Chapter

Sales and Conformity of Goods: A Legal Discourse

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Abstract

This chapter is primarily concerned with the fact that the concept of conformity is dynamic and amorphous as it is recognised as an impetus to economic development and plays a major role in matters of sale of goods within an economy. In making an assessment of the seller's duty of conformity to a contract of sale of goods as governed by the OHADA Uniform Act on General Commercial Law, this study argues that the concept of conformity is limited rather than broad that should appropriately encapsulate the physical and non-physical things that could form the object of a contract of sale. It therefore explores other aspects that could be considered as part of the 'goods' for the purposes of the conformance duty in establishing the limits of the seller's liability. Thus, adopting an empirical and in-depth analysis of primary and secondary data, this study therefore holds that the question of conformity of goods can conveniently be addressed from a number of different angles: contract law, consumer patterns, local and international standards, and the principles of caveat venditor and caveat emptor.

Keywords: sales, goods, legal, discourse

1. Introduction

The preamble to the treaty of the Organisation for the Harmonisation of Business Laws in Africa (better known by its French acronym OHADA[1] points to the establishment of a new economic order based on the mutual economic benefit of cross border trade. The primary objective of this treaty was to provide a secure legal and judicial environment for business to operate in [1]. This was to be done through the elaboration and adoption of simple modern and common rules adapted to their economies, by setting up appropriate judicial procedures and by encouraging arbitration for the settlement of contractual disputes[2]. This suggests that uniform laws governing trans-national trade are essential to achieving these

[1] The Treaty creating OHADA was signed at Port-Louis, Mauritius Island on 17 October 1993, as revised at Quebec, Canada, on 17 October 2008. The revisions became effective on 21 March 2010. As of July 7, 2010, the West African members of OHADA are Benin, Burkina Faso, Cote d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members of OHADA are Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. See http://<www.ohada.org > and http://<www.ohada.com>. On February 22, 2010, the Democratic Republic of Congo's president ratified the country's adoption of the OHADA treaty.

[2] The rules adopted are known as Uniform Acts.

goals. To effectively carry out the piece-meal harmonisation of the business laws of member states, specifically through the elaboration of uniform laws, nine Uniform Acts have been adopted till date[3]. Our interest being sale of goods contract, we shall examine the Uniform Act on General Commercial Law (UAGCL), with respect to its provisions governing sales contracts. Thus, the principal concern of this paper is to critically test the application of the UAGCL to barter-like transactions. The focus on the OHADA business law is to test its functionality in achieving its predictability of business transactions within its contracting states [2].

The rules on the conformity of goods are not only an integral part of sales law, but also an indispensable obligation by the seller by being inextricably linked to his obligation to deliver the goods. This may explain why 'goods' are the very subject matter of a sales contract, and the rules on conformity are what help define this subject matter. Forming part of the economic and legal rights of the buyer, the latter relies on and ascertains the seller's obligation to deliver the goods in conformity with the contract specifications. This right consists in the delivering of goods of right quality, quantity, description and packaging.

Consequently, any breach of this obligation would entitle the buyer to establish proof. In this regard, many buyers will base their complaints on defects of conformity of the goods, allege a breach, and invoke remedies. It is important therefore, that there be fairly clear legal rules, particularly those applied by default, that are capable of allocating risks, thereby producing legal certainty and possibly reducing litigation.

The burden of proof includes the burden of adducing the relevant evidence and the burden of persuasion. The reliance provision is, in other words, an exception to the buyer's entitlement to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. Without these rules, it would often be impossible to say what it is that the seller has agreed to deliver. However, the inevitably broad nature of these rules, together with their considerable conceptual and practical significance, still makes them one of the most frequently litigated issues. All this leads to the conformity rules occupying a central place in any sales contract.

From the foregoing, the issue of the concept of conformity should be addressed with an open mind because it is dynamic and amorphous. This explains why this study will illustrate that the limits of conformity should not be guided by the distinction between physical and non-physical characteristics of the goods. Other conceptual tools for marking this boundary will be explored in consideration of other parameters irrespective of the intent of the parties as evident in their agreed contract.

With this in mind, this study seeks in the first place to take a critical look at the rules on conformity in Article 255 of the OHADA Uniform Act on General Commercial Law (UAGCL). The primary objective therefore is to make an expository study of the concept of "conformity" as the basis of the seller's duty by showing its limits in consideration to other components. It follows with a critical examination of the UAGCL's approach in allocating the burden of proof of lack of conformity of the goods to the contractual stipulations as agreed by the parties. The study also adopts a critical and analytical approach in interpreting the provisions of the Uniform Act and of foreign instruments regulating sale of goods contracts.

[3] The following Uniform Acts are already applicable in Member States: Commercial Companies and Economic Interest Groupings, Law of Securities, Simplified Recovery Procedures and Measures of Execution, Collective Proceedings for Wiping –off Debts, Arbitration Law, Accounting Law, and Law of Co-operatives Carriage of Goods by Road. Two other Uniform Acts have been enacted and adopted by the Council of Ministers but are still inapplicable, to wit; Consumer Law and Contract Law.

2. The legal conception of goods

2.1 Contract of sale of goods

'Goods' form the subject-matter of contracts of sale of goods between the seller and the buyer. The Uniform does not provide any definition to 'goods' as the case under the CISG[4]. Nor is it possible to deduce the meaning of the term by analysing different language versions of the statute. However, from a cursory reading of the Act, a restrictive meaning could be inferred as its provisions basically apply only to moveable tangible goods.

