after the contract has been entered into.

3. **Specific (Ascertained) Goods:** These are goods identified and agreed upon at the time of the contract. E.g. A Mazda 625 Car with a given registration number, engine number and Chassis number.

4. **Unascertained Goods:** These are goods sold by description but which are not identified or agree at the time of contract but are included in a particular class or goods e.g. four kilograms of sugar or salt.

3.0 Sale of Goods Contract Distinguished from Other Forms of Commercial Transactions.

Sale of Goods in its ordinary signification refers to the ordinary commercial activity of buying and selling (which takes place on a regular or daily basis) of goods and services in society. It is

[8] (1934) 2 KB 17.

basically contractual in nature and as such, is no more than a species of contract.

The implication is that the basic rules of contract law apply to a typical sale of goods contract. For this reason, the contractual rules on the issues of capacity, offer and acceptance, consideration, privity, and illegality, including agency rules apply with equal force to a sale of goods contract.

Thus the Sales of Goods Act in section 1 (1) defines a contract for the sale of goods as:

A contract whereby the seller transfer or agrees to transfer the property in the goods to the buyer for money a consideration called the price.

It is necessary for purposes of clarity to distinguish a contract of the sale of goods from the following:

1. **Sale and Exchange:** The consideration required under section 1(1) of the Act must be money whereas an exchange involves a transfer of goods for other goods. A contract of exchange simply means the giving of goods to the person in exchange for the other persons goods-barter. In other words, money which is the pre-requisite for a contract of sale is not involved in a contract of exchange. When there is an exchange the property in the goods passes. However, where goods are exchanged for part goods and part money it could be sale. In this case there is a mere exchange of goods for another set of goods rather than the use of money as the medium of exchange or consideration. The use of barter as a means of exchange is no longer practicable in the light of the complexities of modern business.

2. **Sale and Bailment:** A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee) on certain specified terms, which generally provide that the bailee is to have possession of the goods and subsequently to redeliver them to the bailor or in accordance with his instructions. The property in the goods is not intended to and does not pass on delivery, and in fact remains with the bailor, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of the ordinary hire-purchase contract. In a sale, on the other hand, there is usually an indication that the property in the goods would pass to the other party in the transaction. In other words, in a contract for bailment there is no transfer of property in the goods from the bailor to the bailee, whereas in the case of a sale, from our definition under section 1(1) of SOGA, the property in the goods should be transferred from the seller to buyer.

3.Sale and Hire-Purchaser: A contract of sale involves two parties, the buyer and the seller, whereas a hire purchase transaction invariably involves three parties to it, namely, the seller, of the goods who sell them to finance a company, which in turn leaves the goods on hire purchase terms to the hirer (who may not become the buyer). while under the hire purchase, the hirer (who may or may not become the buyer) has possession of the goods and is entitled to their use, although he is not the owner.

4. Sale and Skill and Labour: This is situation where an agreement entered into for the purpose of the construction of a particular item of property. On completion, the one party collects the item and pays for it at the agreed price. The sale of Goods Acts does not apply to this kind of arrangement as it is not a sale of contract. What is being paid for is mainly the skill of the craftsmanship rather than the item in question. In Robinson v Graves[9], Greer L.J. put it clearly stating thus:

If the substance of the contract is that skill and labour have to be exercised for the production of the article and it is only ancillary that they will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture. It may be gleaned from the above dictum however, that where the product is the substance of the contract it is that of sale goods. Thus in Camel Laird & Co Ltd v Manganese, Bronze & Brass Co.[10] the Court held that in a contract for the construction of ship's propeller, that it was one for the sale of goods. However, it will be that of skill and labour if the product is merely ancillary.

5. Sale and Gift: Ordinarily, there is no difficulty in distinguishing between a sale and a gift. A gift is an immediate, voluntary and gratuitous transfer of any property from one person to another. In other words, it is a transfer of property without consideration. It is, of course, not binding while it remains executory unless made by deed. However, difficulty may sometimes rise with regard to transaction in which what is regarded as 'free' gift is offered as a condition of entering into some other transaction. In Esso Petroleum Ltd v Commissioners of Customs and Excise[11], garages was contractually bound to supply the coin to anyone buying four gallons of

[9] (1935) 1 KB 579.
[10] (1934) AC 402.
[11] (1976) 1 All ER 117.

petrol. It was thus, in substance, a collateral contract existing alongside the contract for sale the petrol.[12]

4.0 Conditions and Warranties

A contract has its own terms which are often grouped into fundamental term, conditions and warranties. Since a sale of goods transaction is essentially a contract, the same rules apply with equal force to it. It is equally a fact that such terms could be express or implied. Certain terms are implied into a sale of goods contract by the Sale of Goods Act by virtue of sections 10-15 thereof.

However, at common law, no condition or warranties as to the quality or fitness of goods for any particular purpose will be implied. A buyer must therefore satisfy himself that there are no defects in the goods he wishes to purchase. Thus if goods, open to inspection, are purchased by a buyer, he cannot, (unless the seller is guilty of a misrepresentation) complain of any defect which he subsequently discovers in the goods. Hence the rule at common law is articulated in the maxim, Caveat Emptor, buyers beware.

This maxim however, has to a large extent been ousted by the Sale of Goods Act 1893 which has implied, in the absence of any contrary agreement, certain conditions and warranties into every contract of sale of goods. For this reason, in Akoshile v Ogidan[13], the court held that the maxim cannot operate to oust the provisions of S.12 (1) of the Act.

