

Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models

By

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Declaration

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Summary

It is generally recognised that diversity of laws may act as a barrier to the development of trade, both at international and regional level. In a globalised era, trade is necessary for economic development and ultimately for the alleviation of poverty. Although the WTO has done extensive work towards the removal of tariff barriers, there is also a need to focus on addressing non-tariff barriers which include legal barriers to trade. Institutionalised legal harmonisation at an international level has provided the necessary impetus for the development of harmonised laws in the area of international trade. The creation of regional economic communities within the purview of the WTO has also given rise to the necessity of legal harmonisation to facilitate intra-regional trade. A number of regional economic communities and organisations have noted legal harmonisation as one of their areas of regional cooperation. This study focuses on the need to harmonise the law of international sale within the SADC region in order to facilitate cross-border trade. The study points out that the harmonisation of sales laws in SADC is important for the facilitation of both inter-regional and intra-regional trade with the aim of fostering regional integration, economic development and alleviating poverty. Although the necessity of harmonising sales laws has been identified, no effort to this end exists currently in the SADC region. This study addresses the mechanisms by which such harmonisation could be achieved by analysing three models which have been selected for this purpose, namely the CISG, the OHADA and the proposed CESL. The main issues addressed include whether SADC Member States should adopt the CISG, join OHADA, emulate the CESL or should use any of the other instruments as a model for creating a harmonised sales law for SADC. In conclusion, it is observed that SADC has its own institutional and operational mechanisms that require a process and instrument tailor-made for the unique needs of the region. It is recommended that SADC should create its own common sales law based on the CISG but taking into account lessons learnt from both the OHADA system and the CESL. A number of legislative, institutional and operational transformative and reform mechanisms are recommended to enable the creation of such a community law and ensure its uniform application and interpretation.

Opsomming

Dit word algemeen aanvaar dat regsdiversiteit die ontwikkeling van internasionale en regionale handel kan strem. In 'n geglobaliseerde ekonomie is internasionale handel noodsaaklik vir ekonomiese ontwikkeling en die uiteindelijke verligting van armoede. Alhoewel die Wêreldhandelsorganisasie reeds belangrike werk doen om handelsbeperkings te verlig, is daar ook 'n behoefte om, afgesien van tariewe, ook ander nie-tarief beperkings op internasionale handel aan te spreek. Regsdiversiteit is een van hierdie beperkings. Geïnstitusioneerde regsharmonisering op 'n internasionale vlak het reeds elders die nodige stukrag verleen vir die harmonisering van die reg van toepassing op internasionale handel. Die totstandkoming van regionale ekonomiese gemeenskappe binne die raamwerk van die Wêreldhandelsorganisasie noodsaak egter verdere regsharmonisering ten einde inter-regionale handel te kan bevorder. 'n Aantal streeksgemeenskappe en – organisasies hanteer reeds regsharmonisering as een van hul areas van samewerking op streeksvlak. Hierdie studie fokus op die behoefte om die internasionale koopreg binne die SAOG streek te harmoniseer ten einde oorgrenshandel te fasiliteer. Die studie toon aan dat harmonisering van die koopreg in die SAOG belangrik is ten einde beide inter-regionale asook intra-regionale handel te fasiliteer met die oog op die bevordering van streeksintegrasie, ekonomiese ontwikkeling en die verligting van armoede. Alhoewel die noodsaaklikheid van 'n geharmoniseerde koopreg geïdentifiseer is, is daar nog geen poging aangewend om dit binne die SAOG streek te bewerkstellig nie. Die studie spreek die meganismes aan waardeur harmonisering bereik kan word deur drie modelle wat vir hierdie doeleindes gekies is te ondersoek, naamlik die Internasionale Koopkonvensie (CISG), OHADA en die voorgestelde gemeenskaplike koopreg-regime van die Europese Unie (CESL). Van die kwessies wat aangespreek word is of the SAOG lidlande die Internasionale Koopkonvensie moet aanneem, by OHADA moet aansluit, alternatiewelik die Europese koopreg of enige van die ander instrumente as model gebruik vir die skep van 'n geharmoniseerde SAOG koopreg. Ten slotte word daarop gewys dat die SAOG sy eie institusionele en operasionele meganismes het wat vereis dat die proses en instrument pas gemaak moet word vir die streek se unieke behoeftes. Dit word aanbeveel dat die SAOG sy eie gemeenskaplike koopreg moet skep wat op die CISG geskoei is, maar wat ook die lesse geleer uit die OHADA en die EU in ag neem. Ten einde so 'n gemeenskapsreg te kan skep en die uniforme toepassing en interpretasie daarvan te verseker, word 'n aantal wetgewende, institusionele en operasionele hervormingsmeganismes aan die hand gedoen.

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Abbreviations

AfDB	African Development Bank
AEC	African Economic Community
AU	African Union
B2B	Business-to-Business
B2C	Business-to-Consumer
CAR	Central African Republic
CCJA	Common Court of Justice and Arbitration
CEMAC	Central African Economic and Monetary Community
CESL	Common European Sales Law
CEPGL	Economic Community of the Great Lakes Countries
CIMA	Inter-African Conference for the Insurances Market
CIPRES	Inter-African Conference for the social Welfare
CISG	UN Convention on Contracts for the International Sale of Goods (1980)
DRC	Democratic Republic of Congo
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEC	European Economic Community
ERSUMA	Regional Training Centre for Legal Officers
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area

GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICGLR	International Conference on the Great Lakes Region
ITC	International Trade Centre
NEPAD	New Economic Partnership for Africa's Development
NTBs	non-tariff barriers
OHADA	Organization for the Harmonization of Business Law in Africa
OAU	Organization of African Unity
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SADC PF	Southern African Development Community Parliamentary Forum
SADCC	Southern African Development Coordination Conference
TRALAC	Trade Law Centre in Southern Africa
UEMOA	West African Economic and Monetary Union
UDEAC	Economic and Custom Union of the Central Africa
ULFIS	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law on the International Sale of Goods (ULIS)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade
UNIDA	Association for the Unification of African Law
UNDP	United Nation Development Program
UNIDROIT	International Institute for the Unification of Private Law

WTO

World Trade Organisation

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PART A: INTRODUCTION

CHAPTER 1

INTERNATIONAL TRADE IN A NEW GLOBALISED ECONOMIC ORDER

1 1 BACKGROUND TO THE STUDY

1 1 1 Globalisation as the stimulus for international trade

The origins of cross-border trading can be traced back to time immemorial.¹ Although there is little agreement on the historical development of the global economy as we know it today, it is clear that international trade has always played a determining role. The levels of international trade experienced in the current era are unprecedented. Prior to the First World War, the global economy had several decades of stable international trade relations characterised by a significant cross border flow of goods, capital and people.² During this period, trade relations centred on a network of bilateral trade treaties,³ which reduced trade barriers, mostly in the form of tariffs, removed quantitative restrictions, voluntary restraint agreements, exchange controls and largely limited trade discrimination.⁴ Reductions in transport costs resulting from technological innovations such as railways and steamships were a major contributory factor to the increase in international trade. However, this system began to falter towards the end of the nineteenth century and was invariably

¹ WJ Bernstein *A Splendid Exchange: How Trade Shaped the World* (2008) chapters 1 and 2 deals with the origin of world trade, beginning with the first fragmentary evidence of long range commerce during the Stone Age. Africa has been involved in global trade with the rest of the world since time immemorial. Trade routes crossing the Sahara desert from West Africa to the Mediterranean show that there was a connection between Africa and other continents before the sixteenth century. PSJ Odhiambo "Global Trade and Development: An African Perspective" (2007) paper presented at The Ignatian Family Pre-World Social Forum seminar at Hekima College in Nairobi 17 - 19 January 2007 available at http://www.sjweb.info/documents/sjs/docs/PO_GlobalTradeandDevelopment.htm (accessed 10-09-2013). See also G Buckman *Global trade: Past Mistakes, Future Choices* (2005) 2 and P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 4.

² P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 4.

³ The network started with the Anglo-French Cobden-Chevaliah Treaty of 1860 and triggered a number of other treaties among European Countries. See WTO *World Trade Report 2007: Six Decades on Multilateral Trade - What have we learnt?* (2007) 35.

⁴ DA Irwin "The GATT in Historical Perspective" (1995) 85 *American Economic Review* 323-328 at 323.

destroyed after the First World War as countries imposed protectionist mechanisms in the form of higher tariffs, import quotas, licensing requirements and foreign-exchange controls.⁵ When the Great Depression struck, countries imposed further tariffs, import quotas and foreign-exchange controls in the false hope that this might help revive their economies. Instead, these policies led to a collapse in world trade.⁶ As a result, cooperation in trade and integration in economic and political affairs became an absolute necessity. Emerging from the Second World War, decontrol of trade and the reduction or elimination of trade restrictions drove the process of economic globalisation which, in turn, functions as a stimulus for international trade.

Economic globalisation is seen as the process that is characterised by the features of the post-cold war era in which we live today. Stiglitz describes the concept of economic globalisation as “[t]he closer integration of the countries and the peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of the artificial barriers to the flow of goods, services, capital, knowledge and (to a lesser extent people) across borders.”⁷ Friedman concurs and notes that economic globalisation is “... the irrevocable integration of markets, nation states and technologies ... in a way that is enabling individuals, corporations and nation states to reach around the world further, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation states further, faster deeper and cheaper than ever before.”⁸ In essence, economic globalisation is the gradual integration of national economies into one borderless economy encompassing free international trade and unrestricted foreign direct investment.⁹ It points to a wide expansion and intensification of existing linkages and

⁵ DA Irwin “The GATT in Historical Perspective” (1995) 85 *American Economic Review* 323-328 at 323.

⁶ DA Irwin “The Return of the Protectionist Illusion: Trade Barriers Once Again Threaten the Global Economy, and the U.S isn’t Helping” (2012) *The Wall Street Journal* available at <<http://online.wsj.com/article/SB10001424052702304058404577492882405657846.html>> (accessed 05-09-2013).

⁷ See JE Stiglitz *Globalization and its Discontents* (2002) 9.

⁸ T Friedman *The Lexus and the Olive Tree: Understanding Globalization* (2000) 9.

⁹ P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 4. There is accelerated trade and investment flow, the diffusion of new technologies, the expansion of capital markets, the integration of financial markets and the internationalisation of the means of production followed by services such as banking, law and finance. See S Fazio *The Harmonisation of International Commercial Law* (2007) 1.

interconnections between states, regions and societies in general, characterised by strong economic interdependence.¹⁰

There now exist unprecedented levels of international cooperation and coordination on trade and trade policy than at any other period in world trade history. In the globalised system, there are a number of reasons as to why states may wish to cooperate on trade policy. These include strategic reasons such as to increase market size and to protect themselves against unfavourable trade policy developments in partner countries. Other reasons such as increasing bargaining power and the pursuit of geographically limited market-opening for protectionist motives could be more relevant to preferential or regional arrangements.¹¹

1 1 2 International trade as a means to address poverty

The key issue is why states trade in the first place, or to put it differently, why is trade so important? Trade is regarded as the main vehicle for both national and international economic growth and development. By taking advantage of differences in productivity or endowments, countries that participate in trade benefit from greater efficiency in the allocation of resources.¹² Citizens are able to enjoy more goods and services than they could in the absence of trade. They can also consume a greater variety of goods. Even in the absence of significant differences among countries, more trade allows economies of scale to operate, thereby bringing down the average cost of production. Finally, trade generally channels resources to the most productive firms in the economy, boosting a country's overall productivity.¹³ All states need trade for economic growth and sustenance. Lack of economic growth can plunge a state into poverty.¹⁴ Restrictions on trade and growth, might also be a source of

¹⁰ See S Fazio *The Harmonisation of International Commercial Law* (2007) 1.

¹¹ See WTO *World Trade Report 2007: Six Decades on Multilateral Trade - What have we learnt?* (2007) 35.

¹² Based on the theory of comparative advantage. See D Ricardo *On the Principles of Political Economy and Taxation* (3rd edition 1821).

¹³ P Lamy "The Future of Trade: The Challenges of Convergence" (2013) 10 World Trade Organisation *Report of the Panel on Defining the Future of Trade* available at <http://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf> (accessed 05-09-2013).

¹⁴ In their study, Dollar and Kraay find a positive relationship between trade, growth and poverty reduction. See D Dollar & A Kraay "Growth is good for the poor" (2002) 7 *Journal of Economic Growth* 195-225.

conflict,¹⁵ Economic globalisation has thus brought about the necessary cooperation and coordination to facilitate trade and stimulate economic growth and development whilst avoiding conflict. These are key ingredients for the eradication of poverty.

Economic globalisation has seen an expansion in international trade to impressive levels. Unprecedented global economic growth has been registered in the period from the second half of the twentieth century to date.¹⁶ Trade openness is believed to have been central to the remarkable growth of developed countries since the mid-20th century and an important factor behind the alleviation of poverty experienced in most of the developing world since the early 1990s.¹⁷ In this sense, there is a considerable belief amongst policy makers at United Nations level and those who lead the greater nations, that economic globalisation can be used to eradicate poverty.¹⁸ Kofi Annan, the then United Nations Secretary General, in presenting his April 2000 United Nations Millennium Report noted that “the benefits of globalization are obvious ... faster growth; higher living standards; and new opportunities, not only for individuals, but also for better understanding between nations, and for common action.”¹⁹

Generally speaking, there seem to be cross-cutting consensus and optimism that economic globalisation is a major vehicle for reducing poverty.²⁰ Poverty remains

¹⁵ International trade increases both the incentives for not making war and the costs of going to war as is often said that “if goods do not cross borders, soldiers will.” See P Lamy *Managing Global Security: The strategic Importance of International Trade* (2007) available at <http://www.wto.org/english/news_e/sppl_e/sppl66_e.htm> (accessed 04-09-2013).

¹⁶ In 1950 the total World GDP was 5 335 860 (million 1990 international Geary-Khamis dollars). It rose to 36 688 285 (million 1990 international Geary-Khamis dollars) in 2000 and to 50 973 935 (million 1990 international Geary-Khamis dollars) in 2008. See A Maddison *Statistics on World Population, GDP and Per Capita GDP, 1-2008 AD* available at <<http://www.ggdc.net/maddison/oriindex.htm>> (accessed 04-09-2013).

¹⁷ See WTO *World Trade Report 2008: Trade in Globalising World* (2008) 139. The number of people living on less than \$1.25 per day has decreased dramatically in the past three decades, from half the citizens in the developing world in 1981 to 21 per cent in 2010, despite a 59 per cent increase in the developing world population. See World Bank “Remarkable Declines in Global Poverty, But Major Challenges Remain” (2013) *World Bank Press Release* available at <<http://www.worldbank.org/en/news/press-release/2013/04/17/remarkable-declines-in-global-poverty-but-major-challenges-remain>> (accessed 03-09-2013).

¹⁸ For instance, it has been estimated that the abolition of trade barriers could increase global income by US\$2.8 trillion and lift 320 million out of poverty by 2015. P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 2, 71.

¹⁹ United Nations Secretary General Statement to the General Assembly 3 April 2000 New York available at <<http://www.un.org/millennium/sg/report/state.htm>> (accessed 03-09-2013).

²⁰ Jordan Bill, the General Secretary of the International Confederation of Free Trade Unions, notes that globalisation can be a big part of the answer to the world’s poor and has the potential to help lift

one of the significant challenges faced by the world. It is particularly of great concern for the poor and developing world particularly in Africa.²¹ Economic globalisation has the potential to reduce poverty through raising living standards by efficiently distributing wealth and the means of creating wealth.²² In 2008, the WTO World Trade Report pointed out that:

“[g]lobal integration in product, capital and labour markets has resulted in a more efficient allocation of economic resources over time. The outcome of integration is greater levels of current output and prospects of higher future output. Consumers have a wider choice of products and services at lower prices. Capitals can flow to countries which need it the most for economic growth and development. To the extent that technology is embodied in capital goods or is closely linked to FDI flows, openness further improves the growth prospects of developing countries. Allowing workers to move across national borders can alleviate skill shortages in receiving countries or improve dependency ratios in rapidly ageing societies while alleviating unemployment or under-employment in countries providing these workers. Remittances from overseas workers or emigrants can represent a substantial share of national income for these countries.”²³

Although economic globalisation encompasses more than just trade, the relationship between international trade in the globalised era and the reduction of poverty is well

more than 2 billion people out of poverty. See B Jordan “Yes to Globalisation, But Protect the Poor” (2000) *International Herald Tribune* available at <<http://www.highbeam.com/doc/1P1-38346005.html>> (accessed 03-09-2013); D Dollar & A Kraay “Spreading the Wealth” (2002) 81 *Foreign Affairs* 120-133 at 120. However, there is also strong opposition to economic globalisation, mainly because of continued inequalities. Many in the developed world are dissatisfied by economic globalisation which has seen street protests at WTO conferences. See V Galax “Trade’s Victims: In the Shadow of Prosperity” (2007) *The Economist* available at <<http://www.economist.com/node/8548661>> (accessed 04-09-2013). Pascal Lamy, the former WTO Director General, noted that globalisation has strengthened the strong economies and weakened the weaker ones. See P Lamy *Trends and Issues Facing Global Trade* (2007) available at <http://www.wto.org/english/news_e/sppl_e/sppl65_e.htm> (accessed 04-09-2013). There is consensus that economic globalisation has to be regulated for its benefits to be distributed evenly. See also similar views in JE Stiglitz “We have become rich countries of poor people” (2007) *Financial Times* available at <<http://www.ft.com/cms/s/0/7aba84d6-3ed6-11db-b4de-0000779e2340.html#axzz2cnQER9eC>> (accessed 03-09-2013); D Rodrik “The Cheerleaders’ Threat to Global Trade” (2007) *Financial Times* available at <<http://www.ft.com/intl/cms/s/0/3d7e8ece-dc00-11db-9233-000b5df10621.html#axzz2cnQER9eC>> (accessed 03-09-2013); D Rodrik “Has Globalisation Gone too Far?” (1998) 41 *Challenge* 81-94; and T Friedman *The Lexus and the Olive Tree: Understanding Globalization*, (2000) 23.

²¹ See WI Ukpere & AD Slabbert “A Relationship between current Globalisation, Unemployment, Inequality and Poverty” (2009) 36 *International Journal of Social Economics* 37-46.

²² See D Dollar & A Kraay “Spreading the Wealth” (2002) 81 *Foreign Affairs* 120-133. However, some believe globalisation has dramatically increased inequality within nations. See Jay Mazur “Labor’s New Internationalism” (2000) 79 *Foreign Affairs* 79-93.

²³ WTO *World Trade Report 2008: Trade in Globalising World* (2008) 21.

documented.²⁴ However, if a substantial proportion of the world population is largely excluded from the benefits of economic globalisation it can become a deeply divisive, and consequently, vigorously contested concept. The same 2008 WTO Report also notes that, “there is also a lot of disquiet about the challenges that come with globalization.”²⁵

The results of economic globalisation have not been even across the world. Whereas world poverty rates have declined, mainly due to poverty decline in China and Asia, the same cannot be said of Sub-Saharan Africa. This means that economic globalisation is far from being a universal process experienced uniformly across the globe.²⁶ Challenges to international trade still exist. Although much has been done to create equal opportunities within the globalised economic order, there is still room for further reform, particularly on the part of the underdeveloped world.

1 2 ADDRESSING THE CHALLENGES OF INTERNATIONAL TRADE

High tariffs, import quotas, licensing requirements, foreign-exchange controls and other protectionist impediments to trade characterised the environment of international trade during the Great Depression into the Second World War. Invariably, after World War II, the conduct of international trade demanded coordination and cooperation in the formulation and implementation of trade policy to avoid conflict and also to settle any possible disputes. The importance of

²⁴ It has been demonstrated that liberalised trade leads to economic growth and economic growth leads to poverty alleviation. See RE Baldwin “Openness and Growth: What’s the Empirical Relationship?” in RE Baldwin & LA Winters (eds) *Challenges to Globalization: Analyzing the Economics* (2004) 499-525; R Duncan & D Quang “Trade Liberalisation, Economic Growth and Poverty Reduction Strategies” (2003) *National Centre for Development Studies, The Australian National University* available at <http://www.usaid.gov.au/Publications/Documents/trade_and_poverty.pdf> (accessed 05-09-2013). Dollar and Kraay have also shown a link between trade liberalisation and the reductions in the level of poverty through growth. See D Dollar & A Kraay “Growth is good for the poor” (2002) 7 *Journal of Economic Growth* 195-225. However, some argue that a link between trade and growth is difficult to establish and that trade liberalisation in itself does not guarantee a long-term effect on growth. It has to be combined with other structural policies. See LA Winters, N McCulloch & A McKay “Trade Liberalization and Poverty: The Evidence So Far” (2004) 42 *Journal of Economic Literature* 72-115.

²⁵ WTO *World Trade Report 2008: Trade in Globalising World* (2008) 21.

²⁶ D Held & A McGrew *Globalisation/Anti-Globalisation* (2002) 1.

international trade makes its regulation and administration not only necessary but also crucial.²⁷

The regulation of international trade is strictly speaking a prerogative of states. Rules on the conduct of trade across borders are enacted either individually or collectively by states. The endeavours to regulate and administer trade has not only led to the enactment of trade rules but also brought with it the creation of institutions that administer and coordinate trade matters amongst states.

1 2 1 Trade liberalisation and the organisations involved

In this day, there can be no substantive talk of international trade regulation and administration without the mention of the World Trade Organization (WTO), an international organisation which was created to facilitate international trade. The WTO creates a platform for addressing the challenges of international trade whilst exploring the opportunities that present themselves. The WTO oversees the implementation, administration and operation of the agreements covered by it and provides a forum for negotiations and for settling disputes.²⁸ Additionally, it is the WTO's duty to review and propagate national trade policies, and to ensure coherence and transparency of trade policies through surveillance of global economic policy-making.²⁹ The WTO is also a centre for economic research and analysis. It produces regular assessments of the global trade picture in its annual publications and research reports on specific topics. In simple terms, the WTO deals

²⁷ See also P Lamy "Managing Global Security: The Strategic Importance of International Trade" (2007) *Speech to the International Institute for Strategic Studies, Global Strategic Review Conference, in Geneva on 8 September 2007* available at <http://www.wto.org/english/news_e/sppl_e/spp_l66_e.htm> (accessed 04-09-2013).

²⁸ Article III (1), (2) and (3) Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994). See also P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 87-93. See also TJ Dillon Jr "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16 *Michigan Journal of International Law* 349-402 at 360.

²⁹ Article III (4) of the WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994). See also P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 93-95.

with global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.³⁰

The system of trade administered by the WTO promotes and fosters trade liberalisation. Although trade liberalisation does not necessarily imply faster export growth, in practice these two concepts appear to correlate. Trade liberalisation has led to massive growth in world trade relative to world output. Its impact on economic growth is mainly seen in the form of improved efficiency and the stimulation of exports which, in turn, have a significant effect on supply and demand.³¹

Among other mechanisms, the WTO rules also promote the creation of regional trading groups through preferential trade agreements in pursuance of an increased free flow of trade. WTO Member States recognise that regional integration is an important element of economic growth. They also recognise that voluntary agreements which facilitate closer integration between economies that are parties to such agreements are desirable for free trade. However, the WTO rules make it clear that the purpose of a customs union or free-trade area, as tools of regionalism and regional integration, is to facilitate trade between the constituent territories and not to raise barriers for countries outside the territory to do business with countries inside the territory.³²

Trade liberalisation is therefore sought at both regional and global level. In this study, trade facilitation is approached in the context of SADC as a regional trading group

³⁰ See WTO website <http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> (accessed 10-04-2013).

³¹ "In certain individual countries, notably in South-East Asia, the growth of exports has exceeded ten per cent per annum. Exports have tended to grow fastest in countries with more liberal trade regimes, and these countries have experienced the fastest growth in GDP." See AP Thirlwall "Trade, Trade Liberalisation and Economic Growth: Theory and Evidence" (2000) 5 *The African Development Bank Economic Research Papers No 63* available at <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157660-FR-ERP-63.PDF>> (accessed 02-09-2013).

³² See The Preamble to the Understanding on Article XXIV available at <http://www.wto.org/english/Docs_e/legal_e/10-24_e.htm> (accessed 02-09-2013); GATT Part III Article XXIV: Territorial Application - Frontier Traffic - Customs Unions and Free-trade Area. See GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). See also P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 696.

buttressed by the SADC Free Trade Area and the current progress towards the SADC Customs Union.

1 2 2 Tariff and non-tariff barriers

While average tariffs have been reduced,³³ an analysis of trade regulation shows that there is still considerable scope for further liberalisation and for greater transparency and predictability in international trade.

The success obtained in the reduction of tariffs resulted in a paradigm shift. Attention is now directed more towards non-tariff barriers (NTBs) to international trade.³⁴ Some scholars are of the view that the lowering of tariffs was, in effect, “like the draining of a swamp and the lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away.”³⁵ Whilst the General Agreement on Tariffs and Trade (GATT) largely succeeded in the reduction of tariffs on a global scale, reprisals in the form of non-tariff barriers have increased, thereby counteracting the effect of tariff reductions.³⁶

Non-tariff barriers are defined as all obstacles, other than traditional customs duties, which distort international trade.³⁷ Thus, NTBs include any government practice,

³³ Tariffs have been progressively reduced through eight rounds of trade negotiations since the establishment of the GATT in 1948. “More progress has been made in the manufacturing sector than in agriculture. Industrial country tariffs on industrial products have come down sharply since the inception of the GATT, from an average of some 20 to 30 per cent to less than 4 per cent”. WTO *World Trade Report 2007: Six Decades on Multilateral Trade - What have we learnt?* (2007) xxxi. In the first decade of the WTO, on tariffs alone, it had been estimated that a forty per cent reduction in tariff protection for manufactured goods would yield approximately US\$70 billion in global income gains in 2005, while the potential gains from similar cuts in agricultural tariffs would add US\$60 billion and a further US\$10 billion from similar cuts in subsidies. See TK Hertel, K Anderson, JF Francois & W Martin “Agricultural and Non-agricultural Liberalization in the Millennium Round” (2000) 19 *World Bank - Policy Research Department CIES Working Paper No. 16* available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=231205> (accessed 06-09-2013).

³⁴ See BM Hoekman & MM Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2nd edition 2001) 42. Non-tariff barriers (NTBs) include any government practice, other than a tariff, which directly impedes the entry of imports in a country.

³⁵ RE Baldwin *Non-tariff Distortions of International Trade* (1970) 2 and also F Ortino *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (2004) 7.

³⁶ H van Houtte *The Law of International Trade* (2002) 96. See also G Ohlin “Trade in a Non-Laissez-Faire World” in PA Samuelson (ed) *International Economic Relations: proceedings of the Third Congress of the International Economic Association* (1969) 157-175 who developed a thesis showing that the success of tariff reduction may put pressure on governments to impose other non-tariff barriers.

³⁷ See JS Hillman “Nontariff Barriers: Major Problem in Agricultural Trade” (1978) 60 *American Journal of Agricultural Economics* 491-501 at 491-492.

other than a tariff, which directly impedes the entry of imports in a country. These could be imposed on imports, such as import quotas, import prohibitions, import licensing, customs procedures and administration fees; or imposed on exports, such as export taxes, export subsidies, export quotas, export prohibitions and voluntary export restraints; or those imposed internally in the domestic economy, such as domestic legislation covering standards, internal taxes or charges, and domestic subsidies.³⁸ What makes NTBs particularly difficult to regulate is the fact that they are usually camouflaged by plausible reasons such as health, security and standardisation requirements or by state sovereignty which allows countries to make their own laws in line with their own developmental policies and needs.³⁹ It has been argued that NTBs will remain a recurring problem because, “like ways of avoiding income tax, human invention of NTBs will go on forever.”⁴⁰

It is important to note that, although in many instances, non-tariff barriers are a creation of national regulating authorities, there is also the possibility that they can self-create and procreate without the involvement of national authorities. It is also possible that government measures, which do not have the restriction of international trade as their object, can impede the flow of goods and services. The law, *per se*, is not a creation of nation states intended to restrict international trade. However, differences in the laws of countries have the potential to become an obstacle in the free flow of goods and services which can impede trade liberalisation and, in effect, also economic development.⁴¹

³⁸ Article IX of the GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). RW Staiger “Non-Tariff Measures and the WTO” (2011) 2 available at <http://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf> (accessed 02-09-2013). See also JS Hillman “Nontariff Barriers: Major Problem in Agricultural Trade” (1978) 60 *American Journal of Agricultural Economics* 491-501 at 491-492.

³⁹ “[T]here are about a thousand different types of distortions on international trade.” H van Houtte *The Law of International Trade* (1995) 76.

⁴⁰ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (1989) 130.

⁴¹ The study that led to the establishment of UNCITRAL referred to difficulties faced by parties engaging in international commercial transactions as a result of the multiplicity of and divergences in national laws and recommended a new UN organ to systematise and accelerate the process of harmonisation and unification of international trade law. See United Nations “Progressive development of the law of international trade: Report of the Secretary General” Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 88, docs.A/6396, Add. 1 and 2, Lando describes the existing diversity of contract laws in Europe as a non-tariff barrier to trade,

Although trade barriers can be diverse in nature, it is imperative to find a solution to barriers that have a negative impact on the free flow of goods. The definition of non-tariff barriers to trade is result oriented. It focuses on the effect of the measure and mechanism rather than the intention behind its creation. This draws into the definition of non-tariff barriers to trade, any measure, policy or principle that applies to the international flow of goods which has the effect of impeding such flow. That would therefore mean that diverse laws are also drawn into the ambit of this definition to the extent that such diversity impedes the free flow of goods across national borders. This study specifically focuses on the diversity of laws as a barrier to free international trade.

1 3 DIVERSE LAWS AS A BARRIER TO TRADE IN THE SADC REGION

Uncertain, fragmented, diverse and unpredictable rules and policies are considered to be a significant challenge to cross border trade.⁴² This obstacle can present itself on both international and regional level.⁴³ Legal diversity increases transaction costs

hampering the free flow of goods, persons, services and capital within the Union. See O Lando "The Principles of European Contract Law and the Lex Mercatoria" in J Basedow, I Meier, AK Schnyder, T Einhorn & D Girsberger (eds) *Private law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000) 391-404 at 392. "The issue of the diversity of laws has been for a long time, an important (even if indirect) obstacle to economic development in Africa" See S Mancuso "The new African Law: Beyond the Difference between Common Law and Civil Law" (2008) 14 *Annual Survey of International and Comparative Law* 39-60 at 40. Ndulo has also observed, in relation to SADC, that [t]he existence, in SADC, of widely accepted trade laws and commercial practices would eliminate a number of problems which usually plague intra-regional trade. See M Ndulo "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 211.

⁴² Much has been said about the "border effect". See generally, JE Anderson & E van Wincoop "Gravity with Gravitas: A Solution to the Border Puzzle" (2003) 93 *American Economic Review* 170-192. Border effect relates to the empirical observation that the volume of trade declines dramatically at national borders. See MA Anderson & SLS Smith "Do National Borders Really Matter? Canada-U.S. Regional Trade Reconsidered" (1999) 7 *Review of International Economics* 219-227. These studies argue that the border effect is caused by "institutional and jurisdictional discontinuities." Particularly that "differences between legal systems impede international trade significantly more than any other factor." See G Rühl "The Problem of International Transactions: Conflict of Laws Revisited" (2010) 6 *Journal of Private International Law* 59-91 at 63.

⁴³ See UNCITRAL "Progressive development of the law of international trade: Report of the Secretary General" Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 88, docs.A/6396, Add. 1 and 2, United Nations Commission on International Trade Law Yearbook Volume 1: 1968-70 (1971) 18; G Bamodu "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" (1994) 38 *Journal of African Law* 125-143 at 125. See also O Lando "The Principles of European Contract Law and the Lex Mercatoria" in J Basedow, I Meier, AK Schnyder, T Einhorn & D Girsberger (eds) *Private law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000) 391-404 at 392-394; S Mancuso "The new African Law: Beyond the Difference between Common Law and Civil Law" (2008)

and serves as a psychological barrier to trade due to fear of the unknown. Resultantly, it may even distort competition as traders become reluctant to enter and compete in new markets beyond their borders. Business requires safety, certainty and predictability with clear rules that will allow the swift and inexpensive conclusion of contracts, whilst retaining some measure of flexibility.⁴⁴

There is no doubt that the countries in the SADC region appreciate the need to increase their trade capacities in order to increase the pace of economic development.⁴⁵ However, the laws relating to trade, and particularly the sale of goods in the region, do not necessarily address this need. Diverse legal systems rank significantly among the non-tariff barriers to trade that SADC must confront. The membership of the SADC represents at least three main legal families, namely (English) common law, Roman-Dutch law and civil law. In turn, many of the legal systems applied in SADC also include rules derived from other sources such as the constitution, indigenous customary law and religious laws. Every country has its own legal traditions, its own system of legal thought, own method of law-making and its own process of judicial determination of disputes which complicate the issue even further.⁴⁶

14 *Annual Survey of International and Comparative Law* 39-60 at 40; M Ndulo "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 211; I Schwenzler "Regional and Global Unification of Sales Law" (2011) 13 *European Journal of Law Reform* 370-379 at 370.

⁴⁴ See also O Lando "The Principles of European Contract Law and the Lex Mercatoria" in J Basedow, I Meier, AK Schnyder, T Einhorn & D Girsberger (eds) *Private law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000) 391-404 at 394.

⁴⁵ Article 5 (2) (4) of the Treaty Establishing the SADC states that the organisation will achieve its objectives, among other things, by "develop[ing] policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States". See the Treaty of The Southern African Development Community signed on 17 August 1992 at Windhoek, Namibia (as amended) available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). The SADC Protocol on Trade was adopted with the realisation that "the development of trade and investment is essential to the economic integration of the community." See the Preamble to the SADC Protocol on Trade signed on 01 August 1996 at Maseru Lesotho and entered into force on 25 January 2001 available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

⁴⁶ See M Ndulo "The need for the harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 196; M Ndulo "Harmonisation of Trade Laws in the African Economic Community" (1993) 42 *International and Comparative Law Quarterly* 101-118 at 102.

Diversity of national sales laws causes a number of problems for cross-border trade in the SADC region. One of the problems traders face is the complexity of the rules of private international law to determine the applicable law of the transaction. Even if based on the choice of the parties, the choice would have to contend with limitations imposed by individual states. Where the parties are not certain of the applicable law of the contract, they will be less inclined to enter into cross-border commercial transactions.⁴⁷ Even if it is clear what the governing law is, its content is more than likely unfamiliar to one of them. This may also discourage parties from entering into international trade transactions. The absence of uniform rules makes the outcome of litigation unpredictable and to some extent dependent on the court and place of hearing of the case which, in turn, causes forum shopping.⁴⁸ The problem is compounded by the fact that national laws are often inadequate when dealing with issues arising from cross-border transactions since they were originally designed to regulate domestic transactions.⁴⁹ Further, in some instances, the law is not easily accessible due to the underdevelopment and unavailability of adequate modern technologies and resources. Uncertainty, unpredictability and inaccessibility of laws in the SADC region constitute a barrier to free trade and considerably limit the

⁴⁷ It is important to note that cross-border trade is not only affected by diverse laws. In fact, some believe it is the least concern for cross-border traders. This was also observed in a European survey which asked businesses about the impact of cross-border contract law obstacles. See Gallup "European Contract Law in Consumer Transactions" (2011) *The Gallup Organization Analytical report No 321* available at <http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf> (accessed 04-09-2013). "Of the businesses which sold to consumers across borders or were planning to do so, 9% reported that consumer contract law obstacles had a major impact and always or often deterred them from selling cross-border." Law Commission & Scottish Law Commission "An Optional Common European Sales Law: Advantages and Problems: Advice to the UK Government" (2011) ii available at <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Summary.pdf> (accessed 02-09-2013) regarding advice to the UK Government from the Law Commission and the Scottish Law Commission. Other factors that affect cross-border trade in SADC include poor transport infrastructure, bureaucracies, lengthy customs clearance procedures and payment delays. See *Report of the 10th SADC Sub Committee on Trade Facilitation* 14-15 June 2012 Gaborone, Botswana available at <<http://www.tradebarriers.org/>> (accessed 02-09-2013).

⁴⁸ Forum shopping refers to the notion of "unfairly exploiting jurisdictional or venue rules to affect the outcome of a lawsuit". See FK Juenger "Forum Shopping, Domestic and International" (1989) 63 *Tulane Law Review* 523-574 at 553; R Maloy "Forum Shopping? What's wrong with that?" (2005) 24 *Quarterly Law Review* 25-62 at 26-28. Some believe there is nothing wrong with forum shopping, see FK Juenger "What's Wrong with Forum Shopping?" (1994) 16 *Sydney Law Review* 5-13.

⁴⁹ See Generally CM Bianca & MJ Bonell *Commentary on the International Sales Law - The 1980 Vienna Sales Convention* (1987) 12-13; S Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 *South African Law Journal* 323-370 at 343; M Ndulo "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis" (1989) 38 *International and Comparative Law Quarterly* 1-25 at 24-25; and A Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" (2009) 21 *South African Mercantile Law Journal* 695-709 at 696.

possible gains that could be derived from globalisation and regionalism through trade and economic development.⁵⁰

1 4 THE NEED FOR THE HARMONISATION OF SALES LAWS IN SADC

Uncertainty and unpredictability, as well as a lack of laws reflecting the changing trends in international trade, are barriers, not only to free trade, but also to the economic fortunes of the region,⁵¹ considering that “[t]rade reform could potentially help to alleviate poverty.”⁵²

The 1992 Treaty Establishing the Southern African Development Community (SADC) aims to harmonise the political and socio-economic policies and plans of Member States.⁵³ In terms of article 21 of the SADC Treaty, Member States undertake to co-ordinate, rationalise and harmonise their overall macro-economic and sectorial policies, strategies and programmes in a number of areas, including trade, investment and finance.⁵⁴ The SADC Treaty does not specifically provide for the harmonisation of laws as one of its organisational objectives. However, the overall trade framework created under the Treaty and the programme of SADC necessitates a process of legal harmonisation. The SADC Trade Protocol is the instrument which governs trade in SADC. Its main objective is the liberalisation of intra-regional trade by means of fair, mutually equitable and beneficial arrangements.⁵⁵ It is a key instrument in removing both tariff and non-tariff barriers to

⁵⁰ “The issue of the diversity of laws has been for a long time, an important (even if indirect) obstacle to economic development in Africa...” See S Mancuso “The new African Law: Beyond the Difference between Common Law and Civil Law” (2008) 14 *Annual Survey of International and Comparative Law* 39-60 at 40.

⁵¹ The problem is not only in SADC *per se*. The same argument can be made out for the whole continent of Africa. See G Bamodu “Transnational Law, Unification and Harmonization of International Commercial Law in Africa” (1994) 38 *Journal of African Law* 125-143 at 125 and S Mancuso “The new African Law: Beyond the Difference between Common Law and Civil Law” (2008) 14 *Annual Survey of International and Comparative Law* 39-60 at 40.

⁵² WTO *World Trade Report 2008: Trade in Globalising World* (2008) xxiii.

⁵³ See Article 5(2) (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵⁴ Article 21 (2) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). The Treaty does not call for the harmonisation of laws. Ndulo has as far back as 1996 identified this *lacuna* as a critical impediment to regional integration. See M Ndulo “The need for the harmonisation of Trade Laws in the Southern African Development Community (SADC)” (1996) 4 *African Yearbook of International Law* 195-225 at 196.

⁵⁵ Article 2 of the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 26-08-2013).

trade. Through this Protocol, SADC reaffirms that the trade in goods and the enhancement of cross-border investment are major areas of cooperation among the Member States of the Community. It also recognises that the development of trade and investment is essential to the economic integration of the Community and that an integrated regional market will create new opportunities for a dynamic business sector.⁵⁶ It, however, contains a number of fairly “vague” objectives to implement measures that hint at harmonisation of laws, for example, to adopt comprehensive trade development measures aimed at promoting trade within the Community;⁵⁷ to adopt policies and implement measures within the Community for the protection of intellectual property rights;⁵⁸ and to implement measures within the Community that prohibit unfair business practices and promote competition.⁵⁹ Also, the Charter of Fundamental Social Rights in SADC specifically aims to “promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States.”⁶⁰ The stated objective of the Regional Indicative Strategic Development Plan (RISDP) is to strengthen regional integration even further by establishing a SADC Customs Union, a Monetary Union and a Single Currency. Harmonised policies and other measures to facilitate free trade can, however, only be successfully implemented if they are supported by an effective legal framework that provides legal certainty, clarity and predictability. Legal diversity functions as an impediment to intra-regional trade. A harmonised or unified legal system, particularly with reference to contract law, and sales law in particular, could assist in facilitating trade. There, therefore, is within the context of the current and

⁵⁶ See the Preamble to the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

⁵⁷ Article 26 of the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

⁵⁸ Article 24 of the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

⁵⁹ Article 25 of the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

⁶⁰ Article 2 (1) (b) of the Charter of Fundamental Social Rights In SADC signed on 01 August 2003 in Windhoek Namibia available at <http://www.sadc.int/files/6613/5292/8383/Charter_of_the_Fundamental_Social_Rights_in_SADC2003.pdf> (accessed 23-08-2013).

future SADC regional trade and economic agenda a clear need for, but also an adequate rationale for the harmonisation of sales laws.⁶¹

1 5 RATIONALE FOR THIS STUDY

Although the increase in trade is not the only reason why sales laws should be harmonised, it provides the context within which the harmonisation of sales laws will be approached in this study.⁶² The SADC economic agenda relies on an increase in trade in order to accelerate the pace of regional integration and development.⁶³ However, the differences in laws relating to trade, and particularly the sale of goods in the region, do not necessarily support this process. This study departs from the premise that the non-existence of a clear and predictable SADC regional community sales law is an obvious barrier not only to free trade but to the economic fortune of this region.

The main problems associated with sales laws in the region are diversity, uncertainty unpredictability, and out-datedness. Harmonised law is capable of providing a sound and efficient framework for creating predictability and removing uncertainty. However, the solution should be flexible enough to recognise diversity where needed, and hence protect the principle of party autonomy. Moreover, since one of the aims of harmonisation is to bring law reform, regional harmonised law can at the

⁶¹ See M Ndulo "The need for the harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 196. See also GJ van Niekerk "Harmonisation of Indigenous Laws in Southern Africa" (2008) 14 *Fundamina* 155-167 at 155 who makes the point that "the need for the harmonisation of laws to attain economic, political and social integration in the African Union is beyond dispute."

⁶² J Coetzee & M De Gama "Harmonisation of Sales Law: An International and Regional Perspective" (2006) 10 *Vindobona Journal of International Commercial Law & Arbitration* 15-26 at 15. "International trade can only develop where its legal language is by and large uniform and so market actors are not put to the costly exercise of familiarizing themselves with the numerous legal frameworks depending on the location of the co-contractor." See I Schwenzer, P Hachem & C Lee *Global Sales and Contract Law* (2012) 33.

⁶³ Article 5 (2)(4) of the Treaty Establishing the SADC states that the organisation will achieve its objectives, among other thing by "develop[ing] policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States". See the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). The SADC Protocol on Trade was adopted with the realisation that "the development of trade and investment is essential to the economic integration of the community." See the Preamble to the SADC Protocol on Trade available at <http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf> (accessed 23-08-2013).

same time address the needs of modern international trade, such as providing rules for electronic commerce for instance.

However, it does not mean *per se* that harmonisation of sales laws is a tested and proven solution in all cases. The dynamics of each region should be taken into consideration. The harmonisation of laws has in general yielded positive results in other regions as is evident from the example of OHADA.⁶⁴ However, the study will examine the veracity of this assumption to establish whether any benefits lie ahead, specifically for the SADC region, by weighing up the advantages and disadvantages of sales law harmonisation for the region.

The benefits of harmonised sales laws are firstly based on the advantages that are derived from harmonised law in general. They range from the removal of trade barriers imposed by different laws,⁶⁵ increasing cross-border transactions; providing an alternative to national laws which are often unsuitable for international transactions and often do not adequately resolve problems of an international nature. Secondly, regional organisations pursue the enhancement of economic development primarily through the harmonisation of laws. From a SADC perspective, a system of harmonised sales laws could aid in achieving specific goals of the region, in particular, regional integration and economic development. The SADC Treaty establishing the Community itself mentions the harmonisation of “political and socio-economic policies and plans” as one of the goals of the Member States.⁶⁶ However even though calls for harmonisation pre-existed the establishment of SADC, no effort has been made in that regard yet.⁶⁷ The absence of a clear regional framework on the harmonisation of laws means that an important component of SADC’s goals is being overlooked. The fact that some countries in SADC have adopted the CISG

⁶⁴ See C Nicholson “Some preliminary thoughts on a Comparative Law Model for Harmonization of Laws in Africa” (2008) 14 *Fundamina* 50-65, who discusses the role of comparative research in the unification and harmonisation of legal systems. *Doing Business* has noted a steady improvement in the OHADA community’s business climate. See World Bank *Doing Business 2011: Making a Difference for Entrepreneurs* (2011) available at <<http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf>> (accessed 22-08-2013).

⁶⁵ See the advantages of harmonisation discussed in Chapter 2 below.

⁶⁶ Article 5 (2)(1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶⁷ See generally See AN Allott “Towards the Unification of Laws in Africa” (1965) 14 *International and Comparative Law Quarterly* 366-389; AN Allott “The Unification of Laws in Africa” (1968) 16 *American Journal of Comparative Law* 51-87.

whilst others such as the Democratic Republic of Congo and Angola have shown interest in the harmonisation of laws to the extent of respectively acceding to the OHADA and expressing an interest therein, indicates that there is at least an increased interest in a harmonised system of business and, consequently, sales laws.⁶⁸ These actions might even be interpreted as a clear expression of the need for a harmonised law.

The study will also address challenges to the process of harmonisation. These challenges differ from region to region and policy makers in the region need to be apprised of the possible challenges that stand in their way. It will be necessary to establish how the harmonisation of sales laws will fit into the general goals on which SADC was formed.⁶⁹ Outlining the benefits and challenges of harmonised sales laws for the region will not help much without providing ways in which harmonisation can be achieved in an efficient manner. In a nutshell, this study will bring to the fore the issues that underlie the harmonisation of laws in SADC. At the same time, it will provide valuable knowledge gained from the analysis of other efforts to harmonise and unify sales laws on an international and regional level. The value of the study, therefore, is not so much in proposing an ideal model for the harmonisation of sales laws in SADC but to do ground breaking work in critically evaluating and assessing different models which could assist SADC should they undertake a project for the harmonisation of laws. It will also make recommendations on institutional, and other, reforms which might be needed for the effective harmonisation of laws in SADC. Knowledge gained from this study can also be used for the harmonisation of other branches of the law.

⁶⁸ See S Mancuso "The New African Law: Beyond the difference between Common Law and Civil Law" (2008) 14 *Annual Survey of International and Comparative Law* 39-60 at 40. The Democratic Republic of Congo declared its intention to join the OHADA in 2004 and acceded in 2012. See P Bahamin "Joining OHADA" (2013) *The Mining Journal Online* available at <http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ_DESIGN_NAME=print_friendly> (accessed 21-08-2013).

⁶⁹ J Henning & S du Toit "Financial Markets in the Southern African Development Community: The Harmonisation and Approximation of Commercial Laws" (2003) 28 *Journal for Juridical Science* 40-70 at 44 make a similar point in relation to the harmonisation of business laws to support financial markets.

1 6 RESEARCH QUESTION AND OBJECTIVES

Research Question: In light of the unique developmental needs, regional goals, challenges and other surrounding circumstances of the SADC region; how can a common SADC sales law be achieved?

Research Objectives: This study discusses the harmonisation of sales laws in SADC as a mechanism for the removal of legal barriers impeding free international trade and consequently regional integration and economic development. Although there is no empirical evidence showing the direct relationship between economic growth and harmonised laws in SADC, analysts argue that there is a potential of increased trade in a harmonised system owing to the predictability and accessibility of the applicable laws. The objective of this study is to gain knowledge from harmonisation projects undertaken on international and regional level in order to make recommendations so that SADC Member States can make an informed decision on the adoption of a community sales law for the SADC region.

1 7 FOCUS AND LAYOUT OF THE STUDY

The focus area of this study is the harmonisation of sales laws in the SADC region. This study therefore specifically looks at the laws relating to the international sale of goods, as it is understood in international trade.

The research comprises a critical analytical study of different selected models for the harmonisation of sales laws in SADC in light of the existing structures and circumstances of the region and the organisation. The study:

- establishes the need for the harmonisation of laws in SADC from a trade liberalisation, regional integration and economic development perspective;
- discusses the advantages and disadvantages of harmonising SADC sales laws in line with regional goals;

- identifies and discusses the methods and techniques that can be employed to harmonise the sales laws of countries in the SADC region;
- analyses the institutional and procedural mechanisms in the SADC institutional framework that can play a pivotal role in the harmonisation process;
- discusses and addresses the challenges that may be encountered in harmonising SADC sales laws;
- discusses and analyses in detail the role of the United Nations Commission on International Trade Law (UNCITRAL) and whether the CISG should be adopted by the SADC Member States, or whether the Convention can be used as a tool for the harmonisation of sales laws in SADC;
- discusses and analyses in detail whether the Organisation for the Harmonisation of Business Laws in Africa (OHADA) could serve as a model for harmonisation in the SADC region and whether SADC Member States should join the OHADA or merely use the OHADA Uniform Acts as a model for creating a community sales law for the SADC region;
- discusses and analyses in detail the institutional and legal framework of the European Union (EU) and the Common European Sales Law (CESL) as an example of regional sales law, and determine whether there are lessons to be learnt from the CESL initiative; and
- draws conclusions and make recommendations for the harmonisation of sales laws in the SADC region.

This study is divided into four parts, which are further sub-divided into different chapters.

Part A serves as an introduction to the study. It sets the scene and provides background information on and context for the subject of research. It emphasises the importance of economic development to alleviate poverty in the SADC region and

the role that harmonised sales law can play in facilitating and supporting the process of development.

Part B contains two chapters dealing with legal harmonisation and the SADC region. In order to have a better comprehension of the research subject, Chapter 2 discusses the concept of legal harmonisation in a general context. It highlights the advantages and disadvantages of harmonised law in the form of a scholarly analysis and comes to the conclusion that the benefits generally outweigh the shortcomings. The analysis shows that the advantages and disadvantages are often linked to the method or technique of harmonisation which is employed in a given situation. Hence, the study proceeds to discuss various examples of hard law and soft law techniques for legal harmonisation. There are a vast range of techniques available and in some instances a particular method is not even capable of being classified as either hard law or soft law, but presents itself as some form of hybrid. Hence, this discussion does not serve to present an exhaustive list of harmonisation at all, but merely an illustration that the efficiency of harmonised law in the regulation and facilitation of international trade often depends on the harmonisation technique used. This chapter also introduces the various agencies that are involved in the harmonisation of trade law. Once again this is not an exhaustive discussion. However, it shows that the traditional inter-governmental harmonisation institutions are no longer the only agencies active in this field but that they are joined by private organisations as well. In a nutshell, this chapter serves to give the reader an understanding of the background, nature, character and mechanisms around legal harmonisation in general.

Chapter 3 takes the matter further and addresses the issue of harmonising the law of sale in the context of the SADC region. The chapter provides some background on the role of SADC as a regional economic community and its ultimate function as a building block to the continental integration of Africa. Some historical background on SADC as an organisation is given and its mandate and institutional structure are discussed to show how the harmonisation of sales law would fit in with its history, objectives and goals as well as its institutional capabilities. The benefits of harmonising sales laws together with the possible challenges are discussed to expose the substantive and procedural aspects of legal harmonisation in the SADC

region. In short, this chapter shows that the harmonisation of sales laws is an important ingredient for the attainment of SADC's objectives of economic integration and development but that its current legislative and institutional framework might provide a stumbling block in the attainment of this ideal. The circumstances and the dynamics of the region should therefore play a critical role in the choice of harmonisation technique.

Part C comprises the analytical section. Having established that the harmonisation of sales laws is necessary and possible within the SADC legal and institutional framework, the discussion in Part C focuses on some of the leading agencies and initiatives for legal harmonisation which can be used as models for harmonising the law of sale in SADC. Although there are numerous agencies and initiatives for legal harmonisation, the analysis only discusses UNCITRAL and the CISG; the OHADA and its Uniform Act on General Commercial Law, more specifically Book VIII dealing with Sales Law; and the EU and its regional sales law in the form of the proposed CESL.

Chapter 4 discusses the role of UNCITRAL and points out that from the very beginning African states have been involved in the United Nations and its organisations, and thus also in UNCITRAL. This study submits that these organisations represent the interests of both developed and developing nations and that this should be reason enough for African states to consider adopting UN instruments. The CISG is furthermore chosen for the important role that it plays in the sphere of international sales laws harmonisation. The chapter *inter alia*, addresses the advantages and disadvantages of the Convention and concludes that the benefits outweigh the challenges. It furthermore addresses whether SADC Member States should adopt the CISG or whether the Convention could be used as the basis for the harmonisation of sales laws in SADC.

As SADC represents a regional angle to the harmonisation of sales laws; regional perspectives on legal harmonisation become indispensable. In Chapter 5, the OHADA is analysed, based on its leadership role in the harmonisation of business laws in Africa. OHADA has become a trendsetter on the African continent. It is important to consider the opportunities it offers to SADC in relation to accession to

the Organisation as such or using its Uniform Sales Law in the form of Book VIII for formulating a regional harmonised sales law for SADC. The analysis conducted in this chapter shows that valuable lessons are to be learnt from OHADA's institutional, operational and substantive mechanisms.

Chapter 6 focuses on the EU and the CESL as a model for the harmonisation of sales laws in SADC. It is the most recent project aimed at the harmonisation of sales laws, specifically within a regional economic community. The CESL is a culmination of extensive research and consultation. The discussion shows that harmonised law should be supported by an enabling institutional and legal framework. The chapter also investigates whether there is an opportunity for an interrelationship between the CESL and the CISG, or whether they are mutually exclusive instruments. The regional versus global harmonisation perspective makes for an interesting comparison with the SADC region.

Part D contains the concluding chapter. Chapter 7 brings the discussion to a close by making a number of recommendations. The discussion and the conclusions reached in the preceding parts of the study are used to make an informed and substantiated recommendation on the most effective technique for harmonising the law of sale in the SADC region as well as on the institutional and legal mechanisms that should guide the process of the harmonisation sales laws in SADC.

PART B: LEGAL HARMONISATION AND THE SADC REGION

CHAPTER 2

HARMONISATION OF LAWS

2 1 INTRODUCTION

The assimilation process of legal systems is not a novel phenomenon.¹ In the eleventh and twelfth centuries, present day Europe experienced significant growth in trade which led to the creation of a distinct social class of merchants engaged in cross-border trading.² Because of revenue benefits and foreign goods which the system brought to their countries, authorities allowed these merchants considerable freedom. Subsequently, the merchant class became increasingly powerful as a result of being permitted some degree of self-regulation in their affairs including the authority to create rules for trade based on their own customs and practices.³ Special courts and tribunals also developed to deal with matters relating to trade. This customary practices of ancient merchants that originated in the Italian cities and then spread to France, Spain and the rest of Europe including England created the notion of a law of merchants, otherwise known as the *lex mercatoria*. This was “a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair.”⁴ The major characteristics of the *lex mercatoria* were that it was transnational; its principal source was mercantile customs; it was administered by merchants and not by professional judges; its procedure was speedy and informal; and it placed a high value on equity, in the medieval sense of fairness, as an overriding principle.⁵ However, as the nation state developed around the sixteenth century, national rulers started to view the merchants with scepticism. This led to the integration of their special courts and substantive rules into the national realm and

¹ RH Graveson “The International Unification of Law” (1968) 16 *American Journal of Comparative Law* 4-12 at 4.

² See HJ Berman & C Kaufman “The Law of International Commercial Transactions (Lex Mercatoria)” (1978) 19 *Harvard International Law Journal* 221-257 at 224.

³ See LE Trakman *The Law Merchant: The Evolution of Commercial Law* (1983) 9.

⁴ CM Schmitthoff “The Unification of the Law of International Trade” (1968) *Journal of Business Law* 105-119 at 105.

⁵ See HJ Berman & C Kaufman “The Law of International Commercial Transactions (Lex Mercatoria)” (1978) 19 *Harvard International Law Journal* 221-257 at 225.

doing away with special treatment accorded to the *lex mercatoria*. Although it was not officially abolished at first, the introduction of national legislation led to the decline of custom-based law and its universality. By the nineteenth century, the unified law merchant had been wholly absorbed into the various domestic legal systems.⁶

Although there is agreement on the existence of some form of self-regulation by merchants in medieval Europe, there is still considerable debate on its real nature and function as a body of law.⁷ Therefore, whether the development and application of the *lex mercatoria* can be regarded as a form of legal harmonisation also remains debatable. Suffice to say that there is evidence of customary practices applied by cross-border merchants as a form of self-regulation until they became amalgamated into the national legal systems.

However, even before the new globalised era that is said to have commenced after the Second World War, the need to create harmonised rules for international commerce was already evident. This could be attributed to the disintegration of the so-called *lex mercatoria*. International legal harmonisation thus began already in the late 19th century in Europe. The subsequent institutionalisation of legal harmonisation was a turning point and a major stride towards the established forms of legal harmonisation that exist today. Although the early bodies of legal harmonisation had a universal vocation and aspirations, the fact that their efforts were for a long time confined to Europe constrained their international impact.⁸ However, due to transformation and more states joining these organisations, a global approach towards legal harmonisation began to take shape in the 20th century. For one, the formulation and adoption of harmonised rules and their implementation at

⁶ See E von Caemmerer "The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries" in CM Schmitthoff (ed) *The Sources of International Trade* (1964) 88-100 at 89.

⁷ Some have denied its existence. See generally FA Mann "England rejects 'Delocalised' Contracts and Arbitration" (1984) 33 *International and Comparative Law Quarterly* 193-198. Others argue that the incorporation of the *lex mercatoria* into the national laws of Europe during this period inevitably meant that commercial law lost much of its international character. See LS Sealy & R Hooley *Commercial Law: Text, Cases and Materials* (3rd edition 2005) 17.

⁸ The Hague Conference on Private International Law (the Hague Conference) and the UNIDROIT. See also JAE Faria "Future Directions of Legal harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review* 5-34 at 7 and J Basedow "Worldwide Harmonisation of Private Law and Regional Economic Integration - General Report" (2003) 8 *Uniform Law Review* 31-52 at 32.

national level have become more complex and sophisticated with the establishment of new institutions. Furthermore, the harmonisation of international commercial law is no longer done only at international level by international formulating agencies but also by other institutions. Apart from The Hague Conference, the UNIDROIT and the UNICITRAL which were involved in the harmonisation of laws from the very beginning, the World Trade Organization has added yet another dimension to legal harmonisation at international level. Through the impetus it provides for trade liberalisation and the removal of barriers to trade, efforts on regional integration and trade facilitation have found resonance with the idea of legal harmonisation. Although the WTO rules do not specifically call for the harmonisation of sales laws, its general legal framework and the attainment of free trade makes legal harmonisation a necessary ingredient of the process. The WTO rules of preferential trade agreements and the rise of supranational regional organisations has added a new element to the law-making process, namely that of regional law. These supranational institutions, in the form of regional intergovernmental organisations such as the EU, SADC COMESA, and EAC, assume exclusive competence over certain areas of the law and may also claim the authority to negotiate agreements with states outside their region.⁹ These developments could have far-reaching consequences, not only for the theoretical developments in the harmonisation of laws but also to our understanding of law making both at national and international level.¹⁰

The increasing influence of globalisation has thus left its mark on the evolution of legal harmonisation. A wide range of techniques may now be used to formulate and implement harmonised laws. The monopoly of states having traditionally been involved in legal harmonisation has been challenged by new non-state actors. Organisations such as the WTO regulate mainly public aspects of international trade where the states' legislative sovereignty is maintained. However, the authority of states has become increasingly challenged in a free market economy where

⁹ See also JAE Faria "Future Directions of Legal harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review* 5-34 at 7.

¹⁰ See also AE Faria "Future Directions of Legal harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review* 5-34 at 7 and J Basedow "Worldwide Harmonisation of Private Law and Regional Economic Integration - General Report" (2003) 8 *Uniform Law Review* 31-52 at 36.

multilateral corporations, business organisations and NGOs now play a significant role in law making. The principle of party autonomy is a well-established principle in international trade and allows traders to choose the terms and conditions as well as the law applicable to their contractual agreements. Traders and investors choose where they want to invest and the conditions they regard as best for their investments. This makes multilateral corporations very powerful. Moreover, business organisations as representatives of the business community have their own power to legislate on trade and harmonise laws within their spheres. This has led to the creation of the notion of a new *lex mercatoria*.¹¹ A classic example is the work of the International Chamber of Commerce. NGOs as representatives of civil society also participate in the sphere of legal harmonisation. They mainly protect interests that have an indirect impact on trade such as the environment and human rights. Although civic society has not yet come up with tangible instruments for the harmonisation of business laws, its influence is remarkable and often finds itself in the midst of harmonisation projects.

Although legal harmonisation is not a new concept, there are very few efforts specifically targeted at the harmonisation of sales laws. Work towards the harmonisation of international sales laws can be traced to the early 20th century. In 1919 the International Chamber of Commerce (ICC) was established in Paris to promote international trade. On 3 September 1926, the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome and inaugurated, about two years later, on 30 May 1928. At its first meeting, Ernst Rabel,¹² whose work has undisputedly contributed to the development of international sales law, suggested a project towards the unification of the law relating to the international sale of goods to the then President of UNIDROIT, Vittorio Scialoja, which idea was immediately accepted.¹³ On 21 February 1929, Rabel submitted his first preliminary report on the

¹¹ See generally BM Cremades & SL Plehn "The New *Lex Mercatoria* and the Harmonization of the Laws of International Commercial Transactions" (1984) 2 *Boston University International Law Journal* 317-348.

¹² Ernest Rabel (1874-1955), a Professor of Law at the Universities of Leipzig, Basel, Kiel, Göttingen, Munich, Berlin and Law Schools of Ann Arbor and Harvard after migrating to the United States. His profile is available at <<http://www.globalsaleslaw.org/index.cfm?pageID=649>> (accessed 22-08-2013).

¹³ See CM Bianca & MJ Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 3; I Schwenzler & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 459; and S Eiselen "Adoption of the Vienna

possibilities of sales law unification to the Institute's Council.¹⁴ On 29 April 1930 a committee consisting of representatives from different legal systems (common law, French, Scandinavian and German law) was instituted.¹⁵ The first draft of a uniform sales law was published in 1935. In 1936 Rabel published the first volume of his seminal work *Das Recht des Warenkaufs* which provided an analysis of sales law at that time on the basis of a broad comparative basis.¹⁶ A second draft was tabled and accepted by the council of UNIDROIT in 1939 before the process was disrupted by the Second World War.¹⁷

Efforts resumed in January 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague. The conference established a special commission which presented a draft on substantive sales law in 1956.¹⁸ In the same year, efforts to create a law applicable to the formation of international sales contracts were revived by UNIDROIT and a draft was produced in 1958. The two drafts were distributed among governments for comments. In April 1964, a diplomatic Conference of 28 States met at The Hague to act on the two drafts; the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS). After three weeks, the drafts were finalised and later came into effect in 1972 after receiving ratifications from the required five states.¹⁹

However, these first uniform sales laws did not fulfil the high hopes and expectations widely shared at the time, mainly because they could not attract ratifications from non-European states that had not participated in the creation of the Conventions.²⁰

Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 *South African Law Journal* 323-370 at 333.

¹⁴ See I Schwenger & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 459.

¹⁵ See P Schlechtriem & I Schwenger (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition 2005) 1.

¹⁶ See I Schwenger & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 458 and also I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 35.

¹⁷ See CM Bianca & MJ Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 4.

¹⁸ I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 35.

¹⁹ See also J Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* (2nd edition 1991) 49-50.

²⁰ See also I Schwenger & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 459; S Eiselen "Adoption of the Vienna Convention for the

Although their practical relevance should not be underestimated, only nine countries became member states while important economies like France and America did not participate.²¹ Furthermore, socialist and developing countries perceived these uniform laws as favouring sellers from industrialised Western economies.²² Their rules were also criticised for being based on the Romanist legal tradition and thus for not being adapted to the needs of modern trade. The nine, mostly European states, which ratified them, abandoned ULIS and ULFIS when the CISG appeared on the stage. The ULIS and the ULFIS were in effect from round about 1972 until 1990-91. Their relatively short existence was not “totally in vain”, though. A number of countries used the instruments “as models for new sales and contract laws, and the courts of the Benelux countries, Germany and Italy, applied them widely and taught others how to deal with uniform sales laws.”²³

The ineffectiveness of the ULIS and the ULFIS led to the formation of a new organisation. On 17 December 1966, the United Nations Commission on International Trade Law (UNCITRAL) was established. UNCITRAL continued the work on the unification of sales law from 1968 onwards, using the Hague Conventions as a basis.²⁴ Recent efforts in the area of the law of sale, especially at regional level generally emulate the work of the UNCITRAL and its CISG, discussed in Chapter 4 below.

The evolvment of legal harmonisation is characterised by legal development and innovation to keep up with the ever-changing needs, not only of traders but also of

International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 335; and O Lando “CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law” (2005) 53 *The American Journal of Comparative Law* 379-401 at 379.

²¹ These states were Belgium, Gambia, Israel, Italy, Luxemburg, The Netherlands, San Marino, Great Britain and Germany. See I Schwenzler & P Hachem “The CISG - A Story of Worldwide Success” in J Kleinemann *CISG Part II Conference* (2009) 119-140 at 121-122 available at <http://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6f6c6e5b746.pdf> (accessed 04-09-2013).

²² See I Schwenzler & P Hachem “The CISG - A Story of Worldwide Success” in J Kleinemann *CISG Part II Conference* (2009) 119-140 at 121 available at <http://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6f6c6e5b746.pdf> (accessed 04-09-2013); and P Schlechtriem *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (1986) 16, 17.

²³ See O Lando “CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law” (2005) 53 *The American Journal of Comparative Law* 379-401 at 380 and P Schlechtriem & I Schwenzler (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition 2005) 1-2.

²⁴ See CM Bianca & MJ Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 5. See also the UNCITRAL and the CISG discussed in 4 1 below.

competing developments at both global and regional level. In this chapter, attention is paid to the concept of legal harmonisation; its advantages and disadvantages; the techniques of harmonisation, as well as the agencies involved in the formulation of rules for legal harmonisation in general. The purpose of this chapter is, thus, to provide general background information on the notion of harmonisation before it is addressed in the SADC context in the next chapter.

2 2 HARMONISATION AS A CONCEPT

In legal literature, the concept of harmonisation of laws is predominately discussed in the area of comparative law and particularly in conjunction with inter-jurisdictional transactions.²⁵ In international trade, it is generally applied to specific and general areas of the laws of different countries in order to facilitate transactions between residents.²⁶ Scholars have attempted to define legal harmonisation on numerous occasions but with varying degrees of congruency.²⁷

Harmonisation means “the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems.”²⁸ Harmonisation, therefore, does not only entail the adoption of a single set of rules, but rather entails a wide range of ways in which differences in legal concepts as found in different jurisdictions are accommodated. It has been defined as:

“a flexible concept embodying a range of measures that may vary according to the context in which an issue is treated. In one context, it may mean that the relevant law of the jurisdictions involved is characterized by a high degree of similarity in basic principles but not

²⁵ M Boodman “The Myth of Harmonization of Laws” (1991) 39 *American Journal of Comparative Law* 699-724 at 702.

²⁶ M Boodman “The Myth of Harmonization of Laws” (1991) 39 *American Journal of Comparative Law* 699-724 at 702-703.

²⁷ See PJ Osborne “Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980” (2006) Section 1.2 available at <<http://www.cisg.law.pace.edu/cisg/biblio/osborne.html#ch1>> (accessed 13-10-2013). See also S Gopalan “New Trends in the Making of International Commercial Law” (2004) 23 *Journal of Law and Commerce* 117-168 at 120; and generally M Boodman “The Myth of Harmonization of Laws” (1991) 39 *American Journal of Comparative Law* 699-724.