Reference can be made to the Uniform Act's Scope and General Provisions. In particular, Article 234 (a) provides that "the provisions of this shall apply to contracts of sale goods", whereas Articles 235 and 236 restrict the ambit of the Act and by implication, the ambit of 'goods'. By inference from the restrictions imposed by Article 236 UAGCL, it may be understood that the term 'goods' is fairly not extensive, indeed, virtually not all-embracing. It clearly excludes to a greater extent non-physical items, such as electricity, negotiable instruments, and company shares, which are technically 'things in action' or incorporeal movables and so are excluded by the plain words of Article 236. Similarly, items of 'intellectual property' such as copyrights, patents and trademarks are not corporeal movables and so fall outside the definition, although of course goods may exist, which embody these intellectual property rights

Even though under the Uniform Act, the notion of 'goods' serves to quantify the main obligation of the seller contained in Article 250, which requires that '… the seller must deliver the 'goods' … as required by the contract and this Uniform Act', consideration must be given to the type or nature of goods.

The reason which may be advanced for dismissing intangible or immovable goods from the scope of the OHADA Uniform Act could be that even though these are assets available for trade, they can only be disposed by way of trade or security and not possibly to be transferred physically to another party. The absolute interest in such types of goods may be disposed of outright or may be made the subject of security. Since by virtue of Article 250 para. 1 UAGCL, the main duty of the seller under the contract of sale is to deliver the goods to the buyer, what matters here is the physical transferability of the goods and not necessarily the transfer of a legitimate interest in the goods. The peculiar consideration here does not lie on the identification of the type of goods but rather on the physical segregation and ownership of it. Only in this situation is segregation both possible and necessary to identify the subject of the transfer obligation of the seller under the Uniform Act.

3. Contracts consisting partially of services

The UAGCL does not apply to mixed contracts as the case under the CISG, under which the seller provides goods and services. Nevertheless, by inference, these can be treated as unitary contracts rather than separate sales and services contracts [3], and the UAGCL will apply to both parts. This provision further restricts the meaning of 'goods', excluding contracts 'in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services'. The issue of whether software is a good is once again illustrative.

In modern commerce, an important point, not yet resolved by the OHADA Uniform Act on General Commercial Law, is whether computer software may

[4] Article 30 UAGCL.

constitute 'goods' within the meaning of Article 234 para. 1. Software is normally embedded in some physical form, such as disks or as part of a package in which it is sold along with computer hardware, that is, computers or computer parts. Therefore, it could be considered as a tangible object capable of it being possible to be transferable. This raises an argument in trying to understand why such an item cannot be considered as a 'good' under the Uniform Act. It could without any doubt be covered by the OHADA Uniform Act because such a good is being able to be transferred to another person in a contract of sale in its physical form. Again, there is probability that a disk be physically defective due to a virus for example. In this case, the seller should be liable as the seller of a physically defective car.

Under French law, goods are known as *marchandises*. This simply entails a collection of movable assets forming the subject-matter of a contract of sale. This is actually an element of *fond de commerce*. From this standpoint, there is one clear limit: this meaning will not include any form of immovable property in a contract of sale. Consequently, it can be inferred from the meaning of Article 235 para. 1 UAGCL that it limits the meaning of goods to movable property by its reference to *commerçants*. The meaning of 'sale of goods' limits the very meaning of 'goods'. Also, this would mean that no sale with a non-trader is of a 'good'. The general approach that is adopted under the Uniform Act is to apply the OHADA Uniform Act to the *commerçant* and not to *non-commerçant*.

4. The conception and nature of conformity in domestic sales law

In fact, conformity is a term with a variable content. In English language, conformity is a noun derived from the verb to conform, meaning "agree with" [4, 5]. From this, it becomes clear that the goods should agree with the terms of the contract for them to be in conformity. In other words, the concept of conformity concerns the difference between the object agreed in the contract and that delivered.

Some particularities of domestic law on the concept of 'conformity of goods' in a sale of goods deserves a careful interpretation and understanding [6]. For instance, rules on conformity under the Uniform Act differ considerably from those in common law and civil law. In fact, subtle distinctions can be between the different kinds of defects of conformity under the different laws. Under civil codes[5] as well as under the Uniform Act,[6] a hidden defect [*défaut caché*] is distinguished from an apparent defect [*vice apparent*]; the English Sale of Goods Act (SGA) [1893] distinguishes condition[7] from warranties[8]. Nevertheless, surely merchantability under common law is a similar concept to conformity as the case under UAGCL.

4.1 Conformity requirements under the Act: Material and functional conformity

The notion of conformity under the Uniform Act is almost identical to that under the CISG[9]. The Act views conformity from a dual perspective, that is,

[5] Cameroon Civil Code, art 1641; Côte d'Ivoire Civil Code, art 1641.

[6] Uniform Act, art 231.

[7] SGA, sec 11(3) provides that a condition is a major term of a contract, breach of which is considered to go to the root of the contract so as to entitle the innocent party to treat the contract as discharged.

[8] Id, secs 14–15.

[9] CISG, art 35.

material and functional conformity. Whilst material conformity deals with the quality of goods, function conformity on its part focuses on the usefulness of the goods. A recent adoption by the Uniform Act is the condition that goods must conform both materially and functionally before they are judged acceptable by the Act. As such, sellers have to respect this prescription before delivering their goods[10] [7, 8].

The conditions of quantity, quality, description, packaging, particular purpose, and sample are encapsulated into the concept of conformity in the Uniform Act as contained in its Article 255 [9]. Article 255 thus states as follows:

"The seller shall deliver the goods according to the quantity, quality, specification, and packaging provided for in the contract. Where the contract is silent, the seller shall deliver goods in conformity with the purposes for which goods of that nature are generally used, and the goods must match the sample or model which was presented to the buyer by the seller. The seller also must deliver the goods that are packaged according to the usual method of packaging goods of the same nature or failing which, in a manner to ensure their conservation, and protection"[11].

