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Rethinking the Place of E-commerce Transactions under The Harmonization of Business Law in Africa (OHADA)

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Abstract

The contemporary trend of electronic commerce transactions has been identified as a significant development in the realm of business, with social networks emerging as effective platforms for conducting global commerce. While the OHADA Law through its Uniform Act on General Commercial Law does not expressly address electronic commerce, this study contends that the borderless and faceless nature of technology cannot be disregarded, as it has significantly amplified the prevalence of trans-border commercial transactions. The central objective of this study therefore is to test the potency of OHADA Law through its Uniform Act on General Commercial Law in regulating specifically e-commerce transactions when applying traditional contract law rules to the buying and selling of goods. As this study employs an in-depth critical analysis of the provisions of the Uniform Act, it firmly asserts the imperative need for the enactment of a uniform framework capable of regulating this critical aspect of online business transactions in this contemporary era.

Keywords: E-commerce-Harmonization-Business-OHADA

1. Introduction

The preamble to the treaty of the Organisation for the Harmonisation of Business Laws in Africa[1]indicates the establishment of a new economic order based on the mutual economic benefit of cross-border trade. The foundational objective of this legal instrument was to establish a stable and predictable legal and judicial framework conducive to business operations.[2] This objective was to be achieved through the formulation and implementation of straightforward, contemporary, and widely applicable principles tailored to their respective economies, by establishing suitable judicial procedures, and by promoting arbitration for the resolution of contractual disagreements.[3] This finding indicates that uniform laws governing transnational trade are imperative to achieving these objectives. Consequently, to efficiently execute the piecemeal harmonization of business laws among member states, particularly through the formulation of uniform laws, nine Uniform Acts have been adopted to date.[4] Our focus is on the sale of goods contract, and therefore, we will undertake a critical examination of the Uniform Act on General Commercial Law (UAGCL)[5]. However, for OHADA countries to meaningfully augment their contribution to transnational trade, it is imperative that they employ innovative trading methods

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[1] Hereafter referred to as OHADA. This French appellation refers to "Organisation pour L'Harmonisation en Afrique du Droit des Affaires". 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, Cote 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>. 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, a country becomes a member sixty days after the note has been deposited in Senegal. OHADA Treaty, article52, paragraph 3.

[2] N Pilkington, "The Secuity of Transactions and Investment in Africa", pp. 28-41, p.28-30, culled from the Proceedings of the OHADA Seminar held at the University of Buea, Buea, Cameroon, 18-19 September 2003 on the theme: "The Applicability of the OHADA Treaty in Cameroon" (ed. Martha Tumnde).

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

[4] The following Uniform Acts are already applicable in Member States: Commercial Companies and Economic Interest Groupings, Law of Securities, Simplified Recovery Proocedures and Measures of Execution, Collective Proceedings for Wping-off Debts, Arbiitration 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 inapicable, to wit; Consumer Law and Contract Law.

[5] Hereinafter referred variously as 'UAGCL' or 'Uniform Act'. This is known in French as OHADA, *Acte Uniforme 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>.

enabled by global technological advancements. Additionally, e-commerce is emerging in the OHADA member states as consumers' socio-economic circumstances evolve in response to the impact of technological advancements in the trading environment. Despite the enactment of several municipal legislations to govern the e-commerce field within member states, the UAGCL's present provisions for the protection of commercial buyers, conditions, and warranties appear inadequate to address the issues confronting today's well-organised and modernized digital society. The presence of such discrepancies and variations in the legal frameworks of member states of economic integration organizations, such as the case of OHADA, poses a significant legal obstacle to economic cooperation within the West African subregion.[6] Therefore, the objective of this paper is to discuss the applicability of the UAGCL in the cyber environment.

The primary objective of this paper is to critically evaluate the applicability of the UAGCL to e-commerce transactions by meticulously assessing its provisions. The focal point of this inquiry is the OHADA rules on sale of goods, which are to be assessed for their efficacy in ensuring the predictability of business transactions within the ambit of their contracting states.[7]

The paper firstly calls into question the applicability of the scope of the UAGCL to e-commerce transactions. The subsequent analysis delves into the provisions of the UAGCL, meticulously examining their applicability to e-commerce transactions. The final section of the paper offers a conclusion that synthesizes the various strands of argument explored in the paper and calls for the inclusion of e-commerce transactions in the agenda of the OHADA contracting states. The paper's approach is rooted in a purely legal perspective, as it is considered the most effective means of elucidating the intricacies of the UAGCL in the context of e-commerce transactions.