²⁸ This can be achieved through “eliminating major differences and creating minimum requirements or standards”. See WJ Kamba “Comparative Law: A Theoretical Framework” (1974) 23 *International and Comparative Law Quarterly* 485-519 at 501. It also enhances legal cooperation between the involved states, see S Mancuso “Trends on the Harmonization of Contract Law in Africa” (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 159.

detailed provisions. The result is that a person familiar with the law in one jurisdiction can easily understand the law of another and adjust to it without difficulty.”²⁹

Another opinion is that it is a process whereby the legal effects of a particular transaction in one legal system are brought as close as possible to the effects of a similar transaction under the laws of other legal systems.³⁰ Therefore, harmonisation is a process in which diverse elements are combined or adapted to each other so as to form a coherent whole. In its relative sense, harmonisation is the creation of a relationship between diverse rules. Its absolute and most common meaning, however, implies the creation of a relationship of accord or consonance.³¹ The laws are not necessarily supplanted by a single rule; rather they can continue to co-exist. Therefore, uniformity of results is not necessarily the goal of harmonisation.³² However, it can be a step towards achieving unification.³³

The concept harmonisation of laws is often confused with the unification of laws, whilst in reality the two concepts do not necessarily have the same meaning. “Unification” may be seen as the adoption by states of a single law governing particular aspects of international business transactions while “harmonisation” is the process through which domestic laws may be made more similar. The major difference between the two notions is therefore to be found in the level and degree of integration required. Unification is the process whereby two or more different legal provisions or systems are supplanted by a single provision or system. “Unification” is thus a very intrusive process. “Harmonisation”, on the other hand, is a process whereby the rules in one legal system or the effects of a type of transaction in one legal system are brought as close as possible to the laws of other countries. The

²⁹ RCC Cuming “Harmonization of Law in Canada: An Overview” in RCC Cuming (ed) *Perspectives on the Harmonization of Law in Canada* (1985) 1-58 at 3-4.

³⁰ See J Goldring “Unification and the Harmonisation of the Rules of Laws” (1978) 9 *Federal Law Review* 284-325 at 289.

³¹ See M Boodman “The Myth of Harmonization of Laws” (1991) 39 *American Journal of Comparative Law* 699-724 at 702.

³² P Glenn “Unification of Law, Harmonisation of Law and Private International Law” in J Erauw, B Bouckaert, H Bocken, H Gaus, & M Storme (eds) *Liber Memorialis Francois Laurent 1810-1887* (1989) 783-784 quoted by M Boodman “The Myth of Harmonization of Laws” (1991) 39 *American Journal of Comparative Law* 699-724 at 706.

³³ See PJ Osborne “Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980” (2006) Section 1.2 available at <<http://www.cisg.law.pace.edu/cisg/biblio/osborne.html#ch1>> (accessed 13-10-2013).

degree and nature of integration and the processes required therefore are different.³⁴ However, in reality total unification is difficult to achieve except through a process of gradual harmonisation. Therefore, harmonisation can be used as a process to achieve total unification. In this study, the concept of harmonisation is employed to cover any degree of bringing laws in line with each other, including uniformity.

2 3 THE NECESSITY OF HARMONISING INTERNATIONAL SALES LAW

There is no doubt that the trend towards the harmonisation of laws is on an upward spiral. From the 19th century to date there have been remarkable efforts undertaken to harmonise national laws through various means. More than a century ago, Lord Kennedy agitated that harmonising laws brings “the security and the peace of mind [to] the ship-owner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country.”³⁵ This statement still finds resonance today and has propelled the perception that the harmonisation of sales laws is important to facilitate international trade. However, the harmonisation of laws involves financial costs and time.³⁶ Hence, for some, the resources put into harmonisation projects are considered a sacrifice of other real concerns that require attention. As it sometimes involves other competing national interests, the process and outcome of a harmonisation project could be divisive. In this sense the question whether the harmonisation of laws is necessary, becomes pertinent.

The number of harmonisation projects and role players within this area has increased, possibly due to globalisation. By its nature, globalisation promotes interdependence and interconnectedness which further necessitates the elimination of differences and diversity. In fact, one major criticism of globalisation is its erosion

³⁴ One way for evaluating any model for the standardisation of international law is the degree to which it creates certainty; that is, a quality of law that facilitates common understanding among parties to international contracts and fosters uniform application of international law in national courts. It has been asserted that in “some cases the desire for convergence of legal systems merely expresses a yearning for simplicity.” See JH Merryman “On the Convergence (and Divergence) of the Civil Law and the Common Law” (1987) 17 *Stanford Journal of International Law* 357-388 at 364-365.

³⁵ J Kennedy “The Unification of Law” (1910) 10 *Journal of the Society of Comparative Legislation* 212-219 at 214.

³⁶ B Zeller “The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law” (2006) 17 *Stellenbosch Law Review* 466-481 at 469.

of culture and diversity into one global identity.³⁷ Within the globalised economy, harmonisation of laws becomes indispensable

Global interactions are easier when there is familiarity. With the convergence of the world through trade, investment and market integration, the law plays a pivotal role. Differences in legal expectations founded on different legal contexts could spark legal phobia and possible confrontation. The law is important in creating a common understanding and to regulate expectations. Where there is no legal harmonisation, business relations across borders could be difficult to manage.

In a broader sense, the harmonisation of laws finds its legitimacy therein that it is a vehicle for legal reform and trade facilitation. The harmonisation of law has two main objectives. It aims for similarity where there is disparity; and law reform when the existing law cannot cope with evolving commercial practices. In either case the ultimate objective is the development of a legal framework and the setting of international standards. Against these two objectives the advantages of harmonisation of law seem to be self-evident.³⁸

Uncertainty and inaccessibility of the law applicable to a business transaction is a major barrier to cross-border trade. Although diversity is not necessarily a problem, the complexity that is brought by the applicability of different and diverse laws may create complexities that deter rather than promote cross-border trading.³⁹ Free trade and the free flow of goods are thus undermined. A harmonised system of sales laws provides a commonly known set of rules which makes it easier for traders to plan

³⁷ See generally WF Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edition 2006) 11-18.

³⁸ See L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20-22.

³⁹ See L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20. See also M Ndulo "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 211-213.

and understand the legal effects of transactions beyond their own national boundaries. Harmonised law, therefore, facilitates commerce.⁴⁰

A proliferation of national sales laws means that every time traders engage in a cross-border transaction, they are vested with the responsibility of finding the law that will be applicable to that particular transaction. This involves either negotiation or, in the absence of agreement, the use of conflict of law rules. Forum shopping is one of the consequences of resorting to conflict of laws as a means of determining the applicable law.⁴¹ The real danger posed by forum shopping is that it creates uncertainty and fear.⁴² Harmonised laws create legal certainty so that a trader can engage in cross-border trading with greater confidence.

In cross-border transactions where there is no harmonised law, traders might have to contend with the application of domestic laws. The challenge in this case is that domestic laws are not specifically made to apply to cross-border transactions because the law is normally informed by practices, values and traditions of a particular country, including the legal philosophy that underpins the legal system in question.⁴³ Although they might be suitable in some instances, they could pose a danger of domesticating issues that stem from the international nature of the transaction or the parties involved. In the final analysis, there is the potential of inconsistencies in applying domestic laws to cross-border transactions. However, where national sales laws are harmonised, the harmonised law could be formulated and applied with the view that it is meant to be applied in cross-border transactions of an international nature. The law would then be informed by the issues that

⁴⁰ See M Ndulo "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 213.

⁴¹ See R Goode "Reflections on the harmonisation of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24.

⁴² See L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

⁴³ In some instances national laws may be inappropriate for international transactions. See S Gopalan "Transnational Commercial Law: The Way Forward" (2003) 18 *American University International Law Review* 803-850 at 804; R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24; and L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20.

characterise international transactions opposed to the situation where a law enacted to regulate domestic transactions is applied to international sales transactions.⁴⁴

Law is furthermore informed by socio-economic and political considerations. These considerations add to the diversity and variability of laws in different countries. National laws are therefore often a reflection of the different interests of the countries in question which are protected through state sovereignty. Law can be used to protect certain national interests, especially in cross-border transactions. The reverse, however, is that the protection of certain national interests might come at the cost of other states. It is important to note that, due to the different and ever-changing dynamics amongst nation states, particularly on the economic front, these interests are constantly changing. A harmonised law provides neutral law that can cater for legal challenges posed by diversity.⁴⁵ It is, thus, possible to formulate a law that is compatible with different legal traditions such as common law and civil law. A good example is the CISG which is regarded as neutral law, being a compromise between the common law and civil law traditions. A neutral law provides traders with confidence since the law is deemed to be responsive to the legal convictions of all the parties involved.⁴⁶

Accessibility of the law is generally affected by two or more factors. Law can be inaccessible because it might be difficult to locate the legal texts or sources physically or because it is not clear which law applies. For instance, in a system which consists of a mixture of customary law, common law and religious law, it is

⁴⁴ See for example Report of the Seminar on International Trade Law, Preferential Trade Area for Eastern and Southern African States/United Nations Commission on International Trade Law, Regional Seminar, Maseru, Lesotho, 25-30 July 1988 at 18 where it is noted that national laws do not address themselves to international commercial arbitration because they were basically designed for the arbitration of domestic commercial disputes.

⁴⁵ The harmonising instrument provides another choice that is neutral, for both parties, when either entity is willing to surrender reliance on their own law. See S Gopalan "Transnational Commercial Law: The Way Forward" (2003) 18 *American University International Law Review* 803-850 at 804; R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24; and L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20.

⁴⁶ See Generally P Winship "Formation of International Sales Contracts under the 1980 Vienna Convention" (1983) 17 *International Lawyer* 1-18 and AM Garro "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods" (1989) 23 *International Lawyer* 443-483.

very difficult to know which body of law applies to a particular transaction, if any. Establishing the common law or customary law position is always a contentious issue which sometimes necessitates the use of expert testimony. On the other hand, law can also be inaccessible because it is disseminated in such a manner that finding it is difficult. This is true where the law is only available in paper format through a government agency which requires tedious processes to access it and where it is not electronically accessible through the internet, for example. Legal harmonisation can facilitate access to the law. Language is another barrier that can make law that is otherwise available inaccessible. The domestic law of a country is normally crafted in one of its official languages which are not always accessible to users of other languages. The harmonisation of sales law will make the law readily available as it can be enacted in various languages to accommodate the various lingual interests whilst maintaining the same content and meaning as far as possible.⁴⁷

Reform is necessitated by the general changing dynamics both at national and international level. In Africa, it is mainly necessitated by the need to repeal and replace colonial laws.⁴⁸ At international level, globalisation has brought many changes. As the world is changing, the law is required to change with it. Although legal reform is often necessary it sometimes demands a lot of resources to formulate and implement such reform.⁴⁹ Poor countries are often deterred from venturing into legal reform processes because they do not have the necessary financial resources

⁴⁷ The harmonising instrument is drafted in several languages and is more accessible. See S Gopalan "Transnational Commercial Law: The Way Forward" (2003) 18 *American University International Law Review* 803-850 at 805. Examples are the CISG, INCOTERMS, and the UNIDROIT Principles of International Commercial Contracts all available in most of the major languages of the world. See also R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24.

⁴⁸ The new instrument provides those countries with deficient legal regimes with a ready-to-adopt instrument whereby developing countries get an opportunity to get rid of their colonial laws in favour of modern regimes. See S Gopalan "Transnational Commercial Law: The Way Forward" (2003) 18 *American University International Law Review* 803-850 at 805. A harmonising measure "may fill a legal vacuum by providing rules in a field where national law was previously non-existent or obscure" See R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24 and L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20.

⁴⁹ See B Zeller "The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law" (2006) 17 *Stellenbosch Law Review* 466-481 at 469.

to sustain the processes. This could impact negatively on the attractiveness of these countries as investment destinations, which in turn further entrenches underdevelopment. In some instances, it is not surprising to find that there is no law on a given subject or where there is law it is not geared for the needs of the investor. Changing trends at international level can create new dynamics that were not previously provided for in the laws of the relevant country or the existing law could be out-dated and inconsistent with modern trends at both regional and international level. These legal challenges need to be addressed through legal reform processes that are consistent with the needs, demands and dynamics of the countries involved.⁵⁰

However, on the other hand, the importance of legal harmony within the new global era should not be overstated. In a free market economy, the law is a major tool for competitiveness. Traders and investors must have the freedom to choose where to conduct their trade depending on the favourability of the jurisdictional laws. If a single applicable law is enacted amongst different countries, that choice is eliminated.⁵¹ In that case, legal harmonisation serves to limit choice except where there is provision for opting out or opting into the law as is the case with the CISG or the CESL, which will be discussed in the next part of this study.

Harmonisation projects are generally established on the assumption that traders rank legal diversity as a real barrier to international trade.⁵² It can be argued that the assumption that uncertainty and unpredictability is an issue of concern for traders has not been adequately tested. There is a school of thought suggesting that cross-border flows are affected by other measures rather than by diverse sales laws; that

⁵⁰ For a number of legal systems, the harmonisation of laws bears fruits of law reform. L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

⁵¹ See Also LA DiMatteo "A Curious Case of Transborder Sales Law: A Comparative Analysis of the CESL, CISG and the UCC" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 52.

⁵² See General Assembly Resolution 2205 (XXI) of 17 December 1966 section I, United Nations Commission on International Trade Law Yearbook Volume I: 1968-70 (1971) 65 on the establishment of the UNCITRAL. See also JAE Faria "Future Directions of Legal harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review* 5-34 at 10.

is, traders do not rank legal diversity as a key determinant in choosing who to trade with.⁵³

The principle of party autonomy in contract laws makes harmonisation of sales laws largely illogical and unnecessary. Parties to a business transaction have the right to choose the law applicable to their contract. In rare cases where they do not do so, the rules of private international law determine the applicable law. Most, if not all, harmonisation instruments to date are primarily based on an opt-in or opt-out rule which perpetuates diversity. If parties can choose the law applicable to their contract from a variety of instruments, there is no realistic chance of achieving harmony. Harmonisation instruments simply add to diversity through proliferation.⁵⁴

Even if legal certainty and predictability are proved to be such important elements of international trade, it could be contended that harmonisation is not the only way, and also not the best way, to achieve it. Legal certainty and predictability could be achieved through creating awareness of the laws in the relevant investment destinations, as for example through scholarship and the adaptation of university curricula.⁵⁵ Because the principles of contract law around the world are not as diverse as they are purported to be by the proponents of legal harmonisation, the true source of unpredictability and uncertainty lies in the lack of knowledge rather than in their diversity.

Further, it is sometimes stated that diversity poses a challenge in that different laws apply in different jurisdictions and therefore traders may not know the applicable law with certainty. However, it could be argued that diversity in itself is good and promotes competition because it affords the investors an opportunity to choose the best amongst a host of competing legal regimes, and eventually the market will

⁵³ See R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24-27.

⁵⁴ This criticism has also been levelled against the recent Common European Sales Law proposal. See N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 18 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013).

⁵⁵ See M Ndulo "The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 221.

determine the best law.⁵⁶ Traders are not bound to trade with partners from legally unfavourable jurisdictions and can therefore factor the applicable law into their decision process on which partners to trade with. Harmonised law dispenses with legal competition and can be regarded as a form of anti-competitive behaviour.⁵⁷

The meaning of words in the legal context is very important; hence the role played by legal interpretation in the application of law by the courts. A single word can have different meanings depending on the circumstances and the context. Although it is an advantage of harmonised law that the text of the law can be made available in the various official languages of the contracting states, it means that the harmonised law has to be translated. The challenge is that legal concepts cannot always be expressed in other languages without losing their essential genius or meaning.⁵⁸ The loss of meaning through translation can pose serious problems. It can create challenges for lawyers and those tasked with interpreting these words in that their understanding of the same law could be different to the extent that the different languages affect the meanings of the legal concepts involved. Lawmakers draft a law and enact it. Once the law is put into force, the application of the law is no longer under the control of the legislature. The drafters have no control over the way the law is going to be interpreted and applied in the courts of the different countries. To that effect there is no guarantee that, even if the letter of the law harmonises the different national laws, interpretation by the courts and enforcers in the different countries will be done harmoniously.⁵⁹ Widely different legal systems with different cultures, legal structures, and methods of legal reasoning can play a significant role in the application and interpretation of laws. Judges of different courts in various

⁵⁶ See JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *Law Quarterly Review* 530-535 at 534-535 and also LA DiMatteo "A Curious Case of Transborder Sales Law: A Comparative Analysis of the CESL, CISG and the UCC" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 52.

⁵⁷ See also JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *Law Quarterly Review* 530-535 at 535.

⁵⁸ See JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *Law Quarterly Review* 530-535 at 531; HM Flechtner "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)" (1998) 17 *Journal of Law and Commerce* 187-218 at 189-190; and BB Crawford "Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1988) 8 *Journal of Law and Commerce* 187-206 at 189-191.

⁵⁹ L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

jurisdictions can still interpret the law differently based on their own legal ideologies and philosophies. Changing the text of the law alone might not necessarily change the law. This means that the quest of harmonisation can still be undermined and become meaningless even though the law is, theoretically speaking, harmonised. Also, to expect that judgments from other jurisdictions would be easily available or accessible to other jurisdictions for comparison is to be overly optimistic.⁶⁰

Where harmonisation is sought to be achieved through the means of conventions additional problems arise. The negotiation and drafting of international conventions is normally a lengthy and costly process. This is also true for all amendments and updates. International conventions normally operate through a national act of positive law, for example ratification. Delays in ratification result in conventions coming into force only after a long period of time.⁶¹

An international convention is drafted, negotiated and signed by different states with different social, political economic and legal cultures. To achieve progress and consensus there is always an inevitable need for some “give-and-take” negotiations. Conventions often do not follow a single consistent legal theory or philosophy in their quest to satisfy all the players and intended users of the law. Whereas the balancing of interests is often acceptable amongst sovereign states, it might come at an expense when it relates to the harmonisation of laws. International conventions are inevitably drafted as multicultural compromises between different legal orders and will hence be enervated, inconsistent, and incoherent.⁶² The drafting of compromises reduces perfection and consistency.⁶³ At the same time the coherence that flows with the use of a single cultural or philosophical legal principle or notion cannot be maintained in a convention balanced across different legal cultures. The importance

⁶⁰ JS Hobhouse “International Conventions and Commercial Law: The Pursuit of Uniformity” (1990) 106 *Law Quarterly Review* 530-535 at 531.

⁶¹ See L Mistelis “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 22.

⁶² See S Gopalan “Transnational Commercial Law: The Way Forward” (2003) 18 *American University International Law Review* 803-850 at 805 and also JS Hobhouse “International Conventions and Commercial Law: The Pursuit of Uniformity” (1990) 106 *Law Quarterly Review* 530-535 at 531.

⁶³ Rosett observed, in the context of the CISG, that “[t]he problem is that in their anxiety to reach an agreement the delegates often buried problems without resolving them, cut off their messy ends, or adopted a verbal formula which hides persistent disagreement.” A Rosett “The International Sales Convention: A Dissenting View” (1984) 18 *International Lawyer* 445-450 at 447.

of consistency and coherence in the practical use of the law cannot be overlooked. One criticism of conventions is that they are badly drafted and characterised by mistakes and inconsistencies.⁶⁴ The main reason for this is that they are a product of many people drawn from widely differing legal systems with different cultures, legal structures, and methods of legal reasoning and decisions making, entailing maximum flexibility, cooperation and compromise.⁶⁵

Issues that arise after the convention has been concluded often need to be addressed through amendment. Like drafting, amending a convention is similarly a tedious process and therefore often deterrent to further reform. It normally requires that the contracting states have to come back to the negotiating table and agree on the amendments. The time it takes to negotiate and agree on the terms of the amendments makes it difficult to amend a convention effectively. National laws, on the other hand, can be amended with relative ease by the national law making body. Although it could take slightly long for amendments to pass through the legislature and be signed by the president, the time and effort cannot be compared to the amount of energy and time required to amend international conventions and to put these amendments into force. For that reason, national laws are preferred to international conventions whenever there is a need to respond to changing circumstances. The difficulty in amending international conventions, therefore, weighs against the harmonisation of laws.⁶⁶

Generally conventions are drafted and adopted by states which have the legislative authority to enact laws for their jurisdictions. In recent times, state sovereignty has however become eroded by new techniques and methods introduced by trade associations and other independent actors in reaction to the weaknesses of

⁶⁴ Goode queries this criticism and questions whether a "Perfect Draft" ever exists. See Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 25.

⁶⁵ R Goode "Reflections on the Harmonization of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 25.

⁶⁶ AL Diamond "Conventions and their Revision" in EH Hondius, GJW Steenhoff & FJA van der Velden (eds) *Unification and Comparative Law in Theory and Practice: Contribution in Honour of Jean Georges Sauveplanne* (1984) 45-60 at 60. See also A Rossett "Critical Reflections on the United Nations Convention of Contracts for the International Sale of Goods" (1984) 45 *Ohio State Law Journal* 265-305 at 272.

conventions.⁶⁷ There is now increased participation by non-state actors in the making of harmonised laws. The question surrounding their participation is one of legitimacy. Some of them represent particular interests and are even funded by persons or institutions which have their own interests to protect. The rules they formulate and promote are therefore aimed at furthering the interests of NGOs, trade associations and organisations that are not independent.⁶⁸

Despite arguments against legal harmonisation, various regions have found it an attractive option. This study has to establish whether legal harmonisation is necessary for the SADC region in particular. Taking into consideration the costs attached to legal harmonisation, should this project be addressed at this stage? SADC has many other issues to focus on such as political development, peace and security in the region as well as other serious concerns such as HIV and AIDS, high infant mortality rates, wars, political instabilities and other factors which are major contributors to poverty and regional isolation. Should the region at this point in time be focusing on legal harmonisation, or rather concentrate on other pillars of regional integration? The study submits that here is no simple answer to this question. However, it is important to realise that the role of legal harmonisation is to facilitate trade. The increasing role of trade as a cornerstone of economic development which contributes towards poverty alleviation makes trade law reform indispensable. Legal harmonisation can create neutral tailor-made laws which can assist in the swift and inexpensive execution of international business transactions. It further assists with legal reform and easy accessibility of laws. Therefore, although there are clearly challenges in the conclusion of conventions and other reservations on the actual need for harmonised law, there is at the same time adequate reason to endeavour to harmonise business laws. The benefits of a harmonised law of international sales law outweigh the challenges that could arise.⁶⁹ More so, most of the challenges relating to legal harmonisation could be overcome by choosing and adopting the most effective harmonisation technique depending on the circumstances. Thus, for

⁶⁷ See also S Fazio *The Harmonization of International Commercial Law* (2007) 17-18.

⁶⁸ See also P van den Bossche *The Law and Policy of the World Trade Organisation: Text Cases and Materials* (2nd edition 2008) 154.

⁶⁹ See R Goode "Reflections on the harmonisation of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 24-25 where he lists the numerous advantages of harmonisation and suggests that the criticisms against harmonisation are not persuasive.

instance, soft law techniques such as model laws, guidelines and codifications of customs and trade usages can be utilised to avoid the challenges of international conventions. Soft law harmonisation is open-ended and provides for a flexible and effective convergence of different legal systems. However, it is imperative that the needs of the region should dictate the process and not *vice versa*. The style or technique of legal harmonisation introduced should thus always be determined in light of the circumstances that prevail in the area where the harmonisation instrument is to be introduced.⁷⁰

2 4 HARMONISATION TECHNIQUES

There are various techniques that can be utilized in the harmonisation of sales laws. Chief amongst these are a conflict of laws convention; a uniform substantive law convention; community legislation; model law; guidelines; a codification of trade terms, customs, standards or principles of commercial law promulgated by an international non-governmental organisation; model contracts and general contractual conditions.⁷¹ The distinction between and understanding of the differences between the various harmonisation techniques is important in many respects. That would include understanding the level of integration provided as well as the degree of ease or efficacy in using either of the techniques.

It must be noted, however, that the techniques for legal harmonisation do not remain static. As practices evolve, new players are introduced who require change. New techniques for the harmonisation of laws continue to be created whilst old techniques are often “recycled” or reformed to meet new demands. Sometimes techniques become intertwined and present themselves as new approaches in the area. Some of the techniques commonly employed in the area of international commercial law

⁷⁰ See RCC Cuming “Harmonization of Law in Canada: An Overview” in RCC Cuming (ed) *Perspectives on the Harmonization of Law in Canada* (1985) 1-58 at 4.

⁷¹ Goode suggests at least nine techniques of legal harmonisation. See R Goode “Reflections on the harmonisation of Commercial Law” in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 6-9. See also LF Del Duca “Developing Transnational Harmonisation Procedures for the Twenty-first Century” in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 28-40; L Mistelis “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 12-15.

are subsequently discussed. Note that this discussion is not meant to provide an exhaustive list of harmonisation techniques but are merely aimed at providing some insight in the possibilities available.

2 4 1 Hard law versus soft law methods

The various techniques for the harmonisation of laws can be divided into hard and soft law methods.⁷² Hard law techniques lead to the highest degree of uniformity. They are regarded as hard law in the sense that they are based on legislation and are automatically binding on state parties once adopted. In the international or regional context it would include a conflict of laws convention, a substantive law convention or a community law. Once ratified, adopted or acceded to, as the case may be, these instruments have the effect of harmonising the law of these states with the sole exception of specifically permitted reservations. The main disadvantage of this method is its inflexibility. Hence, states which do not subscribe to specific aspects of the law will simply decline from ratifying it or adhering to it where possible⁷³

The difference between hard law techniques and soft law techniques is that hard law instruments are binding, whereas soft law instruments are not binding on the parties involved.⁷⁴ Soft law techniques could consist of model laws; guidelines; codified trade terms, customs, standards or principles; and model contracts or general contractual conditions. Soft law has the advantage of being generally independent of

⁷² L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 16-17. On page 17, he also refers to a third category of "softer on non-law" consisting of "any non or extra legal standards which are relevant for the assessment of legal questions."

⁷³ L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 16.

⁷⁴ "[T]he very nature of "soft" law lies in the fact that it is not in itself legally binding." See PM Dupuy "Soft Law and the International Law of the Environment" (1991) 12 *Michigan Journal of International Law* 420-435 at 430. The difference between hard law and soft law is not merely in the instrument used but rather in "the obligations undertaken or the rights granted." See CM Chinkin "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 *International and Comparative Law Quarterly* 850-866 at 851. See also S Fazio *The Harmonization of Commercial Law* (2007) 20-21.

legislative activity. As such, it is relatively simple to amend soft law to keep pace with developments in international business.⁷⁵

2 4 2 Hard law techniques

Traditionally, the harmonisation of trade laws has been achieved by the conclusion of treaties or conventions. Once ratified by the contracting state, conventions become part of the domestic law of the state. They are therefore binding and create a strong degree of uniformity. However, conventions have proved to have serious drawbacks. Most of these drawbacks are natural consequences of the treaty negotiating process. During negotiations, the negotiators are generally fond of promoting their own law to strengthen the economic position of their respective countries. To reach an agreement, compromises are unavoidable. Compromises culminate into reservations or opt-out clauses which diminish the intended goal of uniformity. Due to the cumbersome consultation and negotiation process, the conclusion of conventions takes very long and in some instances they never get ratified as they are overtaken by advancements in practice.

2 4 2 1 A conflict of laws convention

A conflict of laws convention is a convention that does not provide a substantive law which can be applied directly to sales transactions. Instead, such a convention simply provides for the criteria by which the applicable law can be determined in a given situation.⁷⁶

A fundamental principle of contract law is freedom of contracting. This freedom extends to determining the applicable law of the contract. However, challenges arise

⁷⁵ For a distinction between hard law and soft law, see also R Goode "Reflections on the harmonisation of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 7 and L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 16-17. For the nature and characteristics of soft law, see AE Boyle "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 *International and Comparative Law Quarterly* 901-913 and also T Gruchalla-Wesierski "A Framework for Understanding Soft Law" (1984) 30 *McGill Law Journal* 37-88.

⁷⁶ Making the same suggestion in the context of the EAC, see also M Ndulo "Harmonisation of Trade Laws in East African Community" (1993) 42 *International and comparative Quarterly* 101-118 at 110.

when the parties do not choose a law to apply to their contract. In this case conflict of law rules determine the applicable law. Conflicts of law rules are generally dependent on the law of the forum. That means that the other party to the dispute might never know the law applicable until he is brought before that particular jurisdiction.⁷⁷ Harmonising the conflict of law rules means that the law which determines the substantive applicable law is made similar.

The EU provides a good example where harmonisation attempts have been made in the area of choice of law and the recognition and enforcement of judgements in civil and commercial matters.⁷⁸

The main advantage of a uniform conflict of laws convention is that it can determine the applicable law in the event that the parties have not chosen one themselves. If the conflict of law rules are harmonised, the parties will be in a better position to determine the applicable law themselves because they will no longer have to rely on divergent conflict of law rules. Conflict of law rules appear to be easier to harmonise than the substantive aspects of law in that they are more general and only apply when triggered. Furthermore, harmonisation of conflict of law rules preserves legal competition by not seeking to create a uniform substantive law.⁷⁹

⁷⁷ This leads to forum shopping. For an analysis of the various aspects of the potentially adverse effect of forum shopping on the fairness and efficiency of international dispute resolution, see generally M Petsche "What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice" (2011) 45 *International Lawyer* 1005-1028. See also F Ferrari "Forum Shopping' Despite International Uniform Contract Law Conventions" (2002) 51 *International and Comparative Law Quarterly* 689-707 who discusses the role of international unification in addressing forum shopping.

⁷⁸ The Rome Convention on the law applicable to contractual obligations of 19 June 1980 80/934/ECC Official Journal of the European Communities No L 266 9.10.80 and subsequently replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Official Journal of the European Union L 177/6 (4 June 2008) and also the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) Official Journal of the European Union 40 L 199/40 (31 June 2007). See also B Zeller "The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law" (2006) 17 *Stellenbosch Law Review* 466-481 at 471, who points out that the success of conflict of law instruments has been relative.

⁷⁹ See also "Rechtsvereinheitlichung - Nutzen, Kosten, Methoden, Ziele" 1986 50 *RabelsZ* 1 12 cited by B Zeller "The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law" (2006) 17 *Stellenbosch Law Review* 466-481 at 469.

A major disadvantage of a common conflict of laws convention, however, is that it does not embody a uniform applicable law of the contract, which leaves the domestic substantive law of the member states intact together with all the problems connected to the application of an unfamiliar law. Although the harmonisation of conflict of laws would be a step in reducing some of the challenges faced by cross-border traders, this is not adequate to address the major challenges that currently exist. Challenges of inaccessibility and fragmentation of the applicable national laws cannot be addressed in this manner. Further, there are limits to a conflict of laws convention, thus still leaving doubts as to the applicable law in a given situation.⁸⁰ Advantages and disadvantages of legal harmonisation generally attached to the use of multilateral conventions have been highlighted above and will not be repeated here.⁸¹

2 4 2 2 A uniform substantive law convention

A uniform substantive law convention is a convention that provides for uniform substantive law. The difference between a uniform substantive law convention and a conflict of laws convention is that the former sets out the applicable law itself whilst the latter provides the rules used to determine the applicable law.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of the best examples of a multilateral convention embodying uniform substantive law.

“It establishes a set of rules governing certain aspects of the making and performance of everyday commercial contracts between sellers and buyers who have their places of business in different countries. By adopting it, a nation undertakes to the other nations that have

⁸⁰ See B Zeller “The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law” (2006) 17 *Stellenbosch Law Review* 466-481 at 471. In some instances the Rome Convention also leaves doubt as to the applicable law. See O Lando “Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?” (2003) 8 *Uniform Law Review* 123-134 at 125.

⁸¹ See 2 3 above.

adopted it that and will treat the Convention's rules as part of its law."⁸²

The advantage of a uniform substantive law convention is that the law on the subject is the same for all the contracting parties. Further, the convention is generally accessible. Once it comes into effect in a member state it is binding law, which makes it in many instances the best method of creating certainty, except where there is room for reservations. Also, a convention provides measures for its application, enforcement and implementation. It provides for rights and obligations which carry sanctions if not complied with. However, the disadvantages of a convention discussed above equally apply here and should be weighed against the advantages before choosing this harmonisation method.⁸³

2 4 2 3 Community legislation - (typically directives, regulations, uniform acts or protocols)

The emergence of regional economic communities and the new focus on regionalism and regional integration has certainly brought new dimensions to law making. Most of these regional groupings have the authority to legislate for their membership.⁸⁴ This legislation can take various forms and use different procedures, however with the same goal of legal harmonisation. Examples are directives or regulations used in the European Union, uniform acts used in the OHADA or protocols in SADC. In this study, the terms community legislation, community law, regional law or regional harmonised law are used interchangeably to refer to laws formulated at regional level.

Directives are used to bring different national laws into line with each other.⁸⁵ They are laws that prescribe certain legislative results that must be achieved in every

⁸² See JP McMahon "Guide for Managers and Counsel Applying the CISG: Guides for Business Managers and Counsel" (2010) B available at <<http://www.cisg.law.pace.edu/cisg/guides.html>> (accessed 02-09-2013).

⁸³ See 2 3 above.

⁸⁴ R Goode "Reflections on the harmonisation of Commercial Law" in R Cranston & R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* (1993) 3-27 at 7.

⁸⁵ See also the term "constitutional approach" used with the same meaning as directives: M Ndulo "Harmonisation of Trade Laws in East African Community" (1993) 42 *International and Comparative Quarterly* 101-118 at 110. See also M Ndulo "The Harmonisation of Trade Laws in the Southern African Development Community (SADC)" 1996 (4) *African Yearbook on International Law* 195-225 at

member state. National authorities consequently have to adapt their laws to meet these goals, but are free to decide how to do so. The directive can specify a date by which the national laws must be adapted, leaving room for national authorities to take action according to their differing national situations.⁸⁶ On the other hand regulations⁸⁷ and uniform acts could be more direct.⁸⁸ They are laws adopted at regional level and are directly applicable to member states at national level by overriding conflicting national laws. SADC Protocols are technically speaking the same as international conventions; albeit, restricted to members of SADC. They are negotiated and concluded at regional level but still undergo the normal ratifications procedures as in the case of international conventions, and therefore are only binding on the parties thereto.⁸⁹

The main advantage of a directive is that it sets out the parameters for and outlines the goals that have to be achieved. It is therefore a result oriented instruction to member states to take specific action to align the laws in line with certain goals. To specify the result that has to be achieved without forcing a single substantive text on all the member states is desirable in striking a balance between national and regional interests. Member states are given an opportunity, within specific time frames, to freely enact laws that resonate with specific harmonisation goals of the region. The same could be said of protocols which undergo ratification at national level before coming into effect. The desirability of this is based on the fact that different states have different circumstances and as a matter of state sovereignty it is

214; A Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" (2009) 2 *South Africa Mercantile Law Journal* 695-709 at 704; and E Hidling *The Swedish Conflict of Laws* (1965) 272.

⁸⁶ See 6 4 2 below on European Union legislation and also Article 288 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). See also LF De Duca "Developing Transnational Harmonization Procedures for the Twenty First Century" in R Cranston & R Goode *Miles Commercial and Consumer Law: National and International Dimensions* (1993) 28-40 at 32-34.

⁸⁷ See 6 4 2 below on European Union Legislation and Article 288 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). See also LF De Duca "Developing Transnational Harmonization Procedures for the Twenty First Century" in R Cranston & R Goode *Miles Commercial and Consumer Law: National and International Dimensions* (1993) 28-40 at 32-34.

⁸⁸ For the OHADA Uniform Acts, see 5 2 4 1 below and Article 10 of the Treaty on Harmonisation of Business Law in Africa (OHADA) signed at Port Louis, Mauritius on 17 October 1993 and came into force on 18 September 1995 as revised on 17 October, 2008 at Quebec.

⁸⁹ For SADC Protocols, see Article 22 of the Treaty of The Southern African Development Community signed on 17 August 1992 at Windhoek Namibia (as amended) available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

important to allow domestic processes to individually manoeuvre national laws towards the common regional goal.⁹⁰ On the other hand, regulations and uniform acts are more direct and suitable for achieving maximum uniformity. Because they are directly applicable to all member states, generally overriding national law, and without choice, an offending state could face action in the form of sanctions from the economic community.

However, although flexibility in the implementation of a directive retains a certain level of sovereignty for the individual member states, there might be undesirable consequences in the end. The degree of harmonisation achieved through the individual laws enacted by the different states could be minimal. Although the general goal and framework is set out by the directive, differences in linguistics and legal traditions can still give rise to legal uncertainty, unpredictability and diversity.⁹¹ Furthermore, whether or not a state has enacted laws that fully comply with the directive is often a debatable matter and is sometimes difficult to determine. This could result in a minimal degree of harmonisation opposed to what could be achieved using other techniques and methods. Equally, protocols are based on choice and therefore one can never be sure how many states will ratify them and when they will in fact do so. This leads to piecemeal harmonisation where some states have a similar law whereas others within the same regional group retain their old national laws.⁹² Although regulations and uniform acts are ideal for maximum uniformity, it should be highlighted that there is still a lingering question of legitimacy

⁹⁰ SADC generally recognises that the different Member States are economically and politically positioned differently when it comes to fulfilling their responsibilities under the SADC Treaty. Thus, there is an understanding that the so-called common but differentiated responsibilities principle should apply. This is particularly obvious in the differentiated gradual phase down of tariffs under the Free Trade Area.

⁹¹ In the context of the EU directives, it was observed that, “the practice pursued to date has achieved greater approximation of national laws and a reduction of differences, but to some extent, it has only really shifted the degree of diversity between the national laws”. See C Twigg-Flesner “Good-bye Harmonisation by Directives, Hello Cross-border only Regulation? - A way forward for EU Consumer Contract Law” (2011) 7 *European Review of Contract Law* 235-256 239. See also WH Roth “Transposing ‘Pointilist’ EC Guidelines into Systematic National Codes - Problems and Consequences” (2002) 6 *European Review of Private Law* 761-776.

⁹² Statistics available show that SADC Protocols take time to come into force and that states are reluctant to ratify the Protocols. See a 2010 compilation of SADC Protocols and their status done by TRALAC available at <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/SADC_LEGAL_INSTRUMENTS_INFORCE_23_JUNE_2010_-_REVISED_13-08-2010.pdf> (accessed 26-08-2013).

pertaining to regional laws enacted outside of the realm of the national legislative system.⁹³

2 4 3 Soft law techniques

The cumbersome process of consultation and negotiation encountered in the creation of international treaties, which often produce compromised results rather than the best unified law, has shifted the attention to non-legislative means of harmonisation, usually referred to as soft law methods. Soft law consists of non-binding sets of rules formulated by organisations. These rules are often based on existing commercial practices which the parties can choose to incorporate into their contracts or which states can consider when enacting national legislation. Soft law methods include model laws, guidelines, codified trade terms, customs, standards or principles, as well as model contracts and general contractual conditions. Soft law methods allow for easy adaptation and are generally based on the presumption that the organisations which create these instruments know what traders need.⁹⁴ However, the impartiality of some non-state organisations involved in the creation of these instruments could sometimes be questionable since they often represent specific interests within a broader business sector. However, because they are not binding on the parties, their effectiveness is sometimes minimal.

2 4 3 1 Model laws

Model laws are legal instruments that will not *per se* acquire any legal force at international level but are available for adoption by states if and to the extent that they desire to do so.⁹⁵ They are mostly formulated as tools of technical assistance to

⁹³ In the EU, where Members of the European Union are directly elected, the issue is less sensitive; however, in the OHADA, the issue of state sovereignty erosion is real. For a general discussion, see S Mancuso "The Renunciation of State Sovereignty: Is it an issue for the OHADA Treaty on the Harmonisation of Business Law in Africa?" in CC Nweze (ed) *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor. Dr Christian Nwachukwu Okeke* (2009) 475-490.

⁹⁴ See EA Farnsworth "Closing Remarks" (1992) 40 *American Journal of Comparative Law* 699-702 at 700.

⁹⁵ R Goode "Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law" (2001) 50 *International and Comparative Law Quarterly* 751-765 at 758. A good example in the field of commercial law is the UNCITRAL Model Law on International Commercial Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (accessed 02-07-2013).

assist governments in formulating their national legislation. Model laws aim to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. Model laws are meant to help with but not to substitute the meticulous process of drafting a law. Individual states will need to make adjustments to the text to more accurately reflect the fundamental principles of their legal systems and constitutions. Model laws are generally accompanied by commentaries. These commentaries explain the legal basis of every provision and provide information on its content and use.⁹⁶

The difference between a model law and a directive is that, whereas a directive is some form of instruction by a superior body, normally the regional organ authorised to direct a member state to align its laws with a certain specified law or principle, a model law is a set of rules formulated by a body or organisation normally without any authority to direct states to follow the rules created.⁹⁷

There are a number of organisations that create model laws in the area of international commercial law. The UNCITRAL, UNIDROIT⁹⁸ and the International Chamber of Commerce (ICC) are some of the leading organisations in this area. They create model laws based on legal diversity and best international practice.

Harmonisation of laws using the model law technique has many advantages. Chief amongst these is the fact that model laws are generally drafted by specialised organisations with the necessary resources and capacity. They often reflect the best international practice of the day. On the same note, model laws are not mandatory to adopt and there is no requirement to adopt the model law verbatim. Model laws preserve state sovereignty inasmuch as they merely provide model provisions which states can refer to when enacting their own laws. Once the model is enacted by way of national law, the problems associated with amending conventions are obviated. The model law, whether adopted wholly or partly, will become part of national law

⁹⁶ See explanation UNODC website available at <<http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html>> (accessed 04-10-2013).

⁹⁷ See JAE Faria "International Harmonization of E-commerce Law: The Way Ahead" in AH Boss & W Kilian (eds) *The United Nations Conventions on the use of Electronic Communications in international Contracts* (2008) 17-42 at 30.

⁹⁸ See UNIDROIT website at <<http://www.unidroit.org/dynasite.cfm?dsmid=103284>> (accessed 04-09-2013).

and thus any amendment to the law will follow the same process as for the amendment of any other national law.⁹⁹ This process is permissibly faster and can be tailor-made because each state determines its own processes. The possibility to vary or adapt the content of the law makes it much easier for states to adopt a law which they have total control over, giving them the ultimate right and responsibility over its continued existence.¹⁰⁰

However, the degree of harmonisation achievable through the use of model laws is sometimes questionable. With model laws, there is no obligation for states involved to adopt the model law because it is merely created for persuasion purposes. Further, there is no obligation to adopt the instruments verbatim. If every state can pick and choose provisions, it can actually increase disharmony instead of achieving harmonisation. The flexibility to vary, amend or even repeal the law at any time can be a further and serious source of disharmony. The original version of the model law can be muddled with national legal tradition, language and legal norms, so much so that the original meaning and content of the model law itself become altered and changed, giving rise to the very uncertainty and unpredictability which harmonisation seeks to address. States are also generally sceptical of legal instruments where they were not involved in the drafting thereof.

2 4 3 2 Guidelines

Guidelines in the present context are neither rules nor principles but rather a systematic treatment of matters to be addressed in contracts.¹⁰¹ They entail specific suggestions on ways in which specific situations may be treated. They are thus practical manuals on contracting and the best possible ways of addressing specific

⁹⁹ See also, LF De Duca "Developing Transnational Harmonization Procedures for the Twenty First Century" in R Cranston & R Goode *Miles Commercial and Consumer Law: National and International Dimensions* (1993) 28-40 at 32.

¹⁰⁰ "The model law method has the advantage that it permits substantial uniformity without requiring, as a treaty normally does, exact equivalency". A Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" (2009) 21 *South African Mercantile Law Journal* 695-709 at 705.

¹⁰¹ A good example is the UNCITRAL Legal Guide on the Drawing up of International Contracts for the Industrial Works, UN Publications (1988), A/CN9/Scv B/2.

contractual situations without providing mandatory solutions.¹⁰² Traders and states can use such guidelines to deal with their own situations and adopt these guidelines to the extent that they deem necessary.

Generally speaking, contractual guidelines are drafted by non-governmental organisations with interests in a specific area, but they could also emanate from state actors. Such guidelines are based on best international practice but are also simplified to reflect different dynamics and changing circumstances. They are generally products of high standard and quality research by well experienced and knowledgeable drafters who are mostly neutral and mandated to produce good standard drafts conforming to the demands of current trends and envisaged future practices. Guidelines have been seen as helpful for developing countries¹⁰³ because the investment and levels of research that go into their drafting would ordinarily be beyond the means of some nations. Guidelines afford access to high standard work without the need for an investment in it. They offer a means of harmonising law by their application in contracts by traders in a specific area of trade. Their flexibility and adaptability to different situations give traders some choice in the face of different circumstances. More importantly, they appeal to traders because they are easy to apply and understand. Countries can even draw inspiration from guidelines when creating their own legislation.

However, the fact that guidelines are neither binding rules nor principles makes them dependent on the general acceptance of traders. Their acceptability *per se* is also not an easy matter. Without the necessary approval from traders, guidelines will never be effective as a harmonisation method. Moreover, the fact that guidelines simply act as suggestions leaves too much room for flexibility and affords no guarantee of similarity.

¹⁰² For the same point, see also LF De Duca “Developing Transnational Harmonization Procedures for the Twenty First Century” in R Cranston & R Goode *Miles Commercial and Consumer Law: National and International Dimensions* (1993) 28-40 at 32.

¹⁰³ See LF De Duca “Developing Transnational Harmonization Procedures for the Twenty First Century” in R Cranston & R Goode *Miles Commercial and Consumer Law: National and International Dimensions* (1993) 28-40 at 32.

2 4 3 3 Codified trade terms, customs, standards or principles

Codified trade terms, customs, standards or principles can be derived from merchant customs, case law and judge-made doctrines that gradually develop over time or a general collation of principles of law that are collected from various sources. They can also be developed under the auspices of specialised and well established organisations such as the ICC, UNCITRAL or UNIDROIT. Although they are not binding, codified trade terms, customs, standards or principles are well respected and are often cited as persuasive material by both academics and legal practitioners.

Codified trade terms, customs, standards or principles are generally a product of practice and traders' behaviour rather than a history of the evolution of rules. In some instances they are more valuable than rules because they contain that what is practically used by traders. Research by well-resourced international organisations which have both the financial and human resources to conduct thorough research and analysis is key to the process of codifying customs and usage. UNCITRAL, UNIDROIT and the ICC are leading organisations in this area. Their work, such as the UNIDROIT Principles of Commercial Contract, the ICC INCOTERMS and the Uniform Customs and Practices, are well recognised and used globally.

Codifications of trade terms, customs, standards or principles inform traders of established practices within a certain area or subject of trade and serve to restate or standardise such practices or customs. To that extent, these instruments fulfil a harmonisation function.¹⁰⁴ At the same time, such codifications are used as a basis for legislative reform or the drafting of international conventions. The role of such codes in the interpretation and application of the laws of international trade cannot be understated either. In fact, some national and international legislation recognise the value and importance of trade customs, usages and practice in judicial interpretation and trade practice.¹⁰⁵

¹⁰⁴ It has been pointed out, "[c]ustom, not law, has been the fulcrum of commerce since the origins of exchange" See LE Trakman *The Law Merchant: The Evolution of Commercial Law* (1983) 7.

¹⁰⁵ Article 8 (3) of the CISG states, for example, that "[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." See also PJ

Codified trade terms, customs, standards or principles have many advantages for the harmonisation of law. They are codified by well-experienced professionals after extensive research and analysis to accurately reflect the practice of the day. They are easy to change in line with the changing dynamics in trade practices. Practices and usages are not what the law ought to be and thus do not have to rely on persuasion or coercion for acceptance; they reflect what traders already do and prefer.¹⁰⁶ In that sense, they function as a valuable method of harmonisation. However, the fact that the legal force of codified trade terms, customs, standards or principles depends on party agreement or recognition through other laws make them less effective for higher degrees of harmonisation. Further, although codified trade terms, customs, standards or principles are products of extensive research and investment, customs are not consistent across the globe and only reflect the most consistent practice. Codifications of international customs, though a reflection of modern and established international trends, might therefore not be acceptable to traders in all regions of the world, for example those in developing countries.

2 4 3 4 Model contracts and general contract terms

Model or standard contracts are contract templates developed by organisations involved in the field of trade. They provide standards for the structure and content of a concluded contract on specific areas of the law. Model contracts and model contract terms and conditions are based on law and because they are carefully drafted by experts and professionals practice could be used as basis for a contract.¹⁰⁷ Traders often make use of model contracts and contractual terms when concluding contracts.¹⁰⁸

Mazzacano "Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective" (2008) 1 *Nordic Journal of Commercial Law* 1-33 at 22.

¹⁰⁶ See LE Trakman *The Law Merchant: The Evolution of Commercial Law* (1983) 7.

¹⁰⁷ For example, both the International Trade Centre available at <<http://www.intracen.org/exporters/contract-templates/>> (accessed 04-09-2013) and the International Chamber of Business available at <<http://www.iccwbo.org/News/Articles/2013/New-ICC-Model-International-Sale-Contract-hits-the-shelves/>> (accessed 04-09-2013) claim the involvement of experts in their work.

¹⁰⁸ See International Trade Centre available at <<http://www.intracen.org/exporters/contract-templates/>> (accessed 26-08-2013).

UNCITRAL, the ICC¹⁰⁹ and the International Trade Centre¹¹⁰ are some of organisations involved in the drafting of model contracts and contractual conditions. Their work reflects the best international practice as well as modern trends of international trade. Model contracts generally provide assistance to small and medium scale traders who cannot invest in sophisticated legal resources and experts. They are not law *per se* and are dependent on party agreement. The model contracts only become binding on the parties to the extent to which they have agreed on the text of the model contracts. The parties can choose to make use of the model contract as is or adopt the model contract to their needs. As they become commonly used and accepted, model contracts can become useful material in legislative drafting, law reform and judicial interpretation and application.

The advantage of model contracts and contractual conditions is that they are ready to use, well drafted contracts. Traders increasingly prefer them because of the legal certainty and predictability they provide. They are drafted according to high standards of professionalism to avoid ambiguities. For traders coming from different legal jurisdictions, model contracts have become a source of confidence in that they have generally become common practice. The harmonisation of sales laws can thus be achieved through model contracts in an easy way.¹¹¹

On the other hand, model contracts and contract terms have their own drawbacks insofar as harmonisation is concerned. Such formulations are not specifically drafted with a view to a particular transaction; they are generalised contracts dealing with the most prominent and recurring issues in a particular trade. They cannot cover all aspects of the sale of goods for example, which requires that the user should adapt the contract to its specific needs. Uniformity is thereby lost. As with any other soft law method of harmonisation, there is no obligation on either of the parties to use or

¹⁰⁹ For example, the ICC Model International Sale Contract. See <<http://www.iccwbo.org/News/Articles/2013/New-ICC-Model-International-Sale-Contract-hits-the-shelves/>> (accessed 02-09-2013).

¹¹⁰ See, for example the International Trade Centre Model Contracts which were motivated by the lack of “access” to the necessary contract forms of “many small companies ... engaged in international trade”. International Trade Centre available at <<http://www.intracen.org/exporters/contract-templates/>> (accessed 26-08-2013).

¹¹¹ See ITC *Legal Contracts for Small Firms: Legal guidance for doing international business* (2010) 1 available at <http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Templates_of_contracts/3%20International%20Commercial%20Sale%20of%20Goods.pdf> (accessed 28-08-2013).

consider a model contract. This makes model contracts dependent on appeal and persuasion and an ineffective mechanism for achieving a high degree of legal harmonisation. Rigorous campaigns and efforts to promote model contracts and contractual conditions as a basis for the harmonisation of sales laws might go a long way to heightening awareness of their value and importance. In a region where hard-law methods face resistance and are likely to be derailed by lack of political will, there could be a need to promote the use of model contracts. Model contracts provide a more flexible and easier avenue towards harmonisation in that they are mainly used amongst traders in their private capacities without requiring any authority from their national authorities. At the same time, interest in and their effective use by traders can appeal to law makers to use them as a basis for legislative and policy considerations.¹¹²

2 4 4 Concluding remarks

The choice of a harmonisation technique depends on the specific circumstances of countries seeking to harmonise their laws. In some situations effective harmonisation may require a hard law approach involving legislative measures with a high degree of state participation. In other cases, a soft law approach might suffice to facilitate effective harmonisation.¹¹³ There are, however, no hard and fast rules or formula to evaluate the impact and value of the different techniques. To determine which technique would be best suitable in a given situation it is best to focus on the prevailing factors in the environment in which the technique is to be applied.

Various techniques have been utilised by organisations partaking in legal harmonisation projects. Some organisations prefer hard law methods whilst others place the emphasis on soft law approaches. Some of these regional and international organisations have become pacesetters in the field. The study will now turn to a discussion of a few formulating agencies.

¹¹² Soft law may constitute a prior or earlier stage of binding legislation. See also S Fazio *The Harmonisation of International Commercial Law* (2007) 20.

¹¹³ See RCC Cuming "Harmonization of Law in Canada: An Overview" in RCC Cuming (ed) *Perspectives on the Harmonization of Law in Canada* (1985) 1-58 at 4. "Harmonization of law is at best a pragmatic or grounded concept in that it cannot be dissociated from its particular context or applied use." M Boodman "The Myth of Harmonization of Laws" (1991) 39 *American Journal of Comparative Law* 699-724 at 707.

2 5 FORMULATING AGENCIES

Formulating agencies are associations or organisations, national, regional or international, governmental or non-governmental, which are entrusted with or merely involved in the formulation of trade policy or rules for the conduct of international commercial transactions.¹¹⁴ The term “formulating agency”¹¹⁵ could be misleading as it denotes that the organisation undertaking legal harmonisation is a medium created only for that purpose. This could have been true of early establishments such as the Hague Conference, UNIDROIT and UNCITRAL. However, recent trends show that legal harmonisation is now being undertaken by various organisations with diverse goals and institutional make-ups. In this study this term is used to encompass any institutionalised initiative towards legal harmonisation. With the continuous transformation of the drive towards legal harmonisation and the development of new approaches by both new and old agencies, the only real distinction between these agencies is now whether their activities are conducted as private initiatives or whether there is state control and involvement. Some of these agencies “claim to be international standard setters in that they possess either acquired expertise in legislative drafting or have international experience by virtue of their membership or may even export, in modified form, successful domestic legislation.”¹¹⁶

Organisations entrusted with the task of harmonising aspects of commercial law are few. They generally use both hard and soft law techniques. The leading organisations are the United Nations Commission of International Trade Law (UNCITRAL), the International Institute for the Harmonisation of Private Law (UNIDROIT), and the Hague Conference on Private International Law. The World Trade Organisation (WTO) has also joined this group. Most regional economic integration organisations provide for some form of legal harmonisation. The European Union (EU), the Association of Southeast Asian Nations (ASEAN), the

¹¹⁴ See L Mistelis “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 18-20.

¹¹⁵ The term “harmonising agencies” originate from CM Schmitthoff *Commercial law in a Changing Economic Climate* (2nd edition 1981) 24.

¹¹⁶ L Mistelis “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 18.

Common Market of the South (MERCOSUR) and the North American Free Trade Association (NAFTA) are some of the notable examples outside Africa. In Africa, the Organisation for the Harmonisation of Business Laws in Africa (OHADA), the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA) are such examples. Regional organisations use both hard law and soft law but mostly hard law techniques.

Prominent non-governmental international organisations or professional associations involved in the harmonisation of commercial law include the International Chamber of Commerce (ICC), the International Law Association (ILA), the International Bar Association (IBA), The African Law Institute (ALI) and the Comité Maritime International (CMI). These organisations or professional associations always employ soft law techniques. They generally promulgate model laws, model rules and standard contracts. They sometimes also co-operate with intergovernmental organisations in the formulation of hard law instruments, in particular, international conventions.

A discussion of all these agencies is unnecessary and will also take a considerable amount of time and space. For purposes of this study the discussion will be restricted to those which could be used as an effective point of reference or comparison or in an investigation on the harmonisation of sales laws in SADC. This study restricts the discussion to state initiatives conducted through international intergovernmental agencies, more specifically UNCITRAL, and regional intergovernmental organisations, more specifically OHADA and the EU. UNCITRAL is an international pacesetter in the area of the harmonisation of sales laws on a global level, using an international convention in the form of the CISG. OHADA is a leading example for regional legal harmonisation in Africa with an open invitation for members of the African Union to join. The EU is internationally regarded as a leading example of a successful regional economic community. A proposal for a Regulation on a Common European Sales Law (CESL) is currently being considered. This law deserves consideration not only because this is the most recent example of regional sales law available but also of the importance of the trade relationship between the EU and SADC.

2 6 CONCLUSIONS

Although legal harmonisation is not a new phenomenon, there have been remarkable developments in the past few decades, mainly driven by globalisation and the institutionalisation of these efforts. The harmonisation of international sales laws notably took shape in the second half of the 20th century. Since then, legal harmonisation has also evolved and now includes various approaches whilst new organisations, including private institutions, have joined in to formulate harmonised law. Because of the diversity in approaches, the definition of the concept legal harmonisation has become less consistent. However, in essence it still remains a process of making laws more similar. Whether it is necessary to make laws similar is a debatable issue. However, there are good reasons to justify the value accorded to it, even for the SADC context; especially if one weighs the advantages against the disadvantages. A number of techniques have been utilised over time by different formulating agencies; however, the best technique and the most effective model for the harmonisation of sales laws in SADC should be deduced from the dynamics of the SADC region itself. In practice, however, regional communities tend to follow the community law approach. This enables members in a regional community to adopt laws at this level and avoid the intricacies of global approaches, whilst at the same time fostering regional integration. This study will investigate this approach together with the other techniques available. The next chapter will be devoted to a discussion on the harmonisation of law in the specific context of SADC.

CHAPTER 3

LEGAL HARMONISATION WITHIN THE CURRENT LEGAL, INSTITUTIONAL AND OPERATIONAL FRAMEWORK OF SADC

3 1 INTRODUCTION

The importance of international trade for the economic development of Africa as a whole cannot be over-emphasised. Already in 1961, the General Assembly of the United Nations recognised that international trade is “the primary instrument for economic development.”¹ Many African countries have come up with initiatives to encourage export marketing. However, to promote international trade, it is not adequate for them merely to focus on export promotion initiatives; “there is also a need to tackle impediments to trade, which includes the problem of diversity of laws.”² The continent’s colonial legacy which brought arbitrary borders and Eurocentric legal traditions has made the issue of harmonisation of laws even more imperative.³

The pressures of globalisation and the need for the harmonisation of laws are as prevalent in Africa as in the developed world.⁴ As far back as 1963, the Charter of the Organisation of African Unity obliged Member States “to co-ordinate and harmonise their general policies” in a number of fields, including economic co-operation.⁵ This focus on economic integration was entrenched with the signing and resultant ratification of the Abuja Treaty establishing the African Economic

¹ United National Resolution 1707 (XVI) of 19 December 1961 available at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/60/IMG/NR016760.pdf?OpenElement>> (accessed 28-08-2013).

² G Bamodu “Transnational Law, Unification and Harmonization of International Commercial Law in Africa” (1994) 38 *Journal of African Law* 125-143 at 128.

³ See B Fagbayibo “Towards the Harmonisation of Laws in Africa: Is OHADA the way to go?” (2009) 42 *Comparative and International Law Journal of Southern Africa* 309-322 at 310.

⁴ I Schwenzer “Regional and Global Unification of Sales Law” (2011) 13 *European Journal of Law Reform* 370-379 at 370.

⁵ See Article II (2) of the Charter of the Organization of African Unity, 49 U.N.T.S. 39/2 I.L.M. 766 (1963).

Community in 1994 (Abuja Treaty).⁶ A successor to the Organisation of African Unity (OAU), the African Union (AU) was formally launched at the Durban Summit in 2002. The AU is Africa's premier institution and principal organisation for the promotion of accelerated socio-economic integration of the continent. Among the objectives of the AU is the coordination and harmonisation of the policies of existing and future regional economic communities.⁷ However, despite emphasis on closer integration, no specific reference is made to legal harmonisation or the role of law in the integration process.⁸ The need for legal harmonisation can at best be deduced from the aspirations of the Union. The African Union is not in itself an organisation for the harmonisation of laws; however, it is the epicentre of regional integration and the organisation where the legitimacy for integration in African regional economic communities also stems from. The African regional economic communities are seen as building blocks towards continental integration. The Abuja Treaty's paragraphs 1 and 3 of Article 88, hence, lay out the Protocol on relations between the African Economic Community and Regional Economic Communities for the coordination, harmonisation and integration of these regional economic communities under the African Economic Community.⁹

The search for a solution to Africa's economic underdevelopment and marginalisation in the global economy has led to a proliferation of regional integration initiatives. Within the African Union (AU) there are at least fourteen regional economic communities with varying scopes and objectives. The enhancement of

⁶ See Article 3 and 4 of the Treaty Establishing the African Economic Community signed on 3 June 1991 at Abuja Nigeria available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf> (accessed 29-08-2013). See also RF Oppong "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 3 *Journal of South African Law* 497-509 at 503 and RF Oppong *Legal Aspects of Economic Integration in Africa* (2011) 165-187.

⁷ Article 3 of the Constitutive Act of the African Union signed on 11 July 2000 in Lome Togo available at <<http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf>> (accessed 29-08-2013). Integration is sought to be achieved gradually through Regional Economic Communities. See also MP Ferreira-Snyman & GM Ferreira "The Harmonisation of Laws within the African Union and the Viability of Legal Pluralism as an Alternative" (2010) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 608-628 at 609 and RF Oppong "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 3 *Journal of South African Law* 497-509 at 503.

⁸ See RF Oppong "Private International Law and the African Economic Community: A Plea for Greater Attention" (2006) 3 *Journal of South African Law* 497-509 at 504.

⁹ See Preamble to the Protocol on Relations between the African Union (AU) and Regional Economic Communities (RECs) adopted on 28 February 1998 available at <<http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf>> (accessed 14 February 2014). See also RF Oppong *Legal Aspects of Economic Integration in Africa* (2011) 165-187.

economic development, chiefly through regional integration, is a common thread that runs through the objectives of all these organisations.

Apart from OHADA, a regional organisation for the harmonisation of laws which will be discussed in more detail in Part C of this study; other regional economic communities in Africa have also embarked on legal harmonisation. More important are the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA) which have an intricate relationship with SADC.

The EAC was established in 1967 but later dissolved in 1977 and only resurfaced in 2000. It is an organisation of five states in the eastern part of Africa, comprising of Tanzania, Uganda, Rwanda, Burundi and Kenya. Its headquarters is in Arusha, Tanzania. According to the EAC Treaty, the objectives of the EAC are to develop policies and programmes aimed at widening and deepening cooperation and integration amongst its member states. To that effect, the member states agreed to cooperate in many areas including legal matters. This suggests that these states recognise the need for and are committed to the harmonisation of laws in order to facilitate international trade and investment. This new vision of the reinvented EAC is a reflection of the inspiration provided by OHADA.¹⁰

The aim of the EAC is to have regional commercial laws particularly in those areas that fall within the ambit of the EAC Treaty.¹¹ The EAC enacted laws are automatically integrated into its member states' domestic laws and "take precedence over the similar national laws in related matters."¹² The EAC currently has two types of legal systems existing amongst its member states. English common law is used in Kenya, Tanzania and Uganda, whilst Burundi and Rwanda used Belgian Civil Law until 1994. Rwanda itself is going through a system of comprehensive legal reform to switch its legal system from civil law to common law. At regional level, the EAC is

¹⁰ See also MB Idris "Harmonization of Business Laws in Africa - An Insight into the Laws, Issues, Problems and Prospects" in CM Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspective on OHADA* (2nd edition 2012) 7-27 at 23.

¹¹ See also MB Idris "Harmonization of Business Laws in Africa - An Insight into the Laws, Issues, Problems and Prospects" in CM Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspective on OHADA* (2nd edition 2012) 7-27 at 23-24.

¹² See Article 8 (4) of the Treaty Establishing the East African Community signed on 30 November 1999 in Arusha Tanzania (as amended) available at <http://www.eac.int/treaty/index.php?option=com_content&view=category&id=38&Itemid=159> (accessed 27-08-2013).

currently working on legislation on intellectual property law, contract law, public private partnership law, the law on the recognition of foreign commercial law and the law related to enforcement measures and procedures for debt recovery. These uniform laws will become automatically binding once they are adopted by the East African Legislative Assembly. The EAC Court of Justice created under the Treaty has jurisdiction in all matters relating to the application and interpretation of the EAC Treaty. The Court also plays an advisory and counselling role to member states on issues relating to the EAC Treaty laws, rules and procedures.¹³

The COMESA Treaty was signed on 5 November 1993 in Kampala, Uganda, and ratified in December 1994. The main goal of COMESA is to fully integrate the EAC and SADC into an economic union through trade and investment.¹⁴ Under the COMESA Treaty, the objective is to deepen and broaden the integration process among member states through the adoption of more comprehensive measures. These measures include the harmonisation and approximation of laws of the member states “to the extent required for the proper functioning of the common market.”¹⁵ The harmonisation of laws is therefore an explicit goal of COMESA. The area of harmonisation is broad and focuses on investment rules, regulations and practice. COMESA created its own Court of Justice with an advisory and interpretive role on all issues relating to the Treaty and its provisions whilst also serving as a dispute settlement mechanism.¹⁶ It has jurisdiction to hear referrals from member

¹³ Article 28 (2) of the Treaty Establishing the East African Community signed on 30 November 1999 in Arusha Tanzania (as amended) available at <http://www.eac.int/treaty/index.php?option=com_Content&view=category&id=38&Itemid=159> (accessed 27-08-2013). See also MB Idris “Harmonization of Business Laws in Africa - An Insight into the Laws, Issues, Problems and Prospects” in CM Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspective on OHADA* (2nd edition 2012) 7-27 at 24.

¹⁴ Article 3 of the Treaty establishing the Common Market for Eastern and Southern Africa, COMESA signed on 5 November 1993 in Kampala Uganda available at <http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf> (accessed 15-10-2013).

¹⁵ Article 4 (6) (b) of the Treaty establishing the Common Market for Eastern and Southern Africa available at <http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf> (accessed 15-10-2013). See also S Mancuso “Trends on the Harmonization of Contract Law in Africa” (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 172-173.

¹⁶ See Article 19 of the Treaty establishing the Common Market for Eastern and Southern Africa available at <http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf> (accessed 15-10-2013).

states and from the Secretary General of COMESA as well as from natural to legal persons challenging decisions of member states.¹⁷

SADC was formed to deepen economic integration for the attainment of economic growth and development in order to alleviate poverty.¹⁸ The EAC and COMESA together with SADC have formed a tripartite relationship for the coordination and cooperation of the three regional economic communities.¹⁹ This was necessitated mainly by the overlapping membership of the three communities.²⁰ The EAC and SADC have a strong relationship in COMESA in that most of the members of these two regional groupings are members of the Common Market for East and Southern Africa. The composite interrelationship between SADC, EAC and the COMESA reiterates the need for the harmonisation of sales laws as a necessary process for fostering and sustaining regional integration and economic development on the continent.

In this chapter, an analysis is undertaken on the role of SADC institutions in the harmonisation of sales laws; the trade and economic development agenda of the region and how that could fit in with the harmonisation of sales laws in SADC; the nature and characteristics of the prevailing legal environment in SADC which function as a barrier to free trade if the laws are not harmonised; and the impending challenges for legal harmonisation in the region.

¹⁷ Article 24-26 of the Treaty establishing the Common Market for Eastern and Southern Africa available at <http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf> (accessed 15-10-2013).

¹⁸ See GH Oosthuizen *The Southern African Development Community: The Organisation, its Policies and Prospects* (2006) 39.

¹⁹ The Tripartite was established in 2005. The Tripartite Task Force, headed by the Secretary Generals of COMESA and the EAC, and the Executive Secretary of SADC, has met at least twice per year since 2006. The main focus of deliberations has been the harmonisation of REC programmes in the areas of trade and infrastructure development. In 2007, the Tripartite Task Force recommended that a Tripartite Summit of Heads of State and the Government of COMESA, EAC and SADC be convened. The envisaged Summit would give important direction and political endorsement to the Tripartite efforts to harmonise their various programmes and would increase the buy-in of Member States. The recommendation was accepted and the Tripartite Summit was held on 22nd October 2008 in Kampala, Uganda. See COMESA-EAC-SADC Tripartite website <<http://www.comesa-eac-sadc-tripartite.org/about/background>> (accessed 28-08-2013).