These implied that conditions deserve careful treatment because of the protection that they now offer the buyer of goods, who is almost invariably in a weaker position than the seller. This can be explained by the fact that, most of the times, the seller seems to be the manufacturers of the goods. As a result, these terms protect buyers' interest since they ensure that the purchased goods are neither deficient nor defective. The Act thus makes it clear that any breach of the provisions by either parties shall be interpreted as non-respect of terms of contract. It is important to state that the terms of a contract, which include conditions and warranties, of sale of goods could be implied or expressly stated. It is now clear that the common law principle of *caveat emptor* which used to focus on the buyer now places emphasis on the seller's awareness (*caveat venditor)* [10]. Implied conditions and warranties are not stated by the parties during negotiations or included in a contractual document, but nevertheless form part of the contractual provisions.

Implied terms as implied by law are geared to ensuring a minimum of business efficacy[12], regardless of the parties' paramount intention to create a workable contractual agreement[13]. Some contracts of sale are very detailed; the parties deal with all or most eventualities. However, in others, the only element that the parties deal with is identifying the goods to be sold and the price to be paid.

The seller is obliged to be conversant with aspects of quality, quantity, specification, and the packaging of goods, which falls within material conformity as well as features linked to functional conformity such as the suitability, purpose, or purposes and specificities of the usefulness of goods of similar design.

Material conformity therefore consists of four elements derived from the contract: quantity, quality, description, and packaging.

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[10] Under French law, the hidden defect element is dealt with under sales law. This is actually effectively the purport of the text: Pougoué et al Encyclopedie, above at note 11 at 55.

[11] This is the author's translation.

[12] The Moorcock (1889) 14 PD 64; Lister v Romford Ice Co Ltd [1957] AC 555.

[13] Compare with Lord Tomlin in Hillas & Co Ltd v Arcos [1932] ALL ER 494 at 499: "The problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may so far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

4.2 An inquiry into the nature of lack of conformity

4.2.1 Apparent defects

Article 258 of the Uniform Act raises no difficulty as to defects which would have been apparent on a reasonable examination of the goods by the buyer immediately after delivery. In practical terms, examination by the buyer of any apparent defects to ascertain the seller's obligation operates from the moment delivery has been effected[14]. After this exercise, the buyer must give notice of a lack of conformity discovered within 1 month from the date of delivery. If he fails to observe these requirements, the buyer will be deprived of his right to claim redress for non-conformity.

4.2.2 Hidden defects

Moreover, it is advisable that the buyer declares any detected defect observed in a purchased item within a year to enable the seller to make up for any deficiency within his/her competence[15]. The period of 1 year is enough time for the buyer to notice hidden defect in a purchased good. The foregoing condition notwithstanding, it is necessary to state that the detecting of defect goes beyond according to a timeframe since some goods require immediate inspection and adjustment even before they are sold and bought. In this case, therefore, the buyer gets to understand any hidden defect before the commercial transaction.

However, the detecting of hidden defects is difficult, especially with frozen and canned/tinned goods that are always meticulously packaged. In such cases, there is little or no opportunity for instant or early detection of defects.

The problem raises two complex issues. The first is how to establish the liability of a seller or retailer who sells food products in tin or other sealed container because of the difficulty to identify any injury caused to his customers either from some foreign substance in the can or from unwholesomeness of the food and the second is how to establish the liability of a seller who sells goods with some defects in bulk. In this situation, the seller may not be faulted for such hidden defects owing to the difficulty involved in detecting such defects in bulk goods. These complex situations account for the emphasis of Uniform Act, in relation quality goods, that the seller shall be liable to deliver the goods "in the usual manner" that goods are packaged[16].

Examples of such nature regarding the determination of hidden defects in goods can never solve all the problems related to quality. Nevertheless, with the aid of Article 255(2) of the Uniform Act, the intent of the parties can be construed in their agreement. In striving to achieve this purpose, two questions could guide this exercise: The understanding of the contractual provisions defining quality goods as spelt out by Article 255(2) and the usefulness of the goods are two basic conditions that could guide the parties, as the strive to satisfy their intent. An understanding of these conditions would certainly curb misunderstanding with regard to fitness of 'ordinary' use of goods as stated in the contract.

It follows therefore that the nature of the kind of non-conformity that the buyer is expected to reveal are two, namely apparent and hidden defects. This type of test is likely to pose challenges involving goods of varying grades.

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[14] Uniform Act, art 257.

[15] Id, art 259. Under CISG, art 39, the time frame is two years: J Huet, Contrats Civilset Commerciaux, Responsabilité du Vendeur et Garantie Contre les Vices Cachés [Civil and commercial contracts: Responsibility of the seller and guarantee against hidden defects] (1987, Litec) at 42.

[16] Uniform Act, art 255(2).

4.3 Different quality test: a matter of interpretation

A further inquiry into the notion of quality is necessary. This discussion points to the various quality tests the buyer may alleged non-conformity of goods. In fact, this raises a debate in trying to clear the confusion surrounding the basis of the seller's liability for the non-conformity of goods. This discussion, in turn, makes it necessary to choose between various quality tests.

Against this background, the Act's default rule in Article 255 para 2 appears narrow and limited in its content and scope. On its face, this provision does not rely on any notion of quality, with the only relevant question seemingly being whether the goods are fit for "the purposes for which goods of the same description would ordinarily be used". In other words, the Uniform Act only seems concerned with whether the goods are fit for their ordinary purposes and not with quality. Rather, quality is a broader notion that may include not only fitness for ordinary purposes, but a number of other aspects such as the goods' physical state and condition, intrinsic qualities and features, safety, durability, appearance, finish, and freedom from minor defects[17]. It is an undeniable fact that these other aspects of quality could be attributable to the dynamic decisions of individuals and group choices and satisfaction based on information gathering relating to a particular commodity [11]. Further exploration of the problem centres on the considerable evidence that quality variation is greater in group unanimity than in personal preferences over certain goods. Here, the commercial buyer may be inclined to conform and to choose goods required by group customers in the market.

