

A Comparative Legal Analysis of Elements of Contract of Sale under the Laws Regulating Contract of Sale in Nigeria, South Africa and United States

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Abstract: This seminar paper focused on the comparative legal analysis of elements of contract of sale under the laws regulating contract of sale in Nigeria, South Africa and United States. It examined the various laws regulating elements of contract of sale in the three jurisdictions mentioned above looking at the similarities and differences in their statutory provisions. The research methodology adopted is doctrinal approach. The Primary and Secondary sources of materials were consulted in the writing of the work. Primary sources such as law reports, case laws, statutes etc. and secondary sources such as law textbooks, journals etc. This work finds out that there is similarity in the essential elements of a contract of sale in the three jurisdictions but there are slight differences in their practices. The work also found out that the law regulating contract of sale in Nigeria is obsolete and archaic and therefore needs to be amended to suite the current practices of modern-day commercial transactions. It is important that our laws be reviewed from time to time to incorporate changes that occur day in day out in our societies. This work advocates for timely review of laws governing contract of sale and commercial transactions in Nigeria.

I. INTRODUCTION

Buying and selling is a major activity in human life. Man cannot fully exist without having the necessary essentials needed to keep him living in this world. Buying and selling has been in existence with human race from time immemorial. The exchange of one thing for another which is usually termed trade by barter can also fall under the category of commercial transaction (buying and selling). Under trade by barter, a good is usually exchanged in consideration for another good. This good used in exchange for another good can be termed as the price paid for the value of the good to be taken in return. However, with the use of currencies, the idea of exchanging a good for another becomes obsolete as one could easily pay for what he wants with the use of currency or legal tender.

In Nigeria, prior to the reception of the Sale of Goods Act 1893, customary law applies to customary sales as it applies to other customary commercial transactions. The law of sale of goods in Nigeria is principally governed by the Sale of Goods Act, 1893, an English Law adopted in Nigeria long before political independence as one of the statutes of general application in the country. As it is with a number of other statutes of general application, this statute has become

outdated and out of tune with current realities of business and contractual transactions involving both movable and immovable properties. As such, some of its provisions have become either obsolete or inapplicable in a given sets of circumstances.¹

Meaning and Scope of Contract of Sale

Section 1(1) of the Sale of Goods Act defines contract of sale as follows “A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called price”. This statutory definition recognizes that every sale transaction is first and foremost a contract.

It is pertinent to note that all the elements of an ordinary simple contract such as offer, acceptance, capacity to contract, consideration, intention to create legal relation, *consensus ad idem* and legality of contract are also basic requirements of a contract of sale.²

Essential Elements of a Valid Sale

Flowing from the definition of a contract of sale given in Section 1(1) of the Sale of Goods Act, the following can be distilled as elements of a valid sale:³

1. A contract between the buyer and the seller
2. Transfer or agreement to transfer goods
3. Goods
4. Price

The elements shall be discussed as follows:

A Contract between the Buyer and the Seller

Every sale must be preceded by a contract where the seller agrees to sell and part with possession absolutely and the buyer agrees to buy and obtain possession for a price. The parties must be at consensus in relation to all the terms of contract as regards the price, time and place of delivery,

¹ M.E. Nwocha, Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Rights of Parties to a Sale of Goods Contract [2018] (9) *Beijing Law Review*, 201-210.

² J.A.M. Agbonika and J.A.A. Agbonika *Sale of Goods (with Sale of Goods Act)* (Ababa Press Ltd, Ibadan 2011)

³ *Supra* p4

quantity and quality of the goods in question etc. The parties will not be seen as contracting on the same terms when there is an absence of consensus or agreement of the mind.⁴ The parties must also have an intention to create a binding legal obligation so that upon breach of the terms of the agreement by one party, the other could sue to recover damages for the breach or loss.

Section 1(3)⁵ goes further to distinguish between sale and an agreement to sell. The sub-section provides thus: “where under a contract of sale, the property in goods is transferred from the seller to the buyer, the contract is a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell”

However, Section 1(4) of the Act provides that: “an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred”. A common condition imposed in an agreement to sell is that properties in good will not pass until the buyer has paid the agreed price.

Transfer or Agreement to Transfer Goods

The primary objective of a contract of sale of goods is the transfer of the property in the goods from the seller to the buyer. The seller either transfers or agrees to transfer such property by his contract or under it.⁶ It has been said in this regard that, “the whole object of a sale is to transfer property from one person to another”.⁷

Transfer of goods here could be absolute or conditional. Transfer is absolute where the property passes to the buyer immediately upon the payment of price or consideration for the goods. Transfer is conditional on the other hand where transfer is to be made at a future time upon the fulfilment of certain conditions e.g. full payment of the purchase price, putting goods in a deliverable state etc.

