ARTICLE 255 OF THE OHADA UNIFORM ACT ON GENERAL COMMERCIAL LAW AND CONSUMER PROTECTION: THE NEED TO EXPERIMENT

*Dr. Roland Djieufack, (Ph.D.)**

ABSTRACT

This article sets out to vividly illustrate that the duties of the seller contained in Article 255 of the OHADA Uniform Act on General Commercial Law has some bearings on the consumer buyer. Various provisions of the Act, in particular Article 255, make inroads into the consumer law position to strengthen the position of the consumer vis-à-vis the commercial buyer. Undoubtedly, sellers are facing an onerous task to comply, and eventually attempt to comply, with the satisfaction of consumers through the regulation of their commercial transactions with the commercial buyer. Adopting an in-depth content analysis and critical evaluation of primary and secondary data, the paper concludes that the Uniform Act is a true recognition of the Latin phrase *caveat venditor* under the UAGCL. This will raise a greater awareness among sellers to compel their suppliers to supply them with quality goods in order to meet up with the expectations of commercial buyers. Consequently, consumers to a larger extent would benefit from such measures as contained in Article 255.

INTRODUCTION

The implied warranty of quality or fitness for particular purpose was first developed in Anglo-American jurisprudence in the early 19th century.[1] This was universally characterised by the slogan, *caveat emptor*; the thing is sold as it is, let the buyer beware; who does not open his eyes may open his purse.[2] In England, the warranty of merchantability was first established by Lord Ellenborough in 1815 not in issues of sale of goods but in commercial

* Senior Lecturer, Faculty of Law and Political Science, University of Dschang; Part-time Lecturer in the Department of Law, University of Buea, Cameroon.

1 George G. Bogert & Eli E. Fink, "Business Practice Regarding Warranties in the Sale of Goods", (1930-1931) 24 *Illinois Law Review,* pp. 400-417, p. 401.

2 Ernst Rabel, "The Nature of Warranty of Quality", (1950), vol. 24 (3) *Tulane Law Review*, pp. 273-287, p.274. Walton H. Hamilton, 'The Ancient Maxim Caveat Emptor', (1931) 40 (8) *Yale Law Journal*, pp. 1133-1187.

navigation and manufacturing of agricultural and mining products. Prior to this time, particularly in the seventeenth century commerce and trade were subjected to intolerable abuse and fraud.[3] In fact, 17th century onwards, doctrine of *caveat emptor* was given a new lease of life because of the influence of an emergent individualism and notions of *laissez-faire* which strongly opposed mediaeval regulation of quality by guilds, church and the state.

It was in this popular frame of mind which emerged the adage, "Let the buyer beware": *caveat emptor*. The ideology of *caveat emptor* was popular with the common folk. It denoted to them that they could stand their own ground with tricks of the merchants. The doctrine of *caveat emptor* was best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts. As a principle regulating the legal relationship between buyer and seller, *caveat emptor* is today a pretty sick horse.[4] It is not so much the buyer as it is the manufacturer and the seller who must beware, on penalty of damages. The rise and fall of this Latin phrase, which had attained the status of an ancient maxim, has brought damaging effects to the buyer in his relationship with fraudulent sellers and local consumers who are the end users of the goods. The total absence of any express warranty by the seller did not afford much protection to the buyer over the goods he bought from the seller. In some cases the exceedingly low grade or poor quality of the article sold to the buyer explained the failure to warrant by the seller. In many cases, sellers were in fact very liberal in making adjustments to reliable customers since sale was customarily by description or sample and the implied warranty thus obviates the necessity of any express warranty.[5] The doctrine of *caveat emptor* had a strong influence and retarded the development of not only implied but

3 George G. Rogert, "Express Warranties in Sales of Goods", (1923-1924) 33 *Yale Law Journal*, pp. 14-32, p. 15. Friedrich Kessler, "The Protection of the Consumer under the Modern Sales Act, Part I", (1964) 74 *Yale Law Journal* 262, pp. 1-27.

4 Charles T. Leviness, "Caveat Emptor versus Caveat Venditor", (1943),7 (7) *Modern Law Review*, pp. 177-200, p. 177.

5 George G. Bogert & Eli E. Fink, "Express Warranties in Sales of Goods," *op cit*, p. 403.

also express warranties. In spite of administrative and trade regulations which cause the decline of trade and commerce, it gave impetus for the development of the concept of implied warranty of merchantability. The concept of implied warranty for the fitness for the buyer's particular purpose got developed and was recognised as something separate and distinct from that of merchantable quality. From its inception, breach of warranty was a tort. Action was passed on breach of assumed duty and the wrong was considered to be a form of misrepresentation in the nature of deceit. The tort element served as a sound argument for those who intend to extend implied warranties of quality from the buyer to the ultimate consumer in the absence of privity of contract between the two.

The idea of quality has become more important in the present-day world where the consumer-buyer of goods is guided on the basis that the development of a modern nation is based on increase in products of reputable sellers to expect responsibility for defective goods sold to the commercial buyers. This notion of the consumer accompanied with responsibility has best influenced upon sellers in running their business in order to ensure conformity of the goods they sell to commercial buyers. An enduring legacy of globalisation is the widespread prevalence of sophisticated goods which through the medium of cross-border trade involves the flow of those goods across national frontiers. The saleability of those goods for the commercial buyer rests on laws in place in ascertaining the conformity of the goods.

The contract of sale of goods covers such an extraordinarily wide range of transactions that it seems necessary to set out a single standard of quality appropriate to guarantee the conformity for commercial concerns.

Accordingly, it is remarkable to note that the harmonisation of business law in Africa is situated in this same line of reasoning. This is the case of the Organization for the Harmonisation of Business Laws in Africa (better known by its French acronym OHADA).[6] Accordingly, the

6 This French appellation refers to Organisation pour L'Harmonisation en Afrique du

warranty protection has been made available to the commercial buyer under the OHADA Uniform Act on General Commercial Law[7] on the basis of the "conformity" requirement unlike their Common law counterparts which put at the disposal of the buyer implied and express warranties.[8] The Uniform Act on General Commercial Law has worked out a unified treatment of the complete sales responsibility of the seller under the duty of conformity.[9] Therefore, the importance of conformity today under the OHADA legislation as a result of the ineffectiveness of the *caveat emptor*

Droit des Affaires. The primary objective of this treaty was to provide a secure legal and judicial environment for business to operate in. The Treaty setting-up 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, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members of OAHDA are Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. *See* <http://www.ohada.org> and <http://www.ohada.com>. Pursuant to Decree No. 96\177 of 5 September, 1996, the President of the Republic of Cameroon ratified the Treaty, thus incorporating it into Cameroonian law. Also, Article 45 of the Cameroon Constitution as revised by Law No.96/06 of 18 January 1996, gives precedence to international laws or conventions on national laws. On February 22, 2010, the Democratic Republic of Congo's president ratified the country's adoption of the OHADA treaty. By the treaty's terms, the country becomes a member sixty days after the note has been deposited in Senegal. OHADA Treaty, Art.52, Para. 3. By virtue of Article 10 of the OHADA Treaty, its Uniform Acts are of direct application and take precedence over national laws of the Member States. See Martha Simo Tumnde, ''Cameroon offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts'', in *Unified Business Laws for Africa, Common Law Perspectives on OHADA* (ed. Claire Moore Dickerson), London, IEDP, 2012, 2nd edition, pp.64-65; Paul-Gérard Pougoué & Yvette Rachel Kalieu Elongo, *Introduction Critique a l'OHADA*, Yaounde, P.U.A.2010, p.62.

7 Hereinafter referred variously as 'UAGCL' or 'Uniform Act'. This is known in French as OHADA, *Acte Uniform portant sur le Droit Commercial Général*, found in the Official Gazette of OHADA, No. 23, of 15th February 2011. It is also available at <http://www.ohada.com/textes>. 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, 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.