The Sale of Goods Act 1893 provides that certain terms are implied in every transaction for the transfer of goods. Terms of the contract are those statements made by the parties, which may be regarded as incorporated into or as forming part of the obligations undertaken by the parties. Such terms may be express or implied.[14]

Express terms refer to terms specifically agreed upon by the parties and incorporated into their agreement. Further terms may in some circumstances be read into contracts by custom and usage. These are implied terms. It seemed well settled that terms of a contract, whether express

[12] M. C. Okany, *op cit at footnote 3.*
[13] (1950) 19 NLR 87.
[14] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

or implied, are conditions or warranties. In Mihalis v Angelos[15], the traditional division into conditions and warranties was upheld.

However, in Chave NV v Bremer Handels Gasellschaft[16], approving it earlier decision in Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha[17], the court said that the division is not exhaustive. Neither the 1893 nor 1979 Act, has given the meaning of the word **'condition'**. The Sale of Goods Law Kaduna State, Northern Nigeria is helpful when it defines the word as:

'A term which goes directly to the substance of the contract for the sale of goods and so essential to it very nature that it non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all and so gives him the right to repudiate the contract and reject the goods, in addition to a claim for damages'.

Uvieghara writes that a condition is a term, which is essential to the main purpose of the contract so that if it is not performed it may be said that the contract has not been performed. The two definitions point to the fact that a condition is a vital term of a contract. Although the two Acts do not define condition, they both state the effect of breach of a condition and warranty as follows:

'Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract'.

Warranty as defined in section 61 of Sale of Goods Act, UK as:

'An agreement with reference to goods, which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated'.[18]

It is clear from the provision of the Act that a warranty is less important than a condition. A condition is of more importance than a warranty. A term which is only collateral to the main

[15] (1970) 3 All ER 125.
[16] (1975) 3 All ER 139.
[17] (1962) 1 All ER 474.
[18] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

purpose of the contract is a warranty.

However, Monye is of the opinion that contrary to the impression created by this provision, a warranty is a term of the contract and something collateral to it. Atiyah notes in this regard that the term collateral, though hallowed by usage, is not very happily chosen, for it may give the impression that a warranty is a term which is somehow outside the contract; whereas it is in fact part of a term of the contract. The use of the word collateral may be useful in distinguishing between a condition and warranty. Sagay states that a warranty is collateral to the main purpose of the contract, a condition must at least be essential to it. In the interest of promoting higher standards in the marketplace, the law imposes certain responsibilities on the seller for the quality, character and suitability of the goods sold. The duties that a seller of goods owes his customer are the terms implied by the Act. An implied condition is a term created by operation of law rather than the seller's express statements. The terms implied by the Act are the right to sell, compliance with description, fitness for purpose, merchantable quality and compliance with sample. In practice, it is the implied terms of description, merchantable quality and fitness that are the most important of these provisions for product liability.

4.1 Implied Conditions:

In the absence of any contrary agreement, the following conditions will be statutorily implied in every contract of sale of goods:

1. That the seller, in the case of a sale has the right to sell, and that in the case of agreement to sell, he will have a right to sell goods at the time the property is to pass. In Rowland v Divall, S sold a car to B who used it for about three months and had to return it to the owner because it turned out to be a stolen car. The court held that in the circumstance B could recover the purchase price of the car as S had no title to the car when he sold it to B.

2. Section 13 of the Act provides that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. But if the sale is by sample as well as by description, the goods must correspond with both the sample and the description. This applies particularly in a case where the purchaser has not seen the goods, but is merely relying on its description as given by the seller. Thus once it is demonstrated that the goods do not answer to the description, the buyer may reject them.

3. Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods are of

merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

Goods are of merchantable quality when they are fit for use for the purpose for which such as an article is ordinarily used, and in such condition and of such quality that a reasonable man acting reasonably, would after a full examination accept them in performance of the contractors. Where the good have defects which are apparent and could be disclosed by proper examination, this implied condition will be ousted . Where the buyer expressly or impliedly makes known to the seller the particular purpose for which the goods are required as to show that he relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall reasonably be fit for such purpose, provided that in the case of contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. It is obvious that before this condition may be implied:-

a. It must be shown that the seller deals in goods of that description.

b. That the seller knows the purpose for which the goods are required.

c. That reliance was placed by the buyer on the seller's skill or judgment.

Where the purpose is obvious as in the case of a radio or calculator, knowledge of the purpose will be imputed to the seller. However, where the goods could be put to variety of use, the buyer must disclose the particular use to which he want to put items sought to be bought.

Often a situation arises where there is a latent defect in an article held by a seller to a purchaser and this cause injury to the buyer. This will amount to a breach of an implied warranty of fitness for purpose, for which the goods were bought. This however, excludes a situation where the purchaser bought on the basis of a trade name.

Where the sale is by sample only there is an implied condition that:

a. The bulk shall correspond with the sample in quality.

b. The buyer shall have a reasonable opportunity of comparing the bulk with the sample.

c. The goods are free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

In West African Import & Export Co v Paul Jassar[19], a contract of sale by order of sample was involved. The buyer proceeded to pay customs duties on behalf of the seller when it was clear to

[19] (1939) 15 NLR 2.

him that the goods do not correspond with the sample. The Court held that having taken that step it was an acceptance of the goods and he was estopped from subsequently rejecting them.

