

RULES APPLICABLE TO THE INTERNATIONAL SALE OF GOODS DEVELOPED IN THE OHADA

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Abstract

The OHADA Uniform Act on contract law (draft)³ contains separate provisions on commercial sale and treats aspects of the scope, form of contract, obligations of the parties, the effects of the contract with reference to the transfer of property and risks, but also to non-executing the contract and liability of the parties.

Key words: *Uniform Act, international sale, international trade contract, international conventions, uniform legal law, contract uniform law.*

1. Introduction

The Doctrinaires have channeled their concerns along with the practitioners towards the contract of International Sale of Goods, since it constitutes the most important and effective legal instrument by which both individual or general purposes can be achieved, related to the growth and diversification in trade in the world.

The role of the Organization was to transfer the skills of legal integration of an Interstate organization with power of decision and with supranational powers in order to achieve an overall unique and coherent legal ensemble for the Member States.

In order to harmonize and standardize the analyze of the ensemble of legal rules used by the African states after obtaining independence was required, as well as the results and methods of legal integration.

Harmonization is the operation consisting of merging legal systems in order to suppress the differences and conflicts of form and make them compatible with the Community objectives. To the present 17 states have joined this organization.

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³ Acte uniforme portant sur le Droit commercial general, adopte le 15 decembre 2010, Lome in Journal Officiel de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, www.ohada.org. The distinction made between the two Uniform Acts is that one wishes to be of a general nature, applicable to all contracts, and the other would apply only to relationships that arise between traders, all the participants in the legal relations being from the States Parties to OHADA.

2. The Uniform OHADA Act on general commercial law

On 17 October 1993 there has been set up to Port - Louis the Organization for the harmonization of business law in Africa (OHADA)¹.

The uniform act relating to general commercial law adopted by the OHADA has entered into force with effect from 1 January 1998².

Within the appeals for harmonization there was also developed a preliminary draft of the OHADA Uniform Act on contracts law, which is based on the UNIDROIT Principles³. In fact, it takes almost exactly the provisions of the UNIDROIT Principles, which - so - from the uniform contractual framework becomes uniform legal framework.

The OHADA Uniform Act regarding contract law consists of an introductory chapter and 223 articles that make up 13 chapters as follows: Chapter 1 - general provisions; Chapter 2 - training and authority of agents; Chapter 3 - validity; Chapter 4 - interpretation; Chapter 5 - content and third parties rights; Chapter 6 - performance; Chapter 7 - non-execution; Chapter 8 - compensation; Chapter 9 - joining obligations; Chapter 10 - the contingent, joined and alternative obligations; Chapter 11 - the assignment of claims, the obligations transfer, the assignment of contracts; Chapter 12 - limitation periods; Chapter 13 - the protection of creditors and third parties.

In accordance with Article 234, of the Uniform OHADA Act, these apply to contracts of sale of goods between traders, natural persons or legal persons, understanding by this, contracts of supply of goods for manufacturing or production. Outside of contrary stipulations, the contract of sale is subject to the commercial provisions of the said Act, if the contractors are based or operate in one of the States party to this Act, or if the rules of private international law lead to the application of the law of a State party.

These provisions shall not apply to sales of goods bought for the personal, family and household use, unless the seller, at any time prior to, or at the time of conclusion of the contract, did not know, and shouldn't have known that those goods were purchased for such use.

According to Article 236, several categories of sales which are contained in the framework of special rules are not the subject to the Uniform Act, namely: Sale at auctions, sale by execution, or in any other way, through the authority of justice, sale of securities, effects of trade and currency, and operations with other financial instruments, sales of ships, vessels, air-cushion vehicles and aircraft, the sale of electricity.

In terms of formation of the contract, Article 241, Paragraph 1 provides that it will be completed, either by acceptance of an offer, either by the attitude of parties, which indicates enough their consent. Also, it shows further that an offer is clear enough if it indicates the goods and expressly sets the default quantity and price or give guidance in determining them (Paragraph 2).

¹ Joseph Issa Sayegh, Jacqueline Lohoues – Oble, OHADA: Harmonisation du droit des affaires en Afrique, Bruxelles, 2002, p.44-45

² Acte uniforme relatif au Droit commercial general, adopte le 17 avril 1997, Journal Officiel de l'OHADA, No.1 du 1 octobre 1997, amended in 15 Decembrie 2010 and published in the Official Journal of OHADA no. 23 of 15 february 2011.

³ In fact, this project has been drawn up in September 2004 in collaboration with prof.M. Fontaine and the UNIDROIT Secretariat which takes in most of the texts of the UNIDROIT Principles, the differences that appear in text being more of a formal type.

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of its author, that shall be bound in case of acceptance that way.

A proposal to specific persons is considered only as an invitation to offer, even if the person making the proposal has not manifested in that respect.

Article 242 provides that the offer becomes effective when it reaches the recipient. The offer may be revoked if the revocation reaches the offeree before acceptance having occurred. However, the offer may be revoked if it indicates, by setting a fixed term of acceptance, which is irrevocable even if the recipient reasonably considered that the offer was irrevocable and acted accordingly.

It constitutes acceptance all statements or attitudes by which the recipient indicates that he agrees to the offer.