As a general rule under the Uniform Act, conformity of the quality of the goods will be met if and only if the usage criterion is also satisfied[18]. In fact, the commercial utility of the goods seems to be the guiding rule to the commercial buyer under the Uniform Law in ascertaining the seller's responsibility. This can be best explained by the fact that the utmost preference to the commercial utility of the goods by the commercial is guided by several different ways in which interpersonal influences impact variety-seeking behaviour of consumers [12]. In fact, changing social habits may require merchants to select a variety of items appropriate to the demands of divergent contexts and audiences with the view of acting in conformity with consumers' preferences. Understandably, consumers' individual choices tend to conform to or diverge from the choice of another group of consumers [13]. It follows therefore that the material conformity of the goods to the commercial buyer is guided by individual and divergent preferences of its end users. The result of the non-respect of both material and functional quality or either of the qualities, often insinuates a breach of contract. In a case where the quality is deemed essential, the breach may result in a fundamental breach with *the consequence that the buyer may either ignore the contract or request the total substitution of the purchased good*[19].

Conversely, many domestic legal systems have used varied notions in ascertaining the ultimate default rule of conformity of the goods in order to safeguard the buyer's satisfaction. Notions of quality such as "average, "merchantable," "acceptable, or "satisfactory quality" have been the measuring yardsticks meanwhile "fitness for an ordinary or a common purpose" is merely one of the components

[17] Sale of Goods Act § 14(2)–(2)(B).

[18] As per the position in the civil codes of Cameroon (art 1641), Côte d'Ivoire (art 1641) and France (art 1641).

[19] Id, art 283.

referred to in some legal systems to make a sound judgement on the notion of quality or to know whether the goods meet the required standard of quality[20].

The above approach can be said to be associated with the merchantability test, which obtains with some common law systems. This test is viewed as comprising more than just the saleability of the goods as those terms in the parties' contract (with description, fitness for purpose, and acceptance being other relevant aspects of merchantability) [14].

4.3.1 Ethical values

Ethical value is an emerging applied subject. It is still currently debated as it is applied to all aspects of business conduct, the manufacturing of goods, and the quality standard of goods. In general, ethical values appear to contribute to the development of legal systems in which contracts are enforced fairly, and bribery and corruption are less prevalent, enabling business entities to have equal access to legal process and equal protection under the law.

At the international level for instance, private initiatives such as the principles laid down in the United Nations Global Compact covering issues such as human rights, labour, environment and anti-corruption aim to assist its member countries to comply with the international standards required on these issues. In Africa, ethical values are known and recognised in international and national sales contracts as one of the solutions to the defective goods as from the manufacturing process.

An ethical value contractual clause can be express or implied in the contract of sale. When implied, they may be inferred from trade and usages. Whether expressly or impliedly in a contract of sale, they become part of the contract and may be enforced, or their violation sanctioned, in the same way as with any other term. However, the parties agree on their express stipulation [15].

In Cameroon, for instance, most organised professions and some trade associations have codes of practice which set out ethical behaviour for members in their dealings with their clientele[21]. For instance, the company in charge of distributing energy makes available to the public an e-mail address for anyone who wants to make a complaint and report any violations of their Code of Business Conduct and Ethics. A clause ensuring ethical code and conduct is prior inserted in the contract signed by customers before they benefit from the services of the company. This is done in favour of its customers.

In line with the above example, it should be pointed out that in most, almost all contracts of sales of goods, including both domestic or international contracts, the quality of goods is not restricted to its physical appearance; it also has to comply with any other requirements which are prescribed by the law or subject to trade and usages[22]. Therefore, if the origin of the goods prescribes an ethical value standard at production, the standard will definitely constitute a quality of the goods. As a result, the requirement of quality will not be met if the goods produced do not meet with the ethical standard as required. It could therefore be agreed that people incorporate more variety into their consumption decisions when their behaviour is subject to public scrutiny [16].

[20] Sale of Goods Act, 1979, c. 54, § 14(2)–(2)(B) (Eng.), available at http://www.legislation.gov.uk/ukpga/1979/54; U.C.C.§ 2-314(2)(c) (1977).

[21] These would include the code of ethics of manufacturers' associations, association of advertising practitioners, etc.

[22] Uniform Act, arts 238–239.

It is not easy to determine the non-conformity based on the ethical value[23]. Such difficulty is due to the hidden character of its nature and also to the fact that it does not physically influence the physical feature of the goods. If the breaching party does not of good faith disclose or cure the defect, an expert may sometimes be required to determine the breach.

Unless the parties have agreed otherwise, failure from the seller to deliver the goods in conformity with the ethical standards amounts to a breach of contract. In particular, when the seller is required to deliver goods that are fit for the purpose for which goods of that nature are commonly used or when a special request on an ethic (such as health and environmental considerations) was made known to the seller[24]. The buyer remedy will be its rights of redress[25] and claim for damages[26].

4.3.2 Good manufacturing practice

GMP refers to the "Good Manufacturing Practice". This is a well-known regulation whose purpose is to ensure the appropriate manufacturing process that would impact on the quality of the products. Good Manufacturing Practice is a series of regulations that are binding on the contracting business parties, (is agreed upon) requiring food producers, manufacturers, pharmaceutical companies, and packagers of drugs to ensure that their products are safe, pure, and totally effective. These regulations are then meant to ensure a level of quality approach to manufacturers of goods in order to protect consumers from contracting for non-effective and dangerous goods. In summary, Good Manufacturing Practice plays a paramount role of quality assurance that ensures that products are consistently produced and controlled to the quality standards appropriate for their intended use and their legal requirements. In some cases, it is simply required by the marketing board or in some countries by the government department in charge of regulating trade and commerce[27].