4.2 Implied Condition as to Description

Section 13 of the Sale of Goods Act 1893 provides that:

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the good do not also correspond with the description. The courts have given wide meanings to the term '**Sale by Description**'. It applied to all cases where the purchaser has not seen the goods but is relying on the description alone. In Varley v Wipp[20], the Defendant bought a reaping machine by description. Shortly after delivery, he complained that it did not correspond with the Plaintiff's statement. The sale was held as a sale by description and the Defendant was held entitled to reject the machine.[21]

There may also be a sale by description of a specific article, which the buyer has inspected, but only if the description relates to something not apparent on inspection. It was thought that the original intention of the drafts men of the Sale of Goods Act 1893 was that specific goods (i.e. goods identified and agreed upon at the time of the contracts) could not be the subject of a sale by description. The idea behind this was that if a buyer is buying something specific, he has the opportunity to examine it or have an expert examine it for him. If the goods then fail to correspond with the description, section 13 would not be breached (although the buyer might have a remedy for breach of an express term of the contract or for misrepresentation).

Accordingly, the buyer will fail if, viewed objectively, the court is satisfied that he did not rely on the description. The implied condition may only be breached if the buyer relies on the description. The section also applies to goods selected by the buyer at a self-service store or supermarket. This is the effect of section 13(3) of the Sale of Goods Act, United Kingdom. Whilst some changes in the law in England have taken care of situations where there are microscopic or minor defects from the contract terms, the law still insists on protecting the consumer under the implied term of description. Section 4(1) of Sale and Supply of Goods Act

[20] (1990) 1 Q 513.
[21] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

1994 inserts into the Sale of Goods Act, a new
section 15A that provides as follows:
(1) Where in the case of a contract of sale:
(a) the buyer would apart from the subsection have the right to reject goods by reason of a breach on the part of the seller of a term implied by Sections 13, 14 or 15 above, but;
(b) if the breach is so slight that it would be unreasonable for him to reject them, then if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

In the leading case of Arcos Ltd v Ronaasen[22], the sellers sold a quantity of wooden stoves to the buyers. The thickness was given as half an inch. When the goods were delivered the arbitration found that:
(i) only five per cent were half an inch thick (ii) a large per cent were between half-an-inch and nine – sixteenths of an inch; (iii) some were between nine -sixteenths and five-eighths of an inch; (iv) a very small portion were more than five – eighths of an inch (v) the stoves were fit for the buyer's purpose and commercially within, and merchantable under the contract specification. Despite the finding in (v) the buyer claimed that he was entitled to reject them. The High Court, Court of Appeal and House of Lords upheld the buyer's claim. The Judgments in the House of Lords emphasize the need for strict compliance. The House of Lords however, noted that there might be microscopic deviations, which may be ignored; the right to ignore for minor breaches is restricted only to non-consumer. It should be noted that if words have acquired a special trade meaning, there will be no breach of section 13 if they answer that meaning.

4.3 Implied Condition as to Fitness for Purpose

The most common complain of the consumer is that the goods or services supplied or rendered were not up to the expected standard. If a contract is for the sale of goods, section 14 of both

[22] (1933) AC 470.

Acts implies a condition of reasonable fitness as well as the condition of merchantable or satisfactory quality.[23] Section 14(1) of the 1893 Act reads:

Subject to the provisions of this Act or any statute in that behalf; there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which is in the course of the seller's business to supply (whether he be the manufacturer or not), there is implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of contract for sale of a specified article under the patent or other trade name, there is no implied condition as to its fitness in any particular purpose.

A buyer comes under an obligation to supply goods that are reasonably fit for the purpose for which they are bought when the stipulated conditions are met. A particular purpose means specified or stated purpose. It means the purpose communicated expressly or impliedly to the seller by the buyer for which the goods are required. The buyer must have made known to the seller, either expressly or by implication, the particular purpose for which he requires the goods. Usually, this is the case where the goods have only one particular purpose. The purpose for which such goods are required is made known to the seller by implication, In Priest v Last[24], it was held that the purpose of a hot water bottle was made known by implication. If the purpose is obvious as in case of single purpose goods, nothing need be said. This is notably true where the item is common place, such as bottled table water. In Grant v Australian Knitting Mills, Grant bought a woolen underpant from the seller and upon wearing it, he contracted dermatitis. This is because the underwear contained excess sulphite. The court held that:

There is no need to specify in terms the particular purpose for which the buyer requires the goods which is none the less the particular purpose within the meaning of the section, because it is the only purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods.

[23] Rufus Akpokurere Mmadu, *op cit at footnote 1.*
[24] (1930) 2 KB 148.

The implication of this is that a buyer or consumer does not have to go through the ritual of spelling out his purpose. This will be implied because it is self evident. If there are special circumstances connected with the use of the goods, or the purpose is a special one, the seller will be liable only if that purpose was expressly made known. Where goods are suitable for more than one purpose, the particular purpose for which the buyer requires them must be made known. The buyer must show reliance on the seller's skill and judgment. It is clear that reliance must be brought home to the mind of the seller expressly or by implication. The reliance will be seldom expressed. It will usually arise by implication from the circumstances. The seller will be liable for unfitness of purpose only in respect of the reliance placed upon him. The condition of fitness is not implied if the seller can prove that the buyer did not rely on the seller's skill or judgment. One important rule common to implied terms of fitness for purpose and quality is that the seller is only liable if he supplies the goods 'in the course of a business'. The reason for the exception in the provision is plain. If a man orders in express terms an article known by a patent or trade name under the name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even though he told the vendor before he ordered it the purpose for which he required it.