Transfer in this sense means the voluntary delivery of the goods from the seller to the buyer. Section 27 therefore provides that: “it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract sale”

Goods

The subject matter of the sale must be goods. Goods are defined by the provision of S 62(1) of the Sale of Goods Act as “All chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale”. The term goods embrace widely varying objects such as clothes, shoes, aircraft, motor cars, machinery, ships, books, furniture and

growing crops. However, the term does not include choses in action, like the bills of exchange and cheques.⁸

The Act does not provide for contract of sale involving real property. In other words, land or any interest therein is excluded from the definition of goods. The term emblements on the other hand which was borrowed from ancient real property law, comprises crops and vegetables (such as corn and potatoes) produced by the labour of man and ordinarily yielding a present annual profit.⁹ Such annual crops like yam, cassava, maize, potatoes, which are popularly known as ‘emblements’ are not part of land and are regarded as chattels, even before they are severed from the land.

The provision of this S 62(1) defining goods has caused more confusion especially the second part of it talking about things attached to or forming part of the land. For instance, timber is not comprised in the term ‘chattels personal’ if it is sold as growing timber, but if it is sold as timber severed from the land it is ‘chattels personal’. In *Kursell v Timber Operators and Contractors Ltd.*¹⁰, the Court of Appeal held that, a contract for the cutting of timber over a period of 15 years was a sale of goods.

Goods can be classified into the following:

- a. Existing goods
- b. Future goods
- c. Specific or Ascertained goods
- d. Unascertained goods

Price

Section 1(1) of Sale of Goods Act 1893 expressly states that the transfer of property in the goods from the seller to the buyer is “for money consideration called the price”. The Act invariably therefore restricts contracts of sale of goods to those contracts where the consideration of the buyer for the transfer of the ownership in the goods to him by the seller is in the form of money payment. This is an essential element of a contract of sale and which distinguishes it from a contract of exchange or barter where the goods are delivered in exchange for other goods.¹¹

The ascertainment of price in most sale of goods transactions will not raise any problem as the contract will invariably provide for this expressly. However, Section 8(1) of the Sale of Goods Act declares that not only may the contract itself fix the price, it may also leave the price to be fixed by in a manner thereby agreed or may be determined by the “course of dealings between the parties”. Section 8(2) goes further to provide that where the price cannot be determined by the application of the said Section 8(1), the buyer must pay “a reasonable price”. It provides further that what constitutes “a

⁴ Supra p1

⁵ Sale of Goods Act 1893

⁶ K.I. Igweike *Nigerian Commercial Law: Sale of Goods* (3rd edition Malthouse Press Ltd, Lagos 2015) p13

⁷ Per Akin, LJ. In *Rowland v. Divall* [1923] 2 KB 500 at p 505

⁸ M.C. Okany *Nigerian Commercial Law* (Africana First Publishers, Onitsha, Nigeria 2009) p311

⁹ Supra

¹⁰ (1927) 1 KB 298

¹¹ K.I. Igweike *Nigerian Commercial Law: Sale of Goods* (3rd edition Malthouse Press Ltd, Lagos 2015) p14

reasonable price' should be a question of fact dependent on the circumstances of each particular case.¹²

The price of a good can also be determined by agreement by the parties that the price should be fixed by the valuation of a third party. In this case, where the third party cannot or does not make the valuation, and the goods has been delivered to the buyer, the buyer must pay a reasonable price.¹³ Section 9(2) further provides that "where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault."

Legal Framework for Contract of Sale in Nigeria

The law governing sale of goods in Nigeria is the Sale of Goods Act, 1893 – a statute of general application in force in Nigeria – the rules of common law, including the Law Merchant which are not inconsistent with the express provisions of the Act,¹⁴ some provisions of the Factors Act, 1889, and the Sale of Goods Law, 1959, of the former Western Nigeria. The Sale of Goods Act, 1893, embodied a code of law as observed by merchants many centuries ago, relating to contracts for sale of goods. It is necessary to note that the 1893 Act is not exhaustive because if today, on production of satisfactory evidence in its support, any mercantile usage is accorded recognition by the courts, that usage will have force of law. Originally, the Sale of Goods Act, 1893 had force throughout Nigeria. But today, except in the Western States and Bendel State where the Sale of Goods Act has been repealed by the Sale of Goods Law, 1959 the rest of the Federation still applies the Sale of Goods Act, 1893.¹⁵ It is worthy of note that the Sale of Goods Law, 1959 which repealed the Sale of Goods Act, 1893 in the Western States, is a carbon copy of the 1893 Act.¹⁶