2. Interpreting the Scope of Application of the Uniform Act to E-commerce

A thorough review of the provisions of the UAGCL reveals that the Act is exclusively applicable to contracts for the sale of goods. The Act's silence on the matter of e-commerce contracts suggests a clear exclusion of such contracts from its purview. Article 1 of the UAGCL stipulates, among other provisions that "this Act applies to contracts of sale of goods between parties whose places of business or registered office are in different contracting states." Consequently, the UAGCL will only be applicable to a specific transaction if it pertains to:

- a contract of sale;
- of goods;
- between parties whose places of business are in different contracting States.

2.1.1: Contract of sale of Goods and E-commerce

The relationship between the contract of sale of goods and e-commerce under the OHADA Law is a subject of debate. The overarching objective of OHADA, as a transnational commercial law, is to promote cross-border trade, thereby enhancing economic growth.[8] However, it is important to note that growth, in and of itself, using present technology, inevitably leads to an increase in the exchange of goods and services. However, the absence of recognition of technology's role in the context of sales transactions within the OHADA framework hinders the potential for trade and economic growth within its member states.[9] Addressing this discrepancy in the execution of contract of sale of goods through e-

[6] B Thompson, 'Legal Problems of Economic Integration in the West African Sub-Region' *African Journal of International and Comparative Law,* (1990) 2.

[7] J E., Nzalie, 'Reflecting on OHADA Law Reform Mission: Its Impact on certain aspects of Company Law in Anglophone Cameroon', *Annales de la Faculté des Sciences Juridiques et Politiques*, Université de Dschang, (2002) (6);. B. Zeller & N. Janko, 'Trade Harmonisation - How Harmonised Is It' (2015) 18 *InternationalTrade and Business Law Review,* (2015) 18.

[8] OHADA negotiated intra-regional uniform laws to regulate specific legal issues such as commercial law within the OHADA group of nations. uniform laws facilitate and strengthen the competiveness of the internal market as it creates a single window in relation to trade laws.

[9] C.J. Nwabueze, 'Reflections on legal uncertainties for e-commerce transactions in Cameroon', *The African Journal of Information and Communication* (AJIC) (2017) 20, 171-180, https://doi.org/10.23962/10539/23499; E. Burkar, 'Transnational business governance interactions: Conceptualization and framework for analysis', *Regulation and Governanace* (2014) 8, (available at doi:10.1111/rego.12030).

commerce emerges as a pivotal concern. The integration of e-commerce can serve as a catalyst for the promotion of cross-border trade in goods and services within the OHADA framework.[10]

Given that the Uniform Act is the primary legislation concerning the sale of goods, it is notable that the provisions of this Act do not explicitly address any terms related to "electronic" in any of its provisions. Furthermore, the Act does not provide a clear definition of what constitutes a "contract of sale." Consequently, it can be deduced that electronic commerce is an integral component of a "contract of sale." Consequently, the UAGCL does not explicitly address the potential for the conclusion of a contract of sale through or by electronic means. This prompts the question of whether the drafters of the UAGCL intended for contracts of sale to be exclusively concluded in person.

However, it is possible to infer the meaning of a "sales contract" from the different rights and obligations of the seller and of the buyer provided by the UAGCL. According to these provisions, a sales contract is defined as a legal agreement that obligates one party (the seller)[11] to deliver goods and transfer property to the other party (the buyer)[12] at an agreed-upon price. This indicates that a sales contract constitutes a reciprocal exchange of goods, wherein one party binds itself to transfer the goods in exchange for the agreed-upon price.[13] This principle is further reinforced under Article 250 para.1 UAGCL, which delineates the primary obligations of the seller to deliver the goods and to transfer any associated documents. Conversely, the primary obligations of the buyer, as outlined in Article 262 UAGCL, are to fulfill the financial transaction and accept the goods.

In fact, the Uniform Act is predicated on the proposition that transactions involving the exchange of goods for money consideration are not within its purview. In the context of e-commerce transactions, this stipulation is typically uncontroversial. Sales contracts formed through electronic means are legally binding and equivalent to those formed through more conventional methods. However, a notable area of concern in the realm of e-commerce pertains to online software sales. In the context of software transactions, the term "sales contract" may not accurately reflect the nature of the agreement, as it could be more accurately characterized as a licensing agreement. For instance, when a customer purchases a Microsoft product, the product is accompanied by a license agreement that states, "This software product is licensed, not sold."[14] The rationale behind this phenomenon pertains to the fact that a substantial proportion of the software in question constitutes intellectual property rights, which are inherently attached to the software itself. While the software manufacturer may engage in the sale of the physical disk containing the software to the buyer, the intellectual property rights inherent in the program are not included in this transaction. Instead, the purchaser is granted a license to utilize the software.