The provision assumes the absence of any express assurance by the seller and deals only with the case of express or implied information by the buyer of the purpose for which he requires the articles, so framed as to show that the buyer relied on the seller's skill or judgment. It is also important to note under the subsection that the implied condition as to fitness for purpose applies to all the goods supplied under a contract of sale. Indeed, the courts have given a sensible meaning to the term 'goods supplied' by giving the words their normal meaning. This is crucial in modern days of canned food and bottle drinks. Thus, the conditions of fitness and merchantable quality apply not only to the contents of a bottle or tin but also to the container, that is, the bottle or tin itself, even if it has to be returned; it is still supplied under the contract. Similarly, the meaning makes the seller liable if the goods actually supplied contain a foreign body, for examples, a worm, a snail a piece of glass. This affects the totality of goods supplied. It is not certain whether advertising can contribute to the existence of an implied condition of fitness. A seller who advertises his product expects to persuade buyers that the product is suitable for a certain purpose or purposes. Many sellers also expect to create 'brand loyalty' by convincing the buyers that the seller's product is superior to the products of competitors. Sellers

who engage in brand loyalty advertising may well have reasons to know of the buyer's particular purpose and of the buyer's reliance on the seller to provide suitable goods. In a context of intense competition and flamboyant advertising, implied condition of fitness might be implied even though the seller never meets the buyer.

4.4 Implied Condition as to Merchantable Quality

Under the Sale of Goods Act 1893 the implied condition as to merchantable quality assumes a technical connotation. Section 14 (2) of the Act provides: Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

Where goods are bought by description from a seller who deals in goods of that description the seller must supply goods that are of merchantable quality. The meaning of the phrase 'deals in goods of that description' seems to be settled by a majority decision in Ashington Piggeries v Christopher Hill as goods of that kind, that is, the seller deals in the kind of goods sold. They are not restricted to the contract description of the goods. In such a case, there is an implied condition that the goods supplied under the contact are of merchantable quality. However, this implied condition does not extend to matter making the quality of goods unmerchantable where examination of the goods is made by the buyer before the contract is made which the examination ought to reveal. This exception applies where the defect should have been revealed by the examination. Numerous judicial definitions point to the controversial nature of the phrase merchantable quality. The difficulty stems from the fact that the phrase is a complex concept, which can only be determined on the merit of each particular case. As a result of the difficulty in forging a single definition of merchantable quality, the phase has been replaced under the Sale of Goods Act 1979, (UK) with 'satisfactory quality'. Section 14 (2) of the Act as amended by the Sale and Supply of Goods Act, 1994 (UK), is an implied term that the goods supplied under the contract are of satisfactory quality. The UK Act provides an objective test to determine 'satisfactory', taking into account any description of the goods, the price (if relevant) and other relevant factors.

By section 14 (2)(b), the quality of goods includes their state and condition and the following

(among other things) are in appropriate cases, aspects of the quality of goods:

(a)Fitness for all the purposes for which the goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability.

The courts have identified certain factors that may raise or lower the expectation of satisfaction. Second hand goods will attract a lower expectation. On the other hand goods of a reputable brand may attract a higher expectation. These factors are well illustrated in Rogers v Parish (Scarborough) Ltd.[25] Mr. Roger bought a Range Rover for £16,000 under a conditional sale agreement. It was sold as new but it had defects in its engine, gearbox and bodywork and the oil seals were unsound at vital junctions. In the six months following, Mr. Roger drove the car some 5,500 miles while unsuccessful efforts were made to rectify the defects. At the end of the period he rejected the car and claimed the return of his payments and damages on the basis that the car was unmerchantable. The judge at first instance held that since the car was roadworthy, the defects did not make it unmerchantable. The Court of Appeal rejected the ruling and held that to indemnify the relevant expectation one must look at the relevant factors listed in the subsection.

First, the description applied to the goods. In the present case the vehicle was sold as new. Deficiencies which might be acceptable in a second – hand vehicle were not to be expected in one purchased as new. Next, the description 'Range Rover' would conjure up a particular set of expectations, not the same as the one relating to an ordinary saloon car, as to the balance between performance, handling comfort and resilience. The factor of price was also significant. At more than £16,000 this vehicle was, if not at the top end of the scale, well above the level of the ordinary family saloon. The buyer was entitled to value for his money. Even if the car is in the middle or lower end of the market it will still be unmerchantable if the defects have a knock-on effect so that the car can never be restored to its previous condition, or the defects (e.g. oil lead) render it dangerous to drive the car. Though the provision is more comprehensive, it is doubtful whether the definition has taken care of all issues of quality that may arise in a given case. The implication is that the term is so elastic that it cannot be encompassed in single definition. These observations notwithstanding, 'satisfactory quality' is more appropriate to a consumer transaction than 'merchantable quality'.

[25] (1987) QB 933.