²⁰ The Tripartite is also addressing challenges of overlapping membership through harmonising programmes across the three RECs. See COMESA-EAC-SADC Tripartite website <<http://www.comesa-eac-sadc-tripartite.org/home>> (accessed 28-08-2013). See also P Kwandelwal "COMESA and SADC: Prospects and Challenges for Regional Trade Integration" (2004) 14 *International Monetary Fund Working paper WP/04/227* available at <<http://www.imf.org/external/pubs/ft/wp/2004/wp04227.pdf>> (accessed 27-08-2013).

3 2 SADC HISTORICAL OVERVIEW AND GENERAL BACKGROUND

The Southern African Development Community (SADC) started as Frontline States whose objective was the political liberation of Southern Africa. SADC was preceded by the Southern African Development Coordination Conference (SADCC), which was formed in Lusaka, Zambia on 1 April 1980, with the adoption of the Lusaka Declaration (Southern Africa: Towards Economic Liberation). The formation of SADCC was the culmination of a long process of consultation by the leaders of the then only majority ruled countries of Southern Africa, thus Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe, working together as Frontline States. On 17 August 1992, at their Summit held in Windhoek, Namibia, the Heads of State and Government signed the SADC Treaty and Declaration that effectively transformed the Southern African Development Coordination Conference (SADCC) into the Southern African Development Community (SADC). The objective of the organisation shifted to include economic integration following the independence of the rest of the Southern African countries.²¹

SADC now consists of fifteen countries which have a total population of approximately 277 million people, which is just slightly above half of that of the European Union.²² Three countries, the Democratic Republic of Congo (DRC), South

²¹ Key developments in the formation of the SADC are the following: in the 1970s Angola Mozambique, Tanzania, Botswana and Zambia form a grouping called the Frontline States to fight Apartheid; in May 1979 in Gaborone, Botswana, the Foreign Ministers of the Frontline States called on the ministers responsible for Economic Development to meet and consider an economic development initiative for the region; in July 1979 in Arusha, Tanzania, the Ministers of Economic Development drafted a declaration paving the way for the Southern African Development Coordinating Committee, on 1 April 1980 in Lusaka, Zambia, the Lusaka Declaration called the "Southern Africa: Towards Economic Liberation" was adopted by the founding members, Angola, Botswana, Zambia, Tanzania, Zimbabwe, Malawi, Namibia, Mozambique, Swaziland and Lesotho, paving the way for the establishment of the SADCC; on 17 August 1992 in Windhoek, Namibia, the Heads of State of SADCC Members signed a Declaration and Treaty establishing SADC which shifted the focus from coordination of developmental projects to a more complex task of integrating the economies of Member States; on 29 August 1994 in Gaborone, Botswana, South Africa acceded to the SADC Treaty which accession was ratified in September 1994 whereupon South Africa became a Member; on 9 March 2001 in Windhoek, Namibia, an Extraordinary Summit approved recommendations to restructure SADC to give effect to the change in focus of the new demands of regional integration of SADC (the Community) and to efficiently and effectively realise the new objectives. See SADC website available at <<http://www.sadc.int/about-sadc/overview/history-and-treaty/>> (accessed 26-08-2013).

²² See SADC website available at <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> (accessed 26-08-2013).

Africa and Tanzania account for almost two thirds of the total population, while the other six smallest members (Seychelles, Swaziland, Mauritius, Botswana, Namibia and Lesotho) comprise only about 3% of the total population.²³ The major reason for integration is therefore the belief that there is strength in numbers and in unity, and that this strength can speed up the pace of development as well as enhance security.²⁴

On the economic front, SADC struggles to shake of the bonds of poverty and underdevelopment. The Gross Domestic Product of the entire SADC region was 575 billion dollars in 2010. To this, services contribute 51%, industry 32% and agriculture 17%.²⁵ However, of the total GDP, South Africa is the dominant economy, accounting for about three quarters of SADC's GDP.²⁶ Agriculture is the back-bone of the SADC regional economy insofar as about 70% of the SADC population depends on agriculture for food, income and employment.²⁷ SADC countries are rich in natural resources and minerals which include precious and base metals, industrial minerals and precious stones.²⁸ It is imperative for SADC to transform its natural resources and economic potential into reality. To achieve this, conditions conducive to trade and investment must be created and sustained. It is pointless for SADC to pride itself with vast natural resources whilst more than half of its population is languishing in extreme poverty.

3 3 SADC OBJECTIVES

SADC recognises the sovereignty of its Member States, but also acknowledges the need to promote co-operation amongst such Member States in order to address the challenges of the dynamic and increasingly complex regional and global environment. The main objectives of SADC spelt out in Article 5 of the Treaty of the

²³ See SADC website available at <<http://www.sadc.int/member-states/>> (accessed 26-08-2013).

²⁴ M Chingono & S Nakana "The Challenges of Regional Integration in Southern Africa" (2009) 3 *African Journal of Political Science and International Relations* 396-408 at 397.

²⁵ See SADC Statistics on <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> (accessed 26-08-2013).

²⁶ This dominance is not always a pleasure. As the saying goes, if her neighbours "do not eat, then she won't sleep".

²⁷ See Food Security and Climate Change in SADC on SADC website available at <www.sadc.int/REDD/index.php/download_file/94/> (accessed 26-08-2013).

²⁸ M Chingono & S Nakana "The Challenges of Regional Integration in Southern Africa" (2009) 3 *African Journal of Political Science and International Relations* 396-408 at 398.

Southern African Development Community are to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication; enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; consolidate, defend and maintain democracy, peace, security and stability; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the region; combat HIV/AIDS or other deadly and communicable diseases; ensure that poverty eradication is addressed in all SADC activities and programmes; and mainstream gender issues in the process of community building.²⁹

The SADC Member States agree that issues of underdevelopment, exploitation, deprivation and poverty can only be overcome through economic co-operation and integration. The objectives of SADC are sought to be achieved through harmonising the political and socio-economic policies and plans of its Member States; encouraging the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC; creating appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; developing policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally; promoting the development of human resources; promoting the development, transfer and mastery of technology; improving economic management

²⁹ Article 5 (1) of the Treaty of The Southern African Development Community signed on 17 August 1992 at Windhoek Namibia (as amended) available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

and performance through regional co-operation; promoting the coordination and harmonisation of the international relations of its Member States; securing international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region; and developing such other activities as Member States may decide in furtherance of the objectives of the SADC Treaty.³⁰

Looking at the objectives and aspirations of SADC, one cannot miss the running thread of regional integration and cooperation for economic development. Economic development is the pivot for achieving the goals and resolving the problems of the region. Economic development can never be detached from trade. Trade has become the main vehicle for economic development across the globe.³¹ States want to trade in order to improve the lives and welfare of their people. Cooperation on issues of trade has always been of strategic importance. Conflicts in the earlier part of the 20th century have shown how devastating the consequences of lack of cooperation in trade and economic development matters can be.³²

To achieve its objectives and implement its programmes, SADC has established a number of institutions. Based on the experience in other regions, these institutions have the ability to foster integration and development if they are capacitated and supported with adequate resources and driven by political will. The SADC institutions are subsequently discussed with particular attention to their effectiveness in fostering regional harmonised law.

3 4 SADC INSTITUTIONS

On the turn of the millennium SADC restructured itself, giving birth to more institutions and development plans. The SADC Treaty now provides for eight institutions which are the Summit of Heads of State or Government; the Organ on

³⁰ Article 5 (2) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

³¹ S Grammling "Reconciling Trade and Development in Southern Africa: Challenges for Trade Unions" (2007) 2 FES/NALEDI Training Course on "Trade and Development" for Trade Unionists of SADC Countries Johannesburg 9-11 July 2007 *Conference Report* available at <<http://library.fes.de/pdf-files/bueros/genf/04973.pdf>> (accessed 23-08-2013).

³² World Wars are also blamed on protectionism. See P Lamy *Managing Global Security: The strategic Importance of International Trade* (2007) available at <http://www.wto.org/english/news_e/spl_e/sppl66_e.htm> (accessed 04-09-2013).

Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and the SADC National Committees. The Summit is empowered to create other institutions if necessary³³ and it in fact created the SADC Parliamentary Forum which is not provided for by the Treaty itself. These institutions play a critical role in the realisation of SADC's objectives. There cannot be any meaningful integration without strong institutions that drive the process. These institutions are therefore also important for the creation and sustenance of any process for the harmonisation of laws.

3 4 1 Summit

The Summit is made up of Heads of State and/or Government. It is the ultimate policy-making institution of SADC responsible for the overall policy direction and control of functions of the Community.³⁴ To this end, subject to Article 22,³⁵ the SADC Summit adopts legal instruments for the implementation of the provisions of the Treaty; or may delegate this authority to the Council or any other institution of SADC as the Summit may deem appropriate.³⁶ The appointment of the Executive Secretary and the Deputy Executive Secretary is done by the Summit on the recommendation of the Council.³⁷ The Summit also, subject to Article 8 of the Treaty,³⁸ decides on the admission of new members to SADC. The Summit meets at least twice a year and is headed by a Chairperson and Deputy Chairperson elected

³³ Article 9 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

³⁴ Article 10 (1) and (2) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). See also GH Oosthuizen *The Southern African Development Community: The Organisation its Policies and Prospects* (2006) 188.

³⁵ Article 22 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013), deals with the provisions of the adoption of Protocols.

³⁶ Article 10 (3) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

³⁷ The Current SADC Executive Secretary Dr Stergomena Lawrence Tax from the United Republic of Tanzania was appointed by the 33rd Summit of the Heads of State and Government in August 2013 in Malawi. See point 31 of the Communiqué of the 33rd Summit of SADC Heads of State and Government Lilongwe, Malawi (August 17-18, 2013) available at <http://www.sadc.int/files/5513/7691/9196/COMMUNIQUE__-18_August_2013.pdf> (accessed 26-08-2013).

³⁸ Article 8 (4) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013) also provides that "admission of any State to membership of SADC shall be effected by a unanimous decision of the Summit."

by the members on annual term rotating amongst its members. Summit decisions are generally taken by consensus and are binding.³⁹

The Summit is the supreme and most powerful structure of SADC and in practice makes any decision on any matter pertaining to SADC.⁴⁰ This leaves the success or failure of SADC primarily in the hands of the Heads of State or Government. Political will, thus, plays a critical role in advancing the SADC objectives and goals. Therefore, legislation or policy towards the harmonisation of sales laws in SADC would require direction and commitment from the SADC Heads of State or Governments. Although SADC has recorded some milestone achievements against the backdrop of many challenges, the Summit has often been criticised for its lack of direction and commitment on critical policy issues.⁴¹ In several cases, the Summit has failed to take a firm stand against the violation of its principles and rules. The suspension of the SADC Tribunal and the decision to renegotiate the Protocol for the Tribunal remains a key point of reference.⁴² To this end, rather than being commended for progress thus far, Summit is viewed as a club of friends united against its citizens. The role of the Heads of State and Government is primarily to use their executive influence and power to propel their sovereign states into the regional agenda. This can only be achieved if there is political will and belief in regional integration and cooperation.

³⁹ For more on the Summit, see Article 10 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁴⁰ These somewhat expansive powers have been criticised by the Former President of the SADC Tribunal, Ariranga G Pillay after the dissolution of the SADC Tribunal. He argued that “Council and Summit believe they are all powerful and are accountable to no natural or legal person and can take any action they deem fit against both the Tribunal and its members that are expendable but the truth remains that both Council and Summit are constrained in their actions by the provisions of the SADC treaty and the Protocol.” See AG Pillay “SADC Tribunal Dissolved by Unanimous Decision of SADC Leaders” (2011) available at <<http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf>> (accessed 26-08-2013).

⁴¹ See also C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 68.

⁴² For more on this point see generally OC Ruppel “The Case of Mike Campbell and the Paralysis of the SADC Tribunal” in ET Laryea, N Madolo & F Sucker (eds) *International Economic Law Voices of Africa* (2012) 140-158 and at 152 where he notes that “[t]he same decision also brings into question the commitment of the member states in this regional bloc towards good governance and human rights.”

3 4 2 Organ on Politics, Defence and Security Co-operation

The Organ on Politics, Defence and Security Co-operation (the Organ) is coordinated at the level of Summit on a Troika basis and is to report to the Chairperson of SADC. The Chairperson of the Organ acts on a rotation basis for a period of one year. The Chairperson of the Organ may not simultaneously hold the Chair of the Summit.⁴³ The Secretariat provides services to the Organ. The structure, operations and functions of the Organ are regulated by the Protocol on Politics, Defence and Security Cooperation.⁴⁴ A Ministerial Committee of the Organ, consisting of the ministers responsible for foreign affairs, defence, public security or state security from each of the Member States is responsible for the coordination of the work of the Organ and its structures. The Organ is responsible for the promotion of peace and security; the prevention of the breakdown of law; the development of common foreign policies; enforcement of action in line with international law; and the promotion of the development of democratic institutions in Member States – among other responsibilities.⁴⁵

The Organ should play a critical role in the observance of the rule of law in SADC. Because there is a two-way causal relationship between economic development and conflict,⁴⁶ the observance of the rule of law is an indispensable element of regional integration and legal harmonisation. Development needs peace and security for it to be achieved; however, peace requires development for it to be sustained.⁴⁷ However, although structured as a rules based system, the SADC experience shows that power politics override the rule of law. This element needs to change if a harmonised legal system is to be implemented successfully.

⁴³ Article 10A of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁴⁴ The Protocol on Politics, Defence and Security signed on 14 August 2001 in Blantyre, Malawi and came into force on 02 March 2004 available at <[http://www.sadc.int/documents-publications/show/Protocol%20on%20Politics,%20Defence%20and%20Security%20\(2001\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Politics,%20Defence%20and%20Security%20(2001))> (accessed 26-08-2013).

⁴⁵ Article 2 of Protocol on Politics, Defence and Security available at <<http://www.sadc.int/documents-publications/show/809>> (accessed 26-08-2013).

⁴⁶ See PT Mathoma “Challenges for Southern Africa” in C Clapham, G Mills, A Morner & E Sidiropoulos (eds) *Regional Integration in Southern Africa: Comparative International Perspectives* (2001) 27-32 at 29.

⁴⁷ KM Mbuende “The SADC: Between Cooperation and Development – An Insider Perspective” in C Saunders, GA Dzinesa & D Nagar *Region-building in Southern Africa: Progress, Problems and Prospects* (2012) 39-60 at 46-47.

The transformation of SADC presupposes a desire to move from being an association of states to a regional economic community of binding legal relationships with obligations and responsibilities. It is critical to note that a harmonised system can only thrive in a rules based environment where implementation and enforcement mechanisms exist. The Organ, at least on paper, provides an important ingredient for legal harmonisation. However, its reaction to the crises in the DRC, Zimbabwe and Madagascar leaves a question mark on whether it has the adequate capacity to ensure compliance with SADC norms to “protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order”⁴⁸ Compliance with regional laws requires that the Organ should function as an effective institution which ensures that Member States and private persons alike will be bound by the regional laws, failure of which will lead to punitive consequences.

3 4 3 Council

The Council of ministers consists of one minister from each Member State, normally a minister responsible for foreign or external affairs.⁴⁹ The Chairperson and Deputy Chairperson of the Council are appointed by the Member States holding the chairpersonship and deputy chairpersonship of SADC respectively.⁵⁰ The Council meets at least four times a year. It reports to and is responsible to the Summit. The responsibilities of the Council as set out in Article 11 (2) of the SADC Treaty are to oversee the functioning and development of SADC; oversee the implementation of the policies of SADC and the proper execution of its programmes; advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC; approve policies, strategies and work programmes of SADC; direct, coordinate and supervise the operations of the institutions of SADC subordinate to it; recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs; create its own committees as

⁴⁸ Article 2 (a) of the Protocol on Politics, Defence and Security available at <[http://www.sadc.int/documentspublications/show/Protocol%20on%20Politics,%20Defence%20and%20Security%20\(2001\)](http://www.sadc.int/documentspublications/show/Protocol%20on%20Politics,%20Defence%20and%20Security%20(2001))> (accessed 26-08-2013).

⁴⁹ Article 11 (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵⁰ Article 11 (3) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

necessary; recommend to the Summit persons for appointment to the posts of Executive Secretary and Deputy Executive Secretary; determine the terms and conditions of service of the staff of the institutions of SADC; develop and implement the SADC Common Agenda and strategic priorities; convene conferences and other meetings as appropriate, for purposes of promoting the objectives and programmes of SADC; consider and recommend to the Summit any application for membership to SADC; and perform such other duties as may be assigned to it by the Summit or the Treaty. Decisions of the Council are taken by consensus.⁵¹

The overall role of the Council is to have more regular engagement with the affairs of SADC and ultimately report to the Summit. The composition of the Council shows again, not only the role that politics play in the affairs of SADC, but also the observance of state sovereignty manifesting itself through the preferred composition of the Council.⁵² Ministers of Foreign Affairs or External Affairs, as the case may be, are generally more inclined to preserve their state sovereignty than concede to the objectives of integration. At face value, this shows that SADC issues still continue to be treated as aspects of foreign affairs rather than forming an integral part of national programmes. However, there is now generally a trend in SADC countries to create ministries dealing with international relations, cooperation and regional integration and to discard the traditional ministries dealing with foreign affairs only.⁵³ This move recognises the need to align national interests with regional interests.

However, the role of Council is not sufficiently effective, particularly not in the context of the enactment of harmonised laws. It appears as if the Council is merely a “messenger” of the Summit. Although Summit does not meet as regularly as Council does, the Council does not have any significant powers to make far-reaching decisions except to “advise” or “recommend” to the Summit on certain matters.

⁵¹ The provisions on the Council are found in Article 11 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵² Article 11 (1) of the Treaty makes it clear that the Council shall consist of one Minister from each Member State, preferably a Minister responsible for Foreign or External Affairs. The Council before restructuring consisted of a Minister responsible for Economic Planning, or Finance. See also GH Oosthuizen *The Southern African Development Community: The Organisation its Policies and Prospects* (2006) 191.

⁵³ For example South Africa has moved in that direction already because it has a Ministry of International Relations and Cooperation, not Foreign Affairs.

3 4 4 Integrated Committee of Ministers

The Integrated Committee of Ministers is technically a new institution which took over from the abolished Sectorial Committees of Ministers. It consists of at least two ministers from each Member State. The Chairperson and Deputy Chairperson of the Integrated Committee of Ministers are appointed from the Member States holding the chairpersonship and deputy chairpersonship, respectively, of the Council. The Integrated Committee of Ministers meets at least once a year. The Committee has to report to and is also accountable to the Council. The Integrated Committee of Ministers, with respect to its responsibilities, has decision making powers to ensure rapid implementation of programmes that would otherwise wait for a formal meeting of the Council. Its responsibilities are to oversee the activities of the core areas of integration which include trade, industry, finance and investment; infrastructure and services; food, agriculture and natural resources; and social and human development and special programmes; monitor and control the implementation of the Regional Indicative Strategic Development Plan in its area of competence; provide policy guidance to the Secretariat; make decisions on matters pertaining to the directorates; monitor and evaluate the work of the directorates; and create such permanent or ad hoc subcommittees as may be necessary to cater for cross-cutting sectors. Decisions of the Integrated Committee of Ministers are taken by consensus.⁵⁴ The Committee is also pivotal in regional policy adoption because it provides policy guidance to the SADC Secretariat and makes recommendations to the Summit.⁵⁵

Being a new institution it is not possible to establish its effectiveness right now, and only time will tell what its role is to become.

⁵⁴ Provisions on the Integrated Committee of Ministers are found in Article 12 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵⁵ See also C Landsberg "The Southern African Community's Decision-making Architecture" in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 69.

3 4 5 Standing Committee of Senior Officials

The Standing Committee is a technical advisory committee to the Council. This Committee consists of one permanent secretary or an official of equivalent rank from each Member State, coming from the ministry that is the SADC National Contact Point in that State. The Chairperson and Vice-Chairperson of the Standing Committee are appointed from the Member States holding the chairpersonship and deputy chairpersonship, respectively, of the Council. The Standing Committee processes documentation from the Integrated Committee of Ministers to the Council. It has to report to and is accountable to the Council. The Committee meets four times a year.⁵⁶

This institution helps to coordinate both national and regional matters as the permanent secretaries at national level mostly belong to the technical staff within the relevant ministries and thus have more overall knowledge on the implementation of national programmes than the relevant minister himself.⁵⁷ Channelling regional matters into the national realm can be easier this way. However, the selection of a permanent secretary from only one ministry does not seem to be guided by the need for efficiency. If the role of the Standing Committee is to advise the Council, then this responsibility should be given to experts in matters of regional integration instead of senior government officials who, sometimes, are not even appointed on merit but mainly on political affiliation. Worse still, the ministry which functions as the so-called “SADC National Contact Point” could still be a foreign affairs ministry or any other ministry which could have very little to do with integration issues, seeing that most SADC countries do not have a particular ministry on regional integration. Thus, although its role is an advisory one, the vague composition of the Standing Committee does not seem to target the experts required for regional integration matters. However, it could be influential in regional policymaking as it technically

⁵⁶ Provisions on the Standing Committee of Senior Officials are found in Article 13 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵⁷ See also C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar (eds) *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 69.

plays a mediating role between the Council, the Secretariat and the Integrated Committee of Ministers.⁵⁸

3 4 6 Secretariat and Executive Secretary

The Secretariat is the principal executive institution of SADC responsible for strategic planning, co-ordination and management of SADC programmes. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana. The Council determines the structure of the Secretariat and the specifications, descriptions and grading of jobs of its staff.⁵⁹ In terms of Article 14 (1), the Secretariat is responsible for strategic planning and management of the programmes of SADC; implementation of decisions of the Summit, Troika of the Summit, Organ on Politics, Defence and Security Co-operation, Troika of the Organ on Politics, Defence and Security Co-operation, Council, Troika of the Council, Integrated Committee of Ministers and Troika of the Integrated Committee of Ministers; organisation and management of SADC meetings; financial and general administration; and the representation and promotion of SADC. Furthermore, its duties include the coordination and harmonisation of the policies and strategies of Member States; gender mainstreaming in all SADC programmes and activities; submission of harmonised policies and programmes to the Council for consideration and approval; monitoring and evaluating the implementation of regional policies and programmes; collation and dissemination of information on the Community and maintenance of a reliable database. The development of capacity, infrastructure and maintenance of intra-regional information communication technology; mobilisation of resources, co-ordination and harmonisation of programmes and projects with cooperating partners; devising appropriate strategies for self-financing and income generating activities and investment; management of special programmes and projects; undertaking research on Community building and the integration process; and preparation and submission to the Council, for approval, administrative regulations, standing orders

⁵⁸ See also C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar (eds) *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 69.

⁵⁹ Provisions on the Secretariat are found in Article 14 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

and rules for management of the affairs of SADC are also part of its responsibilities.⁶⁰

It is fair to say that the capacity of SADC to plan, design, coordinate and implement its programmes and initiatives is dependent on the capacity, ability, innovation and effectiveness of the Secretariat. It is the think tank and executive arm of the organisation. Although the ultimate decision on major policy issues such as the harmonisation of sales laws might rest with the SADC Summit, the design and model of such an initiative depends on the innovative capabilities and initiative of the Secretariat. Regardless of its capacity and funding constraints, the Secretariat has arguably done its best to execute its mandate within its realistic confines.⁶¹

The Executive Secretary and the Deputy Executive Secretary are appointed for four years, and are eligible for appointment for another period not exceeding four years.⁶² The Executive Secretary liaises closely with other institutions, guides, supports and monitors the performance of SADC in the various sectors to ensure conformity and harmony with agreed policies, strategies, programmes and projects. The Executive Secretary is accountable to the Council. His duties include consultation and coordination with the Governments and other institutions of Member States; undertaking measures aimed at promoting the objectives of SADC and enhancing its performance pursuant to the direction of Council, Summit or on his or her own initiative; promotion of co-operation with other organisations for the furtherance of the objectives of SADC; organising and servicing meetings of the Summit, the Council, the Standing Committee and any other meetings convened on the direction of the Summit or the Council; custodianship of the property of SADC; appointment of the staff of the Secretariat, in accordance with procedures, and under terms and conditions of service determined by the Council; administration and finances of the

⁶⁰ Article 14 (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶¹ C Landsberg "The Southern African Community's Decision-making Architecture" in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 70.

⁶² At the time of conducting this study in 2013, the Executive Secretary Dr Tomaz Augusto Salomao of Mozambique was replaced by Dr Stergomena Lawrence Tax from the United Republic of Tanzania. See point 31 of the Communiqué of the 33rd Summit of SADC Heads of State and Government Lilongwe, Malawi (August 17-18, 2013) available at <http://www.sadc.int/files/5513/7691/9196/COMMUNIQUE_-_18_August_2013.pdf> (accessed 26-08-2013).

Secretariat; preparation of Annual Reports on the activities of SADC and its institutions; preparation of the Budget and Audited Accounts of SADC for submission to the Council; diplomatic and other representations of SADC; public relations and promotion of SADC and such other functions as may, from time to time, be determined by the Summit and Council.⁶³

3 4 7 Tribunal

The Tribunal is an integral part of the SADC Treaty.⁶⁴ It was constituted to ensure adherence to and the proper interpretation of the provisions of the Treaty and its subsidiary instruments, and to adjudicate upon such disputes as may be referred to it.⁶⁵ The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed by a new Protocol to the Tribunal pursuant to the decision of the 32nd Summit of the Heads of State or Government.⁶⁶ Members of the Tribunal are appointed for a specified period of time. The Tribunal is mandated to give advisory opinions on such matters as the Summit or the Council may refer to it. The decisions of the Tribunal are supposed to be final and binding⁶⁷ although the Summit has the decision on any matter relating to SADC.⁶⁸

⁶³ Article 15 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). See also KM Mbuende "The SADC: Between Cooperation and Development – An Insider Perspective" in C Saunders, GA Dzinesa & D Nagar *Region-building in Southern Africa: Progress, Problems and Prospects* (2012) 39-60 at 54-55.

⁶⁴ Article 16 (2) of the Treaty of the Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶⁵ Article 16 (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶⁶ Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique August 18, 2012 point 24. See also W Scholtz "Review of the Role, Functions and Terms of Reference of the SADC Tribunal" (2011) 1 *SADC Law Journal* 197-201 for a discussion on the suspension of the Tribunal.

⁶⁷ Article 16 of the SADC Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶⁸ This is controversial. For example, concerning the decision of the Summit to suspend the Tribunal, Pillay argues "[t]he decision of Summit [...] is clearly illegal and ultra vires. Summit has no power to restrict the Jurisdiction of the Tribunal, not least because it is subject to the Tribunal's Jurisdiction" See AG Pillay "SADC Tribunal Dissolved by Unanimous Decision of SADC Leaders" (2011) available at <<http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf>> (accessed 26-08-2013).

As for the now defunct Tribunal, the Members of the Tribunal were appointed by the Summit of Heads of State or Government pursuant to Article 4 (4) of the Protocol on the Tribunal⁶⁹ during its Summit of Heads of State or Government held in Gaborone, Botswana on 18 August 2005. This paved the way for the inauguration of the Tribunal. The swearing in of its members took place on 18 November 2005 in Windhoek, Namibia.⁷⁰

The Tribunal is currently suspended pending its restructure. This step followed on a decision in a landmark case involving the land reform programme in Zimbabwe.⁷¹ During its 32nd Summit in August 2012, Summit considered the Report of the Committee of Ministers of Justice/Attorneys General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.⁷² Although some may interpret this development as a failure to uphold the rule of law,⁷³ there is optimism that this could be an opportunity for revisiting the Tribunal's jurisdictional powers to create an institution for ensuring rules-based integration. In that case the elements of the rule of law can be retained and be improved to ensure the protection

⁶⁹ Protocol on Tribunal and Rules of Procedure Thereof signed on 07 August 2000 in Maputo Mozambique came into force on 14 August 2011 available at <http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf> (accessed 23-08-2013) will be subsequently replaced by a new Protocol currently being negotiated.

⁷⁰ SADC Tribunal website available at <<http://www.sadc-tribunal.org/>> (accessed 26-08-2013).

⁷¹ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

⁷² Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique August 18, 2012 point 24. The report by Dr Lorand Bartels of the University of Cambridge on the role, responsibilities and terms of reference of the SADC Tribunal was commissioned by SADC in November 2010 and presented to the SADC Member State Ministers of Justice and Attorneys-General Meeting in Swakopmund on 14 and 15 April 2011. For further analysis on the suspension of the Tribunal see M Hansungule "The suspension of the SADC Tribunal Strategic Review for Southern Africa" (2013) 35 *Strategic Review for Southern Africa* 135-145; L Nathan "The Disbanding of the SADC Tribunal: A Cautionary Tale" (2013) 35 *Human Rights Quarterly* 870-892; B Chigara "What should a re-constituted Southern African Development Community (SADC) Tribunal be mindful of to succeed?" (2013) 81 *Nordic Journal of International Law* 341-377; E de Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" (2013) 28 *Foreign Investment Law Journal* 45-63; OC Ruppel "The Case of Mike Campbell and the Paralysis of the SADC Tribunal" in ET Laryea, N Madolo & F Sucker (eds) *International Economic Law Voices of Africa* (2012) Cape Town: Siber Ink 140-158; and W Scholtz "Review of the Role, Functions and Terms of Reference of the SADC Tribunal" (2011) 1 *SADC Law Journal* 197-201.

⁷³ See PN Ndlovu "Campbell v Republic of Zimbabwe: A moment of Truth for the SADC Tribunal" (2011) 1 *SADC Law Journal* 63-79 at 78 and OC Ruppel "The Case of Mike Campbell and the Paralysis of the SADC Tribunal" in ET Laryea, N Madolo & F Sucker (eds) *International Economic Law Voices of Africa* (2012) 140-158 at 152 where he concludes that "the rule of law is in a state of flux in SADC."

of the rights of natural and legal persons involved in cross-border business, including the harmonious interpretation and application of harmonised laws.⁷⁴

The critical role of the future Tribunal in the context of legal harmonisation should not be understated. Although it is quite clear that the jurisdiction of the new Tribunal will be limited to disputes between states,⁷⁵ issues pertaining to the interpretation of harmonised laws or enforcement of such can easily fall under disputes that can be brought forward at state versus state level, particularly where the rights and obligations are derived from a regional community law.⁷⁶ However, based on the historical and cultural ties existing amongst the SADC Member States, there is a perception that disputes, including trade related disputes should be classified as diplomatic issues rather than a way of promoting rules based relations.⁷⁷ Although, this is an anathema to the rules based systems, it must always be borne in mind that SADC is historically an association of friends found on the culture of cooperation and assisting one another more than holding each other to agreements. Even in the African cultural context, litigation is still viewed as an alien way of resolving disputes which only leads to breakdown in relations.⁷⁸ Perhaps it is important to note at this

⁷⁴ For some views on the restructuring of the SADC Tribunal, see G Erasmus "What Future now for the SADC Tribunal? A plea for a Constructive Response to Regional needs" (2012) available at <<http://www.tralac.org/2012/08/22/what-future-now-for-the-sadc-tribunal-a-plea-for-a-constructive-response-to-regional-needs/>> (accessed 23-08-2013).

⁷⁵ Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique August 18, 2012 point 24.

⁷⁶ For a similar view, see G Erasmus "What Future now for the SADC Tribunal? A plea for a Constructive Response to Regional needs" (2012) available at <<http://www.tralac.org/2012/08/22/what-future-now-for-the-sadc-tribunal-a-plea-for-a-constructive-response-to-regional-needs/>> (accessed 23-08-2013).

⁷⁷ On a discussion on whether the SADC system is a rule based system, see G Erasmus "Is the SADC Trade Regime a Rules Based System?" (2011) 1 *SADC Law Journal* 17-34. The Preamble to the SADC Treaty has an interesting statement on how SADC States are related. The Member States recognise that "in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation among the countries of the Region are indispensable to the realisation of these ideals." See Preamble to the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁷⁸ For an insightful discussion on the African traditional justice system, see C Mapaire "Reinvigorating African values for the SADC: The Relevance of Tradition African Philosophy of Law in a Globalising World of Competing Perspectives" (2011) 1 *SADC Law Journal* 149-173. "The African system of justice administration, as epitomised by traditional courts, is inclusive, democratic, open and welcoming to those who seek justice. In contrast to western value-inspired courts, which are intimidating, alienating, complicated, retributive, incarcerating and expensive, traditional courts seek to foster harmony, reconciliation, compensation to the aggrieved, easy and inexpensive access to justice, and the rehabilitation of the offender. It fosters a spirit of communalism, where the individual exists for the benefit of the greater community." See P Holomisa "Balancing Law and Tradition The TCB and its Relation to African Systems of Justice Administration" (2011) 35 *South Africa Crime Quarterly* 17-22 at 17.

stage that, for it to be effective and its rules enforceable, any model for legal harmonisation in SADC must take this reality into account.

3 4 8 SADC National Committees

As a result of the restructuring of SADC a new structure was formed under Article 16A of the Treaty. Each Member State is required to create a SADC National Committee consisting of key stakeholders including government, the private sector, civil society, non-governmental organisations, and workers and employers organisations.⁷⁹ The responsibility of each SADC National Committee is to provide input at the national level in the formulation of SADC policies, strategies and programmes of action; coordinate and oversee, at the national level, implementation of SADC programmes of action; initiate projects and issue papers as an input to the preparation of the Regional Indicative Strategic Development Plan, in accordance with the priority areas set out in the SADC Common Agenda; and create a national steering committee, sub-committees and technical committees. Each national steering committee consists of the chairperson of the SADC National Committee and the chairpersons of sub-committees. Sub-committees and technical committees of the SADC National Committee operate at ministerial and official levels. A national steering committee is responsible for ensuring rapid implementation of programmes that would otherwise wait for a formal meeting of the SADC National Committee.⁸⁰

The nature and role of the National Committees is outlined in the Treaty. However, there is little consistency between the Treaty and the 2003 SADC National Committees guidelines. Worse still, there is a contention that the National Committees being formed do not conform to the formal provisions.⁸¹ This should be avoided. However, overall, the National Committees can play a key role in making sure that citizens effectively participate in SADC affairs so as to derive maximum benefits from it. Participation at national level could be vital for incrementally

⁷⁹ See Article 16A (13) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁸⁰ Article 16A of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁸¹ See GH Oosthuizen *The Southern African Development Community: The Organisation its Policies and Prospects* (2006) 205.

furthering the regional agenda. Without full participation of citizens in SADC programmes and initiatives, there cannot be any meaningful integration.⁸²

3 4 9 SADC Parliamentary Forum

The Southern African Development Community's Parliamentary Forum (SADC PF) is an inter-parliamentary institution which was launched in July 1996 and was officially approved, in accordance with Article 9 (2) or Article 10 (6) of the SADC Treaty, by the SADC Summit of Heads of State and Government in Blantyre, Malawi, on 8 September 1997. It is not provided for in the SADC Treaty as is the case with the other eight institutions discussed above. The Communiqué of the Summit which adopted the SADC PF states that the main objective of the SADC PF is "to constitute a parliamentary consultative assembly ... to establish a regional parliamentary framework for dialogue issues of regional interests and concern." The main role of the Parliamentary Forum is to provide a platform for parliaments and parliamentarians to promote and improve regional integration in the SADC region by bringing regional experiences to bear at the national level so as to promote best practices in the role of parliaments in regional cooperation and integration as outlined in the SADC Treaty and the Forum Constitution. However, the SADC PF is characteristically "a loose association of national parliaments" which has not been able to participate influentially in the decisions and programmes of SADC.⁸³ The name Parliament suggests something that is beyond the scope of the SADC PF because it is not involved in the legislative processes of SADC in any meaningful way. Despite the restructuring of SADC in the turn of the millennium, the SADC PF was not incorporated into the Treaty as one of the premier institutions of SADC.

It could be expected that the SADC PF, being composed of members of national parliaments, would take a significant and leading role in the legislative endeavours of SADC. The European Parliament, for example, is a regional parliament that plays a

⁸² The National Committees are still largely ineffective and hardly any SADC State can claim to have a functioning National Committee. See C Landsberg "The Southern African Community's Decision-making Architecture" in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 73.

⁸³ See T Musavengana "The Proposed SADC Parliament: Old Wine in New Bottles or an Ideal whose time has come?" (2011) vi available at <<http://www.issafrica.org/uploads/Mono181web.pdf>> (accessed 23-08-2013).

significant role in regional legislation. Perhaps, the difference is also inherent in that those are regional parliaments; yet, the SADC PF is merely a “forum” for members of national parliaments.

The challenges of the SADC PF are apparent in that the institution is weak and plays no meaningful role. To try and remedy this situation, the SADC PF has gone so far as developing a draft protocol on the establishment of the SADC parliament which defines, among other issues, the powers, functions and relational linkages among the proposed parliamentary body, national parliaments and other organs of SADC. Although this is a commendable step, there is still uncertainty on whether this protocol will be adopted by the Summit. It is also extraordinary for a protocol to emanate from the SADC PF as it does not have legislative powers within SADC.

Whatever the case may be, it is important to note that parliaments are the true elected representatives of the peoples in the region. The national executives, through Summit and Council, primarily run SADC. Invariably, their legislative instruments undergo parliamentary approval in national parliaments. This process could be cut short for the purposes of legal harmonisation by establishing a supranational parliament with the power to enact laws at regional level. This would legitimise regional legislative activities.⁸⁴ Without transformation, the SADC PF will remain an “association” without effective authority to play a significant role in legal harmonisation.

3 5 TRADE AND DEVELOPMENT IN SADC

3 5 1 The SADC economy and trade relations

An important objective for each Member State of the Southern African Development Community is to achieve sustained economic growth and sustainable development so that the people in the region could have better living standards and employment opportunities. Poverty remains one of the greatest challenges in the SADC region,

⁸⁴ See also P Wanyande “The Role of the East African Legislative Assembly” in R Ajulu (ed) *The Making of Region: The Revival of the East African Community* (2005) 63-75 at 70.

with approximately half of the population living on less than US\$ 1 a day.⁸⁵ Hunger, malnutrition, gender inequalities, exploitation, marginalisation, high morbidity, and HIV/AIDS are a few of the complex challenges that contribute to poverty in the SADC region.⁸⁶

Since its inception in 1980 (as SADCC), SADC has formulated policies and strategies for regional integration in support of economic growth and development. The economic benefits expected from regional integration, as shown elsewhere around the world, include increased market size, improved intra-regional trade and investment flows, as well as increased transfer of technology and experience.⁸⁷ As economic cooperation among Member States is central to SADC's mission, the low levels of productivity throughout the region are disconcerting. Poor economic growth, investment and employment can have negative impacts on a region's social and economic development.

Economic development and poverty alleviation remain key goals for SADC. As explained in Part A, these goals can to a large extent be achieved through trade. Trade can take place on different levels, namely intra-regionally between countries within the SADC region; inter-regionally with countries which belong to other economic regions (such as the EU or trade with ECOWAS); and international trade with other countries. This study will take all levels of trade into consideration.

Trade within SADC mainly consists of petroleum oils, agricultural products, electricity and some clothing and textile products. Exports from SADC predominantly consist of the export of resources (for example coal, ferrochromium, manganese ores, platinum, as well as precious metals and diamonds), resource intensive manufactured goods mainly for the automotive industry, some clothing and textiles, and tobacco. Total SADC export trade almost quadrupled between 2000 and 2011

⁸⁵ See <<http://www.sadc.int/themes/poverty-eradication-policy-dialogue/>> (accessed 26-08-2013). About 80% of the population of some Member States - notably Mozambique and Zambia - live in extreme poverty, see C Sasman "Majority of SADC Citizens Poor" (2010) *New Era* 1. See also generally V Benziger "The War against Poverty: Out of the Loop - Causes of Africa's Poverty and Isolation" (2005) 48 *Challenge* 26-50.

⁸⁶ See SADC website available at <<http://www.sadc.int/themes/poverty-eradication-policy-dialogue/>> (accessed 26-08-2013).

⁸⁷ See SADC website available at <<http://www.sadc.int/themes/economic-development/>> (accessed 26-08-2013).

from around US\$ 91 billion in 2000 to about US\$ 353 billion in 2011, although there was a sharp decline of more than 25% in 2009 as a result of the global economic crisis.⁸⁸ Despite such impressive growth, intra-SADC trade remains weak. A comparison of SADC with other regional blocs shows that in those regions intra-regional trade provides the necessary impetus for deeper integration and regional progress. However, SADC is lagging behind most regions.⁸⁹ Even the establishment of the Free Trade Area in 2008 has not done much to improve intra-regional trade.⁹⁰ Intra-regional flows in SADC account for about 20% of total trade⁹¹ - more than in other African regions but well below intra-regional trade in more established regional trading blocs.⁹² Moreover, the bulk of these flows are accounted for by trade with South Africa.⁹³ The most important linkages within the group consist of Swaziland's exports to South Africa, closely followed by South Africa's exports to Zimbabwe, Zambia and Mozambique.⁹⁴ South Africa is also a major export market for Namibia. Zambia's exports to its SADC neighbours are also considerable. However, intra-

⁸⁸ See SADC Statistics on SADC website available at <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> (accessed 26-06-2013).

⁸⁹ See M Yayo Negasi "Trade Effects of Regional Economic Integration in Africa: The Case of SADC" (2009) 29 available at <http://www.tips.org.za/files/13.Trade_effects_of_Regional_Economic_Integration_-_SSD.pdf> (accessed 23-08-2013). See also A Behar & L Edward "How Integrated is SADC? Trends in Intra-Regional and Extra-Regional Trade Flows and Policy" (2011) 12 *The World Bank Policy Research Working Paper 5625* available at <http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/04/05/000158349_20110405125648/Rendered/PDF/WPS5625.pdf> (accessed 02-09-2013).

⁹⁰ A Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" (2009) 21 *South African Mercantile Law Journal* 695-709 at 700.

⁹¹ This is a decrease from previously recorded levels, although it should be noted that statistics are not consistent on this matter. See R Burgess "The Southern African Development Community Macroeconomic Convergence Program: Initial Performance" (2009) 8 *The International Monetary Fund SPN/0914* available at <<http://www.imf.org/external/pubs/ft/spn/2009/spn0914.pdf>> (accessed 04-09-2013). Other recent studies place intra-SADC trade and investment at about 13%. See United Nations *Economic Development in Africa Report 2013: Intra-African Trade: Unlocking Private Sector Dynamism* (2013) 17.

⁹² See United Nations *Economic Development in Africa Report 2013: Intra-African Trade: Unlocking Private Sector Dynamism* (2013) 17 and R Burgess "The Southern African Development Community Macroeconomic Convergence Program: Initial Performance" (2009) 8 *The International Monetary Fund SPN/0914* available at <<http://www.imf.org/external/pubs/ft/spn/2009/spn0914.pdf>> (accessed 04-09-2013).

⁹³ See R Burgess "The Southern African Development Community Macroeconomic Convergence Program: Initial Performance" (2009) 8 *The International Monetary Fund SPN/0914* available at <<http://www.imf.org/external/pubs/ft/spn/2009/spn0914.pdf>> (accessed 04-09-2013). On an updated analysis of SADC Trade flows, see R Sandrey "An Analysis of the SADC Free Trade Area" (2013) available at <<http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf>> (accessed 04-09-2013).

⁹⁴ See United Nations *Economic Development in Africa Report 2013: Intra-African Trade: Unlocking Private Sector Dynamism* (2013) 25-26 and See R Sandrey "An Analysis of the SADC Free Trade Area" (2013) 7 available at <<http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf>> (accessed 04-09-2013).

regional exports from Angola, DRC, Madagascar, and Mauritius account for the lowest in the region.⁹⁵

Regional dependence on trade therefore divides countries into two groups. Botswana, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe depend heavily upon SADC, particularly for imports. These countries source upwards of 50% of their imports from other SADC countries and sell more than 20% of their exports to the region. The remaining countries in SADC maintain much stronger trade relationships with the rest of the world.⁹⁶ Altogether, SADC accounts for less than 2% of world trade.⁹⁷ Exports from SADC for 2000 to 2010 were as follows: 45% to the Asian Pacific Economic Community; 27% to the European Union; 10% within SADC; 3% to the rest of Africa and 15% to the rest of the world. As for imports: 45% were recorded from the Asian Pacific Economic Community; 27% from the European Union; 13% from the rest of Africa; and 15% from the rest of the world.⁹⁸

Trade statistics show that trade levels are paltry. The data shows that not only is intra-regional trade within SADC unimpressive but that inter-regional trade with other regions in Africa and general international trade with countries outside SADC is even poorer. There is therefore a clear need for SADC to increase its trade capacity if the goal of poverty eradication is to be realised. Increased trade efficiency can be a major source of trade generation and economic development. Deepened regional integration should therefore support intra-regional trade and also trade with the rest of Africa and the world. Although the SADC Trade Protocol is the primary instrument

⁹⁵ See R Burgess "The Southern African Development Community Macroeconomic Convergence Program: Initial Performance" (2009) 9 *The International Monetary Fund SPN/0914* available at <<http://www.imf.org/external/pubs/ft/spn/2009/spn0914.pdf>> (accessed 04-09-2013).

⁹⁶ See A Behar & L Edward "How Integrated is SADC? Trends in Intra-Regional and Extra-Regional Trade Flows and Policy" (2011) 7 *The World Bank Policy Research Working Paper 5625* available at <http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/04/05/000158349_20110405125648/Rendered/PDF/WPS5625.pdf> (accessed 02-09-2013).

⁹⁷ See WTO *International Trade Statistics 2012* (2012) available at <http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf> (accessed 02-09-2013).

⁹⁸ See SADC Statistics on SADC website available at <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> (accessed 26-08-2013).

for trade matters in SADC,⁹⁹ the role of the Regional Indicative Strategic Development Plan (RISDP) cannot be overlooked.¹⁰⁰

The RISDP is a comprehensive development and implementation framework guiding the regional integration agenda of SADC over a period of fifteen years (2005-2020).¹⁰¹ It is designed to provide clear strategic direction with respect to SADC programmes, projects and activities in line with the SADC Common Agenda and strategic priorities as enshrined in the SADC Treaty. The purpose of the RISDP is to deepen regional integration in SADC. It provides SADC Member States with a consistent and comprehensive programme of long-term economic and social policies. It also provides the Secretariat and other SADC institutions with a clear view of SADC's approved economic and social policies and priorities.

The ultimate objective of the plan is to increase integration in the region with a view to accelerate poverty eradication and the attainment of other economic and non-economic development goals. The RISDP set the following targets: in the sphere of trade, liberalisation and development a Free Trade Area by 2008; completion of the negotiations for the SADC Customs Union by 2010; completion of the negotiations for the SADC Common Market by 2015; diversification of industrial structure and exports with more emphasis on value addition across all economic sectors by 2015; macro-economic convergence on inflation rate single digit by 2008, 5% by 2012, and 3% by 2018; the establishment of a SADC monetary union and finalising preparation of institutional, administrative and legal framework for setting up a SADC Central Bank by 2016 leading to the launch of a regional currency for the SADC Monetary Union by 2018.¹⁰²

⁹⁹ See 1 4 above.

¹⁰⁰ See the SADC Regional Indicative Strategic Development Plan signed on 01 March 2001 available at <<http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/>> (accessed 26-08-2013).

¹⁰¹ See the SADC Regional Indicative Strategic Development Plan available at <<http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/>> (accessed 26-08-2013).

¹⁰² The Regional Indicative Strategic Development Plan is currently being revised. See also TRALAC "Tralac Policy Brief: The Review of the SADC RISDP Matters" (2013) available at <<http://www.tralac.org/files/2013/08/tralac-Policy-Brief-final-RISDP-Review-20130814.pdf>> (accessed 04-09-2013).

Despite challenges in meeting some of the targets, the Free Trade Area was established in 2008 as envisaged, whilst the establishment of the Customs Union is still work in progress. The delay is attributed to capacity constraints within the SADC Secretariat which led to the late implementation of the Regional Indicative Strategic Development Plan. However, it is anticipated that the establishment of the SADC Customs Union will be reached soon. These delays in the implementation of the SADC Customs Union mean that the steps which are to follow in the chain of integration milestones will be delayed, including the SADC Common Market and Monetary Union.¹⁰³

The RISDP is a very ambitious development plan. It envisages harmonisation of policies, legal and regulatory frameworks that address the business environment and the free movement of all factors of production. This seems to provide a permissive framework for the harmonisation of business laws and in particular sales laws for the facilitation of cross-border trade. However, the RISDP faces challenges in that it has no “legal backbone”. It is not incorporated in the SADC Treaty and neither does the SADC Trade Protocol give it legal force. This has an impact on the overall implementation of the plan and enforcement of its targets.¹⁰⁴ Regardless of this, it remains a blueprint for integration and development; the success of which requires further trade law reform.

3 5 2 The necessity of further trade law reform

Although significant progress has been achieved in terms of reduction in tariffs between SADC Member States, these strides are essentially a direct result of SACU and the launch of the Free Trade Area in 2008. By their nature, customs unions and free trade areas lead to reduced tariffs. However, there still remain a number of non-tariff barriers which hinder trade amongst these countries. The discussion in Part A showed that non-tariff barriers range from transport costs, immigration controls and delays, lack of infrastructure to diverse laws. These aspects still remain major barriers to free trade and economic growth in the region.

¹⁰³ See SADC website available at <http://www.sadc.int/about-sadc/integration-milestones/customs-union/> (accessed 26-08-2013).

¹⁰⁴ See A Saurombe “The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis” (2009) 21 *South African Mercantile Law Journal* 695-709 at 699.

This study focuses on diverse, fragmented, uncertain and unpredictable laws as a barrier to cross-border trade. Diversity in itself is not a problem; however, it becomes a problem when it affects trade and therefore economic growth. This invariably interferes with the goals and aspirations of SADC itself. Although there is no empirical evidence showing the direct relationship between economic growth and harmonised laws, analysts argue that there is a potential of increased trade in a harmonised system due to the predictability and accessibility of the laws applicable.¹⁰⁵ Further, economic integration needs a legal framework to facilitate and sustain it. It is widely acknowledged that conflicts and divergences arising from the laws of different states in matters relating to international trade constitute an obstacle to the development of trade.¹⁰⁶

Many African development economists as well as the 1980 Lagos Plan of Action see regional economic integration as a vehicle for enhancing economic and social development of the African countries.¹⁰⁷ The Lagos Plan of Action underlined Africa's objective of attaining a more self-sufficient and more economically integrated continent through, *inter alia*, the accelerated process of regional economic integration.¹⁰⁸ The idea is reinforced by the relatively successful experience of

¹⁰⁵ I Schwenzer "Regional and Global Unification of Sales Law" (2011) 13 *European Journal of Law Reform* 370-379 at 370, details the development of trade mainly because of trade reform. "The law, being a vehicle for economic co-operation and development, is required to facilitate such growth and with the increase in international trade there has been a corresponding increase in the demand for legal co-ordination and harmonisation." See J Coetzee & M De Gama "Harmonisation of Sales Law: An International and Regional Perspective" (2006) 10 *Vindobona Journal of International Commercial Law and Arbitration* 15-26 at 15. "Unified law promotes greater legal predictability as well as legal certainty, both essential for the investment climate and economic development in general." See OC Ruppel & FX Bangamwabo "The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration" in A Bösl, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook Volume 8 2008* (2008) 179-221 at 207.

¹⁰⁶ See General Assembly Resolution 2205 (XXI) of 17 December 1966 section I, United Nations Commission on International Trade Law Yearbook Volume I: 1968-70 (1971) 65. See also M Ndulo "The Promotion of Intra-African Trade and the Harmonization of Laws in the African Economic Community: Prospects and Problems" in MA Ajomo & O Dewale (eds) *African Economic Community Treaty: Issues, Problems and Prospects* (1993) 107-131 at 111-113 and I Schwenzer "Regional and Global Unification of Sales Law" (2011) 13 *European Journal of Law Reform* 370-379 at 370.

¹⁰⁷ See M Ndulo "The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 198.

¹⁰⁸ The Lagos Plan of Action was adopted in 1980 and its central theme was regional integration. It called for the establishment of the African Economic Community by the year 2000. See Organization of African Unity, Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa (Lagos, April 1981). The SADC Treaty in its Preamble states that, the Southern African States in establishing SADC took into account the Lagos Plan of Action and the Final Act of Lagos of April 1980, and the Treaty establishing the African Economic Community at Abuja, concluded on 3 June 1991. See Preamble to the Treaty of The Southern African Development

integration among European States in the European Union and other promising integration schemes such as NAFTA. Development experiences and achievements in these integration schemes have shown that economic cooperation is an important and potentially effective means of facilitating social and economic development.

The relevance and importance of harmonised sales laws to the whole agenda of regional integration in SADC should be understood in the context of the trade agreements and commitments that the members of SADC have made both at national and regional level. Regional integration requires an equally integrated legal system to support and foster it. Meaningful regional integration will be difficult to achieve and sustain without the harmonisation of laws. It is not adequate to harmonise policies of a public nature such as customs regulations without increasing interactions between private traders in the region. The role of SADC Member States in creating an enabling environment for cross-border traders is an important element for deepened integration.

There are fifteen countries in SADC mostly with different legal philosophies, backgrounds and systems, mainly as a result of colonialism. A trade lawyer researching the sales laws of a SADC Member State finds the first hurdle to be in finding the law itself. Most laws are not only inaccessible but often complex rules for determining the applicable law complicate matters even more.

Harmonisation could therefore create a single sales law and harmonise the different laws of the fifteen SADC Member States so that traders will have a community sales law which will be applicable to international sales. Such a harmonised law can facilitate inter-regional trade with traders from other regions since they will be able to use the SADC community law instead of having to find the law if the governing law is to be that of a SADC Member State.

Cross-border trading involves a lot of transactional costs. Invariably these costs are passed on to the consumer who normally is the poor person of the sub-Saharan region. If some of the costs can be reduced or avoided, this will reduce the price of

Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

the goods themselves and hence impact on the lives of many people in this poverty stricken region.¹⁰⁹ The general view is that conflict of laws and forum shopping overburden traders with transactional costs.¹¹⁰ Reducing transactional costs is also an important step towards attracting foreign direct investment into the region. Foreign direct investment, in turn, is a key aspect of economic development for SADC. Efforts towards attracting investment should at the same time look at ways to reduce the costs of doing business in the region, something which many investors consider as key to their decisions on whether to invest or not.

Risk is another key factor in business transactions. It mainly determines the decision on whether to transact or not. Where there is high risk, traders are reluctant to venture. However, where risk is low, there is better potential for and more interest in doing business. Scholars consider uncertainty and unpredictability of the law in sales transactions as a big risk factor for both the buyer and the seller.¹¹¹ For the seller, this might involve uncertainty as to the steps necessary to enforce payment for the goods by the buyer, or where the content of the law is certain the outcome of a dispute might be unpredictable and there might be no certainty on whether the substantive rules will actually be determined in the seller's favour. For the buyer, the question whether the law protects him from non-delivery or defective performance is always a critical one. It will be unwise for either the seller or the buyer to transact without full knowledge as to the effects of the legal issues pertaining to their sales contract.¹¹² Where traders transact in circumstances of legal uncertainty, the consequences are sometimes protracted legal battles and forum shopping which increase transactional costs even more. If the law dealing with the key aspects of a sales contract is uncertain and unpredictable, there is a high level of legal risk involved and both parties will only be able to rely on good faith, which more than often does not prevail in transactions between strangers. In the end, as a way of

¹⁰⁹ Unification, and to a lesser degree harmonisation, reduces transaction costs. JA Yakubu "Community Laws in International Business Transactions" in CM Dickerson (ed) *Unified Business Laws for Africa: Common law Perspectives on OHADA* (2nd edition 2012) 1-6 at 5.

¹¹⁰ Harmonisation of law, which at the same time reduces conflict of laws, results in the significant reduction of transactional costs. L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

¹¹¹ See 1 3 and 2 3 above.

¹¹² See M Ndulo "The Promotion of Intra-African Trade and the Harmonization of Laws in the African Economic Community: Prospects and Problems" in MA Ajomo & O Dewale (eds) *African Economic Community Treaty: Issues, Problems and Prospects* (1993) 107-131 at 111-113.

reducing legal risk traders are forced to restrict themselves to doing business with partners from jurisdictions where legal predictability and certainty are more evident.

Although not all cross-border sales transactions in SADC are regulated purely by domestic laws, in countries that are not party to the CISG or other trade agreements on the sale of goods, this position prevails. A harmonised law will provide traders with a law tailor-made for cross-border transactions.¹¹³ The harmonised law will replace the application of general rules on sales with a specific law formulated with the international nature of the transaction in mind. Normally, the harmonised law will be formulated to address the differences in domestic laws and at the same time will be more sensitive to cross-border transactions, which is not necessarily the case with domestic laws currently applied to international transactions.

Legal reform is often necessary, but requires resources to implement. The process for formulating new law and disseminating information relating to it, so that the people can know, accept and understand it, can be costly. Archaic laws impact negatively on the attractiveness of many countries as investment destinations, which further entrenches underdevelopment. However, most of the poor countries in SADC are deterred from venturing into legal reform initiatives because they do not have the necessary financial resources to sustain the processes. The harmonisation of sales laws in SADC will give the Member States an easy channel to legal reform through a cooperative agenda. This will assist most of the underdeveloped countries that would otherwise not be able to meet the costs and demands of reforming their laws individually. Archaic and colonial laws can also be removed and reformed using a regional cooperative agenda. At the same time legal vacuums can be filled by a modern regional law that can be reformed and changed easily and speedily when needed to keep up with changing trends at regional and international level.¹¹⁴

¹¹³ L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 20.

¹¹⁴ For a number of legal systems, the harmonisation of laws bears fruits of law reform. L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

In conclusion, outdated, unpredictable and uncertain laws across the whole membership of SADC is a barrier to trade and inconsistent with the principle of trade liberalisation and the goal of facilitating trade in the region. A harmonised law might aid in increasing trade in SADC and developing the economies of the region.¹¹⁵ Although the harmonisation of sales laws does not imply faster growth, in practice there seems to be a relationship between free trade and economic growth. As the harmonisation of laws creates a sound framework for enhancing free trade,¹¹⁶ economic growth will follow.

3 6 LEGAL SYSTEMS IN SADC

The history of southern Africa, and particularly that of colonialism, has affected this region on the legal front. The laws of southern Africa are strongly influenced by its history of successive colonial governance.¹¹⁷ The result is that each of the countries in SADC has a legal system that closely resembles or has been influenced by the colonial regimes.¹¹⁸ Because African countries were colonised by different countries with different legal systems, it has left the Member States of SADC with diverse legal systems. The legal systems such as Roman Dutch law, common law and civil law are premised on different legal principles making them more difficult to reconcile. Moreover, after gaining independence, the Member States have gone on to develop the colonial laws within their national legal systems through either judicial means in

¹¹⁵ See J Coetzee & M De Gama "Harmonisation of Sales Law: An International and Regional Perspective" (2006) 10 *Vindobona Journal of International Commercial Law and Arbitration* 15-26 at 15. See also JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *The Law Quarterly Review* 530-535 at 531 and OC Ruppel & FX Bangamwabo "The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration" in A Bösl, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook Volume 8 2008* (2008) 179-221 at 207.

¹¹⁶ M Ndulo "The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 211-213 also discusses the need for harmonising trade laws in SADC and argues for the necessity of harmonised trade laws to facilitate trade.

¹¹⁷ See I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 23-24. See also A Barratt & P Snyman "Researching South African Law" (2005) available at <http://www.nyulawglobal.org/Globalex/South_Africa.htm> (accessed 26-08-2013) who discusses specifically the South African legal system and also note that SADC countries were colonised by Britain, France, Portugal, Belgium and Holland whose legal systems still have a telling effect on the laws of the SADC Member States.

¹¹⁸ See also I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 23-25.

the form of case law or through legislative enactments.¹¹⁹ This, in effect, adds to the diversity and uncertainty.

Besides the diversity in the historical origins of the legal systems themselves, the different SADC Member States also have complex legal systems consisting of different sources of law. Indigenous customary law, religious law and constitutional law, which differ from country to country, also occupy different positions within their legal systems. This poses great difficulty in ascertaining the applicable law because, not only are the laws different but also their hierarchy within the broader national legal system. The influence of the political system on the making of laws should also never be underestimated. Different governance structures have a great influence on the making, upholding, revision and implementation of laws, which are important ingredients of the harmonisation process.¹²⁰

From the perspective of trade and investment in SADC, the difficulties posed by the diversity of laws reveals three different dimensions. There is a diversity of laws within each country; a diversity of laws amongst SADC countries; and a diversity of laws between SADC countries and other countries outside SADC, particularly those that have trade relations with the region.¹²¹

South Africa, Botswana, Lesotho, Namibia, Swaziland and Zimbabwe have a generally mixed legal system which resulted from the interaction between the Roman-Dutch law and the English common law.¹²² After several years of independence, the law still reflects residual traits of the process of transplantation,

¹¹⁹ See S Mancuso "Trends on the Harmonization of Contract Law in Africa" (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 162 and I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 24.

¹²⁰ See A Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" (2009) 21 *South African Mercantile Law Journal* 695-709 at 698; M Ndulo "The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 196; and also M Ndulo "The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area" (1987) 3 *Lesotho Law Journal* 127-152 at 129.

¹²¹ In the context of Africa generally see S Mancuso "Trends on the Harmonization of Contract Law in Africa" (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 161 and G Bamodu "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" (1994) 38 *Journal of African Law* 125-143 at 125-128.

¹²² See I Schwenger, P Hachem & C Lee *Global Sales and Contract Law* (2012) 25.

historical disempowerment and colonial takeover.¹²³ The main sources of law in these legal systems consist of the common law (non-statutory or unwritten Anglo-Roman Dutch law), legislation, case law (precedent) and indigenous customary law.¹²⁴ As regards international sales law, Lesotho is the only member of this group that has adopted the CISG.¹²⁵

Malawi, Tanzania and Zambia constitute another category. They were formerly colonised by Britain and hence follow the English common law. The sale of goods in Malawi is regulated under a domestic law, the Sale of Goods Act.¹²⁶ For the purposes of sales contracts, Tanzania has also enacted The Sale of Goods Act.¹²⁷ With regard to Zambia, it is important to note that it has adopted the CISG for the purposes of international sales.¹²⁸ These three are also Anglophone countries.

As former Portuguese colonies, Angola and Mozambique were under Portuguese law during colonial times, although traditional customary law was in many cases generally accepted. On independence, these countries started repealing the old colonial system, its laws and rulings. Understandably, the legislators took the Portuguese legal system as a model when structuring their own. This was the natural option due to the previous colonial ties and the sharing of a common language and legal education. Angola and Mozambique's legal systems can be considered a civil law based (at least as far as the formal legal system is concerned) and legislation is the primary source of law. Courts base their judgments on legislation and there is no

¹²³ See also C Ng'ong'ola "The Vienna Sales Convention of 1980 in the Southern Africa Legal Environment: Formation of a Contract of Sale" (1992) 4 *African Journal of International and Comparative Law* 835-854 at 835-837.

¹²⁴ See also C Ng'ong'ola "The Vienna Sales Convention of 1980 in the Southern Africa Legal Environment: Formation of a Contract of Sale" (1992) 4 *African Journal of International and Comparative Law* 835-854 at 835-837.

¹²⁵ Effective date, 1 January 1988. See CISG: Table of Contracting States on the CISG website available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> (accessed 03-09-2013).

¹²⁶ The Sale of Goods Act 14 of 1967 available on the Malawi Law Society website <<http://www.malawilii.org/mw/legislation/consolidated-act/4801>> (accessed 25-07-2013). see also RE Kapindu "Malawi: Legal System and Research Resources" (2009) available at <<http://www.nyulawglobal.org/globalex/malawi.htm>> (accessed 25-07-2013).

¹²⁷ The Sale of Goods Act, Chapter 214 of the Law of Tanzania (R.E 2002). See also I Schwenzer, P Hachem & C Lee *Global Sales and Contract Law* (2012) 24-25.

¹²⁸ Acceded on the 6th of June and coming into force on the 1st January 1988. See CISG: Table of Contracting States on the CISG website available at <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> (accessed 03-09-2013).

binding precedent as understood in common law systems. These two are Portuguese-speaking countries.¹²⁹

Madagascar, a former French Colony, and the Democratic Republic of the Congo are civil law countries. As such, the main provisions of its private law can be ultimately traced back to the Napoleonic Civil Code, but they have enacted their own Civil Code which covers, *inter alia*, the law of contract.¹³⁰ As a former Belgian colony, the Congolese legal system is primarily based on Belgian law so that its characteristics are similar to those of the Belgian legal system.¹³¹ Both Madagascar and the DRC are francophone countries. The DRC is the only SADC Member State that has joined the OHADA.¹³²

Mauritius's legal system is also based on the French civil law system but with elements of English common law in certain areas such as company law and commercial law.¹³³ The Seychelles was first a French colony and then later fell under British rule, which resulted in them having a mixed legal system (common law and civil law), which is a common trait they share with Mauritius. When Seychelles became a British colony, the substantive civil law was kept as it was, but the criminal law was overhauled. Procedural law was also Anglicised and so too were the laws of evidence, subject to evidential laws inherent to the French civil law. Therefore, the Seychelles' legal system is similar to the English legal system, except that whereas English law is based on case law developments (common law), Seychelles civil law

¹²⁹ See P Rainha "Republic of Mozambique - Legal System and Research" (2008) available at <<http://www.nyulawglobal.org/globalex/mozambique.htm>> (accessed 24-07-2013) and P Rainha "Republic of Angola - Legal System and Research" (2007) available at <<http://www.nyulawglobal.org/globalex/angola.htm>> (accessed 24-07-2013).

¹³⁰ Madagascar is undergoing judicial reform which has seen the development of a new civil and criminal procedure code. The French *code de commerce* is the only codification that has remained unchanged after independence. See K Pillay & A Zimbris "Law and Legal Systems in Madagascar: A Political Sieg" (2013) available at <<http://www.nyulawglobal.org/globalex/Madagascar.htm>> (accessed 15-10-2013).

¹³¹ D Zongwe, F Butedi & C Phebe "The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview" (2007) available at <http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm> (accessed 24-07-2013).

¹³² See P Bahamin "Joining OHADA" (2013) *The Mining Journal Online* available at <http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ_DESIGN_NAME=print_friendly> (accessed 21-08-2013); B Kahombo "The Accession of the DRC to OHADA: Towards National Prosperity by the Unification of Law?" (2012) available at <<http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf>> (accessed 03-09-2013).

¹³³ See STEP Journal website on Mauritius New Developments available at <http://www.stepjournal.org/jurisdictions/jurisdictional_summaries_2012/mauritius.aspx> (accessed 22-08-2013).

is based on the French Napoleonic Code. Seychelles has enacted its own Civil Code which governs, *inter alia*, contract law.¹³⁴

In summary therefore, the traditional legal systems of the fifteen countries can be categorised as follows: Angola, DRC, Madagascar and Mozambique (civil law); Malawi, Tanzania and Zambia (common law); Mauritius and Seychelles (both civil law and common law); and Botswana, Lesotho, Namibia, South Africa and Zimbabwe (Roman Dutch law and English common law).¹³⁵

Differences can be illustrated by means of the example of legal capacity. The age of majority and resultant requirement for contractual capacity is 18 years for Zambia, Zimbabwe, Angola, Mauritius, Tanzania, South Africa, Mozambique, and Malawi, Seychelles and the DRC and 21 years for Botswana, Namibia, Lesotho, Swaziland and Madagascar. Technically this creates problems as it affects the capacity to contract. In the context of breach of contract, the differences in approach towards the issues of specific performance and damages as a remedy for breach of contract between the civil law and common law are well known. The concept of “delivery” is also treated differently under different legal traditions. These are only a few examples to indicate that differences exist which can give rise to legal uncertainty and unpredictability.

Thus, the SADC region has diverse, fragmented and mostly uncertain systems of laws attributable to colonialism and a lack of coherent development during the post-colonial era. The disparity in the legal traditions and systems of Member States hinders trade with and within SADC because of the challenges they pose to cross-border traders. The challenges range from difficulties in determining the applicable law and finding its provisions, obtaining legal advice particularly in SADC’s diverse cultural and linguistic systems, negotiating the law applicable to transactions and

¹³⁴ See the Seychelles Legal Environment website available at <<https://sites.google.com/site/the-seychelleslegalenvironment/legal-system>> (accessed 22-08-2013).