It is crucial to note that license agreements of this nature do not involve the transfer of property in the goods "sold," as stipulated by Article 252 UAGCL. The seller retains ownership of the software and merely grants the buyer a license to use it. Consequently, it can be posited that such agreements, which are prevalent in e-commerce contexts, do not constitute contracts of sale and are not subject to the provisions of the UAGCL.

Nevertheless, it is conceivable to posit that licensing agreements may be considered as a form of sales contract. Article 260 stipulates that "the seller must deliver goods that are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim." Consequently, it can be contended that the UAGCL permits a "sales contract" under which a buyer who "purchases" software under a license agreement has consented to accept the goods subject to the seller retaining ownership. This argument is supported, to some extent, by the fact that Article 260 proclaims that the

[10] A recent entrant to the field of cross-border trade in Cameroon for example have arisen from the proliferation of cross-border e-commerce *via* online business platforms such as *jumia, Afrimarket, sellam quick*. With one-click buyers can utilize the online platforms. to market their goods to the global marketplace.

[11] UAGCL, Article 250: (Conforming goods)

[12] UAGCL, Article 262: (to purchase)

[13] *Ibid;* (refers to buyer's obligation to pay the price)

[14] T. Cox, 'Chaos versus Uniformity: The Divergent Views of Software in the International Community', (2000)*Vindobona Journal of International Commercial Law and Arbitration,* 4 3.

UAGCL is concerned with the effect which the contract may have on the property in the goods sold as opposed to the position of the CISG.[15]

2.1.2: Goods

The UAGCL does not provide a definition of "goods."[16] It is not possible to deduce the meaning of the term by analyzing different language versions of the statute. The Uniform Act appears 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. Consequently, the prevailing academic consensus among legal scholars is that intangible rights, including patents, trademarks, copyrights, quotas of limited liability companies, and know-how, do not fall under the purview of 'goods.' A similar exclusion pertains to immovable property.

Digital goods represent a negligible proportion of the broader e-commerce market. Moreover, the aforementioned provisions under the UAGCL have not yet taken the next logical step beyond eliminating cumbersome cross-border duties on digital goods, which would be to harmonize customs laws and improve the supply chain for non-digital goods transported through e-commerce. The provision in question encompasses a wide range of digital products, including but not limited to music, video, software, and text.

According to the Uniform Act, the term "goods" is generally understood to encompass movable and tangible objects. The concept of "goods" serves to quantify the primary obligation of the seller, as outlined in Article 250, which stipulates that "... the seller must deliver the 'goods' ... as required by the contract and this Uniform Act." To ascertain the scope of the seller's duty of conformity, it is imperative to identify the specific 'goods' to which this Uniform Act pertains. Despite the absence of a definition for "goods" in the Uniform Act, its meaning can be ascertained by referring to the Uniform Act's Scope and General Provisions.[17] Specifically, Article 234 (a) stipulates that "the provisions of this Act shall apply to contracts of sale of goods," while Articles 235 and 236 impose limitations on the scope of the Act, thereby, by implication, constraining the definition of "goods." By inferring from the restrictions imposed by Article 236 UAGCL, it can be deduced that the term "goods" is not expansive, and in fact, it is virtually exhaustive. It excludes non-physical or intangible items, such as electricity, negotiable instruments, and company shares, which are technically "things in action" or incorporeal movables. These items are excluded by the plain words of Article 236.

One potential justification for excluding intangible or immovable goods from the purview of the OHADA Uniform Act could be that, despite being assets available for trade, these goods can only be disposed of through trade or as security, rather than being physically transferred to another party. The absolute interest in such types of goods may be disposed of outright or may be made the subject of security. This assertion is further reinforced by Article 250 para. 1 UAGCL, the primary obligation of the seller under the contract of sale is to deliver the goods to the buyer. In this context, the salient issue is the physical transferability of the goods, not necessarily the transfer of a legitimate interest in the goods. The salient consideration in such instances is not the identification of the goods, but rather their physical segregation and ownership. In this context, segregation is not merely a possibility but an imperative, as it serves to ascertain the subject of the seller's transfer obligation under the Uniform Act. In the contemporary digital landscape, the proliferation of online transactions in the acquisition of goods such as computer software and mobile applications has become increasingly evident. It is evident that these products are intangible in nature, thereby rendering the UAGCL inapplicable to such contracts.

