THE THREE PILLARS REGULATING INTERNATIONAL SALES CONTRACTS ON THE AFRICAN CONTINENT

1 Introduction

In 2018, the African Continental Free Trade Agreement (AfCFTA)[1] was concluded with the overarching aim of creating a common market for goods and services on the African Continent in order to promote economic integration, increase investment opportunities and economic growth in Africa with the ultimate goal of the reduction of poverty.[2] This aim is in sync with the United Nations Sustainable Development Goal 8 of, *inter alia,* promoting sustained, inclusive economic growth[3] and Aspiration 1 of Agenda 2063 of the African Union envisaging prosperity for Africa by inclusive growth and sustainable development.[4] The General Objectives of the Free Trade Agreement (AfCFTA) refer to enhancing the competitiveness of the economies of State Parties both on the Continent and in the global market.[5]

The Protocol on Trade in Goods[6] included in the AfCFTA refers to the specific objective of boosting intra-African trade in goods through, amongst others, the progressive elimination of tariff and non-tariff barriers.[7] It is widely acknowledged that differences between legal systems constitute the largest non-tariff trade barrier.[8] In fact, different domestic legal systems even impede trade on regional level where there may be many similarities between the systems.[9] Therefore, the harmonisation of legal principles relating to international trade, but specifically to international sale of goods, is indispensable for meaningful trade cooperation between African states.

It is proposed that the ultimate goal of harmonisation of law, specifically in the field of the international sale or trade in goods, is the unification of law.[10] Unification of international

---

[1] https://au-afcfta.org/
[2] See Article 3(a) of the AfCFTA text available at xx. This objective is in line with UN SDG 1.
[3] UN SDG URL
[4] AU URL.
[5] Article 3(f) of the AfCFTA.
[6] Protocol I of the AfCFTA.
[7] Art 2(a) and (b) of the AFCFTA Protocol on Trade in Goods.
[8] United Nations Commission on International Trade Law *UNCITRAL, HCCH and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (2021) 5 (available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf, accessed 8 September 2023) – hereinafter referred to as the UNCITRAL Tripartite Guide. See also Rühl G "The problem of international transactions: Conflict of laws revisited" 2010 (6) *Journal of Private International Law 59* who states "differences between legal systems impede international trade significantly more than any other factor" (at 63).
[9] Rühl (n) 64.
[10] Wethmar-Lemmer "The important role of private international law in harmonising international sales law" 2014 *SA Merc LJ* 93 at 94. Wool states that "[t]he belief that commercial law ought to be gradually unified is a salient feature of orthodox thought on international commercial law reform" (Wool

commercial law would increase legal certainty and drastically reduce costs associated with the transaction itself as well as possible compliance and enforcement costs.[11] Where harmonisation refers to the approximation of legal rules in a certain field in order to find a shared solution to a legal matter, unification refers to replacing certain rules in participating jurisdictions with a unform set of rules.[12]

The question in this field of international commercial law is therefore not why unification is necessary, but rather which method of unification to use.[13]

Unification of law can take one of two forms.[14] On the one hand, the unification of substantive law, which refers to the unification of the legal principles relating to the subject matter of the dispute. In the case of international sales transactions, these aspects would typically include the legal principles governing the formation of the contract and the rights and obligations of the contractual parties. On the other hand, the unification of the rules of private international law, which are the rules determining the applicable substantive law. In an international sales contract, there are connections with two or more national legal systems. The parties may elect the applicable law by including a choice of law clause. The rules of private international law will determine the validity of such a choice of law and, in the absence of a choice made by the parties, will indicate the applicable law. However, rules of private international law form part of the domestic law of each jurisdiction and may differ substantially, leading to a different answer as to applicable law depending on the forum and state the dispute is heard. This of course, impacts negatively on legal certainty. Therefore, harmonisation of the rules of private international law of African states, will establish a predictable approach to determining the applicable substantive law.

In the past, if was often argued that these two methods of unification of law were mutually exclusive,[15] the contention being that the harmonisation or unification of international substantive law in a field supersedes or greatly reduces the need for resorting to the rules of private international law.[16] However, in my doctoral thesis in 2010 I concluded that there is in fact a symbiotic relationship between the unification or harmonisation of substantive law and

---

"Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Preliminary Proposal for the Development of a Policy-based Unification Model" 1997 *Revue de droit uniforme* / *Uniform Law Review* 46 46.)

[11] Wool 147.

[12] Boele-Woelki xx

[13] David "The Methods of Unification" 1968 *The American Journal of Comparative Law* 13 14.

[14] Ibid.

[15] Dalhuisen *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade law* (2007) 156 argued that the uniform substantive and conflict of laws approaches are conceptually mutually exclusive. However, David (n xx) 13 maintained from the outset that these methods of unification of law are not in conflict with each other.