8 Charles Mba-Owono, ''Non-conformité et vices cachés dans la vente commerciale en droit uniforme africain, (2002) 41 *Juridis Périodique*, pp.107-127, p.108. Friedrich Kessler, ''The Protection of the Consumer under the Modern Sales Act, Part I'', *op cit.* p.1-2.

9 Serge-Patrick Levoa Awona, ''Defaut de Confornité et Défaut Caché dans la Vente Commerciale OHADA: Retour a la Case Depart?'', *Recueil d'etudes sur l'OHADA et les normes juridiques africaines* (2013), Vol. VI, pp. 317-337, p.317-320.

rule occupies a considerable place in modern sales law. The chief function today is to enable the parties to tailor the sales contract to their individual needs. This is particularly to expand the sales obligation in order to include aspects not covered by the express warranty of a buyer from a contract law perspective.

One criticism, which emerged from this standpoint, is that the Uniform Act is indifferent to economic hardships suffered by consumers in the marketplace. This indifference triggered demands for consumer activists of late advocating for reform measures designed to curb abuses in transactions that fall within the scope of the Act has not been much felt. Although consumer protection laws multiplied in number on the national plane in the OHADA Member states, the author claims that fundamental fairness in contract relationships between consumers and merchants had not been achieved. Because of consumer vulnerability and consequent exploitation, several OHADA countries are enacting laws and setting up agencies geared towards protecting the interests of consumers. Majority of these countries rely on Presidential decrees and Ministerial Orders rather than legislations passed to remedy the situation. Such countries include Cameroon,[10] Côte d'Ivoire[11] and Senegal.[12] The difference in scope is directly related to the partially different purpose of the two sets of principles. The primary purpose of the OHADA Law is to function as a tool to assist contracting parties in organising their relationships, and courts and arbitrators in adjudicating cross border contracts. Very broadly speaking, the OHADA Law through its Uniform Act on General Commercial Law mainly purport to function as a kind of codified international *lex mercatoria*, offering a soft law infrastructure for transnational contractual relationships. Existing consumer laws were limited in coverage, and injustices not captured by

10 See Cameroon, Law n°90/031, August 10th 1990 Organising Commercial Activities in Cameroon; Loi-cadre no 2011/012 du 06 mai portant protection du consommateur.

11 See Côte d'Ivoire, Article 1, loi n° 91-999 du 27 décembre 1991; *Pour la vente entre professionnel et consommateur*, (sales between professional traders), see Article 6-3 du décret 95-29 du 30 janvier 1995.

12 See Sénégal, loi n°94-63 du 22 aout 1994 sur le prix, la concurrence et le contentieux économique.

these laws continued to flourish in the marketplace. Commercial buyers are increasingly the victim of a diverse and bewildering array of unscrupulous selling and deceptive business practices in a market overt[13] which this article sets out to explore. By extension, this causes hardships to commercial buyers in their business relationship with consumers. In fact, these frauds undermine the consumer's confidence in the entire business community, thus injuring the goodwill of honest commercial buyers.[14] As a result of this, this paper will examine the seller's liability for the non-conforming of the goods as set out in Article 255 UAGCL that may give a preliminary indication of whether the seller in practice ensures the protection of consumers by supplying goods in conformity with the terms of the contract of sale to the commercial buyer.

However, Article 255 of the UAGCL which could be described as the heart of the area of sales law becomes the rallying point for consumer groups. The author argues that the Article's provisions, which rest on the doctrine of freedom of contract, enables skilled and powerful sellers to perpetrate injustices upon unsuspecting consumers burdened with goods which failed to meet their reasonable expectations.

The Uniform Act, as its Common Law and the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) counterparts provide three obligations namely: delivery, conformity and guarantee as the seller's duties. There is usually at some point a considerable confusion and uncertainty as to whom to blame for the non-conformity of the goods to

13 The market system in major cities in Cameroon which are publicly patronised at regular hours and acknowledged as markets qualify to be described as a market overt. However, it is generally admitted at common law that "market overt" is a legally constituted market, open on hours of sunrise and sunset and where goods for sale are openly displayed to any stand-by or passer-by. It is commonplace to find a high incidence of Chinese goods in shops and streets of most towns. Preference of these goods by commercial buyers is because of their cheap prices and easy affordability. However, the local consumers continue to complain about the poor quality of these goods in terms of durability. Such goods include clothing, shoes, electronics and electrical equipment.

14 Alvine Longla Boma, "Consumer Protection: A Cameroonian Perspective", *Revue fricaines des Sciences Juridiques* (2011), Vol. 8, No. 2, pp. 47-62, p.47.

the terms of the contract of sale. This duty today is not efficient as business practices by sellers today are to an extent characterised by deception, false pretense, misrepresentation and false promise. Consequently, this situation does not afford a greater protection to commercial buyers of goods over their business with consumers. The importance of "conformity" today as a result of the ineffectiveness of the *caveat emptor* rule occupies a considerable place in modern sales law. The contract of sale of goods covers such an extraordinarily wide range of transactions that it seems necessary to set out a single standard of quality appropriate to guarantee the conformity of goods for commercial concerns. This is merely an umbrella term which embodies lots of issues to be deciphered by one's ingenuity. Regard should be paid to the change of this nomenclature introduced in England by the Sale and Supply of Goods Act 1994.[15]

The purpose of this article is to explore the reasons as to why the provisions of Article 255 of the Uniform Act to an extent are controversial to consumer protection and to suggest how this controversy frustrates efforts to address a number of important consumer issues in Article 255.

This paper has as an objective therefore to indirectly (to an extent) advocate for consumers' interests by principally making an appraisal of the legal mechanism regulating the relationship between the seller and the commercial buyers of goods as governed under the UAGCL. Basically, it will critically examine the seller's material and functional duties of conformity in showing the degree of protection it could afford local consumers dealing directly with the commercial buyer. This paper also adopts a critical and analytical approach in interpreting the provisions of the UAGCL and of foreign instruments regulating the sale of goods contracts.

15 Atiyah et al., *The Sale of Goods,* London, Pitman, 2005, 11th edition, p.162; See Sections 14 (2) & 15 (2).

CONTRACT THEORY AND THE DOCTRINE OF FREEDOM OF CONTRACT

The classical theory of contract is based on the idea of freedom of contract which was an offspring of the *laissez-faire* economic theory championed by Adam Smith. Hence, the will of the contracting parties becomes the source of their mutual rights and duties which the contracting parties hold with respect to one another. The essential teaching in this respect and in connection to this article is the principle of economic freedom under a contract of sale of goods. According to Adam Smith,[16] everyone has the economic freedom to act in his or her self-interest in order to achieve his economic desires. Consequently, in their relentless effort to achieve this economic desire, they are guided by an invisible hand, which ensures that while seeking to promote their self-interest, they incidentally promote the public interest as well although they did not set out to do so.[17] "By pursuing his own interest the individual member of society frequently promotes that of the society more effectually than when he really intends to promote it."[18]

Classical theory defines freedom of contract as the power of parties to decide whether to contract and to determine the rights and obligations of their bargain.[19] According to this vision, obligations arise out of the exercise of free will and a "meeting of minds."[20] Freedom of contract between parties of equal bargaining power, skill, and knowledge preserves and

16 *Wealth of Nations,* (Vol.1, Dent 1910) p. 421.

17 S. Todd Lowry, "Bargain and Contract Theory in Law and Economics", (1976) 10 (1) *Journal of Economic Issues*, pp.1-22, p. 13.

18 Richard J. Barber, Government and the Consumer, (1966) 64 *Mich. L. Rev*. 1203, 1221-26 Richard Barber has described the optimistic view of nineteenth century economists: The designers of the classical model reasoned that there would be optimal allocation of resources if markets were competitively structured, if buyers and sellers possessed adequate information about prices and the availability of goods, and if sales were made without artificial restrictions of any form....If all of these conditions are present, so the theory goes, utilities are maximized, and the society secures the fullest possible benefit out of its resources. In effect, a perfect balance is struck; producers (sellers) and consumers (buyers) are on an equal footing, and neither group will be able to take advantage of the other. p. 1222.