Moreover, Article 235 (b) stipulates that the UAGCL is inapplicable to contracts that involve the substantial provision of services. The aforementioned article stipulates the following:

[15] CISG, Article 4.
[16] CISG, Article 30.
[17] See Chapter 1.

> *the provisions enumerated in this Book shall not be applicable to contracts in which the primary obligation of the party that delivers the goods is the provision of manpower or other services.*

In the context of electronic contracts for the delivery of tangible goods, this poses no particular problems. However, as previously discussed, a significant proportion of electronic contracts pertain to the sale of software. The nature of software is such that it does not readily fit into the category of a "good," as it exhibits characteristics of goods, services, intangibles, and intellectual property.[18] Given the fact that the UAGCL does not apply to services, intangibles, or intellectual property, a pertinent question arises as to whether the UAGCL applies to software. Intellectual property, such as copyrights, patents, and trademarks, is not considered corporeal movables and therefore falls outside the definition. However, goods may exist that embody these intellectual property rights.

The subsequent discussion will address the most common forms of software and analyze whether they fall within the concept of 'goods' for the purposes of the UAGCL.

2.1.2.1: Software on a Disk

Software provided on a disk bears a resemblance to other commodities subject to the provisions of the UAGCL.[19] In the context of contemporary commerce, a salient issue that remains unresolved by the OHADA Uniform Act on General Commercial Law pertains to the question of whether computer software can be considered as "goods" as defined in Article 234, paragraph 2. 1. Typically, software is incorporated into a physical medium, such as diskettes, or is included as a component within a package with computer hardware, including computers or computer components. Consequently, it could be regarded as a tangible object that possesses the potential for transferability.[20] This prompts the question of why such an item cannot be considered a "good" under the Uniform Act. It can be posited that the OHADA Uniform Act would encompass such an item, given its capacity to be transferred to another party through a contract of sale in its physical form. It is noteworthy that the possibility of a disk being physically defective due to a virus, for instance, is a valid concern. In such an event, the seller would be considered liable for the seller of a physically defective car.

However, it is crucial to note that the disk also contains an intangible software program, which is separated from the disk after delivery by being downloaded onto the hard drive of the buyer's computer. The question arises as to whether the UAGCL is applicable to the program as a distinct entity from the disk containing the program.

2.1.2.2: Custom-made Software

The term "custom-made software" refers to software that is developed or adapted specifically for a particular buyer. The sale of "custom-made software" would likely not fall under the current scope of the UAGCL. According to Article 235 (b), the Act "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." This prompts the following question: How does one ascertain whether the "preponderant part" of the seller's obligation lies in the provision of services as opposed to the provision of goods?

2.1.2.3: Electronic Software

Electronic software is software that is not delivered on a disk or other physical medium; rather, it is transmitted electronically, for example, via the Internet. This characteristic of electronic software renders it entirely intangible; it does not take on a physical form, even when it is delivered to the buyer. Given the prevailing perspective within the UAGCL that it does not apply to intangible goods, it is reasonable to infer that electronic software will not fall within the purview of the UAGCL.

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[18] M. Larson, 'Applying uniform sales law to international software transactions: The use of the CISG, its shortcomings, and a comparative look at how the proposed UCC Article 2B would remedy them', (1997) Tulane *Journal of International and Comparative Law*, 5, 445.

[19] Cox, (n 14).

[20] A Jansen and N G. Ahuja, 'The Imperfect International Sales Law: Revamp, Supplement or Leave it Alone?', *op cit*., p. 3.