The response to an offer by which that offer is accepted, but that contains additions, limitations or other amendments, refusing the offer, constitutes a counteroffer (Article 245 Paragraph 1). However, the response may signify an acceptance if it contains some additional elements that do not substantially change the terms of the offer, and if the tenderer, without delay, does not express disagreement on these elements.

An acceptance may be revoked if the revocation reaches the offeror at the latest at the moment when the acceptance produced no effect.

The parties are free to negotiate and cannot be held responsible if any of them failed to reach an agreement. However, the part that does or ceases a negotiation in *bad faith* is liable for losses caused to the other party¹.

The Act enshrines the reception theory about the time of conclusion of the contract.

The seller's obligations under the OHADA Uniform Act are: to deliver the goods, to furnish the documents and accessories required for their use, to ensure conformity of the goods and its warranty.

If the seller is not obliged to deliver the goods in a certain place, he should bring the goods to the buyer at the place where it was made or stored or at the seller. If the sales contract provides for delivery of goods to a carrier, the seller fulfills his obligation to deliver exclusively to the buyer.

Nevertheless the seller is obliged to conclude contracts for transport, for the goods to arrive by appropriate means and in accordance with the conditions set by the buyer.

As for the requirement of the conformity of the goods, the seller must deliver the goods in the quantity, quality and packaging specifications established under the conditions stipulated in the contract. In case of the silence of the contract, the seller must deliver the goods which best fit the purpose for which they are normally used, or have the same qualities as samples or models presented.

According to Article 256 the compliance of the good sold is valued at the date of acceptance of the delivery, even if the defects occur later.

In line with the guarantee obligation, the seller must deliver goods free from any right or claim from a third party, unless the buyer didn't agree on these conditions. The seller shall indemnify the buyer for any eviction produced by his doing.

¹ Is acting in bad faith the part that begins or continues the negotiations without the intention of reaching an agreement (article 249 Paragraph 3).

Article 261 states that any inability to guarantee due to the seller shall be interpreted restrictively. The seller basing itself on such a clause must show that the buyer knew this and accepted this clause on the conclusion of the contract of sale.

The provisions of the Uniform Act show that buyer's obligations are: to pay the price and take in the goods.

Regarding the first obligation of the buyer, he is obliged to pay the agreed price, being obliged to take all necessary measures to fulfill formalities before the actual payment of the price.

When the price is fixed according to the weight of the goods, the price is determined, in case of doubt, according to their net weight. Article 266 determines that the payment of the price to the seller is made either on its premises or, at the delivery place of the goods, if the price is paid in cash, or if delivery is made in exchange of the documents.

If the sales contract provides for delivery of goods to a carrier, the seller can make the transfer or delivery to the buyer based on issuing the document representing prior payment. The parties may also provide that the buyer is not obliged to pay the price, until after examining the goods.

Regarding the delivery of the goods, the buyer must examine or inspect it, as soon as possible. If the sales contract provides for delivery of goods to a carrier, examination may be deferred until the goods arrive at their destination. If the goods are redirected or returned by the purchaser, examination may be deferred until the goods arrive at their new destination.

When payment is due at the time of delivery and the buyer delays in taking in the goods and does not pay the price, the seller must take reasonable steps to preserve the goods, the buyer being obliged to reimburse any expenses.

The transfer of property assumes that the risk passes to the buyer, so that the loss or damage to the goods does not exempt the buyer from the obligation to pay the price (Article 277).

If the sales contract provides for delivery of goods to a carrier, the risk passes to the buyer, by the delivery of goods to the first carrier.

If the sold goods are not individualized, the risk transfer takes place at the moment of their identification, being at the buyer's disposal.

Any party to a commercial contract of sale is entitled to request the competent court the dissolution of the contract for total or partial failure in executing the obligations by the other party. Regardless of the severity of the consequences, the party invoking them might be required to notify the other party its unilateral decision. The party seeking the dissolution of the contract may obtain it by paying compensation for loss and unrealized profits, as a result of breach of the contract (Article 281).

A party is not liable for any breach of its obligations if it proves that the failure was due to an impediment beyond its control, such as the act of a third party or force majeure. Force majeure is any impediment beyond the control of the person, who was not able to provide any occurrence or its consequences.

Dissolution of the contract releases the parties from their obligations, but does not exempt them from the payment of damages. The party that has executed totally or

partially its obligations may obtain a refund from the other party of what it has supplied or paid under the contract.

If the seller is bound to refund the price, must also pay interest from the day he received it. If the buyer must return the goods, he must pay the seller also a part of the profits that would have accrued.

3. Conclusions

As stated in the introductory chapter this Uniform Act applies to contracts concluded between traders, natural or legal persons (art. 0/1). In fact, the provisions of the said Act shall apply to all contracts without prejudice to any special provisions on consumer contracts, unless stated that they apply to commercial contracts (art. 00/1).

Specifically, although in this Act there are not contained provisions on contract of sale, it constitutes common law of contracts and the parties to a contract of sale coming from the States Parties to OHADA can invoke it, if there are some shortcomings at the time of negotiation, conclusion or execution of the contract of sale.

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