19 Samuel Williston, "Freedom of Contract", (1921) 6 *Cornell L.Q.* 365, p. 367-69 (discussing the limitations imposed upon freedom of contract during the early decades of the twentieth century because equal bargaining power did not exist in the marketplace).

20 *Ibid,* at p. 368.

enhances individual welfare. The exercise of this freedom allows each party to express liberty and responsibility in the marketplace and to maximize his expected utility. It ensures fundamental fairness in contract because informed, un-coerced consent to each term of the bargain is given by the parties.[21] The bargain contract, formed between equal parties, also meets the demand of the marketplace for a vehicle to facilitate the orderly and efficient exchange of goods and services.[22] Parties mould contract rights and obligations to meet their expectations, thus satisfying market needs for flexibility in contract.[23]

Certainly, there is a paternalistic ground for legal rules to regulate and protect the very interest of the contracting parties as well as the consuming public at large.[24] This concept of legal paternalism is instrumental to this article in that under a contract of sale, the seller's duty of conformity is embodied in a magnitude of implied rules contained in Article 255 *et seq*. of the Uniform Act on General Commercial Law to ascertain the quality of goods to the commercial buyer.

This article seeks to argue that the freedom of traders of goods to enter into a contract of sale for the supply of quality goods in conformity with the contract terms in the market is much dictated too by the demands of consumers in insisting for quality goods. Hence, in spite of the freedom of the parties in their contract of sale, such measures under the OHADA Uniform Act are by extension, tend to be protective to consumers, (who are the end-users of those goods), and the economy of the state. Arguably, this article is working on the premise that the idea of freedom of contract is today

21 Parties are normally the best judges of their own utility, and normally reveal their determinations of utility in their promises. Bargain promises are normally made in a deliberative manner for personal gain, and promises so made should normally be kept.

22 The optimistic view of nineteenth century economists that the pursuit of self-interest promotes community welfare was adopted by contract theorists to support the proposition that harmony existed between freedom of contract and the good of all.

23 Friedrich Kessler, "Contracts of Adhesion--Some Thoughts About Freedom of Contract", (1943) 43 *Columbia L.aw Review* 629, p. 629.

24 Michael J. Trebilock, *The Limits of Freedom of Contract,* Harvard University Press, 1993, pp.149-151.

a pretty sick horse, because of socio-legal and economic considerations among the economic actors. This relates to the fact that the expansive duties imposed on the seller in satisfying the preferences of the commercial buyer under their business contract as set out in Article 255 UAGCL, also by analogy serve as measures to protect the development of a country by requiring sellers to do legitimate business with commercial buyers.

THE PURPOSE, INTERPRETATION AND APPLICATION OF ARTICLE 255 OF THE ACT

3.1. The Purpose of Article 255

Article 255 of the Act sets out the purpose of the Act, which is to protect and develop the economic welfare of traders, that is, sellers and commercial buyers, and in particular vulnerable consumers. Article 255 places mammoth obligations on sellers of goods to ensure the commercial buyer's protection *vis a vis* its customers who are the end users of those goods he sells. These duties of the seller are principally governed by the notion of "conformity". This duty is expansive, imposing an absolute liability for defects that exist when risk passes to the seller, regardless of the fault.[25] The duties of parties to a contract of sale of goods are very important under commercial transactions. This is because parties most often show concern to what needs to be done and how it has to be done so as to achieve each other's interests in the transaction. It is not an over-statement to say that, the obligations of parties is the core of a contract of sale. Since the other requirements notably the contract formation and the terms of a contract shall have no significance if contractual parties fail to honour respective obligations. So, the subsistence of a contract of sale largely depends on the full respect of duties by parties concerned.

25 Kristian Maley, "The Limits to the Conformity of Goods in the United Nations Convention on Contacts for the International Sale of Goods (CISG)", (2009) 12 *International Trade & Business Law Review,* pp.83-126*,* p. 83.

The Uniform Act, as its Common Law and the CISG counterparts provide three obligations namely: delivery, conformity and guarantee as the seller's duties. Before the coming into force of OHADA, the seller had two principal obligations to wit, delivery of the goods and that the goods delivered are free from any encumbrances. Basically, Article 255 states that:

> *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.*[26]

The above implied conditions deserve careful treatment because of the protection which they now offer the buyer of goods who is almost invariably in a weaker position than the seller. These terms provide buyers with a healthier measure of protection against defective and sub-standard goods. This implies that if any of the parties breach any of the above provisions; such a breach shall be treated as a breach of condition and warranty. The terms (conditions and warranties) of a contract of sale of goods can be express or implied. These provisions have in fact moved the Common Law principle from *caveat emptor* to *caveat venditor*.[27]

In addition, Article 260 of the Act prescribes additional responsibilities to the seller to ensure the realisation of the purposes of 255. In other words, this seems to be an extended duty of the seller. By virtue of Article 260 of the Uniform Act the seller has as obligation to deliver goods which are free from any rights of a third party. This is embodied in his duty to guarantee which is an extended duty of the seller in the OHADA Uniform Act on

26 This is the author's translation.
27 Walton H. Hamilton, 'The Ancient Maxim Caveat Emptor', *op cit.*

General Commercial Law. By definition, the Black's Law Dictionary[28] considers guarantee to be "the assurance that a contract or legal act will be duly carried out." It equally implies warranty, but preference goes to the former as far as this work is concerned. In practice, it is often for example, in the context of consumer warranties or other assurances of quality or performance. Thus, Article 260 of the Uniform Act stipulates that:

> *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.*[29]

From the reading of Article 255 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 according to the contractual terms. This implies that the seller should not necessarily be the owner of the goods but have a right to sell. This finds importance to the fact that, the passing of title to the commercial buyer under the Uniform Act which is vital for the running of its business all depends on whether the goods delivered are in conformity with the contract specifications as per the indications of the commercial buyer. As a Common Law principle expressed in the Latin phrase, *nemo dat quod non habet*, (no one can sell what he does not have), the seller would be in breach of a contact of sale where he is not able to pass a good title to the commercial buyer.

On the premise of the above, it is not an overstatement to conclude that the provisions of Article 255 will achieve its purpose and be as successful in consumer protection if sellers of goods are strictly imposed these duties in their business dealings with resale buyers of goods.

---

28 Collin P.H., *Dictionary of Law,* 3rd edition, Peter Collin Publishing, 2000, p.77.

29 Article 230 of the old Uniform Act is the forerunner to Article 260, which still maintains the wordings.

3.2. Interpretation of Article 255

On one hand, the interpretation of Article 255 largely depends on the terms of the contracting parties, which provides that it must be interpreted in a manner that gives effect to the purposes that are set out in their contract of sale.[30] However, it is also necessary to consider the interpretation of any statements or conduct made by the parties on the basis of offer[31] and acceptance.[32] This is the basis of the theory of freedom of contract as discussed above. The UAGCL uses the usual approach found in most legal systems to the analysis of the conclusion of the contract, namely distinguishing between an offer and an acceptance bringing the contract into existence.

On the other hand, if the parties do not expressly contract, trade usage and practices established between the parties are also given some considerations under the UAGCL as per Article 239 para 2 in interpreting the contract of the parties. It states that:

Pour déterminer la volonté d'une partie, il doit être tenu compte des circonstances de fait, et notamment des négociations qui ont pu avoir lieu entre les parties, des pratiques qui se sont établies entre elles, voire des usages en vigueur dans la profession concernée.

In other words, "the parties are bound by any usage to which they have agreed and by any practices they have established between themselves" (Article 239 para.1) and that "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in commercial sales is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" (Article 239 para.2). Article 239 grants normative value to trade usages.[33]

30 Article 238 para 1 UAGCL.
31 Article 241 UAGCL.
32 Article 244 para 1 UAGCL.
33 The antecedent of this article is to be found in Article 207 of the former Uniform Act on General Commercial Law (Signed in Cotonou, Benin on 17 April 1997), which

Thus, this particular provision uses trade usages as a factor for interpreting the will of the parties; in other words, it lends an interpretative value to the usages.[34]

Furthermore, it could be understood that the usages of trade prevail over the provisions of the UAGCL, independently of whether they bind the parties pursuant to Article 239 para.1 or para.2. Reading Article 239 together with the freedom-of-contract rule in Article 238 para.2, we see that much international sales law is to be found not in the UAGCL text, but rather, within the "consensus" reached by UAGCL merchants, their "bargain in fact." Basically, this can be interpreted by looking at their will and conduct of the parties.