The argument has been made that the UAGCL could apply to electronic software because software programs must be embodied in some physical medium, for example, a computer, before they can be used. This suggests an inherent link between software and a tangible medium, thereby maintaining a tangible aspect in the software's composition. However, this approach appears to be somewhat artificial. Furthermore, the "tangible medium" containing the software when it leaves the seller's possession, namely the seller's computer, is not equivalent to the "tangible medium" containing the software when it is delivered to the buyer's possession, namely the buyer's computer. The transfer of tangible goods from the buyer to the seller is not observed in this process. This phenomenon appears to contradict the provisions outlined in the UAGCL, which explicitly contemplates the transfer of tangible goods between parties.[21]

A further impediment to the implementation of the UAGCL in the context of electronic software is its explicit exclusion of contracts for the sale of electricity from its purview.[22] The provision of electronic software can be considered a "stream of electrons," which is, naturally, electricity. Consequently, an argument can be made that electronic software is explicitly excluded from the purview of the CISG.[23] Nevertheless, it is important to note that electronic software is likely distinguishable from electricity. The electronic software itself, the product, is quite distinct from the electricity, the means by which the product is transmitted to the buyer. The Commentary to the CISG suggests that electricity was excluded from the scope of the Convention due to the unique challenges associated with its provision. This could be analogous to the situation in most OHADA member states. Consequently, the governance of electricity is subject to the respective national legal frameworks of member states. This suggests that the exclusion should not extend to products transmitted by electricity, provided they do not involve the supply of electricity itself. However, the increasing use of fibre optics, which facilitates the transmission of software in a manner independent of electricity, may effectively render this issue largely academic.

2.1.3 Between Parties whose Places of Business are in Different States'

Article 1 of the UAGCL stipulates, among other provisions, that "this Act shall be applicable to contracts of sale of goods between parties whose places of business or registered office are in different contracting states." Consequently, to ascertain the applicability of the UAGCL, it is imperative to determine the place(s) of business of the parties in question. This can pose particular challenges in the context of e-commerce, where transactions are conducted, received, and processed in virtual spaces with minimal physical connection to a specific location. Electronic commerce is designed to transcend geographical boundaries.[24] Consequently, it is plausible for individuals or entities to conduct commercial activities exclusively online without possessing a conventional 'place of business' in the traditional sense. Indeed, companies are rapidly adopting e-business models, prompting regulatory authorities to express heightened vigilance concerning potential monopolistic or monopolistic market structures.[25] In the absence of a traditional "place of business," as defined by conventional standards, it can be challenging to ascertain the place of business of a party for the purposes of the UAGCL. Nevertheless, it is imperative for the OHADA statute on Companies to reconsider the place of companies in conducting businesses *via* the internet.

2.1.4: Exclusion of Consumer Contracts

Article 235 (a) UAGCL explicitly excludes consumer contracts from its scope. This exclusion significantly restricts the application of the UAGCL in the context of e-commerce, as one of its hallmark features is its provision of consumers with unprecedented access to manufacturers and suppliers based overseas, enabling direct contractual engagement between consumers and these entities. Given the

[21] UAGCL, Article 250 for example, requires the seller to 'deliver the goods, hand over any documents relating to them and transfer the property in the goods.'
[22] UAGCL, Article 236 (f).
[23] UAGCL, Article 2(f).
[24] F. Piera, 'International Economic Commerce: Legal Framework at the Beginning of the XXI Century', (2001) *International l Trade Law Journal*, 8.
[25] Where do you sue a website? How do you protect personal data and privacy? Is an online contract valid? These are some of the issues that International Electronic Commerce regulations have to face.

pervasive use of the Internet for consumer transactions within the OHADA countries, particularly international consumer transactions, the inapplicability of the UAGCL to consumer contracts represents a substantial constraint on the full implementation of e-commerce transactions. It can be posited that this absence of consumer protection legislation is attributable to the fact that the existing legal framework contains provisions that do not align with the expectations and interests of consumers. Instead, these provisions are oriented towards the interests of commercial sellers and buyers of goods. It is possible that the draft Uniform Act on Consumer Law addresses this gap by expanding its scope to encompass consumer protection.

3. Testing the Applicability of the Provisions of the UAGCL to the Regulation of E-commerce

3.1 Formation of Contract

Commerce, defined as the exchange of goods and services, is governed by the legal framework of contract law.[26] The formation of sales contracts under the Uniform Act is largely subject to the Common Law principles of offer and acceptance. As contracts are typically consensual, the parties must be in agreement with each other as to its terms. This mutual understanding is formalized through the processes of offer and acceptance. It is imperative for the parties to reach a consensus on the fundamental terms to constitute a valid contract. This principle is deeply rooted in the prevailing tradition of freedom of contract, which is well-established and widely recognized. Accordingly, the UAGCL asserts that a contract is not considered formed unless the parties have demonstrated an intention to enter into a binding agreement.[27] The question of whether computers possess the capacity to possess the relevant intention is a subject of considerable debate in the field of computer science. If they do not, then the question arises of whether a computer can be regarded as an agent for the human programmer. In this capacity, the actions of the computer would serve to indicate the programmer's intention to be bound by the contract.