Sometimes, GMP is referred to as Cgmp- meaning "Current Good Manufacturing Practice". This is a mere call to producers, packagers, or manufacturers to update their machineries, systems or equipment in order to comply with the new technology, capacity and /or legal requirement in their business. Generally, GMP's guidelines provide regulation on products such as foods, drugs, blood and medical devices. Accordingly, countries do update their cGMP regulations for local companies to act in accordance with the legislation. In Cameroon, for instance, the Medical Council is a statutory body that was established in terms of the medicines and related substances control to oversee the regulation of medicines. Nonetheless, the "Standard and Quality Agency (ANOR)" and the "Service of Norms" in the Ministry of Trade and Commerce have a wide mandate to ensure the quality of products in meeting the required standards[28].

Even though not prescribed by the UAGCL, such a business practice or measure is relevant in enhancing the warranty of quality of goods that flood the markets.

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[23] Uniform Act, art 255 para. 1.0.

[24] Uniform Act, art 255 para. 2.

[25] Uniform Act, art 282-283.

[26] Uniform Act, arts 292-293.

[27] Definition of GMP by the World Health Organisation and as per GMP institute found at <http//www.gmp1st.com/index.htm>, Accessed on October 24th, 2009.

[28] It was created by Decree No.88/204 of 5 February 1988, re-organising the Ministry of Commerce. See Juridis Périodique no. 5 1991, p. 13. These structures were created with the objective of protecting consumers and ensuring the technical supervision of the quality and quantity of goods through inspection.

This goes a long way to improve on the quality of goods which the end users would obtain from commercial buyers. Respect of such a measure is left at the wishes of the parties in a contract of sale or could be implied from the trade and usages of specific goods in a given branch of business. This is the very meaning of Articles 237 and 239 of the UAGCL.

5. Conformity and other related concepts as characteristics of the 'goods'

Generally, goods have certain defined physical characteristics which in everyday business practice the parties have full knowledge of when contracting. In some cases, certain states of affairs may be so inextricably linked to the goods as to be 'non-physical characteristics' of the goods. In this regard, the parties may in concluding their sale insist on some features connected to the goods but are not physically part of the goods. These could concern the tangible and intangible things connected to the good. Nevertheless, the dichotomy between intrinsic and extrinsic characteristics of a 'good' is fundamental in determining the functionality of the goods. In effect, these characteristics are broad and can be described in various terms, for example, intrinsic/extrinsic; embodied/unembodied; tangible/intangible; corporeal/incorporeal; objective/subjective; real/intellectual and physical/non-physical.

A key example of non-physical characteristics that the parties may view as part of the goods emerges from the field of marketing. In that field, '[the idea of tangible and intangible attributes [of goods] is well established' [17]. Tangible characteristics are those that 'are physically present or can be seen, experienced or measured in some way'. Intangible characteristics, such as reputation, quality image, and country of origin, are 'understood using cognitive processes and also often contain an emotional dimension'[29]. It should be stressed that these intangible characteristics most impact the consumer behaviour in guiding their choices of goods they buy. It, therefore, ascertains the economic value of goods[30]. Hence, these non-physical attributes are conceived of as part of the goods.

5.1 Brand

A brand of a good is an exemplified example to be conceived as a non-physical attribute of the goods. By definition, a 'brand' is a commercial concept that describes' the impression of a product in the minds of potential users or consumers'. This explains the more reason why the wide sale of certain goods in some international markets is due to the strength of their brand and reputation publicised by mass advertisements and persistently demanded by a group of customers. That is why it is common today to find consumers in places across the world wearing, driving and drinking the same brands of certain goods [18]. This is considerable evidence that quality variation is greater in group unanimity than in personal preferences over certain goods [19]. This is another clear indication of the fact the commercial buyer of goods in her business will be seeking to conform to group norms.

Brand is conceived as an attribute of the goods, rather than something external to them[31]. Related to this is the notion of 'brand equity'. The brand equity in a

[29] Ibid, 438.

[30] Ibid, 438.

[31] Oxford English Dictionary (2nd edn, 1989), s.n. 'brand'.

good is measured by the difference between the inherent value of the good and the perceived value (or market value) of the good. Another justification for this is the public habits and beliefs in certain virtues of these goods, which have stood their test of time. Such a picture is typical in Cameroon where from socio-economic and psychological perspectives, the purchasing public still hold tight to the buying of some goods of old reputable trademark or taste. For example, certain brand of goods such as, shoes like "pierre cadin" from France, "clarks" from England are still believed to be durable even sold as used goods. The sale of used goods or second-hand goods is an everyday practice where is visible to find a line-up of stores in Cameroonian cities such as Douala and Yaoundé operating in this trade. Goods vary from cars, household equipment to consumer goods. Based on observations from field trips conducted by the researcher in the above mentioned cities, it was gathered that consumers prefer certain used goods irrespective of their diminished quality and safety but rather simply because of their cheap prices, accessibility and long standing brand [20].

The law recognises that reputation and customer awareness are worthy of protection by allowing the enforcement of intellectual property rights. Although it is not a legal concept, brand equity has been referred to as being '[a]t the core of a trademark's value and a manifestation of the legal concept of trademark good will' [21].

The branding and reputation of the goods are connected to intellectual property in the goods. The seller's duties in respect of conformance and intellectual property rights are interrelated rather than mutually exclusive. Certain characteristics of the goods may indeed be relevant to both duties. As will be demonstrated, the UAGCL's provisions relating to intellectual property are apt to deal only with the existence of certain non-physical characteristics of the goods. The content of those characteristics must be dealt with under the principle of conformity. The seller has express obligations in relation to trademarks and other intellectual.

property rights under Article 260(1) UAGCL: *the seller shall deliver the goods with the assurance that no third party has a right or claim to them, unless the buyer accepts to collect the goods under such conditions.*

From a reading of Article 275 UAGCL, it is clear that the main purpose and effect of the seller's duty to deliver is to require the seller to transfer the property or title to the goods to the buyer. This implies that the seller should not necessarily be the owner of the goods. The fundamental requirement here is to qualify the seller's right to sell and also the third party's right(s) over the goods. As concerns the seller's right to sell, the seller must not necessarily be in the possession of the goods and be able to transfer property to the buyer. To avoid any third party's claim, the seller must be the right holder of some patent, trademark or other proprietary interest over the goods. Any possibility for the third party to have access to the goods on such reasons will amount to a defect in title and the seller will be liable for this. The essence here is for the seller to be able to transfer to the buyer a title overriding that of the true owner.