To conclude on this point, in every case where Article 255 comes into play, this brings into focus contract law perspectives; as well as custom and usages as background legal regimes in addressing the question of conformity of goods from a number of different angles:

-the formation of the contract

-the interpretation of the contract and

-the validity of the contract

3.3. Application of Article 255

Article 255 has a very restrictive application. In the first place, it applies to every commercial contract occurring within any OHADA member states

---

reads: *The parties shall be bound by the practices they agreed upon and by the customs established in their commercial relations. Except where there are agreements between the parties to the contrary, they are supposed, in the commercial sales contract, to have tacitly referred to the professional practices they knew or ought to have known, and which, in trade, are widely known and generally observed by parties to contracts of the same type in the commercial sector concerned.*

34 Sven Schilf, Writing in Confirmation: Valid Evidence of a Sales Contract? Reflections on a Danish Case regarding Usages, CISG and the UNIDROIT Principles', *Uniform Law Review*, 1999-4, p. 1004. Roland Djieufack, "The Concept and Importance of Usages and Practices Established between the Parties under the OHADA Uniform Act on General Commercial Law", (2013) 95 *Juridis Périodique*, pp. 114-129.

unless the transaction is exempted from the application of the Act.[35] In order to determine the field of application of Article 255, the most important definitions given within its ambit should be analysed.

The first important definition is the preoccupation of Article 255 which is to regulate the contracts of sale between traders in contracts for the acquisition of goods for business purposes which can be identified as "business to business contract" (B2B contracts). B2B contracts refer to sales contracts between two professional sellers. On the other hand, business to consumer sales (B2C) contracts refer to sales contracts concluded between a professional seller and a consumer. The UAGCL does not cover B2C contracts but the expected outcome of a B2B contract under the UAGCL is to proceed to a B2C contract. In fact, the goods involved in a B2B transaction are the subject in a B2C contract. Consumers are the end-users of those goods. This distinction under the UAGCL offers one obvious explanation of its different approach to the question of whether the Act should cover only commercial contracts or include consumer contracts in their scope as well. Perhaps the legislator rightly thought it wise to treat consumer contracts under a separate Act. This reasoning is understandable. The discussion on the relationship between contract law in general – or commercial contract law – and consumer contract law is a modern classic in many countries. The academic debate concerning the possible separation of consumer law has focused attention on various kinds of arguments. All arguments, however, can be met by reasonable counter arguments.

The type of B2B contract with which we are concerned here is a contract between traders for business purposes what is here referred to as contract for sale of goods. The predominant feature of this type of contract is that it involves the selling of goods between the seller and commercial buyer. The purpose for which the goods are bought is of special relevance. This leads to the justification that the OHADA UAGCL is entirely concerned with

35 Article 234 para 2 UAGCL. Also see Articles 235 and 236 in limiting the scope of the UAGCL.

the reselling business of goods to non-consumers.[36] Again, undeniably, the idea connected with this issue of reselling of goods under the Uniform Act concerns expressly commercial buyers (acting as retailers or wholesalers), exercising trade for the purpose of the goods which are bought for resale and not for personal consumption.[37]

Thus, Article 255 of the Uniform Act expressly excludes business to consumer (B2C) contracts that is, a contract between a professional trader and a consumer.[38] It imposes solely duties upon the seller *vis a vis* the commercial buyer.

The second important definition is that of a "consumer". As a matter of distinction, the UAGCL expressly defines who is a consumer different from a trader (*commerçant*). It follows that a consumer is a person who buys goods for personal, family or household use[39] and not acting for purposes of buying and selling.[40] Therefore a consumer is neither a commercial person nor a person acting within his professional capacity. Furthermore, a user, a recipient or beneficiary of a product or service is a consumer, even if the person was not a party to the transaction for the purposes of the supply of the goods or service. In this context that this paper is situated in arguing that consumers are affected by the business transactions between the seller and the commercial buyer as regulated under the UAGCL. In other words, consumers are the final recipients or users of the goods that accrue from the contract of sale between the above two professional traders. For exomple, be in a case which a person receives a gift from another consumer. In short, the consumer is outside the provisions on contract of sale governed by the Uniform Act and consequently, B2C contracts are undoubtedly not covered by the UAGCL.[41] Looking at the matter from a legal-normative

36 Article 235 para.1 UAGCL.
37 Santos Akuété Pedro & Jean Yado Toé, *OHADA Droit Commercial Général,* Droit Uniforme Africain, Bruxelles, Bruylant, 2002, p. 341.
38 Article 235 (a) UAGCL.
39 Article 235 (b) UAGCL.
40 Articles 1 and 3 UAGCL.
41 This is the same position under Article 2 of the CISG and the EC Directives on Unfair Contract Clause, See Official Journal, 1993 L-95/29-34, April 5, 1993.

perspective, an obvious counter-argument immediately leaps to the fore. The extent to which anyone today would be "bound" by some form of *lex mercatoria* obviously varies depending on whether he were acting in a professional capacity or as a consumer. Although it is unclear to what extent commercial parties are bound by such "law", there are at least some binding effects of commercial customs and usages[42] which may be seen as a part of *lex mercatoria*, whereas a consumer is not usually presumed to be aware of such usages and can therefore not be bound by them either.[43]

However, this is not the principal debate of this paper. This paper rather assumes that the rules on consumer contract law would rather take its starting points from or be impacted by rules on commercial contracting. Even though consumer contract law should be understood as a relatively autonomous branch of law, one cannot in any deep sense separate the rules on contract contracts on the one hand and the rules on commercial contract on the other hand solely on the basis of an assumed difference in their basic morality/rationality. For some, who see consumer protection as predominantly a question of remedying asymmetries in the marketplace, much of consumer law can be connected with the principle of autonomy which is the basis for business contracting as well. Evolving principles of freedom of contract, fairness and good faith do not affect business relations

42 An example of direct reference to usages and practices can be found in Article 239 paragraph (para.) 1 regarding, matters of trade, which states that; "The parties shall be bound by the practices they agreed upon and by the customs established in their commercial relations''. Also, for example, in Article 244 para.2, it is stated that an offer can be accepted by an act, if practices and usages permit this (*Cependant, si en vertu des dispositions de l'offre, des pratiques établies entre les parties ou des usages, le destinataire peut, sans notification à l'auteur de l'offre, exprimer qu'il acquiesce en accomplissant un acte, l'acceptation prend effet au moment où cet acte est accompli)*. An example of indirect reference to usages and practices can be found in Article 254, regarding carriage of goods, which reads : '*Si le vendeur est tenu de remettre des documents et accessoires de la marchandise, il doit s'acquitter de cette obligation au moment, au lieu, et dans la forme prévus au contrat ou par les usages de la branche d'activité concernée'.,* in Roland Djieufack, "The Concept and Importance of Usages and Practices Established between the Parties under the OHADA Uniform Act on General Commercial Law", *op cit.*

43 Thomas Wilhelmsson, "International Lex Mercatoria and Local Consumer Law: an Imposssible Combination", (2013) *Uniform Law Review,* pp.141-153, p.144.

alone but consumer relations as well. These principles interact. It is rather a question of legal policy: in what legal setting one sees this interaction to take place.[44]

Even though in the past there has been an effort in putting in place a draft OHADA Uniform Act on Consumer Law, by virtue of Article 237 of the Uniform Act, it could be inferred that the governing law for B2C contracts in most OHADA Member countries is found in the ordinary contract law rules.