[16] Wethmar-Lemmer Thesis

private international law and that the harmonisation of private international law enhances the functioning of harmonised substantive law rules.[17] I will illustrate this point in this address as well. Ever since, I have advocated for an integrated approach to harmonisation or unification in the field of international sales law, through accession to the CISG by non-contracting states on the substantive law side, and the unification of the rules of choice of law on the other.[18] In 2021, this complementary relationship between uniform substantive law and private international law was acknowledged by the United Nations Commission on International Trade Law (UNCITRAL) Tripartite Guide.[19] This document was compiled by UNCITRAL, the Hague Conference on Private International Law (HCCH)[20] and the International Institute for the Unification of Private Law known as UNIDROIT.[21] This Guide explains how the different legal instruments, drafted by these three sister organisations, complement and interact with each other to provide a "flexible and predictable legal framework" for governing international sales transactions.[22]

Once the rules applicable to the substance of an international sales contract have been established, and the approach to determining the applicable law to incidental matters is demarcated, the third aspect of effective governance of such a transaction is identifying the most appropriate forum or vehicle for dispute settlement. In the case of international sales disputes, this would be international commercial arbitration.[23]

Trading in terms of the African Continental Free Trade Agreement (AfCFTA) was set to commence on 1 January 2021.[24] However, what is necessary now to fully implement the objectives relating to trade in goods under this agreement is:

a) Harmonisation or ideally, unification of the substantive law rules governing contracts for the international sale of goods
b) Harmonisation of the rules relating to determination of the applicable law, or the rules of private international law
c) Harmonisation or unification of the rules relating to alternative dispute resolution, in particular international arbitration.

[17] Wethmar-Lemmer MM *The Vienna Sales Convention and Private International Law* (LLD Thesis, 2010) UJ 263 – 264.
[18] See, for example, Wethmar-Lemmer MM *CILSA* 393.
[19] See n xx.
[20] URL
[21] URL.
[22] Ref website
[23] See par 4 below.
[24] Ref website.

I will now discuss each of these three pillars of the effective regulation of international sales contracts in African continental context.

2 Harmonisation of substantive international sales law

2.1 Harmonisation / unification of international sales law in Africa

All the trade blocs on the African Continent have the aim of promoting regional and international trade by removing tariff and non-tariff barriers.[25] Harmonisation or unification efforts are challenging due to the vastly different legal systems in the trade blocs and on the Continent – ranging from Civil law to Common Law to Sharia law-based systems combined with different customary law systems.[26]

The OHADA trade bloc has made the most progress to date on the African Continent in respect of its attempts at harmonising international commercial law within the bloc. The Treaty establishing OHADA was signed in 1993[27] and remains open for accession by any member of the African Union as well as any other state invited to become a member by all state parties.[28] In terms of the enabling provisions of the OHADA Treaty,[29] Uniform Acts are adopted. These Uniform Acts become directly applicable in the member states and override domestic legislation on the relevant topics.[30] However, OHADA Uniform Acts only address matters of substantive law, not private international law.[31] The OHADA Sales Law is found in Book VIII of the Uniform Commercial Act.[32] It is clear from its provisions that it was based on the CISG.[33]

However, the most expedient manner to harmonise or, ideally unify, substantive sales law on the Continent would be accession of all African states to the CISG.

2.2 Suitability of the CISG as vehicle for unifying substantive international sales law on the Continent

---

[25] See the objectives of OHADA (Organisation for the Harmonisation of Business Law in Africa) URL; the Common Market for Eastern and Southern Africa (COMESA) URL; the Southern African development Community (SADC) URL ; the East African Community (EAC) URL; and the new Tripartite Free Trade Area (TFTA) comprising COMESA, EAC and SADC (URL). See also Eiselen 'The adoption of the Vienna Convention for the International Sale of Goods (CISG) 1980 in Africa – A critical analysis' 2022 1 (55) CILSA (https://doi.org/10.25159/2522-3062/10808) 1 10.

[26] See Eiselen 'Teaching transnational commercial law in the African context' (2017) 40 *University of Western Australia Law Review* 3 for an enlightening overview of the divergent legal systems; Mancuso 'The new African law: Beyond the difference between Common law and Civil Law' (2008) 14 *Annual Survey of International and Comparative Law* 41.

[27] URL

[28] Art 53 OHADA Treaty.

[29] See art 5 and 6 of the OHADA Treaty.

[30] Article 10 of the OHADA Treaty.

[31] Mosenepwo ULR 2021.

[32] URL.

[33]

The United Nations Convention on Contracts for the International Sale of Goods (the CISG or the Vienna Sales Convention)[34] was adopted at a diplomatic conference of the United Nations held in Vienna during 1980.[35] The Convention came into force on 1 January 1988. According to its preamble, the Convention is based on the premise that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".[36] It has even been stated that the CISG has established a "world law on international sales"[37] and that it has influenced several domestic sales laws.

As on 1 October 2023, the CISG has ninety-seven contracting states, with Hong Kong becoming a member in 2022, Saudi Arabia acceding on 3 August 2023 and the newest member state, Rwanda acceding on 22 September 2023.[38] Though the Convention was drafted more than forty years ago, its member states have grown steadily, even over recent years, with over twenty states acceding since 2010.[39] This fact also negates any potential arguments that the CISG is outdated or no longer suitable to govern modern international sales transactions. In addition, the member states are representative of all legal traditions, indicating that it is successful in breaching differences between the divergent legal families.[40] It has also been indicated that the CISG ensures a fair balance between the interests of the buyer and seller,[41] which also enhances its effectiveness for regulating international sales contracts from an African perspective. This balance is important for the African Continent – even though one may postulate that African merchants are often importers or buyers of manufactured goods, they are equally exporters or sellers of raw materials. Therefore, a set of unified international sales law rules that provides equal protection to all parties to an international sales agreement, is to be supported.