¹³⁵ See composition in OC Ruppel & FX Bangamwabo “The Mandate of the SADC Tribunal and its Role for Regional Integration” in A Bösl, W Breydenbach, T Hartzenberg, C McCarthy & K Schade (eds) *Yearbook for Regional Integration Volume 8 2008* (2008) 179–221 at 205 and also I Schwenzer, P Hachem & C Lee *Global Sales and Contract Law* (2012) 24-25.

also drafting contracts which meet the requirements of the applicable law.¹³⁶ These difficulties imposed by diverse legal systems often translate into increased risk, transaction costs and uncertainty. Traders need to adapt to the different sales laws applicable in different cross-border transactions which makes cross-border trade more complex and costly compared to domestic trade.¹³⁷

The differences in law and the additional transaction costs and complexities that they could generate in cross-border transactions potentially dissuade a considerable number of traders from expanding into markets of other Member States. Diverse and fragmented legal systems thus operate as a barrier to cross-border trading.¹³⁸ The resultant effect is the stifling of international trade and economic growth which affects development, a primary and major goal of the SADC region. Finding a solution to fragmented, diverse and complex sales laws systems is necessary and unavoidable to support regional integration and economic development through free market access and unhindered competition.¹³⁹

In resolving the challenges associated with legal diversity, policy makers must consider solutions that allow the level of flexibility required whilst not compromising

¹³⁶ See M Ndulo "The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)" (1996) 4 *African Yearbook of International Law* 195-225 at 211-213. The same point was made in the European context. See the European Commission "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law" (2011) COM(2011) 635 final available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>> (accessed 23-08-2013). The proposal deals at length with the need and rationale for a harmonised system of sales laws in the EU. The problems identified in the EU proposal reflect the types of challenges that can be faced in any regional trading system contemplating regional harmonisation, and hence will apply to the present investigation into the need for regional sales law harmonisation in the SADC region as well.

¹³⁷ In SADC and Africa generally, the law is even more difficult to find due to poor legal infrastructure and complex legal systems.

¹³⁸ A trader would have peace of mind if "the Courts of the foreign country would deal with questions arising out of collisions at sea, questions of salvage, limitation of liability, freight, mortgages, liens, insurance, agency, sale of goods, stoppage in transition, and bills of exchange (to take only some of the principal matters of mercantile interest) as they would be dealt with in his own country's Courts." See this famous quote from J Kennedy "The Unification of Law" (1910) 10 *Journal of the Society of Comparative Legislation* 212-219 at 214.

¹³⁹ As said in the context of international unification: "Let jurists continue in their routine opposition to international unification of law; nevertheless, that unification will occur without and despite them, just as the *ius gentium* developed in Rome without the pontiffs, and as equity developed in England without the common-law lawyers. Today the problem is not whether international unification of law will be achieved; it is how it can be achieved." See R David "The Methods of Unification" (1968) 16 *American Journal of Comparative Law* 13-27 at 14.

predictability and certainty.¹⁴⁰ This calls for a way of bringing together, to the closest possible extent, the laws of the member countries of the SADC region to make it easy for traders to be aware of the content of law which applies in the region. Harmonisation is capable of removing discord and reconciling the rules and effects of two or more legal systems. It can provide a sound and workable framework for creating predictability and removing uncertainty.

3 7 MAJOR CHALLENGES FOR LEGAL HARMONISATION IN SADC

Although the harmonisation of sales laws in SADC could facilitate economic development and foster regional integration, the experience from other regions has shown that the achievement of legal harmonisation is often associated with various challenges that have also proved to be deterrent factors. The general challenges encountered in harmonising laws are a lack of financial resources, capacity constraints, and other social, economic and political challenges inherently involved in attempting to bring together the fragmented, outdated and diverse sales laws of a region of characteristically underdeveloped and developing countries. Several factors may be considered as challenges to the harmonisation of laws in the SADC region. Apart from the diversity of legal cultures and traditions and the challenge posed by the diversity of languages and overlapping or multiple memberships of REC's, other challenges such as the significant absence of well-developed and efficient institutional arrangements to coordinate and facilitate the harmonisation of laws in SADC and the lack of resources and capacity to carry out and sustain the harmonisation process also require consideration.

3 7 1 Legal systems in SADC

The biggest challenge to addressing the diversity of laws in SADC is diversity itself. As already mentioned above, SADC is characterised by various legal systems and traditions with different sources of laws and hierarchies. Added to that are mostly post-independence endeavours to reform colonial laws and in some instances

¹⁴⁰ See also from a European perspective O Lando "The Principles of European Contract Law and the *Lex Mercatoria*" in J Basedow, I Meier, AK Schnyder, T Einhorn & D Girsberger (eds) *Private law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000) 391-404 at 394.

having to align them with indigenous customary laws and practices. In other instances, successive colonial governments left different legal traditions and thought. Perhaps the diversity of legal systems across the membership of SADC is a paradox in that they generally follow the law of their former colonisers which streamlines the diversity to English common law, civil law and the Roman-Dutch law.¹⁴¹ In any case, legal harmonisation thrives on diversity.¹⁴²

3 7 2 Multilingualism

The countries in the SADC region consist of many ethnic societies that have constitutionally guaranteed cultural rights which include the right to the preservation of minority languages. Although that may not be a major challenge as every country will have official languages that are used in the legal realm, the role that language plays in building legal tradition and to understand the content of a law should not be underestimated. Assessing the effect of different linguistic communities on harmonisation efforts is important in determining the impact on the ultimate product. Thus, the issues are whether these linguistic communities negatively impact on the harmonisation of sales laws in the region or whether harmonisation will reduce the capacity of these communities to make a positive contribution to trade, within the broader context of the SADC goals and aspiration?¹⁴³

Apart from different ethnic and linguistic communities, there are also differences in the official languages used across the region. The Member States of SADC use not one or two of the most recognised international languages, but three; that is English, French and Portuguese. Although the majority of States use English, the presence of French and Portuguese speaking countries in a grouping of fifteen Member States present more problems than would be faced by regions where one or two languages are predominant. A diversity of languages can affect the understanding, implementation and even the process of harmonisation itself, as translations often do

¹⁴¹ See S Mancuso "Trends on the Harmonization of Contract Law in Africa" (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 163.

¹⁴² "It is a paradox of the harmonisation process that it aims at removing differences, but derives its acceptability from diversity." JAE Faria "Future Directions of Legal harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review* 5-34 at 25.

¹⁴³ For a discussion on legal harmonisation in a multilingual society, see PJ Thomas "Harmonising the Law in a Multilingual Environment with different Legal Systems: Lessons to be drawn from the Legal History of South Africa" (2008) 14 *Fundamina* 133-154.

not carry the same meaning as the original, which is a factor that is important for legal predictability and certainty. The example of Cameroon as a Member State of the OHADA is a very interesting one in this regard, in view of its bilingual system recognising both French and English with equal status under the Cameroonian Constitution.¹⁴⁴ Diversity in language certainly poses challenges, but at the same time it should be kept in mind that having a law in different languages would enhance its accessibility.

3 7 3 Overlapping memberships

A proliferation of regional trading groups in Africa has resulted in overlapping memberships.¹⁴⁵ There are fourteen regional economic communities with broadly similar objectives but technically different programmes, processes and institutions to certain degrees. Some members of SADC are also members of the EAC and COMESA. Recently the DRC have also acceded to the OHADA. The EAC and COMESA have internal harmonisation projects already underway. In some instances, unless the concerned Member States choose to belong to only one of the communities, there is a potential for conflict in the rights and obligations arising from multiple memberships. It is difficult to see how competing obligations under different communities can be reconciled. In the case of SADC, EAC and COMESA, a tripartite forum has been created to coordinate the programmes and policies of the three communities. Whether this will lead to a plausible solution in for the problem of overlapping memberships is still to be seen. A grand tripartite legal harmonisation project overriding the individual community projects could assist in resolving the challenges that could arise if the three communities were to embark on three parallel harmonisation projects. The further challenge posed by tripartite Member States that

¹⁴⁴ The implementation for OHADA Uniform Laws in Cameroon has caused some challenges sometimes due to the its bilingual and bijural system. See CM Dickerson "The Cameroonian Experience under OHADA: Business Organisations in a Developing Economy" (2007) 112 *Business and Society Review* 191-213; CM Dickerson "The Introduction of OHADA Law in Anglophone Countries: Linguistic Challenges" (2008) *Revue de droit des affaires internationales* 743-750. AO Amegatcher "The OHADA Treaty from an Anglophone Perspective" (2008) 2 *Ghana Policy Journal* 111-123. See also generally P Konings & FB Nyamnjoh "The Anglophone Problem in Cameroon" (1997) 35 *The Journal of Modern African Studies* 207-229.

¹⁴⁵ See UNECA and AU Assessing Regional Integration in Africa II, Rationalizing Regional Economic Communities (2006) 50-55.

have acceded to the OHADA might be difficult to resolve unless cooperation and coordination is also sought with the OHADA.

3 7 4 Absence of well-developed and efficient institutional arrangements to coordinate and facilitate the harmonisation of laws

SADC underwent significant institutional transformation from being a coordinating committee to a development community. This was a major step towards building institutional capacity to carry out its ambitious goals. Although SADC has established these institutions, there are currently no dedicated or sufficiently empowered institutions for the harmonisation of laws. A harmonisation process requires strong institutions to foster and sustain it. The current institutions are not adequately empowered to enact laws, implement, enforce and sustain legal harmonisation. This does not come as a surprise as SADC does not have the harmonisation of laws as one of its explicit objectives.¹⁴⁶ However, this mandate is inherent to its nature as a regional community. The structural challenge could be resolved by revising the SADC Treaty and thereby creating the necessary institutions for legal harmonisation or extending the mandate of the existing structures.

3 7 5 Lack of resources and the capacity to carry out the harmonisation process

SADC has transformed itself on the turn of the millennium to embark on a more robust but very ambitious integration process. It has aspirations to cooperate and integrate the national economies into one monetary union with a common currency. It has set targets mainly on poverty alleviation, employment creation and development. These programmes and goals are noble and achievable. The huge challenge that faces the attractive plans of SADC is lack of implementation mainly due to lack of capacity and financial resources. Although SADC is primarily funded by its Member States, it fundamentally relies on donor funding to carry out its programmes and activities. The resources at the disposal of SADC are not adequate to implement its programmes. Legal harmonisation is a costly exercise which requires funding. The OHADA has largely succeeded because it has received

¹⁴⁶ See discussion at 3 3 and 3 4 above.

assistance from outside, even though funding constraints still cripple some of its operations. Limited resources might be a major deterrent factor towards embarking on the process of legal harmonisation considering other cost contributing factors already highlighted above.

3 8 CONCLUSION

SADC is the premier institution for trade, cooperation and economic development in Southern Africa. It has institutions that have been created to foster regional integration and cooperation in line with SADC objectives. Its goal is to boost economic development through trade and ultimately eradicate poverty. However, the levels of cross-border trading in the region are very low. Measures need to be taken to ensure that there is a free flow of goods, services, investment, capital and labour. The existence of diverse national sales laws acts as a barrier to the free flow of trade. The harmonisation of sales laws is therefore a necessary ingredient of the SADC Common Agenda as implemented through the Regional Indicative Strategic Development Plan (RISDP).

Legal harmonisation comes with benefits to trade and economic development in SADC mainly through the facilitation of trade. Although there are challenges, these seem to be far outweighed by the benefits. Some of the challenges can be counteracted by choosing the appropriate technique for the harmonisation of laws. Experiences from other legal harmonisation initiatives can provide some insight into how the process could be handled in SADC. However, an appreciation of the fact that the current situation is hampering the free flow of trade is important in order to find the appropriate solutions. It is therefore disconcerting that within the context of legal diversity that exists in the region, there is no community law on sales and neither is there any notable objective to create harmonised law particularly to facilitate cross-border trading.

It is concluded that SADC needs a harmonised community law that will facilitate international trade. Before coming to a conclusion on how such a community law can be achieved and providing the necessary recommendations, it is important to look at some of the existing models on the subject. The next part of this study is devoted to

a critical analysis of different examples of harmonised sales law which are available internationally or in a regional context. The purpose of this analysis is to investigate the nature, characteristics, pros, and cons of these examples and to evaluate them as possible models or options for the harmonisation of sales laws in the SADC region.

**PART C: SELECTED MODELS FOR HARMONISING
THE LAW OF SALE IN SADC**

CHAPTER 4

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

4 1 INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) is one of the most established and leading organisations in the area of international trade. The Commission has produced a number of successful instruments for the harmonisation of international trade laws of which the United Nations Convention on Contracts for the International Sale of Goods (CISG) is a leading example. The CISG is hailed across the globe for its success in harmonising the law relating to the sale of goods at international level which is evidenced not only through the volume of trade that is conducted by countries that have ratified the Convention, but also by the geographic sphere of its operation which reaches across different legal, social, economic and political traditions. To date the CISG has had remarkable influence on international and regional projects towards the harmonisation of laws and has functioned as the point of reference for the UNIDROIT Principles, the Principles of European Contract Law, the Common European Sales Law, the OHADA Uniform Acts and many more. It has even been used as the standard for the revision of national sales laws, such as in the case of Article 2 of the American Uniform Commercial Code, the German Law of Obligations, the Dutch Civil Code and Chinese Contract Law. However, the CISG has also attracted criticism on its limited scope of application and the interpretational challenges it present. It is therefore important that this analysis should reflect a balanced viewpoint as the conclusions reached here will influence the recommendations made in the end.

This chapter focuses on the role that the CISG can play in the harmonisation of sales law within the SADC region. At the same time it also investigates whether UNCITRAL as an international organisation with a mandate to promote the

harmonisation of trade law can facilitate such a harmonisation process. For this reason, it is important to trace the history, institutional and operational mechanisms of the organisation, its working methods and progress thus far. The discussion will show that UNCITRAL should not be perceived as a “foreign” or Eurocentric organisation based on westernised ideas but that there is an underlying relationship between African states and the UNCITRAL which dates back to its inception although its products have not always been fully appreciated by countries in Africa.

4 2 UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by way of resolution 2205 (XXI) of 17 December 1966.¹ It is an international intergovernmental organisation mainly tasked with the progressive development and reform of the law of international trade.² UNCITRAL furthers the progressive harmonisation and modernisation of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law, including dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and the sale of goods. Other functions that are undertaken by UNCITRAL includes a range of technical assistance activities to promote its work and the use and adoption of the legislative and non-legislative texts it has developed to further the progressive harmonisation and unification of private law. UNCITRAL is also tasked with coordinating and promoting the work of other organisations involved in international trade law, establishing a regional presence and publishing materials for the development of international trade law. It maintains close ties of co-operation with other international organisations, both intergovernmental and non-governmental, which in many cases take the form of co-operation agreements

¹ See UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume 1: 1968-70 (1971) 65.

² See United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section I in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 65. The Commission's first session was convened in January 1968 at United Nations Headquarters in New York. See EA Farnsworth “UNCITRAL - Why? What? How? When?” (1972) 20 *American Journal of Comparative Law* 314-322 at 314 and J Honnold “The United Nations Commission on International Trade Law: Mission and Methods” (1979) 27 *American Journal of Comparative Law* 201-211 at 201.

concluded at inter-Secretariat level.³ The three private law formulating agencies, UNCITRAL, the Hague Conference on Private International Law and UNIDROIT, “are quite appropriately referred to as the three sisters.”⁴

The relationship between Africa and UNCITRAL dates back to the formation of the Commission. In an explanatory memorandum accompanying a request to the General Assembly for the formation of UNCITRAL, the Hungarian Permanent Representative said the following:

“Recently the United Nations has undertaken special efforts towards the development of international trade, having regard particularly to the general interest of the community of nations in the advancement of the developing countries. A thorough study of the legal forms of international trade, their possible simplification, harmonization and unification, would be well suited for this purpose. Governments, learned societies and international organizations have thus far done commendable work in this field. This work, however, is done mostly on a regional basis and practically without the participation of representatives of the greatly interested States of Africa and Asia.”⁵

This statement shows that at that time there was a need to bring African and Asian States to the table when shaping an international unified sales law since they were not part of the previous harmonisation endeavours by The Hague Conference and UNIDROIT. The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) had primarily a European focus,⁶ which was in the end one of the main reasons for their demise. There was therefore a clear need for an organisation that represented all nations of the world.

³ See the United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section II in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 66.

⁴ See *UNIDROIT: An Overview* (2012) 5 available at <http://api.ning.com/files/f*Vgn5il1A4TZHe4QO iBxAAKwd417vwiR4KV1Z88-LW259rMVgbKwWFBT3GXbzxLMuMvt0eluWrVFZLWNcawAGht0ym XkUTE/Unidroit.orgINTERNATIONALINSTITUTEFORTHEUNIFICATIONOFPRIVATELAW.pdf> (accessed 20-09-2013).

⁵ See UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 5.

⁶ See SK Date-Bah “The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States” (2011) 13 *European Journal of Law Reform* 360-369 at 361-362 and also EA Farnsworth “UNCITRAL - Why? What? How? When?” (1972) 20 *American Journal of Comparative Law* 314-322 at 315-316. See also 2 1 above on the history behind the CISG including the earlier works on the unification of international sales law and the reasons why the ULFIS and the ULIS failed.

The first membership of the Commission was numerically distributed in favour of Africa with seven seats against five from Asian States, four from Eastern European States, five from Latin American States and eight from Western European and other States.⁷ Africa, furthermore, played quite a significant role right from the formation of UNCITRAL in that at its first and second meetings, on 29 and 30 January 1968, the Commission elected the Ghanaian representative, Ambassador Emmanuel Kodjoe Dadzie, as its first Chairman.⁸ This was the session and the year that prioritised work on the harmonisation of international sales law.⁹ Three African countries, namely Ghana, Kenya and Tunisia were members of the very first Working Group on Uniform Rules Governing the International Sale of Goods and the Law Applicable Thereto.¹⁰ Also, in 1978, the year when the Final Draft of the CISG was finalised, former Justice Date-Bah of the Supreme Court of Ghana was UNCITRAL's Chairman.¹¹ He also presided over the session at which the rules on contract formation were adopted.¹² It is, therefore, undeniable that African states have been involved in the work of UNCITRAL from the time of its formation. UNCITRAL's work is furthermore organised in a way that ensures transparency and accountability to all states in the United Nations and at the same time guarantees participation by African states.

A brief outline of UNCITRAL's structure is subsequently provided.

⁷ See the United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966 section II para (1) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 66. Members from African states were Nigeria, Tunisia, Democratic Republic of Congo, Kenya, Tanzania, Ghana and the United Arab Republic (now Egypt). See Annual Report of the Commission (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 72.

⁸ See Report of the Commission: I. the First Session (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 73.

⁹ See Report of the Commission (1968) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 77.

¹⁰ See Report of the Commission: II. The Second Session (1969) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume I: 1968-70* (1971) 99; SK Date-Bah "The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States" (2011) 13 *European Journal of Law Reform* 360-369 at 262.

¹¹ See Report of the United Nations Commission on International Trade Law on the work of its eleventh session (New York, 30 May-16 June 1978) (A/33/17) in UNCITRAL *United Nations Commission on International Trade Law Yearbook Volume IX: 1978* (1981) 12. See also SK Date-Bah "The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States" (2011) 13 *European Journal of Law Reform* 360-369 at 362.

¹² See SK Date-Bah "The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States" (2011) 13 *European Journal of Law Reform* 360-369 at 362.

4 2 1 Organisation and structure

UNCITRAL's work is organised and conducted at three levels. The first level is UNCITRAL itself, often referred to as the Commission, which holds an annual plenary session. The second level is the intergovernmental working groups, which to a large extent undertake the development of the topics on UNCITRAL's work programme, while the third is the Secretariat, which assists the Commission and its working groups in the preparation and conduct of their work.¹³

4 2 1 1 The Commission

The Commission comprises 60 member states elected by the United Nations General Assembly from members of the United Nations. The original membership comprised 29 States and was expanded by the General Assembly of the United Nations in 1973 to 36 States and again in 2002 to 60 States.¹⁴ The composition is structured in such a way as to ensure representation of the various geographic regions and the principal economic and legal systems of the world. The 60 Member States include 14 African states,¹⁵ 14 Asian states, 8 Eastern European states, 10 Latin American and Caribbean states and 14 Western European and other states. These members are elected for terms of six years. After every three years the terms of half of the members expire.

For the duration of each annual session the Member States elect a "Bureau of the Commission" comprising of a chairperson, three vice-chairpersons and a rapporteur representing each of the five regions from which the members of the Commission

¹³ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 5 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

¹⁴ Through United Nation General Assembly Resolutions: The establishment of UNCITRAL: General Assembly Resolution 2205 (XXI) of 17 December 1966 section II para 1 UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 65-66; United Nations General Assembly Resolution 3108 (XXVIII) of 12 December 1973 para 8 in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume V: 1974 (1975) 11-12; and United Nations General Assembly resolution A/RES/57/20 Enlargement of the membership of the United Nations Commission on International Trade Law of 19 November 2002 in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume XXXIII: 2002 (2005) 49-50.

¹⁵ The African states are Algeria, Botswana, Cameroon, Cote d'Ivoire, Gabon, Kenya, Liberia, Mauritania, Mauritius, Namibia, Nigeria, Sierra Leone, Uganda and Zambia. See UNCITRAL website on the current membership available at <<http://www.uncitral.org/uncitral/en/about/origin.html>> (accessed 12-08-2013).

are drawn.¹⁶ Non-member states and organisations with expertise in the topics under discussion are invited to attend both UNCITRAL annual sessions and Working Group sessions as observers.¹⁷ A report of the UNCITRAL annual sessions is submitted to the UN General and also provided to the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) for comment.¹⁸

The Commission carries out its work at annual sessions held alternately in New York and Vienna. The work at these sessions typically includes the finalisation and adoption of draft texts referred to the Commission by the Working Groups; consideration of progress reports of the Working Groups on their respective projects; the selection of topics for future work or further research; reporting on technical assistance activities and coordination of work with other international organisations; monitoring developments in the case law on UNCITRAL texts in a database known as CLOUT; monitoring the status of and promoting UNCITRAL legal texts; the consideration of General Assembly resolutions on the work of UNCITRAL, and other administrative matters.¹⁹ One of UNCITRAL's functions is to assist in law reform through "undertaking law reform assessments to assist governments, legislative organs and other authorities in developing and other countries to review existing legislation and assess their needs for law reform in the commercial field."²⁰ UNCITRAL also assist with the drafting of national legislation to implement UNCITRAL texts. Technical assistance could be useful for law reform and legal development in Africa. This facility should be utilised especially since fourteen of the Commission's members are from Africa.

¹⁶ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 6 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

¹⁷ Regarding the participation of observers in UNCITRAL meetings, see Note by the Secretariat: UNCITRAL rules of procedure and methods of work (A/CN.9/638/Add.5), section IV. Status of observers; and Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17 (A/65/17) (2010), Annex III: UNCITRAL Rules of procedure and methods of work.

¹⁸ See United Nations General Assembly Resolution 2205 (XXI) Establishment of the United Nations Commission on International Trade Law of 17 December 1966 sect. II, para 10 in UNCITRAL *United Nations Commission on International Trade Law Yearbook* Volume I: 1968-70 (1971) 66.

¹⁹ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 6 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

²⁰ For more on UNCITRAL's technical assistance to law reform, see UNCITRAL website available at <http://www.uncitral.org/uncitral/en/tac/technical_assistance.html> (accessed 12-08-2013).

4 2 1 2 Working Groups

The substantive preparatory work for topics on UNCITRAL's work programme is assigned to Working Groups, which generally hold one or two sessions per year and then report back to the Commission. The membership of the Working Groups currently includes all Member States of UNCITRAL. Once a topic has been assigned to a Working Group, the Working Group is generally left to complete its substantive task without intervention from the Commission, unless it asks for guidance or requests the Commission to make certain decisions with respect to its work. At each Working Group session, a chairperson and rapporteur is selected from among member delegates to preside over the work. The secretariat of each working group comprises staff members of the UNCITRAL Secretariat. It is responsible for preparing working papers for Working Group meetings, providing administrative services to that Working Group and reporting on Working Group sessions. Reports are considered and formally adopted at the end of each Working Group session for submission to the annual session of UNCITRAL.²¹

4 2 1 3 Secretariat

The International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat provides the secretariat for UNCITRAL.²² Professional staff members of the Division include a small number of qualified lawyers from different countries and legal traditions, together with the Director of the Division serving as the Secretary of UNCITRAL. The Secretariat undertakes a variety of different tasks, which include preparation of studies, reports and draft texts on matters that are being considered for possible future inclusion in the work programme; legal research; drafting and revision of working papers and legislative texts on matters already included in the work programme; reporting on Commission and Working Group meetings; and the provision of a range of administrative services to UNCITRAL and

²¹ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 7 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

²² It was originally located at United Nations Headquarters in New York, but later relocated to the United Nations Office at Vienna in September 1979, but still formally remaining a part of the Office of Legal Affairs in New York. See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 7 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

its Working Groups. The Secretariat frequently seeks the assistance of outside experts from different legal traditions with whom it conducts *ad hoc* consultations or convenes group meetings. These experts include academics, practising lawyers, judges, bankers, arbitrators and members of various international, regional and professional organisations. In some instances, the Secretariat prepares draft texts with the help of experts instead of the Working Group. In the end these texts still go to the Commission which is composed of Member States.²³

4 2 2 UNCITRAL techniques for the harmonisation of laws

In order to determine the possible value that UNCITRAL as an organisation can bring to the harmonisation of sales laws in SADC, it is necessary to examine the techniques it utilises in achieving harmonised law. UNCITRAL describes the approach with respect to the techniques it uses to perform its mandate of modernising and harmonising the law of international trade as a “flexible and functional approach”.²⁴ The techniques are divided into three broad categories, namely legislative, contractual and explanatory techniques. Legislative techniques encompass both hard and soft law whilst the contractual and explanatory techniques are simply soft law by nature.

4 2 2 1 Legislative techniques

UNCITRAL produces different types of legislative texts, namely conventions; model laws; legislative guides and model provisions. After a working group has prepared the draft text of a convention, model law or other instrument it is submitted for the consideration of UNCITRAL at its annual session. If appropriate, the text may be accompanied by an explanatory commentary prepared by the Secretariat in order to assist participants in their deliberations. Generally, the draft text and the commentary (if prepared) are circulated, before the applicable annual session, to governments and interested international organisations for comment. Again, this shows the

²³ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 9 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

²⁴ UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 13 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

amount of influence States outside the Commission can have on all UNCITRAL's laws. The Secretariat prepares an analysis of comments received which is provided to the Commission to assist in its deliberations on the draft text.

Different procedures apply to the finalisation and adoption of different types of texts. If the text concerned is a draft convention, the established practice is for UNCITRAL to recommend to the General Assembly that an international conference of plenipotentiaries be convened to finalise and adopt the convention and open it for signature.²⁵ If the draft text is to be a model law or a legislative guide, UNCITRAL itself generally finalises the text and formally adopts it. Adoption by a conference of plenipotentiaries is not required. Generally the General Assembly would express its support for the UNCITRAL process by formally endorsing the adopted text and by recommending that States give it due consideration when modernising and reforming their laws.

To become a party to a convention, States are required to deposit a binding instrument of ratification or accession. The entry into force of a convention is usually dependent upon the deposit of a minimum number of instruments of ratification. A convention is normally used where the objective is to achieve a high degree of legal harmonisation in the participating states. A convention reduces the need to undertake research of the law of another State. Except to the extent that they permit reservations or declarations, conventions afford little flexibility to adopting States. The CISG provides for reservations and declarations in terms of Articles 92 to 96.²⁶

On the other hand, model laws, legislative guides and recommendations and model provisions are generally finalised and adopted by UNCITRAL at its annual session,

²⁵ The United Nations General Assembly acted as the conference of plenipotentiaries for a number of draft conventions. Examples are the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), (1989) 28 I.L.M. 170; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) 2169 UNTS 163; and the United Nations Convention on the Assignment of Receivables in International Trade (2001), (2002) 41 I.L.M. 777.

²⁶ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 14 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

as opposed to adoption of a convention which is done at a diplomatic conference.²⁷ Legislative guides and recommendations are formulated when it is not possible to draft specific provisions in a suitable or discrete form such as a convention or a model law. Model provisions of conventions opposed to model contract clauses are adopted when a number of conventions deal with a particular question in a way that may require unification and modernisation.²⁸

4 2 2 2 Contractual techniques

Standardised contract clauses have numerous advantages for legal harmonisation and for traders. Standard contracts or uniform contract clauses identify the issues that parties should address in their contracts. At the same time, they ensure that the clause is drafted in a manner that is effective and reduces transaction costs, rational and valid and which provides internationally recognised and up-to-date solutions to specific issues. One common example is in the field of dispute resolution where a contract can include a standard dispute resolution clause referring to the use of internationally recognised rules for the conduct of dispute resolution proceedings. Another example is the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983). As is the case with model laws and legislative guides, a text using the contractual technique is finalised and adopted by the Commission.²⁹

4 2 2 3 Explanatory techniques

Legal guides and interpretative declarations are examples of explanatory techniques. Where it is not feasible or necessary to develop a standard or model set of contract

²⁷ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 18 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013).

²⁸ For example, the United Nations Convention on the Assignment of Receivables in International Trade (2001), (2002) 41 I.L.M. 777 contains an annex (of optional substantive law provisions) supplementing the conflicts of laws rules of the Convention that deal with priority issues. Also in 2003, UNCITRAL adopted the Model Legislative Provisions on Privately Financed Infrastructure Projects, which complements the legislative guide on the same topic.

²⁹ See UNCITRAL *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013) 18 available at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>> (accessed 12-08-2013). The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980) are examples of such internationally recognised uniform rules.

terms, an alternative may be a legal guide giving explanations concerning contract drafting.³⁰ The focus of a legal guide may not be exclusively on contract drafting, but may have a broader purpose of discussing issues that would also be of interest to legislators and regulators. One example is the UNCITRAL Legal Guide on Electronic Funds Transfers (1986), which discusses issues relating to the use of electronic means of communication in making international payments. Interpretative declarations are adopted to assist in the uniform interpretation of UNCITRAL texts by specifying or clarifying the meaning or scope of a convention and its provisions.³¹ Legal guides and interpretive declarations are finalised and adopted by the Commission.

4 3 THE CISG

4 3 1 Background to the CISG

In 1968, shortly after its inception, UNCITRAL set out to develop an effective uniform international sales law. Work began with Member States being asked to comment on the ULIS and the ULFIS in order to establish why they never gained international favour and to create a way forward.³² In 1970, the Working Group on Sales Law started to prepare drafts for the plenary UNCITRAL sessions, which drafts were based on the ULIS and the ULFIS. It appointed Working Groups which focused on specific issues such as the definition of the international sales of goods.³³ This culminated in the first draft uniform law which was finalised in January 1976 and revised by UNCITRAL at its tenth session in 1977. The rules on the formation of the contract which had been prepared by the Working Group on its ninth session in 1977 were discussed by the UNCITRAL in 1978 at its eleventh session and merged with

³⁰ The first legal guide was the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works (1987) followed by the UNCITRAL Legal Guide on International Countertrade Transactions (1992) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

³¹ See also for example Article 20 of the United Nations Convention on the Use of Electronic Communications in International Contracts adopted on 23 November 2005 in New York available at <http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html> (accessed 12-08-2013) which refers the application of this particular convention to the interpretation of earlier conventions.

³² See I Schwenzler (ed) *Schlechtriem & Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 2.

³³ See I Schwenzler (ed) *Schlechtriem & Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 2.

the substantive draft to form what became the New York Draft. This was the Final Draft which was circulated to the United Nations Member States for comment.³⁴ This draft and the comments received formed the basis for the Vienna Conference in 1980. At this Conference, delegates from 62 nations deliberated on the Draft Convention and 42 countries voted in favour of its adoption.³⁵ The United Nations Convention on Contracts for the International Sale of Goods (the CISG) received the requisite number of ratifications on 11 December 1986 and it came into force on 1 January 1988.³⁶

The CISG was adopted to bridge the gap between the different legal systems of the world, mainly between the civil law and the common law by creating a uniform law for the international sale of goods.³⁷ It is a uniform sales law - a single collection of default rules that apply to sales contracts within its scope, which is to govern the formation of the contract of sale as well as the rights and obligations of the buyer and seller.³⁸ However, the CISG is not merely a codification of existing rules of international trade, but is part of a progressive effort toward harmonising diverse approaches to international law led by UNCITRAL.³⁹ It has been described as “a workmanlike attempt to devise legal rules and practical procedures for international sales transactions” using language which is “free of legal shorthand, free of complicated legal theory and easy for businessmen to understand,” because “it is, after all, businessmen who must understand the meaning of the provisions.”⁴⁰

³⁴ On a brief background to the Convention, see P Schlechtriem *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (1986) 17-20.

³⁵ I Schwenzer (ed) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 3.

³⁶ Article 99 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980) required 10 ratifications for the convention to come into force. See also I Schwenzer (ed) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 3. From Africa, Egypt, Lesotho and Zambia were amongst the first eleven countries to deposit their instruments of ratifications. See also JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 1.

³⁷ See Preamble to the United Nations Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980), Reprinted in 19 I.L.M. 671 (1980).

³⁸ S Walt “The CISG’s Expansion Bias: A Comment on Franco Ferrari” (2005) 25 *International Review of Law and Economics* 342-349 at 342.

³⁹ See AC Esslinger “Contracting in the Global Marketplace: The UN Conventions on Contracts for the International Sale of Goods” (2007) 31 *ALI-ABA Business Law Course Materials Journal* 43-46 at 43.

⁴⁰ K Sono “The Vienna Sales Convention: History and Perspective” in P Sarcevic & P Volken (eds) *International Sale of Goods: Dubrovnik Lectures* (1986) 1-17 at 1, 7.

The CISG is an instrument founded on the broad objectives of the resolutions adopted by the sixth session of the General Assembly of the United Nations on the establishment of a new economic order and, hence, is a product of globalisation. It takes into account the different social, economic and legal systems in which international trade takes place, and recognises that the development of international trade should take place on the basis of “equality and mutual benefit” in order to promote friendly relations among states. It is also based on the understanding that the adoption of uniform rules would contribute to the removal of legal barriers to trade and promote the development of international trade.⁴¹

Significantly influential countries are parties to the CISG, such as for example the United States, Germany, Japan and Russia. China is a leader among developing countries and has lately also moved to become a world leader.⁴² In fact, twelve members of the G12 Group are parties to the CISG.⁴³ Nine of the top ten countries in terms of international trade which altogether account for more than two thirds of world trade are parties to the CISG.⁴⁴ The trade relationships between SADC states and countries which are Contracting States to the CISG, in particular China, the United States and countries in the European Union might be an important factor for SADC countries to follow suit and adopt the Convention. In Africa, to date, only Benin, Burundi, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Mauritania, Uganda, and Zambia are Contracting States to the CISG and, of those, only Lesotho and Zambia are in the SADC region.⁴⁵

⁴¹ Preamble to the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁴² See AC Esslinger “Contracting in the Global Marketplace: The UN Conventions on Contracts for the International Sale of Goods” (2007) 31 *ALI-ABA Business Law Course Materials Journal* 43-46 at 44-45.

⁴³ The Group of G12 is a group of thirteen industrially advanced countries whose central banks cooperate to regulate international finance. They are Australia, Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Spain Sweden, Switzerland and USA. The 13th and non-CISG member state is the United Kingdom. See JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 1.

⁴⁴ These are USA, China, Germany, Japan, France, Netherlands, Republic of Korea, Italy and Canada. The odd one out of the top ten is the United Kingdom. See WTO *International Trade Statistics 2012* (2012) available at <http://www.wto.org/english/res_e/statist_e/its2012_e/its2012_e.pdf> (accessed 02-09-2013).

⁴⁵ See the full list of contracting states on UNCITRAL website available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed 12-08-2013).

4 3 2 Scope of application

In terms of Article 1 of the Convention, the CISG applies to contracts for the sale of goods between parties whose places of business are in different States when the states are Contracting States; or when the rules of private international law lead to the application of the law of a Contracting State.⁴⁶ The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by the parties at any time before or after the conclusion of the contract.⁴⁷ When determining the application of the CISG, neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is taken into consideration.⁴⁸

The Convention is not meant to apply to consumer sales because in general it does not apply to the sale of goods bought for personal, family or household use except in instances where the seller knew nor ought to have known that the goods were bought for any such use.⁴⁹ It also does not apply to sales by auction, on execution or otherwise by authority of the law; or to stocks, shares, investment securities, negotiable instruments or money; to ships, vessels, hovercraft or aircraft, and not to the sale of electricity.⁵⁰ Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.⁵¹ The CISG, furthermore, does not apply to contracts in

⁴⁶ See Article 1 (a) and (b) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁴⁷ See Article 1 (2) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁴⁸ See Article 1 (3) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁴⁹ See Article 2 (a) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵⁰ See Articles 2 (b), (c), (d), (e) and (f) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵¹ See Articles 3 (1) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.⁵²

The CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. Therefore, except where expressly provided in the Convention, the CISG does not concern itself with the validity of the contract, the validity of contract provisions, the validity of any usage of the effect which the contract may have on the property in the goods sold.⁵³ The CISG also does not apply to the liability of the seller for death or personal injury caused by the goods to any person.⁵⁴

The limited scope of the CISG has been raised as one of the reasons for other parallel regional initiatives undertaken for the harmonisation of sales laws.⁵⁵ “The very fact that the drafters limited themselves to a narrow field of application within international trade suggests the difficulties inherent in formulating law that needs to be international in scope, application, and acceptance.”⁵⁶ Despite these criticisms, the Convention endeavours to accommodate different, and sometimes conflicting and competing interests, as well as different legal traditions in international sales law. These interests also included those of African and indeed SADC States that were represented at and participated in the drafting and negotiation of the Convention. Where parties do not want to be bound by the Convention, they are allowed room to exclude the application of the Convention or derogate from or vary

⁵² See Articles 3 (2) of United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵³ Article 4 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵⁴ Article 5 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵⁵ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM (2011) 636 final at 5.

⁵⁶ See also M Kilian “CISG and The Problem with Common Law Jurisdictions” (2001) 10 *Journal of Transnational Law and Policy* 217-241 at 217-218.

the effect of any of its provisions.⁵⁷ Further, States themselves are allowed to make reservations and declarations on provisions where they do not wish to be bound.⁵⁸

4 3 3 The relationship between the CISG and the domestic law of a Contracting State

Where the CISG applies to a contract, it takes precedence over the applicable domestic law of the contract and, hence, the national law of a Contracting State. If the parties want to exclude the application of the CISG they should do so explicitly.⁵⁹ Matters not explicitly settled in the CISG but which are generally governed by the CISG will be “settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”⁶⁰ The general principles on which the Convention is based therefore also take precedence over Contracting States’ national law in matters governed by the CISG.⁶¹ Lookofsky uses the example of “writing” which is defined in Article 13 of the CISG to include only telegram and telex but being silent on modern modes of communication such as telefax and e-mail. By virtue of Article 7(2), a court or tribunal can argue that “writing” is governed but not settled by the Convention, and thus should define its scope firstly by reference to the “four corners of the Convention and only when there are no general principles revert to national law.”⁶² Only where matters cannot be settled by the CISG or its principles, or where a matter is not governed by the CISG at all, it is to be settled “in conformity with the law applicable by virtue of the rules of private international law.”⁶³ National law as determined by the conflict of law rules therefore applies as the residual law or the law of last resort. For example, the CISG does not govern “the effect which the

⁵⁷ Article 6 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵⁸ See Articles 92-96 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁵⁹ P Schlechtriem & I Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition 2005) 90-92.

⁶⁰ See Article 7(2) of the CISG of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁶¹ See P Schlechtriem & I Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition 2005) 95-96.

⁶² See JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 34-35.

⁶³ See Article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

contract may have on the property in the goods sold”⁶⁴ and therefore does not govern the passing of title in the goods. The national law as established by applying the rules of private international law will therefore govern the passing of title. Similarly, the rights of third parties in the goods or against the buyer and seller are not governed by the CISG,⁶⁵ and the gap has to be filled by the national governing law of the contract. The same applies for issues relating to the validity of the contract, its provisions or any usage. Therefore, a contract or the provisions of a contract that would be against public policy under Contracting States’ law could be declared invalid even if the contract is also governed by the CISG.⁶⁶

4 3 4 Benefits of using the CISG

Broadly speaking there are significant benefits to utilising the CISG both as a law and as a tool for legal harmonisation. These benefits are connected to the reasons why the Convention was adopted in the first place, namely to resolve the challenges of uncertainty, unpredictability, inaccessibility, fragmentation, diversity and (in some areas) out-datedness of the laws⁶⁷ which give rise to high transaction costs, stifle competition and slow down the development of international trade.

4 3 4 1 Legal certainty

There is no doubt that the field of international trade is complex and that specific rules are needed to create certainty for its participants. National laws create uncertainty in international trade because different laws are applicable in different domestic jurisdictions. Even within the context of party autonomy the bargaining

⁶⁴ Article 4(b) of the CISG of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁶⁵ The CISG only provides a warranty by the seller against third party claims. See Articles 41 and 42 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁶⁶ See Article 4(a) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980). See P Schlechtriem & I Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition 2005) 66.

⁶⁷ See J Honnold “The Sales Convention in Action - Uniform International Words: Uniform Application” (1988) 8 *Journal of Law and Commerce* 207-212 at 207-208.

strength of parties is often unequal and the formulation of satisfactory contractual provisions for all parties could be difficult, which in the end could lead to disputes.⁶⁸

The CISG creates a single law specifically created to deal with the intricacies of international trade and, thus, provides legal certainty. It is a simple law which all parties from different countries can understand and resonate with in many respects. Therefore, the challenges of legal formulation, bargaining for a law or applying conflict of laws rules are obviated because it “offers a real alternative to stalling a transaction over a disagreement about choice of law.”⁶⁹ Traders from countries where the CISG is applicable have greater certainty and confidence in their trading relationships because there is certainty on their respective rights and obligations.

4 3 4 2 Reduced transaction costs and improved competition

The preamble to the CISG acknowledges that the removal of legal barriers to trade is an important factor in the development of international trade. The CISG, therefore, facilitates international trade by creating certainty and thereby reducing transaction costs.⁷⁰ Traders do not have to research the applicable domestic law and incur huge financial costs in legal fees to obtain sophisticated legal advice. Transaction costs involved in international trade include amongst other things the costs of contract drafting, as well as researching and negotiating the applicable law. These costs are generally deterrent to new and small businesses looking for cross border markets.⁷¹ The CISG simplifies these challenges and provides an alternative which reduces transaction costs in this regard. Sellers can avoid the difficulties of reaching agreement with foreign buyers on the applicable law.⁷² Moreover, the CISG text will

⁶⁸ “Where there is greater legal certainty, there is less chance of disputes, and where disputes do arise, the inquiry can concentrate on the factual basis of the dispute rather than the legal intricacies.” S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 344.

⁶⁹ VS Cook “CISG: From the Perspective of the Practitioner” (1998) 17 *Journal of Law and Commerce* 343-353 at 350.

⁷⁰ See S Eiselen “Adoption of the Vienna Convention for the international Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 348-349 and also R Knieper “Celebrating Success by Accession to CISG (2006) 25 *Journal of Law and Commerce* 477-481 at 478

⁷¹ See S Eiselen “Adoption of the Vienna Convention for the international Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 348-349.

⁷² See also L Spagnolo “The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers” (2009)10 *Melbourne Journal of International Law* (2009) 141-216 at 145.

be readily available. Use of the CISG will decrease the time and legal costs otherwise involved in choice of law issues, the research of unfamiliar foreign laws, and the problems of proving foreign law in domestic and foreign courts.⁷³ By reducing transaction costs, the CISG invariably increases competition. As new and small players find it easier and cheaper to enter foreign markets, the incentives for better product quality and competitive prices increase which is important for the development of international trade.⁷⁴

4 3 4 3 Flexibility and predictability

Conventions often provide the opportunity for parties to opt out of its provisions. Whilst flexibility can have the potential for unpredictability, flexibility in the case of the CISG does not necessarily detract from predictability.⁷⁵ The CISG recognises and upholds the fundamental principles of contract, in particular party autonomy and the role of trade usages and practices.⁷⁶ It also allows for derogation, reservations and declarations which are all meant to give participants some leverage and control over their trading relationships.⁷⁷ Flexibility is consolidated into predictability through the Convention's core values for interpretation which require upholding the international nature of the Convention and the principle of good faith.⁷⁸ Therefore, individual needs are catered for in the greater scope of the Convention whilst its aim of uniformity is safeguarded by its core principles.

⁷³ See also G Cuniberti "Is the CISG Benefiting Anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 1511-1550 at 1514.

⁷⁴ See also G Cuniberti "Is the CISG Benefiting Anybody?" (2006) 39 *Vanderbilt Journal of Transnational Law* 1511-1550 at 1513-1514.

⁷⁵ "This is, in any case, not a feature which is unique to the CISG ... The Convention is characterized by a good balance between precision and flexibility." See Eiselen S "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 *South African Law Journal* 323-370 at 344-345 and RM Lavers "To Use, or Not to Use" (1993) 21 *International Business Lawyer* 10-14 at 10-11.

⁷⁶ Articles 6 and 9 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁷⁷ See Articles 6, 92- 96 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁷⁸ See Article 7 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

4 3 4 4 Balanced rules which level the playing field

The CISG was drafted with the input of representatives from various legal systems and stages of economic development around the world.⁷⁹ Traders are placed on an equal footing since the CISG provides them with a balanced law where all the parties have equal access to the text and the materials and jurisprudence thereon. It is considered to be fair and not to favour buyers over sellers or *vice versa*.⁸⁰ Therefore “to the extent that parties have equal bargaining strength and are locked in a struggle over the choice of substantive law governing sales, selection of the CISG may be viewed as a constructive, neutral, and even-handed approach.”⁸¹ This balance creates confidence in the CISG being a compromise between the common law and civil law traditions. The CISG was drafted with an international mind set which did not favour either one of these systems, and furthermore requires autonomous interpretation in line with its international character. At present there is a notable mixture of Contracting States from both the civil and common law traditions.

4 3 4 5 The CISG is well developed, easily accessible and available in several languages

The text of the CISG is not only available in six authentic languages; it also has been translated into numerous others. A wealth of court decisions, arbitral awards as well as scholarly writings are either written or translated into English and other international languages. They are readily accessible, not only in various books and journals but also electronically.⁸² The abundance of legal materials on the CISG

⁷⁹ See I Schwenzler (ed) *Schlechtriem & Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 2-3.

⁸⁰ T McNamara “U.N. Sale of Goods Convention: Finally Coming of Age?” (2003) 32 *Colorado Lawyer* 11-22 at 20.

⁸¹ T McNamara “U.N. Sale of Goods Convention: Finally Coming of Age?” (2003) 32 *Colorado Lawyer* 11-22 at 20.

⁸² Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, available at http://www.uncitral.org/uncitral/en/case_law.html (accessed 12-08-2013) which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. Further databases have since been established, see, for example, <http://www.cisg.law.pace.edu/> (accessed 16-09-2013) run at Pace University, New York, U.S.A., containing numerous materials, scholarly writings, court decisions, and arbitral awards; <http://www.cisg-online.ch/> (accessed 16-09-2013) containing selected articles and numerous court decisions and arbitral awards; <http://www.unilex.info/> (accessed 16-09-2013) containing materials, court decisions, and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004.

means that lawyers, judges and arbitrators have access to the requisite information and are able to apply the CISG in a predictable and uniform fashion.

Many law schools around the world teach the CISG to their students.⁸³ Knowledge on the law is disseminated in this way, which means that lawyers from developing countries in Africa also have the opportunity to study the law on the CISG. “[B]etter accessibility of the CISG saves time and costs, and makes the outcome of cases more predictable.”⁸⁴

4 3 4 6 The CISG as the basis of sales laws reform

International trade is an area that is constantly developing, mainly through the invention of new technologies that continue to shape the trading environment. To keep pace with these developments, both national and international rules require constant revision to meet these needs. The CISG reflects a balanced law that is well-researched, fairly recent compared to other national laws, and provides for international usages and customs. For a CISG Contracting State, the CISG provides a solution to outdated laws and any need for constant revision. As for national laws, the CISG is regularly used as the basis for legal reform of domestic laws of sale. It has been used in revising the American, German, Dutch and Chinese sales and contract laws, to name but a few.⁸⁵

4 3 5 Major criticisms of the CISG

Despite its apparent benefits, the CISG has also been criticised for its incompleteness, inadequacy and inability to create uniformity among other things.

⁸³ In South Africa specifically, postgraduate courses in international law trade generally have a component on the CISG even though South Africa is not party to the Convention. Examples of such universities are Stellenbosch University, University of Cape Town and University of Pretoria.

⁸⁴ I Schwenzer & P Hachem “The CISG - A Story of Worldwide Success” in J Kleinemann *CISG Part II Conference* (2009) 119-140 at 128 available at <http://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6f6c6e5b746.pdf> (accessed 04-09-2013).

⁸⁵ For a broader analysis of the CISG’s impact of national legal systems, see F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008).

4 3 5 1 The CISG is a compromise and thus an incomplete law

The CISG was founded on the principles of inclusivity (so-called “equality and mutual benefit”) to promote friendly relations among states. Different social, economic and legal systems were taken into account during its drafting process.⁸⁶ In the quest to come up with an acceptable instrument across all legal systems and traditions, compromises were inevitable. In instances where it was impossible to reach a compromise, the drafters agreed to disagree.⁸⁷

The inclusion of the principle of good faith in the Convention is such an example. This was a compromise between those who argued that parties to a contract must respect a standard of good faith and fair dealing, yet others argued that such a vague term would be inconsistently interpreted.⁸⁸ This compromise creates challenges because, as it is, the CISG does not provide an express definition of good faith, which leads to variable interpretations across different jurisdictions. For example, it has been observed that practitioners trained in Canadian or British law do not accurately grasp the notion of good faith because they are accustomed to detailed legal rules.⁸⁹ The inconsistencies engineered by such compromises will be

⁸⁶ See the Preamble to the CISG of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

⁸⁷ Rosett identifies various categories of compromises: “1. Compromises Reached by Moving in Two Directions at the Same Time: The Puzzles of Article 8 on Interpretation ... 2. Compromises Reached by Including Two Inconsistent Provisions: Articles 14 and 55, and Open-Price Terms ... 3. Compromises Reached by Leaving Disagreements Unmended: Article 7 and Good Faith and Fair Dealing ... 4. Compromises Reached by Covering over Persistent Differences with Rhetoric: Article 16 and the Revocability of Offers ... 5. Compromises Reached by Procrustean Solutions: Article 35 and Conforming Goods.” See A Rosett “Critical Reflections on the United Nations Convention on Contracts for the international Sale of Goods” (1984) 45 *Ohio State Law Journal* 265-305 at 286-293.

⁸⁸ See J Honnold *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations, and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations* (1989) 298-299. See also the Legislative History to Article 7, available at <<http://cisgw3.law.pace.edu/cisg/chronology/chrono07.html>> (accessed 17-09-2013) for the history of the drafting of article 7.

⁸⁹ See C Sheaffer “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 471 and MG Bridge “Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?” (1984) 9 *Canadian Business Law Journal* 385-426.

difficult to resolve since they are based on different legal traditions which compromise the goal of uniformity.⁹⁰

As a result of such compromises, the Convention is also invariably littered with vague terminologies. The endeavour “to find the right combination of words that would not be too offensive” or “to soften opposing perspectives, to grant small concessions to salve the feelings of the side that lost the last argument, and to straddle two points of view” led the drafters to seek refuge in compromises and vague language.⁹¹ The result of such a level of compromise is inevitably a weakened convention. As Rosett puts it:

[e]lastic words are undesirable in international enactments even more than in national enactments because the international situation does not possess the coherent background for interpretation.⁹²

As a consequence of compromises, the CISG is a convention with many gaps. Because there are many aspects of the law of international sale it does not cover, the CISG can be described as an incomplete law.⁹³ Some of these aspects are specifically excluded in articles 2 to 5 of the Convention; others are not addressed or, as Article 7 (2) states, some are “governed but not settled”. In the instances that the CISG does not apply, some other law has to be made applicable. This in fact draws the sphere of international sales law into the realm of private international law rules which the CISG seeks to avert.

4 3 5 2 CISG Article 7 compromises uniformity

Article 7 of the CISG is considered to be fundamentally important for the success of the Convention because it is the key provision guiding its interpretation and application. However, the provision is often perceived as a challenge to the

⁹⁰ See also A Rosett “Critical Reflections on the United Nations Convention on Contracts for the international Sale of Goods” (1984) 45 *Ohio State Law Journal* 265-305 at 279, 281- 282.

⁹¹ See also A Rosett “Critical Reflections on the United Nations Convention on Contracts for the international Sale of Goods” (1984) 45 *Ohio State Law Journal* 265-305 at 286.

⁹² See also A Rosett “Critical Reflections on the United Nations Convention on Contracts for the international Sale of Goods” (1984) 45 *Ohio State Law Journal* 265-305 at 286.

⁹³ See I Schwenzler & P Hachem “The CISG - Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457-478 at 471- 475.

uniformity sought by the Convention⁹⁴ since it does not stipulate clear hierarchical guidelines for interpretation.⁹⁵ This lack of interpretational clarity compromises the efficiency of the Convention in fostering uniformity.

Article 7 (1) of the CISG states that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." This provision was included with the aim of achieving a high degree of uniformity, yet it does not provide guidance about its application.⁹⁶ The only way to ensure "uniformity" of interpretation is to utilise and compare decisions from other international jurisdictions.⁹⁷ Unfortunately, the CISG does not in any way provide any guidance on the value to be given to judicial precedent, if any.⁹⁸ Without this guidance, Article 7 has been applied with extreme flexibility, making it unlikely to contribute to a uniform interpretation of the Convention.⁹⁹

Furthermore, Article 7 (2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity

⁹⁴ See also JE Bailey "Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales" (1999) 32 *Cornell International Law Journal* 273-318 at 276, 286ff; CB Andersen "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce* 159-180 at 165; C Sheaffer "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law" (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 470-474.

⁹⁵ See generally C Sheaffer "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law" (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 469; LA DiMatteo, L Dhooge, S Greene, V Maurer & M Pagnattaro "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence" (2004) 24 *Northwestern Journal of International Law and Business* 299-440 at 313-314.

⁹⁶ See also CB Andersen *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (2007) 30.

⁹⁷ However, the fact that Article 7 prefaces its uniformity mandate with the words "regard has to be had" implies that a standard below strict uniformity in application was envisioned. LA DiMatteo, L Dhooge, S Greene, V Maurer & M Pagnattaro "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence" (2004) 24 *Northwestern Journal of International Law and Business* 299-440 at 310.

⁹⁸ See also CB Andersen "The Uniform International Sales Law and the Global Jurisconsultorium" (2005) 24 *Journal of Law and Commerce* 159-179 at 167.

⁹⁹ See C Sheaffer "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law" (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 474. See also JE Bailey "Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales" (1999) 32 *Cornell International Law Journal* 273-318 at 293-294.

with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” This provision was presumably included to avoid the use of domestic law in interpreting the provisions of the Convention.¹⁰⁰ The challenge is that common law systems generally rely on judicial precedent and legislative history for gap filling whilst the civil law systems commonly fill gaps using general principles. In the end, this leads to discrepancies which ultimately results in inconsistent judgments and unpredictability as courts easily rely on their own domestic approach in dealing with matters arising out of intentional transactions. Moreover, the Convention fails to define the general principles on which it is based, which is a further challenge to uniform interpretation.

4 3 5 3 Opting out provisions

The CISG seeks to accommodate different interests. Therefore, it does not only have compromised provisions but also provisions that allow parties to exclude it entirely or derogate from some of its provisions. For instance, Article 6 of the CISG states that, “parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”¹⁰¹ This creates obvious challenges in whether the goal of uniformity will be achieved and depends on whether parties choose to opt-out of the Convention or not. Such an optional approach, though consistent with the principle of party autonomy, hampers the purpose of the CISG. It is a genuine concern that, where the parties do not exclude the Convention in its entirety, they might choose to exclude the application of Article 7 which is an important provision in achieving uniformity under the Convention.¹⁰²

¹⁰⁰ See J Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* (2nd edition 1982) 157.

¹⁰¹ Article 12 of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980) states that “[a]ny provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.”

¹⁰² See C Sheaffer “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 476.

Apart from exclusions and derogations by parties to the contract, the CISG allows Contracting States various powers to exclude portions of the Convention by making declarations or reservations. These options are provided for in Articles 92 through 96 of the Convention. Article 92 essentially allows Contracting States to exclude more than two thirds of the Convention, whilst other provisions within this category, such as Articles 95 and 96, allow for the exclusion of specific provisions, or allow Contracting States to declare that the Convention no longer applies where the parties to the contract have their places of business in Contracting States with similar sales laws as in the case of Article 94, or that it applies only to some of its territorial units as provided for under Article 93.

These provisions detract from the goal of uniformity because, whilst a State might have ratified or acceded to the Convention, exclusions might be attached to such ratification or accession in the form of declarations and reservations. Therefore, the Convention applicable in one Contracting State could actually be different from the Convention applied in another Contracting State, and hence different from the original text. A party to a contract where the Convention applies or a court applying the CISG must therefore first determine which of its provisions apply and which have been excluded. This opens up the CISG to piecemeal harmonisation where parts of its provisions would be applicable combined with national law for the parts to which these Contracting States have made a declaration or reservation. Apart from this, a Contracting State may denounce the Convention which essentially could complicate the legal environment because practitioners constantly have to keep track of developments in relation to States' participation. There is no doubt that this creates uncertainty and unpredictability because it contradicts the underlying uniformity that the drafters aspired to create.¹⁰³ It should, however, be noted that lately there is a trend to denounce Article 92 declarations which has been led by the Nordic countries which will increase the level of uniformity in the application of the Convention.

¹⁰³ See C Sheaffer "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law" (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 477.

4 3 5 4 The homeward trend because of the absence of a supranational court

As pointed out, the CISG does not provide a hierarchical structure for its interpretation.¹⁰⁴ Those who interpret the CISG tend to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the provisions of the Convention.¹⁰⁵ Although there has been some improvement of late,¹⁰⁶ the United States is one of the main culprits when it comes to the homeward trend. This is mainly because of the problems emerging from some US courts' misuse of the parol evidence rule and its insistence on the application of UCC principles not relevant to the CISG.¹⁰⁷

For example, in *Beijing Metals & Minerals v American Business Center Inc.*,¹⁰⁸ a Chinese party (Beijing) entered into a contract with an American company (American Business Center) to supply weightlifting equipment. At trial, American Business Center argued that the contract had been orally modified as a defence to its failure to pay. The Court, however, applied the American parol evidence rule without any analysis of the CISG and thereby incorrectly rejected the oral modification, despite the fact that the CISG expressly permits such amendments under Article 29.¹⁰⁹ More controversially, the court in *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*¹¹⁰ expressly stated, "case law interpreting analogous provisions of Article 2 of the

¹⁰⁴ See M Kilian "CISG and the Problem with Common Law Jurisdictions" (2001) 10 *Florida State University Journal of Transnational Law and Policy* 217-243 at 226.

¹⁰⁵ See J Lookofsky & H Flechtner "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" (2005) 9 *Vindobona Journal of International Commercial Law and Arbitration* 199-208 at 202 and F Ferrari "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 15-42 at 23.

¹⁰⁶ For this observation, see also F Ferrari "Homeward Trend and Lex Forism despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 15-42 at 24.

¹⁰⁷ See generally KH Cross "Parol Evidence under the CISG: The 'Homeward Trend' Reconsidered" (2007) 68 *Ohio State Law Journal* 133-160, who makes the same observation but argues that the "categorical condemnation of the homeward trend is unwarranted."

¹⁰⁸ *Beijing Metals & Minerals Import/Export Corp. v American Business Center, Inc.* United States Court of Appeals for the Fifth Circuit, 993 F.2d 1178 (5th Cir. 1993).

¹⁰⁹ See *Beijing Metals & Minerals Import/Export Corp. v American Business Center, Inc.* United States Court of Appeals for the Fifth Circuit, 993 F.2d 1178 (5th Cir. 1993) at 1182-1183. See HM Flechtner "More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, 'Validity' and Reduction of Price Under Article 50" (1995) 14 *Journal of Law and Commerce* 153-176 at 158 and also DH Moore "The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*" (1995) *Brigham Young University Law Review* 1347-1376.

¹¹⁰ *Raw Materials Inc. v Manfred Forberich GmbH & Co. KG*, United States District Court Northern District of Illinois, Eastern Division [federal court of 1st instance] 6 July 2004, 2004 WL 1535839 (N.D. Ill). See also F Ferrari "Do Courts Interpret the CISG Uniformly?" in F Ferrari (ed) *Quo Vadis CISG?*

Uniform Commercial Code may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”¹¹¹

Despite the focus on US courts, other jurisdictions are equally prone to the homeward trend. In *Italdecor SAS v Yiu Industries*,¹¹² for example, the court decided that the CISG governed a dispute between an Italian buyer (Italdecor) and a Chinese Seller (Yiu Industries). However, the Italian court examined only domestic case law and failed to review pertinent foreign cases which resulted in it rendering a decision without guidance provided by cases dealing with fundamental breach under the CISG.¹¹³

This tendency to domesticate the interpretation of the CISG defeats the purpose for uniformity. The homeward trend is compounded by the fact that there is no supranational forum for the interpretational and application of the CISG which guides uniformity. The attainment of uniformity is thus left to domestic courts which, as evidenced by the examples above, cause the misapplication and misinterpretation of the Convention. It must be emphasised that harmonious interpretation is pivotal for the achievement of uniformity, yet this is not guaranteed under the CISG.

4 3 5 5 Different but equally authentic languages

The CISG was “[done] in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.”¹¹⁴ This is apparently meant to attract states from different lingual backgrounds and ensure maximum

Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods (2005) 3-23 at 6.

¹¹¹ Similar remarks can also be found in other cases such as *Delchi Carrier S.P.A v Rotorex Corp*, United States Court of Appeals for the Second Circuit 71 F.3d 1024 (2d Cir. 1995). See C Sheaffer “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 477.

¹¹² *Italdecor s.a.s v Yiu’s Industries (H.K.) Limited*, Corte d’Appello di Milano [Regional Court of Appeals] 20 March 1998 (Italy), available at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html#ct>> (accessed 16-09-2013). For a detailed analysis of the *Italdecor s.a.s* decision, see AM Romito “CISG: Italian Court and Homeward Trend - Queen Mary Case Translation Programme Corte d’Appello di Milano 20 March 1998 *Italdecor s.a.s. Yiu’s Industries (H.K.) Limited* (default) Case Comment” (2002) 14 *Pace International Law Review* 179-204.

¹¹³ See LA DiMatteo, LJ Dhooze, S Greene, VG Maurer & MA Pagnattaro (eds) *International Sales Law: A critical Analysis of CISG Jurisprudence* (2005) 3.

¹¹⁴ Article 101 (2) of the United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980, U.N. Doc A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 671 (1980).

adoption of the Convention. Although multiple languages both strengthen the Convention internationally and facilitate its adoption, multiple texts complicate the goal of uniformity.¹¹⁵ It is important “to note the extreme difficulty not only in translating concepts that have no exact legal equivalent in the other system but also in converting the structure and syntax of one language into the quite different structure and syntax of another.”¹¹⁶ Thus, reproducing terms in a consistent manner in six languages is a difficult, if not impossible, task.¹¹⁷ These problems are further complicated because many terms have different meanings and levels of significance when translated into other languages.¹¹⁸ The terms “offer” and “acceptance” could be used as an example.

“In English these words carry a rich heritage of legal doctrine, and their equivalents in the Western European languages have similar depth ... Yet the translations of these words used in the other official versions, such as Chinese and Arabic, do not carry similar implications...”¹¹⁹

4 4 THE SUCCESSES OF THE CISG IN THE HARMONISATION OF INTERNATIONAL SALES LAW

In weighing up the benefits and criticisms of the CISG it is apparent that the Convention has many advantages but that there are also challenges. Before considering whether SADC Member States should adopt the CISG, it is important to identify the successes that the Convention has achieved thus far. In general,

¹¹⁵ See C Sheaffer “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 474.

¹¹⁶ R Goode “Reflections on the Harmonisation of Commercial Law” (1991) 1 *Uniform Law Review* 54-75 at 71.

¹¹⁷ See HM Flechtner “The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)” (1998) 17 *Journal of Law and Commerce* 187-218 at 189-190; BB Crawford “Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods” (1988) 8 *Journal of Law and Commerce* 187-206 at 189-191.

¹¹⁸ Sheaffer avers that even Flechtner, an authoritative scholar on the CISG inadvertently misinterpreted Articles 71 and 72 due to linguistic inconsistencies between the French and English texts. He therefore argues that if an expert such as Flechtner is capable of such mistakes, it is reasonable to assume that parties less familiar with the intricacies of the CISG will have difficulty interpreting the Convention in a consistent and coherent manner. See C Sheaffer “The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law” (2007) 15 *Cardozo Journal of International and Comparative Law* 461-496 at 475.

¹¹⁹ See AH Kastely “Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 *Northwestern Journal of International Law and Business* 574-622 at 593.

creating certainty and predictability is the hallmark of legal harmonisation. Whether this has been achieved can be measured against the uniform application of the Convention; its reception by practitioners, scholars, national authorities and traders; its influence on the law in general and on other harmonisation initiatives; and the total membership of its contracting parties. Although these factors are not conclusive, it can provide a fair indication of how far the CISG has progressed in its quest for harmonisation. This, in turn, informs the question whether it should be considered for SADC.

4 4 1 Uniform application

The Convention's interpretational problems, particularly its imprecision and vague terms have been criticised; more so considering that there is no court of ultimate resort to ensure uniform interpretation.¹²⁰ However, the Convention safeguards uniformity by means of Article 7 (1) which requires that the Convention is to be interpreted in a uniform manner. The CISG provides that in its interpretation, “regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade”. Therefore, courts and tribunals are mandated to interpret and apply the CISG in a manner consistent with its goal of creating a uniform sales law.¹²¹ While some have ignored this mandate, other courts, including some in the US, have committed themselves to seek out the common values within the CISG which provide for functional uniformity.¹²² An example is the case of *MCC Marble Ceramic Center v Ceramica*

¹²⁰ See I Schwenzer & P Hachem “The CISG-Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457-478 at 467.

¹²¹ See also J Lookofsky “In Dubio Pro Convention? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)” (2003) 13 *Duke Journal of Comparative and International Law* 263-290 at 275; P Schlechtriem “Requirements of Application and Sphere of Applicability of the CISG” (2005) 36 *Victoria University of Wellington Law Review* 781-794 at 789-791; and M Torsello *Common Features of Uniform Commercial Law Conventions: A Comparative Study Beyond the 1980 Uniform Sales Law* (2004) 18.

¹²² See also F Ferrari “Have the Dragons of Uniform Sales Law been tamed? Ruminations on the CISG’s Autonomous Interpretation by Courts” in CB Andersen & UG Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008) 134-167 and also LA DiMatteo, L Dhooge, S Greene, V Maurer & M Pagnattaro “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence” (2004) 24 *Northwestern Journal of International Law and Business* 299-440 at 306.

Nuova D'Agostino,¹²³ where the court cited foreign jurisprudence on the CISG and referred to academic commentary. It held that the CISG's purpose is to provide uniformity and certainty for parties to international sales.¹²⁴ Incidentally, the number of decisions complying with the obligation to have regard to the CISG's international character by not resorting to domestic concepts is growing¹²⁵ and according to some scholars "clearly outweighs" those that do not comply.¹²⁶

A court of last resort for the application and interpretation of the CISG is not the sole and ultimate mechanism for uniform application of the Convention. There are other methods which can be utilised to ensure that courts and tribunals have access to foreign decisions and consider them. For example, UNCITRAL has made accessible a wealth of resources which provides access to decisions from jurisdictions around the world via the internet. If courts seriously consider these decisions with the aim of creating uniformity, the absence of a supranational court on the CISG could have little negative impact. This is supported by evidence that, despite the absence of a supranational court, both civil and common law courts are producing conforming decisions regardless of traditionally differing approaches to legal interpretation.¹²⁷

Lastly, the criticism based on a lack of uniformity is largely founded on the wrong premise. Strict uniformity applying the CISG across national boundaries will practically never be achieved. As Honnold puts it:

"Throughout the work on uniform laws realists have told us: Even if you get uniform laws you won't get uniform results. Those sad-faced realists were dead right - as right as confirmed bachelors and

¹²³ *MCC-Marble Ceramic Center Inc v Ceramica Nuova D'Agostino*, United States Court of Appeals for the Eleventh Circuit, 144 F.3d 1384 (11th Cir.1998).