The reason for examining B2C contracts in the light of the OHADA UAGCL, stems from the fact that practice dictates that the usual transaction of the goods between the seller and the commercial buyer under the Act, also by extension involves the selling of those goods to the consumers who are the end-users of the goods. In fact, the very purpose for which the goods are bought under a sale contract is for resale in view of making profits. In other words, attention is given to consumers here only because they buy directly from the ultimate commercial buyer, and that, consequently, what consumers can demand as quality matters to the commercial buyer. Consequently, this is the purport of Article 255 in regulating the contract of sale of goods between the seller and the commercial, which certainly has a repercussion the local consumers of these goods.

The third important definition is that of "goods". Goods form the subject-matter of commercial sale contracts between the seller and the buyer. There is no definition of "goods" in the UAGCL. Nor is it possible to deduce the meaning of the term by analysing different language versions of the statute.

The Uniform Act seems to embody a rather conservative concept of goods, as it is considered both in legal writings and case law to apply basically to moveable tangible goods. Thus, according to most commentators intangible rights, such as patent rights, trademarks, copyrights, a quota of

44 Thomas Wilhelmsson, *op cit,* p.147.

a limited liability company, as well as know-how, are not to be considered "goods". The same is true for immovable property.

Under the UAGCL, the notion of "goods" relates basically to movable and tangible objects. 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. Therefore, to identify the ambit of the seller's conformance duty, it is relevant to identify the "goods" that are the object of this Uniform Act. The term "goods" is not defined in the UAGCL as the case under the CISG.[45] However, its meaning can be understood by reference to the Uniform Act's Scope and General Provisions.[46] 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 greater extent non-physical items, such as electricity, negotiable instruments, 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.

ARTICLE 255 AND FUNDAMENTAL CONSUMER RIGHTS: A CRITICAL OVERVIEW AND ANALYSIS

Consumer protection may be regarded as those measures which contribute directly or indirectly to the consumer's assurance that he will buy goods of suitable quality appropriate for his purpose; that they will give him reasonable use and that if he has a just complaint, there will be

45 Article 30.
46 See Chapter 1.

a means of redress.[47] Incidentally, this preventive protection therefore comprises all those measures contained in Article 255 of the Uniform Act imposing duties on the seller. They have some indirect implications on fundamental consumer rights that are worded in the positive (namely the duty to deliver goods in conformity to: *the quantity, quality, specification and packaging provided for in the contract*). Although these measures are specifically concerned with the seller and the commercial buyer under a contract of sale of goods, their import lies in the fact that in many cases, the commercial transaction between these merchants in the market place is not a one-off, but part of a continuing relationship so that an insistence on the strict application of those measures should benefit the consumers on the other end. It is therefore necessary at this stage to examine the nexus of the ambit of this Article in affording protection to fundamental consumer rights.

4.1. Quantity

Under the UAGCL, unless otherwise agreed, the seller must deliver the goods to the buyer in the exact quantity stipulated in the contract of sale. It should be noted that the exactness of quantity requirement is not emphasised in Article 255 of the UAGCL. Basically, this is guided by the contract stipulation of the parties. The seller's duty to deliver goods of conformity in relation to the quantity can be estimated in terms of weight and measures. Weight is important information for the commercial buyer in evaluating the quantity of certain goods. It is also needed in the export-import trades requiring goods to bear this information in order to meet up with customs regulations. The Uniform Act has not clearly stipulated this but it can be inferred that weight and the measures of goods are considerable extrinsic characteristics of a product which form part of a seller's duty of conformance to deliver goods of right quantity. This is all the more necessary because the supply of most goods does not bear the accurate information as promised by some sellers. It is left at the hands of consumers through their dealings with commercial buyers.

47 Molony Committee Report on Consumer Protection, CMD 1781 (1957) 2 in Alvine Longla Boma, "Consumer Protection: A Cameroonian Perspective", *op cit.,* p.49.

Failure of the seller to comply with this obligation amounts to a breach of contract.[48] It may sometimes occur that the seller delivers a quantity below or beyond the one requested. In this case, the buyer has the option to either take or refuse delivery of the excessive or reduced quantity.[49] However, statutory provisions related to quantity of the goods are subject to any usage of trade, special agreement, or course of dealing between the contracting parties.[50]

4.2. Quality

According to the Sale of Goods Act, the term "quality" refers to the state and condition of the goods.[51] At common law, there has sometimes been confusion between identification and quality. But in practice, it appears difficult to apply that distinction as similar facts resulting from the breach of quality[52] can also result in the breach of description or identity.[53] These provisions are exclusive at some points.[54] As a matter of fact, it may appear that a statement of quality regarding the goods form the descriptive part of the goods and *vice versa*.[55]

Accordingly, the UAGCL does not provide any statutory meaning to the term "quality" which has little substantive content. Under the UAGCL, the notions of "quality" and "specification" have also been a question as to the limit of one to the other.[56] Hence, the notions of "quality" and "specification"[57] have been defined by French case law[58] and scholars[59] as

48 Article 255 para. 1 UAGCL; Article 35 (1) CISG.
49 Article 262 UAGCL; Article 52 (2) CISG
50 SGA 1893 s 30 (4).
51 SGA 1893 s 62.
52 As per the breach of the implied condition as to the quality or fitness; SGA 1893 s 14.
53 As per the breach of sale by description; SGA 1893 s 13.
54 A.G. Guest, *Benjamin's Sale of Goods,* London: Sweet & Maxwell, 2006, 7th edition, p. 545.
55 As per the argument advanced in the leading case of *Ashington Piggeries Ltd v. Christopher Hill Ltd.*
56 Santos Akuété Pedro & Jean Yado Toe, *OHADA Droit Commercial Général*, *op cit*, p. 394.
57 Article 255 UAGCL.
58 Civ.,4 déc. 1871., D.P., 1873, 5, 201.
59 Gérard Cornu, *Vocabulaire Juridique*, Presses Universitaires de France, 1987, 8 édition, p.756 ; Santos Akuété Pedro & Jean Yado Toé, *op cit*, p. 394.

different, but complementary. The reason is that the extent of the seller's duty depends largely upon the meaning to be attached to the description of the goods. This tends to be meaningless in practice. It does not only suffice for the buyer to be entitled to goods which conform to quality. What is the buyer entitled to expect under the contract? As an answer to this, the buyer is entitled to expect goods of satisfactory quality, that is, goods suitable for reasonable usage. This reasonable use will certainly be for commercial re-saleability and not for personal consumption. In fact, this re-saleability test depends largely by implication on the usage to consumers. This is the purport of Article 255 para. 2 of the UAGCL. The present provision provides that the quality of the goods includes their state and condition and that among other things which are aspects of the quality of goods for the purpose for which goods of the kind in question are commonly used. Clearly, fitness for all purposes is an important, indeed, an essential-element in the concept of conformity and remains important under the current provision of the Uniform Act.

Cross-references to Article 255 para 1 make Article 255 para 2 difficult to comprehend. Article 255 para 1 must be read with Article 255 para 2. In fact, the standards and requirements contemplated in Article 255 para 1 cover a broader spectrum than the quality of the goods. These standards and requirements also pertain to the safety of the goods and their suitability for the purposes they are generally intended for or the specific purpose that the customer has indicated.

What is the reason for and practical implications of the use of these specific terms for the seller? The issue of quality under Article 255 para 1 is extended to the producer or importer and the distributor and the retailer, with whom the seller purchase his goods. It is not a hidden fact the requirement of quality cannot pertain to the seller alone but as a matter of business practice, it rests on the relationship between the seller and his suppliers simultaneously so that it all benefits the commercial buyer with

her customers who are the end-users of those goods.[60] Even though Article 255 applies only to contracts between the seller and the commercial buyer within the OHADA member states, it is an imperative on the seller to press on the suppliers of the goods his sells in a particular supply chain[61] before they reach the buyer.

On the other hand, the duty of quality under Article 255 para 1 is curbed by the limitation in Article 257. Should the buyer have expressly informed the seller of the specific condition of the goods, and should the buyer have expressly agreed to accept the goods in that condition, or knowingly acted in a way compatible with accepting the goods in that condition, the implied warranty of quality may (depending on the facts), for example, not include that the goods are reasonably suitable for the generally intended purposes, or the warranty may not include that the goods are of good quality, in working condition and free of any defects.