4.5 Implied Warranties

In the absence of any contrary agreement, the following warranties will be implied namely; that the buyer shall have and enjoy quiet possession to the goods. If therefore the buyer's possession or enjoyment of the goods is disturbed or interfered with by a third party with a superior title, the seller will be liable to the buyer for breach of the implied warranty. In Akoshile v Ogidan[26], the Plaintiff bought a saloon car from the Defendant and took possession. The Defendant had bought the car from a European who was subsequently indicted for stealing the car. The police thereafter recovered the car from the Plaintiff who now sued the Defendant. The Court held that the Defendant was in breach of section 12(1) of the Act and therefore the Plaintiff was entitled to recover the purchase price from him. Again it is an implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or made known to the buyer before or at the time the contract is made.[27]

4.6 Exclusion of Implied Terms

Under the 1893 Act the parties have complete freedom to exclude implied terms in the Act. Section 55 provides:

When any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

The above was the position but has been radically altered in the UK. Section 55 (1) of the Sale of Goods, UK states that:

When any right, duty, or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement or by the course of dealing between the parties, or by usage as to bind both parties to the contract.There are three basic rules contained in section 6 of the Unfair Contract Terms Act 1977:

i. The conditions and warranties in section 12 (right to sell) can never be excluded.

ii. Where the buyer deals as consumer the conditions under sections 13, 14 and 15 can never be excluded.

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[26] (1950) 19 NLR 87.

[27] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

iii. Where the buyer does not deal as consumer, a clause excluding or restricting the obligations referred to in (i) above will only be valid if it satisfies the test of reasonableness.

This paper finds that whilst it may be said that the provisions of the Sale of Goods Act apply indiscriminately to consumer transactions in Nigeria, statutory reforms in the UK protect the consumer within the Sale of Goods Act. Although many of the cases dealing with implied conditions arise from commercial situation the provision can be important in consumer transactions. The limitation imposed by the Act in the UK prohibiting a seller from excluding or limiting his liability in relation to the implied conditions, clearly supports the position that those implied conditions are applicable to consumer contract of sale as they apply to commercial transactions. The position of the law in Nigeria is that if a manufacturer or supplier of goods applies to his goods a false or misleading description, the buyer or user of the good has a remedy for breach of implied conditions under section 13 of the Sale of Goods Act 1893 or if the goods fail to comply with its description, or under section 14 if their quality is defective or not fit for its normal purpose. The shortcoming of the law in this respect lies in the fact that these implied conditions may not apply in most cases.

This is because the Act permits a large measure of freedom of contract. Thus, the parties are still at liberty to exclude their liability. In practice, most manufacturers and suppliers readily exclude their liability with the use of standard form. Such exclusion clauses are subject to the usual rules of constructions, but if on the other hand, in the UK, the Act prohibits exclusion or restriction of manufacturer's or supplier's liability.

In this sense, liability under the Sales of Goods of UK is strict. This means that the seller is liable for an occurrence, which could not have been avoided, however much care had been taken by all parties in the chain of supply. Such a provision in our law is highly desirable. An amendment to the Act should prohibit the exclusion or restriction of liability under sections 13 and 14 of the Sale of Goods Act, 1893, in the case of consumer sales.

The wide meaning given the word 'description' has brought the consumer within the purview of the Sale of Goods Act. The statutory provision in the UK allows goods being exposed for sale to be regarded as goods sold by description. This imposes liability on a seller in a self-service shop or supermarket where any of the implied conditions is breached. The provision supports the idea that goods can speak for themselves. The truth is that many consumers today patronize supermarkets to meet their domestic needs.

The provision therefore recognizes the reality of retail trading. This provision is recommended for the Sale of Goods Act and Sale of Goods Law of every state in Nigeria. This right allowed the consumer to reject goods for minor deviation is commendable since a microscopic deviation may cause the consumer some health hazards. Section 15(a) of the 1979 Sale of Goods Act breaks a new ground by drawing a distinction between consumer and non-consumer. The requirement is that the buyer must deal as a consumer. So if a private individual buys a car from a finance house, he deals as a consumer. The development is aimed at every day consumer situation. The implied term of merchantability should be renamed simply as an implied term as to quality. It should be defined in terms of the goods being of such quality and in such state or condition as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstance.

Furthermore, the proviso to section 14 of the Sale of Goods Act 1893 which excludes the implied term as to fitness in the case of contract for the sale of a specified article under its patent or other trade name should be deleted.[28]

5.0 Importance Of United Nation Convention On International Sale Of Goods (CISG) And Its Improvement To The Nigerian Sale Of Goods Act.

The United Nations Convention for Contracts on International Sale of Goods (CISG) is an international trade agreement adopted in 1980 at the Vienna Convention for the International Sale of Goods. Its purpose is to eliminate any ambiguity caused by different domestic laws concerning the international sales of goods.

The CISG applies to contracts for sales between companies located in different countries. CISG is currently in force in almost 89 countries as at 2018, which account for more than 75% of world trade, making it one of the most successful international uniform laws. The Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) were adopted in previous years. They were not accepted by many countries for material deficiencies specified within the contracts, the lack of participation on the part of European countries in the ratification process and the fact that the two conventions were not ratified by United States.