6. Burden of proof for the non-conformity of the goods with the standard

As a general principle, the allocation of the burden of proof under the Act, seeks to know whether or not the goods are presently in conformity with the applicable standard as contained in Article 255. This mostly guided by the principle of proof proximity, which states that conformity or non-conformity of any good is determined by the individual who is in possession of the said good. This means that when

a good is still with the seller, he/she is in the rightful position to establish and prove that the said good conforms or not. By the same token, once the buyer purchases the good, he/she assumes the responsibility of *establishing conformity or non-conformity of the good in the case of an incident.*

One relevant general principle under the UAGCL is that the assessment of the conformity of goods sold starts upon delivery[32]. In fact, it is understandable that it is the buyer's obligation to examine the goods in view to reveal any lack of conformity. Therefore, the law grants an opportunity to the buyer to inspect the goods and report to the seller whether or not the goods are in conformity with the contractual obligation as agreed upon with the seller [22]. The question that arises is whether the buyer's knowledge, usually derived from having an opportunity of pre-contractual examination of the goods, should be relevant to deciding what conformity obligations were imposed on the seller by the contract and, even if not, whether the facts of the buyer's inspection or assessment is hardly relevant to determine the content of the seller's obligation[33].

The philosophy behind the application of Article 255 UAGCL directs that a buyer ought to be able to rely on the agreed arrangements. Therefore, if there is any discrepancy between the contract and the goods inspected, the buyer has a right to cause the seller to redress the situation. This applies regardless of whether the buyer knows of a defect, or if it was agreed that the seller shall deliver the goods without defects [23]. At this point, the parties must be assumed to have expressed their wishes in their written agreement in relation to the requirements for the goods in question. This means that an analogous or expanded interpretation of the provision so as to apply it to Article 255 para. 1 of the Uniform Act seems in principle to be a restricted application of the *caveat emptor* principle.

When reference is made by the contracting parties, what is normally meant is inspection by the buyer. However, control of quality may also be effected by the seller, in which case its quality certificate is attached to other documents (which is significant in respect of certain goods since quality may be considerably affected during transport by reason of environmental and other circumstances). This method of inspection is provided by some governmental or international bodies. The certificate of inspection is the only proof of what it is bound to furnish under the contract. There is, however, another view to the effect that the other party is always entitled to a further inspection[34].

The answers to these preoccupations exert an influence on contract interpretation depending on the particular circumstances. Presumably, these points are too obvious for the drafters of the Uniform Act not to have been aware of them considering the fact that Article 255 para. 1 does not concern the terms implied by default but concerns what the contract itself provides. This clearly shows the limits of the application of the concept of conformity under the Act which presumably seems to be detrimental to the business climate. In actual fact, in addition to that standards contained in the contractual stipulations, other national and international norms of goods need to be considered. Rapid technological changes with a corresponding impact on consumer behaviour is taking place within an increasingly liberalised marketplace in which the global drive to compete brings new challenges to regulatory authorities in setting up conformity standards of goods.

From the above strand of reasoning, it is certain that irrespective of the contractual stipulations, it is also of prime importance to note that the commercial buyer

[32] Uniform Act, arts 256 & 258.

[33] Uniform Act, art 258.

[34] Uniform Act, art 256.

could dictate other requirements to the seller as driven by the desires of consumers. In addition, there is also necessity of the seller to have knowledge of surrounding facts requiring the goods to conform with certain local and international standards. Nevertheless, no matter the argument, the buyer's evidence as to any lack of conformity can only be validated through his duty to examine as well as supported by any information which was brought to him by the seller.

6.1 Burden of proof for the non-conformity of the goods at the time risk passes

In real commercial practice, there is usually the practical difficulty in ascertaining the allocation of the burden of proof with the purpose of establishing a defect of conformity of the goods which already existed at the time risk passed, or existed before that time. The situation under the Act is ambiguous in that there is no clarity with regard to the charge on the seller who deals in goods that do not conform or are observed to have hidden defects. Moreover, the Act does not clearly spell out the seller's responsibility when his/her goods are defective or *do not conform as a result of a particular kin*d. Arguably, the notion of conformity under the Act falls within the meaning of the subjective understanding of a "defect" [24].

As an evidence to the forgoing fact, the purport of Article 256 UAGCL which suggests the fact that a buyer can only make a case for any lack of conformity after the risk passes irrespective of the nature of the defect. In fact, the strong implication is that the burden of proof has shifted onto the buyer in order to establish the seller's liability when delivery has duly been effected. Most often when the buyer verifies a good to be purchased, the intension is hardly to establish its actual state; rather he/she tries to determine the good's non-conformity aspects in order to demand immediate reparation. The new Uniform Act has further empowered the buyer to notify the seller of any observable defect. Despite this responsibility given to the buyer, the nature or kind of defect the buyer is supposed to report to the seller is not clearly defined.

There remains, however, a serious problem about the kind of defects which the buyer is expected to report to the seller. Nevertheless, a clear right of action has been imposed unto the buyer to establish the seller's responsibility for apparent defects and for hidden defects[35] discovered by the commercial buyer particularly when delivery has taken place.

At this juncture, it would be necessary to make an inquiry into the type of risk that can be transferred or passed to the buyer after delivery before examining the kind of defects the buyer is expected to reveal.

6.1.1 Which risks are transferred to the buyer?

Risk of "loss" in a sales context refers to the allocation of financial responsibility for the injury or destruction of goods that occurs whilst the goods are changing hands from seller to buyer [25]. To identify the appropriate moment for passage of this risk is the task of the law governing risk of loss. That law is currently found in Article 277 *et seq*. of the Uniform Act. The Uniform Act contains no definition of the types of risks governed by the rules on transfer of risk, thus leaving uncertainty. First, one must look at the risks that fall within the scope of the Act[36].