Although the presumptive rule in Article 255 para. 3 must mean that it is the seller, who must, in the first instance show that the parties have agreed that the goods shall have a different quality than that stated in the agreement. This means that the buyer is entitled to expect that the goods will conform to the agreement, in practice the written agreement, and that any variance from what should apply under the agreement and under Article 255 para. 1 will be made good by the seller prior to delivering the goods to the buyer. 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.

However, Article 270 para 1 confirms that the implied warranty in respect of quality under Article 255 para 1 also to a greater extent rests on the buyer in the light of examining the state of the goods and the right to return

60 Roland Djieufack, "The Seller's Duty to Cure a Non-Conformity Delivery of Goods as governed by the Uniform Act on General Commercial Law", (2013) 3 *Revue de Droit des Affaires OHADA,* pp.212-232, p.232.

61 The suppliers in the supply chain may be in a given instance the "producer", "importer", "distributor" and "retailer".

goods under Article 257. Under the UAGCL,[62] it is the buyer's obligation to examine the goods or have them examined. Therefore, the law grants an opportunity to the buyer to inspect the goods and report immediately to the seller whether or not the goods are in conformity with the contractual obligation as agreed upon with the seller.[63] Inspection of the goods means not ascertainment of their actual condition but rather, the purpose of the examining of the goods is to reveal any aspects of non-conformity, namely; the right to cure.[64] The reason behind this exercise may be based on the fact that, this is an "obligation" stipulated not only in the interest of the seller but also in that of the buyer himself. This obligation could be justified in the first place by the need to obtain a clear situation, for by sending the goods to the buyer the seller is put in an uncertain position which cannot last forever. He must know the fate of the goods. This shows the clear recognition and imposition of the principle of *caveat emptor* on the buyer. At this point, the goods are under his sphere of influence, which calls for care and diligence in favour of the seller.

Should the goods fail to comply with the standards and the requirements contemplated in Article 255 para 1, the buyer may return the goods to the seller[65] without penalty and at the seller's risk within one year after the delivery of the goods.[66] This subsection may have huge cost implications for the seller and the expected consumers dealing with the commercial buyer. The buyer has a choice to claim that the seller must *either* repair or replace the failed, unsafe or defective goods[67] or refund the consumer the price paid for the goods. The reason behind such a measure is to protect the business of buyer as well satisfying the requirements of her customers.

---

62 Article 258 UAGCL.
63 Santos Akuété Pedro & Jean Yado Toé, *OHADA Droit Commercial Général*, *op cit.,* p. 405.
64 Article 259 para. 1 UAGCL.
65 Articles 257 and 283 UAGCL.
66 Article 259 para 1 UAGCL.
67 Article 31(3) of the 2011 Consumer Protection Law in Cameroon.

This raises the question of what the impact of Article 255 on the effect of the consumer's rights to safe, good quality goods bought directly from commercial buyers. The consumer's right to safe quality goods includes the right to receive goods that: are reasonably suitable for the generally intended purposes; and are of good quality, in working condition and free of any defects.

Further with reference to the consumer's right to receive goods that are reasonably suitable for the generally intended purposes, a consumer who has specifically informed the commercial buyer of a particular purpose for which he/she wishes to acquire or use the goods has a right to expect that the goods are reasonably suitable for that particular purpose. This is one of the driving forces which the commercial buyer insists upon in her business dealings with a seller. The author assumes so as the wider interpretation of Article 255 gives more protection to the consumer.

However, the role of Article 255 para. 2 UAGCL is to aid in construing the agreement of the parties (seller-commercial buyer). The question is this: What was the parties' understanding of the contract provision describing the goods? More precisely (in the language of Article 255 para.2 UAGCL) what was their understanding of the purposes for which goods of the same description would ordinarily be used? Since the problem concerns fitness for the "ordinary" use of goods described in the contract, serious misunderstandings should be infrequent in order not to harm the business dealings of commercial buyers to an extent with their consumers.

The view that the parties' agreement cabins the quality standard under Article 255 para. 2 UAGCL gains support both from the Article's text, which references the goods' "description." This is in line with the Secretariat Commentary to the draft CISG. The Secretariat Commentary balances such party expectations with a kind of reasonableness level commensurate with a goods' ordinary use, stating that "the standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description."

One still remains baffled about whether strict liability should apply to commercial sellers of used products bought and sold to consumers. The expectation of the quality of these types of goods is usually not the same as those newly sold. From the text of the Uniform Act, liability will be imposed on "regular" used-goods sellers. Several field trips by this researcher reveal that used –product markets are common in the major cities of Cameroon in particular and in some African Countries.[68] These goods vary from cars, household equipment to consumer goods. It is an everyday practice now to find a line-up of stores in the towns of Douala and Yaoundé in Cameroon operating in this trade. Observation from this experience reveals that consumers prefer and expect diminished quality and safety from used goods. This is because of the cheap prices of these goods and their accessibility. Another justification for this is the public habits and believes of certain virtues of these goods which have stood the 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 an old reputable trade mark 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 when sold as a used goods.

It is staggering to note that the magnitude of this problem of used-goods may be better appreciated by bearing in mind the potential problem of product dumping from jurisdictions with stricter safety laws.[69] It is not inconceivable for unscrupulous foreign manufacturers to target the markets of developing countries with products that fail to meet the safety requirements in terms of their period of expiration or damaged in packing in their home countries by charging low prices for these products in the importing country. Banned or used-goods are dumped in developing countries through a number of ways. This is effected either simply through

68 Specifically in some major markets in Abidjan-Côte d'Ivoire and Accra-Ghana, where the researcher conducted part of the research.

69 Samgena D. Galega, ''Strict Liability for Defective Products in Cameron? Some Illuminating Lessons from Abroad'', *op cit*, p. 253.

changing the product's name or slightly altering the chemical formula or subtracting an inert part of the good. Sometimes the parts of the banned product are then exported separately to the country, where a recombining facility is set up for assembly. It could be said that most of these components of these products which are used to build up a "new" structure. These unscrupulous businessmen would close down their plants at home and establish more lucrative business in third world countries, where they can more freely manipulate with products of low quality and sell those whose shelf-lives have expired in their home countries.

Used-product sellers play an essential role in fostering an efficient economy. They help businesses and government's recycle, which reduces the cost and environmental impact of the manufacture of new products. By broadening the reasonable care standard of used-product sellers, courts should recognise these legitimate social benefits of a used-product market.[70] However, expanded absolute liability should force used-product sellers to act as virtual insurers for any kind of latent defect.[71] This justification should also rest on the fact that it should be maintained because of breach of the duty of conformity as well as misrepresentation in accordance with rules under the Uniform Act. Regard should not be given to the new or old state of the goods but much attention should be paid rather to the economic value incurred by the commercial buyer and the personal injury to the consumer. By imposing this liability on the used-product sellers, it will force manufacturers or suppliers of goods to discard these types of businessmen from their business line because they are unable to guarantee about the safety and quality of those goods, which may tend to drive similar products of the same brand from the market. Thus, such a measure would make manufacturers to stand behind the goods they sell in the marketplace. As a matter of public policy, to properly price all goods according to their true social and economic costs, liability must apply to all

70 J. Paul Peter & Jerry C. Olson, *Consumer Behavior and Marketing Strategy*, Homewood, 1998, 2nd edition, pp. 496-510.

71 Antonio J. Senagore, "The Benefits of Limiting Strict Liability for Used-Product Sellers", (2010) 30 Northern Illinois University Law Review, pp.1-34, p. 3.

sellers of defective goods. Otherwise, one defective product seller would cost relatively less, thereby encouraging consumers to buy the cheaper, more dangerous products. A used- product seller is no different from a new-product seller, and therefore, is liable for the sale of defective goods. Only the imposition of liability on sellers' of used-goods can effectively deter the spread of defective goods.