---

[34] United Nations Convention on Contracts for the International Sale of Goods, 1980-04-11, Vienna, UN Document A/CONF.97/18: 1489 UNTS 3; 1980 *International Legal Materials* 668. Available online on the UNCITRAL website at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (last accessed 2023-09-08).

[35] See the Official Records of the Diplomatic Conference xx available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf (last accessed 2023-09-08).

[36] See the text of the Convention (n).

[37] Lando "Preface" in Janssen and Meyer (eds) *CISG Methodology* (2009) 1 1.

[38] See the Status document of the CISG available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (accessed 8 September 2023).

[39] Wethmar-Lemmer *The Vienna Sales Convention and Private International Law* (2010, LLD thesis, UJ) 1, referring to the CISG status table in 2010 indicating 74 member states at that time.

[40] See the Status document and list of jurisdictions and Eiselen 'CISG as bridge between Common Law and Civil Law' in DiMatteo L (ed) *International Sales Law: A global challenge* (2014), https://doi.org/10.1017/CBO9781139103923.047 (last accessed xx)

[41] Eiselen (CILSA) 17.

The main advantage of harmonising or unifying international sales law by means of a convention, is the fact that contracting states are under an international law obligation to give effect to the convention and it would require all such states to adapt their domestic law to comply with this obligation.[42] In the case of the CISG, it means that the provisions of the Convention become the principles governing international sales law under the legal systems of contracting states.[43]

2.3 Overview of the CISG's scope of application and provisions

Article 1(1) of the CISG sets out it's applicability criteria and provides that the Convention applies to contracts of sale of goods between parties whose places of business are in different states either (a) when the states are contracting states or (b) when the rules of private international law lead to the application of the law of a contracting state.

In other words, if the buyer and seller both have their places of business in two different CISG contracting states[44] or if they choose the law of a CISG contracting state as the governing law of their contract[45] or if a forum assigns the law of a CISG contracting state as the applicable law,[46] then the CISG applies.

The CISG governs the formation of the contract for the international sale of goods, as well as the rights and obligations of the buyer and seller.[47] It is important to note that consumer contracts; sale of goods by auction or sale on execution; the sale of stocks, shares, investment securities, negotiable instruments or money; the sale of ships, vessels hovercraft or aircraft and the sale of electricity are excluded from the Convention.[48]

Let us briefly turn to an overview of the CISG's provisions. It contains four parts, divided into chapters covering different aspects of an international sales contract. The scope of application is set out in Part I which contains the two alternative applicability criteria already mentioned, the exclusions and the very important party autonomy provision in article 6.[49] Under the first part, a provision on the interpretation of the Convention and the filling of gaps is included,[50] as

---

[42] United Nations Convention on Contracts for the International Sale of Goods, 1980-04-11, Vienna, UN Document A/CONF.97/18: 1489 UNTS 3; 1980 *International Legal Materials* 668.
[43] As Eiselen (CILSA n xx at 3) states: 'The CISG replaces the normally applicable domestic law with a neutral and internationally uniform legal regime'. See also, Wethmar-Lemmer De Jure 2008.
[44] Art 10 CISG place of business:
[45] Wethmar-Lemmer M "Party autonomy in international sales contracts" 2011(3) *TSAR* 431; Wethmar-Lemmer M "The Vienna sale convention and party autonomy – article 6 revisited" 2016 (2) *TSAR* 255
[46] Wethmar-Lemmer M "When could a South African court be expected to apply the CISG?" 2008 *De Jure* 419
[47] Article 4(a) of the CISG.
[48] Art 2 CISG.
[49] Article 6 CISG
[50] Article 7.

well as provisions on customs and trade usages.[51] In addition, the freedom of specific form requirements for such a contract is confirmed,[52] unless either of the parties to the contract have their place of business in a contracting state that has made a reservation in terms of article 96 of the CISG, requiring a contract to be evidenced in writing.

Part II of the Convention contains detailed rules on the formation of the contract. It contains provisions on what amounts to an offer (article 14), when an offer becomes effective (article 15), when an offer may be revoked (article 16), when an offer is terminated (article 17), when an acceptance becomes effective (article 18), late acceptance (article 21), and withdrawal of an acceptance (article 22). Article 23 provides that a contract is concluded at the moment when the acceptance of an offer becomes effective in terms of this Convention, which is the moment the assent reaches the offeror.

Part III (articles 25–88) is entitled 'sale of goods' and contains the substantive rules in this regard. Article 25 defines a fundamental breach of contract as a breach 'that results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'. Article 28 provides that, when a party is entitled to claim specific performance, a court is not bound to enter a judgment for specific performance unless it is an available remedy under the *lex fori* for similar contracts of sale.