¹²⁴ Other examples of cases that have complied with this obligation under Article 7(1) include *St. Paul Guardian Insurance Company and Travelers Insurance Company, as subrogees of Shared Imaging, Inc. v Neuromed Medical Systems & Support, GmbH and others*, United States District Court for the Southern District of New York, 26 March 2002, 2002 WL 465312 (S.D.N.Y.).

¹²⁵ F Ferrari "Homeward Trend and Lex Forism Despite Uniform Sales Law" (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 15-42 at 38.

¹²⁶ See also F Ferrari "Do Courts Interpret the CISG Uniformly?" in F Ferrari (ed) *Quo Vadis CISG?: Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (2005) 3-23 at 7.

¹²⁷ See EH Patterson "United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination" (1986) 22 *Stanford Journal of International Law* 263-304 at 282 and also O Lando "CISG and its Followers: A Proposal to adopt some International Principles of Contract Law" (2005) 53 *American Journal of Comparative Law* 379-401 at 286.

spinsters who build their lives on the realistic view that there is no perfect spouse.”¹²⁸

The CISG seeks the objective of functional or relative uniformity in both the interpretation and application of the CISG across a common set of commercial norms.¹²⁹ In other words, the CISG is an attempt to harmonise “not so much the law of international sales transactions, but more precisely, the norms and values regarding the conduct of international trade in goods.”¹³⁰

4 4 2 Support from legal practitioners

The success of the CISG can be deduced from its influence on lawyers, judges, the legislature and scholars which in turn reflects its influence on national legal systems.¹³¹ There are still jurisdictions where legal practitioners continue to exclude the CISG for “fear of the unknown” because they assume that the substance of the Convention cannot easily be grasped.¹³² This can primarily be ascribed to a lack of knowledge on the CISG. However, many other practitioners across the world have embraced the Convention because of its neutral nature.¹³³ The increasing volumes of trade presumably conducted under the CISG show that practitioners have gained confidence in the Convention. A new generation of legal practitioners educated in the benefits of a unified sales law will also contribute to an increase in its use.

¹²⁸ See J Honnold “The Sales Convention in Action - Uniform International Words: Uniform Application?” (1988) 8 *Journal of Law and Commerce* 207-212 at 207.

¹²⁹ See also CB Andersen *Uniform Application on the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (2007) 34-36.

¹³⁰ See generally PJ Mazzacano “Harmonizing Values, not Laws: The CISG and the Benefits of a Neo-Realist Perspective” (2008) 1 *Nordic Journal of Commercial Law* 1-33 at 4.

¹³¹ F Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480 at 421.

¹³² See F Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* 413-480 at 426; Reimann M “The CISG in the United States: Why it has been Neglected and why Europeans should Care” (2007) 1 *Rabel Journal of Comparative and International Private Law* 115-129 at 125.

¹³³ C Fountoulakis “The Parties’ Choice of ‘Neutral Law’ in International Sales Contracts” (2005) 7 *European Journal of Law Reform* 303-330 at 314.

4 4 3 Influence on other harmonisation projects

The CISG has exerted significant influence on an international as well as a domestic level. Its influence is substantial and pervasive.¹³⁴ When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG, not only in its systematic approach but also with respect to the mechanism of remedies. Although the PICC is broader in its scope of application by addressing commercial contracts in general and not only sales contracts, it also deals with issues that are covered by the CISG. Hence, to the extent that they deal with the same issues, the CISG provisions were essentially followed with the exception of adaptations which were considered appropriate to reflect the particular nature and scope of the PICC.¹³⁵ The influence of the CISG on the PICC is clearly recognised by the drafters who made explicit reference to the CISG in their official comments whenever they borrowed from the CISG opposed to their general norm of non-disclosure of their sources.

The Principles of European Contract Law (PECL) published in 1999 have also been influenced by the CISG. The same can be said of the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.¹³⁶ The Draft Common Frame of Reference published in the beginning of 2008 is a continuation of the different unification efforts which are all heavily indebted to the CISG.¹³⁷ The Common European Sales Law also closely resembles the CISG.¹³⁸ In Africa, the

¹³⁴ HM Flechtner "The CISG's impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law" in F Ferrari (ed) *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences - Verona Conference 2003* (2003) 169-197 at 176-181 and MJ Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edition 2005) 305-306.

¹³⁵ See MJ Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edition 2005) 305-306.

¹³⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Official Journal of the European Communities 7.7.1999 L/171. It took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states. See I Schwenzer & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 461-462.

¹³⁷ I Schwenzer & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 461-462.

¹³⁸ See U Magnus "CISG vs. CESL" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 and also U Magnus "Interpretation and Gap-filling in the CISG and in the CESL" (2012) 11 *Journal of International Trade Law and Policy* 266-280 at 274.

OHADA Uniform Act of General Commercial Law Book VIII is another example of harmonised law which is primarily based on the CISG.¹³⁹

Furthermore, Ferrari suggests that the Convention may be used as a starting point for a so-called “interconventional”¹⁴⁰ interpretation. This refers to a systematic approach to the interpretation of international uniform law instruments which has the advantage of making the unification process much easier. It obviates the need to create different autonomous concepts for each international uniform law instrument and prepares the ground for a more coherent harmonisation process to “replace the piecemeal unification one confronts today.”¹⁴¹ Such submissions by eminent scholars provide recognition for the CISG’s role as an “indispensable point of reference”, thus, making it a “success beyond its scope.”¹⁴²

4 4 4 Ratifications and acceptance

The CISG has notably achieved one of its main goals and objectives, namely the creation of a uniform body of international sales law with a high universal acceptance rate. Only ten years after it entered into force, it had been accepted by 50 Contracting States. Currently it has grown to 80 Contracting States.¹⁴³ Scholars are

¹³⁹ See R Beauchard & MJV Kodo “Can OHADA Increase Legal Certainty in Africa?” (2011) 34 *World Bank Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013); MB Idris “Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects” in CM Dickerson *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2012) 43-44; and F Ferrari “The CISG and OHADA Sales Law” in U Magnus (ed) *CISG vs Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 81.

¹⁴⁰ F Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480 at 449-452.

¹⁴¹ See F Ferrari “The CISG and its Impact on National Contract Law - General Report” in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480 at 450 and also U Anyamele *The United Nations Convention On Contracts For The International Sale Of Goods: A Proposal For Nigeria* (2011) LLM Thesis University of Durham 2.2.5 available at <<http://www.cisg.law.pace.edu/cisg/biblio/anyamele.html#141>> (accessed 08-08-2013).

¹⁴² See discussion in F Ferrari “Remarks on the Autonomous Interpretation of the Brussels 1 Regulation, in Particular of the Concept of ‘Place of Delivery’ under Article 5(1) (b), and the Vienna Sales Convention (on the Occasion of a Recent Italian Court Decision)” (2007) 1 *International Business Law Journal* 83-99.

¹⁴³ See the updated list of contracting states on the UNCITRAL websites available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed 12-08-2013).

of the opinion that it is a “worldwide success”¹⁴⁴ and practitioners hold that its “acceptance is well-founded since CISG is a fair and well-drafted law that generally reflects the expectations of the parties to an international sales transaction.”¹⁴⁵

4 4 5 Concluding remarks

Like any other international instrument, the CISG faces several implementation challenges, such as that it allows parties to opt out of it where it would legally apply. Furthermore, it is available in different languages and its vague terminology is to be interpreted in national courts and by arbitral tribunals according to similarly vague rules of interpretation. These matters pose great challenges to the application of the Convention in courts and in practice. However, despite these challenges, in practice the benefits far outweigh the challenges¹⁴⁶ and that “most criticism boils down to the reluctance of old dogs to learn new tricks.”¹⁴⁷ This study submits that, as the Convention presents one of the best opportunities for achieving the harmonisation of sales laws, it is best to resolve the challenges that present themselves in the application of the CISG as an instrument for harmonisation, than shy away from using it because of those challenges.

There are thousands of court decisions and arbitral awards which apply the Convention,¹⁴⁸ and it is widely dealt with in the legal literature throughout the world. “Furthermore, the rules of CISG have become familiar to lawyers and business people all over the world.”¹⁴⁹ It is fair to say that the CISG, after more than two decades of being in force has proved that it can achieve what it set out to achieve, which is the harmonisation of sales laws. There is little doubt that it is the most successful instrument for the harmonisation of laws to date and also one of the most

¹⁴⁴ See MJ Bonell “Do we need a Global Commercial Code?” (2001) 106 *Dickinson Law Review* 87-100 at 88.

¹⁴⁵ See VS Cook “CISG: From the Perspective of the Practitioner” (1998) 17 *Journal of Law and Commerce* (1998) 343-353 at 346.

¹⁴⁶ See also, making a case for South Africa’s adoption, S Eiselen “Adoption of the Vienna Convention for International Sales of Goods (the CISG) in South Africa” (1996) 116 *South African Law Journal* 332-370 at 369.

¹⁴⁷ I Schwenzer & P Hachem “The CISG - Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457-478 at 477.

¹⁴⁸ See JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 2.

¹⁴⁹ See O Lando “CISG and its Followers: A Proposal to Adopt some International Principles of Contract Law” (2005) 53 *American Journal of Comparative Law* 379-401 at 380.

ratified conventions. It has been well received by scholars, practitioners, traders, national authorities and other organisations in the area of legal harmonisation. It “has already proved itself to be a wonderfully effective instrument”.¹⁵⁰ Moreover, it has remained influential in guiding international and regional harmonisation processes by being the point of reference for new initiatives and reforms.

4 5 SHOULD SADC STATES ADOPT THE CISG?

The CISG has proved particularly popular outside Africa. However, only a few States have adopted it in Africa, with only two in SADC. Taking into account the role that African countries have played in UNCITRAL and the creation of the CISG, it is pertinent to turn to the question whether SADC Member States should adopt the CISG as an instrument for harmonising the law of sale in the region. In this context, the term *adopt* is employed to refer to ratification, accession, approval, acceptance or succession, as the case may be.

The successes of the CISG present strong arguments for SADC Member States to adopt the CISG. SADC can take a decision that its Member States should adopt the CISG as the law governing international sales. It is, however, unprecedented for SADC to adopt an international convention on behalf of its Member States. Even SADC Protocols undergo ratification processes in each Member State. Hence, each Member State will have to complete the procedures themselves to introduce the Convention into their respective national laws. SADC as a regional economic community can, however, urge the Member States to adopt the Convention.

Although a number of advantages of the CISG have been outlined already, the focus in this section is specifically on its benefits for the SADC context. An important factor for any successful African trade expansion agenda is the establishment and maintenance of an appropriate legal framework to facilitate trade. The CISG is an instrument that was created to remove legal barriers to trade and hence promote the development of international trade.¹⁵¹ There is an undoubted relationship between

¹⁵⁰ MG Bridge “Uniformity and Diversity in the Law of International Sale” (2003) 15 *Pace International Law Review* 55-89 at 55.

¹⁵¹ See the Preamble to the United Nations Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) Reprinted in 19 I.L.M. 671 (1980).

development and meaningful reform of the legal framework for international trade.¹⁵² The CISG provides a strong legal framework for sales transactions which should be reason enough for African states to accede to the CISG.

Moreover, the active role that African states have from the outset played in UNCITRAL and its products deserves to be recognised by Africa. The CISG is a product of a professional and sophisticated body which receives its mandate from the United Nations. As United Nations Member States the developing countries from Africa have the opportunity to participate and get more involved in the current and future work of UNCITRAL. The importance hereof is that even the poor and smaller countries from Africa can have both diplomatic and political oversight over the work of UNCITRAL.

Another reason why SADC should adopt the Convention is its accessibility.¹⁵³ Recalling that the accessibility of laws in SADC is generally a challenge due to underdevelopment and the fragmentation of the legal systems involved, the CISG may be of great benefit for the SADC practitioner.¹⁵⁴ The CISG is available in various languages, especially English, French and Portuguese which are all used in the region. Supporting services that come with the CISG such as “Case Law on UNCITRAL Texts” (CLOUT), the Pace University database on CISG case law and other databases containing important secondary materials on the CISG are maintained around the world. This means that SADC lawyers would have access to materials in the event of a dispute arising under the CISG because the internet makes it possible to access such materials. Further, traders can also easily access information through private research and only have to consult lawyers when it becomes technically necessary.

¹⁵² See LG Castellani “International Trade Law Reform in Africa: A Call for Action” (2011) 13 *European Journal of Law Reform* 479-487 at 481 and also World Trade Organisation *World Trade Report 2008: Trade in Globalising World* (2008) xxiii. For a contrary view on whether the CISG has been successful in promoting trade, see K Lehmann “The United Nations Convention on Contracts for the International Sale of Goods: Should South Africa Accede?” (2006) 18 *South African Mercantile Law Journal* 317-328 at 320-323.

¹⁵³ See 4 3 4 5 above.

¹⁵⁴ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 349-350.

“One of the most important aims of any legal system is to create an environment wherein the participants can operate with the maximum of security and the minimum of friction.”¹⁵⁵ This is done by ensuring that the rules are fair and equitable, consistent, certain and not plagued with complexities. By acceding to the CISG, SADC Member States are provided with a logical, coherent and comprehensive framework for working through complex legal issues which can facilitate cross-border sales and enhance competition.¹⁵⁶

The intelligibility of the guiding principles of the Convention which were formulated with commercial expectations in mind and do not reflect a specific legal tradition's preferences is also appealing. Thus, for example, the CISG's readiness to uphold the contract and its cautiousness towards termination better fits the expectations and practice of traders across the globe. These expectations are furthermore encapsulated in the concept of good faith which is provided for in Article 7.¹⁵⁷ In addition, the primacy it accords to the relief of specific performance in contrast to the common law approach of ordinarily allowing for damages or damages combined with the right to repudiate does not compromise neutrality. Under the CISG, the innocent party can insist on performance by the party in breach. In other words, specific performance is more widely available under the Convention than under the common law. This is a direct influence of the civil law tradition. However, article 28 CISG provides a compromise in recognition of the common law tradition. Therefore, a court will not have to grant specific performance where under its national rules specific relief would not have been available. This, therefore, strikes a balance between the civil law and common law positions regarding remedies. The compromise character of the Convention should appeal to SADC States which are composed of both common law and civilian national legal traditions.¹⁵⁸

¹⁵⁵ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 339.

¹⁵⁶ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 339-340.

¹⁵⁷ See also L Nottage “Who's afraid of the Vienna Sales Convention (CISG)? A New Zealander's view from Australia and Japan” (2005) 36 *Victoria University of Wellington Law Review* 815-845 at 829.

¹⁵⁸ See SK Date-Bah “The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States” (2011) 13 *European Journal of Law Reform* 360-369 at 365-366. See also C Ng'ong'ola “The Vienna Sales Convention of 1980 in the

Where the CISG operates, it will mitigate high drafting costs for a SADC trader who will no longer have to contractually provide for issues that are covered by the Convention. The choice of opting out, however, ensures that the parties are not constrained to the Convention but can still have their own terms and conditions tailored to suit their needs. Thus, by providing a legal foundation with default terms which reduce transaction costs and ensure certainty, the Convention can be a necessary tool for the facilitation of trade, which is the main goal of legal harmonisation in SADC.¹⁵⁹

Moreover, the CISG provides African cross-border traders with access to a system of modern harmonised rules. Through the practice of an increasing number of Contracting States and the scholarly and practical attention of an equally expanding pool of academics and lawyers of many nationalities, this system of rules has now, in effect, become part of a new *lex mercatoria*.¹⁶⁰ This contention is further supported by the fact that the Convention encourages the use of international trade usages and practices worldwide by way of a compromise which was formulated to protect the interests of developing countries.¹⁶¹

Another advantage of the CISG, which should be of interest to SADC States, is that it minimises resort to the perplexing rules of private international law.¹⁶² Where the places of business of both parties are in the territories of Contracting States, the rules of private international law are bypassed and the uniform rules of the CISG are applied automatically. In order to foster wealth redistribution and diversify economies, developing economies need to encourage small and medium sized enterprises to engage in international trade. These enterprises and their successes is a major concern for the poverty stricken SADC countries which struggle to create

Southern Africa Legal Environment: Formation of a Contract of Sale” (1992) (4) *African Journal of International and Comparative Law* 835-854.

¹⁵⁹ See also CP Gillette & RE Scott “The Political Economy of International Sales Law” (2005) 25 *International Review of Law and Economics* 446-486 at 477.

¹⁶⁰ See SK Date-Bah “The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States” (2011) 13 *European Journal of Law Reform* 360-369 at 264.

¹⁶¹ S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 352.

¹⁶² See SK Date-Bah “The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States” (2011) 13 *European Journal of Law Reform* 360-369 at 264.

employment for the ever increasing population of young people. Conflicts of law rules could financially and psychologically deter medium sized businesses from entering cross-border markets, even within the SADC region. Adoption of the CISG by SADC Member States will simplify the issue of applicable law and reduce transaction costs.¹⁶³

Considering that many of SADC's trade partners such as China, the US and the EU have adopted the CISG, it could provide further impetus for international trade between SADC countries and their trade partners if the SADC Member States were to adopt the Convention as well. Apart from the "sheer kinetic energy" that has been generated in the past couple of decades towards universality in the cross-border sale of goods law by the CISG, another reason why SADC States should adopt the harmonisation movement represented by the CISG is the creation of a similar legal framework to that of its major trading partners which can function as a mechanism for attracting investment.

The CISG has also been an important tool for legal reform. Many countries have relied on the CISG to reform their national laws. For those countries in SADC where the cost of legal reform can impede other developmental priorities due to lack of adequate resources, the CISG can be used for that very purpose.¹⁶⁴ It offers a fairly modern and simple law that can suit the needs of the diverse cultures and legal traditions in the region.¹⁶⁵ The Convention has proven to be successful, not only internationally but within national systems for domestic law reform.¹⁶⁶ As a key model, the Convention has stimulated the reform of national sales law in countries

¹⁶³ See T McNamara "U.N. Sale of Goods Convention: Finally Coming of Age?" (2003) 32 *Colorado Lawyer* 11-22 at 20.

¹⁶⁴ See 4 3 4 6 above and generally F Ferrari "The CISG and its Impact on National Contract Law - General Report" in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480.

¹⁶⁵ See LG Castellani "Promoting the Adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (2000) 13 *Vindobona Journal of International Commercial Law and Arbitration* 241-248 at 243.

¹⁶⁶ See P Schlechtriem "25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts" in HM Flechtner, RA Brand & MS Walter (eds) *Drafting Contracts under the CISG* (2008) 167-187 at 174, 177; P Schlechtriem "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations" (2005) 10 *Juridica International* 27-34 at 28; and I Schwenzer & P Hachem "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457-478 at 460.

that have adopted it.¹⁶⁷ This is because of its perceived “greater attunement to modern commercial conditions than old-style national laws.”¹⁶⁸ For instance, Finland and Sweden introduced the Convention into their domestic systems to reform their sales laws.¹⁶⁹ The same applies for Norway.¹⁷⁰ The Convention’s text was consulted when drafting the civil codes of the Commonwealth of Independent States (CIS) countries.¹⁷¹ It also served as a basis for the modernisation of the Estonian Civil Code and the Estonian law of obligations,¹⁷² the German Law of Obligations and in China where the Chinese Unified Contract law was greatly inspired by the CISG.¹⁷³

From these arguments and many other¹⁷⁴ that have been made since the CISG came into force, it is quite clear that there is a compelling case for adoption of the CISG in SADC. Besides legal harmony and its ancillary benefits, the CISG can serve as a tool for legal reform which is a great necessity in SADC where laws are still characterised by their colonial heritage. Countries in the SADC region could therefore take lessons from the CISG in reforming their domestic laws, which will ensure greater harmony in the law of sale applied in the region. It will at the same time ensure that national laws are brought closer to international trade laws.

At the same time, it must be kept in mind that even where both parties to a contract may not have their places of business in Contracting States, the CISG could still apply to such a contract if the rules of private international law point to the law of a

¹⁶⁷ See I Schwenzler & P Hachem “The CISG - Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457-478 at 461-462.

¹⁶⁸ See MG Bridge “A comment on ‘Towards a Universal Doctrine of Breach: The Impact of CISG by Jürgen Basedow’” (2005) 25 *International Law and Economics Review* 501-511 at 501.

¹⁶⁹ However, they did not include Part II of the CISG (provisions on formation of the contract). See J Lookofsky “Alive and well in Scandinavia: CISG Part II” (1999) 18 *Journal of Law and Commerce* 289-299 at 290. For a discussion of the CISG’s impact in Europe see also generally H Bernstein & J Lookofsky *Understanding the CISG in Europe* (2nd edition 2003) and F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008).

¹⁷⁰ See J Lookofsky “Alive and well in Scandinavia: CISG Part II” (1999) 18 *Journal of Law and Commerce* 289-299 at 289.

¹⁷¹ I Schwenzler & P Hachem “The CISG - Successes and Pitfalls” (2009) 57 *American Journal of Comparative Law* 457-478 at 461-463. There are a few departures from the Convention which, however, do not create irreconcilable difference between the national codes and the CISG. See R Knieper “Celebrating Success by Accession to CISG” (2005) 25 *Journal of Law and Commerce* 477-481 at 478.

¹⁷² See P Varul “CISG: A Source of Inspiration for the Estonian Law of Obligations” (2003) 8 *Uniform Law Review* 209-210 at 209.

¹⁷³ See D Ding “China and CISG” in MR Will *China and CISG: Theory and Practice* (1999) 25-37 at 26.

¹⁷⁴ See also generally S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370.

country that has adopted the CISG. This makes the reluctance to adopt the CISG partly illogical.

Although the advantages of its adoption are apparent, there are also firm arguments against adoption of the CISG in SADC.¹⁷⁵ These concerns might explain why many African and indeed SADC States have not ratified the Convention.¹⁷⁶ However, most of the concerns raised can be addressed and should not deter States from adopting the CISG.

While adoption procedures are generally quicker for the enactment of domestic laws, they could be very slow when it comes to the domestication of conventions. In most instances a convention has to be signed and then followed by ratification procedures within the domestic parliaments of the relevant SADC country.¹⁷⁷ On paper this sounds like a simple and quick process; however, in practice it can take years to complete. This might hinder the adoption of the CISG with the goal of creating a regional uniform law. Some countries have conventions that they have signed but after many years have not ratified them yet.¹⁷⁸ This is also true of the SADC Protocols, most of which have taken many years to come into effect because of the slow pace of ratification by SADC Member States. Moreover, you can never know how many countries will ever adopt it and if, when they will do so. However, if political will can be generated the process can be accelerated, and this is therefore not a legitimate excuse for not adopting the Convention.

The discussion on techniques in Chapter 2 has further noted that the harmonisation of laws using conventions has its own serious drawbacks. One such challenge is the

¹⁷⁵ The case of the UK comes to mind here. It has been suggested that a reason for non-ratification of the CISG in the UK is the delay in legislative process, since the CISG has to join the queue in a long list of other legislative priorities. See N Hoffman "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe" (2010) 22 *Pace International Law Review* 145-182 at 148, 151-152 and S Moss "Why the United Kingdom has not ratified the CISG" (2005) 25 *Journal of Law and Commerce* 483-485 at 483.

¹⁷⁶ K Lehmann "The United Nations Convention on Contracts for the International Sale of Goods: Should South Africa Accede?" (2006) 18 *South African Mercantile Law Journal* 317-328 at 320-323, observes that developing countries particularly from Africa have not ratified the CISG and this could be because they do not believe it to be beneficial to their economic aspirations.

¹⁷⁷ In South Africa the procedure is provided for in section 231 of the Constitution of the Republic of South Africa, 1996.

¹⁷⁸ Ghana for example signed the CISG on 11 April 1980 but has not ratified it to date. See the Status of Ghana's ratification on the UNCITRAL websites available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed 12-08-2013).

inflexibility of the Convention as regards reform and amendments.¹⁷⁹ Contracting States to the CISG are locked in the Convention until another Convention comes into force and displaces the CISG.¹⁸⁰ Therefore, there is a strong chance that a Convention can remain in force whilst it no longer conforms to the needs of the present times. Thus, it can easily become a “static monument” that is out of tune with modern developments.¹⁸¹ The CISG is particularly prone to this risk because it does not provide any procedures for its revision or amendment. In the wake of fast technological developments and innovations, this might create a challenge because certain provisions in the Convention may become archaic, just as some of the laws it currently seeks to replace. That would mean that it will no longer be facilitating trade, as trade facilitation and economic development should be the main goal of legal harmony.¹⁸² However, it has already been pointed out that the CISG was drafted in such a way that it can be interpreted with a view of taking new developments into consideration.¹⁸³ It has been said that the Convention can “remain vibrant and adaptable” because “[t]he CISG was consciously drafted in the style of civil-law codes, with fairly general and flexible formulations.”¹⁸⁴ The Convention's underlying principles, in particular party autonomy, and its rules of interpretation are adequate to

¹⁷⁹ “The inflexibility of many international conventions maybe too heavy a price to pay. The need to revise the law arises constantly, and international procedures sometimes slow the process of necessary law reform to an unacceptable extent.” AL Diamond “Conventions and their Revision” in EH Hondius, GJW Steenhoff & FJA van der Velden (eds) *Unification and Comparative Law in Theory and Practice: Contribution in Honour of Jean Georges Sauveplanne* (1984) 45-60 at 60.

¹⁸⁰ See S Eiselen “Adopting the Vienna Sales Convention: Reflections Eight Years down the Line” (2007) 19 *South African Mercantile Law Journal* (2007) 14-25 at 15-17 and S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 360. “In the absence of residual national legislative competence and oversight, the correction of errors, amendments, and incremental reforms in sales law governed by the Convention can be accomplished only by a return to the negotiation process. This mechanism has obvious flaws.” See A Rossett “Critical Reflections on the United Nations Convention of Contracts for the International Sale of Goods” (1984) 45 *Ohio State Law Journal* 265-305 at 272.

¹⁸¹ See S Eiselen “Adopting the Vienna Sales Convention: Reflections Eight Years down the Line” (2007) 19 *South African Mercantile Law Journal* (2007) 14-25 at 15 and S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 360.

¹⁸² See S Eiselen “Adopting the Vienna Sales Convention: Reflections Eight Years down the Line” (2007) 19 *South African Mercantile Law Journal* (2007) 14-25 at 15 and See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 360.

¹⁸³ It is clear from the wording of Art 13 CISG and other provisions that the Convention does not provide for electronic means of communication other than telegram and telex. This means that these provisions are to be interpreted to provide for such developments. See S Eiselen “E-Commerce and the CISG: Formation, Formalities and Validity” (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 305-318 at 305.

¹⁸⁴ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 360.

ensure that the Convention can adapt to the changing environment without the need for amendment and revision. This might explain why “the fear that the CISG would become an unchanging and static monument of legal unification that would be unable to deal with circumstances in a fast changing world, has not yet been realised.”¹⁸⁵

Other arguments can be made for why SADC Member States should not adopt the Convention. It can be argued that international trade has existed in SADC back to time immemorial and still continues to exist without any uniform law. This suggests that there exist adequate laws,¹⁸⁶ trade usages and practices or standard contracts¹⁸⁷ that are used in cross-border trading, thereby making the adoption of the CISG seem unnecessary or even complicating the legal environment.¹⁸⁸ More so, the principle of party autonomy firmly exists in trade relations, meaning parties are free to choose the law applicable to their contract. However, the latter is not entirely true because party choice is always subject to limitations such as bargaining power, so that the challenges of legal diversity cannot always be addressed by individual choice. Although trade usages, practices and standard contracts exist, these do not detract from the necessity of a harmonised law. Usages, practices and standards can cause problems if they are not applied uniformly, or where there is uncertainty on their content. Standardised terms and usages such as the UCP and INCOTERMS can provide measurers for harmony and trade facilitation, but because they are not as comprehensive as the CISG, it means that there is still a need for the harmonisation and uniformity of aspects not covered by these usages and practices.¹⁸⁹ Furthermore, the fact that trade practices and standard contracts have

¹⁸⁵ See S Eiselen “E-Commerce and the CISG: Formation, Formalities and Validity” (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 305-318 at 318 and also S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 360.

¹⁸⁶ “The same domestic laws are adequate and because there could be just an [a]rtificial division between national and international transactions.” See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 359.

¹⁸⁷ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 363.

¹⁸⁸ The argument is that the CISG adds another law on the existing ones therefore complicating the legal environment. See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 363-364.

¹⁸⁹ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 363.

long existed, making traders more conversant with them, does not detract from the Convention's significance. The CISG covers many aspects where no trade practice or usage exists or where a standard contract does not address the matter.¹⁹⁰ More importantly, in Chapter 3, it was observed that the legal systems in SADC require some form of effective harmonisation to make the diverse laws more similar, to reduce costs, enhance competition and attract investment, among other necessities. Customs, standards and practices have not provided an alternative in this regard. In fact, the challenge of diversity is enough testimony that existing standards and practices are inadequate.

It is therefore concluded that the role which the CISG can play in harmonising the law of sales in SADC should not be underestimated. Member States can either adopt the Convention; alternatively use it as a point of departure for revising their domestic sales laws which will lead to a higher level of harmonisation in the law of sales in the region. International practice also shows that the CISG plays a significant role in regional harmonisation projects and thus can be used as a basis for creating a common sales law for the region. This aspect will be discussed in more detail in Chapter 6 below.

4 6 OTHER METHODS OF HARMONISATION USING THE CISG

Adoption of the CISG by the SADC Member States as a way of harmonising sales laws in the region could be a giant step towards unification. Adoption, however, has its own challenges and might not always be necessary or achievable. In this regard, it is also important to explore other techniques of harmonisation that could utilise the text of the CISG as a blueprint for the harmonisation of sales laws in SADC.¹⁹¹ The strategy here will be to avoid the challenges associated with hard law and conventions in particular by using the CISG as the basis for harmonising the law of sales in SADC.

¹⁹⁰ See S Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 *South African Law Journal* 323-370 at 363.

¹⁹¹ In proposing a uniform contract law, Wandrag notes that firstly one has to research the diversity of contract laws in the region, and then on the basis of these results draft the SADC Principles of Contract Law. If acceptable to member countries, this can form the basis of a Uniform Act on Contract Law." See R Wandrag "Unification of Southern African Contract Law" (2011) 13 *European Journal of Law Reform* 451-461 at 460.

One could consider using the CISG as a model law or a guideline which Member States can consider in the development of their own national laws. If all Member States formulate their sales laws on the basis of the same model law, the different laws will be made more similar and hence the harmonisation of sales laws will be achieved or at least increased. As indicated above,¹⁹² this has happened in many other countries already. The SADC Summit or even the SADC Parliamentary Forum¹⁹³ could adopt the CISG as a model law. The difference between this and a SADC Protocol or SADC guideline is that SADC Member States would not be bound to domesticate the text and neither will there be any real legitimate expectation that Member States would take it into consideration.

The key point here is that the model law is not binding but persuasive. It will also be implemented at the pace of an individual Member State in line with its own developmental goals. This approach leaves room for change and also to adopt some provisions to the exclusion of others. At the same time, traders within the region are free to use the model law as the governing law of their contract if they so wish. The major challenge of this method is that the pace of harmonisation could be very slow since it would now essentially depend on the processes of national legal reform in the individual States. Where States decide to adopt only parts of the model law text it might assist in doing away with archaic elements by substituting them by new rules. However, such an approach could also be a major source of disharmony if the model law is introduced differently by Member States.

An alternative is to use the CISG as a guideline. SADC already has instruments called guidelines.¹⁹⁴ Guidelines can be adopted by the SADC Summit. Similar to a model law, guidelines would not require ratification by Member States. Guidelines simply create a framework for two distinct purposes: it is aimed at national legal

¹⁹² See 2 4 3 1 above.

¹⁹³ The SADC PF adopted the SADC Model Law on HIV/AIDS on 24th November 2008, during its 24th Plenary Assembly convened in Arusha, Tanzania, from the 20th - 27th November 2008. SADC Ministers of Telecommunications, Postal and ICT also adopted a SADC Model Law on Electronic Transactions & Electronic Commerce at the meeting in Mauritius November 2012. The Model law was prepared by the International Telecommunication Union and is available at <http://www.itu.int/en/ITU-D/Projects/ITU-EC-CP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf> (accessed 10-10-2013).

¹⁹⁴ For example, the Principles and Guidelines Governing Democratic Elections were adopted by the SADC Summit in Mauritius in August 2004.

reform but also enshrines some legitimate expectations for the region as a whole. However, in practice, although SADC Guidelines are not meant to be hard law applicable in the Member States, they appear to have some influence as there have been moves to make them effective and applicable as a point of reference in other areas to which they apply.¹⁹⁵ The CISG could thus be used in this form as a tool for harmonisation. Because SADC has shown favour for the concept of guidelines, such an approach might accelerate the process of harmonisation. The CISG as a guideline would therefore be used as the principal basis on which trade matters are to be evaluated by the SADC Tribunal should it receive a mandate to deal with trade disputes. Although a guideline is not, strictly speaking, able to ensure total compliance with the rules set out by it; it is a basis for reform and development. With time, the CISG would then become the reference point for sales laws in SADC. Unlike a model law, which will depend much on its own persuasive force, a guideline will carry with it some form of mandate favouring its recognition and be taken into consideration as the basis for any sales laws reform and development in the SADC Member States. The process can be equally slow, but as reform sets in, the guidelines would increasingly be used as a point of reference and with it would come a genuine expectation that the harmonisation of sales laws in the region is inevitable.

4 7 CONCLUSION

UNCITRAL is a well-established, sophisticated and well-resourced organisation with many years of experience and dedication towards the harmonisation of international trade law. It is a United Nations body with representation from United Nations Member States. African states have participated in its structures and functions from its inception and continue to do so. They were equally involved in the creation of the CISG which is one of the organisation's celebrated achievements so far. It is argued that through the involvement of African states in the UNCITRAL Commission and the working groups that drafted the CISG, the instrument should have adequate legitimacy and attraction for SADC States. More so, UNCITRAL has technical assistance available for regions and states that wish to utilise its instruments, such

¹⁹⁵ There has been much emphasis at SADC level that elections in the region should be conducted in terms of these guidelines especially in the case of Zimbabwe that has had successive disputed elections.

as the CISG, for legal reform. With the shortage of resources in SADC and the competing need to effectively participate in the international trade both at global and regional level it is not clear why SADC States continue to eschew the opportunities and facilities created by UNCITRAL through the CISG.

Despite some misgivings, the CISG is generally hailed for its success in the area of international sales law harmonisation, and is considered to have more benefits than challenges. Its opponents argue that the CISG is an inadequate law which is not consistently applied in practice, thereby limiting its chances of creating uniformity. However, its proponents argue that the instrument has succeeded in meeting its goal of harmonising international trade laws which is evidenced by its worldwide reception and application.

The CISG governs the international trade in goods and has been effectively used for both commodities and manufactured goods. SADC is mainly still an exporter of commodities and an importer of manufactured goods. It should, therefore, find the Convention useful on both fronts. Most of its trading partners, namely China, the US, the EU and lately also Brazil have ratified or acceded to the CISG. This means that in many cases the CISG would in any event be applicable to contracts involving partners from these countries. It should therefore be beneficial to also adopt the Convention and further simplify and strengthen trading relationships with the existing Contracting States. South Africa as the dominant economy in SADC must lead the way in adopting the CISG. South Africa remains not only the key player in SADC trade but is also becoming a significant gateway into Africa for foreign investors. Its position on the CISG therefore has significant influence for the way forward in SADC. Although its success at international level would not automatically translate into a success story for SADC, the analysis conducted in this chapter has shown that SADC has more to benefit from the CISG than the supposed challenges that comes with it. It is submitted that some form of adoption of the CISG in SADC, either as hard law or soft law, is a commendable move which can assist in legal reform and facilitate the harmonisation of sales laws in the SADC region.

CHAPTER 5

THE ORGANISATION FOR THE HARMONISATION OF BUSINESS LAWS IN AFRICA (OHADA)

5 1 INTRODUCTION

The law plays a pivotal role in fostering and sustaining regional integration by creating a legal framework within which economic interchange can take place. Regional integration can be achieved more significantly if conducted within a rules-based framework. The Organisation for the Harmonisation of Business Law in Africa (OHADA) was specifically created for the harmonisation of business laws to serve that purpose through trade facilitation and the attraction of foreign direct investment.

The OHADA initiative towards the harmonisation of business laws in Africa is a trendsetter for legal harmonisation on the African Continent.¹ OHADA has its own institutional, procedural and substantive structure that have founded, created and developed the system. Both its methods and content have been hailed as the best regional business law harmonisation initiative in Africa.² Furthermore, OHADA has been praised for its clarity and sophistication.³ Even though the work of OHADA is respected worldwide, the successful adoption of any model requires a far broader assessment than simply whether or not such model has thus far proven to be a success where it is being applied.

¹ It is regarded by some as representing “the most awaited panacea for the future economic development of member countries.” See J Nzalé “Reflecting on OHADA Law Reform Mission: Its Impact on Certain Aspects of Company Law in Anglophone Cameroon” (2002) 97-119 at 97-98 available at <<http://biblio.ohada.org/greenstone/collect/dohada/index/assoc/HASH0173.dir/reflecting-ohada-law-reform-mission.pdf>> (accessed 02-09-2013) and also generally X Forneris “Harmonising Commercial Law in Africa” (2001) 46 *Juris Périodique* 77-85 at 77.

² See JA Penda & MS Tumnde “The Roadmap of the Harmonization of Business Law in Africa” (OHADATA reference number: D-04-14) 1-45 at 40.

³ See CM Dickerson “Harmonizing Business Laws in Africa: OHADA Calls the Tune” (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 62 and CM Dickerson “Perspectives on the Future” in CM Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2009) 93-110 at 108.

The purpose of this chapter is to discuss and analyse the extent to which the OHADA can be meaningful and useful as far as the harmonisation of sales laws in the SADC region is concerned. The key issues that will be discussed include whether SADC Member States should join the OHADA or whether its harmonised sales law should be used as a model for formulating a community sales law. Whereas it has become a well-recognised and applauded system, there is a need to investigate how far it can be of benefit to the SADC endeavours towards harmonising its sales laws in order to promote cross-border trade and regional economic integration. The different dynamics at play will be discussed and analysed in order to establish whether SADC can utilise the OHADA system as a model of legal harmonisation.

5 2 THE OHADA

The Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) (OHADA) was created on 17 October 1993 in Port Louis, Mauritius by the signing of a treaty which came into force on 18 September 1995⁴ and was subsequently revised at Quebec on 17 October 2008. It makes provision for a system of harmonised business law and establishes institutions which are to implement such law.

OHADA is adopted mainly in West and Central African states. The original signatory states were Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo. Guinea and Guinea Bissau subsequently joined to increase the membership to sixteen. Recently, in 2012, the Democratic Republic of Congo became the seventeenth Contracting State after completing accession procedures.⁵

⁴ See J Nzalé "Reflecting on OHADA Law Reform Mission: Its Impact on Certain Aspects of Company Law in Anglophone Cameroon" (2002) 97-119 at 99 available at <<http://biblio.ohada.org/greenstone/collect/dohada/index/assoc/HASH0173.dir/reflecting-ohada-law-reform-mission.pdf>> (accessed 02-09-2013).

⁵ P Bahamin "Joining OHADA" (2013) *The Mining Journal Online* available at <http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ_DESIGN_NAME=print_friendly> (accessed 21-08-2013); B Kahombo "The Accession of the DRC to OHADA: Towards National Prosperity by the Unification of Law?" (2012) available at <<http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf>> (accessed 03-09-2013).

5 2 1 History of OHADA and the rationale for its formation

Generally Contracting States of OHADA are former French colonies where the applicable commercial law was mainly based on the French Civil Code of 1804, the French Commercial Code of 1806, the law of Commercial Companies of 1807 and subsequent legislation made applicable to the colonies.⁶ After independence, these States legislated in their individual priority areas which in some instances created diversity and plurality. In other cases legislation became obsolete because of a failure to adapt to the current socio-economic realities. The result was generally diverse, archaic and fragmented legal systems to the extent that Mbaye noted that “the law within the fourteen (14) franc zone countries is like a harlequin dress made of fragments and pieces.”⁷ The legal systems, thus, became inadequate and unfavourable for trade and foreign investment.

The idea behind the creation of OHADA originated from the political will to strengthen the African legal system by means of a secure legal framework which is essential to the development of the African continent.⁸ This international organisation was not born as a result of the initiative of the African Franc Zone (the area consisting of countries which use the CFA franc as the single currency) heads of state alone; it was above all “an idea and even a requirement” for traders who demanded that the legal and judicial environment for business should be improved in order to secure their investment. At the close of the 20th century, the business climate in Africa saw less investment in the continent mainly due to legal and judicial insecurities. This necessitated the restoration of investors’ confidence, both domestic and foreign, in order to promote the development of entrepreneurship, trade and to attract foreign investment.⁹

⁶ See also MS Tumnde “The Roadmap of the Harmonization of Business Law in Africa” (OHADATA reference number: D-04-14) 1-45 at 4-5.

⁷ See Summary of the work on the seminar on harmonization of African business law in Franc Zone African states. Abidjan from 19 to 20 April 1993 14-15 cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 10.

⁸ See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Laws in Africa: OHADA and the Harmonisation Process* (2nd edition 2007) 1.

⁹ See MS Tumnde “The Applicability of the OHADA Treaty in Cameroon: Problems and Prospects” (2002) (OHADATA reference number: D-04-37) 1. A Nigerian Minister of Commerce and Industry said at the opening of the seminar on awareness of the harmonised law, held in Niamey on 09 June 1998: “the legal and judicial security is a prerequisite for establishing a sustainable confidence in the

In light of this, a number of arguments were proffered in favour of the harmonisation of business laws in what is today known as the OHADA region.¹⁰ Chief amongst these arguments was that the fragmentation of law is not conducive to trade, both at regional and national level. Following upon independence, in many instances new legislative texts were promulgated whilst other laws which existed in the same area were never repealed, giving rise to incoherence and confusion as to the applicable law in a given situation. Further, many business laws were outdated as they dated back to the colonial period. Traders and legal practitioners found it difficult to predict the result of a legal dispute. Thus, legal uncertainty itself was a major concern for current and potential investors who are, amongst other things, motivated by legal security in the form of predictability and stability.¹¹

Mbaye, who acted as the chairperson of the working group which formulated the OHADA initiative held consultations with the relevant Contracting States. He noted that there was agreement on the need for harmonisation because of legal diversity and uncertainty as well as a lack of judicial security due to the inadequate training of judges, the paucity of legal information and a lack of available resources amongst other things.¹² This situation, however, was then and is still not unique to the former French colonies and West-Central African countries, but is prevalent throughout the African continent. It was concluded that legal harmonisation within the African continent is inevitable. The OHADA Treaty in its ambitious form foresees a broader

national or international investor, to develop a dynamic private sector and promote trade, on one hand and, on the other hand, there is no sustainable economic and social development without a legal framework favourable to investments." See "The Sahel, n° 5565 of Wednesday 10/06/1998 p.2" cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 11-12.

¹⁰ As Mr Keba Mbaye explained at the seminar on OHADA, held in Abidjan (Côte d'Ivoire) on 19 and 20 April 1993. See Summary of the work on the Seminar on Harmonisation of African Business Law in Franc zone African States Abidjan 19 to 20 April 1993 (1993) 14-15 cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 9.

¹¹ See AM Cartron & B Cousin "OHADA: A Common Legal System Providing a Reliable Legal and Judicial Environment in Africa for International Investors" (OHADATA reference number: D-07-27).

¹² See Kirsch "History of OHADA" *Revue Penant* n° special OHADA no 827 Mayñ August 1998 pp. 129 cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 11.

solution for the entire African continent, whether as a whole or within the regional economic communities.¹³

It is important for this study to examine the OHADA system and establish how it addresses the legal hurdles that have been identified and how its solutions can be used to address the challenges of legal certainty, predictability and dependability that are not only prevalent in SADC but also in the entire African continent by and large as a by-product of colonialism.

5 2 2 OHADA aims and objectives

The signatory OHADA states viewed the existence of the Franc Zone as an economic and monetary stabilising factor which constitutes a major asset for the progressive realisation of their economic integration.¹⁴ They were at the same time mindful of the fact that the diligent application of a business law which is simple, modern and adaptable would be essential to guarantee the legal stability of economic activities and to encourage investment in the Contracting States.¹⁵ The OHADA objectives are to harmonise the business laws in the Contracting States by adopting simple, modern and shared laws which are adapted to their economies and to set up appropriate judicial procedures and encourage arbitration for the settlement of contractual disputes.¹⁶ This was done in order to reinforce legal and judicial security and thus guarantee a climate of trust that will contribute to making Africa a centre of development. The agreement to adopt the Treaty on the Harmonisation of Business Laws in Africa was founded on this basis.

The single goal of OHADA, as appears from its name, is to harmonise business laws in Africa. These processes are supported by the mechanisms and institutions that

¹³ For a critical discussion of the possibility of the OHADA becoming a continental organisation, see S El Saadani "Communication: OHADA, a Continent-wide Perspective" (2008) *Uniform Law Review* 485-488.

¹⁴ The OHADA treaty was initially concluded amongst 14, mainly, Franc Zone states which are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Ivory Coast, Mali, Niger, Senegal and Togo. Only Comoros and Guinea are not members of the Franc Zone.

¹⁵ See Preamble to the Treaty on Harmonisation of Business Law in Africa (OHADA) signed at Port Louis, Mauritius on 17 October 1993 and came into force on 18 September 1995 as revised on 17 October 2008 at Quebec.

¹⁶ See Article 1 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

are created by the Treaty to further its objectives. The institutions of the OHADA are discussed below.¹⁷ The harmonisation of business laws in Africa is set out to be done in certain key areas, namely General Commercial Law, Companies and Partnerships, Arbitration, Bankruptcy, Security Interests and Mortgages, Debt Recovery and Enforcement, Contracts for the Transportation of Goods by Road, and Corporate Accounting and any such other matter that the Council of Ministers unanimously decides as falling within the definition of business law in conformity with the Treaty Objectives.¹⁸

In pursuance of these aims, OHADA unifies legislation in the form of Uniform Acts on certain areas of the law. These Acts are directly applicable to all Contracting States and “override” the “previous or subsequent” national legislation on the same topic in each country. They do not prevent the Contracting States from enacting legislation that complies with the Uniform Acts.¹⁹ However, national legislation that is not in compliance with the Uniform Acts is automatically repealed by the enactment of a new Uniform Act.²⁰ The Uniform Acts provide an overall legal framework which is in general based on civil law and has to a certain extent borrowed from modern French business law. Some commentators hold that they are not far from being a simple restatement of French law.²¹ However, there are a number of substantial differences.²² For instance, the Uniform Act on General Commercial Law, Book VIII, is based on the CISG²³ whilst the current Draft Uniform Act on Contract Law is based

¹⁷ See 5 2 3 below.

¹⁸ See Article 2 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

¹⁹ The Treaty makes it clear that “Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.” See Article 10 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

²⁰ See Advisory opinion of the OHADA Common Court of Justice and Arbitration confirmed this position. See Avis No. 001/2001/EP, Apr. 30, 2001, available at <<http://web.ohada.org/doctrine-et-jurisprudence/fr/actes/default/3294,avis-n0012001ep.html>> (accessed 03-09-2013).

²¹ Critics argue that the OHADA is almost a transplantation of the French system so much so that the “OHADA business laws were often a word-to-word copy of the French business laws ... even to the point of including the same grammar mistakes.” G Kalm “Building Legal Certainty through International Law: OHADA Law in Cameroon” (2011) 13 *Working Paper No. 11-005*, The Roberta Buffett Center for International and Comparative Studies Northwestern University PGS available at <http://www.cics.northwestern.edu/documents/workingpapers/Bufett_11-005_Kalm.pdf> (accessed 04-09-2013).

²² See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonization Process* (2nd edition 2007) 3.

²³ R Beauchard & MJV Kodo “Can OHADA Increase Legal Certainty in Africa?” (2011) 34 *World Bank Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17->

on the UNIDROIT Principles on Commercial Contract.²⁴ Further, many aspects of the OHADA law will be quite familiar to practitioners from a common law background and in some areas it “should also be possible for contracting parties, should they so wish, to apply common law concepts within the basic framework laid down by the Uniform Acts.”²⁵

Generally speaking, the present membership of OHADA has a common background with most current members also being former French colonies, with the exception of the DRC (former Belgian colony), Guinea-Bissau (former Portuguese colony), Equatorial Guinea (former Spanish colony), and Togo and Cameroon (formerly under partly British and partly French colonial rule). Besides Equatorial Guinea and Guinea Bissau where Spanish and Portuguese are spoken respectively and the English speaking provinces of Cameroon, all the Contracting States are French speaking. In addition, all the Contracting States have a civil law tradition except for the English speaking provinces of Cameroon, which follow the common law tradition.²⁶ However, based on the current forecast of OHADA expansion into the rest of Africa and the current trends towards developing a more inclusive and broader organisation, the dominance of the French language and of civil law within OHADA is expected to change with time.²⁷ The aim of OHADA is to reach beyond its

2011CanOHADAIincrease.pdf> (accessed 03-09-2013); MB Idris “Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects” in CM Dickerson *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2012) 43-44; and F Ferrari “The CISG and OHADA Sales Law” in U Magnus (ed) *CISG vs Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 81.

²⁴ See generally SK Date-Bah “The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa: Reflections on the OHADA Project from the Perspective of a Common Lawyer from West Africa” (2004) 9 *Uniform Law Review* 269-273 and also M Fontaine “The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts” (2004) 9 *Uniform Law Review* 573-584. For the relationship between the OHADA Uniform Act on Contract Law and the CISG as well, see generally UNCITRAL, LG Castellani “Ensuring Harmonisation of Contract Law at Regional and Global Level: The United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL” (2008) 13 *Uniform Law Review* 115-126.

²⁵ B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonization Process* (2nd edition 2007) 3.

²⁶ See J Nzalie “Reflecting on OHADA Law Reform Mission: Its Impact on Certain Aspects of Company Law in Anglophone Cameroon” (2002) 97-119 at 97-98 available at <<http://biblio.ohada.org/greenstone/collect/dohada/index/assoc/HASH0173.dir/reflecting-ohada-law-reform-mission.pdf>> (accessed 02-09-2013). Forneris points out that the element common to the OHADA members is not an idiom, nor a geographic position, nor a currency, nor a language but a tradition of civil law. See X Forneris “Harmonising Commercial Law in Africa” (2001) 46 *Juris Périodique* 77-85 at 78.

²⁷ Non-French and common law countries such as Nigeria, Ghana and Liberia have expressed an interest to join the OHADA. See AM Cartron & B Cousin “OHADA: A Common Legal System Providing a Reliable Legal and Judicial Environment in Africa for International Investors” (OHADATA

original members and to embrace other countries in Africa that are not necessarily French speaking countries or do not necessarily operate legal systems based on a civil law tradition. For this reason, the OHADA Treaty provides that any of the Contracting States of the AU can join the OHADA by simply acceding to the OHADA Treaty whilst non-members of the AU can join the OHADA if invited unanimously by the OHADA Contracting States.²⁸

OHADA is an ambitious project which aims to be inclusive by attracting the rest of the Member States of the African Union. To this end, it has endeavoured to transform itself in line with that goal.²⁹ With time, the membership is expected to grow from the former French colonies to also include more states from southern Africa and other regional economic communities. In this context, several public and private initiatives have been attempted to encourage general access to OHADA. For example, instruments and textbooks on OHADA are currently being translated into its four working languages to facilitate the dissemination of information.³⁰

5 2 3 OHADA institutions

Pursuant to the 2008 revision of the OHADA Treaty, OHADA now has five institutions instead of the original four which existed at the time of its inception. This follows upon the creation of the Conference of the Heads of States and Government as the supreme institution of OHADA. The five institutions therefore are: the Conference of the Heads of State and Government; its legislature, the Council of Ministers; the Common Court of Justice and Arbitration (known as the CCJA), which

reference number: D-07-27) and B Walsh "In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa" (2010) 43, 45 (Washington, DC: World Bank) available at <http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/10/22/00033495_20101022003638/Rendered/PDF/574450ESW0P1121n0Africa010June02010.pdf> (accessed 05-09-2013). See also A Akinbote "The ECOWAS Treaty as a Legal Tool for the Adoption of OHADA Treaty and Laws by Anglophone ECOWAS States" (2008) 118(865) *Penant: revue de droit des pays d'Afrique* 446-464 and AO Amegatcher "The OHADA Treaty from an Anglophone Perspective" (2008) 2 *Ghana Policy Journal* 111-123.

²⁸ Article 53 the Treaty on Harmonisation of Business Law in Africa (OHADA).

²⁹ The OHADA Treaty was amended in 2008 to introduce a number of reforms including the adding of English, Spanish and Portuguese as working languages of the OHADA. See Article 42 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

³⁰ Websites dedicated to OHADA literature such as the <www.ohada.com> (accessed 03-09-2013) built and maintained by UNIDA, <<http://www.juriscope.org/>> (accessed 03-09-2013) founded and under the direction of Professor David Jacques a renowned specialist in comparative law and also the official website of the OHADA at <www.ohada.org> (accessed 03-09-2013).

is the supreme court; the Permanent Secretariat; and a school for the education of legal professionals, the Regional Training Centre for Legal Officers (known as ERSUMA). These institutions are designed to facilitate the goal of OHADA namely to harmonise business laws in Africa.

Institutions are pivotal to the proper and sustainable implementation of any regional integration agenda including the harmonisation of laws. Without adequate and proper institutions, the system that is required to foster and support regional integration could be difficult to establish and maintain. In all regional integration initiatives across the world where the harmonisation of laws has been successful, institutions have been the pillars of the integration process. The OHADA institutions impose themselves as the drivers and movers of the integration agenda outside the realm of the existing regional economic communities. The role and function of each of these institutions contribute to the achievement of the primary objectives of OHADA. It is, therefore, important to look at each one to see what its role is in a legal harmonisation project of this nature and, hence, to determine whether similar institutions already exist within the current SADC legal and institutional framework to facilitate the harmonisation of sales laws in this region and whether SADC can learn from OHADA's example.

5 2 3 1 Conference of the Heads of State and Government

The Conference of the Heads of State and Government did not exist under the original OHADA Treaty but was created as the supreme institution of the organisation through the 2008 revision of the Treaty. It is composed of the Heads of State and Government of the Contracting States and is chaired by the Head of State of the country which is also, at the time, chairing the Council of Ministers.³¹ The chairperson, or one third of the Contracting States, initiates the Conference but decisions are only taken if two thirds of its total state membership is present. Decisions at the Conference are taken by consensus, and if that fails by absolute majority of the States present.³²

³¹ See Article 27 (1) of the Treaty on Harmonisation of Business Law in Africa (OHADA).

³² Article 27 (1) of the Treaty on Harmonisation of Business Law in Africa (OHADA).

In an international organisation, the role of Heads of State and Government at the uppermost level is not peculiar. In fact, it is the norm rather than the exception; so much so that the original omission of this institution can be seen as an anomaly, irrespective of what the reasons for that might have been. Although the other institutions in an international organisation are generally determined on the basis of their key functions in the day to day service delivery and operation of the organisation, the role of the Conference of the Heads of State and Government is a political one. Political will is a critical component for the success of any harmonisation effort undertaken amongst sovereign states. The adoption of the OHADA Treaty and the progress made so far in the conclusion of the Uniform Acts can in most instances be attributed to political will rather than the individual effectiveness of the other institutions of the organisation. Moreover, all institutions of the OHADA require the necessary support and backing of the region's political leaders for them to discharge their mandate effectively. The Conference of the Heads of State and Government is a vehicle for political decisions that protect the other OHADA institutions from political interference. However, the political discussions and decisions of Heads of State and Government can either facilitate or retard regional integration. It is often suggested that political interference led to the suspension of the SADC Tribunal in SADC.³³ From its inception, OHADA has enjoyed remarkable political support. Its institutions have been respected and they enjoy immunity, which shows the maturity of its political leadership. However, in the long run, the involvement of Heads of State can be the source of demise of this organisation, especially if non-signatory states join the OHADA. Whereas regional integration involves ceding some degree of sovereignty to the greater regional good, politicians by their nature are premised on the consolidation of power rather than the investment of the same into some supranational institution. History has shown that political leaders support supranational institutions only when they resonate with their

³³ See R Lee "Southern Africa: SADC Leaders Destroy SADC Tribunal" (2012) Open Society Initiative for Southern Africa, Johannesburg 20 August 2012 available at <<http://allafrica.com/stories/201208200664.html>> (accessed 05-09-2013). See also "Regional farmers' union urges SAfrica to 'stop protecting' Zimbabwean president" (2010) BBC Monitoring International Reports, 20 November 2010 available at <<http://www.accessmylibrary.com/article-1G1-242537378/regional-farmers-union-urges.html>> (accessed 05-09-2013) and PN Ndlovu "*Campbell v Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal*" (2011) 1 *SADC Law Journal* 63-79. "The *de facto* suspension of the Tribunal subsequent to Zimbabwe's non-compliance with its orders creates the impression that SADC members are not committed to regional integration under the auspices of SADC." W Scholtz "Review of the Role, Functions and Terms of Reference of the SADC Tribunal" (2011) 1 *SADC Law Journal* 197-201 at 201.

own political thinking. If not, they will be subjected to attack, degeneration and legitimacy checks that can cripple and destroy them.

5 2 3 2 Council of Ministers

The Council of Ministers is primarily the legislative organ of the Organisation. It is composed of the Ministers of Finance and Justice of each Contracting State. This composition differs from that of the Council of Ministers of other sub-regional bodies, such as SADC and ECOWAS.³⁴ This is generally attributed to the historical development of the discussions and preparations for the creation of OHADA which began as an initiative of the Ministers of Justice and was taken over by the Ministers of Finance. However, more importantly, it ensures that, on the legal front, the Ministers of Justice ensure legal compliance with the Uniform Acts at domestic level, whilst the Ministers of Finance facilitate the continuity and well-being of the Organisation by taking responsibility over the financial and economic issues that arise as a result of the funding obligations under the Treaty.³⁵

The Chairperson of the Council is held on a rotation basis by each Contracting State for a period of one year according to the alphabetical order of the Contracting States. Acceding states takes up the Chair in the chronological order of their accession after the round of signatory states have come to an end.³⁶ The Treaty is silent on who of the two ministers chairs the Council of Ministers during that Contracting State's turn. No problems have been reported so far, which might suggest that each country has an effective way of determining the chair. The Chairperson of the Council or one third of the Council membership can initiate a meeting of the Council, which must

³⁴ The SADC Council of Ministers consists of Ministers from each Member State, usually from the Ministries of Foreign Affairs. See Article 11 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013). In ECOWAS the Council comprises of the Minister in charge of ECOWAS Affairs and any other Minister of each Member State in terms of article 10 (2) of the Treaty Establishing the Economic Community of Western African States 24 July 1993, 35 I.L.M. 660 (1996). Nine OHADA members are in ECOWAS (Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo).

³⁵ Under the OHADA Treaty, funding of the OHADA shall also come from annual contributions of the Contracting Parties to be determined by the Council of Ministers. See Article 43 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

³⁶ See Article 27 (2) of the Treaty on Harmonisation of Business Law in Africa (OHADA). This was a calculated inclusion seeing that as the organisation grows in membership, the alphabetical rotation alone might see new members taking the Presidency in the second stage of what could be a very long round.

take place at least once every year.³⁷ The deliberations of Council are valid when two-thirds of the Contracting States are represented. Its decisions are validly adopted by an absolute majority of States present with each State having one vote. However, as an exception, the decisions relating to the adoption of the Uniform Acts are taken by a unanimous vote of States that are present and voting.³⁸

The Council of Ministers exercises administrative and legislative functions. Its key legislative function is the approval of the annual programme of harmonisation of business laws and the adoption of OHADA Uniform Acts, which in national context would be the function of parliament. Article 4 of the Treaty states that, regulations for the implementation of the Treaty will be laid down, if necessary, by an overall majority of the Council of Ministers. This expands the role and powers of the Council of Ministers to deal with a wide range of issues. The Council of Ministers, thus, has the competency to adopt and amend the Uniform Acts; determine the area of business law; decide the annual contributions of States Parties; adopt the budget of the Permanent Secretariat and the CCJA; approve the annual accounts of the OHADA; appoint the Permanent Secretary and Director General of ERSUMA; elect the members of the CCJA; make the necessary regulations for the implementation of the Treaty; and approve the annual programme of harmonisation of business laws.³⁹

It is important to note here that the powers and functions of the Council of Ministers under the OHADA are expansive. A major reason for this could be that, originally before the amendment of the Treaty and the establishment of the Conference for the Heads of State and Government, OHADA was primarily run by the Council of Ministers. Also, the OHADA is in fact more the brainchild of those who are now represented in the Council of Ministers.⁴⁰ The Council of Ministers under SADC and ECOWAS, on the other hand, do not have such overarching powers and would therefore struggle to drive a similar project within the context of their current institutional mandate. Whilst the expansive powers of the OHADA Council of

³⁷ See Article 28 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

³⁸ See Article 30 read with Article 8 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

³⁹ These powers are in various provisions of the Treaty dealing with the specific subject matter. This also shows the extensive powers of the Council of Ministers in the OHADA system.

⁴⁰ The idea of harmonising law took off in 1991 at the meetings of Ministers of Finance of the Franc Zone, held first in Ouagadougou (Burkina Faso) in April 1991 then in Paris (France) in October 1991.

Ministers make the institution effective, questions can certainly be raised about its legislative function in an emerging democratic environment. Its legislative function characteristically usurps the powers of elected members of parliament at national level, raising serious questions about accountability and transparency since the Council of Ministers is made up of ministers who are also members of the national executive of each Contracting State.⁴¹

5 2 3 3 Common Court of Justice and Arbitration (CCJA)

It has been appreciated that,

“[t]he attractiveness of the OHADA system results widely from the confidence to a supranational court, away from the incompetence, corruption, political pressure, and peddling. Thus, the creation of a supranational court helps to promote the judicial security.”⁴²

The Common Court of Justice and Arbitration was formed with two key objectives in mind; the unification of the jurisprudence of business law and the interpretation of the Uniform Acts. The Treaty creates a single court situated in Abidjan with judicial as well as arbitration functions. However, Article 19 of the Rules of Procedure of the CCJA provides that the court may meet in the territory of a State Party, other than the State where the headquarters is situated.⁴³ Disputes concerning the application of the Uniform Acts are first submitted to the national courts and then to the CCJA

⁴¹ Although, in terms of Article 7, draft versions of Uniform Acts are to be issued by the Permanent Secretary Office to the Governments of Contracting States, who will have ninety days from the date of reception of the draft versions to submit their written observations to the Permanent Secretary Office, the reality remains that law making is taken out of the hands of national parliaments. For a discussion on the relationship between the OHADA system and state sovereignty see S Mancuso “The Renunciation to the State Sovereignty: Is it an Issue for the OHADA Treaty for the Harmonization of Business Law in Africa?” in CC Nweze (ed) *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor. Dr. Christian Nwachukwu Okeke* (2009) 475-490. It is clear that OHADA members have “agreed to give up some national sovereignty in order to establish a single, cross-border regime of uniform business laws, immediately applicable as the domestic laws of each country.” See also CM Dickerson “Harmonizing Business Laws in Africa: OHADA Calls the Tune” (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 60 and B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonization Process* (2002) 8. However, this could also be a realistic approach to fast track OHADA laws considering that even at national level in most African counties legislation originates from cabinet and only to be rubber stamped in parliament, that is, African parliaments do not have much power and authority.

⁴² See Gilles CISTAC, “The legal integration in all its aspects: OHADA and SADC cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 38.

⁴³ Although one would have expected that during the unrest in Ivory Coast, following on the disputed election, the Court would meet somewhere else, it never happened.

which is the final court of appeal under the OHADA Treaty.⁴⁴ The right to an appeal can be exercised by a party on a matter falling within OHADA law after domestic appeal processes;⁴⁵ on a domestic decision in a matter which the parties feel was within the exclusive jurisdiction of the CCJA;⁴⁶ or where the domestic Supreme Court requires a decision on the subject-matter jurisdiction.⁴⁷ Decisions of the CCJA are final and cannot be appealed.⁴⁸ This is done to ensure uniform jurisprudence amongst the Contracting States. The CCJA also gives persuasive opinions when consulted by Contracting States or the Council of Ministers on questions concerning the interpretation of OHADA law or during elaboration or revision of the Uniform Acts. To create reliability in the judicial system, arbitration as a means of settling disputes is to be promoted.⁴⁹

Judges of the CCJA are elected by the Council of Ministers from the ranks of judges, magistrates, lawyers and law professors who have the necessary experience.⁵⁰ In total, nine judges must be elected for a non-renewable term of seven years. However, considering the size of their tasks and the availability of finance, the number may be increased. Not more than one judge can be chosen from a particular Contracting State. They have diplomatic immunities and are not allowed to do any other remunerated work except with the permission of the CCJA. This is to ensure independence as the judges are required to “undertake faithfully their functions in full impartiality.”⁵¹

⁴⁴ See Article 20 of the Treaty on Harmonisation of Business Law in Africa (OHADA). Execution and enforcement shall be ensured by the Contracting States on their respective territories.

⁴⁵ See Article 14 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁴⁶ See Article 18 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁴⁷ See Article 15 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁴⁸ See Article 20 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁴⁹ See AM Cartron & B Cousin “OHADA: A Common Legal System Providing a Reliable Legal and Judicial Environment in Africa for International Investors” (OHADATA reference number: D-07-27).

⁵⁰ “They are chosen from among: 1) judges and magistrates having at least fifteen years of professional experience, and satisfying their respective countries’ criteria for service in very senior judicial positions; 2) lawyers, being members of the Bar of a Contracting Party, and having at least fifteen years of professional experience; 3) law professors having at least fifteen years of professional experience.” One third of the judges must be lawyers and professors in category 2 and 3. See Article 31 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁵¹ Article 34 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

5 2 3 4 Permanent Secretariat

The Permanent Secretariat is the administrative body of the OHADA with its headquarters at Yaoundé, Cameroon. It is headed by a Permanent Secretary appointed by the Council of Ministers for a four year period, which is renewable for one term. Other members of the Secretariat are appointed by the Permanent Secretary in line with recruitment guidelines set out by the Council of Ministers in terms of 40 of the Treaty.

The Permanent Secretariat has various administrative duties and provides assistance to the Council of Ministers and the Conference for the Heads of State and Government. Amongst other functions, the Permanent Secretariat proposes the agenda of the meetings of the Council of Ministers and also the annual programme for the harmonisation of laws; prepares draft Uniform Acts and presents them to Contracting States and the CCJA for consideration and opinions and to the Council of Ministers for adoption; publishes Uniform Acts in the Official Journal of the OHADA; prepares candidate lists for judges; and is responsible for the OHADA Regional Training Centre for Legal Officers. To independently and adequately perform its functions free of interference, the Permanent Secretariat is accorded privileges and diplomatic immunities. It would appear that the most critical challenge it faces at present is a lack of funding.⁵²

5 2 3 5 Regional Training Centre for Legal Officers (ERSUMA)

The Training Centre has its headquarters at Porto Novo in the Benin Republic. It is functionally attached to the Secretariat. Its management team is headed by the General Director appointed by the Council of Ministers. It is OHADA's "centre of training and continuing education, and of continuing study and analysis of business law."⁵³

⁵² See also R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 18-19 World Bank *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013), alludes to the funding challenges faced by OHADA.

⁵³ See Article 41 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

The Training Centre is a remarkable innovation of the OHADA as it plays a pivotal role in improving uniformity through the training of lawyers, judges, notaries, courts experts, registrars and other legal officers in the Contracting States. Training is provided on OHADA law and the law of other regional bodies.⁵⁴ OHADA has enacted large volumes of legislation in a short space of time and it is hoped that the training will assist in spreading knowledge of the content, application and understanding of OHADA law to different countries.⁵⁵ The trainers are high-level legal professionals and academics who are chosen and independently hired for their in-depth knowledge and experience of OHADA law and other regional laws.