[35] Under art 1641 of the French Civil Code, for the purpose of an implied or legal guarantee, the defects must be hidden defects (vices cachés), unknown to the buyer.

[36] For example, in complex agreements, a part concerning services may entail a certain risk in conjunction with a sale but not governed by the Uniform Act. (Art 235(b)).

6.1.1.1 Liability for loss or damage to the goods

The wording used in the Uniform Act is "loss or deterioration"[37] contained in the Article 277 para. 2. Physical risks to the goods including their destruction are covered by the concept of "loss". The Uniform Act's risk-of-loss rules clearly limit their ambit to loss or damage to "the goods" (that is, the goods sold) or "in respect of goods sold". By analogy, the causes of loss could be broad encompassing disappearance of the goods, including theft, misplacing the goods, their transfer to a wrong address or person, and mixing up the goods with other goods are included.

This situation was vivid during a field trip conducted by the researcher in markets of some big cities in Cameroon: Douala and Yaoundé[38]. Most big merchant-sellers of second- hand goods like shoes for example find in their bulk of goods damaged shoes and because the risk has already been transferred to them by their supplier in their country, such as Dubai and China, they are unable to return the goods. Therefore, because of financial interest, they are forced to sell them at relatively cheap prices.

Another concern is the documents pertaining to the goods. The risk-of-loss rules of the Uniform Act apply as easily to documents as to goods. This study rather holds strong to the fact that the risk -of- loss of a document connected to the goods, should simultaneously pass together with the risk for the goods. The time and place to hand documents may at times not reach the buyer concurrently. In a case where there exists no agreement to this effect, the delivery of documents may be expected just in time for their use, for taking delivery of the goods or for their import in accordance with the trade usage[39]. Thus, if the documents are lost before they are delivered; the risk would not be treated similarly as for goods. Consequently, the holding of relevant documents of the goods by the seller does not affect the passing of risk[40]. The buyer could rather be contended to claim remedies for non-conforming delivery of documents, by applying to the courts for avoidance of the contract, which would stop risk relating to those documents from passing[41].

7. Proof as matter regulated under the uniform Act

Considering that Article 255 of the Act neither states the liability attached to proof nor points out on whom the responsibility of determining the conformity and non-conformity standard of a good as well as the timeframe of declaring such information, UAGCL principle have to be applied to establish the seller's liability in a case where a purchased good does not conform with acceptable standards.

Nonetheless, one relevant general principle under the UAGCL is that a party who asserts a right must prove the necessary preconditions for the existence of that right. This is clearly evident under Articles 258 and 259 para. 1, which gives the burden to the buyer to notify the seller cases of lack of conformity. The buyer's right to do so is to ensure the seller's obligation in delivering goods in conformity with the express contract terms pursuant to Article 255 para. 1 of the UAGCL. It suggests that the burden of proof includes the burden of adducing the relevant evidence and

[37] This is the author's translation of the French version of the UAGCL, which uses the words: "la perte ou la deterioration".

[38] The Nkoulouloun and Mokolo markets respectively.

[39] Uniform Act, art 254.

[40] Uniform Act, art 278 para. 2.

[41] Uniform Act, art 281 & 296.

the burden of persuasion. This comes into play by the reliance of the buyer on the seller's conformity obligation. In other words, an exception to the buyer's expectation to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. However, if the seller does not raise the issue of reliance, the goods' fitness under Article 255 para. 2 will be presumed.

The "rule and exception" principle of the allocation of burden of proof may not always be applied strictly in practice because the burden of adducing evidence is sometimes placed on a party who simply has better access to evidence but who would not otherwise bear this burden on strict principles of the allocation of burden of proof [42].

From the above, as well as in line with Articles258 and 259 para. 1, it can be deduced that the buyer has to prove the factual prerequisites of the provisions upon which he wants to rely for its claim or defence. It follows from the above that in absence of an explicit regulation in the UAGCL, the allocation of the burden of proof in relation to the various factual requirements in establishing the seller's liability for non-conforming goods has to be exercised primarily on the basis of the general principles underlying the UAGCL.

These general principles are to be found first of all in the few provisions which explicitly address the question of burden of proof, in particular Article 294(1). It states:

> *A party is excused from his duty to render performance if he can prove that it is made impracticable without his fault by the occurrence of an event, namely; due to a third party or the occurrence of a force majeure. A force majeure entails events which happen beyond the party's control and which could not be reasonably foreseeable. However, there is no exemption if the failure to perform has been caused by a third party appointed by the defaulting party to perform all or part of his contractual obligations*[43].

Inherent in these general statements of excuse are four elements: (1) performance has become impracticable; (2) the non-occurrence of the cause of impracticability was due to *force majeure*; (3) the party asserting the excuse is without fault; and (4) the party seeking excuse did not assume greater obligations in the contract.

On the strength of this, as well as in accordance with Articles 235 (a) and 282 UAGCL it can be deduced that each party is under the obligation to prove the factual prerequisites of the provisions as the basis of his/her complaint and justification. This situation originates from Roman practice expressed in Latin as *ei incumbit probatio, qui dicit non qui negator actori incumbit probatio*; translated in English as 'rule and exception-principle.' It is important to underline that the respect of equity is the driving force behind this rule, since both the UAGCL and the CISG do not expressly elaborate on the principle of proof proximity[44].

This rule is supplemented or modified by considerations of equity according to which each party has to prove those facts which originate from its sphere. The basis for this principle proof proximity in the UAGCL as in the CISG is less clear [26, 27]. Consequently, the courts will presumably generally limit themselves in

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[42] "If the buyer rejects the goods by invoking their non-conformity the seller must prove that the goods are in conformity with the contract; if the buyer already accepted the goods the buyer would have to prove their non-conformity."