Articles 30–52 set out the obligations of the seller. Article 30 provides that the seller is obliged to "deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention".[53] In addition, these articles contain provisions relating to the conformity of the goods and third party claims[54] and describe the remedies available to the buyer in the case of breach of contract by the seller.[55] Specific performance is the primary remedy, unless, of course, the buyer litigates in a forum that does not provide for specific performance under those circumstances. Resorting to any of these remedies, does not deprive the buyer from also claiming damages in terms of articles 74–77.

---

[51] Articles 8 and 9.
[52] Art 11 CISG.
[53] See also articles 31 – 33.
[54] CISG articles 34 – 43.
[55] CISG articles 45 – 52. The buyer may claim performance of the seller, unless the buyer has resorted to an inconsistent remedy (article 46). The buyer may fix an additional, reasonable period of time for performance by the seller of his obligations (article 47). The buyer may declare the contract avoided if the seller commits fundamental breach of contract or, in the case where an additional period of time was fixed for delivery, after expiry of such period of time (article 49). In the case of non-conforming goods, the buyer may claim price reduction, subject to the conditions as set out in article 50.

Articles 53–65 set out the obligations of the buyer. Article 53 provides that the buyer 'must pay the price for the goods and take delivery of them as required by the contract and this Convention'. Articles 54–59 contain provisions on the payment of the purchase price. The general rule in this regard is that the buyer is under the obligation to pay the price at the seller's place of business, or, if payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place; unless the contract contains a provision to the contrary.[56] According to article 60 the buyer's obligation to take delivery consists of 'doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery and in taking over the goods. Articles 61–65 list the remedies available to the seller in the case of breach of contract by the buyer. The seller may require the buyer to perform his duties in terms of this Convention and the contract, unless the seller has resorted to a remedy inconsistent with a claim for performance.[57] The seller may fix an additional period of time for the buyer to comply with his obligations. The seller may declare the contract avoided, in other words, cancel the contract, if the buyer has committed fundamental breach of contract, or, where an additional period of time for performance was fixed, if the buyer did not perform before the expiry of such additional period of time (article 64).[58] In general however, the seller may rely on the remedies as stipulated in articles 61–65 without losing the right to claim damages.

Articles 66–70 contain provisions on the passing of risk. The general rule, if the contract involves carriage of goods and the seller is not bound to hand them over at a specified place, is that the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.[59]

Articles 71–88 contain provisions common to the obligations of the seller and buyer. These matters include anticipatory breach and instalment contracts.[60] Of great importance are the provisions on damages.[61] This part of the CISG also sets out the circumstances that exempt

[56] Article 57 of the CISG.
[57] Article 62 of the CISG
[58] Article 63. In cases where the buyer has paid the price, the seller loses the right to declare the contract avoided, unless he does so under the circumstances provided for in article 64(2).
[59] CISG art 67. In the case of goods sold in transit, article 68 provides that the risk passes to the buyer from the time of the conclusion of the contract, unless circumstances indicate that the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.
[60] Articles 71 – 73.
[61] Articles 74 – 77. According to article 74, damages for breach of contract by one party "consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract". If the contract was avoided and if, in a reasonable time and manner, the buyer has bought substitute goods or the seller has resold the goods, the party claiming damages may also claim the difference between the original contract price

a party from his obligations.[62] According to article 79(1), "a party is not liable for failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome it or its consequences".

Articles 81–84 concern the effects of avoidance, or, cancellation of the contract. Article 81(1) provides that avoidance of the contract "releases both parties from their obligations under it, subject to any damages which may be due". According to article 81(2), both parties are entitled to restitution of performances rendered. The last articles of this chapter contain provisions on the preservation of the goods.[63]

Articles 89–101 fall under the heading "final provisions" and address public international law matters.[64] Importantly, according to article 90, the CISG does not prevail over any other international agreement which contains provisions concerning matters governed by the CISG under circumstances where the parties have their places of business in contracting states to such international agreements. This article therefore envisages and enables further harmonisation efforts in the field on regional and global level.

From this overview it is evident that the CISG therefore provides a solid basis for unifying large parts of international sales law of all contracting states in an effective manner. It is therefore imperative that all African non-contracting states accede to the Convention. This would also ensure that the international sales law of jurisdictions on the African Continent are aligned with a large part of the global economy whose jurisdictions are CISG member states.

---

and the substitute transaction price (article 75). Article 76 provides that, in the case of avoidance where no substitute contract could be concluded and there is a current price for the goods, the party claiming damages may also claim the difference between the contract price and the current price of the goods at the time of avoidance. Article 78 makes provision for interest payable on any sum in arrears, irrespective of a claim for damages in terms of article 74.

[62] Art 79 – 80.

[63] Art 85 – 88. Article 85 stipulates that where the buyer delays in taking delivery of the goods or fails to pay the purchase price and the seller is in possession or control of the goods, the seller should take reasonable steps to preserve the goods. The seller then acquires a retention right over the goods until he has been reimbursed for his reasonable expenses. Article 86 provides that, under circumstances where the buyer receives non-conforming goods and intends to reject them, the buyer should also take reasonable steps to preserve the goods. The buyer then also acquires a retention right for his reasonable expenses.