Training is provided to two types of trainees. Firstly, there is training that is organised and funded by OHADA. This training is for people from Contracting States who are sent to ERSUMA by the Ministries for Justice and Finance of the Contracting States or by national training centres or professional organisations. Trainees are selected based on their professional responsibilities, the nature of their legal duties, and their professional and educational background. They could be judges or legal officers from Contracting States, or any person from a Member State of the African Union subject to the approval of the Board of Directors. The other type of training is organised by the Training Centre but its costs are not borne by OHADA itself. This training is organised for private professionals who are required to pay a fee and the trainees need not be from an OHADA Contracting State or be a Member of the African Union. There is also a selection process for this training, similar to what is required in the case of training funded by OHADA; however, there is no requirement that there must be an equal number of trainees from each Contracting State. The training is also on OHADA law and other regional laws.⁵⁶

Training and teaching on OHADA law is an important part of the OHADA system. As one commentator states:

⁵⁴ See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonisation Process* (2nd edition 2007) 13.

⁵⁵ See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonisation Process* (2nd edition 2007) 12-13.

⁵⁶ See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonisation Process* (2nd edition 2007) 12-13.

“One cannot succeed [in] the harmonization of the Business Law if we do not train the peoples capable of knowing this law, promoting it, and understand it, and apply it effectively and uniformly throughout the community space [of] OHADA”.⁵⁷

Since the greater corpus of the OHADA law is based on the civil law tradition, differences between the common law and the civil law necessitate training for common law lawyers from countries such as Cameroon. At the same time, training has become pertinent to facilitate the bridge from the French drafted Uniform Acts that have been translated into other working languages including English, Spanish and Portuguese especially for practitioners from non-French speaking countries. Invariably, ERSUMA, as a centre of OHADA knowledge and research where the latest quality information on OHADA can be obtained, is essential for realising the goal of the harmonisation of laws. As a centre for teaching and learning on OHADA it promotes the dissemination of information to Contracting States and other stakeholders.

5 2 4 OHADA technique for the harmonisation of laws

Although there were consultations and discussions in the OHADA on the form which legal harmonisation should take,⁵⁸ it is still not clear what exactly the results of these consultations and discussions were. The Organisation had to adopt either harmonisation or unification/standardisation as a way of bringing the business laws of the Contracting States in line with each other.⁵⁹ As was explained in Chapter 2, the terms unification or harmonisation are often used to mean the same thing, but they can also mean different things. Whilst the terms are closely related, “unification” can take the form of a single law governing particular aspects of international business transactions, while “harmonisation” can be seen as a process through which domestic laws may be made more similar. However, the differences between these methods are increasingly becoming blurred.

⁵⁷ See A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 47.

⁵⁸ See A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 24.

⁵⁹ See A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 25.

On paper, OHADA chose harmonisation instead of unification, hence the reference to “the harmonisation of business laws in Africa” in its name. Furthermore, Article 1 of the Treaty refers from the outset to “the harmonisation of business laws in the Contracting States.” However, in a more practical sense, the process is one of unification. The Uniform Acts are adopted at organisational level by the Council of Ministers and are directly applicable and obligatory in the territory of each OHADA Contracting State, notwithstanding any conflict they may give rise to in respect of previous or subsequent enactments of national laws.⁶⁰ The use of Uniform Acts that are enforced through a supranational Court further supports the view that the process takes the form of unification rather than harmonisation. At the end of the day, whether OHADA uses harmonisation or unification is a semantic issue. Mbaye explains this unique technique applied by OHADA as follows:

“A unifying convention may be applicable without the obligation to repeal the domestic law since the latter is not contrary to the convention and the uniform laws contain substantive rules that need to be introduced in each State in order to be applicable. This is the technique that the political authorities seem to favour in our country. The uniform laws must become national laws and be as comprehensive as possible in order not to give rise to divergent interpretation.”⁶¹

Whether indeed this can be regarded as harmonisation or unification depends on the degree of harmony being sought. Total unification is by nature difficult to achieve, if not impossible. However, the degree of harmonisation in this context and the pursuance of Uniform Acts which override national legislation points to a drive towards unification.⁶² The OHADA method is therefore a hard law approach because its Uniform Acts are directly binding on the Contracting States.

⁶⁰ See Article 10 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶¹ See A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 25 quoting Mbaye from Summary of the work on the seminar on harmonization of African business law in Franc Zone African states Abidjan from 19 to 20 April 1993.

⁶² It has been noted that in the context of the OHADA, the term harmonisation is synonymous with unification. See CM Dickerson “OHADA Laws: Tool for Harmonisation of Business Laws in Africa” in D Adekunle, L Fashola, TF Kio-Lawson & G Etomi (eds) *Developments in Business Law: A compilation of papers presented at the Nigerian Bar Association Section on Business Law Conferences Series 1 2006-2009* (2010) 33.

5 2 4 1 OHADA Uniform Acts

The OHADA Uniform Acts are prepared so as to implement the Treaty objectives for the harmonisation of business laws. The areas covered are business law regulations concerning company law; the definition and classification of legal persons engaged in trade; proceedings in respect of credits and recovery of debts; means of enforcement; bankruptcy; receiverships; arbitration and also include employment law; accounting law; transportation and sales laws; and any other matter that the Council of Ministers unanimously decide would fall within the definition of Business Law in conformity with the objective of the OHADA Treaty.⁶³ The Council of Ministers, upon recommendation on behalf of the Permanent Secretariat, approves the annual programme for the harmonisation of business laws.⁶⁴

Uniform Acts are prepared by the Permanent Secretariat in consultation with the Governments of Contracting States. They are debated and adopted by the Council of Ministers in consultation with the Common Court of Justice and Arbitration.⁶⁵ Draft versions of Uniform Acts are issued by the Permanent Secretariat to the Governments of Contracting States, which have ninety days from the date of receipt of the draft to submit written comments to the Permanent Secretariat. The revised Treaty now provides for an extension of another ninety days on the request of the Permanent Secretariat if the circumstances or the complexity of the text to be adopted requires that.⁶⁶ After expiration of the ninety days period or any extension thereof, the draft versions of the Uniform Acts, together with the comments and observations of the Contracting States and a report from the Permanent Secretariat, are forwarded to the Common Court of Justice and Arbitration. The Court will declare its opinion on the draft within sixty days of receipt of a request for consultation. At the expiration of the consultation period, the Permanent Secretariat will finalise the text

⁶³ Article 2 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶⁴ See Article 11 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶⁵ See Article 6 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶⁶ This extension is now provided for under Article 7 of the Treaty of the Treaty on Harmonisation of Business Law in Africa (OHADA).

of the draft versions for the Uniform Acts, and propose that it be listed on the agenda of the next Council of Ministers meeting.⁶⁷

Adoption of the Uniform Acts by the Council of Ministers requires unanimous approval by the representatives of the Contracting States who are present and who have exercised their right to vote. For such adoption, at least two-thirds of the Contracting States should be represented. Abstention does not delay adoption of the Uniform Acts.⁶⁸

Within sixty days after the adoption of either a Uniform Act or a modification to a Uniform Act, the Permanent Secretariat shall cause same to be published in the Official Journal of the OHADA. Unless the Uniform Act or modification, as the case may be, contain different preconditions for their entry into force they become effective ninety days after such publication. The Uniform Acts are also published in the Official Journals of the Contracting States or by any other appropriate means. However, whether publication in the Contracting States' Official Journals has taken place or not does not affect the Uniform Acts' entry into force.⁶⁹ Uniform Acts are directly applicable in the Contracting States and override conflicting national laws. These Acts can be modified at the request of any Contracting State or of the Permanent Secretariat, and upon authorisation of the Council of Ministers.⁷⁰ Modifications are prepared by the Permanent Secretariat in consultation with the Governments of Contracting States, then debated and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration as per Article 6.

To date, a total of nine Uniform Acts have been adopted under the OHADA. These include the Uniform Act Relating to General Commercial Law (the General Commercial Code as revised on 15 December 2010, effective as from 21 March 2011); the Uniform Act Relating to Commercial Companies and Economic Interests Groups; the Uniform Act on Organising Secured Transactions and Guarantees (revised on 15 December 2010, effective as from 21 March 2011); the Uniform Act

⁶⁷ See Article 7 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶⁸ See Article 8 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁶⁹ See Article 9 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁷⁰ See Article 12 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

on Organising Simplified Recovery Procedure and Measures of Execution; Uniform Act on Organising Collective Proceedings for Clearing of Debts (bankruptcy); the Uniform Act of Arbitration; the Uniform Act Organising and Harmonising Undertakings' Accounting Systems (Accounting); the Uniform Act Relating to the Carriage of Goods by Sea; and the most recent Uniform Act Relating to the Law of Cooperatives. More Uniform Acts are expected in other areas in the near to future.

5 2 4 2 The Uniform Act on General Commercial Law

The most relevant OHADA instrument to the subject under discussion is the Uniform Act Relating to General Commercial Law. It was adopted on 17 April 1997 and revised on 15 December 2010 and the revision came into effect on 21 March 2011. It is designed to foster trade and make it safer for traders. The Uniform Act contains Eight Books. Book One deals with the status of a merchant; Books Two to Five deals with the Business and Movable Securities Register (*Registre du Commerce et du Crédit Mobilier* (RCCM)) which registers individual and corporate structures engaged in merchant activity as well as movable securities with Book two on local registries, kept by local courts' registrars; Book Three on national registries, which centralise the information at the national level, and Book Four on an OHADA register, kept at the CCJA, which centralises the information contained in each national card index; Book Five deals with the consequences of computerisation on the RCCM, such as electronic signatures, electronic certificates, electronic transmission, archiving, and so forth. Book Six deals with commercial leases and commercial enterprises; Book Seven with commercial intermediaries; and Book Eight with commercial sale (Book VIII). Of particular importance in this context is Book VIII on commercial sale which harmonises the law relating to the sale of goods.

5 2 4 3 Book VIII

This Book regulates sale agreements between commercial operators laying down rules relating to the conclusion of such agreements, the obligations of the parties, the consequences for breach of contract and the general effects of the sale agreement itself. It therefore deals with contracts of sale of goods between merchants and, hence, excludes consumer sales, auction sales, and sales of chattels, negotiable

instruments, currencies or foreign exchange. The Uniform Act closely resembles the UN Convention on International Sales of Goods (CISG) with regard to issues such as seller and buyer's obligations.⁷¹ The possible role of this Book in the harmonisation of sales laws in SADC will be considered in 5 4 3 below.

5 3 OHADA SUCCESSES AND CHALLENGES

The successes that OHADA has registered and the challenges it faces are critical elements for determining whether it can serve as a model for legal harmonisation. Moreover, this could be particularly important in considering whether other states, especially those from SADC, can join OHADA.

5 3 1 Successes

Since the signing of the OHADA Treaty in 1993, the organisation has recorded some notable successes. To start with, it is a fully operational organisation. This may at first seem obvious, but with institutions in the African context this should be considered an achievement. OHADA continues to grow as a result of an increasing membership; the enactment of numerous Uniform Acts; organisational transformation; an improved business climate; and the advancement of legal certainty, predictability and accessibility of the law. So far it should be commended as being on course to achieving its objective of legal harmonisation. Its key successes so far are subsequently discussed in more detail.

5 3 1 1 Growing membership

From its formation, OHADA appears to have been well received. Judged by its membership, it could be argued that the system is a success in its endeavour to harmonise business laws in Africa. Apart from its fourteen signatory states, two more

⁷¹ See R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 34 World Bank *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013); MB Idris "Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems and Prospects" in CM Dickerson *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2012) 43-44; and F Ferrari "The CISG and OHADA Sales Law" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 81.

countries (Guinea and Guinea-Bissau) joined the Treaty, which means that almost a third of African states are part of the Organisation. The Democratic Republic of Congo (DRC) recently acceded as well, increasing the total to seventeen. Other states, namely Burundi, Cape Verde, Djibouti, Ethiopia, Madagascar, Mauritania, Mauritius, Rwanda and Sao Tome and Principe, have expressed an interest in joining OHADA. It is significant that OHADA is also making strides among English-speaking countries with economically significant states such as Ghana and Nigeria having expressed some interest in becoming members.⁷² Using membership as a yardstick, the growing interest in OHADA is a significant indication of its success and attractiveness.

5 3 1 2 Progress in enacting Uniform Acts

The principal achievement of OHADA is that it has largely fulfilled its aim, namely to produce uniform law. OHADA has delivered nine Uniform Acts; as of now, with the exception of employment law, all the subject matters enumerated in Article 2 of the Treaty have been codified in a Uniform Act. Some of the original Uniform Acts have recently been amended,⁷³ showing a concern for the regular review and modification of these Acts. It is no surprise that the OHADA has received much praise and admiration for its work so far.⁷⁴

⁷² See AM Cartron & B Cousin "OHADA: A Common Legal System Providing a Reliable Legal and Judicial Environment in Africa for International Investors" (OHADATA reference number: D-07-27) and B Walsh "In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa" (2010) 43, 45 (Washington, DC: World Bank) available at <http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/10/22/000334955_20101022003638/Rendeed/PDF/574450ESW0P1121n0Africa010June02010.pdf> (accessed 05-09-2013). See also A Akinbote "The ECOWAS Treaty as a Legal Tool for the Adoption of OHADA Treaty and Laws by Anglophone ECOWAS States" (2008) 118(865) *Penant: revue de droit des pays d'Afrique* 446-464 and AO Amegatcher "The OHADA Treaty from an Anglophone Perspective" (2008) 2 *Ghana Policy Journal* 111-123.

⁷³ For example, The Council of Ministers updated the Uniform Act on General Commercial law and Uniform Act Organizing Securities on 10 December 2010 (Published in the OHADA Official Journal on 15 February 2011).

⁷⁴ See JA Penda & MS Tumnde "The Roadmap of the Harmonization of Business Law in Africa" (OHADATA reference number: D-04-14) 1-45 at 40 and B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa: OHADA and the Harmonisation Process* (2nd edition 2007) x.

5 3 1 3 Organisational transformation

The 1993 OHADA Treaty was amended in 2008 to “create all conditions necessary to consolidate the accomplishments of OHADA, and to enhance and promote them”.⁷⁵ Altogether, Articles 3, 4, 7, 9, 12, 14, 17, 27, 31, 39, 40, 41, 42, 43, 45, 49, 57, 59, 61 and 63 of the 1993 Treaty were modified, amended and completed. Major reforms included the addition of the Conference of the Heads of State and Government as supreme institution of the organisation with the authority to decide on any question concerning the Treaty.⁷⁶ This was done after it was realised that the success of the OHADA is dependent on political will and that political leaders at top level have a major role to play in integration initiatives. Another key modification was the addition of English, Portuguese and Spanish as working languages of the Organisation and the duplication of the Treaty in all four working languages of OHADA.⁷⁷ The timeframes for commenting on Draft Uniform Acts have also been reviewed to allow for an extended time limit where necessary.⁷⁸ Some of these amendments reflect the desire of OHADA Contracting States to pursue legal harmonisation at continental level and accommodate non-French speaking states. The ability to transform itself is a major success of OHADA.

5 3 1 4 Improved business climate

OHADA was founded on the realisation that there is a need to create an environment conducive to business which will ensure legal stability in economic activities and encourage investment. Although no OHADA Contracting State appears in the list of the ten most improved countries of the World Bank’s metrics, twelve of their members enjoy a better business climate now than five years ago.⁷⁹ This

⁷⁵ Preamble to the 17 October 2008 Quebec revision of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁷⁶ See Article 27 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁷⁷ See Article 42 and 63 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁷⁸ Article 7 of the Treaty on Harmonisation of Business Law in Africa (OHADA) was modified to allow for an extension of further ninety days considering circumstances and the complexity of the text to be adopted.

⁷⁹ See JA Yakubu “Simplified Recovery Procedures and Measures of Execution: A Nigerian Perspective on OHADA” in CM Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspective on the OHADA* (2nd edition 2012) 97-127 at 127; World Bank “Doing Business 2011: Making a Difference for Entrepreneurs” available at <www.doingbusiness.org> (accessed 22-08-2013).

improvement can be attributed to the implementation of the OHADA system. This is a major stride towards its primary objective of facilitating trade and attracting investment.

5 3 1 5 Legal certainty and predictability

The success of OHADA in creating certainty and predictability in the Contracting States' legal systems should be understood in the context of what existed prior to its establishment.⁸⁰ Before the formation of OHADA it was difficult to know which law applied in a given situation or particular transaction.⁸¹ Fragmented and outdated laws breed uncertainty and unpredictability. OHADA has managed to create certainty, or at least reduced the state of uncertainty and unpredictability that existed before its inception. The content of the law is now "clear, comprehensive and known in advance"⁸² regardless of some implementation challenges which are discussed below.

5 3 1 6 Accessibility of the law

Fornieris⁸³ observed a lack of access to legal information in one of the OHADA signatory states he visited in 1997. Particularly, there was no Code, Official Gazette or legal Treaties available in the judges' offices. The reasons provided for the unavailability of legal material was that the government was not providing and the judges earned too little to afford the materials themselves. To make matters worse, the judges did not have knowledge of the existence of a particular law which was in force at the time. A lack of access to legal information is not extraordinary in the African context. One of the successes of OHADA was to create access to laws. The OHADA laws are published in the OHADA Official Journal before they come into force. A number of copies of the Journal are sent to each Contracting State. OHADA laws are also required to be published in National Journals. ERSUMA, furthermore, helps with the dissemination of information through training and facilitation. Although

⁸⁰ See 5 2 1 above for history and rationale.

⁸¹ See X Fornieris "Harmonising Commercial Law in Africa" (2001) 46 *Juris Périodique* 77-85 at 79 and CM Fombad "Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond" (2013) 59 *Africa Today* 50-80 at 65-66.

⁸² See X Fornieris "Harmonising Commercial Law in Africa" (2001) 46 *Juris Périodique* 77-85 at 79.

⁸³ See X Fornieris "Harmonising Commercial Law in Africa" (2001) 46 *Juris Périodique* 77-85 at 79-80.

a lot of improvements can still be made, OHADA has certainly brought with it a new accessible system of law that has far improved on the situation that existed in the Contracting States in the pre-OHADA period.

5 3 2 Challenges

Despite the achievements outlined above, many challenges remain for developing a truly harmonised and consistent African business law and creating an investment climate sufficiently favourable for African economic development. The enactment of Uniform Acts is simply one phase in the process of legal harmonisation. Amongst the challenges that OHADA face are budgetary and capacity constraints; challenges with the seat and accessibility of the CCJA; the uncertain relationship between the OHADA Treaty and national constitutions or other treaties; resistance by domestic courts to apply OHADA law; dissemination of law and information; and a lack of regulation in the application of OHADA law at national level.

5 3 2 1 Budgetary and capacity constraints

Even though OHADA institutions are now well established, they still face considerable budgetary constraints that hamper their ability to implement the Treaty's Uniform Laws.⁸⁴ The Permanent Secretariat, which does all the ground work for OHADA, is understaffed and has no autonomous budget for important duties such as organising the Council of Ministers' meetings. ERSUMA's mission is also hampered by budgetary constraints.⁸⁵ Without funds for training from donors such as the World Bank or the US-funded Millennium Challenge Corporation, ERSUMA would likely encounter some substantial difficulties. The Regional Training Centre received substantial funding in the past from the European Union, but these funds

⁸⁴ In 2012 OHADA had a budget of about US \$ 8, 3 million, which is far little considering the expenses involved. R Beauchard "OHADA Nears the Twenty-Year Mark: An Assessment" in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 323-333 at 330.

⁸⁵ See R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 18-19 World Bank, *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIncrease.pdf?resourceurlname=17-2011CanOHADAIncrease.pdf>> (accessed 03-09-2013).

have ceased.⁸⁶ The African Development Bank has also provided some funding for OHADA.⁸⁷ However, without adequate funding and over reliance on well-wishers, OHADA will find it difficult to achieve its objectives.

5 3 2 2 Challenges with the seat and accessibility of the CCJA

The CCJA is the institution facing the severest of challenges. This court's operations were significantly hampered by the political violence in the Ivory Coast, following the refusal of former President Laurent Gbagbo to step down after losing the presidential elections in 2010. It is also severely understaffed despite a constant increase in its caseload. As a result, the CCJA must now deal with a significant backlog of cases.⁸⁸ The problem with caseloads could also be a consequence of the nature of the CCJA as the court of last instance on all OHADA issues. While in theory this status is a key element for ensuring uniform interpretation, capacity constraints have created challenges to this end.⁸⁹

Available statistics also point to another problem. Observing the geographical origins of appeals brought before the court, it appears that overwhelming numbers come from Ivory Coast, the seat of the CCJA. Although this could be attributed to the size of the Ivorian economy compared to other Contracting States, these statistics may

⁸⁶ See A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A)* (2nd edition 2009) 48.

⁸⁷ See SM Cooper "The African Development Bank, the African Law Institute and the Harmonization of Laws in Africa" (2004) (OHADATA reference number D-05-18).

⁸⁸ Since OHADA was launched, "the workload of the CCJA has steadily increased. By 31 December 2009, the CCJA had rendered 467 decisions, including nine consultative opinions, 400 judgments and 58 orders." See R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 17 World Bank, *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013); Minutes of the Meeting of the Council of Ministers of June 16-17, 2011, available at <<http://web.ohada.org/actualite-cm/fr/cmfr/actualite/3574.compte-rendu-de-la-reunion-du-conseil-des-ministres-de-lohada-juin-2011.html>> (accessed 03-09-2013) and also R Beauchard "OHADA Nears the Twenty-Year Mark Volume 4: An Assessment" in H Cisse, S Muller, C Thomas and C Wang (eds) *World Bank Legal Review: Legal Innovation and Empowerment for Development* (2012) 323-333 at 331.

⁸⁹ See R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 19 World Bank, *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013); CM Fombad "Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond" (2013) 59 *Africa Today* 50-80 at 68; and R Beauchard "OHADA Nears the Twenty-Year Mark: An Assessment" in H Cisse, S Muller, C Thomas and C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 323-333 at 331.

suggest that other potential litigants may be reluctant to pursue their claims due to the cost of moving the final appeal to the CCJA in Abidjan. In the context of regionalism, this might be viewed as an unfair advantage granted to Ivorian litigants because of their proximity to the Court. This could have potential for generating resistance, if not hostility, against appeals to the CCJA by litigants from other States, especially those far from Ivory Coast.⁹⁰ It should be noted that Article 19 of the CCJA Rules Procedure allows the Court to hold sessions in any of its Contracting States. This could be done at the discretion of the Court but so far this discretion has rarely been exercised.⁹¹ Substantial modifications and reforms are needed for these institutions to function adequately and thereby strengthen the legal certainty of the CCJA. The CCJA needs to increase its capacity by increasing its staff, and streamlining and decentralising its operations to ensure that ordinary citizens, especially the poor, can have access to justice.⁹²

5 3 2 3 Unclear relationship between the OHADA Treaty and national constitutions and other treaties

Clarity is a key requisite for legal certainty. The OHADA Treaty currently deals with the hierarchy of its Uniform Acts and national laws by providing for the supremacy of Uniform Acts as mandatory law, notwithstanding conflicting national provisions, whether enacted before or after the Uniform Act.⁹³ However, the issue of supremacy between OHADA and the national constitutions has not been settled yet.⁹⁴ Similarly,

⁹⁰ "Until the OHADA structure finds a way to reassure non-Ivorians on the expense front, it will be unlikely that the CCJA will play the fullest possible role in support of uniformity." See CM Dickerson "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 57-58.

⁹¹ See S El Saadani "Communication: OHADA, a Continent-wide Perspective" (2008) 13 *Uniform Law Review* 485-488 at 487.

⁹² See CM Fombad "Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond" (2013) 59 *Africa Today* 50-80 at 69.

⁹³ Article 10 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁹⁴ The issue is reflected in the constitutional problems in Cameroon before the revision of the Treaty because of the precedence given to the French language under the OHADA treaty yet under Article 1(3) of the 1996 the Cameroonian Constitution both French and English have the equal status. See JA Penda & MS Tumnde "Problems of Implementation of OHADA in Anglophone Cameroon" (OHADATA reference number: D-04-13). See also CM Dickerson "The Introduction of OHADA Law in Anglophone Countries; Linguistic Challenges" (2008) *Revue de droit des affaires internationales* 743-750 (OHADATA reference number: D-10-22); NE Enonchong "The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?" (2002) 51 *Journal of African Law* 95-116; TJ Nyambo "The Legal System of Trial in Cameroon: Implementing the OHADA Treaty in Anglophone Cameroon" (2001) 47 *Juris Périodique* 100-105; MS Tumnde "The Applicability of the OHADA Treaty

provisions in the Uniform Acts could also conflict with the norms of other regional economic communities, such as UEMOA, ECOWAS, SADC or CEMAC. In this case, conflict of laws rules are not available, nor is it likely that OHADA would attempt to argue that its provisions take precedence over the rules of these regional organisations or *vice versa*. Coordination of laws is needed to ensure that the laws enacted in the different regions are not in conflict with the OHADA Treaty and its Uniform Acts as this can be a source of legal uncertainty.⁹⁵

5 3 2 4 Resistance of domestic courts to apply OHADA law

Another implementation problem is the resistance of domestic courts to apply OHADA statutes.⁹⁶ For example, judgements delivered in some States have given effect to national provisions despite the mandatory provisions of the Uniform Acts, while supreme courts and litigants tend not to accept the exclusive jurisdiction of the CCJA as the court of last instance in matters falling within the scope of application of OHADA law.⁹⁷ The unwillingness of domestic supreme courts to apply the Uniform Acts is more deliberate and is attributed to conflicts of sovereignty caused by the drafting of the OHADA Treaty which, by removing business laws from the sovereignty of the supreme courts as courts of final instance increased defiance and hostility toward the CCJA.⁹⁸ The reluctance of national courts to accept the jurisdiction of the CCJA as court of last instance is evident in cases where the

in Cameroon” (2002) (OHADATA reference number: D-04-37). Although the Treaty was amended to include English, Spanish and Portuguese as working languages of OHADA thus partly resolve the Cameroonian situation, the issue of the relationship between the OHADA Treaty and national constitutions remains.

⁹⁵ See also R Beauchard “OHADA Nears the Twenty-Year Mark: An Assessment” in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 323-333 at 330.

⁹⁶ See Justice Paul Ayah in an unreported Cameroonian case *Akiangan Fombin Sebastian v Foto Joseph & Others*, suit no. hCK/3/96 of 6 January 2000. A senior Anglophone judge indicated that “many sitting judges did not know about OHADA until after the first OHADA laws were already in effect,” and were “furious and embarrassed to have learned about OHADA for the first time not from the government or from OHADA, but rather from counsel pleading a case. See CM Dickerson “Harmonizing Business Laws in Africa: OHADA Calls the Tune” (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 59.

⁹⁷ See CM Dickerson “Harmonizing Business Laws in Africa: OHADA Calls the Tune” (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 57.

⁹⁸ M Frilet “Legal Innovation for Development: The OHADA Experience” in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 335-346 at 340.

supreme courts continue to exercise that jurisdiction over matters that fall within the ambit of the OHADA laws.⁹⁹

5 3 2 5 Dissemination of law and information

One of the challenges of the OHADA is the inadequate dissemination of OHADA law to legal professionals, the judiciary and other interested persons. The establishment of ERSUMA is an important milestone because it provides training for judges and officers from Contracting States on the topics covered by OHADA legislation. However, ERSUMA lacks resources and certainly cannot provide training for all persons who need it. The minutes of meetings held by the Council of Ministers on the subject of awareness campaigns in the business communities of OHADA Contracting States suggest that these efforts move at a relatively slow pace.¹⁰⁰

Another issue is the availability of OHADA documents in all official languages of the OHADA Contracting States. Since 21 March 2010, when the revised version of the Treaty came into force, four languages, namely French, English, Spanish, and Portuguese, became working languages of OHADA. This makes it now possible for Anglophone and other countries in Africa to access the documents too, which could strengthen the impact of OHADA on the continent since the Treaty is open for signature to all countries. However, to achieve this goal it would mean that the Uniform Acts must be made available in all these languages. The revised Article 42 of the Treaty provides that before their translation into English, Spanish and Portuguese, all documents already published in French are fully enforceable. Where there is a difference between the French version and one of the other languages, the former will prevail. Currently, the Treaty and most of the Uniform Acts have been translated into English. However, none of the translated versions is an official

⁹⁹ See CM Dickerson "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 57-58.

¹⁰⁰ See Minutes of the Meeting of the Council of Ministers of June 16-17, 2011, available at <<http://web.ohada.org/actualite-cm/fr/cmfi/actualite/3574.compte-rendu-de-la-reunion-du-conseil-des-ministres-de-lohada-juin-2011.html>> (accessed 03-09-2013).

document yet but merely a translation of an official document, and very often these translations are of poor quality.¹⁰¹

5 3 2 6 Lack of regulation in the application of OHADA law at national level

Article 20 of the Treaty provides that CCJA judgments are directly enforceable in the territory of Contracting States under the same conditions as domestic judgments. It, however, does not contain any jurisdictional provision for transnational matters, nor does it regulate how domestic judgments that apply the Uniform Acts can be applied in other Contracting States. This provides the domestic courts with autonomy to enforce the OHADA laws and decisions. Because of this, issues of jurisdiction, recognition and enforcement within the OHADA system tend to follow national rules, which have not been harmonised and are still characterised by the same problems which marred the laws which OHADA has replaced with Uniform Acts. These domestic rules are thus, often diverse, inaccessible, unenforced and, or non-existent.¹⁰²

5 3 3 Concluding remarks

The discussion has shown that OHADA has achieved a number of successes thus far. However, the challenges it faces require immediate attention. Through further

¹⁰¹ See R Beauchard & MJV Kodo “Can OHADA Increase Legal Certainty in Africa?” (2011) 29 World Bank, *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013). As Tumnde writes: “[i]mplicitly, any document in English or any other language would be a translation from French to English or Spanish or Portuguese. Most of the texts in translation have been criticised for being literal, inadequate and rather nebulous. They are simply approximations, and in many cases there are no legal equivalents in English. There is a need for co-drafting of future OHADA Uniform Acts in order to avoid translation. Furthermore, it would be desirable to have a co-revision team to work together on the existing Uniform Acts. This team should employ contextual meanings of terminologies and the adaptation approach to translation. Member States should develop an OHADA lexicon of words, phrases and concepts. This would go a long way clarifying the misunderstandings of legal jargons and terminologies.” MS Tumnde “OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists” in CM Dickerson (ed) *Unified Business Law for Africa: Common Law Perspectives on OHADA* (2009) 69-82 at 72.

¹⁰² Only Senegal, Côte d’Ivoire, Guinea, Burkina Faso, and Gabon have legislation on the recognition and enforcement of foreign judgments. See R Beauchard & MJV Kodo “Can OHADA Increase Legal Certainty in Africa?” (2011) 30 World Bank, *Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-09-2013) and also CM Fombad “Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond” (2013) 59 *Africa Today* 50-80 at 69.

reform it can address some of these challenges and establish a more efficient system for legal harmonisation and integration. Comprehensiveness, precision and coherence of laws are standards that the OHADA should continuously strive to meet to foster legal certainty.¹⁰³ Proper interpretation of the laws, adequate adjudication of disputes, dissemination of information, coordination, implementation and enforcement of the Uniform Acts are the pillars for sustainability and success. If well implemented, OHADA could have an exemplary effect throughout Africa by leading the way towards legal harmonisation. In fact, the same methods used for the proper implementation of OHADA could be applied to other potential areas of integration. Invariably, OHADA will, in the long run, be judged by its ability to be applied uniformly, and only then can its full impact be truly assessed.

5 4 TOWARDS CONTINENTAL LEGAL HARMONISATION: OHADA AND SADC

There are a number of factors that are relevant to whether the OHADA can serve as a model for the harmonisation of sales laws in the SADC region. These factors deal primarily with the objectives, institutions and operation of the two organisations. To see whether the OHADA process can function as a model for the harmonisation of laws in SADC, it is necessary to look at some of these factors and how they play out in the SADC context.

Although OHADA is open to accession by African Union States and any other state which the Organisation consents to, the Organisation was primarily conceived as a regional rather than an internationally overarching organisation.¹⁰⁴ OHADA is thus primarily aimed at furthering economic development in and the integration of the original signatory states. One of the factors that should be taken into consideration is that, although economic development is the overall objective of both OHADA and SADC, the organisations use different means to this end.¹⁰⁵ For one, the processes leading to economic development and regional integration are different. Unlike

¹⁰³ See generally P Meyer "La Sécurité Juridique et Judiciaire dans l'Espace OHADA" (2006) 116(855) *Revue Penant* 151-175 available at <<http://www.ohada.com/bibliographie/titre/386/La-securite-juridique-et-judiciaire-dans-l-espace-OHADA.html>> (accessed 02-09-2013).

¹⁰⁴ Article 53 invites AU and non-AU members to be part of OHADA but as it stands the Organisation is still not adequately reformed to present itself as a global organisation for harmonisation of business laws rather than merely being a regional harmonisation project.

¹⁰⁵ The Preamble of both the OHADA Treaty and the SADC Treaty points to economic development as a key goal.

OHADA, which is an organisation that was created for propose of the harmonisation of business laws, SADC is a regional economic community which was formed to ensure economic integration and development through cooperation and coordination among the Contracting States. The methods they use are therefore different. Whereas economic development and regional integration is sought to be achieved through the harmonisation of business laws under the OHADA, development in SADC is sought to be achieved through various ways of cooperation by Member States.¹⁰⁶ The only SADC objective that relates to the OHADA objective of harmonising laws is SADC's goal to harmonise policies and programmes. OHADA is an organisation for the harmonisation of laws whereas SADC is a regional economic community. There is no doubt however that the ultimate goal of the organisations is the same and that SADC should perceive the harmonisation of laws as a priority area because economic development and regional integration requires a stable and effective legal environment to foster it.

OHADA was primarily formed amongst the Franc Zone countries which shared a French civil law background. These countries have a lot in common, including their colonial, legal and social history. They also share French as their commonly used and official or working language.¹⁰⁷ The environment for integration was therefore solidly permissive. SADC's total numerical state membership is almost the same as that of OHADA. Most SADC Member States share a common history of colonialism but at the hand of different colonial rulers, which means that they do not share a common legal and linguistic background as in the case of OHADA. This means that different dynamics are at play. In SADC, English, Portuguese, and French are all official languages of Member States. As a result of colonialism the legal traditions in the region range from civil law to common law. Added to that is the influence of customary law, and in some instances also constitutional law which was created at a later stage, which increase legal fragmentation. However, legal fragmentation is an

¹⁰⁶ OHADA is an organisation for the harmonisation of business laws in Africa, whereas SADC is an all-encompassing development community.

¹⁰⁷ France itself also played a critical role in the formation of OHADA and the funding of its operations. The historical, political and economic connection amongst the OHADA signatory states is apparent. See B Martor, N Pilkington, DS Sellers & S Thouvenot *Business Law in Africa OHADA and the Harmonisation Process* (2nd edition 2007) 2 and also S Mancuso "The New African Law: Beyond the Difference between Common Law and Civil Law" (2008) 14 *Annual Survey International and Comparative Law* 39-60 at 41-42.

issue that has affected almost the entire continent of Africa. Furthermore, the premise of lingual historical and political connection as the epitome for cooperation and success in OHADA has, since its inception, been diffused by the accession of Portuguese, Spanish and English speaking countries to the Organisation. This encouraged OHADA to adopt these languages as working languages in 2008.¹⁰⁸ Countries which now show interest in OHADA have diverse historical and legal backgrounds representing almost all historical or legal traditions on the continent. What is also interesting is that some of the states joining OHADA are SADC Member States that have in the SADC context contributed to the diversity deterring harmonisation efforts in SADC.¹⁰⁹ It is prudent to say, therefore, that the dynamics and role of a common historical relationship that has been linked to the successful formation of OHADA is not truly what sustains it today. Of importance is its flexibility and ability to adapt to the changing environment that is appealing to peoples of different historical, legal and lingual origins.¹¹⁰

Institutions play a pivotal role in driving an organisation and its objectives. Both OHADA and SADC rely on the Heads of States, a Council of Ministers and a Secretariat for the proper functioning of their organisations. Although the scope of their responsibilities may differ depending on the objectives of the organisation, in principle, it would appear that the make-up and styling of these institutions are the same. An important institution that both these organisations share, and which could be key in propelling the harmonisation of laws and integration, is the CCJA of OHADA and the SADC Tribunal. When compared to the SADC Tribunal, the role of the OHADA CCJA in the harmonisation of laws should be commended.¹¹¹ It is the

¹⁰⁸ See 5.2.2 above. The OHADA Treaty was amended in 2008 to include Spanish, Portuguese, and English as working languages of the organisation. See Article 42 and 63 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

¹⁰⁹ The DRC has joined OHADA and Angola is contemplating the idea. The DRC is one of the only four French speaking states in SADC. The other ones are Madagascar, Mauritius and Seychelles, except that Seychelles and Mauritius also use English.

¹¹⁰ The OHADA Treaty Article 61 provides that it can be amended revised if a contracting State sends to that effect a written request to the Permanent Secretary Office of OHADA. The amendment or the revision must be adopted in the same way as the Treaty was adopted.

¹¹¹ The CCJA continues to function with hundreds of judgements so far. Of course it has its own problems as highlighted above. Its backlog challenges are currently being addressed by the Permanent Secretariat. See Minutes of the meeting of the Council of Ministers of June 16-17, 2011, available at <<http://web.ohada.org/actualite-cm/fr/cm/fj/actualite/3574,compte-rendu-de-la-reunion-du-conseil-des-ministres-de-lohada-juin-2011.html>> (accessed 03-09-2013). Although this is not ideal, it amounts to a better performance than that of the SADC Tribunal.

institution that ensures that the Uniform Acts are interpreted and applied in a harmonised manner through the mandate and powers it obtains from the OHADA Treaty. Following on the *Campbell Case*, the SADC Tribunal has been suspended.¹¹² There is no doubt that the suspension of the Tribunal could be perceived as reflecting the direction that the Summit of the Heads of State in SADC is taking the region in terms of regional integration. However, there is no question that the Tribunal is an integral part of SADC, and that its return to normal operations will be a major boost for regional integration. The role of the Tribunal should be expanded so that it can play a pivotal role in the harmonisation of laws as is the case in OHADA. The Tribunal can be accorded jurisdiction to adjudicate on trade disputes between private persons involving the application of the harmonised sales law and not only between states as intended. Although SADC does not have a training centre as is the case with OHADA's ERSUMA, such an institution could be created for the training of legal officers, or depending on whether SADC Members accede to the OHADA or use the OHADA Uniform Act on General Commercial Law as a model, the ERSUMA can still be of assistance in this regard.

One of the most important requirements for the cooperation of sovereign states is the political will of its leaders. The creation of the Conference of the Heads of State and Government by means of the revised OHADA Treaty was because of the realisation that without political will and push, there can be little success. The speed with which success has been achieved in the drafting, signing and ratification of the OHADA Treaty, which was subsequently followed by the adoption of the Uniform Acts, shows that there is adequate political will to achieve the objectives of OHADA.¹¹³ Political will is often regarded as a challenge for SADC's political leaders. Member States are often not receptive to the idea of losing some degree of their sovereignty to supranational bodies that can foster integration. The situation with the SADC Tribunal is a major example in this regard. Political will is critical to the success of integration programmes. In order to achieve legal harmonisation in the

¹¹² The Tribunal was suspended pending renegotiation of the protocol establishing it pursuant to its decision against the Government of Zimbabwe in *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No 2/2007.

¹¹³ The creation of the OHADA came from the political will to strengthen the African legal system by enacting a secure legal framework for the improvement of business in Africa. See MS Tumde & JA Penda "The Roadmap of the Harmonization of Business Law in Africa" (OHADATA reference number: D-04-14) 3.

region, SADC leaders must emulate their counterparts in OHADA. By embracing integration initiatives and projects, leaders must understand that the success thereof also depends on how much they are willing to let go of part of their state sovereignty in order for other institutions to drive the process. It is no longer sufficient to join regional groupings merely as a way of showing you are “a good African” without having the intention to achieve regional integration and economic development through these groupings.

The similarities and differences in the dynamics that foster the existence and operations of both the OHADA and SADC are to a great extent cosmetic rather than real. The real issue lies in the political will to drive a harmonisation project. Evidence has shown that SADC Member States have declared their interest in joining the OHADA without having historical, legal and political connection with the original Franc Zone states of the OHADA.¹¹⁴ It is safe to say, therefore, that the plinth of legal harmonisation and regional integration is the political will to drive the process rather than common or dissimilar historical, legal or political backgrounds *per se*.¹¹⁵ This would mean that political will is also needed to transform the institutional structures and functional operations of SADC which are required to achieve the harmonisation of sales laws in the region.

5 4 1 SADC options with regard to the OHADA

The OHADA is an organisation which was built on a process determined to achieve economic development and integration but which is also supported by a much strengthened institutional framework. OHADA has emerged as a very attractive model for the harmonisation of laws in Africa because of the successes it has registered so far and the promise it has for a brighter future for legal harmonisation.

¹¹⁴ Besides the DRC, which is closely connected to the Franc Zone based on its French colonial history, Angola from SADC has shown interest in joining OHADA, whilst other Common law and English speaking countries are also considering accession. See B Martor Partner, N Pilkington, DS Sellers Partner & S Thouvenot *Business Law in Africa OHADA and the Harmonisation Process* (2nd edition 2007) 2. See DH Rauch “Ghana May opt for Harmonised Business Law, in African Business, February 2003 (284) 36 and JA Yakubu “Harmonizing Business Laws in Africa: How Nigeria Can Benefit” *This Day* (29 September 2004).

¹¹⁵ See also KM Mbuende “The SADC: Between Cooperation and Development - An Insider Perspective” in C Saunders, GA Dzinesa & D Nagar *Region-building in Southern Africa: Progress, Problems and Prospects* (2012) 39-60 at 52.

The processes and mechanisms that make OHADA the success it is today can be used as important lessons for the harmonisation of SADC sales laws.¹¹⁶ “It is a major innovation unique in the modern world [so much that] [t]here is much to be learned by assessing it.”¹¹⁷ The different historical and political dynamics in both the OHADA and SADC have some striking structural similarities which can provide a basis for comparison and which warrants an investigation into OHADA as a model for the harmonisation of sales laws in SADC. The differences that exist are found in the objectives of the two organisations which are not similar in scope. What is important, though, is that they both have a similar aim, namely to achieve economic development and integration.

To say that the OHADA can be utilised as a model for the harmonisation of sales laws in SADC does not mean that SADC can simply dispose of its existing operational and institutional mechanisms and adopt those of the OHADA. There are various ways in which the OHADA system or some of its elements or products can be used or adopted to achieve legal harmonisation in SADC. The options that are discussed here are whether SADC Member States should join OHADA or whether they should adopt the OHADA Uniform Act on General Commercial Law Book VIII dealing with commercial sales.

5 4 2 Whether SADC Member States should join OHADA

The OHADA, though originally formed by mainly Franc Zone states, has transformed itself to accommodate states across the African continent in their diversity. The revised version of the Treaty explicitly states in Article 53 that the Treaty is open to all members of the AU not signatory to the Treaty. It is upon unanimous agreement of the Contracting States open to the accession of any other state which is not a member of the AU. This provision creates room for the admission of other non-signatory states into OHADA. Accession is simplified for members of the African Union which only need to accede to the OHADA Treaty without the need of any

¹¹⁶ See LD Ngaundje “Regionalism: Lessons the SADC may learn from OHADA” (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 256-270.

¹¹⁷ M Frilet “Legal Innovation for Development: The OHADA Experience” in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 335-346 at 337.

approval by the Contracting States, as is the case with non-members of the African Union.

However, the provision that provides for accession to OHADA by AU Member States is not clear on whether a regional body such as SADC can accede on behalf of all its members. Since this is not clearly stipulated, it can be assumed that only individual AU Member States can accede to the OHADA as the rights and obligation under the Treaty seem to accrue to states individually. In any case, there does not seem to be any way within the SADC framework that would permit the regional body to commit all of its Member States collectively to the OHADA. Even the SADC Protocols themselves require ratification procedures in the individual SADC Member States. The preservation of state sovereignty is underlined by the principle of “sovereign equality”¹¹⁸ in Article 4 of the SADC Treaty. Therefore, joining OHADA in this context must be understood to mean individual accession to the OHADA Treaty by individual SADC Member States. The role of SADC could, however, be to encourage Member States to do so.

There are various arguments in support of and against accession. Some of the key arguments in support of joining the OHADA are subsequently discussed.

SADC Member States would benefit from an already successful system of legal harmonisation without having to undergo the strenuous process of establishing its own institutions and mechanisms of legal harmonisation. All SADC Member States will form part of an established system of regional legal harmonisation where the same legal conditions apply, which will create legal certainty and stability and encourage foreign investors to invest in the region without the luxury of playing off one country against the other.¹¹⁹

¹¹⁸ The term “probably means sovereignty and equality, two generally recognized characteristics of the States as subjects of international law” H Kelsen “The Principle of Sovereign Equality of States as a Basis for International Organization” (1944) 53 *Yale Law Journal* 207-220 at 207.

¹¹⁹ In essence, this gives SADC Member States a stronger and more confident position in dealing and negotiating affairs in the international arena. See also S Mancuso “The New African Law: Beyond the Difference between Common Law and Civil Law” (2008) 14 *Annual Survey International and Comparative Law* 39-60 at 40.

The establishment of harmonisation mechanisms and institutions is not only a lengthy and strenuous process but also a costly one. Joining OHADA could have a financial benefit for the cash strapped SADC. All that is needed is to accede and to make an annual contribution which is far less expensive than the costs of establishing a new process for SADC.

If all the SADC Member States were to join OHADA, the SADC regional block would enjoy an accelerated process of legal harmonisation and regional integration by simply joining in an existing and on-going process rather than having to start and experiment with a new process altogether.

Some of the OHADA laws have been drafted by international experts or with the assistance of leading organisations in the area of legal harmonisation, such as UNIDROIT. These Uniform Acts are applauded for not representing a single legal tradition but reflecting commercial practice, albeit, with modifications to suit the African realities.¹²⁰ The SADC and its citizens will benefit from the modern and widely acceptable principles incorporated in the OHADA Uniform Acts. Most importantly, the OHADA laws “takes into consideration the complexity and the peculiarities of the African legal systems”¹²¹ including customary laws and in some cases mixed legal systems.

Currently SADC Member States, such as the DRC and Angola, have already or are making individual decisions to join or not to join the OHADA. The challenge with individualism in a regional block which has a common agenda is the tendency to renege on relevant measures for achieving the common agenda. In this instance, states that have already joined the OHADA will most likely drag their feet on resolutions to harmonise laws at SADC level. As the SADC Summit operates on a consensus basis, it will be interesting to see how the DRC as an OHADA Contracting

¹²⁰ The UNIDROIT ICC and UNCITRAL texts had considerable influence on some of the OHADA Uniform Acts. See generally SK Date-Bah “The Preliminary Draft OHADA Uniform Act on Contract Law as seen by a Common Law Lawyer” (2008) *Uniform Law Review* 217-222; M Fontaine “The Draft OHADA Uniform Act on Contract and the UNIDROIT’S Principles of International Commercial Law” (2004) 9 *Uniform Law Review* (2004) 573-584; and LG Castellani “Ensuring Harmonisation of Law at Regional and Global Level: The United Nations Convention on the International Sale of Goods and the Role of the UNCITRAL” (2008) 13 *Uniform Law Review* 115-126.

¹²¹ S Mancuso “Trends on the Harmonization of Contract Law in Africa” (2007) 13 *Annual Survey of International and Comparative Law* 157-178 at 167.

State but at the same time also a SADC Member State will approach the idea of legal harmonisation in SADC.

Lastly, SADC is part of the African Union's agenda for economic integration and development. It will be more sensible and speedy for reaching this continental objective if all the African Union Members States can organise themselves in a single legal harmonisation process which incorporate and accommodate the needs of all the Member States as is the case in the European Union. This approach arguably makes integration at continental level quicker and easier to achieve.¹²²

However, despite all the benefits in joining the OHADA system, there could also be challenges for SADC Member States that make this approach less attractive than it seems at face value. The most important thing is to look at those aspects that might affect the SADC region's goals and objectives were its members to join the OHADA system. In this respect, a number of challenges come to the fore.

SADC is an organisation of states that came together for the common purpose of economic development and integration based on their common historical background and current social, economic and political ties. The foundations and basis for the formation of SADC and OHADA are remarkably different.¹²³ This in itself might cause some incoherence if SADC States adopt the OHADA system since SADC has its own mechanisms and institutions that were specifically created to further its goals and objectives.¹²⁴ Merging the OHADA system into the current institutional, legal and operational framework of SADC could pose a challenge,

¹²² In any case "the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny." AN Allott "Towards the Unification of Laws in Africa" (1965) 14 *International and Comparative Law Quarterly* 366-389 at 378.

¹²³ The difference in scope and objectives of the regional organisation has also been identified as a reason why the OHADA may not be a model for the ASEAN. See E Dudicourt "Assessment of the Affectivity of OHADA Reforms: Is OHADA a Relevant Model for the ASEAN (Association of Southeast Asian Nations)?" (2007) (OHADATA reference number D-07-40) 1-36 at 19.

¹²⁴ Members of the OHADA also belong to the different regional groupings such as ECOWAS, UEMOA, CEMAC and SADC; however, there is no clarity as to which organisational organisations supersede the others when these come into conflict. See also R Beauchard & MJV Kodo "Can OHADA Increase Legal Certainty in Africa?" (2011) 25 *World Bank Justice and Development Working Paper Series 17/2011* available at <<http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf>> (accessed 03-9-2013) and also R Beauchard "OHADA Nears the Twenty-Year Mark: An Assessment" in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 323-333 at 330.

especially since the two organisations have parallel but independent legislative and judicial institutions with competing powers which might not be easy to reconcile without conflict. The situation with the OHADA and western-central Africa regional economic communities (mainly CEMAC, ECOWAS and UEMOA) is different in that the membership of these regional communities makes up the majority of OHADA Member States and therefore cooperation and consideration between these organisations are inherently easier. SADC will add yet another regional community to the system which could lead to complications.

The current study focuses on the necessity for the harmonisation of sales laws in SADC.¹²⁵ In joining OHADA, SADC Member States will accede to the Treaty on the Harmonisation of Business Laws in Africa as such. There is no room in OHADA for the ratification of only the Uniform Acts that a particular Contracting State feels it wants to be part of to the exclusion of others. In fact the Uniform Acts need not to be ratified, as this word is understood in the law of treaties, but automatically apply to Contracting States which accede to the OHADA system. The critical issue here is that SADC Member States will then, by virtue of being an OHADA Contracting State, be subjected to all the OHADA Uniform Acts irrespective of whether they might want to be bound on any basis and irrespective of parallel but irreconcilable approaches in SADC.

The OHADA Treaty and Uniform Acts were negotiated and adopted by Contracting States of mainly the Franc Zone. The drafting, negotiation and adoption process of such laws entail a consideration of various factors, including the political and economic impact on Contracting States. Thus, even where a law was drafted to meet international standards, it would not ignore regional and national factors altogether but would be responsive where necessary to the needs of its contracting parties. A Treaty and Uniform Acts that were negotiated without the contribution of SADC Member States might omit to address some key aspects which are pertinent to the social, political and economic interests of the SADC Member States.¹²⁶

¹²⁵ However, the necessity of harmonising business laws in general remains and is ideal.

¹²⁶ For a more in-depth discussion on the issue of state sovereignty under the OHADA system, see S Mancuso "The Renunciation to the State Sovereignty: Is it an Issue for the OHADA Treaty for the

The OHADA Treaty does not allow for reservations to the Treaty or the Uniform Acts. This is a major issue affecting particularly the issue of state sovereignty and independence. Some SADC Member States are known for clinging on to state sovereignty as much as they can.¹²⁷ Reservations generally give states some leverage to accede to those parts of an international treaty which do not conflict with their values or interests and exclude those parts that do. Unless SADC can effect a revision of the Uniform Acts to allow for reservations, it would be unlikely that they would join OHADA; to do so would entail them surrendering much of their sovereignty to Uniform Acts which were negotiated, drafted and adopted without any input from them.

Although both the OHADA and SADC envisage deeper economic integration and development as key goals, the blueprint for the achievement of such goals is based on different processes and institutional mechanisms. A wholesale commitment to OHADA by SADC Member States might derail progress on other key areas they need to pursue. This might even cause incoherence and conflict in the coordination and management of the two organisations.¹²⁸

The harmonisation of sales laws is an integral part of regional economic integration without which free trade and the free movement of goods cannot easily be achieved. The harmonisation of sales laws should therefore be linked to other integration

Harmonization of Business Law in Africa?" in CC Nweze (ed) *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor. Dr. Christian Nwachukwu Okeke* (2009) 475-490. In fact there is a feeling that the system is not even African but dictated by France. As Dickerson points out that "the OHADA system is aggressively top-down, and ... inserts an aggressively Western/Northern legal system." See CM Dickerson "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 *Columbia Journal of Transnational Law* 17-73 at 59 and also LD Ngaundje "Regionalism: Lessons the SADC may learn from OHADA" (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 256-270 at 266.

¹²⁷ "On a continent where there is a high regard for power, it must be acknowledged that persuading [SADC] leaders to transfer decision-making powers will not be an easy task." See LD Ngaundje "Regionalism: Lessons the SADC may learn from OHADA" (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 256-270 at 266.

¹²⁸ The issue of membership of various different international organisations is regarded to be a major problem in implementing regional commitments in Africa. "The resulting problems of multiple and overlapping memberships constitute a 'spaghetti bowl' that hinders regional integration by creating a complex entanglement of political commitments and institutional requirements adding significantly to the costs of conducting intra-regional business. Africa, with its weak states and institutional capacities can afford none of these things." See P Draper, D Haleson & P Alves "SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?" (2007) 7 *The South African Institute of International Affairs Trade Policy Report No. 15* available at <http://sarprn.org/documents/d0002411/SACU_SAIIA_Jan2007.pdf> (accessed 04-09-2013).

mechanisms and the goals of the regional economic community itself. The project should best be integrated into the *corpus* of the SADC system so that it becomes part and parcel of the entire trade and economic agenda rather than being pursued outside these realms; otherwise it would be susceptible to scepticism and prone to being treated as an alien agenda not originating from within the SADC region.

The degree and extent of the harmonisation of sales laws in SADC could be greatly compromised by individualism if the Member States were to accede to OHADA. It cannot be ascertained how many states will individually join the OHADA, and if so, when. This poses the danger of furthering legal uncertainty and anxiety for traders. Harmonisation in this form would depend much on the number of SADC States that would join the OHADA. At this stage only a few have shown interest. The rest have not pronounced their intention to join OHADA at all. Individualism could be a source of uncertainty and unpredictability and would negatively affect the degree and extent of the harmonisation endeavour.¹²⁹

The challenges posed by states having membership in multiple regional organisations have been well documented, especially the possible conflicts that might arise in terms of fulfilling obligations under each of the regional organisations. The Democratic Republic of Congo is a good example of a SADC Member State having multiple memberships.¹³⁰ There is a real possibility that conflict or competition might arise in obligations under the OHADA and SADC. This could threaten the political fabric that gives force and strength to legal harmonisation and regional

¹²⁹ Harmonisation using conventions depends on the number of states that accede to the conventions, yet this might never be clear for a long period of time. The Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) failed because they could not get ratifications from even some of the states that had participated in its adoption. "At the international level, it is harder to persuade States to accede to a convention if the 'price' is so high at the outset. And, if this initial hurdle is overcome and a reasonable number of States do accede, amendment of that original convention then requires agreement from a much larger group of States if uniformity is to be maintained". See AD Rose "The Challenges for Uniform Law in the Twenty-First Century" (1996) 1 *Uniform Law Review* 9-25 at 13.

¹³⁰ The DRC is also Economic Community of the Great Lakes Countries (CEPGL), Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central African States (ECCAS), Southern African Development Community (SADC), International Conference on the Great Lakes Region (ICGLR) and has now joined the OHADA as well. See also for the same point LG Castellani "Ensuring Harmonisation of Contract Law at Regional and Global Level: The United Nations Convention on International Sale of Goods and the Role of the UNICITRAL" (2008) 13 *Uniform Law Review* 115-126 at 117.

integration. SADC was created for economic and political coordination and cooperation. Individualism by its members on issues that should be addressed at SADC level would seem to be a deviation from its core principles. If Member States individually choose to join another regional block, there could be lack of cohesion in the operations of SADC. This could send a message of lack of transformation and development in the SADC organisation and a failure to accommodate the ever-changing needs of its membership.

Intra-regional trade refers to trade within certain boundaries. SADC intra-regional trade is, thus, trade amongst the SADC Member States. It is noble to aid the free trade area in SADC by seeking a home grown solution to the legal diversity and fragmentation that is hindering the free movement of goods within the region. Member States joining the OHADA rather than negotiating a harmonisation process in SADC itself will negatively affect the possibility of a localised supranational sales law which addresses the needs of this region. A harmonised sales law could boost intra-regional trade in SADC which, in turn, would promote deeper economic integration and development in SADC. Accession to the OHADA of only a few states will not be able to sufficiently facilitate intra-regional trade in SADC as long as other states in the region still use their own outdated and inaccessible national sales laws.

Fragmentation of the law is still one of the major challenges to cross-border trade in SADC. It is often difficult to know which law applies to a particular transaction as the law is often derived from different sources. Whether a matter is dealt with under national legislation or by the common law is often not easy to establish. Worse still, some states have acceded to the CISG, meaning that in some instances the international instrument would apply. This fragmentation will not be resolved by piecemeal accession to other international instruments or organisations by interested SADC Member States. That might actually worsen the situation, seeing that, instead of having a collective solution, OHADA will provide yet another regime which will add to fragmentation of the law.¹³¹

¹³¹ The same criticism has been levelled against the Common European Sales Law in that [t]he introduction of a European instrument for cross-border commercial sales contracts essentially inserts a new, regional instrument between the divergent national laws of the Member States and the

The SADC Treaty envisages the harmonisation of policies and programmes. Although this does not specifically refer to the harmonisation of laws, it is argued that this might well be a solid basis for a SADC initiative on harmonised sales laws, particularly now that lessons can be learnt from OHADA on the processes and procedures.¹³² It would seem as if the SADC and its membership, through this objective, is looking forward to a SADC based solution for the harmonisation of policies and programmes as one of the key pillars for deeper integration and economic development. It is argued that, by joining the OHADA individually, Member States could in effect be working against one of its core objectives of collectivism and coordination at SADC level.¹³³

If one state in an intra-regional dispute is also an OHADA member and the other one is not, the dispute resolution process will be somewhat obscure. The jurisdiction of the OHADA Common Court of Justice on matters involving SADC Members States might be in conflict with the jurisdiction of the SADC Tribunal. Besides, the possibility for forum shopping, conflicts might also arise between the two systems since the OHADA system is a rules based one which prioritises adjudication and arbitration as its core dispute settlement mechanisms, whilst in SADC the Tribunal is seemingly overshadowed by diplomacy and politics.¹³⁴

In the final analysis, although the accession to the OHADA system by SADC Member States might facilitate rapid and consistent harmonisation of laws in SADC and pave the way for accelerated continental harmonisation, it is doubtful whether this will be the best option. There could be challenges of regional incompatibilities between the original OHADA and SADC Member States mainly based on legal

international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity." See N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 2 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013).

¹³² See Generally LD Ngaundje "Regionalism: Lessons the SADC may learn from OHADA" (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 256-270.

¹³³ "The SADC Vision is to build a region in which there will be a high degree of harmonisation and rationalisation, to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region." See SADC Vision on SADC website available at <<http://www.sadc.int/about-sadc/overview/sadc-vision/>> (accessed 26-08-2013).

¹³⁴ It has been observed that SADC is also rules based system, at least on paper, but disregarded by its members. See discussion by G Erasmus "Is the SADC Trade Regime a Rules Based System?" (2011) 1 *SADC Law Journal* 17-34.

tradition, culture and language because of the different colonial backgrounds. Moreover, multiple memberships to regional groupings come with many challenges of their own especially considering the scope and overall objectives of both the OHADA and SADC which are based on different goals.

5 4 3 Adopting the OHADA General Commercial Law Uniform Act Book VIII

The OHADA system comprises a host of instruments in addition to the Uniform Act on General Commercial Law, which contains Book VIII on sales law (hereinafter Book VIII). In order to avoid the burden and complications inherent in the entire OHADA system, the possibility of adopting Book VIII is an attractive one because of the flexibility it provides.

Technically, it is possible for the SADC to simply adopt Book VIII alone and make it a SADC instrument to be adhered to by its Member States. In the context of the OHADA system, the Treaty, however, does not provide for such an eventuality. Under the OHADA, states accede to the OHADA Treaty as such. The Uniform Acts then apply automatically by virtue of that accession. Thus, accession to the OHADA Treaty means that states will not have the option to adopt specific Uniform Acts to the exclusion of others.

The practical approach is therefore to copy Book VIII and then to use it in the SADC region. Realistically, this is tantamount to drafting a harmonised law using another instrument of harmonisation as a model. Using instruments formulated by leading international organisations is a common approach to legal harmonisation followed across the globe. Generally, this approach is adopted to ensure that developing legal systems learn from leading and developed systems and so keep pace with the best international standards. Although this approach has its advantages, challenges can still arise depending on the circumstances.

Transplanting the provisions of the OHADA Treaty and incorporating them into a SADC legal instrument for the harmonisation of sales laws will absolve the SADC States from having disputes under the uniform law settled by the OHADA Common Court of Justice and Arbitration. The instrument will be subjected to the SADC

structures and institutions where the SADC Tribunal can adjudicate disputes arising under such instrument. There is a strong perception in SADC that dispute resolution can cause disintegration in the region if not handled properly, and sometimes diplomatically and politically.¹³⁵

The philosophy of “local solutions for local problems” is paramount in SADC. This means that the region prefers home grown solutions for the challenges it faces. A wholesale transplantation of a certain legal system could be seen as greatly at variance with this tradition. Indeed, SADC has its own institutions and organs designed to carry out its mandate under the SADC Treaty. However, using the best available standards and instruments as a basis for creating its own harmonised law should not be against the notion of local solutions for local problems. This approach could in fact give SADC organs an opportunity to draw from the available works on harmonised sales law in creating the best law for its Member States, thus providing itself with the best “local solution for local problems.”

The final product could either be a hard law or a soft law instrument. Thus, SADC can use Book VIII to enact a binding community sales law with or without some modifications on the OHADA text. In the current system, this can be done through the adoption of Book VIII by the SADC Summit and opening it for signature by Member States. However, concerns about the effectiveness of such a process are discussed in Chapter 7 below.

Alternatively, Book VIII could simply be adopted as a model law or guideline for SADC Member States to follow in the enactment of their national sales law. This approach therefore affords SADC the flexibility of not only modifying the text of Book VIII but also leaves SADC Member States with a choice on the nature of the instrument and the method of introduction. This process would be similar to the adoption of the CISG as a Model Law or Guideline discussed in 4.6 above.

¹³⁵ The CCJA is a major source of concern seeing that it is the Supreme Court on OHADA uniform Acts. See S Mancuso “The Renunciation to the State Sovereignty: Is it an Issue for the OHADA Treaty for the Harmonization of Business Law in Africa?” in CC Nweze (ed) *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor. Dr. Christian Nwachukwu Okeke* (2009) 475-490 at 479-481.

Although there are strong arguments in favour of using the OHADA Book VIII as a basis for SADC to create its own local instrument for the harmonisation of sales laws, such an approach could have some serious drawbacks. The disadvantages of this approach relate mainly to the value and acceptance that the Uniform Acts would have in SADC. This is mainly because of the differences in legal tradition, history and political affiliations between SADC and OHADA States.¹³⁶

The dispute settlement system in SADC, ahead of the new Protocol on the SADC Tribunal, seems to be different from that of the OHADA.¹³⁷ Without a supranational judicial system that has overriding powers in the interpretation of the harmonising law, there is no guarantee that a harmonised supranational law in SADC will in fact be interpreted and enforced in a harmonised way if it is to be left to the different national courts alone.¹³⁸

If regional harmonisation is understood as a stepping stone towards continental harmonisation of sales laws, then this approach could be detrimental to that goal. SADC will likely not adopt the OHADA Book VIII *verbatim* as the instrument will invariably contain provisions that need to be amended to meet SADC needs. The amendment and localisation of the OHADA Book VIII into SADC law will create two instruments with differing provisions. Continental harmonisation could eventually be hampered by such a step as it leaves room for further diversity instead of uniformity.

Drafting regional or international instruments involves research and reference to existing instruments or work that has been done in the subject area. This is mostly done to keep pace with international trends, especially in an ever-changing business world. Although this is done as a matter of standard procedure in legal research and drafting, it does not mean that the provisions of the instruments of reference are categorically adopted. In some cases they are explored to build a case against their

¹³⁶ See 5 4 above

¹³⁷ The Summit directive is that the Tribunal should only have jurisdiction on disputes between states whereas the CCJA has jurisdiction for all persons.

¹³⁸ In fact some judges in other OHADA countries have professed ignorance of the OHADA laws and the system and have shown a further resistance to embracing the system. See CM Dickerson "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 *Columbia Journal for Transnational Law* 17-73 at 59 and M Frilet "Legal Innovation for Development: The OHADA Experience" in H Cisse, S Muller, C Thomas & C Wang (eds) *World Bank Legal Review Volume 4: Legal Innovation and Empowerment for Development* (2012) 335-346 at 340.

adoption. Trade, in particular the sale of goods, is influenced by a wide range of issues including culture and practice. The law contained in a particular instrument might not reflect the practice within a certain sphere of trade or geographical region. It is futile to create an instrument of legal harmonisation in SADC based on a foreign instrument that does not resonate with the practice of traders in SADC. For the adoption of the OHADA Book VIII to be wholly or partially useful for the harmonisation of sales laws in SADC, it must pass the test of compatibility with the legal culture, tradition and practice in SADC from a more general and technical perspective.

5 5 CONCLUSION

A number of factors are at play when it comes to the process and institutionalisation of legal harmonisation. Issues of capacity, availability of resources, legislative authority, availability of relevant institutional organs to carry out the task and compatibility with the existing norms and processes in the organisation are all factors that play a role in the process. The issue in this regard is how far can the OHADA system be used to create a harmonisation system within the context of the current SADC legal and institutional framework?

The OHADA process has received much recognition and applause for the work it produced towards the harmonisation of business laws. The recognition of the OHADA, not only in Africa but also internationally, as a pace setting model for legal harmonisation makes it not only attractive but warrants serious consideration. There is little doubt that the establishment and purpose of OHADA is something to envy and that its utility is derived from the measure of respect and positive response it gets from both members and non-members of the Organisation.

The OHADA harmonisation style involves the creation of automatically binding uniform laws. This is a system that not only encourages harmonisation but hastens and fosters it. Automatically binding uniform acts might also be pivotal in achieving the SADC objective of deeper regional integration. Regional integration needs a legal framework that fosters and sustains it. Regional laws could be important in

ensuring cohesion and cooperation towards improving the legal conditions in each of the SADC Member States as is evident from the example of OHADA.

The availability of the SADC Tribunal is a major advantage in the creation of a regional system of harmonisation. The Tribunal can be assigned the role of being the final adjudicator or arbiter in cases involving the interpretation and application of the harmonised law.¹³⁹ This is to ensure that the harmonised law is interpreted and applied in a uniform way and also to encourage deeper regional integration.

The assumption that the institutional structures of the Organisation drive and sustain the OHADA is not completely accurate. An argument can be made out for the fact that OHADA is driven more by political will than institutional capacity. Political will refers to the will of the national political leaders of the Member States to cooperate and achieve success in the project. The addition of the Conference of the Heads of State to the OHADA institutions was a sign of recognition for the role of political will in international relations in the region. The real issue is whether SADC political leaders have the will to initiate and drive the process of legal harmonisation. Criticism is always levelled against SADC political leaders for using their political power to negatively influence the processes of deeper integration. That in itself is one of the major concerns. As Ruppel points out, “without political will and good faith on the part of ... states to meet and comply with their obligations as spelt out in ratified treaties and conventions, economic regional integration is likely to remain a concept on paper.”¹⁴⁰

In the end, the question must be asked whether the benefit, or attractiveness, of the OHADA lies in the instruments it produced or in the system itself. If SADC Member States find the entire OHADA system attractive, there is a possibility for the region to adopt the functional structure of the OHADA system and create within the current SADC organisational framework a similar project for legal harmonisation.

¹³⁹ The new Protocol on the SADC Tribunal currently being negotiated can transform the Tribunal and give it this role. The only challenge at this stage is that the directive from the SADC Summit is that the Protocol should limit the jurisdiction of the Tribunal to matters between states only. There is no reason why this cannot be changed to facilitate a new harmonisation dimension.