Consequently, by making a market incentive to sell quality used-products would increase the likelihood that consumers will buy quality used-products from retail or wholesale buyers who may stand as a proxy for product quality.[72] A seller interested in providing the customers with a product whose performance will fully meet both the needs of the latter might be able to establish a system of quality control that would eliminate the risk that deficient products would deliver to customers. An alternative approach would be to use less stringent quality control practices and compensate buyers for defects in products when buyers discern those defects and complain about them.[73]

Considering the current market in which goods are sold honestly or dishonestly; quality may be represented, or it may be misrepresented. The commercial buyer's problem, of course, is to identify quality. The presence of sellers in the local markets who are willing to offer inferior goods tends to drive the market of some specific brand of goods out of existence – as is the case with bad automobiles or building construction materials. In *Scholastic Nsaiboti v. Felix Ezeafor*,[74] the appellant bought a second-hand car from the respondent car dealer who made oral representations to the effect that the car was one year old and in good working condition. The oral representation proved to be untrue since the car was indeed older than that and was utterly defective. The contract, however, contained a term that excluded liability for any defect in the car and for any implied

72 *Ibid,* p. 12.

73 Arthur Best & Alan R. Andreasen, "Consumer Response to Unsatisfactory Purchase: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress", (1977) 11 *Law & Society*, pp.701-742, p. 703.

74 Appeal No. BCA/6/73 of March 1974, Bamenda Court of Appeal (unreported).

express warranty. The Bamenda Court of Appeal (in the English speaking region of Cameroon), in upholding the High Court's decision in favour of the respondent had this to say: "Restricted though the doctrine of 'caveat emptor' might be in its application to contracts of sale, its application in the buying of a second-hand car is in my opinion most fitting since there is very little by way of guarantee that the seller could give as to fitness" – per Rupert Thomas J., President of the Court.

If the above case shows the courts in dealing with the problem of the sale of second-hand cars, the case of Michael Ebwe v. Hubert Euverte[75] accentuates this point. On the 13th of May 1974, at about 10 a.m., the plaintiff entered into a written contract with the defendant for the sale of a second-hand car. The contractual document stipulated that the buyer has been given the opportunity of examining the car and that any liability whatsoever was excluded. The plaintiff signed the contractual document allegedly without reading it. On the same day the sale took place, at about 5 p.m., the car's engine stalled and the car was, on later examination, proved to be considerably defective. The plaintiff tried to get a refund of the contract price from the defendant on the grounds that the car was worthless, whereupon he brought this action. The Buea High Court in Cameroon held that the terms of the contract were clear and wholly unambiguous and that in the absence of fraud, they were binding on the parties.

It is this possibility that represents the major costs of dishonesty - for dishonest dealings tend to drive honest business dealings of some goods out of the market. There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of dishonest sellers who wish to pawn bad wares as good wares tends to drive out the legitimate business, causing scarcity. The cost of dishonesty, therefore, lies not only on the amount by which the buyer is cheated; the cost also must include the loss incurred

75 Suit No. HCSW/24, 1974, Buea High Court (unreported).

from reducing the size of the legitimate business of certain goods out of the market.

It is now a common practice in most countries that before goods are sold nationally or internationally, they should meet the minimum ethical and quality requirements. This could be inspected by the contracting parties as they deem it necessary by a third party.

4.3. Description

A specific right embedded under the umbrella duty of conformity is the duty to give right description. In the leading *Ashingston Piggeries* case,[76] Lord Diplock pointed out in his statements that:

> *The description by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied… Objectively, on the issue of sale by description and in line with the contractual requirements, the word description is to be understood as the identity of the goods in question*.[77]

The test used by Lord Diplock was to determine whether the goods would be rejected because they are different in kind than those agreed upon. It follows that the determining factor in sale by description is "identification".[78] Thereof, it is only on rare occasion that a sale other than that by description gets into existence.[79] Particularly, certain sale contracts of specific goods may not be sale by description when the statement on the goods is immaterial to the identity of the goods or where without a statement the buyer buys the goods as they are. But under the SGA, specific goods require identification.[80]

---

76 [1972] AC at.503-4.
77 A.G.Guest, Benjamin's Sale of Goods, *op cit.,* p. 541.
78 As stated in the case of *Ashington Piggeries Ltd v. Christopher Hill Ltd* (1972) A.C 441; Sale by Description lies in SGA 1893 s 13.
79 A.G.Guest, Benjamin's Sale of Goods, op cit., p. 541.
80 SGA 1893 s 62.

Also, identification through description has also been extended to unascertained goods and future goods. From these, it has been inferred in practice across the region that even buying in a self-service shop was sale by description, provided the goods are either described on the shelf or they are labelled as relating to their contract.[81] But it should be pointed out that it is not because the sale by description has taken place that all statements in relation to the goods are necessarily descriptive.

As explained above, under the UAGCL, the seller's contractual duty is to deliver quality goods in consonance to the specification made by the buyer. In fact, quality and specification are complementary under the Uniform Act. But in particular, there are instances where contractual agreements on sale determine with accuracy technical specifications expected on the goods; or when the parties define the label of a good to be manufactured following the exact ingredients or products to be used. Most often, the seller is required to deliver the goods identical to a sample made available to the buyer. This component of Article 255 protects the consumer against any misleading trade descriptions or trade descriptions that have been tampered with. Goods, such as medicines already have labels. No person, either the seller or buyer may apply a trade description knowing that it is likely to mislead the consumer, or tamper with a trade description in a manner that might mislead a consumer. It is therefore for the interest of the commercial buyer in her business dealings with the seller to ensure that: *caveat emptor*, the goods supplied by the seller are in conformity with the specification or labelling of that kind of goods. They would have to be scrutinised for any potential misleading information, such as "Lose ten kg in four weeks" and "Anti-ageing effects guaranteed". This duty has a wide field of application because it also applies to a packager, who might not be aware of such ingredients or components.

81 A.G.Guest, *Benjamin's Sale of Goods*, *op cit.,* p. 541; Franck L. Mechem, "Implied and Oral warranties and the Parol Evidence Rule", (1928) 12 (3) Minnesota Law Review, pp.209-224, p.215.

In case there is a failure to comply with the description of the goods (exact technical specification, model or sample) the result will be non-conformity of the goods.[82] Non-conformity as such sometimes leads to a delivery of goods totally different to those agreed upon. An example may be the delivery of soya beans instead of green beans.

Furthermore, if the required specifications or description on the goods have been met, the goods must also conform to the required usage determined on the contract. If it was not determined in the contract, the goods must satisfy the common usage of goods of the same kind. Thus, non-conformity of this requirement amounts to a breach[83] and the remedies available for the buyer will be similar to those under non-conformity as to quality of the goods.[84]

Implied warranties of quality in connection with sales or contract for the sale of goods by description must usually be proved by evidence of facts which are extrinsic to the contract. Again, when the sale or contract of sale is oral, any evidence necessary to show the presence of those elements is ordinarily admissible. At least, it is never excluded because it is parol evidence. The Cameroonian case of *Joseph Neba Abongwa v. Ngang Cletus Achu*[85] is illustrative.