One of the elements which make Nigeria's contract of sale obsolete is the fact that our Laws on contract of sale are outdated and no longer in touch with modern realities.¹⁷ Nigeria's principal statutory law in this area, the Sale of Goods Act, 1893 is a very old statute, (a Statute of General Application) which is over 100 years old while its provisions do not capture the evolving changes in commercial transactions such as the introduction of online contracts and sales including its attendant issues like data protection, jurisdictional challenges, evidential problems and e-payments.¹⁸ Because of these, the provisions of the Act are

¹² Supra p14

¹³ Section 9(1) Sale of Goods Act, 1893

¹⁴ Section 61(2).

¹⁵ M.C. Okany *Nigerian Commercial Law* (Africana First Publishers, Onitsha, Nigeria 2009) p299

¹⁶ See Okay, Achike *Commercial Law in Nigeria* (1985) p173; M.O. Adesanya and E.O. Oloyede *Business Law in Nigeria* (1983) p87

¹⁷ T.I. Akomolede and M.S. Afolayan, "Legal Regime of Electronic Commercial Transactions in Nigeria." *Benson Idahosa University Law Journal (BIULJ)* Vol. 6, pgs 119-142 (2020).

¹⁸ M.S. Afolayan "Legal Analysis of Electronic Payment System and Frauds Associated with E-Commerce Transactions in Nigeria." *Nnamdi Azikwe University Journal of Commercial and Property Law, Vol. 8, Issue No. 3, pgs. 116-125*(2021).

deficient in some areas and it needs to be reviewed or a new law enacted to cover online sales and transactions.¹⁹

Legal Framework for Contract of Sale in South Africa

The South African Contract of Sale is basically governed by domestic legislation and international rules. The Consumer Protection Act 68 of 2008 (CPA) is the main legislation regulating the rights of consumers in South Africa. Generally, the CPA applies to²⁰:

- a) Transactions occurring within the Republic of South Africa, unless they fall within the scope of certain exemptions.
- b) Goods or services that are supplied in transactions to which the CPA applies.

The CPA also applies to transactions entered with:

- i. Natural persons
- ii. Juristic persons whose asset value or annual turnover, at the time of the transaction, is less than the threshold value determined by the Minister of Trade and Industry (currently ZAR2 million).

The Second-Hand Goods Act 6 of 2009 (Second-Hand Goods Act) regulates the business of dealers in second-hand goods and pawnbrokers in order to combat trade in stolen goods, and to promote ethical standards in the second-hand goods trade. Every person who carries on a business of dealing in second-hand goods is identified as a dealer and must be registered in accordance with the Second-Hand Goods Act.

On the other hand, South Africa is a party to the following international instruments:²¹

1. Convention for the Unification of Certain Rules for International Carriage by Air 1999
2. Convention on International Trade in Endangered Species in Wild Fauna and Flora
3. International Ship and Port Security Code
4. International Safety Management Code
5. International Maritime Dangerous Goods Code.

Also, the International Chamber of Commerce (ICC) and International Commercial Terms (Incoterms) are recognized in South Africa as standard contractual terms. Their use has been endorsed by industry bodies such as the Johannesburg Chamber of Commerce, whose members are involved in trade in goods.

The transport documents prescribed by the ICC Uniform Customs and Practice for Documentary Credits are recognized

¹⁹ T.I. Akomolede and M.S. Afolayan, "Socio-Legal Analysis of Electronic Commercial Transactions in Nigeria." *Nnamdi Azikwe University Journal of International Law and Jurisprudence*, Vol. 11, Issue No.2, pgs 20-33(2020).

²⁰ S. Meltzer and C. Smith and C. Bubu *Sale and Storage of Goods in South Africa: Overview* [https://uk.practicallaw.thomsonreuters.com/w-011-9988?transitionType=Default&contextData=\(sc.Default\)&firstpage=true](https://uk.practicallaw.thomsonreuters.com/w-011-9988?transitionType=Default&contextData=(sc.Default)&firstpage=true) accessed on July 4, 2021

²¹ supra

in South Africa for the purposes of effecting foreign currency payments by authorized dealers.

The ICC Uniform Rules for Demand Guarantees are applied by Commercial banks when issuing payment guarantees.

According to Kerr²², a contract of sale is formed when parties who have the requisite intention agree together or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the *res vendita* or *merx*, available to the other, called the buyer or the purchaser, in return for the payment of a price, the contract is a sale.