[43] The author's translation.

[44] Sometimes this rule is broken down into two separate rules distinguishing between the burden for a party raising a claim and a party claiming an exception or raising a defence.

stating the existence of the principle without giving any further justification. The proof proximity pays attention to the ability of the party to gather evidence as well as the relevant facts and issues presented as proof. This implies that once a good is delivered to a buyer without a prior indication of deficiency from him/her (the purchaser), the responsibility to prove any claim based on lack of conformity of the delivered good becomes that of the buyer. This seems to be the spirit surrounding the provision of Article 256 of UAGCL. It states:

> *Conformity of the goods shall be appraised as of the day of delivery, even if defects appear only later*[45].

The rules on conformity under the UAGCL are by no means an exception in dealing with issues of proof as the case under the CISG. The point to be addressed here in the first place is the burden of proof. The burden of proof is not a legal obligation, but by its legal nature, a duty. The duty represents an obligation to oneself and not to the other party in a contract. The duty to proof is closely connected with the buyer's duty to examine the goods and to notify the seller. Namely, the seller will be liable for the non-conformity of delivered goods only if the buyer gives notice pursuant to Article of the UAGCL.

The main purpose of the examination is to determine whether or not the goods are in conformity with the contract, that is, to reveal defects in quality, quantity, description and packaging. In fact, it is only on the result of the examination that the buyer can make a claim for nonconformity. It follows therefore that, burden of proving non-conformity rests on the buyer.

8. Overview of the various allocation of burden of proof in practice

It is expressly clear from the provisions of the Uniform Act that the allocation of the burden of proof for the seller's liability for non-conformity of the goods at the time the risk passes is imposed on the buyer. It is however rare to find under the Act an apportion of the burden to proof to the seller. There is a lack of necessary specificity and distinction to attribute it clearly to the seller.

In light of that and other considerations, attention should also be given to the fact that the Act is completely silent on the procedure for establishing the burden of proof. This can be explained by the fact that such an issue which is beyond the OHADA's scope of application and consequently be governed by the non-harmonised national laws of member countries. Consequently, such a question must be left to the courts of member states as a matter of procedural law. In addition, it is inappropriate for the Act, which relates to the cross-border sale of goods, to deal with matters of evidence or procedure. In fact, they are still some hurdles that beset the uniform working of the OHADA Uniform Act on General Commercial, considering the glaring differences between the procedural and evidential laws operating in the member States on matters of proof. This is as a result of the prevailing differences in legal cultures, procedures in the area of criminal proceedings which is out of the scope of the Act. Therefore, a degree of non-uniformity can be expected in matters of taking evidence and more broadly in allocating burden of proof.

In fact, the allocation of the burden of proof under the Uniform Act rests primarily on the basis of the *actori incumbit probatio* principle. Thus, the burden of

[45] The author's translation.

proof is largely dependent on the position of the parties in the process, that is, who invokes Article 255 in its favour.

The common practice is that the responsibility of proof is often on the basis of proof proximity principle, whereby the responsibility to prove the non-conformity with standards of a good is transferred from the seller to the buyer once a purchased item is delivered to the buyer. The implication here is that the seller is responsible for proving the conformity or non-conformity of his/her good only a purchaser has not yet taken possession of or demanded the reservation of the particular good. *Therefore, the moment a buyer receives the delivered good raising the question of non-conformity, any further proof non-conformity would be his/her responsibility*.

It is suggested, however, that legal predictability should not be undermined any further by the introduction of the proof proximity principle into the UAGCL. As already alluded to, proof proximity can easily contravene the rule and exception principle, and its introduction necessitates a choice between the two, either as a matter of general principle or in the particular case. That, in turn, gives rise to an additional layer of complexity and unpredictability.

Reaching a substantial degree of international agreement on the rule and exception principle is a hard-earned achievement, which has potential to promote legal certainty in all areas falling within the Act's scope. From this standpoint, recognising proof proximity as the Act's general principle would be an unwelcome development.

9. Conclusion

The seller's duty in exercising his material duty of conformity under the UAGCL is fraught with some difficulties. One of such difficulty is to establish the seller's liability for the non-conformity of goods as to the specifications of a contract of sale of goods. There is still some confusion and uncertainty regarding the notion of conformity under the Act because the concept of conformity is dynamic and ambivalent. There is really a need to search for a quality standard, which can underpin the ultimate default of the fitness for ordinary purposes and engulf other aspects of conformity. This will greatly be in the interest of the commercial buyer in order to conform with the demands of his consumer buyers.

The seller is equally expected to deliver goods which will satisfactorily serve the purpose for which commercial buyers intend to use them. This suggests therefore that the seller's expected obligation to deliver the adequate requirements to the goods under the contract would hardly in practice be that. This therefore raises the confusion and uncertainty in determining the seller's liability for the non-conformity of goods as to the specifications of a contract of sale of goods under the UAGCL. The concept of conformity must be handled in consideration with a number of issues, irrespective of the contractual stipulations agreed by the contracting parties.

It has also been evident that the issues of proof of lack of conformity under the Act be useful to introduce an overarching quality standard. However, to what extent should a sales law instrument govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence? It has been argued that the UAGCL is not capable of dealing adequately with the admissibility of evidence. Consequently, this may have considerable impact in establishing the seller's liability and on substantive law rights. No consistency in the exercise of this right is available under the UAGCL. There are undeniably differences in legal cultures, procedural environments, and views of the purpose of judicial proceedings in the member states.

To conclude, there is little doubt that the UAGCL has proved to be capable of resolving the issue of conformity of the goods. Attention should be given in drafting new provisions on conformity. Finally, to what extent should the UAGCL govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence. This calls for a fundamental harmonisation of the adjectival laws on matters of proof in order to maintain a higher degree of the uniform character of the OHADA laws.

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