A critical examination of the responses to these inquiries can be facilitated by employing the theoretical frameworks of offer and acceptance, particularly in the context of contract formation.

3.1.2 Offer

According to Article 241, paragraph 2 of the UAGCL, an offer may be directed to one or more specified individuals. The offer must be sufficiently definite and must indicate the offeror's intention to be bound in the event of acceptance.

The requirement for an offer to be addressed to one or more specific persons means that websites, advertisements on bulletin boards, and advertisements sent to electronic mailing lists will not constitute offers. Such "invitations to treat" also lack the requisite indication of the intention of the offeror to be bound in the case of acceptance. In the context of online transactions, the necessity for the offer to be sufficiently definite does not generally pose significant challenges. It is challenging to envision parties entering into contractual agreements electronically without having arrived at a consensus on the goods, the quantity required, and the price.

However, ambiguities may emerge concerning the precise terms of the offer. To illustrate, consider a scenario in which a customer places an order through a website. It has been demonstrated that the website itself cannot constitute an offer; therefore, the offer must occur when the buyer places the order. However, the precise terms of such an offer remain ambiguous. While the price and quantity of goods are determined, the remaining terms of the contract remain to be elucidated. In many cases, the seller's standard terms are printed on the website somewhere, and by submitting the order, the buyer is considered to be submitting an order on those terms. However, if the buyer has not read these terms, particularly if they are located in a separate, often less prominent, section of the seller's website, can the

[26] R. Bradgate, *Commercial Law,* (3rd edition, Oxford University Press, 2005).

[27] Under Article 241 para. 1 UAGCL a contract is concluded at the moment when an acceptance of an offer becomes effective. Article 14 provides that an offer must indicate the intention of the offeror to be bound in case of acceptance. Article 244 para. 1 UAGCL. Indicates that an acceptance is 'a statement made by or other conduct of the offeree indicating assent to an offer.'

offer truly be regarded as indicative of the buyer's intention to enter into a contract under these terms? This conundrum poses a significant challenge, and the UAGCL offers minimal guidance on the matter.

In light of this ambiguity, many website operators have adopted "clickwrap" or "shrinkwrap" agreements as a means to ensure that their terms are brought to the customer's attention. Clickwrap agreements are characterized by the presentation of terms and conditions of a contract to the customer, often through a series of screens, followed by an opportunity to either accept or reject the terms by clicking on an "I accept" icon. This practice appears to contradict the fundamental objective of the UAGCL, which is to ensure a mutual understanding and agreement between the parties regarding the terms of their agreement.[28]

3.1.3 Acceptance

According to the UAGCL, a statement by or any other attitude or conduct from the offeree indicating that he assents to an offer constitutes acceptance.[29] Subject to no condition as to form,[30] the declaration of acceptance must be made simple, that is without reservation or condition, in such a way that upon acceptance the contract is concluded.[31] Hence, the contract is concluded at the moment the acceptance of an offer becomes effective.[32] In the absence of stipulations within the proposal regarding the manner of acceptance, or in the event that the proposal outlines a specific method of acceptance that is not adhered to, the acceptance will be deemed invalid and will not be considered effective.

According to the UAGCL, the means of communication that are to be employed for the purpose of rendering an offer and its acceptance effective are not restricted. The pivotal consideration is the receipt of the acceptance by the offeror.[33] In the majority of instances involving verbal offers, acceptance is expected to be immediate, unless explicit agreement to the contrary is reached by the parties involved.[34] Additionally, the execution of the task can be completed within the time limit established by the offeror, which commences from the moment the offer is received by the offeree.[35]

In the context of an offer extended by a buyer through a website, it is customary for the buyer to receive no formal acceptance or confirmation from the seller. It has been posited that, given the stipulation that the order is to be executed in accordance with the seller's standard terms and conditions, which are presumed to be accepted by the seller, the absence of any response from the seller could be interpreted as tacit acceptance.[36]

3.1.4: Capacity of Contracting Persons

In the context of commercial law, capacity is a pivotal concept in the context of the conclusion of a sale contract. Capacity signifies the capacity to enter into legally binding agreements. The parties involved must possess the legal capacity to enter into a contract of sale.

As the preceding discussion alludes to, an electronic agent might be regarded as a mere communication instrument, akin to a telephone or a fax machine. However, the advent of autonomous electronic agents prompts the application of legal doctrines that govern principals and agents. A particularly intriguing notion is that autonomous electronic agents ought to be treated in some ways as legal "persons."