The above definition takes its roots, and has remained virtually the same, from *Treasurer-General v Lippert*,²³ where the full board of the Judicial Committee of the Privy council cited with approval De Villier's J statement that: "a sale is a contract in which one person (the seller or the vendor) promises to deliver a thing to another (the buyer or empor), the latter agreeing to pay a certain price."²⁴

Essential Elements of a Contract of Sale

Mackeurtan²⁵ states that:

The three essentials of the contract of sale are agreement (consensus ad idem); a thing sold (merx); and a price (pretium), with a view to exchanging the thing for the price. If these exist, there is a sale. Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance.

From the above definition, the following can be deduced as the essential elements of a contract of sale:

- i. Agreement
- ii. Thing Sold
- iii. Price

Legal Framework for Contract of Sale in United States

In the United States, every State has its own laws regulating the contract of sale in their jurisdiction. However, there is a Uniform Commercial Code which though not a federal law, it serves as a model that every State has accepted and implemented in some form. In the United States, a sale contract must be put in writing if the sale of goods is for more than \$500 in order for it to be enforceable under the Uniform Commercial Code.²⁶ Each State has its own sale of goods contracts. Most states base their legislation on Article 2 of the

Uniform Commercial Code (UCC) and the American Law Institute's Restatement (Second) of the Law of Contracts.²⁷

Only in very limited circumstances (such as in the buying and selling of stocks) does federal law govern sale contracts. Until the 1950s, there were two main sources of law for sales contracts: state common law and state statutory law. Thus, the laws governing sales contracts differed from state to state. As interstate commercial activity grew in importance, there was a need for a uniform law for sales transactions that would harmonize rules across the states. Therefore, in 1952, the Uniform Commercial Code (UCC) was created to govern business transactions. All 50 States have adopted the Code, but each has the power to modify it, in line with the wishes of the state legislature.²⁸

The UCC was developed to address two problems in United States business:

- i. The increasingly complex legal and contractual requirements of doing business deriving from some states, and
- ii. Differences in state laws that made it difficult for business people from different states to do business with one another.

The Code is divided into nine (9) Articles, each containing provisions that relate to a specific area of commercial law.

The UCC categorizes items that can be bought or sold into three types:

1. **Goods:** Goods are defined in Section 2-105 of the UCC as tangible items "which are movable at the time of identification to the contract for sale". Therefore, the primary features of goods are that they are movable and tangible. Refrigerators, paper, and furniture are all examples of goods.
2. **Services:** These are items that are movable but not tangible. Accounting is an example of a service.
3. **Realty:** Realty describes non-good items that are tangible but not movable. Under this definition, commercial and residential property are classed as realty.²⁹

Essential Elements of a Contract of Sale under the Provision of the UCC

The UCC provides the essential elements of a contract of sale as the same with the essential elements of a contract which are:

- i. Offer
- ii. Acceptance
- iii. Consideration

²²Law of South Africa vol 24 at 3

²³(1883) 2 SC 172

²⁴ Handout on *Commercial Law 201: Paper 1 The Law of Sale, Carriage & Lease* (2012) compiled by Helen Kruuse

²⁵ G. Hackwill *Mackeurtan's Sale of Goods in South Africa* (5th ed, Juta 1984) 1

²⁶< <https://www.contractsounsel.com/t/us/sales-contract>> accessed on 22nd June, 2021.

²⁷<[https://content.next.westlaw.com/8-618-0307?transitionType=Default&contextData=\(sc.Default\)& IrTS=20180520120306646&firstPage=true](https://content.next.westlaw.com/8-618-0307?transitionType=Default&contextData=(sc.Default)& IrTS=20180520120306646&firstPage=true)> accessed on 22nd June, 2021.

²⁸ <<https://openstax.org/books/business-law-i-essentials/pages/8-1-the-nature-and-origins-of-sales-contracts>>. accessed on 22nd June, 2021

²⁹ supra

However, the UCC also incorporate the provision of the Statute of Fraud and thereby provides that: “except as otherwise provided in this section, a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker”³⁰

The UCC further provides for the exception to the above where:

- a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
- b) If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
- c) With respect to goods for which payment has been made and accepted or which have been received and accepted.³¹

Comparative Analysis of the Three Jurisdictions

Having considered the legal analysis of the essential elements of contract of sale in Nigeria, South Africa and United States, the following can be distilled:

1. There is huge similarity in the provisions of the statutes applicable to each jurisdiction on the essential elements of a contract of sale. All the statute significantly provides for contractual agreement, good to be sold or transferred, and consideration which is the price.
2. The three jurisdictions also emphasized that the essential elements of a contract of sale virtually flows from the essential elements of a contract.
3. The statutory provisions in these jurisdictions also gave parties to a contract of sale the freedom to contract in a way that pleases them as long as it is based on their agreement.