CISG is noted for its simplicity and was ratified by the United States in 1988, which in turn

[28] Rufus Akpokurere Mmadu, *op cit at footnote 1.*

prompted other countries to ratify the convention but for some other countries like Nigeria under its article 1(1)(b)6 and section 12 of the 1999 Constitution of the Federal Republic of Nigeria (Fourth Alteration) 2010 respectively. The laws within CISG supersede domestic trade laws. Even if CISG is not mentioned specifically within a contract between two companies in countries that have ratified the Convention, the companies are bound by the agreement.[29]

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

Despite its shortcomings and perceived inadequacies, the CISG commands an appreciable influence over sales law across borders . Unfortunately, Nigeria is yet to ratify the CISG. This failure to ratify the CISG arguably means that Nigeria is still stuck in the primeval era of commercial regulations, as the 18th Century Sale of Goods Act (SGA) remains the key commercial legislation in Nigeria.[30] The Sale of Goods Act 1893, which is the current legal framework for the sale of goods in Nigeria, is arguably too archaic to grapple with the modern international sales issues constantly popping up for considerations. The adoption of the CISG in Nigeria will provide modern, uniform legislation for the international sale of goods that would apply whenever contracts for the sale of goods are concluded between parties with a place of business in Contracting States. In these cases, the CISG would apply directly, avoiding recourse to rules of private international law to determine the law applicable to the contract, adding significantly to the certainty and predictability of international sales contracts. Nigerians are famed for their ability to buy goods from all over the world ranging from US, Europe, UK, China, Middle East, Russia etc, there is no gain saying the fact that in a commercial relations

[29] Eunice Chiamaka Allen-Ngbale, '*Applicability of United Nations Convention on Contract for the International Sale of Goods (CISG) on Non-Contracting States*' <ijsr-p90109.pdf .> (2019) *International Journal of Scientific and Research Publications* Vol. 9 Issue 6 assessed on 28th January, 2020.

[30] Kenneth I. Ajibo, '*Facing the Truth : An Appraisal of the Potential Contributions, Paradoxes and Challenges of Implementing the United Nations Conventions on Contracts for the International Sale of Goods*' <122607-336342-1-sm.pdf> (2013) *Afe Babalola University Journal of Sustainable Development Law and Policy* Vol. 2 Issue 1 pg 175-189 assessed on 25th January, 2020.

involving buying and selling, sometimes dispute arises. Moreover, the CISG may apply to a contract in Nigeria for international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable one, the CISG provides a neutral body of rules that can be easily accepted in light of its transnational nature and of the wide availability of interpretative materials.

Prof Peter Schlechtriem was of the view that:

it is advantageous for Contracting States to apply the Uniform Law for International Sales in international transactions not only when their own law is applicable by virtue of Article 1(1)(a), but also when it applies by virtue of private international law, since decisions based on the modern law of the Convention, developed under the auspices of the United Nations and tailored to the intricacies of international sales transactions, often will be far more acceptable to both parties than one party's domestic law that often is entirely alien to the other.[31]

This view echoed the paramount importance of the Uniform law of international sale of goods, it has the ultimate ambition of uniting the world of international sales so that merchants as well as international trade aficionados can speak in one voice and act under one coordinated law. The CISG is very suitable for the Nigerian environment because of its tendency to be elastic in order to accommodate different national laws background.[32] Again, the rules of private international law may equally be too recondite and cumbersome to bring a plausible and unambiguous solutions to trans-border business disputes; thus it will be imperative to bring in the provisions of an updated legal instrument such as the CISG, to perform a filling and unification of sales laws role and trenchantly see to justice being done in accordance with international yardsticks in Nigeria.[33] Secondly, the adoption of CISG in Nigeria may not only encourage legal certainty in applying uniform rules but would arguably open up smaller and medium size businesses for global competitions which has the potential to improve the rating of Nigeria's global competitiveness in transnational businesses through the increase in the volumes of trade.

[31] '*Whether The CISG? Case For Its Acceptance In Nigeria*' <SSRN-id 2193316.Pdf> assessed on 28th January, 2020.

[32] I.E. Anigbogu, et al,'*Adaptation of Nigerian Law For Global Commerce: The Common Law and Uniform Law Perspectives in the Law of Sale of Goods of Nigeria*'<58.pdf> *19th Annual Nigerian Association of Law Teachers (NALT) Conference* assessed 28th January, 2020.

[33] *ibid at footnote 31.*

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

Moreover, it is argued that CISG has the potential to operate as a worthy catalyst for development, revision and interpretation of domestic laws in Nigeria. A case in reality is that the Convention has been used as a model for modification of a number of national laws such as in Germany, the Netherland, Estonia, and China. CISG principle has been very much pivotal in guiding the drafting process even in the regional bodies. For instance, OHADA, a union of 16 African States, has adopted a Common Sales Lawn which almost follows the CISG to the letter. It is argued that the Convention has the potential to be compatible with the commercial needs of developing countries such as Nigeria and also seems to offer a sound basis for sales transaction between Anglophone countries and Francophone countries in Africa.

Again, the Convention has met remarkable acceptance internationally. Currently, the CISG has 79 Contracting States among its signatories covering more than 70 percent of the world trade and production of goods; and more than 50 leading exporters and importers in world merchandise. Also, around 1,300 Courts and Arbitral decisions decided under CISG have been handed down from 32 judicial institutions and more than 6,500 academic publications exist in 24 languages.