[64] Article 89 designates the Secretary-General of the United Nations as the depositary for the CISG. Article 91 contains provisions on the signature, ratification, accession, approval or acceptance of the Convention. Articles 92–96 contain reservations that contracting states are permitted to make. Article 98 stipulates that no other reservations are permitted except for those expressly authorised in the CISG. Articles 99 and 100 contain provisions on the CISG's entry into force and entry into force and application of the Convention in contracting states. Article 101 deals with denunciation of the Convention.

2.4 Importance of the uniform interpretation of the CISG

However, uniform legal principles are interpreted and applied by domestic dispute settlement fora, be it courts or arbitral tribunals. The adoption of a uniform substantive law instrument is only the preliminary step towards the ultimate goal of unification of international sales law and it will not be attained unless there is uniform interpretation and application of its provisions.[65] Article 7(1) of the CISG provides guidance in this regard and lists three matters to be taken into account in its interpretation: the international character of the CISG; the need to promote uniformity in its application and the observance of good faith in international trade. First, taking into account the international character of the Convention means that one should rather look to relevant international documents as interpretative aids and resist the temptation to have regard to domestic legal concepts.[66] Several relevant instruments exist in this regard, including the UNIDROIT Principles on International Commercial Contracts.[67] When reading the CISG, one will also find that a concerted effort was made by its drafters to employ so-called "neutral" or "a-national" terminology, for example referring to cancellation of a contract as 'declaring the contract avoided'.[68] Secondly, the promotion of uniformity of the CISG's application requires that fora take all existing international materials available into account as interpretative aids. In this regard reference may be made to the several comprehensive CISG databases such as the Pace Law School Institute of International Commercial Law CISG website;[69] the CISG-online website[70] and the UNILEX database[71] that contain large collections of reported cases and arbitral awards from all contracting states, as well as bibliographies of thousands of academic commentaries on the convention. UNCITRAL's own site contains a large case law repository on all UN Convention texts,[72] the legislative history of the CISG,[73] a consolidated bibliography of academic writings on the Conventions and explanatory notes to the Conventions. Furthermore, the CISG Advisory Council, comprising of internationally recognised scholars in the field of international commercial law, has set itself the goal of promoting uniform interpretation of the CISG and to further this aim, the Council prepares and publishes interpretations of complex or controversial provisions of the Convention[74] These opinions are referred to by courts regularly[75] and held in high regard by other specialists in the

[65] See Wethmar-Lemmer "Regional harmonisation of international sales law *via* accession to the CISG and the importance of uniform interpretation of the CISG" 2014 2 *De Jure* 298 299
[66] See Eiselen CILSA xx on avoiding the "homeward trend" in interpreting the CISG.
[67] Ref UNIDROIT Principles.
[68] Magnus.
[69] URL
[70] URL
[71] URL
[72] CLOUT
[73] UNCITRAL
[74] CISG AC URL.
[75] Bibliography available at CISG AC

field. Thirdly, taking into account the observance of good faith in the CISG's interpretation requires the Convention to be interpreted in a way that its application "leads to reasonable and fair solutions".[76]

In light of the aforementioned, and despite potential concerns over the uniform interpretation of the CISG voiced over the years,[77] it may be concluded that harmonised or even uniform interpretation is decidedly possible.[78]

Though the CISG is not an exhaustive document governing all potential aspects of international sales law, it is a common core of legal principles that states from all legal traditions and representing more than eighty percent of global trade[79] could agree upon. From a regional or African Continental harmonisation perspective, it could present an effective starting point to build on in creating further unification efforts in international sales law.[80]

2.5 The CISG in Africa

Currently, only fifteen of the fifty-four African states are CISG member states.[81] South Africa is not a contracting state yet.

Reasons for slow accession to the CISG on the Continent are not always apparent. However, it has been pointed out that failure of the United Kingdom to adopt the Convention may have had an impact on many Common Law based African jurisdictions not becoming member states as yet.[82] It was found in separate analyses that the primary reason behind non-accession by the United Kingdom[83] and South Africa[84] is the lack of political will to do so. Analyses conducted on the compatibility of the CISG's provisions to South African law concluded that none of the CISG's content was in contradiction of South African legal principles.[85]

Given the CISG's global success, it would be a superfluous exercise to attempt to draft a new unified sales law document for Africa in terms of the Free Trade Agreement.[86] The CISG has

---

[76] Magnus in Janssen and Meyer *CISG Methodology* (2009) 43; Wethmar-Lemmer *De Jure* 2014 304.
[77] See Eiselen ref
[78] See also Eiselen CILSA 18 – 20 in support of this conclusion.
[79] Eiselen CILSA 4.
[80] See Zeller B "Regional harmonisation of contract law – is it feasible?" 2016 3 *Journal of Law, Society and Development* 85. He suggests (at 96) that further protocols could be added to the CISG to fill current gaps. Art 90 of the CISG, which provides that the Convention does not take precedence
[81] CISG Status document (n xx). The African CISG contracting states are: Benin: Burundi; Cameroon; Congo; Egypt; Gabon; Ghana; Guinea; Lesotho; Liberia; Madagascar; Mauritania; Rwanda; Uganda and Zambia.
[82] Eiselen CILSA 22; Neels 'International Commercial Law emerging in Africa' *PER / PELJ* 2022(25) – DOI http://dx.doi.org/10.17159/1727-3781/2022/v25i0a14381 (last accessed xx) 3.
[83] Moss 'Why the United Kingdom has not ratified the CISG' 25 (2005) *Journal of Law and Commerce* 483
[84] Eiselen "Adopting the Vienna Sales Convention 1999; 2007.
[85] Eiselen
[86]Eiselen CILSA 13.