However, having considered the statutory regulations of these three jurisdictions, it is worthy of note that the UCC which is the formal regulatory framework adopted by all states in the US is more comprehensive when it comes to the contract of sale agreements.

For instance, the UCC made provision for writing as an essential element of a contract of sale whereas in the other two jurisdictions, there is no provision for such. On the other hand,

the UCC also considers and brought under the contract of sale, the Sale of real property which the Sale of Goods Act did not make provision for. The provision of the Sale of Goods Act expressly left out contract for a sale of land while defining goods.

II. CONCLUSION

A contract for the sale of good is a type of contract that is widely known and accepted in all nations of the world. Buying and selling has become a part of the human community, and as such, efforts have continuously been made to make sure that contract of sale is properly regulated by setting down rules and regulations by which parties to a contract of sale can be guided so as to avoid disputes in the course of sale.

As much as parties to a contract of sale bind themselves by the requirements of these statutory provisions, there will be tremendous growth in the economic activities of the Nation. It is therefore necessary that parties to a contract of sale will strictly adhere to the statutory provisions regulating Contract of Sale.

III. RECOMMENDATION

The contract of sale is an essential part of human activities. The human community has never been stagnant as there has been continuous growth and development in every sphere. In view of this, it will be necessary that our laws will be reviewed and reformed in order to incorporate the evolving changes that civilization has brought.

The Sale of Goods Act especially which is over 100 years needs to be amended or a new law should be made that will address the present-day issues in commercial transactions begging for attention. When laws are made to address current happenings in a society, it will be easier for members to submit to the provisions of such laws and interpretation of such laws will be easier.

BIBLIOGRAPHY

- [1] Achike Okay, Commercial Law in Nigeria (1985)
- [2] Adesanya M.O. and Oloyede E.O., Business Law in Nigeria (1983)
- [3] Akomolede T.I. and Afolayan M.S. “Socio-Legal Analysis of Electronic Commercial Transactions in Nigeria.” Nnamdi Azikwe University Journal of International Law and Jurisprudence, Vol. 11, Issue No.2, pgs 20-33 (2020).
- [4] Afolayan M. S. “Legal Analysis of Electronic Payment System and Frauds Associated with E-Commerce Transactions in Nigeria.” Nnamdi Azikwe University Journal of Commercial and Property Law, Vol. 8, Issue No. 3, pgs. 116-125 (2021).
- [5] Agbonika J.A.M. and Agbonika J.A.A, Sale of Goods (with Sale of Goods Act) (Ababa Press Ltd, Ibadan 2011)
- [6] Hackwill G, Mackeurtan’s Sale of Goods in South Africa (5th ed, Juta 1984)
- [7] Handout on Commercial Law 201: Paper 1 The Law of Sale, Carriage & Lease (2012) compiled by Helen Kruuse
- [8] Igweike K.I, Nigerian Commercial Law: Sale of Goods (3rd edition Malthouse Press Ltd, Lagos 2015) Law of South Africa vol 24 at 3
- [9] Meltzer S. and Smith C. and Bubu C. Sale and Storage of Goods in South Africa: Overview
<https://uk.practicallaw.thomsonreuters.com/w-011->

³⁰ Section 2-201(1) UCC

³¹ Section 2-201(3) UCC

- [9988?transitionType=Default&contextData=\(sc.Default\)&firstPage=true>](#) accessed on July 4, 2021
- [10] Nwocha M.E, Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Rights of Parties to a Sale of Goods Contract [2018] (9) Beijing Law Review.
- [11] Okany M.C, Nigerian Commercial Law (Africana First Publishers, Onitsha, Nigeria 2009) <<https://www.contractscounsel.com/t/us/sales-contract>> accessed on 22nd June, 2021. <[https://content.next.westlaw.com/8-618-0307?transitionType=Default&contextData=\(sc.Default\)&IrTS=20180520120306646&firstPage=true](https://content.next.westlaw.com/8-618-0307?transitionType=Default&contextData=(sc.Default)&IrTS=20180520120306646&firstPage=true)> accessed on 22nd June, 2021. <<https://openstax.org/books/business-law-i-essentials/pages/8-1-the-nature-and-origins-of-sales-contracts>>. accessed on 22nd June, 2021