This is in addition to the several conferences and other forms of academic discourse dealing with the Convention, especially, the CISG-AC.[34]

6.0 Potential Challenges In Implementing CISG In Nigeria

Although scholars have argued that Nigeria could benefit immensely by ratifying the CISG; arguably, none of these academic arguments have provided in greater detail the potential difficulties and challenges that could affect the possible implementation of the CISG even if adopted in Nigeria. This section will attempt to discuss some of these potential impediments with possible solutions. In Nigeria, treaties such as CISG do not automatically have the force of law even if adopted because the Nigerian law expressly provides that before a treaty between Nigeria and another State (s) shall have the force of law it must be domesticated into law by the National Assembly. Hence, until a treaty has been domesticated in Nigeria, it cannot be applied within the country.[35] The Nigerian constitution adopts a dualist approach to distinguish municipal law from international law. The forces of international law and municipal law are manifested in the two major theories: Monism and Dualism. On the one hand, Monism maintains that there is a unity between municipal law and international law in the relationship in which international law is superior. Under monism, self-executing treaties become enforceable in municipal realm, on its own force, even without the need of domestications. Dualism, on the other hand, contends that non-self-executing treaties require municipal legislations after the adoption. Dualism, it has been argued, results from the mere desire of states to preserve their internal governance and policies from influences dictated from afar on the guise of international law. The weight of judicial decisions from Court of Appeal to Supreme Court favours the view that implemented treaties are, with the exception of the constitution, of higher status than other laws in Nigeria. In the case of General Sani Abacha v Chief Gani Fawehinmi, the Nigerian apex court equally stated that a treaty (African Charter) is superior to municipal legislation but below the constitution and whenever there is a conflict between a treaty and the Nigerian constitution, the constitution will prevail. Applying this to the context, it means that if CISG is ratified in Nigeria and perhaps domesticated as municipal laws, the Convention would be much superior to other local enactments perhaps even the applicable Sale of Goods Act in Nigeria because of its international strength. Arguably, the difficulty could arise where a provision of law that applies to Nigeria by

[34] Kenneth I. Ajibo, *op cit at footnote 30.*
[35] *ibid.*

way of extension of colonial authority, which relates to commercial transactions conflicts with CISG or where the nation's constitution itself through its interpretations appears to be in conflicts with the Convention. On the authority of the Gani's Case, the constitution would prevail as against the CISG.[36]

Similarly, with reference to international agreements, every treaty in force is binding upon the parties to it and must be performed by them in good faith. This principle of pacta sunt servanda is related to good faith, while pacta sunt servanda does not equate with good faith, it entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its municipal (domestic) law as justification for a failure to perform her international obligations under the binding treaty provisions such as CISG. This means that it would be out of place for Nigeria simply to rely on her municipal provision such as her constitution as a basis not to carry out any obligation should the country decide to ratify and perhaps domesticate the CISG as municipal laws. Arguably, the Nigerian government might need to reconsider the provision of Section 12 of the 1999 constitution in view of the recent Supreme Court decision if the CISG is adopted.

Moreover, it has been argued that firms in developing countries such as Nigeria cannot compete against foreign counterparts without the protection afforded by tariffs and non-tariff barriers. At least in theory, this argument remains widespread and convincing in many developing countries, nevertheless, it cannot stand on theoretical grounds alone, but must be tested against empirical evidence. Recent and ongoing researches conducted at the level of countries, industries, and individual firms have given rise to a growing body of evidence, much of it suggesting conclusions precisely the opposite of the infant-industry protection arguments. Although, in reality, if the CISG is adopted which has the potential to increase the foreign direct investments (FDIs) in Nigeria (if the trade barriers are eased off) because of the volume of business transactions daily, it is still doubtful whether the smaller and medium size industries would be able to compete favourably with these multinational firms in the local markets. At the extreme, these fledgling industries in Nigeria could even collapse because the business environment might not be enabling for them since these bigger firms can afford to sale their products cheaper as a

[36] Kenneth I. Ajibo, *op cit at footnote 30.*

result of their economies of scales. Arguably, the Nigerian government cannot afford to allow these young industries to collapse because of its potential impact to both the economy and the public such as job losses. It is suggested that this problem could be reduced if the government continues to support these smaller and medium size industries in the country through subsidies, subventions and grants to enable them compete in international trade if the CISG is adopted.

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

Arguably, a further problem that could potentially frustrate the adoption of CISG is that the previous international trade agreements such as WTO rules may not have yielded the desire economic growth in Nigeria. On account of that, the Nigerian government might have some doubts about the potential benefits of acceding to this Convention. However, the author thinks that this is a hollow assertion because Nigeria has substantially made trade progress after joining the WTO through the increase in the volumes of trade, nevertheless, recent research demonstrates that Nigeria's increasing barriers to trade limit the benefits from its participation in the multilateral trading system. It is argued that while the protection of the local industries may be necessary to encourage local growth, liberalization reforms, through the simplification of its

import duties (including its tariff structure) are equally crucial for growing the nation's economy if the Convention is ratified.[37]

7.0 Lessons for Nigeria - A Comparative Analysis of the CISG in Germany and UK Sales Law

This section analyses the compatibility of the CISG with domestic Sales Laws in the UK and Germany. This is to demonstrate the flexibility and adaptability of the Convention with the domestic sales laws in two different jurisdictions.

7.1 Price Reduction

Where a seller fails to deliver goods that are of the same quality and quantity with the description (article 35), the CISG, (article 50) permits the buyer to reduce the price in the same proportion as the value of goods at the time of delivery. This right to reduce price is unknown in the English SOGA.[38]

Although article 50 is modelled after the German civil code, they do not serve the same function. This is because the buyer may choose a number of remedies under the German law. The SOGA however, provides in Article 30(1) that if a buyer accepts delivery of a quantity of goods less than what was contracted for; he must pay at the contract rate. Additionally, section 53(1)(a) of SOGA, permits buyer to deduct damages from the price for a defect in the quality of goods. Although these provisions have similar results with that of the CISG, there are numerous differences. Scholars suggest the price reduction remedy is a valid alternative to damages especially in the event of force majeure or a falling market price.