stood the test of time, proved its efficacy in bridging the differences between national legal systems and the large body of legal materials available will facilitate accession to it and uniform interpretation by all African non-member states. It is most unlikely that a redrafted substantive sales law instrument on the African continent would yield better solutions than the CISG. Initiating a new harmonisation process is long, slow and very expensive.[87] In short, it would make no sense to reinvent the wheel in the case of harmonising international sales law in Africa.

3 Harmonisation of the rules determining the law applicable to international sales contracts (harmonisation of private international law principles) in Africa

3.1 Current status of harmonisation efforts on the African Continent

To date, the harmonisation efforts in the various trade blocs on the African Continent have focused solely on the harmonisation of substantive law and omitted the principles of private international law from their agendas.[88]

Fortunately, much work has been done in this regard in recent years by the Research Centre for Private International Law in Emerging Countries under the directorship of Prof Jan Neels at the University of Johannesburg. The principal project of the Centre is to compile various sets of principles under the umbrella of the African Principles of Commercial Private International Law to serve as model laws to be used by national legislators for harmonising private international law as well as by the different regional economic integration organisations in Africa to draft regional or supranational instruments of a soft law or binding nature.[89] These African Principles were envisaged with the goal of furthering legislative integration in line with the objectives of the African Free Trade Agreement in order to foster inclusive economic growth on the Continent.[90] The Centre has drafted the proposed African Principles on the Law Applicable to International Commercial Contracts.[91] These Principles contain the necessary provisions to establish a predictable approach by fora on the African Continent when having to determine the existence and validity of a choice of law clause in international commercial contracts, including international sales contracts, or, in the absence of such choice, provide concrete rules for a forum to assign the applicable law. The primary sources drawn from when drafting these Principles were the Hague Principles on Choice of Law in International

[87] Zeller 'The significance of the Vienna Convention on the International Sale of Goods for the harmonisation and transplantation of international commercial law' 2006 (17) *Stell LR* 466 469.
[88] Mosenepwo '*Quo vadis*, OHADA Private International Law?' 2021 (26) *ULR* 345; Oppong 'Globalisation and Private International Law in Commonwealth Africa' 2014 (36) *University of Arkansas at Little Rock Law Review* 153.
[89] Neels and Fredericks 2018 *Stell LR* 347, 347 – 348. See the Preamble to the African Principles.
[90] Neels *ULR* 2020 426 427.
[91] Neels *ULR* 2020, the draft text is available at 428 – 436.

Commercial Contracts[92] and the Rome I Regulation on the Law Applicable to Contractual Obligations.[93] Several other international instruments were consulted, including the UNCITRAL Model Law on International Commercial Arbitration.[94]

These draft Principles support a broad and liberal interpretation of party autonomy, allowing parties to choose a neutral legal system with no connection to any party or the transaction as the governing law of their contract.[95] In addition, it allows the choice of a non-national legal system such as the UNIDROIT Principles or a treaty such as the CISG as the proper law of the contract.[96] The Principles require a high standard of certainty before it may be deduced that parties made a tacit choice of law (which is a choice of applicable law not expressly included in the contract, but inferred from the other contractual provisions and surrounding circumstances).[97] If the parties do not make a choice of law, either expressly or tacitly, then art 6(1) of the Draft Principles determines that a contract for the sale of goods is governed by the law of the country of habitual residence of the seller,[98] unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the law of that latter country applies.[99] I strongly support this choice of law rule, since it is in line with international best practice as evidenced in various other international instruments[100] and offers a high level of predictability in respect of the applicable law.

In June 2023, the Research Centre at UJ held the Pan-African Conference on the African Principles (on the Law Applicable to International Commercial Contract) where scholars representing several African jurisdictions debated the content of these provisions with the purpose of finalising the text for adoption.[101]

At this point, the South African Minister of International Relations and Cooperation has undertaken to request the African Union to formally endorse the project of the UJ Research Centre.[102]

---

[92] URL
[93] URL
[94] See paragraph 4 below.
[95] Art 3(3) of the Draft Principles.
[96] Art 4 of the Draft Principles.
[97] Art 5(2) Draft Principles. Ref Bouwers.
[98] According to Art 15(1) of the Draft Principles, “the habitual residence of a company or other corporate body is the country of their incorporation. The habitual residence of an unincorporated juristic person is the country of central administration”.
[99] Art 6(3) Draft Principles.
[100] See, for example, art 4 of the Rome I Regulation.
[101] URL UJ RCPILEC.
[102] Neels *ULR* 427.