While computers and organizations are clearly distinct entities, the rationales for attributing legal personhood to computers are analogous. The fundamental rationale behind this legal personhood is to establish a

[28]The UAGCL is silent on the specific point relating to the freedom of contract. However, this principle is manifested through the making of an offer and acceptance under the UAGCL.
[29]UAGCL, Article 244 para. 1.
[30]UAGCL, Article 244 para. 2.
[31]P. S. Akuété, & J.Y.Toé, *OHADA Droit Commercial Général*, *(*Bruylant, Collection Droit Uniforme Africain, 2002).
[32]UAGCL, Article 244.
[33]UAGCL, Article 242.
[34]UAGCL, Article 244 para. 1.
[35]UAGCL, Article 246.
[36] P. F. Ohandja, 'Le silence et le contrat : la consecration d'un antagonisme par le droit OHADA', (2020) 25 *Revue de Droit Uniforme* ; M. Chissick, & A, Kelman, *Electronic Commerce : Law and Practice*, (Sweet & Maxwell, London, 1999).

distinction between the actions of the entity itself and those of its individual members.[37] In a similar vein, in the context of computers, there may be pragmatic reasons to differentiate between the machine and its user. The pertinent inquiry, therefore, pertains to whether individuals engaged in transactions with electronic agents perceive the agent as the origin of communication rather than its owner. This inquiry pertains to the realm of perception. A reasonable person would likely seek indications of behavior that is typically associated with humans. Does an electronic agent, in the process of contract formation, act in a manner consistent with that of a human being? Does the agent employ a bargaining strategy? Does this bargaining strategy align with that of a natural person? This requirement does not appear to present any significant impediments. After all, electronic agents are developed to negotiate and conclude contracts.

If the electronic agent is not considered a legal person but is regarded as a software application, the parties to a contract concluded through electronic agents will be the human controllers. Consequently, should a party perceive a violation of their rights, they will have the option to address the issue with the other party. In the event that the electronic agent is deemed a legal entity, the possibility of legal action against the agent arises. However, the potential remedies available in such legal actions remain unclear. It is evident that an electronic agent lacks tangible assets. Consequently, it is challenging to identify potential sanctions that could be imposed on it.

3.1.5: Timing

One of the major difficulties with applying the UAGCL to e-commerce involves determining when communications are effective. This is particularly salient in the context of acceptance, as the timing of acceptance significantly impacts the determination of when, and consequently, where, the contract is considered concluded.

According to the UAGCL, an offer is considered to have reached the offeree when it is made orally to the offeree or delivered by any other means to the offeree's personal address, place of business, or postal address.[38] However, the UAGCL does not restrict the means of communication through which to render the offer and acceptance effective. That is to say, the provision appears to encompass any means of communication without exception. Of paramount importance is the prerequisite that the acceptance must reach the offeror.[39] In the majority of instances involving verbal offers, acceptance is expected to be immediate, unless explicit agreement to the contrary is reached by the parties involved.[40] Additionally, the execution of the task can be completed within the time limit established by the offeror, which commences from the moment the offer is received by the offeree.[41]

In the context of electronic communications, there is an absence of physical acceptance, akin to that observed in the delivery of a letter or telegram. Instead, communication transpires in the conceptual domain of "cyberspace," a term denoting the virtual realm accessible *via* computers and other devices. This characteristic renders the determination of the precise moment and location of "delivery" challenging. Electronic communications traverse multiple servers and computing devices on their way to the intended recipient, and often, the parties involved are unaware of the physical location of the servers processing their communications.[42] In the context of electronic commerce, when a purchaser submits an order through a website, the order is transmitted to the server of the seller. Thereafter, the server may transmit the order to the seller's computer. At what point, then, can the order be considered to have been delivered to the seller. The temporal aspect of this process is addressed by Article 243 of the Uniform Act.