4.4. Packaging

Packaging is defined as all containers or other products used for the containment of goods, for facilitating their transport or their presentation to the public.[86] Packaging is an important contractual duty under the

82 Article 255 para. 1 UAGCL.
83 Ibid.
84 Articles 282, 288, 283 UAGCL.
85 Appeal No. BCA/58/98-99 of 12th October 2000 in the North West Court of Appeal, Bamenda, Cameroon. This case is culled from *Cameroon Common Law Report*- 1 CCLR (Quarterly Law), Liberty Publications, (2001) Part 7, pp.107-112.
86 Caroline London and Michael Llamas, "Packaging Laws in France and Germany", (1994) 6 (1) *Journal of Environmental Law*, p.1-3; Catherine Elliot & Frances Quinn, *Contract Law*, Longman, 2003, 4th edition, p.360; as per the Sale of Goods Act definition on goods; SGA 1893 s 62 (1). It is a general practice in export-import trade to find packaged goods marked with a statement of quantity, either of weight or volume, or with

Uniform Act. It applies to sales and entails secondary packaging destined for commerce and by extension to household. The UAGCL thereby channels all liability on the seller directly concerned with the packaged product. The scope of the UAGCL is more limited here because it concerns sellers and commercial buyers;[87] that is, persons responsible for putting the said packaged products in the market for the first time, are under the duty to ensure the disposal of the packaging of their products with the view to their marketing. Essentially, this duty is mostly important to the commercial buyer because he has an obligation to resell the products to the end- users in the conditions in which he bought them. This plays an essential role as the end-user (consumer) expects to receive quality packaged goods directly from the commercial buyer because it is the former who separates finally the packaging from the product in order to use or consume the said products. Therefore, a packager[88] of hazardous or unsafe goods must display a notice on or with the packaging that provides the consumer with adequate instructions for the safe handling and use of the goods. The packager of goods (who may actually be a person other than the supplier of the goods) bears this very onerous duty. Consequently, at this point it is a duty on the seller-*caveat emptor*, to watch on the hazardous nature of the packaged goods before supply.

Packaging, just like quality and quantity of the goods constitutes in the UAGCL a fundamental element in the conformity definition of the goods.[89] Packaging is a component part of their quality. Therefore, if

---

the name and address of the importer or packer or a mark which enables his name and address to be readily ascertained by an inspector (custom officer). "Importer" means, in relation to a package, the person by whom or on whose behalf the package is entered for customs purposes on importation.

87 As opposed to manufacturers.

88 In certain trade branches, especially in connection with transportation of the goods by sea, the usual means of packaging is containerisation, that is, packaging of the goods in containers.

89 Saantos Akuete Pedros & Jean Yado Toé, *OHADA Droit Commercial General*, *op cit,* p. 395. At Common law, the seller is under the obligation to deliver the goods in a "deliverable state"; to some authors, "deliverable state" refers to packaging. See SGA 1893 s 62 (4). Also see the dictum of Banks L.J. in the case of *Underwood Ltd v. Burgh Castle Brick & Cement Syndicate* [1928] 1 K.B. 343.

the parties' contract determined the safety and packaging type, the seller must conform to them. If the contract is silent on this requirement, the parties must refer to trade and usage in the context of their contractual agreement.[90] This is true of goods in general; the use and quality of the packaging may also be regulated and the seller is bound to observe those regulations, as the products in question cannot otherwise be put on sale. In this regard, standards and usages may also exist and the seller (or the buyer, depending on who is to provide the packaging according to the contract) is bound to observe those standards and usages. Non-conformity on the packaging amounts to a breach of contract.[91] This was illustrative in the case of *Societé MADELACH c/ Societé FEREX,*[92] where the Court of Appeal in Douala (Cameroon) pronounced the cancellation of a contract of sale between the two companies due to a lack of conformity of delivery of goods in a packaging of 100kg instead of 50kg as requested by the plaintiff. In today's international sales contract, contractual parties are also called upon to respect rules on packaging in accordance with the buyer's location rules on environmental law.

This has been the concern within the CEMAC contracting states regulating the export-trade of goods within their sub-region.[93] In order to ensure equal treatment in all member States for goods exported within the CEMAC region, thereby enabling all goods in circulation within the community to benefit equally from the free movement provisions, the CEMAC Treaty provided for the introduction of the common custom tariff. This measure which applies to all products imported within the Community ensures they must be adequately packaged and certified with a label on the packaged marked with the CEMAC initials.[94] This certification which permits

90 Article 238 para. 2 UAGCL.
91 Article 255 para. 1 UAGCL.
92 Cour d'Appel du Littoral, Arret No. 88/C du 15 Mai 1995.
93 Edouard GnimpiebaTonnang, 'Le Nouveau Régime Juridique des Exportations entre les Etats d'Afrique Centrale : Entre Reformes Laborieuses et Influences Européennes', (2006) 857, *Penant*, pp.433-483, p.443-445.
94 It is commonly written in French as: FABRIQUE AU…….. (pays d'origine)…….. VENTE EN CEMAC.

circulation carries the following information: address of the supplier, the country of origin of the production of the product, the name of the producer, information regarding the product (weight, etc). The operation is governed by the CEMAC regulations.[95] Under the common custom tariff, goods are classified according to a common nomenclature, and are subject to common Community rules as to value, packaging and origin.[96]

Again, the question of packaging is dealt with more strictly under the UAGCL when it involves cross-border sales, owing to long journeys. In respect of the packaging, it should be stressed that, the seller and the buyer[97] may be liable for any defect in the packaging; even though this may also be as well the responsibility of the forwarding agent of the carrier. Packaging is a component part of their quality. Unless otherwise agreed by the contracting parties, the packaging must be of a quality permitting safe transport of the goods to their destination. An important role is played here by the seller under the UAGCL in having as duty to deliver the goods in conformity to the order.[98] In fact, the goods shall conform to the contract if packaged in the manner usual for such goods to be transported.[99]

Again, unless special provisions on packaging are contained in the contract, the seller is required to forward the goods as packaged in his country, taking into account possible trans-shipment under proper and usual handling of the goods in order to prevent damage to or deterioration of the goods before it reaches its destination as stated in the contract or

95 Article 9 de l'annexe a l'acte no. 7/93-UDEAC-566- SE1 du 21 Juin 1993 portant révision du TEC et fixant les modalités d'application du TPG en UDEAC ; Règlement No 17/99/ UEAC-CM-639 portant règlement des pratiques commerciales anticoncurrentielles,1999; Règlement No 4/99/ UEAC-CM-639 portant règlement des pratiques étatiques affectant le commerce entre Etats membres, 1999.

96 Until recent, it is now a governmental practice to find alcoholic drinks such as wine to be affixed a labelling with the CEMAC initials on each bottle to be sold within Cameroon. This is a measure to certify the quality and origin of this product. This is carried out at the Douala seaport supervised by customer officials.

97 Article 269 UAGCL.

98 Article 250 UAGCL.

99 This is the purport of Article 255 UAGCL.

otherwise.[100] However, the prevalent idea is that sale of the goods by the seller not conforming to the packaging does not prevent the buyer from having recourse to the remedies recognised in cases of lack of conformity of packaging.[101] The buyer may refuse delivery, request for replacement of the goods (may be by demanding a re-packaging of the goods), and payment of damages.[102]

CONCLUSION

This article has illustrated that the Uniform Act on General Commercial Law has some bearings on the consumer through the regulation of the business relationship between the seller and the commercial buyer. Various provisions of the Act, in particular Article 255 make inroads into the consumer law position to strengthen the position of the consumer *vis-à-vis* the commercial buyer. Undoubtedly, sellers are facing an onerous task to comply, and eventually attempt to comply, with the satisfaction of consumers through their business relationship with the commercial buyer. This is vividly felt through the imposition of a panoply of absolute duties on the seller, which is a true recognition of the latin phrase *caveat venditor* under the UAGCL. In fact, these measures in their various dimensions would favourably add assurance to the expectations of consumers in their dealings with commercial buyers. In other words, such measures would eventually filter through to the consumer. From a consumer's point of view, the Act is, however, to be welcomed, as it will contribute to the eradication of many exploitative practices in the marketplace as it is expected that sellers would press on their suppliers to supply them with quality goods in order to meet up with the expectations of commercial buyers. Even though, there is not yet an implementation of the draft OHADA Uniform Act on

100 Article 252 UAGCL. On a, procedural level, an important Prime Ministerial Decree was passed in 2008 to lay down the modalities for the packaging for importation, sale and distribution of retail and wholesale veterinary drugs in Cameroon: Decret no. 2008/2009/PM du 5 December 2008 fixant les conditions de fabrication, de conditionnement, d'importation, de vente de distribution en gros et au detail des medicaments veterinaires.

101 This could be deduced from the wordings of Article 272 UAGCL.

102 Articles 288 and 292 UAGCL.

Consumer Law, consumers to a larger extent benefit from such measures as contained in Article 255.