This set of harmonised private international law principles would work in a symbiotic manner with the CISG as a set of unified substantive sales law rules to provide a comprehensive governing framework for international sales contracts on the African Continent.

3.2 The indispensable role of private international law in the context of the CISG

As mentioned already, the CISG's substantive scope of application is limited to the formation of the contract and the rights and obligations of the parties. Matters surrounding the validity of the contract and the effect of the contract on the property in the goods sold, are explicitly excluded from the ambit of the Convention.[103] Therefore the CISG does not provide answers to all substantive law matters relating to contracts for the international sale of goods. Certain matters fall outside the scope of the CISG. When the CISG is applicable, a residual legal system would have to be identified to provide answers to substantive law matters falling outside the scope of the Convention.

The scope of application is broadened in article 1(1)(b) through the application of the rules of private international law. In addition to the CISG being applicable if both parties have their places of business in contracting states, this provision makes the CISG applicable if the rules of private international law refer to the law of a contracting state.[104] Therefore, if the forum finds the law of a CISG contracting sate to be the proper law of the contract, the CISG applies. There exists overwhelming case law evidence and academic support for the view that a reference to the law of a CISG contracting state, includes a reference to the CISG.[105]

Party autonomy is a cornerstone of international sales law. It is given full recognition in article 6 of the CISG which permits the parties to exclude the application of the Convention or to derogate from or vary the CISG's provisions. Party autonomy or freedom of contract also implies that parties are permitted to choose the law applicable to their agreement. If the parties insert a choice of law clause into their contract designating the law of a contracting state as the proper law, it is generally accepted that such a choice includes the CISG.[106]

In the of case internal gaps in the CISG, which are matters falling within the scope of the Convention as delineated, but that the convention does not provide a definitive answer to, article 7(2) requires that they be filled with reference to the general principles on which the Convention is based, or in the absence of such, by the law applicable in terms of the rules of private international law. Such gaps are inevitable in an instrument governing a field as vast

[103] Art 4(2) CISG.
[104] See Wethmar-Lemmer 'The important role of private international law in harmonising international sales law' 2014 (26) *SA Merc LJ* 93 95 – 104 for a detailed analysis of the interpretation and application art 1(1)(b).
[105] Wethmar-Lemmer SA Merc LJ 102 – 103.
[106] Wethmar-Lemmer 2011 (3) TSAR

as contracts for the international sale of goods with endless possible permutations.[107] In addition, gaps arise due to new developments that the drafters could not foresee at the time, such as those brought about by the major technological advances over the past forty years. Furthermore, since the CISG represents a compromise between vastly different national legal systems and it would have been impossible to reach consensus on all matters pertaining to this field. In order to promote accession, highly contentious maters were purposefully omitted from the text. For such internal gaps in the case where they cannot be solved by general principles on which the CISG is based, and for all sales law matters excluded from the CISG's ambit, the relevant governing rules need to be determined by the principles of private international law.

It is therefore abundantly clear that the rules of private international law still play an indispensable role in the context of uniform substantive law conventions in general and in respect of the CISG in particular by broadening its scope of application, giving effect to party autonomy and directing internal and external gaps to the most appropriate governing rules. Harmonising or ideally unifying the relevant rules of private international law of the different jurisdictions will therefore create a predictable or potentially uniform approach to directing these matters.

4 Developing international commercial arbitration as preferred dispute settlement regime for international sales matters on the African Continent

International arbitration is the preferred dispute settlement regime in international commercial disputes.[108] This fact is widely acknowledged by academic commentators.[109] It is also empirically proved by a series of international arbitration surveys conducted by Queen Mary, University of London (QMUL) from 2006 to date.[110] In the 2021 survey, more than 90% of the respondents confirmed their preference for arbitration to resolve cross-border commercial disputes.[111]

---

[107] Wethmar-Lemmer 2014 SA Merc LJ

[108] See, in general, Wethmar-Lemmer *International commercial arbitration in South Africa and the CISG* 2022 4 *UCC LJ*

[109] See for example, Mistelis L 'International Arbitration: Corporate Attitudes and Practices' (2004) 15 *American Review of International Arbitration* 525; Moser G *Rethinking Choice of Law in Cross-border Sales* 2018 (Eleven International Publishing, The Hague) 146; Waincymer J 'The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship between Substance and Procedure' in Andersen CB and Schroeter UG (eds) *Sharing Commercial Law across Boundaries. Festshrift for Albert Kritzer on the Occasion of his Eightieth Birthday* 2008 (Wildy, Simmonds & Hill Publishing, London) 582 583.

[110] Moser (n xx) provides an overview of all these studies.

[111] 2021 Queen Mary University of London International Arbitration Survey: Adapting Arbitration to a Changing World, summary of results may be accessed and full report downloaded at https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/ (accessed 20 July 2022).; Moser

Where international sales disputes are settled by means of arbitration, the CISG is frequently applied. This is evidenced by the percentage of arbitral awards *versus* court cases included in the various CISG case law databases.[112] In light of the confidentiality policy of arbitral institutions, it is certain that the real number of arbitration cases applying the CISG is even higher than available statistics indicate.[113]

In African context, the 2020 Arbitration in Africa Survey Report[114] indicates the Arbitration Foundation of Southern Africa (AFSA) is the first preferred arbitral centre in Africa, followed by the Cairo Centre for Regional Commercial Arbitration (CRCICA). The top five African cities to host arbitration as chosen by the respondents are Johannesburg, Lagos, Cairo, Cape Town and Durban. The top five African countries chosen as seat of arbitration are South Africa, Nigeria, Egypt, Rwanda and Ivory Coast.