¹⁴⁰ See OC Ruppel ECAS 2011 – 4th European Conference on African Studies Uppsala 15-18 June 2011 quoted by LD Ngaundje “Regionalism: Lessons the SADC may learn from OHADA” (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 256-270 at 364.

Alternatively, it can even join the OHADA rather than merely adopting the OHADA instruments. However, if the success of OHADA only lies in its instruments, a different approach is required. Looking at the scope and objectives of the two organisations, it is argued that the best solution is to create within SADC a project for the harmonisation of laws that is in line with the principles and objectives of SADC as a regional economic community. SADC has an adequate basic institutional, operational and legal framework to address this matter, although in some instances these require some level of transformation and reform which could benefit from the OHADA example.

CHAPTER 6

THE COMMON EUROPEAN SALES LAW (CESL)

6 1 INTRODUCTION

Although there are other regional economic community initiatives which also pursue the harmonisation of law, the European Union is perceived as the most sophisticated and recognised model for legal harmonisation on a regional level.¹ It boasts a long history, broad scope, a process of deepening integration and successive arrangements which makes it the epitome of regional integration. The European Union also fulfils a leadership role in assisting other regions embarking on initiatives for regional integration and legal harmonisation.²

As is the case with the Southern African Development Community, the European Union is a comprehensive regional organisation, and not simply an organisation for the harmonisation of laws as is the case with OHADA. In the EU, processes for the harmonisation of laws are ingredients towards the proper functioning of the Union as a comprehensive inter-governmental organisation. Its institutional make up has been emulated by regional organisations around the world, most of which are in Africa, Asia, the Caribbean and South America. In some form or the other, these regional organisations have institutions that mirror those of the EU, such as the executive arms (Heads of State and Council of Ministers), judicial (a court or tribunal), legislative (regional parliaments) and administrative institutions (the Commission or

¹ It is the most developed though not perfect. See TA Börzel & T Risse “Diffusing (Inter-) Regionalism: The EU as a Model of Regional Integration” (2009) 5 KFG *Working Paper Series No. 7* available at <http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_7.pdf> (accessed 09-09-2013). See also generally R Oprescu “EU - Sui Generis Entity. Can the Integration Model be Replicated? An Exploratory Insight to Regional Integration” (2012) 57 *Studia Universitatis Babeş-Bolyai, Europaea* 85-100.

² See European Union Finances Regional Integration Agencia de Informacao de Mocambique (Maputo, Mozambique), March 21, 2013. “Acceleration of regional and continental integration” is one of the key principles of the New Economic Partnership for Africa’s Development (NEPAD). See I Taylor “Governance and Relations between the European Union and Africa: The case of NEPAD” (2010) 31 *Third World Quarterly* 51-67 at 53.

Secretariat). Although most of them still lag behind, the ambition to emulate the European Union remain.³

Although the role of the European Union is mainly that of a leader, it continues to enjoy good relations with other regional organisations around the world. In Africa, and in particular southern Africa, colonialism has been replaced by developmental assistance. In recent times, the EU's focus has shifted from merely concentrating on providing financial aid to that of trade with Africa, alternatively to provide financial aid for trade.⁴ Trade cooperation through partnership agreements have increased between southern African countries and the European Union,⁵ to the extent that the EU is currently one of SADC's largest trading partners.⁶ Consequently, the SADC region should have a sound business and legal framework which meets the European standards to attract trade and investment from the EU.

Insofar as the harmonisation of regional sales laws is concerned, the European Union has taken the lead by proposing a Common European Sales law (CESL) - an instrument of particular importance to this study. The CESL is the result of years of

³ See also generally T Lenz "Spurred Emulation: The EU and Regional Integration in Mercosur and SADC" (2012) 35 *West European Politics* 155-173 and J Kitipov "African Integration and Inter-regionalism: The Regional Economic Communities and their Relationship with the European Union" (2012) 34 *Strategic Review for Southern Africa* 21-44.

⁴ For a discussion on the evolvement of the relations between the EU and SADC, see M Qobo "The European Union" in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 251-263.

⁵ At the end of 2007 Botswana, Lesotho, Swaziland, Mozambique (23rd November) and Namibia (3rd December) agreed to an Interim region-to-region Economic Partnership Agreement with the EU. See Interim Agreement with a view to an Economic Partnership Agreement between the European Community and Its Member States, of the one part, and the SADC EPA States, of the other part available at <http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_143981.pdf> (accessed 14-08-2013). Trade with South Africa is covered by the Trade, Development and Cooperation Agreement (TDCA) signed in 1999; see Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, Official Journal of the European Communities 42 L 311 (4 December 1999). The least developed countries in SADC also enjoy duty-free quota-free market access to the EU under the "Everything but Arms" initiative. Also see generally S Karingi, N Oulmane, M Sadni-Jallab, R Lang, R Pérez & I Ouadreggo "The EU-SADC Economic Partnership Agreement: A Regional Perspective" (2005) African Trade Policy Centre No 28 available at <<http://www.uneca.org/sites/default/files/publications/atpc28.pdf>> (accessed 10-09-2013) for an assessment of the impact of the EPA negotiations on the economies of SADC, and effects of these negotiations on the regional integration process.

⁶ See SADC trade statistics available on the SADC website <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> (accessed 26-08-2013). In 2010, the value of total EU imports was about €25bn (9.8% agriculture; 1.9% fish; and 87.3% industry). EU imports focus on few products such as diamonds (mostly Botswana), petroleum (Angola), precious stones metals and fish (Namibia), sugar (Swaziland) and fruit and nuts. In 2010, total EU exports represented €28 bn. See EU *Fact sheet on the interim Economic Partnership Agreements: SADC EPA GROUP* (2011) available at <http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142189.pdf> (accessed 14-08-2013).

research and consultation amongst the Member States of the EU. Before the creation of the CESL, the EU attempted a number of steps to harmonise its contract laws in order to facilitate trade.⁷ The emergence of the CESL, therefore, is a significant but not surprising development in many ways.

The proposal of a common sales law for Europe has been met with mixed reaction. Whilst some think it is a commendable development, others are of the opinion that it is simply unnecessary. Important issues have been raised pursuant to the proposal of the Common European Sales Law. The European experience in this regard can therefore provide valuable information for SADC on how to approach legal harmonisation in a regional context. Most importantly, questions have been raised on the functional relationship between the CESL and the CISG; in particular, whether the CESL is a diversion from global efforts towards the harmonisation of international sales law. One of the critical issues that are considered in this chapter is whether the CESL is necessary in light of the fact that the CISG is applicable in almost all EU Member States. This chapter provides an investigation into the rationale for, function of and matters arising from the proposed CESL within the broader context of existing and future trends towards the harmonisation of international sales law.

At the time that this study was undertaken, the processes leading up to the enactment of the CESL has not been finalised yet; hence, all references are to the Proposal for a Regulation on a Common European Sales law as communicated by the European Commission on 11 October 2011. Any further revisions or steps undertaken on the Proposal are not taken into account and also do not affect the general purpose of this study.

Arguably, because of the strong trade relations between SADC and the EU together with the fact that SADC, to some extent, follows the EU model of regional integration⁸, the CESL becomes a necessary tool for comparison, or perhaps even a point of departure, for any SADC endeavour to harmonise its national sales laws. The investigation into the CESL is therefore approached against this background.

⁷ See the background to the proposal for the Regulation on a Common European Sales Law in 6.5 below.

⁸ See R Gibb "Regional Integration and Africa's Development Trajectory: Meta-theories, Expectations and Reality" (2009) 30 *Third World Quarterly* 701-721.

This chapter commences with a discussion of the institutional make-up and legal framework of the EU before analysing the proposed Common European Sales Law to illustrate that the success of any project for regional harmonisation depends on its institutional and legal foundations.

6 2 THE EUROPEAN UNION

The European Union (EU) is a unique economic and political partnership between 28 European countries.⁹ It can be traced back to attempts in the aftermath of the Second World War to foster economic cooperation and to facilitate economic interdependence in the region. This resulted in the European Economic Community (EEC), which was created in 1958 to increase economic cooperation between six countries, namely Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, a single market¹⁰ has been created which is still continuing to develop towards its final fruition. The single market is the EU's main economic engine, enabling most goods, services, money and people to move freely between countries within the Union. The EU has furthermore evolved into an organisation spanning all policy areas, from development aid to environment. The name change from the EEC to the European Union (the EU) in 1993 reflects this change.¹¹

The basic framework of and reasons for the formation of the European Union echo those of SADC. There is a great similarity in the philosophy behind the formation of the two economic groupings, which to some extent testify to the European influence on regional integration in the world. The Preambles to the Treaties of both organisations show that the states are brought together based on their common history and culture and a need to end “division” or in SADC’s case consolidate the gains of liberation. They are also founded on the desire to deepen solidarity and

⁹ “The creation of the European Community is not easily captured by any simple theoretical argument. It appears as a phenomenon *sui generis*.” See W Mattli *The Logic of Regional Integration: Europe and Beyond* (1999) 68.

¹⁰ A single market is “a market consisting of a number of nations, especially those of the European Union, in which goods, capital, and currencies can move freely across borders without tariffs or restrictions”. See Collins English Dictionary available at <<http://www.collinsdictionary.com/dictionary/english/single-market>> (accessed 15-08-2013).

¹¹ The European Union was established by the Treaty on European Union, Official Journal of the European Communities C 191 (29 July 1992). For the evolution of the European Union, see R Baldwin & C Wyplosz *The Economics of European Integration* (3rd edition 2009) 3-46 and J McCormick *Understanding the European Union: A Concise Introduction* (2nd edition 2002) 56-83.

well-being amongst the citizens of their respective communities through regional integration, citizen participation in such integration, the upholding of democratic principles and respect for human rights, the rule of law and fundamental freedoms. Briefly, the foundations and objectives of the European Union and the SADC are to a large extent identical.¹²

Whilst on paper the objectives are comparable, the results on the ground are not. The EU has arguably delivered half a century of peace, stability, and prosperity which has helped to raise living standards. It has also launched a single European currency, the Euro.¹³ SADC still lags behind in many respects because of, mainly, bad governance, corruption, disrespect for human rights, poverty and many more. Therefore, it can continue to take lessons from the European Union as an important pacesetter for regional integration in the world. However, it should be kept in mind that, although progress is slow in SADC, the organisation is still young if compared to the evolved European Union. Poverty continues to affect development and integration, not only in SADC, but in almost all African regional economic communities.

6 3 EUROPEAN UNION INSTITUTIONS

As it continues to grow, the EU remains focused on making its governing institutions more transparent and democratic. More powers are being given to the directly elected European Parliament, while national parliaments are also being given a greater role working alongside the European institutions. In turn, European citizens have an ever-increasing number of channels for taking part in the political process. The EU's broad priorities are set by the European Council, which brings together national and EU-level leaders. European citizens are represented by elected members in the European Parliament. The interests of the EU as a whole are promoted by the European Commission whose members are appointed by national

¹² See Preamble to the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). See also 3 3 above.

¹³ See European Union website available at <http://europa.eu/about-eu/> (accessed 14-09-2013).

governments. Governments address their own countries' national interests in the Council of the European Union.¹⁴

The European Union has primarily seven institutions which are: the European Parliament; the European Council; the Council; the European Commission; the Court of Justice of the European Union; the European Central Bank; and the Court of Auditors.¹⁵ These institutions are required to cooperatively work within their Treaty powers to promote the EU values, "advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."¹⁶ A closer look at these institutions is necessary for this study in order to establish their role in regional integration in general and in particular for the harmonisation of laws.

6 3 1 European Parliament

The European Parliament is composed of representatives of the Union's citizens, elected for a term of five years by direct universal suffrage in a free and secret ballot. However, the membership of the parliament is "degressively proportional" with minimum thresholds of six per state and a maximum threshold of ninety-six seats per state. The main function of the European Parliament that sets it apart as relevant for integration is its legislative role, although it also has budgetary and political functions.¹⁷

It has been noted already in the SADC context that the SADC-PF is just a "loose association of national parliaments" without a meaningful role to play in regional integration and the harmonisation of laws. The European Parliament on the other hand, together with the Council, drives the legislative processes of the European Union. The members of the European Parliament are elected by direct universal

¹⁴ See European website available at <<http://europa.eu/about-eu/>> (accessed 14-08-2013) and also J McCormick *Understanding the European Union: A Concise Introduction* (2nd edition 2002) 84-85.

¹⁵ See Article 13 (1) of the Consolidated versions of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). The first five are referred to as the "Big 5" denoting their role as the main institutions of the Union. See R Baldwin & C Wyplosz *The Economics of European Integration* (3rd edition 2009) 68.

¹⁶ See Article 13 (1) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

¹⁷ For provisions on the European Parliament, see Article 14 of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

suffrage. This aspect is fundamental to element characterises the democratic context in which the European Union functions. In this respect it can be distinguished from the OHADA and SADC where respectively the Council of Ministers and Summit, which are composed of members from the national executive branch of their Member States, are the primary legislative arms. In the OHADA context, this distinction is even greater than in SADC. The SADC Protocols go through ratification procedures in the national parliaments of Member States before they come into force. This gives SADC Protocols some level of legitimacy. The OHADA Uniform Acts by contrast are adopted by the Council of Ministers and become applicable without the involvement of national parliaments.¹⁸ However, the democratic nature of the processes in SADC is also generally and equally questionable if one considers that at national level, parliaments in many African countries are simply there to rubber stamp legislation drafts from the executive arm of the state. Parliaments composed of elected members should be the true representatives of the people.¹⁹ Because there is a need to bring the citizens closer to the integration processes, especially that of legal harmonisation, the European Parliament sets a good example that could be emulated by other regional economic communities such as SADC.

6 3 2 European Council

The European Council is composed of the Heads of State or Government of the Member States, its President who is elected by the European Council using a “qualified majority” for a term of two and a half years renewable once, and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy also takes part in the work of the European Council. It meets twice every six months or as convened by the President when the situation requires. The main role of the European Council is “to provide the Union with the

¹⁸ There are consultations in the OHADA legislative process, however this is done through national commissions organised by the OHADA Secretariat. This is arguably not enough to diffuse the assertion that this process is not adequately democratic. See also CM Fombad “Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond” (2013) 59 *Africa Today* 50-80 at 67.

¹⁹ See also generally B Karuombe “The role of parliament in regional integration – the missing link” in A Bösl, W Breytenbach, T Hartzenberg, C McCarthy & k Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook Volume 8 2008* (2008) 222-248.

necessary impetus for its development and define the general political directions and priorities thereof.”²⁰ Decisions of the European Council are taken by consensus.²¹

The role of the European Council is not different from that of the SADC Summit of the Heads of State and Government except that the SADC Summit has legislative authority which the European Council does not have. The real purpose of the European Council is to drive the process of regional economic integration. Although there are other influential institutions within the EU, the political role of the European Council cannot be discounted. Most of the pertinent policy decisions are made by the European Council. Although the SADC Summit is modelled on the European Council, this seems only to be the case on paper as the achieved levels of economic, political and social integration are more significant in the European context than in SADC. There is an apparent lack of adequate political will in the case of SADC Heads of State to complete the milestones required for deeper integration. Targets for the implementation of programmes are missed, concluded agreements are generally not enforced and progress in new programmes is delayed by a failure to meet the targets set by the Regional Strategic Indicative Plan for the establishment of the Customs Union and the full implementation of the Free Trade Area. All of this has a bearing on the implementation of other integration targets.²²

6 3 3 Council

The Council is composed of a ministerial representative of each Member State who commits the government of the Member State in question and casts its vote. Jointly with the European Parliament, it exercises legislative and budgetary functions and further carries out policy-making and coordinating functions. The Council meets in different configurations and the Presidency of the Council for each configuration, other than that of Foreign Affairs, is held by a Member State representative in the Council on the basis of equal rotation in terms of Article 236 of the Treaty on the

²⁰ Article 15 (1) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²¹ For provisions on the European Council, see Article 15 of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²² This could be because authority for decision-making is even too centralised in the “all-influential heads of state and government”. C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 66, 68.

Functioning of the European Union.²³ Generally, the Council makes decisions by “qualified majority.”²⁴ The work of the Council is prepared by a Committee of Permanent Representatives of the Governments of the Member States. Council meetings are divided into two parts, dealing respectively with deliberations on Union Legislative Acts or non-legislative acts. Deliberations and voting on Draft Legislative Acts are done in the public whilst there is no such requirement for non-legislative acts.²⁵

Although the Council plays a significant legislative function, there is consolation in that its legislative function is exercised together with the European Parliament. In OHADA, the Council of Ministers’ legislative role is expansive as it primarily takes on the role of parliament. In fact, one major criticism of both OHADA and SADC is that these two organisations are mainly run by the executive without any oversight role of parliament despite the founding aspiration of bringing the citizens of the Member States closer to the integration process. As for the EU, there is a general sense that the Council of Europe effectively discharges its mandate. This could, in general, be attributed to the proper functioning of the Union as a whole and perhaps also to the fact that it has evolved and perfected itself over a long period of time since its humble beginnings after World War II.

6 3 4 European Commission

The members of the Commission are chosen for a five year term from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States.²⁶ These members should be competent and no doubt should exist about their independence because the mandate of the Commission itself is that

²³ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²⁴ For a discussion on the meaning of “qualified majority” and the numerical dynamics in the European Union voting system, see R Baldwin & C Wyplosz *The Economics of European Integration* (3rd edition 2009) 122.

²⁵ See Article 16 (8) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²⁶ See Article 17 (5) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

it should act independently without undue interference.²⁷ Currently it is composed of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who is one of its Vice-Presidents.²⁸ The key functions of the Commission are, to promote the general interest of the Union and take appropriate initiatives to that end; ensure the application of the Treaties and of measures adopted by the institutions pursuant to them; oversee the application of Union law under the control of the Court of Justice of the European Union; execute the budget and manage programmes; exercise coordinating, executive and management functions as laid down in the Treaties; ensure the Union's external representation with the exception of the common foreign and security policy and other cases provided for in the Treaties; and initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements.²⁹ Most importantly, Union Legislative Acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.³⁰ This puts the Commission at the centre of legal harmonisation in the European Union, thus giving some supranational drive to the process of regional integration.

The Commission is the engine of the European Union, so to speak. The smooth and proper functioning of the Union depends on the capacity of the Commission. Its role in the adoption of Union legislation also shows that it bears the responsibility for coming up with proposals on necessary legislation. The Common European Sales law, which is discussed in this chapter, is an initiative of the European Commission which was proposed in 2011 in line with its mandate under the Treaty of the European Union.

²⁷ See Article 17 (3) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²⁸ See Article 17 (4) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). "As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number." See Article 17 (5) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

²⁹ See Article 18 (1) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

³⁰ See Article 18 (2) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

The European Union Commission is the equivalent of the SADC Secretariat. Although they share a lot in common, the capacity of the SADC Secretariat needs to be extended, particularly through the amendment of the SADC Treaty, to enable it to facilitate the harmonisation process. Whilst the functions of the SADC Secretariat as set out in Article 14 of the Treaty appear to be overarching, the reality is that much power is bestowed on the SADC Summit, which reduces the role of the Secretariat to an administrative body rather than an effective and flexible executive body.³¹ Again, with just over a decade since the new restructured SADC, it could be argued that expectations of the still growing organisation are unrealistic.³² The former executive secretary of SADC, Tomaz Salomão and his Secretariat, have done some notable groundwork and laid down standards which, if maintained, could motivate SADC to better heights in the future.³³

6 3 5 Court of Justice of the European Union

The Court of Justice of the European Union includes the Court of Justice, the General Court and specialised courts which ensure the observance of the rule of law in the interpretation and application of the Treaties.³⁴ The Court of Justice is composed of one judge from each Member State and assisted by Advocates-General, whilst the General Court includes at least one judge per Member State.³⁵ They are chosen from persons whose independence is beyond doubt and who are

³¹ It has been observed that “power to make decisions, even on democracy and governance matters, is centralised within the SADC Summit and this situation denudes the effectiveness of the SADC Secretariat as a whole....” See Matlosa and Lotshwao quoted by C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 68.

³² Landsberg notes that “under trying circumstances the Secretariat is doing a relatively good job in coordinating and managing strategic planning in the region.” C Landsberg “The Southern African Community’s Decision-making Architecture” in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 70.

³³ For instance, the Secretariat managed to transform itself to meet the International Standards of Institutional Compliance which has immediate benefits for access to funding through Contribution Agreements. (“The EU has committed €84 million under the EDF10 programme, of which €50 million will be funded through the following Contribution Agreements: Regional Political Co-operation, €18 million; Regional Economic Integration Support, €20million; Project Preparation and Development Facility, €12 million.”) See *SADC Secretariat Meets International Standards of Institutional Compliance* (2013) available at <<http://www.sadc.int/sadc-secretariat/institutional-strengthening/>> (accessed 26-08-2013).

³⁴ See Article 19 (1) Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

³⁵ See Article 19 (2) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

appointed by common accord of the governments of the Member States for a term of six years.³⁶ The Court of Justice has jurisdiction to rule on actions brought by a Member State, an institution or a natural or legal person; give preliminary rulings at the request of courts or tribunals of the Member States on the interpretation of Union law or the validity of acts adopted by the institutions; and rule in other cases provided for in the Treaties. It has been important in defining the relations between the Member States, the EU and its citizens who are allowed to take cases straight to the Court without going through their national judicial systems.³⁷ The EU Member States are required to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.³⁸

The current process on transformation of the SADC Tribunal can learn from the Court of Justice, particularly from its jurisdictional powers, structural and functional independence and role in ensuring legal harmonisation within the region. Although the Court of Justice is currently experiencing case backlogs,³⁹ access to justice continues to be enhanced by the Community's principles of respect for the rule of law, democracy and fundamental human rights. The Court contributes to ensuring that regional laws are accorded regional and harmonious interpretation. One of the European Commission's arguments for proposing the CESL despite the availability of the CISG is that the Union has a court that can ensure harmonious interpretation of the CESL which is not available in the case of the CISG.⁴⁰ The availability of the SADC Tribunal in SADC and its role in the legal harmonisation process should not be ignored by the on-going negotiations on the new Protocol to the Tribunal. In any case, Article 16 of the SADC Treaty recognises that the Tribunal should be

³⁶ See Article 19 (2) of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

³⁷ See also R Baldwin & C Wyplosz *The Economics of European Integration* (3rd edition 2009) 76.

³⁸ For provisions on the Court of Justice of the European Union, see Article 19 of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

³⁹ See Anonymous "ECJ needs more Judges" (2013) *New Law Journal* available at <<http://www.newlawjournal.co.uk/nlj/content/ecj-needs-more-judges>> (accessed 28-08-2013). Statistics show that Court of Justice has serious backlogs. See Court of Justice of The European Union Annual Report (2012) 87 available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf> (accessed 14-08-2013).

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 5.

“constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.” These functions must not remain on paper but put into practice through the re-institutionalisation of the Tribunal.⁴¹

6 3 6 European Central Bank

The European Central Bank is the central bank for the Eurozone. It stands at the centre of the Eurosystem which consists of the national central banks of the Member States whose currency is the Euro. The Eurosystem controls the monetary policy of the Union to ensure price stability. However, the issuing of the Euro is done by the European Central Bank alone.⁴² For the sake of cohesion, the European Central Bank has to be consulted on all proposed Union Acts and all proposals for regulation at national level within the areas falling under its responsibilities and may give an opinion on the matter.⁴³ As regional integration in SADC deepens, particularly with a common currency and a monetary union in mind, the design of a SADC Central Bank should take into account the broader integration goals which should include legal harmonisation.

6 3 7 Court of Auditors

The Court of Auditors consists of one national of each Member State who is chosen from people whose independence should not admit any doubt and who are required to perform their duties with complete independence and only in the Union's general interest. The function of the Court of Auditors is to carry out the Union's audit.⁴⁴ In

⁴¹ It has been submitted that “the question whether SADC will be advanced enough to apply lessons from sophisticated and well developed systems such as the EU and to give effect to the rulings of its judicial organ remains open for the time being.” See OC Ruppel “The SADC Tribunal, Regional Integration and Human Rights: Major Challenges, Legal Dimensions and some Comparative Aspects from the European Legal Order” (2009) *Recht in Afrika* 203-228 at 228.

⁴² See Article 282 (3) of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁴³ See Article 282 (5) of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁴⁴ See Articles 285 and 286 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

SADC, audits are performed by appointed external auditors.⁴⁵ Maintenance of good governance is ensured through financial regulations and auditing processes within the regional organisation. These processes are especially important taking into account the rampant corruption and financial mismanagement in the region, even though no such concerns have officially been recorded against the SADC Secretariat thus far. At face value, the utilisation of external auditors provides confidence to the donor community on which SADC depends for the financing of its programmes and activities, in particular the proposed regional harmonisation of sales laws. As Kofi Annan noted that,

“[t]here is a new global deal on the table: When developing countries fight corruption, strengthen their institutions, adopt market - oriented policies, respect human rights and the rule of law, and spend more on the needs of the poor, rich countries can support them with trade, aid, investment and debt relief.”⁴⁶

6 3 8 Concluding Remarks

The institutional framework of the European Union is well established, advanced and sophisticated. It is way ahead in terms of regional integration when compared to other regional economic communities. Lessons on regional integration are generally extracted from the functioning of the European Union as a leader in this area. Legal harmonisation has played a critical role in the establishment and sustenance of the EU to date. In fact, its deeply integrated political and economic processes are facilitated by an enabling legal framework. The recent proposal of the Common European Sales Laws (CESL) is yet another example of how far the European Union is integrated and motivated to continuously develop and transform its legal framework to meet its economic and political integration needs. Supranational institutions play an important role in driving the integration process; however, citizen participation in regional integration should not be understated as regional integration is in the first place for the common good of its citizens.

⁴⁵ See Article 29 of the Treaty of The Southern African Development Community signed on 17 August 1992 at Windhoek, Namibia (as amended) available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁴⁶ K Annan “Help by Rewarding Good Governance” (20 March 2002) *International Herald Tribune* 8.

6 4 EUROPEAN UNION LEGAL FRAMEWORK

6 4 1 Law-making procedures

The European Union is based on the rule of law. This means that every action taken by the EU should be founded on treaties that have been approved voluntarily and democratically by all EU Member Countries. The EU's standard decision-making procedure is known as "Ordinary Legislative Procedure."⁴⁷ This is a "joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission."⁴⁸ Thus, the directly elected European Parliament has to approve EU legislation together with the Council (the governments of the 28 EU countries). The European Parliament also has more power to block a proposal if it disagrees with the Council. The aims set out in the EU Treaties are achieved by several types of legal acts. European Union law is divided into "primary" and "secondary" legislation. The Treaties are the basis or ground rules for all EU actions. Legislation which includes regulations, directives and decisions are derived from the principles and objectives set out in the Treaties. Some apply to all EU countries, others to just a few.⁴⁹

There are three main institutions involved in EU legislation: the European Parliament, the Council of the European Union and the European Commission. Together, these three institutions produce the policies and laws that apply throughout the EU. In principle, the Commission proposes new laws, and the Parliament and Council adopt them. The Member States then implement them, and the Commission ensures that the laws are properly applied and implemented. This is where the current institutional nature of SADC is still hindering regional law harmonisation. Because there is no regional Parliament, SADC Protocols are

⁴⁷ See Article 289 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁴⁸ See Article 289 and 294 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁴⁹ See EU *Basic information on decision making procedures in the European Union on the European Union* (2013) available at <http://europa.eu/about-eu/basic-information/decision-making/procedures/index_en.htm> (accessed 14-08-2013). See also J McCormick *Understanding the European Union: A Concise Introduction* (2nd edition 2002) 89 and R Baldwin & C Wyplosz *The Economics of European Integration* (3rd edition 2009) 77-80.

approved by the SADC Summit on the recommendation of the Council.⁵⁰ Protocols only come into force when ratified by a specific number of States and only apply to those States that have ratified them, which means that SADC functions more like an international organisation than a regional community. In principle, this means that SADC has no power to legislate on behalf of its Member States. For regional harmonisation to be achieved effectively SADC has to create both an institutional and legislative framework that is permissive to the ideal of harmonisation. The current process of protocols will hardly lead to any meaningful legal harmonisation which holds certainty as its core value.⁵¹

Two other institutions that play vital roles in the EU's law making powers are the Court of Justice which upholds the rule of law and the Court of Auditors which is responsible for matters concerning the financing of EU activities.

The powers and responsibilities of all of these institutions are laid down in the Treaties which at the same time also lay down the rules and procedures that the EU institutions must follow.⁵² The Treaties are agreed to by the presidents and/or prime ministers of all the EU countries, and ratified by their parliaments. The main goal of the EU is the progressive integration of Member States' economic and political systems and the establishment of a single market based on the free movement of goods, people, money and services. To this end, Member States cede part of their sovereignty under the Treaty on the Functioning of the European Union (TFEU) which empowers the EU institutions to adopt laws. These laws (regulations,

⁵⁰ See Article 22 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/94_34/SADC_Treaty.pdf> (accessed 26-08-2013).

⁵¹ See AD Rose "The Challenges for Uniform Law in the Twenty-First Century" (1996) 1 *Uniform Law Review* 9-24 at 13.

⁵² The EU has a number of other institutions and inter-institutional bodies that play specialised roles: the European Economic and Social Committee represents civil society, employers and employees; the Committee of the Regions represents regional and local authorities; the European Investment Bank finances EU investment projects and helps small businesses through the European Investment Fund; the European Central Bank is responsible for European monetary policy; the European Ombudsman investigates complaints about maladministration by EU institutions and bodies; the European Data Protection Supervisor safeguards the privacy of people's personal data; the Publications Office publishes information about the EU; the European Personnel Selection Office recruits staff for the EU institutions and other bodies; the European School of Administration provides training in specific areas for members of EU staff; a host of specialised agencies and decentralised bodies that handle a range of technical, scientific and management tasks; and the European External Action Service (EEAS) which assists the High Representative of the Union for Foreign Affairs and Security Policy. See EU *European Union institutions and other bodies* available at <<http://europa.eu/about-eu/institutions-bodies/>> (accessed 14-08-2013).

directives and decisions) take precedence over national law and are binding on national authorities. The EU also issues non-binding instruments, such as recommendations and opinions, as well as rules governing how EU institutions and programmes work.

6 4 2 European Union legislation (directives and regulations)

EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. Directives may concern one or more Member States, or all of them. Each directive specifies the very last date by which the national laws must be adapted, thereby giving national authorities the room to manoeuvre within these deadlines, which is necessary to take account of differing national situations. Directives are used to bring different national laws into line with each other, and are particularly common in matters affecting the operation of the single market (for example product safety standards).⁵³

Regulations are the most direct form of EU law because as soon as they are passed, they have binding legal force throughout every Member State, at the same level with national laws. National governments do not have to take action themselves to implement EU regulations. They are different from directives, which are addressed to national authorities, who must then take action to make them part of national law, and decisions, which apply in specific cases only, involving particular authorities or individuals. Regulations are passed either jointly by the EU Council and the European Parliament or the Commission alone. The proposed CESL is in the form of a regulation.⁵⁴

⁵³ See Article 288 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012). See also 2 4 2 3 above for a general discussion on directives and regulations,

⁵⁴ See Article 288 of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

6 5 THE COMMON EUROPEAN SALES LAW (CESL)

6 5 1 Rationale for the CESL

The European Commission observed that one of the European Union's most significant achievements is the single market of about half a billion consumers which enable businesses and citizens to move and interact freely. The reduction of barriers between EU Member States has brought numerous benefits to its citizens, such as the freedom to travel, study and work abroad. As a result European consumers enjoy numerous economic benefits such as lower air fares and mobile telephone charges as well as the opportunity of accessing a larger variety of products. Businesses can also benefit by expanding their activity across borders by importing or exporting goods, providing services or establishing businesses abroad. This means that they benefit from the economies of scale and the greater business opportunities that the single market offers.⁵⁵ However, even with these achievements, there are still barriers that affect cross-border trade and which allow citizens and businesses to take full advantage of the single market.⁵⁶ It has been observed that, "currently, only one in ten of traders in the Union exports goods within the Union and the majority of those who do, only export to a small number of Member States."⁵⁷ The contract law systems of the EU's 28 Member States are considered as one of the main barriers that hinder cross-border trade⁵⁸ as there is no single set of uniform and comprehensive European contract law which can be used by businesses and consumers in cross-border trade.

⁵⁵ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 2.

⁵⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 2.

⁵⁷ Recital 1 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁵⁸ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 2. Statistics in trade in OECD countries show that controlling for country-specific factors, distance, the presence of common border and common language, similar legal systems have a significant impact on trade. For instance, if two countries share common origins for their legal system, on average they exhibit trade flows 40% larger". See A Turrini & T Van Ypersele "Traders, Courts and the Border Effect Puzzle" (2010) 40 *Regional Science and Urban Economics* 81-91 at 82.

Efforts towards the harmonisation of contract law in the European Union began with the establishment of the Lando Commission in 1983 which prepared the Principles of European Contract Law (PECL). The PECL, although soft law, were meant to be the basis of a European contract law and in the broader context a European Civil Code.⁵⁹ Work on a common contract law for Europe began in 2001 when the European Commission launched a process of extensive public consultation on the fragmented legal framework in this area of the law.⁶⁰ This led to the formation of two working groups, one focussing on a common civil code (the Study Group on the European Civil Code) and the other on a common contract law (the Research Group on EC Private Law, also known as the *Acquis* Group). The work of both groups culminated in the Draft of the Common Frame of Reference (DCFR).⁶¹ Thereafter, at the end of April 2010, the Commission set up an Expert Group on a Common Frame of Reference in the area of Common European Contract Law in order to “recontractualise” and revise the DCFR.⁶² In July 2010, the Commission launched a public consultation by publishing the ‘Green Paper on policy options for progress towards a European contract law for consumers and businesses’, which set out seven different policy options on how to strengthen the internal market by making progress in the area of European contract law.⁶³ The Expert Group introduced the ‘Feasibility Study for a Future Instrument in European Contract law’ in May 2011.⁶⁴ The study suggested the creation of a regime of contract law that will be optional alongside the national laws of the Member States. In response to the Green Paper,

⁵⁹ See M Hrnčíříková, F Cerný & J Havlíček “A Few Thoughts on the New Common European Sales Law” in (eds) AJ Belohlávek, F Cerný & N Rozehnalová *Czech Yearbook of International Law IV 2013: Regulatory Measures and Foreign Trade* (2013) 123-142 at 126.

⁶⁰ See Communication from the Commission to the Council and the European Parliament on European Contract Law Brussels, 11.07.2001 COM(2001) 398 final.

⁶¹ See generally C Von Bar, E Clive, & H Schulte-Nölke (eds) *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)* (2009).

⁶² See H Eidenmüller, N Jansen, EM Kieninger, G Wagner & R Zimmermann “The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law” (2012) 16 *Edinburgh Law Review* 301-357 at 306.

⁶³ See Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses Brussels, 1.7.2010 COM(2010) 348 final.

⁶⁴ On 3 May 2011, an expert group established by the Commission delivered a feasibility study on a future initiative on European contract law (IP/11/523). See European Commission *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback Annex IV* (2011) available at <http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf> (accessed 14-08-2013). See also G Dannemann & S Vogenauer “Introduction: The European Contract Law Initiative and the ‘CFR in Context’ Project” in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 12-14.

the European Parliament issued a Resolution on 8 June 2011 in which it expressed its strong support for an instrument which would improve the establishment and the functioning of the internal market and bring benefits to traders, consumers and Member States' judicial systems.⁶⁵ After taking these responses into account, the Commission prepared a report which detailed that the suitable instrument was a regulation. The report was approved by the Impact Assessment Board, paving the way for the publication of the Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (CESL) on 11 October 2011.

The CESL is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU).⁶⁶ Its objective is to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules with a clear cross-border dimension that cannot be sufficiently achieved by the Member States in the framework of their national systems. In accordance with Article 114 (3) TFEU, the Common European Sales Law is meant to guarantee a high level of consumer protection. In this regard it contains its own set of mandatory rules to maintain or

⁶⁵ On 8 June 2011, the European Parliament backed an optional European contract law in a plenary vote on an Own-initiative report by MEP Diana Wallis (MEMO/11/236). See Resolution of June 2011 on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, Procedure 2011/2013 (INI).

⁶⁶ See Recital 36 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final and Article 1 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final. See also R Schulze (ed) *Common European Sales Law (CESL): Commentary* (2012) 10. There is considerable debate on whether it is in fact correct to base the CESL on Article 114 of the TFEU. There are strong "arguments voiced by case law and academia that suggest Art. 114 might not be the appropriate legal base for an optional Sales Law instrument. In contrast to what is required by Art. 114, the optional instrument does not aim at a harmonization of laws, but rather constitutes an alternative to the national contract law regimes. According to the case law of the European Court of Justice, such an optional instrument can only be based on Art 352 of the TFEU." See Council of the Notariats of the European Union *Position for a Common European Sales Law* (2011) available at <http://www.notaries-of-europe.eu/files/position-papers/2011/European_Contract_Law-CNUE-final-9-12-11-EN.pdf> (accessed 14-08-2013) paragraph 2. See also M Siebeck "Policy Options for Progress Towards a European Contract Law Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final" (2011) 75 *Rabel Journal of International and Comparative Private Law* 371-438 at 388-389, 393-394, 396; G Low "Unitas Via Diversitas: Can the Common European Sales Law Harmonize through Diversity?" (2012) 19 *Maastricht Journal of European and Comparative Law* 132-147; MW Hesselink, JW Rutgers & TQ De Booy "The Legal Basis for an Optional Instrument of European Contract Law" (2007) *Centre for the Study of European Contract Law Working Paper No. 2007/04* available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091119> (accessed 08-09-2013); K Gutman "The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options" (2011) 7 *European Review of Contract Law* 151-172; and JJ Kuipers "The Legal Basis for a European Optional Instrument" (2011) 19 *European Review of Private Law* 545-564.

improve the level of protection that consumers enjoy under the existing EU consumer law, thereby enhancing competition.

6 5 1 1 A uniform law for doing business across borders

The CESL is founded on the premise that the existence of contract law related barriers may have a negative impact on businesses that consider engaging in cross-border trade and may even dissuade them from entering new markets. Once a trader decides to sell products to consumers or businesses in other Member States, he becomes exposed to a complex legal environment characterised by the variety of contract laws that exist in the EU countries. One of the initial steps is to find out which law is applicable to the contract. If a foreign law applies, the trader has to become familiar with its requirements, obtain legal advice and possibly adapt the contract to that foreign law. When trading online, the trader also may have to adapt his website to reflect mandatory requirements that apply in the country of destination. Surveys observed that European traders rank the problems incurred in locating the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions.⁶⁷

To overcome these hurdles traders have to incur transaction costs which have a significant impact on small and medium-sized enterprises (SMEs). The Commission noted that the “transaction costs to export to one other Member State could amount up to 7% of a micro retailer's annual turnover”, whilst exporting to four Member States could mean that the “cost could even rise to 26% of its annual turnover.” Consequently, European traders who are dissuaded from cross-border transactions due to contract law obstacles have been calculated to be foregoing “at least €26 billion in intra-EU trade every year.”⁶⁸

⁶⁷ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 2.

⁶⁸ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 3.

The CESL is therefore designed to encourage cross border trading by small to medium enterprises through creating a legal regime that responds to concerns on legal predictability and certainty.⁶⁹ This is done through providing one common regime of international sales law that is identical for all EU Member States and thus provides for legal certainty. This, in turn, cuts transaction costs and helps small and medium-sized companies (SMEs) to easily expand into new regional markets.⁷⁰

6 5 1 2 Consumer protection

The Commission noted that about “44 % of EU consumers say that uncertainty about their rights discourages them from buying from other EU countries”, whilst “a third of consumers would consider buying online from another EU country if uniform European rules would apply”, as compared to the only “7 % who currently do.” This “uncertainty is linked to concerns about what the consumers can do if something goes wrong and uncertainty about the nature of their rights if they buy from another country.” On the other hand, traders, in particular those engaged in trading online, reportedly often refused consumers who attempt to search for products across the EU, sales or delivery. Statistics obtained by the Commission showed that “at least 3 million consumers had this experience over a period of one year” and that their attempts to purchase products online from a European trader in a cross-border context more often fail than succeed, with many getting failure messages such as “this product is not available for your country of residence.”⁷¹

The CESL seeks to provide the same high level of consumer protection in all Member States and enable consumers to rely on the Common European Sales Law as a mark of quality. Providing certainty about their rights in cross-border

⁶⁹ See Recital 2 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁷⁰ See also European Commission *Press Release: European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice* (11 October 2011) available at <http://europa.eu/rapid/press-release_IP-11-1175_en.htm?locale=en> (accessed 14-08-2013). Some have argued, “contrary to the general view, the introduction of an optional instrument should increase rather than reduce transaction costs.” See EA Posner “The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition” (2013) 50 *Common Market Law Review* 261-275 at 262.

⁷¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 3.

transactions and increasing transparency and consumers' confidence will also invariably open consumers up to a wider choice of products and lower prices. Therefore, the CESL enhances consumer protection and makes it attractive to buy across borders by allaying the fears of unpredictability and uncertainty surrounding consumer rights and seller obligations.⁷²

6 5 1 3 Competition

The differences between national contract laws and their effect on cross-border trade also limit competition. A low level of cross-border trade restricts competition, and thus lessens incentives for traders to become more innovative and to improve the quality of their products and to reduce prices. This is especially the case in smaller Member States where there is a limited number of domestic competitors. The decision of foreign traders to refrain from entering these markets due to costs and complexity leave the local traders dominating the market, resulting in an appreciable impact on choice and price levels for available products. The same also happens where consumers refrain from buying abroad because of fears about their rights. In addition, the legal barriers to cross-border trade arguably "jeopardize competition" between SMEs and larger companies. Based on the significant impact of transaction costs in relation to turnover, an SME is much more likely to refrain from entering a foreign market than a larger competitor.⁷³ The enhancement of competition within the internal market by improving consumer protection and creating legal certainty, particularly for small to medium businesses, was therefore one of the main reasons for proposing the CESL.⁷⁴

⁷² See Recital 4 and 6 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final and also European Commission *Press Release: European Commission proposes an optional Common European Sales Law to Boost Trade and Expand Consumer Choice* (11 October 2011) available at <http://europa.eu/rapid/press-release_IP-11-1175_en.htm?locale=en> (accessed 14-08-2013).

⁷³ See Recital 7 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁷⁴ See Article 1 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final. See also R Schulze (ed) *Common European Sales Law (CESL): Commentary* (2012) 9-12 and generally G Rühl "Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime, The Recent Legal Developments: A Common European Sales Law" (2012) 19 *Maastricht Journal of European and Comparative Law* 148-163.

6 5 2 Scope and application of the CESL

The Common European Sales Law is a “second regime” of contract law that is identical in every Member State of the EU. In line with the principle of freedom of contract and party autonomy, a trader is free to choose to conclude a contract under this regime (opt-in system) or to remain with the existing national contract law.⁷⁵ Neither businesses nor consumers are obliged to conclude a contract on the basis of the Common European Sales Law.⁷⁶

The Common European Sales Law introduces a “self-standing and complete set of rules” for sales transactions.⁷⁷ This will, in particular, but not exclusively, be useful for the online supply of goods. Traders selling goods and offering directly related services, for instance the installation of kitchen equipment, can also use it. As goods account for the major share of intra-EU trade, tackling the obstacles to sales transactions still has a positive impact on the overall intra-EU trade.⁷⁸ In order to take into account the increasing importance of the digital economy, and to ensure that the new regime is so-called “future-proof”, digital content contracts will also fall within the scope of the new rules. This means that the Common European Sales Law could

⁷⁵ The existing national contract law can either be the domestic law of the country including the CISG as well in the countries that have ratified it. See Recital 9 and Article 3 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final. See also R Schulze (ed) *Common European Sales Law (CESL): Commentary* (2012) 30-34.

⁷⁶ Recital 9 and Article 3 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM (2011) 635 final. See also S Whittaker “The Proposed ‘Common European Sales Law’: Legal Framework and the Agreement of the Parties” (2012) 75 *Modern Law Review* 578-605. This article explains the background to the Proposal, sketches out the purposes and scope of the CESL, and considers and criticises its legal framework (and in particular its relationship with private international law) and the key requirement of the parties’ agreement.

⁷⁷ The CESL is “self-standing” in that it does not require amendments to pre-existing national contract laws but rather creates a second contract regime within each Member State which exists alongside the pre-existing rules of national contract law. Recital 9 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final. See also C Mak “Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law” (2013) 50 *Common Market Law Review* 277-295 at 277.

⁷⁸ According to Eurostat Statistics in Focus 37/2010 and the Eurostat External and Intra-EU Trade Yearbook of 2009, the intra-EU trade volume in goods was 4 times the volume of trade in services in 2008.

also be used, for example, when buying music, films, software or applications that are downloaded from the internet.⁷⁹

This instrument is targeted for a particular constituency of cross-border transactions, that is business-to-consumer relations and business-to-business relations where at least one of the parties is an SME. Contracts concluded between private individuals (consumer to consumer) and contracts between traders where neither of the parties is an SME are not included. It is focused on cross-border situations where the problems of additional transactions costs and legal complexity arise. It is therefore deemed to be targeted to “where it is needed and is not available as a general substitute to existing national contract law.” Individual Member States are left with the discretion on whether to give the regime a wider application⁸⁰ so that it can also apply to domestic contracts.⁸¹

The Common European Sales Law is “carried out on the basis of high level consumer protection” and therefore establishes the same common level of consumer protection for all the areas of the law covered by it. It was adopted to create a harmonised regime which will ensure that a “consumer is protected and safe whenever the Common European Sales Law is used.”⁸²

The Common European Sales Law covers issues of contract law that are of practical relevance during the life-cycle of a cross-border contract.⁸³ It therefore deals with the rights and obligations of the parties and the remedies for non-performance; pre-

⁷⁹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 7-8.

⁸⁰ Article 13 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁸¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 8.

⁸² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 8. See also Recital 12 and Article 1 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁸³ Recital 26 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

contractual information duties; the conclusion of a contract (including formal requirements); the right of withdrawal and its consequences; avoidance resulting from a mistake, fraud or unfair exploitation; interpretation; the contents and effects of a contract; the assessment and consequences of unfairness of contract terms; restitution after avoidance and termination as well as prescription.⁸⁴ It provides for the sanctions in case of breach of the obligations and duties. However, it does not address other topics deemed to be either very important for national laws or less relevant for cross-border contracts such as rules on legal capacity, illegality or immorality or representation and plurality of debtors and creditors, these aspects will continue to be governed by the rules of the national law that is applicable under the conflict of law rules.⁸⁵

The CESL also has an “international vocation”, apart from its regional application. In order for the CESL to find application, it is sufficient that only one party is established in a Member State of the EU. Traders could therefore use the same set of contract terms when dealing with traders from within or outside the EU. Where traders from third party countries are willing to sell their products in the internal market under this law, it would enable European consumers to enjoy a greater product choice under the protection offered by the Common European Sales Law. Its international vocation enables the Common European Sales Law to become a standard setter for international transactions in the area of sales contracts.⁸⁶

6 5 3 CESL and the CISG

In light of its international nature, it is important to note that the law governing international sales contracts between Member States was to a large degree uniform in 24 of the 28 Member States of the European Union insofar as these countries are all Contracting States to the CISG; the notable exceptions being the United Kingdom, Portugal, Ireland and Malta. The CESL is an optional instrument, aimed

⁸⁴ Recital 26 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁸⁵ Recital 27 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁸⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 8.

primarily at international sales.⁸⁷ Magnus points out that “[i]n many respects the CISG is the original root of the CESL.”⁸⁸ At the same time, however, it is mainly but not exclusively designed for consumer sales.⁸⁹ Since the proposed CESL also covers certain business-to-business transactions, the proposed CESL is to a certain extent a “rival” of the CISG⁹⁰ As Flechtner more pointedly explains that “the proposed CESL is, in the B2B area, basically a vote of no-confidence in the CISG.”⁹¹

Why would the EU then take the step to propose the CESL? The Commission highlights three main shortcomings of the CISG that explains, in its view, the need for a new European instrument. It notes as regards the CISG that, (i) not all EU Member States are Contracting States to the CISG; (ii) the CISG is incomplete; and (iii) there is no mechanism to ensure its uniform interpretation.⁹²

Not all members of the European Union are Contracting States to the CISG. The CISG therefore does not create uniform rules for cross-border sales contracts throughout the entire EU. Further, legal diversity remains as a consequence of the reservations made by some States. However, whether this calls for the enactment of a new law is questionable. It would seem to be more rational to call upon those Member States to become parties to the Convention. If they would support the CESL, could there still be reason for them to remain outside the community of CISG States? On the other hand, the reasons why these States have not become party to

⁸⁷ U Magnus “Introduction” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 1-4 at 1.

⁸⁸ U Magnus “Introduction” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 1-4 at 1.

⁸⁹ U Magnus “Introduction” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 1-4 at 1.

⁹⁰ U Magnus “Introduction” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 1-4 at 1.

⁹¹ HM Flechtner “The US Experience with the UCC and the CISG: Some Insights for the Proposed CESL?” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 5-24 at 21.

⁹² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market Brussels, 11.10.2011 COM(2011) 636 final at 5.

the CISG could influence their support for the CESL, which reaches further than the international sales Convention.⁹³

Significantly, the CESL applies to both business-to-consumer contracts and business-to-business contracts. This is a wider scope than the CISG which only applies to commercial contracts and excludes consumer contracts. Additionally, the CISG deals only with matters concerning contract formation, contract interpretation, the rights and obligations of the buyer and seller and the remedies for non-performance. Article 4 CISG excludes from the scope of the Convention issues concerning the validity of the contract, any of its provisions or any usage, as well as the effect the contract may have on the property in the goods sold. The CISG consequently does not deal with, for instance, defects in consent, information duties, and the fairness and validity of standard terms. These issues need to be addressed by some other applicable law, causing fragmentation and complexity. The CESL accordingly goes beyond the issues covered by the CISG and provides what the Commission calls “an instrument that covers the whole lifecycle of the contract.”⁹⁴ It fills gaps which have been left in the CISG, for instance, by having provisions on mistake, fraud, threat and exploitation,⁹⁵ unfair contract terms⁹⁶ and it also deals with pre-contractual information duties.⁹⁷ In addition, although the CISG provides the possibility of claiming interest on any sum in arrears⁹⁸ it does not state the applicable

⁹³ See N Kornet “The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?” (2012) 10 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013). See also S Moss “Why the United Kingdom has not ratified the CISG” (2005) 25 *Journal of Law and Commerce* 483-485.

⁹⁴ In fact, others argue that the scope and approach of the CESL is “too broad and somewhat unconvincing”. See HW Micklitz & N Reich “The Commission Proposal for a Regulation on ‘Common European Sales law (CESL)’ - Too Broad or Broad Enough” (2012) 31 *EUI Working Paper Law 2012/04* available at <http://cadmus.eui.eu/bitstream/handle/1814/20485/LAW_2012_04_ERPL_03.pdf> (accessed 01-09-2013).

⁹⁵ Articles 48-57 of Annex 1 to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁹⁶ Articles 82-86 of Annex 1 to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

⁹⁷ Articles 13-22 of Annex 1 to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final. See also generally DG Baird “Pre-contractual Disclosure Duties under the Common European Sales Law” (2013) 50 *Common Market Law Review* 297-310.

⁹⁸ See Article 78 of the United Nations Convention on Contracts for the International Sale of Goods art. 31, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) Goods Reprinted in 19 I.L.M. 671 (1980).

rate. The CESL addresses this issue with six provisions⁹⁹ dealing with interest and the rates applicable.¹⁰⁰ However, while it claims to address legal fragmentation by providing an instrument with such broad coverage, the CESL itself is not comprehensive. Like the CISG, it also does not address, among other things, illegality, morality, capacity and representation and it does not deal with the passing of property. Initiatives in the field of European contract law have been criticised for leaving the property law dimension aside.¹⁰¹

Uniform interpretation of the harmonising law is critical for the success of the instrument and the achievement of harmony. Although Article 7 CISG requires courts and arbitral tribunals to interpret the Convention in view of its international character and the need to promote uniformity in its application, there is no supranational court to reconcile different interpretations. In contrast, a clear advantage of the CESL is that it is subject to the jurisdiction of the Court of Justice of the European Union which would be tasked with ensuring its uniform interpretation. Important as this may seem, an argument could be made that the capacity of the Court to handle cases under the CESL is limited.¹⁰² It is currently over burdened with backlogs which bring into doubt its ability and preparedness to handle the complex and numerous cases that may arise in trade related matters.¹⁰³

A closer comparison of the CESL and the CISG do not reveal much difference as far as the trader is concerned. It cannot be said that the CESL introduces a more

⁹⁹ Articles 166-171 of Annex 1 to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

¹⁰⁰ See also I Schwenger "The Proposed Common European Sales Law and the Convention on the International Sale of Goods" (2012) 44 *Uniform Commercial Code Law Journal* 457-481 at 461-462, 472-477.

¹⁰¹ N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 10 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013). See also L DiMatteo "Common European Sales Law: A Critique of its Rationales, Functions and Unanswered Gestations" (2012) 11 *Journal of International Trade and Policy* 222-240 at 228.

¹⁰² N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 13 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013).

¹⁰³ The Court of Justice has serious backlogs. See Court of Justice of The European Union Annual Report (2012) 87 available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf> (accessed 14-08-2013).

acceptable and encompassing regime that far outweighs what is currently provided by the CISG.¹⁰⁴

Although the CESL is to a large extent based on the text of the CISG, it does not mean that the CISG was slavishly followed in every aspect.¹⁰⁵ The CISG constitutes a default regime requiring an explicit choice to opt out. This means that it automatically applies to contracts that fall within its scope, unless it has been excluded. Article 6 allows parties to opt out of the CISG or to derogate from, or vary the effect of, any of its provisions. The CESL, on the other hand, only governs the parties' contractual relation if they so choose; it is an opt-in instrument.

In further contrast to the CISG, the CESL does not intend to offer a sales regime for all international sales transactions. Big business transactions (business to business transactions between traders where neither one of them is an SME) are presently excluded in terms of Article 7 of the Regulation Proposal, although Member States can extend the CESL application to cover the same.¹⁰⁶ The CESL will otherwise only apply if at least one of the parties is an SME.¹⁰⁷ Its main purpose is to provide a special, largely protective sales regime for consumers and also for smaller to medium sized enterprises (SMEs). Consumer protection is in the forefront as many mandatory provisions of the CESL only apply to consumer sales (business to

¹⁰⁴ For a closer comparison of the CESL and the CISG see MBM Loos & H Schelhaas "Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention" (2013) 21 *European Review of Private Law* 105-130. For some "the CESL 'simply' adds a new choice for businesses by inserting a new, regional instrument between the national laws of the Member States and the international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity. This while the need for creating a set of uniform European rules has not been clearly established and the added value of the CESL for commercial sales transactions is not immediately apparent." See N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 18 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013).

¹⁰⁵ This is due to the fact that the Draft Common Frame of Reference and the CESL Feasibility Study, which preceded the present CESL Draft, were widely inspired by the CISG. See U Magnus "Interpretation and Gap-filling in the CISG and in the CESL" (2012) 11 *Journal of International Trade Law and Policy* 266-280 at 274. See also MBM Loos "Sales law in the DCFR" (2011) *Centre for the Study of European Contract Law Working Paper Series No.2010/04* available at <<http://ssrn.com/abstract=1640525>> (accessed 12-09-2013).

¹⁰⁶ See Article 13 (b) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

¹⁰⁷ An SME is defined as a trader with fewer than 250 employees and an annual turnover not exceeding EUR 50 Million or an annual balance sheet total not exceeding EUR 43 million. See Article 7 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

consumer). The CESL views SMEs as “pseudo-consumers”; hence the special protection afforded to them.¹⁰⁸

6 6 ADVANTAGES AND DISADVANTAGES OF THE CESL

There are different schools of thought on whether the CESL constitutes a commendable step towards the harmonisation of sales laws. Some contend that the CESL is a plausible step towards harmonisation with distinct advantages. However, the CESL is not short of criticisms for being unnecessary and undesirable. It has been said that the CESL “is likely to remain more an academic legal curiosity than a vital part of the practical world of European commerce, at least until a new generation of lawyers appears who were forced during their legal training to incur the costs of becoming familiar with the CESL.”¹⁰⁹ DiMatteo is of the opinion that “[t]hinking that businesspersons and their lawyers will read and select the CESL is being extremely optimistic.”¹¹⁰ Nevertheless,

“[t]he practical relevance of the CESL remains to be seen in the future. The experience with opt-in solutions is not promising. However, already now CESL has great theoretical importance. ... It is a great step ahead from the EU-typical piecemeal legislation in the past to this new codifying approach.”¹¹¹

The CESL is designed as an optional instrument that European parties engaged in cross-border transactions may choose for their transactions in preference to national law. The goal is to increase cross-border transactions and perhaps also to enhance a European identity.¹¹² However, some argue that the CESL is unlikely to achieve these goals but will instead raise transaction costs while producing few if any benefits; it is unlikely to spur beneficial jurisdictional competition; its consumer

¹⁰⁸ See U Magnus “Interpretation and Gap-filling in the CISG and in the CESL” (2012) 11 *Journal of International Trade Law and Policy* 266-280 at 268.

¹⁰⁹ HM Flechtner “The US Experience with the UCC and the CISG: Some Insights for the Proposed CESL?” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 5-24 at 24.

¹¹⁰ LA DiMatteo “The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 53.

¹¹¹ U Magnus “CISG vs. CESL” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 at 101.

¹¹² On the CESL reflecting a common European identity, see generally MW Hesselink “The Case for a Common European Sales Law in an Age of Rising Nationalism” (2012) *European Review of Contract Law* 342-366.

protection provisions will make it unattractive for businesses; and its impact on European identity is likely to be small.¹¹³ In order to provide a balanced viewpoint on the efficiency of the CESL as an instrument of harmonisation, the advantages and disadvantages of the CESL will now be discussed.

6 6 1 Advantages of the CESL

Firstly, it is an encompassing instrument which governs the full life cycle of the contract of sale. The CISG which is a leader in this field is limited in its scope. The need for filling gaps, which is a major concern towards uniformity, is therefore reduced in the CESL if compared to the CISG.¹¹⁴ As DiMatteo explains:

“CESL is an example of the law that provides both general and area-specific or specialized bodies of rules. CESL has common rules for contract formation, but specialized sections of rules for sales of goods and supply of digital content, and sale of related-services; it has separate bodies of consumer protection rules protecting SMEs in B2B transactions. CESL also provides different remedial provisions for B2B and B2C transactions.”¹¹⁵

Because of many areas of a single transaction that the CISG does not cover, another applicable law has to be applied to those aspects. The CESL covers a wider scope than the CISG and reduces the instances where gap-filling might be required. This is a key element of legal certainty and a sound improvement on the CISG.

Secondly, the CESL is a product of consultation and research. A properly consulted and adequately researched instrument generally has the support of traders, policy makers and enforcers. Although not everyone is in total support of the CESL, it is expected to survive scrutiny; partly also because it has received the support from the Members of the European Parliament.¹¹⁶ Research coupled with comments from

¹¹³ See E A Posner “The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition” (2013) 50 *Common Market Law Review* 261-275 at 272-275.

¹¹⁴ See MBM Loos & H Schelhaas “Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention” (2013) 21 *European Review of Private Law* 105-130 at 109.

¹¹⁵ LA DiMatteo “The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 37-38.

¹¹⁶ On 8 June 2011, the European Parliament backed an optional European contract law in a plenary vote on an own-initiative report by MEP Diana Wallis (MEMO/11/236). See also C Mak “Unweaving

stakeholders will continue to strengthen the end product which might aid the reception of the CESL should it be adopted.

Thirdly, cases relating to the CESL will be posted on a database that will be available for use by lawyers and academics.¹¹⁷ This initiative follows the style of the CISG.¹¹⁸ The value of access to court judgments on a uniform law is self-evident from the context of the CISG. Lawyers and academics will have the opportunity to comment, scrutinize, research and evaluate the judgments. This creates a rich source of jurisprudence necessary for uniformity and harmony.¹¹⁹

Fourthly, the CESL has a clear institutional and legislative framework to foster and support it. The success of a harmonising initiative hinges on how much legal and institutional support it enjoys and the adequacy of that support. Within the context of the EU, there is evidence that legal harmonisation is supported by the institutional structures as regards its implementation and monitoring. The CESL will not only fall under the jurisdiction of the Court of Justice as an enforcement mechanism but the Commission will also organise training for practitioners who use the CESL.¹²⁰

Lastly, the CESL also provides for a review of its provisions within five years of it coming into operation to ensure that it remains effective and in line with developments in trade and Union legislation.¹²¹ Unlike the CISG therefore, it has the advantage of being able to respond to changing dynamics through further reforms enabled by the review process.

the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law” (2013) 50 *Common Market Law Review* 277-295 at 128.

¹¹⁷ See Recital 34 and Article 14 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

¹¹⁸ See the UNCITRAL reporting system (CLOUT) <http://www.uncitral.org/uncitral/en/case_law.html> (accessed 12-08-2013), the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods <http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html> (accessed 12-08-2013) the UNILEX database <<http://www.unilex.info/>> (accessed 12-08-2013) and the Pace website <<http://www.cisg.law.pace.edu/>> (accessed 12-08-2013).

¹¹⁹ The role of legal scholars in this regard is pivotal. See generally JO Honnold & HM Flechtner *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edition 2009); R Schulze (ed) *Common European Sales Law (CESL): Commentary* (2012), as examples for the CISG and the CESL respectively.

¹²⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building Trust in EU-wide Justice: A New Dimension to European Judicial Training, Brussels, 13.9.2011 COM(2011) 551 final.

¹²¹ See Recital 35 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

6 6 2 Disadvantages of the CESL

Firstly, the CESL adds another instrument to the existing national laws in Europe which may or may not include the CISG. This, at face value is a distortion of harmony and uniformity. The addition of another law will only further uncertainty as to the applicable law in a given situation.¹²²

Secondly, the CESL is an optional instrument. That is, it is only applicable when the parties have opted to use it. Optional instruments have a disadvantage in that their success depends much on acceptance and use by traders.¹²³ This leaves a window of uncertainty for the effectiveness of the instrument.¹²⁴ Harmonisation is thus difficult to achieve.

Thirdly, the CESL leaves the issue of language to the discretion of the Member State. If a State wishes, it may require that contractual information be given in a particular language. For example, French law currently requires that certain contractual information be in French. Linguistic requirements may limit small business start-ups in various ways and prove to be a barrier to trade.¹²⁵

Fourthly, the Court of Justice is currently overburdened and overloaded.¹²⁶ The effectiveness of the instrument in creating uniformity also rests on the ability of the

¹²² See N Kornet "The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?" (2012) 18 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013).

¹²³ The experience with opt-in instruments is not encouraging. See LA DiMatteo "The Curious Case of Transborder Sales Law: A Comparative Analysis of the CESL, CISG and the UCC" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 52 and U Magnus "CISG vs. CESL" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 at 101

¹²⁴ This view is shared by Ecommerce Europe who argues, "the Sales Law ... is lacking simplicity, legal clarity and the stability of contracts. ... will lead to legal uncertainty when several contract laws are applicable. ... will also be too complicated for consumers and merchants to use and provides too few benefits over the existing legal framework." See Ecommerce Europe *Ecommerce Europe visits consumer organisation on common European sales law* (19-01-2012) available at <<http://www.ecommerce-europe.eu/ecommerce-europe-visits-european-consumer-organization-on-common-european-sales-law>> (accessed 14-08-2013).

¹²⁵ See Law Commission and the Scottish Law Commission *An Optional European Common Sales Law: Advantages and Problems* (2011) ix available at <<http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law/>> (accessed 02-09-2013).

¹²⁶ Statistics show that Court of Justice has serious backlogs. See Court of Justice of The European Union Annual Report (2012) 87 available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf> (accessed 14-08-2013). See also J Harris "Law to Smooth EU Trade could Face a Rough Ride" (2011) *The Lawyer* available at

Court to adequately discharge its mandate. There is a view that this could be difficult in the current circumstances. Such a situation will render the harmonisation efforts useless and further distort the system of legal harmonisation through uncertainty.

Finally, regionalism might divert rather than aid global uniformity. The success of the CESL can come at the expense of the CISG and global unification.¹²⁷ Although the CESL is more encompassing than the CISG, it also covers issues that are covered by the CISG. There is no situation where they can both apply mutually. They are in fact mutually exclusive on the issues they concurrently address. Therefore, to the extent that the CESL is concerned with regional uniformity rather than global uniformity, its success can divert attention from global uniformity. As Koch argues, “[t]he inclusion of b2b-transactions within the scope of the CESL will de facto create a competition between the CESL and the CISG, and it is to be feared that there will be unfortunately no winners, only losers.”¹²⁸

Whether the advantages will outweigh the disadvantages is something that only time can tell. However, policy makers will have to weigh these issues in coming to a conclusion on the adoption and implementation of the CESL.

6 7 REGIONAL VERSUS GLOBAL HARMONISATION

The question that has to be asked is whether instruments of regional harmonisation support the ideal of global harmonisation or whether there could be some kind of conflict between the two harmonisation forms. In situations where the CISG would also apply, a collision of these sets of rules may be unavoidable when parties choose the CESL to govern their contract but do not exclude the application of the CISG.¹²⁹ In such a scenario, the contractual relationship will be subjected to two

<<http://www.thelawyer.com/law-to-smooth-eu-trade-could-face-a-rough-ride/1010027>> (accessed 15-08-2013).

¹²⁷ It has been remarked that the CESL runs the risk of creating complexity by introducing a law in areas that do not need to be fixed because the CISG is available already. See LA DiMatteo “Common European Sales Law: A Critique of its Rationales, Functions and Unanswered Gestations” (2012) 11 *Journal of International Trade and Policy* 222-240 at 336.

¹²⁸ R Koch “CISG, CESL, PICC and PECL” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 125-146 at 145.

¹²⁹ Pursuant to article 4(1) and article 7(1) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final, the CESL may be used for contracts between two traders if at least one of them is an SME

legal systems, since the scope of the CISG and that of the CESL overlaps. In any case, the existence of two or more competing laws creates issues about conflict and co-existence.

The overlap between the CISG and the CESL is apparent. However, the opt-in character of the CESL presumably solves any problem as to which regime governs a transaction.¹³⁰ As Magnus explains, “the choice of the law of a non-CISG State generally constitutes an implicit exclusion of the CISG ... and the choice of CESL would have to be regarded as a similar exclusion.”¹³¹ Further, the CISG also implicitly allows for regional harmonisation. Article 90 of the CISG provides that the

“Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.”

However, the meaning and scope of the term “international agreement” in this not clear and therefore leaves room for debate.¹³² Would a regional sales law be considered an international agreement? In any case, the practical effects of having parallel competing instruments would not be obviated by this provision.

Recital 25 of the Proposal for a Regulation could also offer an answer to the question.¹³³ It states that the choice of the CESL should imply an agreement of the contractual parties to exclude the CISG. However, this seems to be a controversial provision. Some commentators are of the opinion that the CISG determines its own sphere of application and the approach of the EU might be baseless.¹³⁴ It is their

and at least one of them has his habitual residence in the European Union. Yet, in the majority of cases, this situation will fall within the scope of application of the CISG as well.

¹³⁰ See U Magnus “CISG vs. CESL” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 at 105, 107-110 (discussing ‘covered contracts’ and ‘covered goods’).

¹³¹ U Magnus “CISG vs. CESL Remarks” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 at 106.

¹³² See F Ferrari “CISG and OHADA Sales Law” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 85-88.

¹³³ See Recital 25 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final.

¹³⁴ See N Kornet “The Common European Sales Law And The CISG - Complicating Or Simplifying The Legal Environment?” (2012) 7 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10-09-2013). See also

argument that the CISG itself determines whether it is applicable or excluded, and not the conflict of laws rules of the Rome I Regulation. Hence, the Community legislature might not have the competence to determine whether and to what extent the parties have excluded the application of the CISG. The statement in recital 25 could thus be *ultra vires*.¹³⁵

This uncertainty in itself creates more complexity than the simplicity required from harmonisation. Apart from the problems connected to its applicability in a given situation, it is a fact that the CESL as a regional initiative adds another law to the existing national law and the CISG. Generally, this would mean that regionalism is adding to diversity rather than contributing to uniformity. Regionalism can thus, in effect, be a source of furthering the disharmony it seeks to address. However, this cannot be said in instances where there is no uniform global law applicable, such as in regions that have not ratified the CISG.