7.2 The Right to Cure

Under articles 37 and 48 of the CISG, parties are permitted to remedy defects both before and after the date for delivery. While article 37 is recognised in most legal systems, Article 48 is unfamiliar to most European legal systems. Under the German law, while the seller is entitled to cure a defective tender by substituting with the time limit fixed by the contract, there is no

[37] Kenneth I. Ajibo, *op cit at footnote 30.*
[38] Uche Anyamele, '*The United Nations Convention on Contracts for the International Sale of Goods: A Proposal for Nigeria*'< http://www.cisg.law.pace.edu/cisg/biblio/anyamele.html.> assessed on 25th January, 2020.

provision for the right to cure after the contract period. However, on the basis of the principle of good faith, sellers are now entitled to cure after due date for performance in limited circumstances.

The provisions of the SOGA do not offer the seller a right to cure. However, case laws provide the seller has a right to cure defective performance before the date for performance lapses. Regarding the right to cure after the specified time, 'there is great uncertainty, at least in English law, as to the existence and extent of the seller's right to repair or replace defective goods."[39] Although the right to cure after date of delivery may create confusion, article 48 and 49 provide some protection. The buyer may on his own accord request that the seller cure the defects within an additional period of time. Thus, the uncertainty created by the seller's right to cure is offset by giving the buyer the opportunity to force the seller to perform or terminate. The right to cure after delivery under the CISG works better with commercial practice than the English sales law.

7.3 Granting of Additional Time Period

Articles 47(1) and 63(1) of the CISG allow the buyer or seller to fix additional period of time in which the other may perform, in the event of late performance. After notice, the party granting the additional time is barred from resorting to any remedy asides damages. Failure to perform allows the innocent party to declare the contract avoided.

This provision is similar to the German Law Concept of a Nachfrist. However, it serves a different function from that under the CISG.[40] First, the BGB does not differentiate between simple and fundamental breaches of contract and the right to terminate a contract under limited circumstances. Additionally, there is no security of the injured party's right to avoid contract as is found in articles 47 and 63 of the CISG. Therefore, commentators suggest that the German law is not the model on which articles 47 and 63 are based.

The English law does not provide a time extension clause unlike the CISG and German law. This is because time obligations are based on the doctrines of conditions and warranties. To interpret this, the SOGA is on the presumption that time of payment is not of the essence and the basis of construction of contract. Where a party wants to declare the second contract avoided, problems

[39] *ibid.*
[40] Uche Anyamele, *op cit at footnote 38.*

similar to that in article 25 of the CISG is encountered. Where the contract is silent, it will be difficult to determine whether time clause is a condition. Although the granting of additional time located in articles 47 and 63 of the CISG is an advantage, scholars suggest the English law is less complicated than the provisions of the CISG.

8.0 Conclusion

It is high time Nigeria became a contracting state under the CISG, this move will create a platform for smooth running of international trade between Nigerians and other parties, and will also provide awareness and leverage for the Nigerian Lawyers in order to be competent players in the scene of international commercial law especially in the area of contract of sale of goods. The 78 countries who signed up the convention are already reaping the benefits, the often repeated slogan that the world is a global village is not a joke, technology more especially the internet has lifted the barriers off numerous inhibitions, days are gone, when countries approach global laws with a snail-speed, it is a well-received truth that good laws guarantee safe wealth, CISG is not perfect, but it has proven to be able to stand the test of time, and it is still standing. .

In this era of unprecedented globalisation, Nigeria being a developing country should welcome this trend in order to bolster economic growth through the harmonised platform which the CISG provides for conducting commercial transactions. The provisions of the CISG not only provide effective and modern solutions to international sales, they are in harmony with current commercial practices. The comparison between the CISG and the German law demonstrate how the Convention can coexist with domestic sales law. It is suggested that Nigeria should take a cue from this and consider a reform of the domestic law after ratification.

9.0 Recommendation

It is time Nigeria reviewed , reformed, or updated the extant, obsolete Sale of Goods Act of 1893 and preferably indeed, evolved her own indigenous internationally acceptable Sale of Goods Act as an alternative. This is in addition to adopting the United Nation Convention on International Sale of Goods (CISG), which will govern International Commercial dealing (Sale). This will help to give Nigeria the necessary global face lift needed.

The introduction of the CISG in law schools all over Nigeria, making it part of the regular law school curriculum. This is what is applicable in countries such as China, Croatia and Denmark

and it is proven to be one of the most effective ways through practicing lawyers become familiar with the Convention. The Institute of Continuing Legal Education (ICLE) of the Nigerian Bar Association could offer introductory courses to practicing lawyers on the CISG based on existing professional rules which mandates all Nigerian lawyers to engage in continuing legal education. This medium has helped increase awareness in other jurisdictions. It is suggested that greater awareness could be created through the publication of both commentaries and court decisions in specialized law reviews. The CISG is a success as a uniform legal framework and the Nigerian Government should as a matter of urgency propose legislative action to ratify the CISG. This is for consequential reforms to domestic laws on the sale of goods.

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