In light of the prominent position that South Africa currently occupies on the African Continent in respect of international arbitration, it seems appropriate to take note of its current governing regime in this regard as an example for other African jurisdictions to emulate.

The enactment of the International Arbitration Act (hereinafter 'the Act' or the 'IAA')[115] at the end of 2017 marked an important development in the field of South African international trade and commercial law. This Act introduces a comprehensive legislative framework for conducting international commercial arbitration matters where the chosen seat of arbitration[116] is South Africa. In this regard, the UNCITRAL Model Law on International Commercial Arbitration[117] was incorporated into the Act as Schedule 1.

Explicit recognition of the arbitration agreement itself is most important to provide merchants with peace of mind that their chosen alternative dispute settlement method will be respected by domestic courts. This will improve the desirability of African countries hosting arbitrations

---

[112] See a study conducted on the Pace CISG website (https://iicl.law.pace.edu/cisg/cisg.) by Mistelis ('CISG and Arbitration' in Janssen A and Meyer O (eds) *CISG Methodology* (2009 Sellier Publishers Munich)) 375 where it was found that around 25% of all cases included at the end of 2008, were decided by arbitral tribunals. Four years later, the percentage of arbitral awards included in the database increased to 33% (Janssen A and Spilker M 'The application of the CISG in the world of international commercial arbitration' 77 (2013) *RabelsZ* 131).

[113] Mistelis (n 34) 387, see also the same sentiment expressed by Moser (n 3) 146.

[114] See Onyema E *Arbitration in Africa Survey Report* (2020) available at https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf (accessed 5 September 2023).

[115] 15 of 2017.

[116] The law applicable to the procedural aspects of arbitration at the seat of arbitration is referred to as the *lex arbitri*.

[117] United Nations Commission on International Trade Law (UNCITRAL), 'Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, accessed on 21 December 2019.

in future. Reference may be made to article 16(1) of the South African IAA that requires recognition and enforcement of arbitration agreements specifically.

For arbitration to function as an effective dispute settlement regime for international commercial disputes, the recognition and enforcement of foreign arbitral awards are also of utmost importance. In this regard, South Africa acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention)[118] in 1976[119] and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 to comply with its international law obligations as member state of the New York Convention. The International Arbitration Act repealed the 1977 Act in its entirety[120] and the New York Convention is incorporated into the International Arbitration Act in Schedule 3.

In order to harmonise the procedural framework for international commercial arbitration on the African Continent, it is proposed that all African states adopt legislation incorporating, or based on, the UNCITRAL Model Law on International Commercial Arbitration and that all non-contracting states accede to the 1958 New York Convention.

5 Conclusion

The harmonisation of substantive law rules and the harmonisation of private international law rules should not be seen as either/or approaches to the international harmonisation of law. As illustrated by the relationship between the CISG and private international law, the functioning of uniform substantive law conventions in general would also be enhanced by uniform conflict of laws instruments.

Under arbitration as preferred dispute settlement regime in international sales disputes, the confluence of these three aspects of regulation are once again clear: the importance of the establishment of a uniform procedural framework for arbitration, complemented by a

---

[118] United Nations Commission on International Trade Law (UNCITRAL), 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ('The New York Convention')', available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, accessed on 19 December 2019.

[119] United Nations Commission on International Trade Law (UNCITRAL), 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards', available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed on 21 December 2019.

[120] See Schedule 4 of the IAA. It is also noteworthy that Schedule 4 amends the scope of application of the Protection of Businesses Act 99 of 1978 (PBA) substantially by terminating its application to arbitration awards. Prior to this amendment, section 1(3) of the PBA required that the approval of the Minister of Finance be obtained to recognise and enforce any arbitral award in respect of 'an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic'.

harmonised set of choice of law rules for determining or confirming the validity of a choice of the law applicable to the substance of the dispute and the frequent application of the CISG as substantive law to the dispute.

In the context of the African Free Trade Agreement and its implementation, the removal of the primary non-tariff barrier to increase inter-continental and global trade by means of the harmonisation and ultimate unification of the relevant governing regimes, is decidedly possible. In the case of international sales contracts, this would entail all African non-member states acceding to the CISG, the draft African Principles on the Law Applicable to International Commercial Contracts to be adopted in binding or soft law form in all African jurisdictions, the UNCITRAL Model Law on International Commercial Arbitration to be adopted across the Continent and all non-member states to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In doing so, African countries will promote and uphold the three pillars of effective regulation of international sales law on the Continent which will drastically increase international trade on the Continent and greatly enhance global trade opportunities for African companies. This will foster inclusive economic growth and ultimately lead to the reduction of poverty on the African Continent.