On the same note, regional initiatives can divert the attention that is necessary to create and foster international uniformity. In regions that have undertaken localised harmonisation initiatives, there is an increasing tendency to give precedence and credence to the regional instruments at the expense of international efforts such as the CISG. In both the OHADA and through the CESL, there is a deliberate intention to give more respect and precedence to the OHADA Uniform Acts and to the CESL rather than the CISG.¹³⁶ As Bonell points out, that “[f]or the purpose of unification or harmonization of law there is nothing worse than duplication of work leading to the adoption of different instruments competing with one another in the same area.”¹³⁷

MW Hesselink “How to Opt into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation”(2012) 19 *European Review of Private Law* 195-212 at 201-202. See also I Schwenzer “The Proposed Common European Sales Law and the Convention on the International Sale of Goods” (2012) 44 *Uniform Commercial Code Law Journal* 457-481 at 459.

¹³⁵ See M Piers & C Vanleenhove “Another Step Towards Harmonization in EU Contract Law: The Common European Sales Law” (2012) 18 available at <<http://papers.ssrn.com/sol3/papers.cfm?abstractid=2151256>> (accessed 16-08-2013).

¹³⁶ The OHADA uniform laws apply automatically in Member States overriding national laws of which the CISG could be part of if a state has domesticated the CISG. At the same time Recital 25 of the CESL regulation in some way gives precedence to the CESL over the CISG.

¹³⁷ See M Bonell “UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?” (1996) 26 *Uniform Law Review* 229-246 at 245 (writing on the competition between the UNIDROIT Principles and the PECL) and also R

However, on the other hand it is important to note that the relationship between regional initiatives and global uniformity is not as antagonistic as is often suggested. There is room for cooperation and coordination between regional and global initiatives to achieve much more harmony. In fact, there is no reason “to believe that in those regions and countries where the CISG is in force, there can be no room for regional unification efforts.”¹³⁸ As Ferrari also explains:

“Pursuant to Article 2 of the CISG, for instance, the sale of ships, vessel, aircrafts, electricity, etc, are not governed by the CISG. The same can be said for the sale of goods that are neither moveable nor intangible (such as receivables). ... Nothing prevents contract States to the CISG from unifying the law on a regional level in those areas.”¹³⁹

Firstly, the regional instrument and the global instrument can be used in a complementary manner. Where the CISG is excluded because the CESL becomes applicable, the CISG can still be used for gap-filling where it covers an issue that is not covered by the CESL.¹⁴⁰

Secondly, the CESL, the OHADA and other regional instruments for the harmonisation of regional sales laws are inspired by the CISG. Although the CISG was not slavishly copied, much of its provisions are retained in the regional instruments. In this context, the global instrument can be used to inspire regional instruments, thereby becoming the primary source for legal reform and legal uniformity.

Thirdly, regional initiatives are often supported by institutions for compliance monitoring and enforcement which are not available in the international context. In the EU, the OHADA and also in SADC, there are regional courts that can be tasked

Koch “CISG, CESL, PICC and PECL” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 125-146 at 145.

¹³⁸ F Ferrari “CISG and OHADA Sales Law” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 81.

¹³⁹ F Ferrari “CISG and OHADA Sales Law” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 79-96 at 81, 86-95 (offering a detailed analysis of CISG provisions relevant to regional unification efforts).

¹⁴⁰ On gap-filling between the CESL and the CISG, see U Magnus “Interpretation and Gap-filling in the CISG and in the CESL” (2012) 11 *Journal of International Trade Law and Policy* 266-280 and M Piers & C Vanleenhove “Another Step Towards Harmonization In EU Contract Law: The Common European Sales Law” (2012) 19-20 available at <<http://papers.ssrn.com/sol3/papers.cfm?abstractid=2151256>> (accessed 16-08-2013).

with the implementation of the uniform interpretation required for certainty and predictability. The CISG inspired regional instruments thus go the extra mile by ensuring that mechanisms for implementation are in place and, in fact, have the capacity to enforce uniformity. This is in contrast to the CISG where there is no supranational court for the CISG.

Lastly, regional initiatives do not necessarily diverge from the global instruments. Sometimes they can be used to add matters that could otherwise not be covered under the global instrument. The CESL is a good example in this context. Although it encompasses almost the whole of the CISG, it also provides for issues that are not covered under the CISG, but which are also critical for the contract of sale.¹⁴¹ As DiMatteo explains, “[t]he CISG is the most successful attempt at unifying international sales law, but due to the necessity of compromise and failures to compromise, its scope and coverage is not as broad as one would like.”¹⁴² Therefore, the necessity to complement it might be real.

Although Flechtner concludes that he “remain[s] radically uncertain whether regional efforts to create uniform commercial law are necessary stepping stones or stumbling blocks to the process of creating a true global system of commercial law”,¹⁴³ it is argued that regionalism can in fact be a tool for accelerated globalisation. Regional efforts can be used not only to complement the global initiative but to sustain it through the provision of regional mechanisms for enforcement and implementation that are not available at a global level. As in the context of world trade, if well-coordinated and monitored, regional initiatives can deepen rather than divert globalisation. Regional harmonisation could also be the first step towards acceptance of a global instrument.

¹⁴¹ See LA DiMatteo “Common European Sales Law: A Critique of its Rationales, Functions and Unanswered Gestations” (2012) 11 *Journal of International Trade and Policy* 222-240 at 228.

¹⁴² LA DiMatteo “The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 25-55 at 54.

¹⁴³ HM Flechtner “The US Experience with the UCC and the CISG: Some Insights for the Proposed CESL?” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 5-24 at 22.

6 8 CONCLUSIONS AND LESSONS FROM THE CESL

The European Union is by far the leading example of an integrated regional economic community. It has a rules based system with well-established and coordinated institutions. It has registered remarkable success in improving the lives of its citizens through cooperation and independence. The EU internal market has grown significantly and provides a good basis for increased trade and development in the region. To continue to accelerate development and sustain integration, the EU maintains an enabling legislative environment that is continuously reformed to meet the needs of the Union. In this context it was observed that legal diversity creates significant barriers to the easy functioning of the internal market by creating barriers to trade. The Common European Sales Law was therefore proposed to further improve the functioning of the EU market.

Legal diversity can affect cross-border trade within an internal market. The primary rationale for introducing the CESL is to curb the side effects of legal diversity in trade within the single market. In SADC, there is, presumably, more diversity of laws than in the European Union. Worse still, most of the laws in SADC are out-dated and inaccessible. The assumption may readily be made that trade within the SADC Free Trade Area and the Common Market could be facing legal barriers far greater than in the European Union.

A regional initiative for the harmonisation of sales law needs an enabling authority to give it legal force. The CESL is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU). Article 114 provides that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. At the moment it cannot be said that SADC and its instruments provide any clear legal authority for enacting a harmonised regional sales law.

The enactment of regional uniform laws needs to follow a process of consultation and research for it to be relevant and adequately respond to the needs of that particular region. There is still considerable debate within the context of the EU on whether the CESL is desirable and necessary.¹⁴⁴ This aspect affects the utility of the instrument and its acceptance and should not be ignored. SADC regional leaders should therefore not “jump” into any harmonisation initiatives but carefully analyse and discuss the need and feasibility of the instrument with all stakeholders.

A regional law does not only need adequate financial resources to create it, but also further measures and institutions to enforce and sustain it. The EU undertakes to train officials of the Court of Justice on the law and its enforcement. The Court of Justice will thus be a pivotal player in the uniform interpretation and application of the CESL. As in the EU, SADC also has its own court in the form of the SADC Tribunal. However, the Tribunal needs to be empowered to adjudicate on matters relating to a regional law and to interpret the law in line with the necessary uniform *dicta* required.¹⁴⁵ Further, the EU undertakes to create databases for the distribution of cases relating to the uniform law to ensure uniformity and familiarity with its application. Dissemination of information is crucial to the effective implementation and application of any instrument of harmonisation.

Regional integration, economic growth and development require an environment that can foster it. The EU is the best example of an integrated community. Its success is primarily founded on a strong legislative framework, adequately resourced and

¹⁴⁴ The United Kingdom in particular has argued in its response that “there is insufficient evidence to demonstrate that a new, optional, highly complex legal instrument focussed on contract law for cross-border sales can provide benefits to consumers or business. Nor is it clear that it will achieve the benefits to cross border trade and growth it presumes”. See Anonymous “Common European Sales Law: UK Government Says No Thanks” (2012) *The IT Law Community* available at <<http://www.scl.org/site.aspx?i=ne29232>> (accessed 19-08-2013). See also the full response, Ministry of Justice *A Common European Sales Law for the European Union - A proposal for a Regulation from the European Commission: The Government Response* (2012) available at <<https://consult.justice.gov.uk/digital-communications/common-european-sales-law>> (accessed 19-08-2013).

¹⁴⁵ It is to be remembered that “[t]rue uniformity comes not by simply adopting a uniform law, but from similarity in the interpretation and application of the law. The identical text alone does not secure a high level of mutual understanding. Other factors, like a common method of interpretation, a competent appellate court system, a robust exchange of information - including, foreign case and arbitral decisions, as well as scholarly commentary from among the different jurisdictions - are all essential elements for a uniform interpretation of a multi-jurisdictional law.” See U Magnus “Interpretation and Gap-filling in the CISG and in the CESL” (2012) 11 *Journal of International Trade Law and Policy* 266-280 at 267.

capable institutions, cooperation and most importantly political will. These are all aspects that SADC need to take into account before it embarks on any harmonisation initiatives.

Even if individual countries in SADC decide to adopt the CISG, a regional instrument for the harmonisation of sales laws can still be adopted to address issues that are pertinent for the lifecycle of the contract but are not covered by the CISG. This is particularly the case if the regional instrument is optional. In other words, as is the case with the CESL, regional law can support the CISG insofar as it is based on the Convention, but it can also go a step further to harmonise elements that are not provided for under the CISG. Although the CESL is primarily based on the CISG, it also covers matters beyond the regular scope of the CISG.

The danger of a regional instrument undermining the value of a global sales law should, however, be taken into consideration. As Flechtner points out:

“The level of consensus and of shared legal tradition within the EU is presumably much stronger than it is globally, and this allows the proposed CESL to have a far broader and more ambitious reach. ... [R]egional uniform law may reduce ... costs and difficulties associated with choice of law in some cases. ... [However,] if the CESL proposal undermines the success of the CISG, Europe (as well as the rest of the world) may be the loser.”¹⁴⁶

The adoption of a harmonised regional sales law in SADC should not necessarily divert attention from the global efforts of the CISG “as long as states [do not get] entrenched behind regional instruments at the expense of participating in the work of increasing harmonization of global contract law that has yet to be done to carry forward the achievements of the CISG.”¹⁴⁷ To the contrary, a bottom-up approach might even yield the best results in the African context. Thus, regional efforts

¹⁴⁶ HM Flechtner “The US Experience with the UCC and the CISG: Some Insights for the Proposed CESL?” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 5-24 at 21-22.

¹⁴⁷ See CISG Advisory Council *CISG-AC Declaration No. 1, The CISG and Regional Harmonization, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012* (2012) available at <https://www.google.co.za/?gws_rd=cr&ei=ohRwUo7DI4WOtQat-oDwCA#psj=1&q=CISG+Advisory+Council+Declaration+on+the+position+of+regional+vs+global+law+> (accessed 24-10-2013).

towards a common SADC sales law can be designed in such a way that they support global initiatives and become a stepping stone to the global harmonisation of laws.

PART D: CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 7

A COMMON SADC SALES LAW

7 1 TOWARDS A COMMUNITY SALES LAW

Globalisation brought about the gradual integration of national economies into a borderless global economy encompassing free international trade and unrestricted foreign direct investment.¹ Recent years have seen the establishment of international and regional institutions that support free trade through regulation. The importance of international trade necessitates this regulation and attention. Apart from economic benefits, international trade can help to maintain and promote global peace and security if properly regulated.²

The World Trade Organisation (WTO) regulates mainly the public law aspects of international trade whilst other institutions have been created to focus specifically on the rules for the facilitation of trade relations on a private law level. Whereas the WTO framework has largely succeeded in reducing tariffs on a global scale, non-tariff barriers have remained, thereby frustrating the effect of tariff reductions.³ New ways continue to be developed to ensure trade efficiency, both at international and regional level. Regional trading groups are increasingly taking centre stage in addressing barriers to trade. The WTO recognises that these regional economic communities could be a stepping stone in improving trade efficiency and economic development at global level.⁴

¹ See P van den Bossche *The Law and Policy of the World Trade Organisation* (2nd edition 2008) 4. See also S Fazio *The Harmonisation of International Commercial Law* (2007) 1.

² P Lamy "Managing Global Security: The Strategic Importance of International Trade" (2007) Speech to the International Institute for Strategic Studies in Geneva, available at <http://www.wto.org/english/news_e/sppl_e/sppl66_e.htm> (accessed 04-09-2013).

³ H van Houtte *The Law of International Trade* (2002) 96. See also G Ohlin "Trade in a Non-Laissez-Faire World" in Samuelson PA (ed) *International Economic Relations: proceedings of the Third Congress of the International Economic Association* (1969) 157-175.

⁴ See The Preamble to the Understanding on Article XXIV available at <http://www.wto.org/english/docs_e/legal_e/10-24_e.htm> (accessed 02-09-2013); GATT Part III Article XXIV: Territorial Application - Frontier Traffic - Customs Unions and Free-trade Area. See GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral

Regional integration has economic benefits which include “increased market size, improved intra-regional trade and investment flows, and increased transfer of technology and experience.”⁵ In Southern Africa, the Southern African Development Community was formed to facilitate these purposes. SADC is made up of sovereign states which acknowledge the need to promote co-operation amongst its Member States in order to address the challenges of an increasingly complex regional and global environment. Although SADC presents itself as a dynamic community for cooperation and coordination in all areas including trade, peace, security and other areas; the ultimate goal is development and the eradication of poverty.⁶ Poverty remains one of the greatest challenges in the SADC region, with approximately half of the population living on less than US\$ 1 per day.⁷

This study acknowledges the fact that intra-regional trade is capable of providing the necessary impetus for deeper integration and regional developmental progress. However, a comparison of SADC with other regional economic communities shows that SADC is relatively lagging behind most regions outside Africa.⁸ More so, the international export statistics for SADC show very low trade levels.⁹ Both intra-

Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). See also P van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2nd edition 2008) 696 and KM Mbuende “The SADC: Between Cooperation and Development – An Insider Perspective” in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 39-60 at 40.

⁵ SADC recognises these as some of the benefits that can be gained from regional integration based on experience from other parts for the world. See SADC website available at <<http://www.sadc.int/themes/economic-development/>> (accessed 26-08-2013).

⁶ The Preamble to the SADC Treaty clearly states that SADC is “determined to alleviate poverty, with the ultimate objective of its eradication, through deeper regional integration and sustainable economic growth and development.” See the Preamble to the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁷ See 3 5 1 above. SADC recognises that poverty is its main challenge. See SADC website available at <<http://www.sadc.int/themes/poverty-eradication-policy-dialogue/>> (accessed 26-08-2013). See also C Sasman “Majority of SADC Citizens Poor” (2010) *New Era* 1 and generally V Benziger “The War against Poverty: Out of the Loop - Causes of Africa’s Poverty and Isolation” (2005) 48 *Challenge* 26-50.

⁸ See 3 5 1 above. See also M Yayo Negasi “Trade Effects of Regional Economic Integration in Africa: The Case of SADC” (2009) 29 available at <http://www.tips.org.za/files/13.Trade_effects_of_Regional_Economic_Integration_-_SSD.pdf> (accessed 23-08-2013). See also A Behar & L Edward “How Integrated is SADC? Trends in Intra-Regional and Extra-Regional Trade Flows and Policy” (2011) 12 *The World Bank Policy Research Working Paper 5625* available at <http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/04/05/000158349_20110405125648/Rendered/PDF/WPS5625.pdf> (accessed 02-09-2013).

⁹ See 3 5 1 above.

regional and inter-regional trade involving SADC is very low and needs to be addressed if the main objectives are to be met successfully.

Internationally, there is agreement that “conflicts and divergencies arising from the laws of different states in matters relating to international trade constitute an obstacle to the development of world trade.”¹⁰ In fact, the challenges posed by legal diversity in cross-border trading have been identified since the medieval era, hence the development of a *lex mercatoria*.¹¹ In the twentieth century, the establishment of The Hague Conference, the UNIDROIT and most importantly the UNCITRAL was primarily based on the realisation that legal diversity might be a serious barrier to international commercial transactions, whether at regional or global level.

This study submits that in southern Africa, diverse, fragmented, archaic and inaccessible laws are a major barrier to the free flow of goods in the region and therefore affecting both intra-regional and inter-regional trade as well as the attraction of foreign investment.¹² The membership of the SADC represents at least three main legal families, namely those of English common law, Roman-Dutch law and civil law origin. Each country, in turn, recognises various sources of law, including African customary laws, religious laws and constitutional law. Every country has its own legal system, its own system of legal thought, its own method of law-making and its own process of judicial determination of disputes.¹³ Although there is no empirical evidence showing the direct relationship between economic growth and harmonised sales laws in SADC, scholars argue that there is the potential for increased trade in a more harmonised system due to the predictability and accessibility of the laws applicable among other things.

“The law, being a vehicle for economic co-operation and development, is required to facilitate ... growth; which is why with the

¹⁰ See Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965 United Nations Commission on International Trade Law Yearbook Volume 1: 1968-70 (1971) 18.

¹¹ See 2 1 above.

¹² On the diversity of legal systems in SADC see 3 6 above. For a similar conclusion, see also M Ndulo “The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)” (1996) 4 *African Yearbook of International Law* 195-225 at 196.

¹³ See M Ndulo “The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)” (1996) 4 *African Yearbook of International Law* 195-225 at 196. See also 3 6 above for a discussion on the different legal systems applicable in SADC.

need to increase international trade there has been a corresponding increase in the demand for legal co-ordination and harmonisation.¹⁴

The analysis conducted in Part B of this study found that there is no single definition of what constitutes legal harmonisation.¹⁵ However, in practice, it can be understood to be the removal of discord, and the reconciliation of contradictory elements between the rules and effects of two legal systems, often by eliminating major differences.¹⁶ The main essence of this harmonisation process in the context of international sales laws is that "... the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries."¹⁷

It has been observed that there are numerous techniques for the harmonisation of international sales law. However at regional level, hard law forms of community legislation have become the norm as evidenced by regional initiatives such as the OHADA Uniform Acts and the CESL in the European Union. This is because of their binding nature and effectiveness in creating the necessary harmony with speed.

A community sales law which harmonises the different national laws of the fifteen SADC Member States would provide traders with a single law applicable to transactions in the region. It would not only assist intra-regional trade but also trade with parties from other regions, obviating the need for establishing the applicable law by means of conflict of law rules which are often haphazard, difficult to apply and creates the opportunity for forum shopping.¹⁸ Moreover, it could address the problem of access to the law which is often a problem in the African context, increase legal clarity, certainty and predictability, and at the same time provide neutral and modern law. The harmonisation of sales laws in the SADC region will reduce the need for

¹⁴ See J Coetzee & M de Gama "Harmonisation of Sales Law: An International and Regional Perspective" (2006) 10 *Vindobona Journal of International Commercial Law and Arbitration* 15-26 at 15. See also 3 5 2 above on the necessity of trade law reform in SADC.

¹⁵ See 2 2 above.

¹⁶ See also WJ Kamba "Comparative Law: A Theoretical Framework" (1974) 23 *International and Comparative Law Quarterly* 485-519 at 501 and S Mancuso "Trends on the Harmonization of Contract Law in Africa" (2005) 13 *Annual Survey of International and Comparative Law* 157-178 at 159.

¹⁷ J Goldring "Unification and the Harmonisation of the Rules of Laws" (1978) 9 *Federal Law Review* 284-325 at 289.

¹⁸ See L Mistelis "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 21.

specialist legal services that often come at a huge cost. This effectively would reduce the transaction costs associated with doing business in the region. In turn, that would enhance the opportunities for SMEs to access markets and promote competition. Reduction in transaction costs and an increase in competition could contribute to economic development and attract foreign direct investment, which are key factors for poverty alleviation through economic growth.

In this respect, although legal harmonisation in SADC faces certain challenges,¹⁹ the need for harmonised law is compelling.²⁰ The broader and long term needs of the region require some form of harmonisation of laws to be applied in the different Member States.²¹ As Rabel has said in the context of international harmonisation:

“[t]o avoid these complications and to substitute a reasonably concise body of clear and simple written rules could not be a loss, and still less would it be a loss to have to consult only one law commented on by the courts and scholars of the world instead of innumerable different foreign legislations.”²²

It is therefore a conclusion of this study that we have reached the point where the issue is no longer *whether* the harmonisation of laws should be achieved, but rather *how* it can be achieved.²³ Many of the challenges facing legal harmonisation can be counteracted by choosing an appropriate technique for the harmonisation of laws.²⁴ However, it is important that the method or technique used should always be

¹⁹ See the Challenges for the harmonisation of laws in SADC in 3 7 above.

²⁰ See 3 7 6 above.

²¹ See AN Allott “Towards the Unification of Laws in Africa” (1965) 14 *International and Comparative Law Quarterly* 366-389; AN Allott “The Unification of Laws in Africa” (1968) 16 *American Journal of Comparative Law* 51-87 and also G Bamodu “Transnational Law, Unification and Harmonization of International Commercial Law in Africa” (1994) 38 *Journal of African Law* 125-143.

²² E Rabel “Draft of an International Law of Sales” (1938) 5 *The University of Chicago Law Review* 543-565 at 546.

²³ Harmonisation is generally inevitable. See R David “The Methods of Unification” (1968) 16 *American Journal of Comparative Law* 13-27 at 14. In SADC, the discussion in 2 3 has also shown that there is great benefit in harmonising national sales laws.

²⁴ For techniques see 2 4 above and also generally, L Mistelis “Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law” in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and Perspectives of International Trade Law* (2001) 3-27 at 16-17; A Rosett “Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law” (1992) 40 *American Journal of Comparative Law* 683-697; R David “The Methods of Unification” (1968) 16 *American Journal of Comparative Law* 13-27; JS Hobhouse “International Conventions and Commercial Law: The Pursuit of Uniformity” (1990) 106 *Law Quarterly Review* 530-535 at 535. MD Evans “Uniform Law: A Bridge too Far?” (1995) 3 *Tulane Journal of International and Comparative Law* 145-160 at 157-160 also offers some suggestions of making harmonisation more efficient.

determined by the prevailing circumstances in the region at stake because the nature and level of harmonisation required in a particular area depend entirely upon its specific circumstances.²⁵

The SADC Treaty empowers various institutions to carry out certain mandates for the attainment of its objectives. Article 6 (1) clearly states that “Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.” Article 21, furthermore, requires that all SADC Member States should “cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit” and to “coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of co-operation” through the appropriate institutions. Whereas this sounds permissive and appears to allow SADC to take “all necessary measures”, including legal harmonisation in trade matters, as one of the areas of cooperation; there does not seem to be any institution competent to make such laws in SADC. The current SADC legal and institutional framework does not vest any explicit authority in the Organisation to adopt binding legal instruments for direct application in the individual SADC States.²⁶

Article 10 of the Treaty provides that the SADC Summit as the supreme policy making body of the Organisation is responsible for the overall policy direction and control of the functions of SADC.²⁷ It empowers the Summit to adopt legal instruments to implement and attain the objectives of the Treaty. It can also delegate this authority to the Council of Ministers or any other institution of SADC as the Summit may deem appropriate. The Council of Ministers, under article 11, has power to make recommendations to the Summit on any action aimed at attaining the objectives of the Community.²⁸ It has powers to define and add to the sectors of

²⁵ See RCC Cuming “Harmonization of Law in Canada: An Overview” in RCC Cuming (ed) *Perspectives on the Harmonization of Law in Canada* (1985) 1-58 at 3-4.

²⁶ See discussion in 3 3 and 3 4 above.

²⁷ Article 10 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

²⁸ Article 11 (2)(3) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

cooperation and allocate to Member States responsibility for co-ordinating sectorial activities, or re-allocate such responsibilities. Considering the organisational nature of SADC, it cannot be argued that these powers and procedural mechanisms can be utilised in the SADC to introduce a binding common SADC sales law.²⁹ The other institutions find themselves in even less authoritative positions. The Secretariat comes only as close as “the coordination and harmonisation of the policies and strategies of Member States” and “submission of harmonised policies and programmes to the Council for consideration and approval.”³⁰

The only form of binding legislative instrument provided for under the SADC Treaty is a Protocol in terms of Article 22. In theory it would thus be possible to adopt a harmonised SADC law using the Protocols route. At first glance this would seem to be the answer. However, the procedure for the adoption of Protocols does not appear to provide exclusive legislation making authority to the Summit. Moreover, this process does not seem to have been created for such a purpose. Protocols are not community law *per se* that is to apply directly to all Member States but rather function similarly to international agreements between the Contracting States. SADC Member States conclude such Protocols as may be necessary in each area of co-operation, which spells out the objectives and scope of and institutional mechanisms for co-operation and integration.

Protocols are approved by Summit on the recommendation of the Council and opened to signature and ratification. The effectiveness of the harmonisation instrument will therefore depend on the ease and speed with which it can be introduced and implemented both on organisational level and in the Member States. A Protocol only comes into operation upon ratification by two thirds of the Member

²⁹ However, Ndulo believes “these are important powers which can be used to further the harmonisation of law and trade practices within the Community.” See M Ndulo “The Need for the Harmonisation of Trade laws in the Southern African Development Community (SADC)” (1996) 4 *African Yearbook of International Law* 195-225 at 215. R Wandrag “Unification of Southern African Contract Law” (2011) 13 *European Journal of Law Reform* 451-461 at 461 also concurs and submits that the SADC institutions are sufficiently empowered by the SADC Treaty to successfully complete the process of the unification of contract laws. This conclusion is disputed. The manner in which SADC Protocols are adopted and operationalised does not seem to have legal harmonisation in mind. It is also argued that SADC would not endeavour to further the harmonisation of laws simply by implication in this manner. Harmonisation of laws is therefore not, at least, a stated objective of SADC.

³⁰ Article 14 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

States which is equal to ten SADC Member States at the moment. Protocols are only binding on the Member States that have ratified them and decisions on Protocols are reserved only for those who are party thereto. Reservations are not allowed. Currently, this is the only way in which a binding instrument can be concluded under the SADC Treaty, which seems to be an unconvincing route for the harmonisation of sales laws. The fact that it can come into effect when ratified by ten of the fifteen states is further evidence that it cannot be used as a mechanism for creating harmony. Worse still, states that are not interested in the Protocol can simply shy away from it. Although adoption by the Summit creates the expectation that the Protocol will be ratified and come into force at some stage, this is not guaranteed. In fact, the ratification of SADC Protocols is slow and takes time to come into effect but, most importantly, Protocols generally do not receive ratification from all fifteen Member States.³¹

Within this context, the study focused on analysing selected models for the harmonisation of sales law in the SADC region, namely the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Organisation on the Harmonisation of Business Laws in Africa (the OHADA) and the Common European Sales Law (CESL). The CISG was approached on the basis that it is an important international instrument for the harmonisation of sales laws which claims neutrality based on its compromise approach to different legal traditions (mainly the common law and civil law) which are also the main legal traditions in the SADC region.³² The study sought to assess whether SADC Member States should ratify the Convention considering the quest for global harmonisation of sales law. The OHADA, on the other hand, hails from an African context and was founded on, generally, similar historical cultural and political realities that affect development across the different regions of the African continent. The question is therefore whether SADC Member States should join the OHADA in light of the ambition for

³¹ As of 13 August 2010, a compilation done by TRALAC available at <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/SADC_LEGAL_INSTRUMENTS_INFORCE_23_JUNE_2010_-_REVISED_13-08-2010.pdf> (accessed 26-08-2013) shows that SADC Member States are reluctant to ratify Protocols.

³² See the successes of the CISG in 5.3.3. For an introduction to the CISG, see also JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 1, 4 and I Schwenzer (ed) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edition 2010) 1-3.

continental harmonisation. The CESL, in turn, is approached from three significant realities. The first is that the European Union is regarded as a pacesetter on regional economic integration and the harmonisation of laws within a regional context. The second is that the European Union shares significant trade and political relations with SADC and therefore the CESL becomes an important tool for comparison in that context. Thirdly, the CESL is primarily based on the CISG. The interesting aspect here is that the majority of countries in the EU are Contracting States to the CISG. These realities fuel the questions on whether there is a need for a regional sales law alongside the CISG and therefore whether SADC should follow the CESL example. The core of this study was to approach the models for legal harmonisation within the context of SADC's needs and regional circumstances to outline what could be in the interests of its goals and objectives. Overall, what are the lessons to be learnt from these models which can be used in the quest for a common SADC sales law?

7 1 1 CISG

There is debate on whether the CISG has been successful in harmonising international sales law. Although there is no arithmetic formula to calculate its successes, there is a general understanding that the CISG has had significant influence in its sphere of application.³³ Moreover, it has influenced national, regional and international law reform and harmonisation initiatives.³⁴ The CISG has been exceptionally well received across the globe. As of 20 October 2013, it is in force in 80 countries spread across all trade regions that account for more than two thirds of world trade.³⁵ Therefore, the CISG "is arguably the most successful international instrument adding uniformity in the application of international sales laws."³⁶

³³ See discussion in 4 4 above.

³⁴ It has become the *lingua franca* among legal practitioners of the world. P Schlechtriem "25 Years of the CISG: An International *Lingua Franca* for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts" in HM Flechtner, RA Brand & MS Walter (eds) *Drafting Contracts Under the CISG* (2008) 167-187. F Ferrari "The CISG and its Impact on National Contract Law - General Report" in F Ferrari (ed) *The CISG and its Impact on National Legal Systems* (2008) 413-480 at 480.

³⁵ See JM Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (4th edition 2012) 1. These are USA, China, Germany, Japan, France, Netherlands, Republic of Korea, Italy and Canada. The odd one out of the top ten is the United Kingdom. See the WTO *International Trade Statistics 2012* (2012)

Within the context of SADC, should the CISG be adopted as an instrument for legal harmonisation? Currently there are only two SADC states which have ratified the CISG.³⁷ Eiselen has made an argument for the adoption of the CISG in Southern Africa. He is of the opinion that the CISG

“will create the necessary legal framework within which international trade in the region can be developed and promoted by removing an unnecessary obstacle in a region where many businesses are either newcomers in international trade or would like to become participants. This step alone will, of course, not trigger the African renaissance hoped, but will be an important building block in the process of creating the conditions within which it can take place and flourish.”³⁸

Whilst it can be argued that the CISG provides a neutral law that has been drafted by experts under the auspices of the United Nations, the question remains why, in the context of legal fragmentation, inaccessibility and archaism in the region, more SADC Member States have not yet adopted the Convention? This study has pointed out that very few African countries have opted to adopt the Convention.³⁹ This study submits that the real issue is not with its neutrality or quality, but rather with the region’s focus on regional initiatives aimed at free trade and the reduction of barriers to trade rather than paying attention to existing global solutions in the area of substantive sales law. Policy considerations can also play a role, which in the end are difficult to reconcile with the adoption of the Convention.⁴⁰

The CISG is the most established instrument for the harmonisation of sales laws at international level. It is a trendsetter in this area. Although African countries could perceive UNCITRAL as a western organisation because of its seat and the major

available at <http://www.wto.org/english/res_e/status_e/its2012_e/its2012_e.pdf> (accessed 02-09-2013).

³⁶ B Zeller “The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law” (2006) 17 *Stellenbosch Law Review* 466-481 at 479.

³⁷ Zambia and Lesotho have ratified the CISG. It is a serious concern that South African has not ratified the Convention otherwise it would have had adequate influence on the rest of the grouping, primarily based on its leading role in SADC regional integration. See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 355.

³⁸ See S Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) 116 *South African Law Journal* 323-370 at 370.

³⁹ See 4 2 and 4 3 1 above.

⁴⁰ For instance it has been noted that the United Kingdom is reluctant to ratify the CISG because of the fear that it could erode the value of English law. S. Moss “Why the United Kingdom has not Ratified the CISG” (2005) 25 *Journal of Law and Commerce* 483-488.

participants thereof, this study has shown that Africa has been greatly involved in this organisation since its formation. It is therefore surprising that so few African states have adopted the CISG. As already pointed out, the scepticism about the CISG is, to a large extent, misguided and based on other considerations than the efficiency or the substance of the law it provides. The reality is that, irrespective of whether they have adopted the Convention, where the rules of private international law point to the law of a Contracting State, contracts concluded by members of the SADC region will also be governed by the CISG. Moreover, despite the fact that most Contracting States of OHADA had chosen not to adopt the CISG,⁴¹ the OHADA Book VIII is also based on the CISG and, albeit indirectly, the CISG influences the African sales law significantly.

The CISG, however, remains an attractive instrument for the harmonisation of sales laws. The lack of interest amongst SADC countries, and African countries in general, to ratify the CISG does not mean its influence and utility should be disregarded. This study has suggested that, besides adopting the CISG, SADC Member States can still use the CISG as a basis for formulating their own regional law. Recent projects on the harmonisation of sales law have all heavily relied on the CISG for guidance.⁴²

Global efforts towards the harmonisation of international sales law favour the use of the CISG as the basis for harmonised sales law. Today it is unthinkable to ignore the CISG in any modern regional initiative for the harmonisation of sales law. If it is not an option for Member States to adopt the CISG, it ought still to be used as a point of departure to the enactment of a common SADC sales law. The experiences in Zambia and Lesotho, the only Contracting States to the CISG in the region, can be used as a useful basis for research. This is not to say the CISG should be slavishly followed; it can be adapted to meet the developmental needs of the region by incorporating rules for consumer sales, informal traders and small businesses. The European Union and the OHADA both used the CISG as point of departure but improved on it in some areas and extended its scope and sphere of application as

⁴¹ Only very few of them, namely Benin, Gabon and Guinea, have ratified the CISG.

⁴² This is typically what has been done with both the OHADA Uniform Act on General Commercial law booklet on Sales Law and the Common European Sales Law.

regards matters that are not provided for under the CISG. This, therefore, provides an opportunity to transform the CISG in line with specific regional needs.

Furthermore, to attract foreign investment into Africa it would be sensible to use, and promote, the CISG as the legal gateway to Africa since most foreign investors from the West and Asia are Contracting States to the Convention. The United States of America, China and most countries of the European Union, which are the leading trading partners for SADC, have all adopted the CISG. It is important to create investor confidence because foreign investment is key to the development of the SADC region. Legal certainty and predictability as well as an efficient judicial system for resolving disputes and executing judgements will boost investor confidence effectively.

7 1 2 OHADA

The creation of the Organisation for the Harmonisation of Business Laws in Africa was a bold step towards legal reform and trade facilitation in Africa. Some perceive it even as a new path to continental legal harmonisation in Africa.⁴³ Since the adoption of the OHADA Treaty twenty years ago, the Organisation has made significant progress. OHADA is capable of having a significant impact on the harmonisation of laws in Africa. However, to achieve its aim of becoming a continental wide organisation, OHADA has to address some of the challenges it faces. Although it is growing in membership and has successfully enacted uniform laws, there is still a need for transformation in order to shake off the scepticism about the influence of French and civil law that surrounds it. There is also a need to make sure that the Uniform Acts are implemented harmoniously and effectively. Capacity constraints and case backlogs at the CCJA therefore need to be resolved.⁴⁴

⁴³ It has been hailed as representing “the most awaited panacea for the future economic development of member countries”. See J Nzalé “Reflecting on OHADA Law Reform Mission: Its Impact on Certain Aspects of Company Law in Anglophone Cameroon” (2002) 97-119 at 97-98 available at <<http://biblio.ohada.org/greenstone/collect/dohada/index/assoc/HASH0173.dir/reflecting-ohada-law-reform-mission.pdf>> (accessed 02-09-2013) and also generally X Forneris “Harmonising Commercial Law in Africa” (2001) 46 *Juris Périodique* 77-85 at 77.

⁴⁴ See also CM Fombad “Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond” (2013) 59 *Africa Today* 50-80 at 69. See the discussion on the challenges facing OHADA in 5 3 2 above.

Rather than embarking on a new and separate process for the harmonisation of sales laws, SADC Member States could join the OHADA as members of the AU.⁴⁵ However, this option depends on the compatibility of SADC and OHADA rather than the practicalities of acceding to the OHADA Treaty. Joining the OHADA has serious implications because Contracting States cede their legislative and judicial sovereignty to the OHADA institutions. At this stage OHADA represents mostly the interests and aspirations of its signatory states. Major reform and transformation is needed in some areas before OHADA can accommodate more members from the common law and non-French speaking regional communities.⁴⁶ Despite some amendments to the OHADA Treaty, it can still be described as essentially a French based regional model for the harmonisation of business laws amongst mainly former French colonies Africa. For a non-francophone, access to even the most basic materials on OHADA is still a challenge.⁴⁷

Although OHADA is both structurally and institutionally attractive, joining the OHADA is not an advisable option for SADC at this stage. This study has highlighted a number of reasons why, despite the fact that OHADA is theoretically a good model to follow, it is not a system that SADC Member States can simply join before cooperation between the two regional organisations has been established.⁴⁸ More so, OHADA needs to be further transformed to accommodate SADC Member States that have a colonial, lingual and legal background which is not adequately accommodated by the OHADA system.⁴⁹ The conclusion is that the goal of achieving legal harmony could be undermined as a result of the challenges that may arise when joining OHADA.

However, the nature and the operations of OHADA cannot go unnoticed. The Uniform Acts are adopted at organisational level by the Council of Ministers and are

⁴⁵ Article 53 of the Treaty on Harmonisation of Business Law in Africa (OHADA) invites AU members to join the OHADA.

⁴⁶ French remains superior to other working languages of OHADA. More so, most of the Uniform Acts are based on the civil law tradition and influenced by the French legal system. See also 5 4 2 above on whether SADC Member States should join the OHADA.

⁴⁷ Proceedings in OHADA are still largely in French. Formal materials and updates are also mostly found in French. Most scholarly works are also published in French. In the end, it is difficult to integrate a non-francophone scholar, practitioner or trader in the OHADA system as it is today.

⁴⁸ See 5 4 2 above.

⁴⁹ See 5 4 2 above.

directly applicable and obligatory in the territory of each OHADA Contracting State, overriding any contradictory national laws of the Contracting State. This study commends a community law model which, as in the case of the OHADA Uniform Acts, is directly binding on SADC Member States without having been incorporated into domestic law through national state intervention. This is the most effective way of ensuring uniformity across the region. The institutional framework of the OHADA is another key area that SADC could emulate. Regional legal harmonisation requires an effective adjudication system. SADC needs to transform the SADC Tribunal and provide it with an adequate mandate and the necessary jurisdiction to foster uniform application and implementation of the harmonised law. Training and facilitation as in the case of the ERSUMA is another important element of legal harmonisation amongst states with different legal and lingual traditions.⁵⁰ This study recognises that the OHADA instruments can be used as a basis or model for establishing a SADC based instrument, which in turn can serve as a building block towards continental harmonisation. This could be done by aligning the common SADC sales law with the OHADA Book VIII which is based on the CISG. This could at the same time broaden the database of court decisions which will support uniform interpretation and application of the rules by the SADC Tribunal and the OHADA CCJA. SADC legal practitioners can also attend ERSUMA training on the relevant subjects to create some common knowledge between the SADC community sales law and Book VIII.⁵¹ However, this study has found that political will is of fundamental importance to regional integration and legal harmonisation. SADC could emulate the OHADA in this regard. Particularly, the SADC Summit must show leadership by leading the process of legal harmonisation through creating an enabling legislative, institutional and operational framework in which regional laws can be adopted and enforced with ease and speed. Recommendations in this regard will be made in the next section.⁵²

7 1 3 CESL

Regional integration is being achieved at a faster pace in the European Union than in many other regions, particularly in Africa. This is primarily because of the enabling

⁵⁰ See 5 2 3 5 above.

⁵¹ See also 5 4 3 and 5 5 above.

⁵² See 7 3 below.

legal framework that allows the Union to regulate itself with adequate authority. The Treaty on the European Union and the Treaty on the Functioning of the European Union⁵³ which empowers the EU to legislate on Union matters are the primary basis for the legislative authority of the Union. Through integration, the European Union has achieved enormous economic development and improved the lives of its citizens.⁵⁴

The European Union is a major investor in and trading partner of SADC. The conclusion of trade agreements between the EU and Southern African states makes trade an area of mutual interest for both parties. To further improve its own cross-border trading environment, the EU has recently proposed its own regional sales law, the Common European Sales Law (CESL). Therefore, it is prudent for SADC to consider this initiative and extract lessons from it where possible.

The question has been asked why the European Union has chosen to enact a regional instrument primarily based on the CISG, whilst 24 of its 28 Member States are Contracting Parties to the CISG. Although it tracks the CISG in most instances, the CESL goes further to address issues that are not covered by the CISG, such as consumer sales. It also provides implementation measures that are not available to the CISG, such as the Court of Justice and training for practitioners.

The CESL example is the most recent example of a regional harmonisation initiative undertaken on the basis of the CISG. It provides an interesting example on how the regional harmonisation of sales law can function parallel to the CISG at global level. The relationship between the CESL and the CISG adds to the debate on whether regional harmonisation negates or supports global harmonisation.⁵⁵ This study has noted that regional organisations have better institutional capacity to foster regional integration and the harmonisation of laws.⁵⁶ The OHADA and the European Union are good examples in this regard. Regionalism is more flexible because of the

⁵³ See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁵⁴ See 6 2 and 6 5 1 above.

⁵⁵ For a broader discussion on this subject, see also generally U Magnus "CISG vs. CESL" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (2012) 97-123 and F Ferrari "Universal and Regional Sales Law: Can They Coexist?" (2003) 8 *Uniform Law Review* 177-189.

⁵⁶ See 6 7 above.

smaller number of states involved compared to international conventions which are aimed at global harmonisation. They are therefore better placed to address legal harmonisation matters swiftly, which could be difficult to achieve at global level. Particularly national and regional interests, such as consumer protection for example or informal trade which is prevalent in SADC, can be factored into a regional instrument much easier than with an international convention such as the CISG.⁵⁷ This is in essence what was done with the CESL.

Important lessons have been extracted from the EU.⁵⁸ Apart from political will, the role of enabling legislation and institutional capacity has been noted as the major levers for integration in the EU. It has been observed that the harmonisation of laws can be easily achieved following research, consultation and participation by interested stakeholders. Most importantly, it has been concluded that regional harmonisation initiatives can be a stepping stone towards global harmonisation. Regional harmonisation initiatives that follow the CISG promote and strengthen the role of the Convention rather than undermining it. To achieve this, there is a need to use the CISG as the point of reference in drafting a regional instrument and departing from it only in rare circumstances of real necessity.⁵⁹

7 1 4 Concluding remarks

The need for the harmonisation of sales laws to facilitate trade is well established. The UNCITRAL, the EU and the OHADA have explicit objectives in this regard. This enables the adoption, implementation and sustenance of the harmonisation projects undertaken by these organisations. They provide not only valuable lessons for the harmonisation of sales law in SADC but offer opportunities for adoption particularly in the context of the CISG and the OHADA. However, it has been concluded that the best way forward for SADC is not necessarily to adopt the CISG or to join the OHADA, but rather to use the three selected models as references towards a common SADC sales law with the CISG as the model for the content of such a

⁵⁷ See the differences between the CESL and the CISG in 6 5 3 above.

⁵⁸ See 6 8 above.

⁵⁹ See 6 7 above.

community law whilst the OHADA and the CESL provide invaluable lessons for regional harmonisation.

7 2 RECOMMENDATIONS

The harmonisation of sales laws in the SADC region is an indispensable ingredient of regional integration and economic development. However, to achieve legal harmonisation there is a need to create an enabling legislative, institutional and political environment. The methods of introducing the harmonised law can only be effective if adequate supporting mechanisms are in place. To facilitate, foster and sustain the process of legal harmonisation there are issues that need to be addressed. A few recommendations are made here.

7 2 1 A common SADC sales law – nature and characteristics

The analysis of the three models has led to the conclusion and recommendation that, provided that the necessary enabling framework is created, a common SADC sales law should take the form of community law as this will be the most appropriate technique given the background and the circumstances of the region. Considering the reluctance of SADC Member States to comply with regional instruments, a hard law method creates room for enforcement and implementation mechanisms otherwise not available through soft law techniques.

Such a supranational community sales law should be directly binding on all Member States without the option of reservations and declarations in order to achieve maximum harmony.⁶⁰ The law making process should therefore follow the style of the OHADA Uniform Acts which are adopted at regional level to automatically apply directly in Contracting States superseding any national law to the contrary.⁶¹ Otherwise, national authorities delaying the adoption of the instrument could diminish the effectiveness of the community law.

⁶⁰ Declarations allowed under the CISG have weakened the convention and have been criticised for causing disharmony. See 4 3 5 3 above.

⁶¹ OHADA Uniform Acts apply automatically 90 days after publication in the Official Journal of OHADA. Article 9 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

However, as this is a law applicable to international sales, there is no need for it to apply to domestic transactions. National laws regulating domestic transactions must not automatically be repealed by the community law but are only to be substituted by community law where they apply to cross-border sales. However, as is the case with the CESL, the option must be left for national authorities to decide on its applicability as the community law can equally serve an additional role of reforming national laws.

Furthermore, the community law should establish its precedence over other possible applicable laws such as the CISG, as is also the case with the CESL. It must state that it will apply directly once a contract is concluded by parties from different states where at least one of the parties is from the region irrespective of whether that party's country has other applicable laws. This will resolve issues of conflict and concurrent application of treaties which generally create further disharmony by establishing a hierarchy of norms which seldom exists in international law.

Furthermore, its scope of application should not be limited to business-to-business (B2B) transactions but also regulate the legal environment for small and medium-sized enterprises (SMEs) to stimulate cross-border trade between smaller businesses that would otherwise have been reluctant to trade outside their own countries due to the fear of legal uncertainty and huge transaction costs. If policy makers were to see the need therefore its scope may also be extended to cover business-to-consumer (B2C) sales.

Further, like the CISG, it must be an opt-out instrument applicable only to the international sale of goods.⁶² The law must directly apply to contracts where one of the parties is from the region except where the parties have excluded it by agreement. This is important to create a balance between certainty and the principle of party autonomy. Critics of the CESL cite its opt-in clause as one of the major weaknesses in its quest to achieve harmony.⁶³ To exclude these options altogether

⁶² The CISG applies unless parties have opted out of the Convention. See Article 1 and Article 6 of the United Nations Convention on Contracts for the International Sale of Goods U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) Reprinted in 19 I.L.M. 671 (1980).

⁶³ See U Magnus "CISG vs. CESL Remarks" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law* (2012) 97-123 at 101.

would be undesirable as it then undermines the fundamental principle of party autonomy.

It is recommended that the law must be based on the CISG, as is the case under the CESL and the OHADA Book VIII. This study concludes that the goal of regional uniformity can be attained by using the CISG as the reference point and adding to it to provide for issues otherwise not provided for under the CISG. This approach could in the long run facilitate global unification as it could strengthen the role of the CISG in general.

To address linguistic issues that might arise, the law must be drafted in all the official and working languages of SADC which are English, French and Portuguese. To emphasise, this should not be translations but rather, the instruments should be co-drafted in the different languages to ensure maximum conformity of the different texts in the various languages.

The common SADC sales law must provide procedures for its regular review and possible revision or amendment so that it does not become a “static monument” as it becomes out of touch with realities of the ever-changing trading environment.

7 2 2 Enabling legislative framework - amending the SADC Treaty

The SADC Summit has to date adopted binding and non-binding legal instruments in the form of protocols, declarations and guidelines using the powers vested in it by the SADC Treaty. An example relevant to sales contracts is that of the SADC Model Law on Electronic Transactions and Electronic Commerce⁶⁴ recently adopted by the SADC Ministers of Telecommunication, Post and ICT which seeks to enhance electronic commerce in the region by improving and modernising national laws. This is an example of a soft law effort towards the harmonisation of laws which shows that precedents for the harmonisation and facilitation of sales and commerce already exist in SADC. This is, however, not a binding instrument. An amendment to the

⁶⁴ The Model Law was prepared by the International Telecommunication Union under the auspices of the project on the Harmonisation of ICT Policies in Sub-Saharan Africa is available at <http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf> (accessed 15-10-2013).

Treaty which would explicitly provide for legal harmonisation, the procedure for creating harmonised community laws and the implementation mechanisms for that would provide greater legitimacy, clarity and urgency to the whole process. The Treaty of the European Union and the Treaty of the Functioning of the European Union⁶⁵ may present guiding examples in this regard. These Treaties provide for the types of legislation that can be enacted by the European Union and their relationship with national laws. Without an enabling supreme law, there can hardly be any meaningful legal harmonisation. The SADC Summit can effect these amendments in terms of article 36 of the SADC Treaty.⁶⁶

Interestingly, the amendment of the SADC Treaty appears to be the easier decision that Summit can make. Although Summit decisions are generally made by consensus, the Treaty can be amended by a three quarters majority.⁶⁷ It seems therefore that the best route to address the issue once and for all is by amending the Treaty which is the supreme law of SADC so that the process for legal harmonisation can become one of the overall objectives of SADC rather than attempting piecemeal harmonisation through protocols which were arguably not designed for this purpose.

7 2 3 Institutional reforms

There is difficulty in monitoring, supervising and enforcing laws across legal boundaries without supranational institutional mechanisms.⁶⁸ The EU is created in a supranational style, making the monitoring, supervision and enforcement of the obligations that come with it, including the harmonisation processes, much easier to achieve. SADC was created as an international organisation rather than a

⁶⁵ See Article 288 of the Consolidated version of the Treaty on the European Union, Official Journal of the European Union Volume 55 C 326 (26 October 2012).

⁶⁶ The SADC Treaty provides that “an amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit” and further that a proposal for the amendment of [the] Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.” See Article 36 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁶⁷ Article 10 (9) of the SADC Treaty requires Summit Decisions to be taken by consensus whilst Article 36 (1) provides that a decision to amend the Treaty shall be adopted by three quarters of all Members of the Summit.

⁶⁸ The SADC Tribunal could be a good advantage in this regard if the interference that currently halted its operations could be put to rest.

supranational institution. Although the SADC Treaty provides ways of enforcing obligations generally through sanctions, the responsibility of monitoring, supervising and enforcing a harmonisation project are not inherent to the Treaty.⁶⁹

Institutions play a pivotal role in the creation and sustenance of a harmonised community law. Because a community law cannot be managed by one member state alone, it needs some form of supranational institution to drive and monitor the process. Most of the relevant institutions are available within the current SADC institutional set up, albeit needing some degree of transformation. It might be necessary also to add other important institutions that are not currently available. Transformation will thus target mainly the SADC Parliamentary Forum and the SADC Tribunal whilst a new institution for training should be considered.

Genuinely speaking the name “Parliamentary Forum” is somewhat misleading. It gives the impression that SADC has a Parliament with features common to national parliaments, whilst its role and functions within the SADC context are nowhere near that semblance. At this stage the SADC PF is “something of a talking shop”,⁷⁰ with neither oversight of nor influence in the legislative processes in SADC. The efforts to transform the SADC PF should be accelerated.⁷¹ The SADC PF should be given legislative authority to deal with regional legislative matters particularly community laws. The current pace of protocols and their lack of ratification show that there is a need for a regional parliament that enacts directly applicable community legislation from a regional level. The current structure of the SADC PF which is composed of national parliamentarians can be transformed to create a supranational institution that is connected to national parliaments so that there can be a link between the national parliaments and the regional parliament. Elected parliamentarians are, democratically speaking, the legitimate representatives of the people and therefore

⁶⁹ The SADC Treaty provides for the imposition of sanctions on Member States that “persistently fails, without good reason, to fulfil obligations assumed under the Treaty;” or “implements policies which undermine the principles and objectives of SADC.” See Article 33 of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁷⁰ J Richardson *European Union: Power and Policy Making* (2001) 116.

⁷¹ The SADC PF has taken upon itself to draft a Protocol on a SADC Parliament with legislative and oversight authority. This move is unprecedented because SADC Protocols are generally prepared through the Secretariat, forwarded to the Council and then recommended to the Summit by the Council. It is not clear yet whether Summit will adopt this Protocol.

should not have their powers usurped by the executive under the guise of regionalism. This however would entail the transformation of SADC into some form of supranational organisation rather than the current international organisation it is⁷².

At the same time, much has been said about the role of adjudicating institutions in the harmonisation of laws. One of the perceived key strengths of the CESL and the OHADA if compared to the CISG is that these regional laws have supranational courts that can deal with harmonious interpretation and implementation. The CISG, on the other hand, does not have a supranational institution for interpretation and implementation.

The current situation with the SADC Tribunal is somewhat disturbing, to say the least. The Tribunal is an integral part of SADC and should be strengthened to discharge its mandate rather than being elbowed by politicians. The current transformation of the Tribunal should take into consideration the role that it can play in the harmonisation of sales laws in SADC. Certainly, the fact that the Tribunal's jurisdiction will be streamlined to deal with disputes amongst states only⁷³ is a further cause for concern in this context. Traders in the private sector who use a harmonised community law are the ones that long for certainty. The Tribunal should be empowered to deal with disputes emanating both from state agreements and also uniform private law. The fear that citizens will drag their governments to the Tribunal as in the *Campbell Case*⁷⁴ could be dispelled by giving the Tribunal jurisdiction for two distinct categories of disputes, namely state versus state disputes as already envisaged, and jurisdiction on private person versus private person disputes dealing with harmonised private law.

Another major issue is the dissemination of information and materials regarding the harmonised law. Key lessons can be extracted from the CISG, the OHADA and the CESL on this matter. After all, accessibility is one of the major challenges concerning SADC national laws. A regional training organ should be created to facilitate the

⁷² Without such arrangement, the current SADC normative framework will not enfold international constitutional law implications.

⁷³ See Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique 17-18 August 2012 point 24.

⁷⁴ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

training of officials, practitioners and stakeholders involved in the law. An institution similar to the ERSUMA can also be introduced to take responsibility for maintaining databases on harmonised SADC law and distributing up to date information and materials concerning the law. It can also be a centre for further research. Without the training of persons involved in the law and effective channels for the dissemination of laws, harmonisation could be difficult to achieve.

7 2 4 Political will

National governance structures have a great influence on the creation, upholding, revision and implementation of laws, which are important ingredients of the harmonisation process. In most instances this influence is characterised as political will or lack thereof. Political will is critical for ensuring the success of a harmonisation project undertaken by sovereign states. There are processes and projects that, in terms of history and practice, are commonly perceived as inappropriate or incompatible with the processes and traditions in SADC which are ostensibly found on “good neighbourliness.”⁷⁵ In the wake of the SADC Tribunal decisions on Zimbabwe, there was spontaneous backtracking by SADC leaders with some saying the Tribunal had no mandate whilst some were more blunt, such as for example Tanzanian President Mr Jakaya Kikwete who pointed out that they had unknowingly created “a monster”.⁷⁶ This is an indication that supranational instruments and approaches are currently not easily tolerated and supported in SADC whilst they are in actual fact indispensable for regional legal harmonisation. Invariably, legal harmonisation can only survive if the political leaders in the region are willing to receive it and if they have the political will to implement the community law in their national legal systems.

⁷⁵ See Preamble to the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁷⁶ DG London “SADC summit: Beheading the monster” (2012) available at <<http://www.economist.com/blogs/baobab/2012/08/sadc-summit>> (accessed 02-09-2013). See also “Killing the ‘monster’” (2011) *NewsAfrica* available at <<http://www.newsafrika.net/en/news/1565/killing-the-monster.html>> (accessed 02-09-2013).

There is some lack of clarity on the real legal character of the organisation of SADC. The question is whether SADC is a rules based system or not.⁷⁷ Although founded on the basis of the SADC Treaty with various supporting protocols and declarations which appear to establish a rules based system, the history and operational environment in SADC suggests otherwise. An explicit intention to conclude binding instruments in SADC is not borne out by actual practice.⁷⁸

History, friendship and good neighbourliness are not sound enough reason for failing to take agreements seriously. On the contrary, these elements should assist in cooperation and meeting obligations within communal relations. In this context a comparison can be made with a family. A family cannot agree to increase its income but turn a blind eye towards family members that renege on their obligation to work and contribute to the total output; this is not in the common interest of the family. The same can be said of SADC. The region has concluded cooperation agreements on various fronts in the hope of creating and sustaining development for the benefit of its citizens. Regional leaders must realise that they do not owe development and progress to individual Member States or their leaders but to the common wellbeing of the SADC citizenry whose lives depend on their decisions.

Legal harmonisation can only properly be achieved in a system that respects the rule of law. SADC Member States should commit themselves to the rules they have agreed on and treat them as binding on them. They should, in other words, maintain and sustain the current rules based system. The tendency to renege on regional obligations in the guise of preserving state sovereignty should end. SADC Member States should understand that regional intergovernmental organisations do not take away their national state sovereignty. Instead, by joining regional organisations, States relinquish part of that sovereignty to the supranational organisation in order to facilitate the achievement of regional goals. It has been noted in the Sutherland Report that the -

⁷⁷ See generally G Erasmus "Is the SADC Trade Regime a Rules Based System?" (2011) 1 *SADC Law Journal* 17-34.

⁷⁸ "SADC must move from rhetoric to implementation of these legal instruments." C Landsberg "The Southern African Development Community's Decision-making Architecture" in C Saunders, GA Dzinesa & D Nagar *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) 63-77 at 64.

“[a]cceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why “sovereign nations” agree to such treaties. They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.”⁷⁹

SADC should therefore emulate the European Union and the OHADA where political will is credited for the successes they have registered. States who belong to these regional organisations have invested part of their national sovereignty in these organisations for a common goal and despite friendship and good relations they do not relent on holding each other to agreements and obligations. Even the firmly established political allies of this world such as the United States of America and Britain litigate against each other at the WTO dispute settlement body without seeing this as jeopardising their existing friendly relations. No less can be expected of SADC.

SADC may not achieve effective regional legal harmonisation without adequate political will. This is a key element of the whole puzzle that needs serious attention. It is no longer enough to join these regional organisations under a disguise of being a very good African without the adequate will to achieve the goals of regional integration.

7 2 5 Resolving multiple and overlapping membership to regional organisations

The issue of multiple and overlapping membership of different regional and international harmonisation initiatives is a major source of concern. Multiple and overlapping memberships can cause problems of implementation if there are competing responsibilities without coordination. In the context of regional harmonisation in SADC, a number of problems arise. Some members of SADC are also members of the EAC, COMESA and the OHADA which are regional organisations with their own programmes for the harmonisation of laws. At the same time, some SADC Member States are also Contracting States to the CISG.

⁷⁹ P Sutherland *The Future of the WTO: Addressing Institutional Challenges in the new Millennium* (2004) 29.

There is no easy way of coordinating these efforts. As has been noted already, the OHADA Treaty does not resolve the issues of the relationship between itself and other regional treaties or conventions such as the CISG; neither does the SADC Treaty do so; yet it provides for sanctions for non-compliance.⁸⁰ It has been noted that the CESL tries to side step the CISG by giving itself priority; however, there is still debate on whether this is in fact legally correct. This shows that belonging to multiple initiatives with overlapping mandates is clearly undesirable and causes implementation problems particularly for legal harmonisation as it leads to uncertainties.

As SADC proceeds to embark on regional legal harmonisation, it is undesirable for its member states to be scattered around similar initiatives with competing mandates. Most of the harmonisation instruments in question claim to take precedence over all. The OHADA Uniform Acts takes precedence over national law whilst the CISG also constitute national law in the Contracting States in so far as international sales are concerned unless excluded by the parties. Similarly, any future SADC sales law would have the same legal effect as regards international sales.

To avoid conflict and to pave the way for the harmonisation of sales laws in SADC, it is argued and recommended that the DRC as the single member of SADC that has joined OHADA should be encouraged to renounce its membership of OHADA.⁸¹ In the same context, the SADC Treaty allows SADC to “maintain good working relations and other forms of co-operation, and ... enter into agreements with other states, regional and international organisations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty⁸² ... as long as it does not jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of ... [the SADC] Treaty.”⁸³ Therefore,

⁸⁰ See 3 7 3 and 5 3 2 3 above.

⁸¹ The OHADA Treaty provides that “[a]ny denunciation of the present Treaty must be notified to the depository Government and will take effect only one year after the date of such notification.” See Article 62 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁸² Article 24 (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

⁸³ Article 6 (1) of the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

harmonisation initiatives in the EAC and COMESA together with SADC should be coordinated under the COMESA-EAC-SADC Tripartite forum to ensure harmony and coordination if consolidation is not possible. The same can be done with the OHADA, if possible, to ensure cooperation towards continental integration. Contracting States to the CISG will not necessarily affect the implementation of the common SADC sales law since by virtue of Article 90 of the CISG, community law could supersede the CISG or a declaration can be made under Article 94 to disqualify the application of the CISG once SADC has adopted the “same or closely related rules” under the common SADC sales law.

7 2 6 Capacity, resources and funding

Legal “harmonisation is a long, slow and expensive process.”⁸⁴ The regional harmonisation of laws also requires capacity, resources and funding to support and sustain it. These aspects create a critical challenge for SADC. Many projects have failed to take off or to last because of lack of adequate funding. Harmonisation projects in other regions such as the European Union are easy to sustain because of the general availability of resources and finance. The levels of funding that could be available are a telling factor for whether legal harmonisation can effectively be employed and sustained. There is always the possibility that, despite lack of financial resources in SADC, international donors will be willing to contribute. The process should thus be attractive to prospective donors. The OHADA was supported by France mainly because of French investment interests in the region. SADC should therefore engage its partners and seek cooperation and assistance in this regard. The European Union, UNIDROIT, UNICITRAL and the African Development Bank have already shown interest in supporting regional endeavours aimed at legal harmonisation and trade facilitation.

7 2 7 Research, consultation and participation - the role of non-state actors

A harmonised SADC sales law is not for the regional political leadership or for merely appeasing the international community by being seen as making theoretical

⁸⁴ B Zeller “The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial law” (2006) 17 *Stellenbosch Law Review* 466-481 at 469.

integration progress. The law must serve a purpose. It must simplify and facilitate cross border trading and therefore address the legal barriers faced by traders and investors. To that effect it primarily should not be elitist but rather respond to the needs and aspirations of traders. In that case stakeholder participation, consultation and research play a critical role in the process.

The CISG, the OHADA and the CESL were all preceded by research. Research enriches the substance of the law. In creating a regional sales law attention must also be paid to the best international practices and standards. These standards are best established and understood through research. The CISG was an improvement on conventions that existed before it.⁸⁵ The same can be said of the OHADA Book VIII and the CESL which are based on, but at the same time also purport to improve on, the CISG. Foreign investors require a modern law that is on par with developments in practise at international level. At the same time, research allows for the adaptation of international standards to trade customs and practices within the region.

There are some characteristics common to all African laws that distinguish them from the rest of the world, particularly the western legal culture, which makes it difficult to impose rigid Western models on them.⁸⁶ There is need to strike a balance and find common ground between the competing legal systems rather than dismissing African laws as less valuable because they do not meet set those by Western legal systems.⁸⁷ This is why it is important for “research relating to harmonisation of law in Africa ... [to] be informed by legal anthropologists, sociologists, historians and others, whose insights and observations may ensure that the characteristics of African law are not lost in the process.”⁸⁸

⁸⁵ The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS). See 4 3 1 above.

⁸⁶ See C Nicholson “Some Preliminary thoughts on a Comparative Law Model for Harmonisation of Laws in Africa” (2008) 14 *Fundamina* 50-65 at 58 and also R David & JEC Brierley *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edition 1978) 509.

⁸⁷ See C Nicholson “Some Preliminary thoughts on a Comparative Law Model for Harmonisation of Laws in Africa” (2008) 14 *Fundamina* 50-65 at 59 and also AN Allott *The Limits of Law* (1980) 4.

⁸⁸ See C Nicholson “Some Preliminary thoughts on a Comparative Law Model for Harmonisation of Laws in Africa” (2008) 14 *Fundamina* 50-65 at 59.

Added to research, all interested stakeholders must participate in the harmonisation process. Both the public and private sector should be given an adequate opportunity to contribute to the law making process. Scholars and research institutions should be allowed to comment and review the proposals and ideas on a harmonised law. Representation in the law making process should be devolved and extended to national representatives that represent the diverse voices of the otherwise voiceless small to medium enterprises.

Consultation is another important prerequisite for the success of regional harmonisation. The CESL is an example of the importance of consultation. In the process leading to the proposal to the CESL, there was extensive consultation and comments from all interested stakeholders. If the business community and the real users of the law at national level are not consulted, there is the potential that the law will not be well received by the business community. Legal harmonisation cannot be achieved without adequate buy-in from the end users of the harmonised law. Both the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) did not survive, partly because they did not resonate with the aspirations and the different needs of their intended users.⁸⁹

To this end, the role of other supporting institutions or organisations whether public or private should not be ignored in the harmonisation process. Legal harmonisation requires these role players to play their part in creating and sustaining the desired legal harmony.

SADC should encourage academic and research institutions in Africa and abroad to research and teach on the harmonised SADC sales law as a means of disseminating and at the same time developing the regional law. In promoting the law and participating in the continuous reform process, universities as well as other research centres and private initiatives aimed at regional trade law, such as the Trade Law Centre in Southern Africa for instance, could play an important role.

⁸⁹ See P Schlechtriem *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (1986) 16, 17.

SADC should also allow non-governmental organisations (representing civic society) to play their role. In regional initiatives there are other interests and minority voices that sometimes depend on NGOs as their voice.⁹⁰

7 3 CONCLUDING REMARKS

In the end, it is important to note that business laws and in particular sales laws need to be harmonised to facilitate trade. To achieve that SADC must create an enabling framework by amending the SADC Treaty to address a number of key issues. Firstly, the amendment to the Treaty must make the harmonisation of laws one of the objectives of SADC. Secondly, it must provide for the procedures and mechanisms to adopt harmonised community laws that are directly applicable in Member States. Thirdly, it must reform the SADC Parliamentary Forum into a regional legislative body which can enact laws that are directly applicable in Member States. Fourthly, other available institutions such as the SADC Tribunal and the Secretariat must be adequately capacitated to ensure effective application and implementation of the harmonised law. Fourthly, the necessary institutions for training of officials and research should be created. However, all of this can only take place if the leadership in the region has the adequate political will to achieve harmonisation.

As for the law itself, the common SADC sales law must be a binding community law directly applicable in Member States. It has been observed that both the CESL and the OHADA Uniform Act is based on the CISG. The recommendation, therefore, is that the common SADC sales law must follow the content model of the CISG and only deviate where it is necessary to address matters not currently provided for under the CISG and for which there is a need. The law must be preceded by consultation, participation and research involving all interested stakeholders who are to partake in drawing the parameters of the law and to ensure that this law truly reflects the communal spirit which a regional law has to encompass in order to be effective in facilitating cross-border trade.

⁹⁰ On the role of non-state actors in SADC regional integration, see also KM Mbuende “The SADC: Between Cooperation and Development – An Insider Perspective” in C Saunders, GA Dzinesa & D Nagar *Region-building in Southern Africa: Progress, Problems and Prospects* (2012).39-60 at 56-57.

Lastly, it must be mentioned that the recommendations to amend the SADC Treaty and make further institutional reforms may sound farfetched and unrealistic considering the knowledge of and arguments on the lack of political will in SADC. However, that is also, to some extent, half the story of SADC and probably the side for which the SADC leadership is remembered the most. It must not, however, be forgotten that issues of transformation, institutional reform and Treaty amendment are not new for SADC. The organisation has transformed itself now more than three times, from the Frontline States through SADCC to SADC, which was also comprehensively reformed on the turn of the millennium. Over the past 30 years, once every decade, SADC has, at least on paper, held some self-introspection to try and “meet the challenges of globalization.”⁹¹ Therefore, to the extent that they assist SADC to fully participate in the new globalised economy though facilitating international trade for economic growth, development and poverty alleviation, the recommendations put forward in this study could find resonance with the SADC leadership and within their wisdom be considered for implementation where possible.

⁹¹ See Preamble to the Treaty of The Southern African Development Community available at <http://www.sadc.int/files/91113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013).

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