3.1.6: Formalities

The formal requirements of writing and signature are not necessary for a valid contract to be formed under the UAGCL according to Article 240. Consequently, the applicability of the UAGCL to electronic transactions appears to be unencumbered by significant impediments. Notwithstanding the absence of a

[37] T. Allen, & R. Widdison, 'Can Computers Make Contracts*',* (1996) 9 *Harvard Journal of Law & Tech*nology 25, 26.
[38]UAGCL, Article 243.
[39]*Ibid*, Article 242.
[40]*Ibid*, Article 244 para. 1.
[41]*Ibid*, Article 246.
[42]C. Poggi, "Electronic commerce legislation: An analysis of European and American approaches to contract formation" *Virginia Journal of International Law* (2000) 41 224.

definition of "writing" in the revised UAGCL,[43] It is therefore necessary to consider whether "writing" under the UAGCL extends to cover electronic communications. This inquiry ultimately results in the conclusion that the legal status of electronic communications within the purview of the UAGCL remains ambiguous.

4. The Performance of the Contract

The UAGCL's language was not designed to address the realm of intangible goods, and as a consequence, its provisions are not always particularly suitable for electronic contracts involving the delivery of goods such as software.

4.1 The Seller's Duty

For instance, the stipulation that the vendor relinquish documentation pertaining to the merchandise to a carrier[44] undoubtedly engenders complications in scenarios involving electronic software distribution to the purchaser via the Internet.[45] Similarly, the requirement that the buyer examine the goods is difficult to apply in the context of software, where the buyer often lacks knowledge about how the software functions and simply installs it on their computer. While the language may not fully align with the nuances of e-commerce, the provisions of the UAGCL pertaining to performance are, in the majority, sufficiently general to be applicable to e-commerce transactions.

4.3 The Buyer's Duty to Pay the Price

The advent of alternative payment systems and instruments has gained considerable traction, as evidenced by the proliferation of cryptocurrencies. According to the International Monetary Fund (IMF), such systems are classified under the overarching term "financial technology" (also known as "FinTech"), which denotes the utilization of technology in financial applications.[46] Cryptocurrency, also known as virtual currency, digital currency, crypto tokens, digital tokens, and more recently, digital assets, is a form of digital money that is exchanged through online networks. In particular, the cryptocurrency bitcoin is gaining traction in most countries. In terms of the utilization of cryptocurrency as a medium of exchange for the acquisition of goods and services, the UAGCL stipulates that "the buyer is obligated to remunerate for the goods and take possession of them." In light of the disposition stipulated under the OHADA Law, it is imperative to safeguard the rights of buyers in the digital realm to ensure the sustained growth of e-commerce. Furthermore, this aspirational provision is of paramount importance for free trade agreements and should be incorporated into emerging domains that are instrumental to the expansion of the e-commerce sector, including cryptocurrency, cybersecurity, and mobile payments.[47]

5. Conclusion

It is imperative for the OHADA drafters charged with conducting a comprehensive re-evaluation of existing e-commerce provisions, refining them to align with contemporary trends, and incorporating novel provisions into a statute that address the distinctive challenges posed by e-commerce. By implementing these changes, the OHADA States can establish a robust regime that fosters innovation while providing clear and effective guidelines. It is imperative for the legal framework to evolve in tandem with technological advancements

[43] Also, see the definition of "written" in the earlier Uniform Act on General Commercial Law 1997, Article 209: "Within the scope of this Book,the word "written" shall mean any communication using a written meduim, including the telegram, telex or telefax." Note further, Marcel Fontaine, "OHADA Uniform Acton Contract Law: Explanatory Notes to the Prelimanry Draft" <http :www.unidroit.orgéenglish/legalcooperation/OHADA%20act-e.pdf> accessed 2 November 2013, para 59:"… Another provision of the Uniform Act relating to General Commercial Law that stands the need oof review is Article 209, which gives a rather archaic definition of the word "wriiting", mentioning telex and telegram, with a daring refernce to tellefax. This wording will clearly have to give way to the far more modern definition contained in Articlle 1/10 of the preliminary draft."

[44] UAGCL, Article 252 para. 1.

[45] *Ibid*, Articles 258, 267.

[46] Chishti & Barberis, The FinTech Book: The Financial Technology Handbook for Investors, Entrepreneurs and Visionaries (Wiley 2016) 12; E. Reddy & V, Lawack, 'An Overview of the Regulatory Developments in South Africa regarding the Use of Cryptocurrencies' *South African Mercantile Law Journal* (2019) 31 1.

[47] The Central African Republic, a member to OHADA adopted Bitcoin as a legal tender. In another respect, the necessity of accepting mobile money as a method of payments under the OHADA law is due to the convenience of being able to access funds no matter where the buyer is located; the efficiency of purchasing goods and tracking payments on a single device; and the benefit for sellers of being able to contact their customers instantly are, all strong reasons for encouraging the growth of mobile payments within a digital era.